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European Merger Control Policy:
Private Interests, Policy Communities and Entrepreneurship

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2005

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Declaration

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Acknowledgments

The idea for this study came from a conversation I had with Dr. Raj Chari in the winter of 2000 pertaining to the state of European Competition Policy. Raj's subsequent supervision of this project along with ever-present support from everyone at TCD's Political Science Department provided me with inspiration – all of which I am thankful. Much appreciation must also be paid to the staff of the Department of Political Science at the University of Pennsylvania in Philadelphia for allowing me to conduct research and writing at their institution between 2002 and 2004.

The ability to conduct on-site research for this project in Brussels was greatly enhanced through financial assistance from Trinity College's Arts and Social Sciences Benefactions Fund Award in 2001 as well as receiving a number of travel grants. Furthermore, gratitude must be shown to the numerous people who agreed to be interviewed or provided me with critical information. Particularly, I would like to thank individuals of the European Round Table of Industrialists (ERT), the Union of Industrial and Employers Confederation of Europe (UNICE), and DG Competition of the European Commission for providing valuable materials.

Lastly, I owe much gratefulness to all the family and friends who supported me, both morally and financially, throughout the past five years. Thanks to the 'Dublin Crew': Matthew and Marina, Caroline, Francesco and Severine and Patrick – we kept each other sane and well fed. Loving thanks to Mom, Dad and Kristin for putting up will four years of ups and downs, distant moods and uncertainty. I could not have done it without you.

Summary

The intent of this thesis was to reconcile the divergent strands in the existing literature on European competition and merger policy by providing a systematic analysis of the development and implementation of the European Merger Control Regulation (MCR). The analysis was not confined only to the policy-making process but also examined how policy goals were put into practice. By examining various case studies and trends within the policy area, policy goals were compared with policy output. Consequently, a unique aspect of this study is that it strikes a balance between the political, economic, and legal dimensions of European merger policy.

Analysis of the literature revealed two main insufficiencies at both the developmental and implementation phases of European merger policy. First, there is a lack of analysis on the development and negotiation of the MCR in the context of the Single Market Programme and the integration initiative more broadly. And secondly, there is an absence of analysis of two important trends that have developed since the policy was implemented in 1990 – a development that one would have not otherwise expected given their explicit absence in the original wording of the MCR. The two trends are collective dominance, which refers to a market situation where a small number of large firms occupy a particular market and collude in order to maintain higher prices, and portfolio power, which refers to a situation where the holder of a comprehensive product line – a portfolio – may obtain a strong market position by restricting entry and/or levering into other markets. In an effort to reconcile these insufficiencies in the literature, one of the central ideas pursued in this study was that there is 'feedback' between both policy phases (formulation and implementation) in that actors involved in the formulation of policy can later alter its nature during the implementation phase.

Based on this, the first objective of this thesis was to examine and explain which actors were responsible for the negotiation of the MCR and why they felt the need to participate. It was argued that by examining the reasons for the creation of merger control regulation at the European level and by identifying the primary actors involved, one may gain a clearer picture of the policy dynamics that produced the MCR. Thus, the second objective was to explain why the previously mentioned trends of collective dominance and portfolio power developed since the MCR's implementation in 1990. Similar to the analysis of policy formulation, it was argued that by identifying the main actors and the motivations that both guided and constrained their actions, one would be in a better position to explain developments during the implementation phase.

Pursuit of the aforementioned main objectives produced three distinct arguments, which formed the explanatory and theoretical basis of the thesis. First, it was argued that the negotiations pertaining to the content of the MCR occurred in what was termed the 'merger control policy community,' which was made up by representatives of the Commission and elite industrial interests. Secondly, when turning to the implementation phase it was argued that the Commission and its Merger Task Force (MTF), freed from resource dependency with elite economic actors, pursed internal agendas pertaining to the inclusion of collective dominance and portfolio power-based arguments within the MCR framework in order to expand and consolidate institutional power. As argued in Chapters

4 and 5 the actions of the Commission with regard to these developments highlight its propensity to act as a 'policy entrepreneur' when faced with windows of opportunity. Thirdly, it has been argued that developments in both policy phases can be explained by private interest theory. These arguments produced two main conclusions.

With regard to the first main conclusion, theoretical ideas were presented about different sets of actors found throughout different phases of a policy process within the same issue area. It was argued that there exists 'overlap' between the formulation and implementation phases in that representatives of the Commission were main players within the policy community that formulated the MCR, while also being crucial (along with specific firms and the Community Courts) in determining how the MTF would function and more importantly would have the final say in all decisions taken under the MCR. In this sense the Commission was the 'formulator' of the policy and latter became the 'implementer' of merger control. On the other hand, outcomes of the implementation phase were dynamic and eventually resulted in a type of 'feedback' between the policy phases. Because rules previously negotiated by the members of the policy community had become redefined in the implementation phase to achieve the entrepreneurial goals of the Commission/MTF, this points to the idea that the relationship between the two policy phases is not necessarily static.

The second main conclusion suggests that actor behavior in both policy phases is based on private interests, which in one setting motivated an interdependent, self-supporting bargaining relationship based on resources and shared goals, and in anther promoted an environment where actors sought individual interests and were guided by 'fear' of each other's actions. When the MCR was developed, it was argued that the Commission sought to increase supranational and decrease domestic policy jurisdiction so as to regulate in order to increase the efficiency of the Single Market, while elite corporate actors sought to have rules clearly defined at the supranational as opposed to the domestic level so as to foster a more efficient and business-friendly regulatory environment in the Single Market. Although the policy environment facing the actors in the implementation phase was different from that found at the formulation phase in that merger control involves a succession of 'mixed motive games,' the motives of actor behavior continue to point to private interests. As the trend studies demonstrated, the Commission/MTF sought to establish itself as a more 'sophisticated' bureaucracy by creatively and purposely, selecting 'test cases' in order to advance policy competence. Additionally, firms sought to reap the economic benefits of mergers that would be investigated by a centralized regulatory agency, while the Courts wanted to establish an active role in merger control. The major implication of this situation is that there is a greater probability for conflict between actors since there exist no shared interests among them. The increased usage of judicial review in both trend studies suggests that over time, the Commission became more entrepreneurial, firms became more defensive and the Courts became more active. Although it did not self-initiate its enhanced role in European merger control, appeals filled by disgruntled firms produced numerous windows of opportunity for the judiciary to establish a more pronounced institutional role and re-introduce its intellectual leadership in the area of Community competition law. These dynamics suggest that although actors may try to obtain their goals through different means in different settings, the motivating force of private interests remains constant and guides these actions.

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List of Abbreviations

ABB	Asea Brown Boveri Ltd.
ABGB	Amalgamated Beverages Great Britain
AmChamEU	American Chamber of Commerce Europe
Amplat	Anglo-American Platinum Corporation
ATR	Aerospatiale-Alenia
CCE	Coca-Cola Enterprises
CCNB	Coca-Cola Nordic Beverages
CCSB	Coca-Cola & Schweppes Beverages Ltd
CEO	Corporate Executive Officer
CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
CSBs	Carbonated Soft Drinks
DGIII	Directorate General for Industry
DGIV	Directorate General for Competition
DGVII	Directorate General for Transport
DOJ	U.S. Dept of Justice
EC	European Community
ECB	European Central Bank
ECJ	European Court of Justice
ECSC	European Coal and Steal Community
EEA	European Economic Area
EMS	European Monetary System
EMU	European Monetary Union
EP	European Parliament
ERT	European Roundtable of Industrialists
EU	European Union
EWC	European Works Council
FTC	U.S. Federal Trade Commission
GE	General Electric
GEAE	General Electric Engine Division
GECAS	General Electric Capital Aviation Services
HDPE	High Density Polyethylene
K&K	Kantzeback and Kruse
K&S	Kali und Salz
LPD	Lonrho Platinum Division
M&A	Mergers and Acquisitions
MCR	European Merger Control Regulation
MSs	Member States
MTF	Merger Task Force

OECD	Organization for Economic Cooperation and Development
NABs	Non-alcoholic Beverages
NPT	Normative Positive Theory
PET	Polyethylene Terephthalate
PW	Pratt & Whitney
QMV	Qualified Majority Voting
R&D	Research and Development
RR	Rolls Royce
SBM	Stretch blow-moldings
SCPA	Societe Commerciale des Potassess et de l'azote
SEA	Single European Act
TCCC	The Coca-Cola Company
UNICE	Union of Industrial and Employers Confederation of Europe

Chapter One
Research Agenda and Context

Introduction

The 're-launching of Europe' in the mid 1980s is undeniably linked to the development of the Commission's White Paper on the completion of the Single Market[1] and the passing of the Single European Act (SEA). The Commission's White Paper, which formed the basis of the 1992 Programme, called for the removal of barriers to the free movement and exchange of goods, services, capital and persons among Member States and sought to improve the overall efficiency of Community decision-making. Taken as a whole, the 1992 Programme can be considered 'neo-liberal' because of its strong deregulatory basis and commitment to market integration via increased competition and market relations. One of the worries during the negotiations leading up to the SEA was that the 'deregulatory' design of the Programme would lead to problems for Member State regulation of economic activity without asserting the need for corresponding EC level regulation. However, as pointed out by Grahl and Teague (1990), political union has always been the hidden agenda behind the development of Community-wide economic relations – the EC itself was a way of circumventing the obstacles to direct political integration. The Commission knew from the start that market integration without aspects of centralized economic control would prove untenable. Thus new institutions and Community powers were developed to control the economic forces brought into play by the single market (29). It became clear to the Commission as well as the economic elites of the Community – who where granted privileged access to the policy-making process during the drafting of the White Paper – that policies were needed to both propel and sustain integration of the single market (Peterson and Bomberg 1999, 68). An example of these post-SEA developments is EU merger control policy.

[1] The Single or Internal Market Program is more commonly referred to as the '1992 Project or Programme.'

The questions and debates that have focused on the development of the Single Market initiative have undoubtedly influenced – and to a high degree defined - modern EU integration studies. The neo-functionalist perspective, and later supranational governance perspective, which argue that the EU's supranational institutions (specifically the Commission and European Court of Justice) act as 'engines' of integration in that they nudge Member States towards deeper and deeper integration, seemed to be the dominant integration model during the 1950s and 60s (See Haas 1958, 1961; Lindberg 1963; Sandholtz and Zysman 1989; Majone 1996; Sandholtz and Stone Sweet 1998). Neo-functionalists argue that the development of the Single European Act can be traced to an entrepreneurial Commission driving forward the integration process and seeking regulatory expansion, sometimes against the resistance of Member States. However, the intergovernmentalist tradition argues that Member States remained and still remain in control of the integration process through the intergovernmental bodies of the Council of Ministers and the European Council, thereby limiting the ability of supranational organizations to drive forward the integration process (See Hoffmann 1966, 1982; Taylor 1982; Garrett 1992; Moravcsik 1991).

Although both perspectives can be used to explain developments at the supranational level with regard to the integration process, Moravcsik's latter work provides a more dynamic explanation of the creation of the SEM. Moravcsik (1998, 1999) states that there are two stages in the EU decision-making process. The first suggests that there is a 'demand' for integration by domestic actors with defined economic interests who compete to be heard by national governments. The second stage sees integration being 'supplied' as a result of intergovernmental bargains where the institutions of the EU have a limited impact on final outcomes. Despite the different models and perspectives presented, advocates from both schools would agree that "a new, neo-liberal policy consensus and a relatively healthy, growing economy were both necessary, if not sufficient, condition for the relaunch of the Union" (Peterson and Bomberg 1999, 72).

With that said, relating evidence from the analysis of European merger policy to one of the broad frameworks of the 'grand' theories goes beyond the objectives of this study, which focuses on understanding specific policy formulation and its

implementation. This is because, based on ideas raised by Anderson (1995) it is considered that while 'grand theories' may be of value in attempting to explain some aspects of European integration, more detailed analysis of developments in specific policies are better informed relying on different theoretical frameworks more closely tied to comparative politics and public policy analysis in general, not grand theories which seek to explain several aspects of European integration. In a nutshell, this thesis does not attempt to verify if either the intergovernmental or supranational governance school is of value in explaining EU public policy. Rather, this thesis seeks to investigate developments at both the formulation and implementation phase in a policy area not hitherto analyzed in depth, while being theoretically informed based on models raised in the comparative politics and public policy literature. Although one may extrapolate lessons based on this examination on the value of work performed by both intergovernmentalists and supranational governance scholars – as will be made in the final chapter at the end of this thesis – it is important to note that such extrapolations should be taken with great caution: this exercise does not represent one, or should not be confused as representing one, where broad-brush conclusions on the suitability or not of certain 'grand theories' should be fully taken. As will be explained more clearly below, a more 'micro' frame will be used to analyze the specifics of the creation and implementation of European merger control policy within the context of both the integration initiative and EU competition policy.

Regardless of the theoretical frame one views the European integration process, the decision to launch the 1992 Programme led to a massive repositioning of firms within the EU with a large portion of these activities coming in the form of mergers and acquisitions (M&A). The prospect of European market integration fueled a massive merger wave during the late 1980s. The total number of M&A transactions involving EU firms increased nearly threefold between 1987 and the end of the 1990s with the peak of the merger boom coming in 1990[2] – the same year the European Merger Control Regulation (MCR) came into force. Anticipating the momentum towards mergers, European competition authorities within the Commission as well as transnational economic elites felt the need to establish a supranational level merger regulation.

[2] Data can be found at AMDATA

The MCR gives Directorate General Competition (ex. DG IV) of the European Commission the exclusive power to investigate mergers with a Community dimension. More specifically, the Merger Task force (MTF), a sub-bureaucratic actor of DG Competition, is effectively in charge of all merger investigations, even through the College of Commissioners theoretically has the final say.

The basic definition of a merger is the combination of two or more firms into one. In the case of a merger the essential question raised is whether previously independent businesses have come or will come under common control (Pepall, et al. 2002, 407-9). Throughout the coming chapters an alternative expression, 'concentration,' will often be used, since that is the word used in the MCR instead of merger.

Mergers can be categorized as one of three broad types: horizontal, vertical, or conglomerate. Horizontal mergers are defined as those in which rivals in the same product market merge. As a general proposition horizontal mergers present a greater danger to competition than vertical ones. Mergers where there is a combining of two firms with potential or actual buyer-seller relationships are termed vertical. This means the firms merging operate at different levels of the market: a firm may acquire control of another firm further up or further down the distribution chain; the former is know as 'backward integration' and the latter as 'forward integration.' Vertical integration may have a harmful effect on competition, in particular if it gives rise to a risk of the market becoming foreclosed to third parties. An example of this would be where a firm downstream in the market acquires an upstream firm that has monopoly power in relation to an important raw material or input: there is an obvious concern here that competitors in the downstream market will be unable to obtain supplies of the raw material or input, or that they will be able to do so only on discriminatory terms, with the result that they will be unable to compete effectively. Lastly, conglomerate mergers exist when there is a combining of firms who are neither sellers in the same market, nor stand in a buyer-seller relationship. This kind of merger may be divided into three main types: product extensions (where one firm, by acquiring another, adds related items to its existing products); market extensions (where the merged firms previously sold the same products in different geographical markets); and pure conglomerates (where there is no functional link between the merging firms)(SeeViscusi, et al. 1995, 195-210). Despite US

competition authorities abandoning interest in such 'harmless' conglomerate mergers, recent years have seen the Commission express concern about the 'portfolio' or 'range' effects of these kinds of mergers.

Taken as a whole, the MCR explicitly requires the MTF to focus on the dominance (whether actual or perceived) of the merging firms and the resulting combined entity. Article 2(3) MCR states:

> A concentration that creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market.[3]

A significant development in the first decade of the policy has been the unexpected emergence of two significant trends in DG Competition's merger analysis: the concepts of 'collective dominance'[4] and 'portfolio power'[5] have been introduced and used by the Commission to scrutinize certain mergers that would otherwise fall outside its policy competence. Based on these observations the purpose of this study is twofold, guided by two research questions posed here and that will be developed more fully in the sections below. The first main question is which actors were responsible for the negotiation of the MCR and why did they feel the need to participate? Secondly, how can one explain why the above trends of collective dominance and portfolio power have developed since the MCR's implementation in 1990?

This chapter will present three facets serving a basis for this thesis. First, in order to situate the study, a brief overview of the contemporary EU public policy literature will be presented. Secondly, the general literature on competition policy will be reviewed with explicit reference made to the major theories that define the field. Following this, a more specific section is dedicated to EU competition and merger policy

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[3] The Community dimension of a merger is assessed using thresholds based on the turnover of the firms involved. The most important are the worldwide threshold (EURO 5 billion) and the Community-wide threshold (EURO 100 Million). Below these thresholds, the comparable authorities in the Member States carry out merger control.

[4] Collective or Joint dominance describes a market situation where there is a small number of larger firms in a given product market. By applying the collective dominance concept to such a situation, one would expect that the firms in question would coordinate their market behavior in order to keep prices above the competitive level.

[5] Portfolio Power relates to conglomerate mergers where the merged entity, through the acquisition of brands in separate relevant markets, would gain efficiency and thus become dominant. The rationale behind the concept is best summarized as: "the market power deriving from a portfolio of brands exceeds the sum of its parts"(See Lexecon, 2000). Both trends will be discussed more in depth later in this chapter.

with further emphasis on the policies' relationship with the European integration initiative. The third facet represents the research agenda of this dissertation. Here the project's contribution will be considered, further developing a more defined elaboration of the aforementioned research questions. As such, the remainder of the chapter will enable the reader to understand and identify the project's place and purpose within both the competition and EU public policy based literatures.

1.1 Review of and Project's Place Within the Literature

What are the main insufficiencies evident in the current literature on European competition and merger policy? It will first be shown that scholarly work in the general realm of EU policy studies lacks sufficient analysis of competition policy. Secondly, it will be shown that merger policy has been insufficiently analyzed from a political science perspective. Related to this, the third insufficiency that will be highlighted is that work done on both competition and merger policy tends to be overly economic and legalistic. It is argued that these insufficiencies have contributed to the neglect of the two topics of concern: the development of EU merger policy and the emergence of the two unexpected trends subsequent to its implementation.

There has been extensive political science work done on various aspects of European politics and public policy. However, most work lends itself to general EU operations and even those which do address more specific policy areas limit themselves to the more popular areas such as environmental, social, and EMU policies. A quick glance of the literature reveals that over a relatively short period of time scholarly work on these policy areas has ballooned.

For an example, as a result of the EU adopting extensive common environmental standards two distinct views have become prevalent in the literature on EU environmental policy. Works by Eichener (1997) and Gatsios and Seabright (1989), stress that EU environmental policy was developed to address market failures inherent in the single market. On the other hand scholars such as Lee (1997), Martin (1997) and Weale (1996) contend that environmental policy at the supranational level does not fit the regulatory justification model. Turning to social policy, the common argument purported in the

literature is that the adoption of the single market would primarily benefit 'capital' rather than labour. As a result there has been a proliferation of analyses dealing with various aspects of EU social policy – from health and safety at the workplace to gender equality. The most developed areas are social security rights for migrant workers, health and safety standards and product safety standards (See Eichener 1997; Leibfreid 1996). EMU policy studies generally focus the role of the European Central Bank and the various mechanisms used to produce price stability (See Cukierman 1993; Grilli et al. 1991). Kaufmann's (1995) work focuses exclusively on Central Bank implementation of these mechanisms while Winkler's (1996) work discuses the ECB's legitimacy and reputation (See Kaufmann 1995; Winkler 1996).

It is evident that the literature on these policy areas is well established and displays a depth that is not evident in the literature on competition policy. A possible reason for this may be the inherent economic and technical nature of the subjects which competition policy deals. As a result, it is necessary to consider the specific aspects of competition policy and the relatively larger influence that the 'economics' literature has had on its study.

Competition Policy and The Economics of Market Power

Competition can be understood as a positive or negative as long as it provides (or does not provide) economic efficiency. For this reason competition policy is inherently linked with industrial policy. One may use the term 'industrial policy' fairly broadly, to cover all policies decided at the supranational level that primarily affect the industrial sector of the economy and the behavior of the firms within it. Competition policy implies action of public authorities to promote and maintain, through regulation, a competitive economic environment for industry. It aims to avoid restrictions on the free flow of the market and at hindering anti-competitive behaviors such as collusion or abuse of monopoly power. EU competition policy aims also to prevent national governments from distorting competition through state aids or specific protections. However, it is difficult to define what competition really is, or more precisely, which degree of

competition should be reached, as reflected in debates within the broader economic based literature.

The economic literature puts forth various theories of competition including pure monopoly, perfect competition, and workable competition. The most basic assumption of economic theory is that 'resources' or 'products' are inherently limited. Free market economics seeks to cope with limited supply by rationing resources through price. Firms produce products for consumption and the successful and profitable firms are those that produce products desired by many people. The most profitable firms are those who efficiently produce that which people want to buy. Competition enters this equation when other firms encounter a successful firm and produce something similar and enter the market. Thus, the successful firm is not likely to enjoy market power for long unless "it remains more than usually efficient or for some reason, other firms cannot enter the market freely or those already in the market are unable to expand"(Korah 2000, 9). Competition also works on the demand side of the equation. If the cost of a particular product increases, some may choose to reassess their preferences and consume less of that product. Monopoly power materializes when there are both barriers to entry on the supply side and there are no adequate substitutes for the product supplied on the demand side. The probability of finding a 'pure monopolist' in a given market is extremely low as is finding its polar opposite - pure competition.

Pure competition exists when the number of competitors is so great that the market share of each is small, so that no one firm has sufficient influence to alter price levels or the balance of supply and demand. In theory, if this situation arose, firms could remain totally uninterested in the actions or reactions of their rivals since the market simply responds to Adam Smith's 'invisible hand.' As Korah (2000) points out, "most economists welcome the invisible hand of competition to allocate scarce resources in accordance with consumer choice, to avoid waste in acquiring market power and to stimulate efficiency in other ways"(9). Most governments lack the resources to regulate many markets, so it is particularly important that the market allocate resources.

In practical terms the models of pure monopoly and pure competition only exist in economic textbooks. The concept of workable competition and what it should consist of has caused theoretical difficulties. Generally speaking it is found when there are fewer

rivals in the market than are needed for perfect competition, but where the numbers involved and other relevant circumstances mean that there is a sharper degree and different tempo of mutual reaction than in an oligopoly (Goyder 1998). Following from this, the greater the competition, the greater the benefits for society and if economies were left 'free' markets would allocate resources and produce perfect competition. However, in reality markets do not work in this way and it is for this reason there is a need for regulation of economies by government. Governments and agencies make decisions that affect both the welfare of agents and how they behave. Acting as a regulator, governments and agencies literally restrict the decisions of economic actors. Economic regulation typically refers to government-imposed restrictions on firm decisions over price, quantity, and entry and exit. The over-all assessment that can be drawn is that competition policy is supposed to prevent excess profits, excess market power, and ensure a level playing field for firms. This last point however, does not imply state intervention should be absent, but that these interventions should be consistent for all firms in industry, thus allowing firms to succeed or fail based on their own merits. The theoretical ideas presented here are by no means free of debate. Thus they will be re-visited in the following chapter where the theoretical framework for the rest of the thesis will be established.

EU Competition Policy

From its outset, EU competition policy has been particularly concerned with preventing distortions within the common market, where trade between Member States may be affected. Recalling the analysis dealing with the benefits of completing the internal market, it was concluded that much of the gain is conditional on an effective competition policy. Another important reason for such policy, which is especially relevant to the regulation of mergers, is based on an 'economies of scale' argument: the one stop shop principle. The prospect that cross-border mergers might need to be cleared by several different national competition authorities represented extra costs for the firms involved.

As previously discussed, although there has been some scholarly work done on European competition policy this work focuses mainly on the content of the policy and how both supranational and national institutions implement competition rules (See Nugent 1999, Hix 1999, Allan 1996 and McGowen 2000). Thus, the majority of 'mainstream' EU policy works tend to treat competition policy in generic terms and miss the fact that competition law in Europe is truly a 'European' phenomenon and that the Rome Treaty, although signifying the formal start of EC competition policy, was not the 'origin' of such policy. Similarly, as will be discussed below, scholarly work on merger policy suffers from the same treatment and in some cases, because it is viewed as a highly technical policy area, has largely been left out of the scope of EU political science literature. However, some scholars such as Goyder (1998), Gerber (1998) and Amato (1997) do take a broader view of EU competition policy by studying its pre-SEA history and placing it in the context of the economic integration debate. It is the view here that in order to fully appreciate the importance of EU merger policy, not only should its content, framework and implementation be analyzed, but also its broader role as an extension of European competition policy and a tool to revitalize the integration initiative. Therefore, before speaking of a 'European' brand of competition or merger policy it is important to clarify and refute to some extent, a too often overlooked and accepted aspect of its study.

Within much of the established legal literature, competition policy/law and antitrust policy/law are used as synonyms. The origins of antitrust law have their roots in US policy-making whereby legislation, such as the Sherman and Clayton Acts, were passed.[6] Over the past 100 years, antitrust law has evolved and has expanded its competence to include numerous market actions such as predatory behavior and mergers and acquisitions just to name a few. However, despite the changing content of antitrust law the principles upon which it stands - a capitalist approach to the market and the protection of the consumer - have not been compromised. As on turns to developments in Europe, it is often cited that American officials influenced the development of competition law in the European Coal and Steel Community (ECSC) with the resulting provisions covering most of the basic tenants of American antitrust law (Majone 1991).

[6] These Acts were passed to outlaw the 'trusts' that lead to the creation of cartels and thus a restriction of competition within various markets.

Similarly scholars such as Killick (1998) have argued that because the U.S. had a hand in developing post-war German competition law and pushed for a European endorsement of the competition based market economy approach during the debates surrounding the Rome Treaty, that European competition law is some sort 'American policy colony.' Yet others suggest that American 'antitrust' and European 'competition' policy share some characteristics, but their development and ethos are markedly different. Amato's (1997) work recognizes this and is one of few recent works that attempts to bridge the two despite acknowledging that the study of competition policy is highly centered on the overwhelmingly technical American antitrust system, making it "very private matter for lawyers and economists"(1). Nevertheless, according to Gerber (1998) the widespread assumption that competition law in Europe is a US import or worse yet, imposed by the US after the Second World War radically misrepresents European experience. He states that "competition law in Europe is based primarily on ideas developed by European thinkers and decision-makers in response to European conditions, and it has spread through Europe along indigenous channels rather than through emulation of EU antitrust law" (Gerber 1998, 431).

It is true that most European countries generally preferred to develop a capitalist economic system alongside policies of social welfare and as a result, a 'competition culture' did not have an opportunity to flourish until the post-war period when Germany established the first competition law system on the continent in 1957. Despite this late development, the story of European competition policy can be traced to Austria in the 1890s, Germany in the 1920s and a majority of European states in the post-war era. As argued by Gerber (1998), it is possible to explain the development and content of EC competition law by acknowledging and analyzing the two dominant models of competition law that developed during the twentieth century across Europe.

During the post-war period (1950s-mid 1980s) the proliferation of competition law across Europe took two distinct paths. The majority of European countries based competition regulation on administrative systems. This meant that decisions dealing with competition issues were made by administrative regimes located within the economic

regulatory bureaucracy of the state.[7] As these systems have developed, competition law has been generally understood as a form of economic regulation policy and not 'law' per se. The language and procedures of such systems tend to embrace discretionary policy implementation rather than judicial decision-making. Thus, national competition laws in Europe can be understood as vague. As Gerber (1998) argues:

> These systems have sought to protect competition, but they have been used for other objectives at the same time, often leaving confusion and uncertainty as to their goals. Powerful guiding principles have been rare. Vague notions of the 'public interest' or 'abuse of economic power' have typically been at the center of these systems rather than enforceable norms defining unacceptable conduct (228).

In contrast to the 'administrative model,' Germany embraced a stronger and much more judicial based conception of competition law. This divergent strand of competition thinking can be traced to the ordo-liberal tradition established in Freiburg Germany during the 1930s and 40s. The ordo-liberals focused specifically on the role of the economy in society. While embracing 'mainstream' liberal economic thought, they believed that private, rather than governmental decision-making had to direct the competition system. In addition to this view, ordo-liberal thought also emphasized the need to protect society from the misuse of economic power, which meant that the state had to be strong enough to resist the influence of private economic actors. Thus, the ordo-liberal tradition sought a state with a diffusion of both political and economic power, which translated into the elimination of monopolies and a society with minimal 'big business.' This represented the start of modern competition thought in Germany and it clearly viewed the idea of relying on the executive branch of government to combat cartels as a 'doomed' strategy (See Gerber 1998, ch. 7).

The German competition law system that emerged in the 1950s represented a hybrid that reflected, in addition to ordo-liberal ideas, content from US antitrust law. The system was designed to be 'constitutional' in that its coverage was not limited to specific phenomena such as cartels, but covered all restrictions on competition (merger control was added in 1973). The German system relies on the Federal Cartel Office (FCO) –

[7] The administrative model can be traced back to 1890s Austria and early twentieth century German competition thought. It revolved around a fixation with the 'problem' of cartels and the 'abuse of power' of economic actors. It was thought that cartels should not be harmed, but their conduct should be restricted.

modeled after the ordo-liberal conception of a monopoly office – to apply substantive norms, however its roles and modes of operation are highly judicial. Thus, the system may be understood as an administrative/judicial mix. The FCO's basic role is not to execute political decisions or exercise discretionary authority in the name of the 'public good,' but to interpret and apply legal norms – the 'law' (See Maxeiner 1986). Being based on 'the law,' the FCO operates outside the administrative hierarchy and its decisions are reviewable by the regular state courts. By understanding the fundamentals of the German competition law system, one is in a better position to explain developments at the supranational level, since the German view of competition (as opposed to the French view) gradually took hold during the first 15 years of the EC competition law experience.

The seeds of EC competition law were planted in 1951 when the European Coal and Steel Community (ECSC) was created to deal with the possibility of Germany regaining its (pre-war) dominance in the concerned industries. According to Bebr (1953) political leaders from several states created a 'legal community' that subjected most of the European coal and steel industry to an additional legal regime. The regime created common control over the activities of firms in those industries and thus placed them in the service of the 'community'(1). Because the central goal of the community was to regulate the activities of firms, a competition system needed to be established. The resulting provisions of Articles 65 and 66 represented a unique blend of European and American[8] approaches to cartel questions. The former prohibited anticompetitive agreements (cartels) and the latter dealt with mergers and misuses of economic power. Although the ECSC competition system was little used and had a limited impact on subsequent EC competition law developments, it did provide the first step in the process of European integration. As discussed by Goyder (1998), the Treaty of Paris and the resulting ECSC "embodied for the first time in an international treaty a set of rules of competition tailored to the special circumstances of particular industrial sectors in a group of sovereign States"(24). The institutional structure prescribed by the Treaty delegated to the High Authority (the Commission) the executive authority to implement

[8] The architect of the ECSC, Jean Monnet consulted American antitrust professor Robert Bowie to help draft competition legislation. However, as Gerber (1998, 338) points out, the US was not part of the negotiations and the US role was concealed as much as possible by Monnet.

the rules, but this authority was subject to both the judicial control of an independent Court and the political control of the Council of Ministers. It was this model that formed the basis for a much broader competition and institutional system for the EC.

The inability of the European states to agree on the future course of integration via a European political community and a European defense community, opened the door for pro-integration leaders such as Monnet to concentrate on economic integration as a means to promote and drive European cooperation (See Goyder 1998, 24-30 and Gerber 1998, 199 and 342-48). The idea of economic integration gained currency throughout Europe and by 1956 a framework in the form of the 'Spaak Report'[9] was devised which formed the foundation of the Rome Treaty and the development of the *first* supranational policy – EC competition law.

The two basic objectives of the Treaty were to promote cooperation between states by creating a common economic market and to increase prosperity in Europe by reducing barriers to trade. However, in order for these two objectives to become reality it was agreed that a competition system had to be put in place in order to reduce or eliminate the possibility of firms to manipulate the flow of trade between states (See Grahl and Teague 1990, 29). So, this is the key rationale for competition policy at the supranational level: there is no point in bringing down trade barriers if one then allows firms and Member States to distort trade within the common market via anti-competitive practices. The deliberations surrounding such a 'competition policy' saw the two models discussed above take center stage. The French believed that EC competition law should be viewed in more political/policy terms, preferring to base decisions on the evaluation by Community officials of the needs of the Community and its Member States. This perspective was heavily backed by large European businesses and most states, except Germany, who felt that Community competition law should and would play a marginal role (See Goyder 65). The German position on the other hand was more grounded in judicial norms that should be interpreted and applied according to judicial methods. From their ordo-liberal perspective the Treaty provided the 'economic constitution' from

[9] It is interesting to note that although the working group that produced the report was headed by Paul-Henri Spaak of Belgium a German, Hans von der Groeben who was heavily influenced by ordo-liberal ideas, was a principle drafter of the Report. He would later become the first Commissioner of Competition policy in the EC (See Gerber 1998, 264 and Goyder 1998, 25-26).

which specific regulatory principles were to be derived. Thus, the German's felt strongly that the competition portion of the Treaty (Articles 85 and 86) should be taken seriously and applied strictly (Gerber 347). As will be discussed in Chapter 3, EU competition law has played a major role in Europe and resembles more of the judicial conception of competition than the administrative conception - that is until the MCR was added to the framework.

The absence of any mention of the control over concentrations or mergers in Article 86 is of particular importance to this study. According to Goyder (1998), "It seems that those who negotiated Article 86 did not intend that it should provide the Commission with a control mechanism over concentration: had they intended to do so, it might have been expected that they would have made use of the wording adapted from that already available in Article 66 (ECSC), rather than the more limited wording actually adopted"(33). The absence of merger control provisions in the Treaty would subsequently raise important issues at the supranational level. As will be discussed in Chapter 3, both the Commission and the ECJ made several decisions that questioned both the scope of EC competition law and the place of merger control within it. However, of immediate importance is that the notion of a common, integrated market would allow European firms to acquire sufficient size to compete effectively on world markets and consumers would benefit from a Europe-sized market. Economic integration was also a powerful idea because it was viewed by many as being the only way of confronting the political and economic power of the U.S (See Gerber 1998, 348). Thus, one must not understate the power of the 'integration logic.' As Amato (1997) argues, generally speaking when the EC was founded, the notion of 'competition' was subordinate to both Community industrial and agricultural policy and the idea of market integration (43). Even American scholars have noted that generic competition goals such as lower prices and quicker technological growth were subordinate to the idea of economic integration (See Hawk 1972, 231). As will be discussed below, although the intent to build 'European Champions' to compete on world markets dominated competition thinking during the 1960s, 70s and early 1980s, the ultimate failure of this conception of competition did not completely sink the idea of European economic integration. Indeed,

the idea of economic integration was the centerpiece for the SEA and the expanding role of competition law in Europe, including merger control.

With the establishment of the EC in 1957, the idea of the competitive economy was enshrined by Article 3(g) of the Treaty of Rome, which states that the EU shall include "a system ensuring that competition in the internal market is not distorted." The umbrella term used for this set of rules in the EC was now established: competition policy included both antitrust and state aid regulations and later merger policy would become the third component (See Chari and Cavatorta 2002, Hix 1999, 217-19; Smith 1998).

Soon after the simultaneous 1957 adoption of the Treaty and German competition law France, Holland, and Belgium followed suit by implementing their own competition systems. Over the next 20 years, following the collapse of the dictatorships of the Iberian Peninsula, Luxembourg, Ireland, Greece, Portugal, and Spain did the same. Italy, pressured by the EU, finally adopted an antitrust law in the early 1990s. Considering these events, one can see that the development of national competition rules coincided with that of the European Community. As McGowan (2000) points out, "More so than in other areas, there was a mutual reinforcement between the two levels of policy, in that the work of officials in Brussels gave a higher profile to issues of anti-competitive conduct at the national level, while national officials generally supported the development of a European dimension to their work"(118). The reason for this can be attributed to the fact that Member States (except Germany) had little, if any, experience with competition law. This resulted in Member State governments having little interest in becoming directly involved in the structuring of the EC competition system. The Council, according to Gerber (1998) "was willing to allow the Commission to play the major role in shaping the competition law system, and the Commission grasped the opportunity" (349).

As time progressed the Commission and ECJ have crafted EC competition policy to achieve the goal of a common economic market and thus it has become a more visible and central element in the political economy of the EU. Because the Commission is the sole institutional actor, the decision-making process is somewhat simplified. Although the Commission is a coalition of interests, it has the capacity to behave more

like a unitary agent in this field than in others. However, as the debates between the Germans and the French over the intended role of Community competition policy exemplified, the EU's competition policy has been influenced to different degrees by the extent to which it can reconcile tensions between different aims of policy and by the degree to which it can resist the lobbying pressures of Member States and firms themselves. As will be seen below, the same is true for the Commission in the realm of merger policy.

EU Merger Control

As the mid-1980s approached and a renewed energy to 'complete the single market' began to take hold, economic concentration in the form of mergers and joint ventures seized center stage on the competition front. The creation of the 1989 MCR "represents the single most important addition to European competition law since its inception" (Gerber, 1998, 379). However, developing and implementing a merger control regime posed new challenges to the Commission and ECJ. Dealing with antitrust issues such as cartels and regulating state aids represented fairly straightforward tasks for the two actors. Assessing the harms caused by mergers on the other hand, involves highly complex economic issues on which experts in the field often disagree. Different types of mergers represent different possible consequences for competition. This translates into greater discretion and uncertainty for Commission decision-makers. Moreover, this discretion must often be exercised under strict time pressures and the glare of public scrutiny. The economic consequences of many mergers also tend to increase political pressure on the decision-making process. Because of this, most scholarly work on the subject concentrates on these aspects. This tendency has lead to either overly legalistic or procedural studies, which one may describe as ahistorical: ignoring context for the sake of details. As one turns to political science/policy studies literature relating to European merger control, it is clear there is much to be done.

Both, Nugent's (1999) and Hix's (1999) books (among others) are viewed by most in the field as being the most appropriate 'text-books' for European Union studies. Yet, between the both of them there are only fifteen pages dedicated to competition

policy and even less to merger control. What is even more discouraging is that the quintessential book on EU Policy-making, Wallace and Wallace's (1996) edited work, only five pages are dedicated to merger control even though it is claimed that the area is interesting in that "the merger saga reveals how much politics permeates this apparently technical area"(Allen 1996, 175). As one can gather the topic is not totally devoid of scholarly attention. However, this attention is shallow in that it lends itself to general description. Consequently, the studies presented by Amato and Gerber highlight a shortcoming in the established literature, which this study aims to address - there is a lack of discussion on the context surrounding and the actual development of European merger control legislation.

Despite the above shortcomings, some of the work on competition crosses over to merger policy of which Nugent and Allen put forth points worth considering. Nugent points out "the Commission's ability to exercise its legal guardianship role is blunted by a number of constrictions and restraints"(1999, 116). He contends the three most important are (1) limited resources (i.e. manpower within MTF); (2) availability of information for DG IV officials; and (3) political consideration whether it be member-state governments' pressure or company/industrial pressure. The influence of these variables are confirmed by Allen:

> DG IV has been inspired mainly by a desire to police the European market in the interests of creating and preserving a system of undisrupted or perfect competition. Nevertheless political and economic realities, as well as the practical problems of implementation, have often required DG IV either to turn a blind eye to uncompetitive practices, by both companies and Member States, or to rationalize them in terms of other objectives being pursued by the commission (1996, 161).

Other studies mark references to merger policy in the context of single market analyses. Armstrong and Bulmer's (1998) work in which merger policy is used as a case study to demonstrate the transformation of national and EU regulatory structures is one example. Also, apart from being the most thorough book on how policy is *actually* made at the EU level, Peterson and Bomberg's (1999) contribution contains a section on competition policy that briefly discusses how the MCR was conceived. However, despite these rare insights into European merger control policy it is clear that these studies suffer from the same insufficiencies evident in the competition policy literature.

When one turns to the literature focusing specifically on European merger control, it tends to be overly descriptive in that it provides numerous explanations of the operational side of the policy via overviews of the actual legislation (MCR) and the investigation processes, the role of the Commission and MTF, and the number of constrictions and restraints evident in the policy area. Cini and McGowan's (1998) work provides a solid overview of the history and the workings of the MCR and offers some interesting statistics on cases that are decided in the Phase I as opposed to Phase II investigation processes and a yearly breakdown of merger cases considered.[10] The last section on *assessing merger policy* begins with the observation "the Commission has been accused of being too lenient in its treatment of merger cases"(Cini and McGowan 1998, 126). The authors later go on to outline the constraints and restrictions that are *evidently* influencing the Commission's decisions. However, these variables are very similar to those put forth by both Nugent and Allen. Taken together, the main variables alluded to include the set time frame allotted to merger review, the limited resources available to the MTF, the MTF's makeup being 'lawyer heavy,' and pressures from firms, various Commissioners and other DG's to allow high-profile mergers. A few cases are cited without any great detail as being important because they demonstrate the effects of the different variables. Laudati (1996) offers some interesting insights into the Commission and its role in merger regulation by presenting various characteristics of the merger regulation and its implementation process such as the lack of independence and transparency in the enforcement mechanism and the lack of transparency in Community competition law in general.

One may argue that most of the observations in this work reflect those earlier presented by Portwood (1994) and Neven (1993) which constitute different strands in the overall European merger control literature. While the former concerns itself with the legal aspects of merger control the latter introduces the economics as well as the 'politics' of the policy area. Portwood's work grew out of the greater need for literature on EU law as opposed to national law. Although the book is somewhat outdated it does give a solid

[10] Phase I investigations are initiated by the MTF for all mergers which fall within the MCR's jurisdiction. Phase II investigations are only opened if the MTF concludes that more time is needed to analyze the competitive effects of the merger in question. These processes will be explained in more detail in Chapter 3,

legalistic overview of the MCR from 1989 to 1993 by providing significant depth in both the substantive and procedural aspects of the legislation. Both Goyder (1998) and Whish (2001) offer the most comprehensive and approachable (for non-solicitors) contemporary work done on EU competition law, with Goyder's work giving a thorough history of EC competition law and the early years of DGIV, while Whish concentrates more on the economic context of competition law. Other insightful works that concern themselves with the economic/law realm and shed light on the technical nature of merger assessment and implementation are the offerings of Frazer and Waterson (1994), Fishwick (1993) and Hildebrand (1998). Again, these books concentrate on analyzing the actual legislation (MCR). Peter Verloop's (1999) and Bishop and Kay's (1993) contributions offer definitions of critical economic terms such as market dominance and relevant market in non-economic terms, which is essential for scholars who have a limited background in economics and competition/anti-trust law. The Bishop and Kay book is interesting because it examines certain member-states' merger policies as well as the MCR. The authors make an interesting point that when the MCR was being drafted, the UK, Germany and France did not want the Commission to be able to use the MCR with a heavy hand, a point that will be re-visited in Chapter 3.

Neven's work was the first book that evaluated the European merger regime and, despite being outdated, has become mandatory reading for anyone interested in the area. The authors' basic findings are as follows: first, it is argued that the merger process itself lacks transparency. Overall, the Commission's analyses are insufficiently transparent to allow third parties to fully gauge whether their judgment in individual cases has been sound. Secondly, in many respects the Commission's procedures lack consistently between cases and rely excessively on qualitative judgments where more quantitative and structured analyses are otherwise possible (Neven 1993, 5-6). Lastly, the merger regime has come under assault for being excessively lax and politicized with the Commission approving mergers that should have been blocked, and improperly applying industrial policy criteria to merger decisions (Pollack 1998, 235).[11] These findings were based on evaluations of published merger cases, a survey of firms that have been the object of the Commission's investigations, and an assessment of the merger control procedure.

[11] Although Pollack makes this argument it was one of Neven's as well.

However, what is most interesting for policy students is that they tried to link the study of merger control with broader theoretical issues prevalent in economics. If one thinks of merger policy as a part of an over-arching program or competition framework it becomes apparent that it is an important topic within the study of regulatory economics and industrial organization because a merger represents an activity that could possibly thwart competition. Pepall *et al.* (2002), Martin (2001), and Viscusi *et al.* (1995) offer solid insights on how merger policy fits into the broader study of these areas.

Given the above, the study of merger policy is intriguing for those interested in European policy studies, economics, law, and politics for a number of reasons. As discussed above, although the founders of the EEC did acknowledge the importance of having a competition regime, the resulting policy was explicitly concerned with preventing collusion (cartels), price discrimination along national lines, and the regulation of state aids; explicit reference to merger control was absent. Despite being on the Commission's agenda for most of the 1970's the acceptance of a European merger regime by the Member States was precipitated by changing economic and political environments that were prevalent in Europe during the mid 1980s. Thus, it is crucial to view the adoption of the MCR as a function of the revitalization of the integration initiative. It must also be acknowledged that prior to the MCR, European competition policy was considered 'special,' not only because it was the first supranational policy of Europe, but because the Commission was granted a highly substantial degree of autonomy and discretion to carry out its regulatory tasks. To this day it is one of the policy areas where the authority of the European Council and Parliament is weakest. Many important decisions are taken by simple majority votes in the College of Commissioners and according to Peterson and Bomberg (1999) simple majority voting is used instead of QMV because the Commissioners are 'neutral' and do not represent 'their' Member States (66).

When it comes to merger decisions this statement becomes highly contentious as the Commission's degree of autonomy and discretion are exacerbated. The addition of merger control to the competition system clearly removed mergers 'with a community dimension' from the jurisdiction of the Member States and placed them solely in the hands of the Commission. Consequently, the establishment of a merger regime

represents a shift from the judicial component of the Commission's activity to its political elements (See Gerber 1998, 380). Thus, the MCR represents a fundamental turn in the competition system, away from the judicial/constitutional model to a more administrative model. Most of the recent work done on European merger policy has pointed out that since Council involvement in merger policy is limited: "politics gets played out within the Commission as national governments place direct pressure on 'their' Commissioner, raising considerably the stakes of merger outcomes"(Cini and McGowan 1998, 133). As a result of this, some scholars have claimed that merger control is arguably the most contentious of all the Commission's competition policies as it epitomizes everything that is controversial about the competition regime and highlights the sensitivities that underpin all Commission policies that regulate industry. Decisions are not just about the effects on European industrial structure, but end up as almost symbolic battles determining the ideological/national winners and losers of this aspect of European integration (Cini and McGowan 1998, 133-4). While most of the work done thus far on European merger policy seems to be fixated on Member State pressure in the College of Commissioners, it is clear that this is but a small aspect of the bigger picture. Although the College does have the final say in all merger cases, it is the MTF that conducts the investigations and recommends decisions.

The following dissertation seeks to reconcile the divergent strands in the existing literature on European competition and merger policy by providing a systematic analysis of the development and implementation of the MCR. This analysis will not be confined only to the policy-making process but will also examine how policy goals are put into practice and how this practice has begun to change the European competition system. By examining various case studies and policy trends within European merger control, one may compare policy goals with policy output. Apart from being a study grounded in the political science tradition, a unique aspect of this dissertation is that it will strike a balance between the political (Cini and McCowan 1998, Allen 1996, and Nugent 1999), the economic (Neven 1993, Maritn 2001, Viscusi et al. 1995), and the legal (Portwood 1994, Verloop 1999, Bishop and Kay 1993) dimensions of the policy area. According to Armstrong and Bulmer (1998), too often in policy analysis the three areas are seen as independent of each other. However, it is clear that perceived changes in the

international economy and structural preconditions acted as impulses for reviving the EC. But the legal dimension is also critical and too many scholars of economics and political science have neglected this dimension of policy studies (Armstrong and Bulmer 1998, 38-9). It will be evident from this dissertation that the interaction between European Court of Justice (ECJ) and later Court of First Instance (CFI) jurisprudence and the merger policy process is quite close. It will be shown that the European Commission was able to use ECJ and CFI decisions to expand its regulatory power in the area of competition policy, in general, and in a number of instances in merger policy more specifically. Likewise, it will also be argued that the Commission and Courts have a 'love-hate relationship' in that in other instances, the Courts censured Commission activity.

Following from this, analysis of the literature reveals two main insufficiencies at both the developmental and implementation phases of European merger policy. First, there is a lack of analysis on the development and negotiation of the MCR in the context of the Single Market Programme. And secondly, there is an absence of analysis of two important trends that have developed since the policy was implemented in 1990. The remaining parts of this chapter are thus dedicated to developing further these two main ideas and outlining the research agenda of this thesis.

1.2 The Research Agenda In Context

European merger policy developed in the context of the single market initiative and precipitated from two historical bargains. Although the goal of a European internal market was the impetus for the creation of the EC in the first place, it was not until 1985 when the Council endorsed the Commission's White Paper on 'the completion of the internal market' that it became possible to conceive. After two years of Council meetings to iron out differences Member State governments endorsed the Single European Act (SEA), which formally amended the Treaty of Rome for the first time.

The essential idea purported in the Commission's White Paper was that of European competitive advantage, something that was lacking in the 1970s and early 1980s. The Commission presented a strategy for completing the single market by

seeking measures that would break down barriers in order to ensure the four freedoms as set out by the Treaty of Rome: the free movement of goods, services, capital, and labor. The strategy stipulated that by eliminating the physical, technical, and fiscal barriers separating the nation states by December of 1992, Europe would become more specialized and thus more profitable. Although the idea of "the free movement of goods, services, capital and labor" became the proverbial battle cry of the 1992 Programme (and the general EU project for that matter), the White Paper through the ratification of the SEA in 1987 also outlined institutional change.

With regard to the latter, the major changes called for dealt with the voting arrangements in the Council of Ministers, the role of the EP in policy-making and the Commission's powers. The most important of these changes was the introduction Qualified Majority Voting (QMV) in two ways. Firstly it revised the existing EEC Treaty by changing the voting arrangements specified in several policy areas such as customs tariffs, mutual recognition of labor qualifications, liberalization of capital movements and regulation of air and maritime transport. Secondly it introduced changes in competences, while simultaneously providing for the use of QMV in those areas. The desired result of these changes was to speed up decision-making within the Council, and the general process of market integration. Taken as a whole, the White Paper/SEA package put fourth a blueprint for making the single market a tangible entity in the quickest possible manner.

Although the single market has always been a part of larger ideas of many in the EU, it is not clear from the above overview why the "re-launching of Europe" occurred when it did. As discussed above, there is a vast literature dedicated to analyzing the history and governance of the single market. However, the major factors that contributed to the development of 1992 Programme can be grouped in three broad categories: economic, institutional, and political. Although it is out of the scope of this study to provide a full detailed analysis of these factors, it is important to review the major points that had a direct barring on the development and negotiation of the MCR.

Structural Pre-Conditions and Circumstances

The 1970s proved to be a dramatic period for the world economy as stagflation crippled national economies. The rate of change in process accelerated, imports rose, the balance of trade deteriorated, growth slowed, and unemployment increased. Unlike the US and Japan, Europe seemed unable to adjust to the changed circumstances in international growth and competition. The decades preceding the 1992 Programme saw all Member States become more dependent on inter-Community trade. Political and economic elites quickly began to realize that the Community had unmistakably become an export market where access and equality to competition were impaired for Community exporters. Throughout the 1970s each national government in Europe actively began to build up domestic firms capable of competing with American multinationals. As Sandholtz and Zysman argue, "the state encouraged or engineered mergers and provided research-and-development subsidies; state procurement heavily favored the domestic firms"(1989, 113). This interventionist approach to economic and industrial policy was not producing the desired effects and to some extent explains why merger control was absent or neglected at the national level. For example, in France during the 1970s merger provisions were enacted but had limited scope and force. The primary rationale for such provisions was to provide an excuse to oppose the idea of Community level merger regulation. In the UK, merger regulations installed in the 1960s were little used because the Labour government actively promoted and engineered mergers. Likewise, the general sentiment within the competition system was that mergers were presumed to be beneficial. Although German merger control policy would become the most efficient in Europe in the late 1970s and 80s, it was originally left out of the competition system because it was felt that German firms had not yet reached their optimal size (See Gerber 192, 220 and 302). Furthermore, industrial interests throughout Europe vehemently lobbied against any seemingly 'aggressive' competition legislation – including merger control.

After a series of 'defensive' measures in the form of import tariffs were put into place it seemed that Europe's predicament was worsening and the search for an economic remedy continued. "The European Monetary System was an effort to create a zone of

currency stability so that the expansion of trade inside Europe could continue" (Sandholtz and Zysman 1989, 110). As a result, the early 1980s saw most Member States' inflation levels drop and by instituting a monetary regime that stabilized exchange rates and process, the Community created the monetary foundation for a single internal market (Cameron 1992, 47). Despite the stabilizing effect of the EMS, national economic and industrial policies were not reconsidered because they were not perceived as having failed. Nevertheless, according to Sanholtz by 1980 it was clear to the majority of national leaders that the 'National Champions' approach was failing, for "Europe's champions were losing market shares both in Europe and worldwide, and most of them were operating in the red" (Sandholtz and Zysman 1989, 110). By the early 1980s political elites and policy-makers recognized that the national champion strategies of the past decade had failed to reverse Europe's economic and industrial standing.

Mrs. Thatcher's election in the UK, Mr. Lubber's in Holland and Mr. Kohl's in Germany marked a pivotal divergence from Europe's interventionist strategies to a greater ideological-political preference for a neo-liberal political agenda (Armstrong and Bulmer 1998, 21). It must be understood that this rightward shift in the ideological center of gravity was not confined to these three European states however: between 1979 and 1983, non-Socialist parties replaced five leftist governments[12] and even France experienced a swing to the right when the Socialist government of 1981 changed its program. As argued by Cameron:

> In the wake of three devaluations of the franc between October 1981 and March 1983 the Socialist-controlled government shifted from its initial policy of reflation to one of fiscal and monetary restraint" (1992, 58).

Similar dynamics occurred in Spain under the Socialist administrations between 1982 and 1996 (Heywood 1995, ch. 10).

As a result of these developments the economic and political climate seemed conducive for the Commission to develop a plan for economic integration. However, the fact was that both the Commission and the Council had been working on the creation of such a market since 1980. There is no doubt that the Delors Commission is often

[12] The other two examples are Belgium in 1981 and Denmark in 1982.

credited with development of the White Paper, but most of the work was done previously in the Thorn Commission. It was between 1981 and 1985 that most of the proposals eventually included in the White Paper were discussed and drafted in DG III (Industry).[13] Recognizing the political changing climate throughout Europe, Delors pushed the White Paper onto the Council negotiating table where it rapidly won support. Indeed, because of various national governments' commitments to reductions in the share of public spending in national output and to a renewal of private enterprise and the workings of market competition, it would have been politically difficult for governments committed to free markets to have refused to support the Commission's plan (Grahl and Teague 1990, 25-6). In its effort to accelerate the single market process the Commission simultaneously pushed for a supranational merger regime as a means to regulate the 'new' market. Although the campaign for the MCR began in the 1970s it was not until the White Paper gained popularity that its proposition was given significant consideration.

The Research Questions

In respect to the first insufficiency in the literature, although important, it is not enough simply to outline the circumstances and preconditions leading up to policy implementation and then deduce from these why the decision to create the MCR occurred when it did. One idea pursued in this study is that the actors who played a major role in the formulation of the MCR as well as their motives represent other salient variables that may be useful in explaining the development and subsequent implementation phases of the policy concerned. Thus the first research question to be addressed is: which actors were involved when the MCR rules were formulated and why did they participate? By examining the reasons for the creation of the policy and identifying the primary actors involved, one may be able to explain the two unexpected trends that have developed since 1990, which form the basis for the second research question, why did the trends of

[13] As will be presented latter in chapter 3, although the 1992 programme was spawned in the early 1980s it was not until the collaboration between the Delors Commission and elite industrial Europe (in the form of the ERT) in the mid 1980s that the White Paper took form. More specifically it will be shown that the Commission actually adopted the ERT's position paper on the completion of the common market and made it its own via the White Paper.

collective dominance and portfolio power develop during the implementation of the MCR over the next twelve years? Because the concepts and the economics that underpin them are complex in nature, a substantial part of this dissertation is dedicated to their examination and explanation. These trends are significant because they developed over time, affect all three categories of merger and to some degree represent the articulation of 'new' Commission goals in merger policy.

Broadly speaking, collective dominance is a term used to describe a market situation where a small number of large firms exert power over a particular product market. Market control is facilitated by the coordinated actions of the firms involved with the aim to maintain prices above the competitive level. Collective dominance differs from a cartel or traditional oligopoly because the co-ordination between firms need not be explicit. The Commission has systematically demonstrated that it will interfere is such mergers even if there are no structural links between the supposed collectively dominant firms. In other words, applying the concept of collective dominance means that the MTF may intervene in any merger if it feels the firms within a particular market 'may' coordinate their behavior.

On the other hand, portfolio power, or what is termed 'range effects' in US anti-trust policy, is an example of 'indirect effects' – where competition concerns are raised with regard to conglomerate mergers even where there is no direct overlap between the merging parties (as there are in traditional horizontal and vertical mergers). An example of such effects is when a firm (firm A) has dominance in relation to one product – say whisky – and mergers with another firm (firm B) that handles other kinds of liquor like rum and gin. According to the theory of portfolio power adopted by the Commission, firm A may be able to use its dominance in the whisky market to affect the sales of the newly acquired products. The Commission has demonstrated anxiety over the increased efficiency that such 'portfolio' mergers produce. Thus, as Whish points out, "the development of a doctrine that the enhancement of efficiency could be a ground for intervention is controversial, and would considerably extend the Commission's ability to control concentrations" (2001, 777). Taken together, the emergence and subsequent development of these two trends is surprising for three reasons, which ultimately helps highlight the significance of, and justify the analysis of the second research question.

First, the MCR clearly states that a merger can only be questioned/prohibited if it creates or strengthens 'a' dominate position: investigating a merger using the concepts of collective dominance and portfolio power, however, is contrary to the MCR because it means that the proposed merger will not necessarily create or strengthen a dominant position. Rather, in the case of collective dominance it means the MTF is concerned with a 'collectively dominant' position held by a small number of firms – something the MCR does not cover. As for portfolio power, the MTF is questioning mergers that have no vertical or horizontal links. That is, the products of the firms merging are neither direct substitutes nor complements. These mergers are considered conglomerate and for the best part of the past 12 years most 'mega mergers' have been of the conglomerate variety. Although the MCR does not stipulate specific criteria for the assessment of mergers, it does suggest that only mergers that significantly increase the market share of a given firm in a given market should be exposed to further scrutiny. As Motta points out, "showing that a merger has adverse consequences on competition or that it would increase prices is not enough to block it: under the MCR the finding of a dominant position is a necessary condition for prohibiting a merger"(1999a, 7). The cases in which the MTF have applied the concept of portfolio power completely contradict the MCR in this respect. The MTF has been challenging conglomerate mergers that do not increase market shares of the firms involved in any of the relevant markets concerned.

Secondly, the procedural rules governing amendments to EU legislation prohibit the Commission from unilaterally altering a given policy. Although the Commission has been given a great deal of discretion in the area of EU Competition Policy, there still exists a proper protocol for amending legislation, which is to petition the Council to enact the necessary legislation needed to remedy the problem in the present legislation/rules (Portwood 1994, 84). As will be demonstrated throughout the dissertation, the MTF unilaterally carved out a policy niche for both concepts within the MCR. This was accomplished through the intentional hand picking of 'test cases' by the MTF to establish precedence and, is some instances, judicial backup by the European Court of Justice (ECJ) and the Court of First Instance (CFI) in the form of favorable decisions and rulings.

Third, one would not have expected these trends to arise because of the evident 'coziness' shared by the Commission and elite transnational business interests in the form

of the ERT and UNICE[14] as seen in the development of the SEA as well as the MCR (See Cowles 1996). By using the concepts of collective dominance and portfolio power the MTF has complicated and introduced uncertainty into the merger negotiation process for economic actors who may have had different expectations. As a result, economic actors are skeptical and in some cases concerned, because the MTF has increased transaction costs in its effort to increase policy competence.

These observations lay the foundations for the significant problem one would have not expected: given the explicit wording and intent of the MCR, the procedural rules governing amending EU legislation, and the relatively close relationship between the Commission and elite economic actors, the concepts of collective dominance and portfolio power have nevertheless become significant trends in European merger control. The second main objective of this thesis thus is to explain why.

The rest of the thesis is organized into five chapters. Chapter 2 establishes the theoretical framework and methodology that will guide and inform the proceeding chapters. An overview of the theoretical literature dealing with interest representation will be followed by a more thorough discussion of policy networks/communities, policy entrepreneurship and how the use of private interest theory as an explanatory variable may help explain the development and persistence of these two approaches in the formulation and implementation of the MCR.

Beginning with an actor analysis of the Single Market policy initiative, Chapter 3 presents a systematic, integrated analysis of the MCR and the actors involved in its development in an attempt to answer the first of the two major research questions posed above. A discussion of the first twelve years of European merger control will follow. One will also find general statistics pertaining to EU merger decisions here, which will serve as a basis to better understand the two trends that are explained in the following chapters. Chapters 4 and 5 focus on the implementation of the MCR and represent the bulk of the study by providing a case study based analysis of the two trends in question – collective dominance and portfolio power. These chapters will provide an integrated analysis by providing the economics of, the significant merger decisions dealing with, and the policy

[14] European Roundtable of Industrialists and Union of Industrial and Employers' Confederation of Europe.

consequences of the respective trends. This section will conclude with an assessment of how the trends in question relate and can be explained by policy entrepreneurship informed by private interest theory. The concluding chapter will not only present the various theoretical lessons and conclusions that can be drawn from the study, but will also highlight the limitations of such a study and present suggestions for further research.

Chapter Two
Theoretical Framework

Introduction

Research within the rubric of 'EU policy-making' has become a major focus for students of political science over the last decade. Using Hix's classification, five main strands of EU policies have been analyzed – regulatory, redistributive, economic and monetary, internal security, and foreign policies. One may argue that research has concentrated on the first three of these areas because "approximately 80 percent of all social, economic and environmental regulation applicable in the Member States is adopted through the EU policy process"(Hix 1999, 211). The early 1990s thus saw scholars, guided by the concepts of pluralism, corporatism, and elitism, paying more attention to the role of interest groups in the policy process. Building on the American based literature on interest representation by those such as Dahl (1961, 1982), Lindblom (1977), and later Schlozman and Tierney (1986), scholars such as Gardner (1991), Greenwood *et al.* (1992), Mazey and Richardson (1993), Pedler (1994) and Crouch and Menon (1997) made insights into how non-state actors have sought to influence EU integration by identifying patterns of private interest involvement in the policy process. More recently, as discussed by Peterson (1995), the 'policy network' approach, which was developed as an alternative to pluralist and corporatist analyses, has been applied to policy-making and is enjoying ever increasing popularity amongst EU policy scholars.

The main objective of the following thesis is first, to analyze and explain the formulation of the EU Merger Control Regulation (MCR) and secondly, to explain the emergence of the unexpected trends of collective dominance and portfolio power during the regulation's implementation. As hinted to above, there are various tools that one can employ to achieve these ends and the proliferation of approaches and debates pertaining to policy-making within the EU offers a wide range of perspectives to start from. Which of these is the most appropriate for explaining policy events concerning merger control? Are there inherent deficiencies in some approaches that make one less applicable to

describing and explaining EU policy-making than another? Can the same analytical approach be used to explain developments in both the formulation and implementation phases of EU policies and merger policy more specifically?

As will be discussed more in-depth below, research pertaining to the relationships between governments and various non-state interests was dominated for an extended period of time by different versions of pluralism. The 1970s saw these approaches increasingly challenged by neo-corporatist theory. Both of these models however, have been criticized for their "lack of empirical relevance and, moreover, logical consistency"(Jordan and Schubert 1992, 8 and Rhodes and Marsh 1992, 1-4). The various qualifications (neologisms) to these two models that emerged as a response to criticisms served to compound the problem in some cases because very often similar labels describe different phenomena, or different labels refer to similar phenomena. Some scholars therefore suggested abandoning the pluralism/neo-corporatism dichotomy and developing a new typology in which a 'network' is a generic label embracing the different types of state/interest relations. For them, the network approach presented an alternative to both the pluralist and the corporatist model. The network approach is particularly useful in analyzing EU level policies because policy-making power is widely dispersed between large numbers of actors and not monopolized by national governments. Thus, the EU can be conceptualized as a multi-level system of governance, where private and public actors of the supranational, national and sub-national level interact within highly complex networks to produce policy outcomes.

Following from this, it is the intent here to use the policy community approach, a subset of the policy networks approach, to policy analysis to examine and ultimately answer the first of the two research questions posed. Policy communities will be used to identify which actors where involved during the formulation of the MCR, while private interest theory will be used to explain why the identified actors participated. With regard to the second research question, the concept of policy entrepreneurship will be used to explain the development and persistence of the trends of collective dominance and portfolio power. It will be argued that the formation of the MCR occurred in what will be termed the 'merger control policy community,' which was made up of larger European Commission and elite business interests. The implementation phase on the other hand is

largely defined by the interaction of three main sets of actors, namely the MTF, the European Courts (ECJ and CFI) and specific firms (both those firms wishing to merge as well as competitors not party to the merger).

The following chapter aims first, to review the leading theories that describe the relationship of organized interests to government and identify why or why not they are appropriate for use in this study. Secondly, the case for using private interest theory as an explanatory variable will be presented with specific reference made to its use in the American antitrust literature. It will be argued that together, the community and policy entrepreneurship approaches, informed by private interest theory, represents most adequately the theoretical framework that will guide this study. Lastly, the methodology employed in this study will be presented.

2.1 The Great Debate: Corporatism, Pluralism, or Policy Networks?

Traditional political science analysis of the key social and economic interests that have the ability to play a part in policy-making processes has yielded two main conflicting theoretical schools: (neo) corporatism and pluralism. According to Gallagher *et al.* (2001) corporatism in Europe can be traced back to the regimes of the 1920s and 30s where state control of society was based on an intimate interpretation of certain dominant interest groups and the state. Because the architects of post-war Europe discredited most, if not all, political thought from this era in history, the theory of corporatism was re-launched as 'neo-corporatism' (399). Despite its 'neo' label, corporatism and neo-corporatism are frequently used interchangeably to describe systems characterized by groups that are hierarchically organized and possess representational monopolies, in the sense of one group being the sole or at least dominant representative of an interest, as opposed to competition between groups to represent an interest (See Crouch 1979 and 1993; Lehmbruch 1979; Schmitter 1974; Wilson 1983). Economic groups representing capital and labour, (and sometimes agricultural groups in the competitive corporatism model outlined by Hardiman (October 2002) in the case of Ireland) are the types of groups of principal interest to corporatist theories. The term 'mediate' sometimes replaces 'represent' and conveys a two-way process of

communication and influence between group members and government. Thus, the model purports that cooperation serves the purpose of maintaining stability to the procedures of developing and implementing policies (Thomas 1993, 9).

The notorious problem with neo-corporatism as a theoretical concept is that scholars disagree on what exactly the concept entails. One definition is used to describe a system of centralized wage bargaining in which government and the social partners of organized labour and capital sit at a roundtable and negotiate policy. However, another definition sees corporatism as a more deep-rooted "institutionalized pattern of policy-formation in which large interest organizations co-operate with each other and with public authorities not only in the articulation of interest, but... in the authoritative allocation of values and in the implementation of such policies"(Lehmbruch 1979, 150). Moreover, scholars sometimes qualify the attribution of corporatism with terms such as strong, moderate, or weak, and different levels of interaction within a political system are sometimes distinguished with terms like macro corporatism, micro corporatism, and meso corporatism (See Cawson 1986). There are many other definitions and attributes offered in the literature, but a general inventory of corporatist theory highlights several characteristics that are constant in most of the conflicting offerings.

According to Hix (1999), the major difference between corporatism and pluralism is that the former model purports that class is the dominant social cleavage, and that society is divided into two opposing sets of interests: capitalists/business and workers/labour (190). All corporatist variants purport that a monopoly of representation to certain peak associations (of labour and capital) is granted by government in exchange for cooperation in developing policy. The associations involved are organized in a well-articulated, hierarchical structure with a single policy agenda (See Crouch and Menon 1997, 153-4; Meny and Knapp 1998, 146-49). Moreover, the factor that sets corporatist models fundamentally apart from other systems of interest representation, such as pluralism, is the stress on policy implementation. Interest groups must be comprehensive in their representation of particular sectors of society because the model is based on cooperation between the different interests in order to implement policy based on the 'public interest.' Thus, if agreement can be brokered in these negotiations the assumption is that policy outcomes will reflect a broader social consensus (See

Lehmbruch 1979). Mitchell (1997) points out that policy consensus is a goal for the partners and they will define their interests broadly with an eye to the longer term, not maximizing immediate group benefits. Policies coming out of this process will reflect the participation of all parties, not 'winners' and 'losers' (23).

Despite these commonalities it has been argued that the theoretical disputes within the corporatist school rob it of the capability of clearly delineating the key actors in the policy struggle. Applying corporatism to European level policy-making and especially the area of merger policy would produce inaccurate observations since policy negotiations are more dynamic at the supranational level and in the case of the MCR negotiations, only involved two actors – the Commission and elite business interests. The inherent weakness of corporatist analysis is its one-dimensional view of policy consultation. If the consent of both business and labour were required for all major policies at the European level the policy-making process would be paralyzed by constant deadlock. Following from this, the corporatist model rarely characterizes policy-making at the supranational or EU level, thus alternative models such as pluralism and elite pluralism may offer a more accurate picture of how interests are represented in the policy process. Put simply, the absence of 'Euro' corporatism stems from the fact that the EU level possesses nothing of the state-like properties needed for such a scenario (See Streeck and Schmitter 1991). According to H. Wallace (2000) and W. Wallace (2000) in order to study policy-making at the European level it is imperative to replace the rigidities of the 'old' West European political economy approach with a more flexible, less corporatist style because the extension of EU regulation over areas in which state ownership (and state patronage) had been the norm has upset long-standing corporatist networks (See H. Wallace 2000, 30; W.Wallace 2000, 525). It is for these reasons that corporatist analysis will not be employed in the study of the groups involved in the formulation and implementation of the MCR.

The major alternative to corporatism, pluralism, was the dominant theoretical tradition in twentieth century political science. The pluralist perspective of interest representation can be characterized as a system where various perspectives are represented by individuals, political parties, and interest groups that compete for

influence over policy domains in a relatively disorganized and competitive manner.[1] More specifically the pluralist model is based on four premises: it assumes equal access to the policy-making arena, fragmentation of the marketplace, a competitive process for determining policies, and the neutrality of government. These theoretical conditions form a system in which everyone is free to organize for political purposes, and in which powerful political forces do not monopolize the policy-making process, as is the case in corporatist systems. Based on these conditions it may be said that pluralist interest groups are self-generating and voluntary, having no formal institutional role in the allocation of resources and the implementation of policy. This implies there is a wide range of groups, typically competing with one another to represent the interest of the same classes of 'consumers' in a given sphere of economic or social activity (Crouch and Menon 1997, 151-2).

Pluralists have argued that competition avoids the concentration of political power and influence in a small number of groups. In a nutshell, modern industrial societies see multiple competing centers of power coexist (Dahl 1967, 24). Pluralism purports that business does not occupy a special position within politics. It even tends to be divided on many important issues. Large corporations, for example, encouraged the rise of trade unions, consumer associations, governmental regulatory agencies and public action groups (See Dahl 1967, 326; Galbraith 1956). In this perspective business is treated as any other interest group that tries to influence decisions in the political arena. Truman argues that although "business groups in the United States currently enjoy special advantages in the use of propaganda and in other political efforts, it does not follow that they are or must be dominant or exclusive or unchanging"(Truman 1971, 259). As he states, economic power does not equal political power. Moreover, pluralism contends that actors who are influential in one issue arena are usually unable to exert similar influence in other issue arenas (Lowi 1964). Although top managers in corporations are generally not selected by employees, several institutions constrain the ability of the managerial elite to impose their ideas on the larger society (Lipset 1960, 395). Among those institutions

[1] For a fuller theoretical understanding of 20th Century pluralism see Bently (1967) and Truman (1971).

controlling elite behavior in the private sector are external countervailing forces such as consumer organizations or trade unions.

Lowi and Lipset may be correct in their assessments, yet to put it simply, the EU policy-making machine is not conducive to a pluralist system of interest representation. The EU policy-making rules are often vague, contentious or 'shiftable.' The rules, like nearly everything else, may even be negotiable. As a result of this, it is frequently the political agency of actors that determines outcomes as much or more than the rules or structures that constrain them (Peterson and Bomberg 1999, 254-5). This coupled with the fact that the Commission relies heavily on private actors to provide necessary resources points to a more 'closed' policy-making process in which only those who can contribute valuable information are granted entry (See Coen 1998). This characterization depicts the situation during the formation of the MCR. The policy was created and nurtured by the Commission for some twelve years, before it sought the help of elite transnational business interests to further develop the policy and gain approval in the Council. This highlights one of the general facets of EU policy-making: it is a process characterized by interdependent actors where power is usually a function of resources and interests that help solve policy problems (Kohler-Koch 1997, 48).

It must also be remembered that the majority of Member States had little interest in being directly involved in the structuring and implementation of European competition policy, thus giving the Commission substantial autonomy and power. As the competition system progressed this autonomy grew as a result of Articles and regulations such as Regulation 17, which granted the Commission extensive investigatory and enforcement powers and in 1965 the Council granted it broad power to 'legislate' without approval of the Council. As a result, business interests and their representatives increasingly focused on the Commission in order to gain information, and it was there that they could seek to influence policy (See Gerber 1998, 350-51). Thus, EU Competition policy has evolved into a highly insolated policy area, where the Commission and DG Competition have extensive autonomy and discretion when it comes to 'inviting' interests to take part in policy discussions. There exists no pressure or incentive for the Competition system to 'open up' and become more pluralistic.

Elite Pluralism, Structural Power and the Role of Economic Interests at the Supranational Level

As time passed and the debate over pluralism progressed, the original pluralists became more attentive to the inequality of resources between business and other interests (Dahl 1989, 3). However, a central tenet of pluralism was, and still is, that business is just another interest group. In common with most interests, business sometimes won and sometimes lost. One of the central claims in this study is that, in refuting pluralist beliefs, 'capital' is not just another interest group at the EU level and that this was especially the case during MCR development.

In the opening sentence of *Who Governs* Dahl (1961) poses the question which gave rise to the study of pluralism: in a political system where nearly every adult may vote but where knowledge, wealth, social position, access to officials, and other resources are unequally distributed, who actually governs? Due to the era of contentious politics in the United States in the late 1960s and 1970s, the 'business is just another interest group conclusion' was questioned by radicals. Responses to scholars of pluralism led to the development of the elitist theory, which acknowledges that financially privileged individuals and groups have more impact on policy-making than other groups. Elite pluralism, which may be viewed as a strand of neo-pluralist thought, points to the unequal representation and variations in ability of groups to influence policy. Furthermore, the neutrality of government is questioned. Rather, it is assumed that the State favors some groups over others, and that it is involved in the conflict resolution process, often with the need to defend interests of its own. The power of business, critics of traditional pluralists contended, was not limited to observable forms of power such as lobbying or making campaign contributions but included much more. Apart from inter-pluralist dissentions, Dahl's question sparked off a bitter debate between pluralists, Marxists and elite theorists, for example, between followers of Robert Dahl, C.W. Mills, T.B. Bottomore and Ralph Miliband. Inextricably linked to the debate was the question of who has the ability to wield power and where the epicenter of power might be.

There are a variety of elitist perspectives, however the common theme purported by all is that business as an actor, has a significant impact upon the state and society do to its greater resources and strategic position in society (Bacharach and Lawler 1980).

Accordingly, business belongs to the privileged and powerful layers of society, thus representing one of a few functional elites. Some elitists even attribute to business the role of the dominant social group as such. Their apparent proximity to concepts of Marxist scholars is compensated by the fact that modern elite theory also takes into account other factors for business influence than just means or relations of production. Nevertheless, their common emphasis on the existence of dominant groups in society distinguishes them both sharply from other schools of thought, such as traditional pluralism, which refuses to accept the idea of group dominance in society. The arguments purported by Dahl (1982) and Lindblom (1977) are examples of this divergence.

Although both considered pluralists, Dahl's later work on corporate power and Lindblom's study of the 'privileged position of business' is a kind of self-critical view of pluralism and thus represents a departure from traditional pluralist thought. Lindblom argued that capital (economic actors) holds a privileged bargaining position not only because of its privileged position deriving from control over the economy but also because of the superior resources it commits to the normal channels of interest group politics. Since good economic performance matters to government, policy makers act more favorably to business than to any other interests (Mitchell 1997, 19). In his view, economic actors can insist that government meet their demands, "even if these demands run counter to those of citizens expressed through polyarchy controls..."(Lindblom 1977, 356). With this in mind, one may argue that some aspects of Lindblom's neo-pluralist view are consistent with that of Marxist views of the state and the role of economic actors in politics.

Marxist analyses that focus on the constraints on the 'political system' imposed by the disproportionate influence of economic actors generally come in two versions. According to instrumental Marxism (Miliband) politicians inevitably work to further capitalist interests for a variety of reasons, with two in particular being crucial. The first refers to the vastly unequal distribution of politically relevant resources in capitalist societies that provides owners of capital and corporate managers with a vast array of means, legal and other, to induce political agents to act in their interest at the expense of the representation of ordinary citizens (Miliband 1969). The second reason is more

sociologically orientated in that policy-makers and economic elites share the same social and economic background, thereby acquiring shared value and belief systems through common socialization. This inevitably leads to political elites being biased towards the 'wants' of elite economic actors. It is evident that neo-pluralist approaches to business and politics essentially share the same simple mechanism as instrumental Marxism: economic actors have more resources than any other interest, hence it can exert more time and money to influence policy-makers. Nevertheless, as the instrumental Marxist approach to interest group politics fell out of vogue, its 'structural' counter-part became more popular as it was deemed more 'nuanced.'

According to 'neo' or structural Marxists (Poulantzas 1969; Block 1977) interest realization proceeds somewhat automatically, as it is built into the socio-economic structure itself, thus arguing that the state is dependent on capital (Poulantzas 1969). Because capitalists blindly pursue narrow, private self-interest to sharply restrict the options of all governments... business enjoys over-proportionate consideration in the formulation and implementation of public policy, even if business abstains from direct political activity (Przeworski and Wallerstein 1988, 11-12) As Bernhagen (2003) surmises:

> In a nutshell, the theory (structural dependence) asserts that the negative effects of redistribution on the share of profits consumed by capitalists lead to disincentives for investment, followed by the whole appendage of sluggish growth, unemployment, and decreasing tax revenue. In anticipation of these effects and their electoral and fiscal consequences, policy-makers tend to carefully avoid any policy that affects the revenue prospects of business, and instead are concerned to maintain business confidence by all means (5-6).

As alluded to above, some neo-pluralists seem to suggest that the dominance of business over the state is based on structural dependencies. Lindblom (1977) states, "even the unspoken possibility of adversity for business operates as an all-pervasive constraint on government authority"(178). Business influence already occurs in the absence of political pressure - the mere threat of a decline in business confidence is sufficient to induce state managers to act in favor of business. In this context, scholars argue, the structural dependence of the state becomes highly evident. Despite the acknowledgement by both schools of thought that economic actors hold disproportionate

influence in the policy-making process, the major difference between the structural Marxist and elite pluralist positions is that the former claims that the state/capital arrangement is a permanent characteristic of capitalist systems, while the latter claims that although the arrangement exists most of the time, it can be reversed back to a traditional pluralist system. Consistent with Lindblom's privileged position of business thesis, scholars such as Wilson and Mitchell point out that economic interests do not *always* win, but seldom lose in the policy struggle because of their constant lobbying in the form of both direct (firm specific) action as well as pressure from large, collective trade associations (See Mitchell 1997; Wilson 1981).

Do to its inherent deterministic inflexibility the structural-Marxist thesis is dismissed in this study. Brought to its logical conclusion, structural Marxist analysis argues that in reality, economic interests would not have to lobby policy-makers since their interests are automatically taken into account. Following from this, there would be no reason for firms or other economic interests to take part in politics. Applying this observation to EU merger policy, or any policy that seeks to 'regulate' economic behavior, produces a paradox for structural Marxists. Why would economic interests help a governmental actor produce legislation aimed to restrict economic concentration? Some may argue that elite business interests helped the Commission because of the 'one-stop shop' principle and more broadly because it was the opinion of some in the business community that the Commission would use merger policy as it had used other strands of Competition policy in the 1980s - to actively promote and enhance the competitive position of European business.[2] However, despite these possibilities, the mere fact that economic actors accepted governmental regulation and negotiated policy content seriously questions the fundamentals of the structural Marxist thesis. Furthermore, although it will be argued that elite economic actors were granted a privileged position in the development of Community merger policy, it is not the case that such interests are always the sole private actor in EU policy-making. Moreover, although elite economic actors were the dominant private actor in the MCR policy process, they did not dominate the process. The economic actors were dependent on the Commission just as much as the

[2] During the 1980s the Commission began using its competition powers with increasing boldness by cracking down on both cartels and anti-competitive practices and specifying conditions for state aids to industry.

Commission was dependent on them. Thus, one must employ a theory of interest representation that accounts for mutually dependent actors negotiating policy content.

The work of Grant (1984) and Coen (1998) adhere to the generally accepted definition of elite pluralism as a system of interest representation in which a "restricted range of interests gains a monopoly of access to the state. This might happen because the barriers to entry for collective organization are high and skewed, or because potentially opposing interests are too weak" (Crouch and Menon 1997, 152). Borrowing from the work of Olson (1965), some elite pluralists argue that business is the most likely group to gain privileged access to the policy-making process because it is easier for economic elites to coordinate their behavior and present a united policy position. Olson considered the question of why and how large interest groups can emerge and survive given the rational calculations of its potential members. By doing so, like elite pluralists, he challenges certain views of traditional pluralism.

Olson's analysis is based on the assumption that rational actors behave differently towards collective and individual goals. According to his theory, a core problem of group formation is based on the fact that individuals can enjoy the benefits of collective good provision even without contributing to the groups' efforts to provide that good (i.e. free riding). These problems, however, are especially pertinent in large groups, where free riding is more difficult to observe or monitor, and the relationship between individual contributions and collective goal attainment is more loosely coupled than in smaller groups. However, Olson sees some possibilities for formation of larger groups as well. In order to organize successfully, interest groups can provide selective incentives to their potential members. These incentives can either take the form of coercion or of positive inducements, such as special services accessible only to group members. For instance, business associations may provide non-collective goods to their members such as trade statistics, credit references on customers, help with collecting bills, provision of technical research and advisory services (Olson 1965, 145). Since particularistic aims are easier to organize than public goals, business interests should have an organizational advantage vis-à-vis other societal interests such as labour or consumers. In addition, in large corporations the leadership has more leeway than in smaller firms to pursue certain policies which it regards as necessary and important (Salisbury 1984, 68-9). Therefore,

joining an interest association is easier for larger companies than for smaller ones that have to pay closer attention to short-term interests and individual goals of their members. Olson's (1982) later work argued that the higher capacity for collective action of particularistic groups leads in the long run to a mushrooming of special interests, only interested in rent-seeking and special advantages. A similar perspective is developed in Becker's (1983) deadweight cost argument, where the growth of interest groups is mainly due to their striving for rents and other special advantages.

Due to the creation of the single market and increased Commission competences in the realm of EU policy-making, there has been a proliferation of economic and public interest lobbying at the supranational level. Coen's (1998) work has concentrated on the relationship between organized interests and the European Commission and has shown that the Commission has created various fora for interest representation in order to extract and make use of information provided by the 'invited' interests. More specifically, Coen argues that because the Commission is a relatively small bureaucracy it must rely on private actors, usually corporate actors, to supply it with the substantive information necessary to prepare legislation. This emphasizes the status of Brussels as a 'insider town', and particularly the advantages which resource-rich insiders enjoy over those without a Brussels presence (Greenwood 1999, 37). As Mazey and Richardson (1993) point out, this leaves the institution open to accusations of resource dependency and capture. But as Coen's elite pluralist view purports, the Commission theoretically attempts to encourage an open dialogue with all the social and economic partners in an effort to appear more legitimate.

The 1980s saw the Commission establish open dialogue with some of Europe's largest firms and encouraged firms with a desire to develop 'European credibility' to establish political alliances with rival firms on European policy issues (Coen 1998). Hence members of organizations like the European Round Table of Industrialist (ERT) and EU Committee of the American Chamber of Commerce (AMCHM-EU) established high political profiles and a strong initial presence in the early policy forums established by the Commission (Cowles 1995). Coen's work has shown that despite the increase in interest representatives, overall lobbying for collective goods decreases. At the same time, the Commission prefers to create smaller circles of lobbyists to reduce the number

of actors with which it interacts, in order to increase lobbying and decrease the costs of interacting with interest representatives. It is also shown that the Commission tends to invite actors with stronger interests in a particular policy area to participate in a forum. The overall situation can be described as a complex elite pluralist arrangement centered around industrial fora and policy communities.

The work of Coen and others have made it clear that elite economic interests represent themselves actively in public policy through both umbrella groups (i.e. ERT, AMCHAM) and through their own institutional structures. Having both institutional representation and numerous affiliations with trade associations allows economic interests to fit nearly every contingency within the EU policy-making process. Firms can work together when the interests of an entire industrial sector are met by collective public policy influence. They can also enforce some degree of internal solidarity on important issues. This allows such interests to infinitely tinker on their own with small pieces of existing or purposed policies in order to gain something of discrete interest to their own individual corporations (Browne 1998, 38). This two-tiered strategy employed by elite corporate actors coupled with the complex multi-level decision-making structure that characterized the EU suggests the possibility of combining Coen's framework with policy network analysis in order to obtain a clear picture of policy-making at the EU level and more specifically to describe and explain the formation and implementation of the MCR.

Before discussing the possibilities and advantages associated with using policy networks to analyze EU policy-making, one should acknowledge that the recent work of scholars such as Cowels (1995,1996,1998) and Coen (1997,1998) has been inspired or at least represents a response to the neo-functionalist/intergovernmental debate. As already discussed in Chapter 1 the fundamental difference between the two schools is that the former views supranational institutions such as the Commission as the 'engines of integration,' pushing reluctant Member States to accept 'more Europe.' Intergovernmentalists view supranational institutions as causally unimportant in the integration process because the powerful Member States continue to set the EU's agenda. The fact that most lobbying by business that took place at the national level in the 1970s and 80s had turned to Brussels suggests that supranational actors are now 'more

important' than national institutions in certain areas. Not only have economic interests been lobbying the Commission but, they have also actively promoted the development of regulatory policies at the supranational level. This observation was at the heart of the neo-functionalist theories in the 1950s – where business interests were the first to transfer their loyalties to the European level, and to promote new European competences in sectors that were originally excluded (Haas 1958, 162-213). The situation was similar during the resurgence of the Single Market idea, where corporate Europe urged national governments and the Commission to 'restart' the integration process in order to recover form the recession of the 1970s (Sandholtz and Zysman 1989). According to Hix (1999), the neo-functionalist/surpranationalist interpretation purports that variations in the development of EU regulatory policies stem form the different levels of influence of business interests and public interests in the EU policy process (234). For example, EC telecommunications regulation is often used as one of the exemplary cases to support general claims that the Commission is powerful, successful and able to lead EU policy-making. Such studies have argued that the Commission took the initiative and persuaded or obliged national governments to accept its role; it did so by using various 'positive' ECJ decisions and the support of transnational business interests operating at the EC level to fortify its position (See Schmidt 1996, 1998 and Sandholtz 1993). Schmidt states that "the Commission has put the Council under clear supranational pressure to agree on regulatory measures" and claims that the Commission "initiated an influential European-wide policy debate and enacted its own measures" which "did not reflect the lowest common denominator among governments as an intergovernmentalist position would mandate" (1996, 244-5).

There are striking similarities between the development of EC telecommunications policy and EU merger policy, which will become apparent in the next chapter. However, although merger control can be used as an example to support the theory of supranational governance, this study will stop short of making such an assertion. Many researchers have developed various theories and produced studies which have been guided by the goal of relating them to one of the two 'grand theories.' As discussed earlier, both 'grand' theories were and remain macro-level theories of international relations, which are designed to describe, explain and predict the broad

thrust and path of European integration. Neither are intended to describe, explain or predict the policy outcomes that arise from this process, as policy network analysis often seeks to do. Thus, the theoretical framework that drives this study is more in line with recent work highlighting the increasing spectrum of direct action by economic actors in various EU policy-making processes, which represents a blend of elite pluralism and policy theory. Mitchell describes policy theory as an analytical view-point that argues the best way to identify the most important forces affecting a policy decision is to start from the policy itself and assess what groups where involved in policy formation and why (Mitchell 1997, 15-16).[3]

Policy Networks Powered by Private Interests

The origins of policy network analysis are disputed. Richardson (2000, 1006) claims "British origins of what is now termed the network approach." Rhodes (1990, 32) concurs that "American political science was not the major formative influence" on early work which sough to make sense of the British 'post-parliamentary' state using networks analysis in the late 1970s. Yet, a diverse range of early work in the UK, US and Europe on interest intermediation attempted to develop the idea of networks as an analytical concept. One of the best examples is Heclo's (1978) critique of American 'iron triangles.' He argued that the policy process was influenced by a diverse collection of stakeholders grouped into 'issue networks,' which are made up of much more than those actors with the formal power to set policy. Jordan and Schubert (1992) claim credit for developing the idea that issue networks were one variant of network, which existed on a continuum ranging form very loose to very tightly integrated. Clearly, early work on networks where guided by the goal of explaining how and why interests were mediated in settings that resembled neither an open space of transactions between independent actors nor hierarchies in which governments imposed control.

[3] For purposes here, the most obvious example of policy theory is Stigler's 'economic theory of regulation.' Policy theories differ from group theories like corporatism and pluralism in that group theorists share the assumption that looking in at government from the perspective of the groups involved is the best vantage point. Both theories are trying to explain the same thing – policy formation – albeit from different ends of the process.

International political developments such as globalization and economic liberalization gave rise to new and different forms of governance, such as the EU, in which power was increasing shared horizontally. Bently and Truman where among the first who "pointed to the existence of horizontal relations between government, administration and organized interests" (Kenis and Schneider 1991, 27). In an effort to expand upon this notion, researchers have applied policy networks in two different ways. A vast majority of the networks literature deals with the relationships between interest groups and the state and treats networks as a kind of generic term. On the other hand, some scholars view networks as a specific form of governance, as a mechanism to mobilize political resources in situations where these resources are widely dispersed between public and private actors. The distinctions of the two concepts are not always clearly made in the literature because they are not mutually exclusive (See Rhodes 1988, Marsh and Rhodes 1992). Thus, policy network approaches have became both more common in the policy literature and progressively more ambitious

The basic definition of a policy network refers to "a cluster of actors, each of which has an interest, or 'stake' in a given... policy sector and the capacity to help determine policy success or failure"(Peterson and Bomberg 1999, 8). Analysis of modern governance frequently seeks to explain policy outcomes by investigating how networks or communities, which facilitate bargaining between actors over policy design and detail, are structured in a particular sector or policy area. As a system of governance, the EU depends fundamentally on it ability to forge consensus between a wide variety of decision makers before policies may be set. It thus requires extensive, informal, pre-legislative bargaining over the shape of most proposals before they have any chance of being accepted (Peterson and Bomberg 1999, 22).

It follows then that supranational institutions such as the Commission have incentives to engage with private actors who "have to be drawn into 'policy networks' because they provide necessary expertise and because effective implementation depends on their support (Kohler-Koch 1997, 49). Also, the EU attracts actors interested in policy change, but it is a consensual system in which opposition is appeased or minimized (Smith 1993). The networks that are constructed facilitate the detailed bargaining that must precede attempts to satisfy different needs in different Member States with the same

policy. As Haas (1992, 3) and Peterson and Bomberg (1999, 23) argue, given the highly technical nature of some EU policies, one can expect policy networks or communities to spring up around specific policy sectors in which professionals with recognized expertise and competence in a particular domain define problems, identify compromises and supply expert arguments to justify political choices. In this kind of policy environment, those interests that show solidarity and can bargain their way to internal consensus enjoy powerful advantages. Thus, interests such as labour that have become over-reliant on the national route of interest representation, take unnecessary risks of decisions bypassing them or of becoming reactive to events rather than seeking to manage them in the first instance (Greenwood 1999, 52). McLaughlin and Jordan (1993, 157) point out that the Commission goes to extraordinary lengths to establish constituencies of Euro-groups around each DG – practically sponsoring their formation. For example, this was seen between the Commission and the ERT during the negotiations leading up to the Single Market Programme.

Policy network analysis is based a three basic assumptions. First, modern governance is frequently non-hierarchical. Few policy solutions are simply imposed by governmental agencies or institutions. Governance involves mutuality and interdependence between public and non-public actors. Second, the policy process must be disaggregated to be understood because "relationships between groups and government vary between policy areas" (Rhodes 1997, 32). Thirdly, before policies are set by political actors, policy choices are shaped and refined in bargaining between a diverse range of actors, including some who are non-governmental, all of whom have an interest in what policy is chosen. Policy networks can narrow options and shift the agenda by pursuing "strategies that generate new political and economic forces" (Thatcher 1998, 406). Based on this, the policy network approach is appropriate studying EU policy-making.

However, with that said, the policy networks literature features a variety of models or typologies and, confusingly, sometimes employs the same term to mean different things. All of these typologies share a common understanding of policy networks as power dependency relationships between the government and interest groups, in which resources are exchanged. These typologies however, differ from each

other according to the dimensions along which the different types of networks are distinguished. For instance, Jordan and Schubert (1992) based their typology on three main criteria – the level of institutionalization (stable/unstable), the scope of the policy-making arrangement (sectoral/trans-sectoral), and the number of participants (restricted/open). Atkinson and Coleman (1989) conceptualized six types of policy networks along two different dimensions: the state structure in terms of autonomy and concentration of power, and the capacity to mobilize the interests of employers.

As a response to critics who pointed out the approach lacked a theoretical underpinning, authors such as Benson defined policy networks as "a complex of organizations connected...by resource dependencies and distinguished from each other by breaks in (such) structure(s)...."(Benson 1982). Rhodes (1986, 1988) subsequently developed a model which relied on three variables that determine what type of policy network exists in a specific sector. These variables are stability of a networks' membership, the insularity of the network and the strength of resource dependencies between members. Rhodes then points to five possible types of networks on a continuum ranging from highly integrated policy communities at one end and loosely integrated issue networks at the other end. The internal structure of the network in question is usually considered an independent variable, in that the structure of a policy network will help determine policy outcomes. For example, policy communities have more capacity than issue networks to steer or control the policy agenda. It is the more specific term, policy community, that has caused much confusion within the networks literature and it is where we now turn.

In their original formulation of policy communities, Richardson and Jordan emphasized policies being made between a myriad of interconnecting, interpenetrating organizations. Consequently, they believed that it is the relationship involved in committees – the policy community of departments and groups, the practices of co-option and the consensual style – that perhaps better accounts for policy outcomes than do other examinations (Richardson and Jordan 1979, 74). The image of policy communities as fundamental agents of stability was reinforced by Rhodes (1986, 1988) however, his conception of a 'community' pointed to a much more limited membership. By applying his model to a range of policy sectors beyond intergovernmental relations, Rhodes (1997)

found that there are four main characteristics of a community. First, there are a limited number of participants that operate in a largely insulated fashion, while others are consciously excluded. This points to a highly restrictive membership. Second, there is interaction between members, each with own goals, when an issue is discussed. Third, there is a consensus between actors as well as a consistency in values, membership and policy outcomes shared by them, pointing to a 'policy paradigm', or, a view of the world which consists of the most urgent problems that need to be dealt with (Benson 1982).[4] Fourth, the interaction between members is based on bargaining between members with resources, where the outcomes reflect a positive sum game (although all members may not equally benefit) (See also Marsh and Rhodes 1992). Rhodes' concentration on the important resource dependencies that bind a community together reinforced the bargaining and negotiated order image of communities.

Subsequently, Wilks and Wright (1987) decided to provide another view of policy communities. For them policy communities occur at both the general policy sector and sub-sector levels. A policy network is an entity on to its own and is something that links these sub-sectoral policy communities over particular issues. In other words, Wilks and Wright do not view policy communities as subsets of policy networks. Their description of a policy community is similar to that of Richardson and Jordan in that it is reserved for a more disaggregated system involving a broad group or 'community' of actors who share an interest in a particular industry and who interact with one another, "exchange resources in order to balance and optimize their mutual relationships." However, policy communities can also be made up of smaller personalized groups who have interpersonal contacts with each other (Wilks and Wright 1987, 296).

One of the strengths of the Rhodes model is that, despite occasional discrepancies in terminology, most other models of governance by network are compatible with it. Take, for example, the concept of 'epistemic communities' developed by Haas (1992, 3) as a way to describe how policy-making can become dominated by "networks of professionals with recognized expertise and competence in a

[4] Klijn (1997) also states that "Nearly all authors underline the fact that actors within a policy community have certain interests in common which separate them from the actors of other policy communities and from actors not included in their particular community"(27-8).

particular domain." Similarly, Smith's (1993) views on policy networks and communities are contained in the Rhodes model.

> "Policy networks are a means of categorizing the relationships that exist between groups and the government. Networks occur when there is an exchange of information between groups and government and this exchange of information leads to the recognition that a group has an interest in a certain policy. The exchange of information can be minimal (as in a network) or it can be intense with groups having institutionalized access to government and being involved in the detailed development of policy and, consequently, constantly exchanging a very high level of detailed information (as found in a policy community) (Smith 1993, 56).

Against this background, It follows that the policy networks approach is widely regarded as an analytical tool for examining institutionalized exchange relations between the state and organizations of civil society, allowing a more 'fine grain' analysis by taking into account sectoral and sub-sectoral differences, the role played by private and public actors, and formal as well as informal relationships between them. Moreover, recent approaches to policy networks highlight the interaction and interdependence between public and private actors, implicitly arguing against the necessity of a hierarchical relationship in policy communities. According to this approach "such actors are partially interdependent but also partly autonomous, being linked horizontally without being part of a single organizational hierarchy; their relations are based on exchange, thereby producing policy networks, and combine elements of conflict with those of cooperation"(Thatcher 1998, 389).

The basic assumption is that the existence of policy networks or communities, which reflect the relative status or power of particular interests in a policy area, influence policy outcomes. In sum, these points together help distinguish the community/network approach from other schools: there is no equal access to the (theoretically open) policy-making process for an unlimited number of actors as pluralism argues (Klijn 1997); there is no exclusive position for private (economic) actors who can *unilaterally* impose decisions as elitism contends; there is no fixed, tripartite power consisting of the sate, labour, and capital as discussions informed by corporatism suggest; and there is certainly an absence of structural dependence since interests, especially economic actors engage in lobbying and negotiations.

Although the use of the policy network/community approach is viewed as the most appropriate tool to analyze the formulation and aspects of the implementation of the MCR, the approach does suffer from a major insufficiency: the approach offers

description without explanation. Heywood and Wright (1997) argue, "the most telling criticisms are that most of the approaches rest on imprecise definitions and that its analytical insight is purchased only at the cost of ever-greater descriptive detail"(1997, 88). Dowding (1995) further contends that the network approach presents a sophisticated map of policy formulation and co-ordination, rather than an explanatory model with predictive capacity. Thatcher (1998) also suggests that standard responses to the question of 'why do such networks/communities arise in the first place,' such as fragmentation of governments, interdependence of governments on interest groups and increased speculation in policy-making, are too vague and general (403).

2.2 The Private Verses Public Interest Model

Although the existing literature has not fully tested this idea, one may argue that a potential avenue for explanation for the development and persistence of policy communities may be found focusing on a (second) set of literature broadly defined as 'private interest theory.' The use of this theory in the realm of regulatory policies, and antitrust policy in particular, has its roots in what has become known as the 'Virginia School' of which the works produced by James Buchanan (1972), Gordon Tullock (1967), and Robert Tollison (1983 and 1989) are the most familiar. This literature was developed in reaction to those who assumed that antitrust policy was one of the few remaining public policies in which the government was motivated by goals of serving the 'public interest.' The argument here was that policies toward business were formulated and executed by basically well-informed public servants who maximized public welfare (See Hazlett 1986; Long et al. 1973; Posner 1970; Scherer and Ross 1990). More recent 'public' interest theory, known as normative positive theory (NPT), argues that when regulatory problems do arise given the self-interest of economic actors, there should be a prescription of reforms including: that enforcement agencies work more effectively, that legislators and government officials learn economic principles, and that incumbent policy-makers resign in the interests of serving the public.[5] Yet, along the lines of

[5] The work of Noll and Owen (1983) is a good example of NPT. There are hints of NPT in the arguments in Neven's (1993) work on EU merger policy.

Buchanan and Olson, one may argue that this scenario is tension-filled. On the one hand, market power/failure arises from the activities of self-interested firms seeking to maximize their own private benefits as discussed by authors such as Stigler (1975). On the other, government intervention by public servants promotes the general welfare. Given these inherent tensions in the 'public interest' model, wherein in one setting individuals are assumed to be self-interested and in the other they are assumed to be publicly-interested, an interpretation pointing fully to 'private interests' suggests that while policy may be employed to promote the public's interest, it is also used politically to further the private interests of all actors - including policymakers themselves – potentially at the expense of others.

The assumption in private interest theory is that all individuals, in or out of government, pursue their own self-interests: as consumers seek to maximize their utility and firms seek to maximize their profits, policy-makers seek to maximize their own institutional power and policy objectives.

Applying this argument to better understand supranational developments complements the use of policy communities since many argue that policy-making at the EU level presents a new kind of governance, one whose legitimacy is functional, not representative (See Dehousse 1995; Majone 1996). Wallace (1996) suggests that freed from corporatist and pluralist pressures, the Commission, in an effort to develop its reputation and expand its institutional power, seeks and identifies areas where it 'should' regulate. This confirms Pollack's (1997) thesis that EU institutions' functions, strategies and behaviour "may reflect not so much the preferences and intentions of their Member State principles but rather the preferences, and the autonomous agency, of the institutions themselves" (107). The overall theoretical implication of all this is that the observed differences between public and private choices emerge not because individuals adopt different behavioural objectives in the two settings, but rather because the constraints on behaviour are different (Laver 1997). Laffont and Tirole (1993) point out that there are two main constraints inherent in the regulatory process. The first deals with asymmetries of information that prevent the public from checking the actions of regulators and thus make capture possible. The second consists of the fact that most design of regulatory institutions is undertaken not by the ultimate principles (the public interest) but by

politicians and officials who are themselves agents with delegated powers and whose incentives in designing institutions may in turn differ from those of the principles (ch. 3). The former constraint allows interests to influence regulators and thus policy, while the later constraint underscores the possibility that policy-makers with substantial discretionary power, despite interest pressure, may be able to unilaterally fulfill their 'entrepreneurial' interests by either altering the policy in question or affecting outcomes.

Following from this, the argument posed in this thesis is that a policy community developed at the formulation stage of the policy process, which included members of the Commission and transnational business umbrella groups. The actors within the community had both individual and shared interests, whereby negotiations produced a set of rules that latter became policy. Once the MCR rules were put into practice the constraints on the regulators (MTF) were minimal - affording the agency a high degree of autonomy and discretion. Consequently, this kind of policy environment made it much easier for the agency to pursue its own agenda and thus engage in policy entrepreneurship.

The basic 'thinking' behind policy entrepreneurship is that there is no guarantee that a given policy that has been contracted by a group of actors will be the one that is most preferred by the agency or politician given the job of producing it. This creates the possibility for future conflict between the interests of the actors involved in the development and latter implementation of the policy (Laver 1997, 84). Kingdon (1984) introduced 'policy entrepreneur' in his model of understanding the policy agenda within US federal government. He describes them as "advocates who are willing to invest their resources – time, energy, reputation, money – to promote a position in return for anticipated future gain in form of material, purposive, or solitary benefits (179). Policy entrepreneurs are constantly shopping around for windows of opportunity through which to push their ideas and are driven by benefits such as social recognition (Kingdon 1984). Schneider and Teske (1992) identify policy success and status as driving motivation and they address the need to pay more explicit attention to the issue.

Applied to the EU, policy entrepreneur has been a term used to describe the Commission.[6] According to Majone (1996) the Commission, like all bureaucracies, is

[6] More recently the term has also been applied to the ECJ.

oriented towards expanding its own powers. Cram (1997) concurs, having highlighted the Commission's role as a policy entrepreneur, a term designating a political subject capable of opportunistically exploiting and utilizing the scarce resources at its own disposal in order to create or change policies. However, most work focusing on entrepreneurship at the EU level has focused on the agenda setting ability of the Commission and its ability to forge consensus between groups 'to get 'its' policies passed.' A particular group of scholars have argued that the Commission is causally important as an agenda setter and policy entrepreneur, which identifies problems, mobilizes support from transnational interests, exploits openings in the political opportunity structure and calculates strategically how to achieve its goals. More specifically, for Ross (1995) the entrepreneurial role is driven by an activist political culture within the Commission. Majone (1996) suggests entrepreneurship occurs because supranational institutions facilitate a common integrative approach through persuasion and discourse. Sandholtz (1992) goes further arguing that a policy entrepreneurship role is a necessity for integration to take place, while Jachtenfuchs and Kohler-Koch (1996) suggest the inherently technical nature of EU business facilitates closed decision-making, with an enhanced role for central non-governmental institutions. Although the Commission is small and fragmented, it has significant resources at its disposal as well as its formal monopoly over policy initiation - the Commission's "permanent mandate for political leadership" (Laffan, et al. 2000).

Following from this, Kingdon (1984) lists three characteristics of the successful policy entrepreneur. First, the person must be taken seriously, as an expert or a leader. Second, the person must be known for her political connections or negotiating skills. Third, the successful entrepreneur must be persistent and wait for the opening of a "policy window." Based on the above discussion, the Commission embodies all three characteristics of expertise, brokering skills and institutional persistence, and has the additional advantage of the formal right of initiative. With this in mind, this study uses the concept of policy entrepreneurship to explain policy change/evolution within European merger control.

With that said, the rest of this thesis seeks to offer insights into the usefulness and theoretical classification of EU-level policy communities while attempting to better

explain the development of such communities. It also seeks to use the policy entrepreneur concept to better understand the motives and perceived benefits of an autonomous agency seeking to unilaterally alter policy. More specifically, this study will seek to answer the following questions: Can the MCR be explained by centrally concentrated policy actions towards common goals based on resource dependency – thus producing a policy community in accordance with the Rhodes/Smith conceptualization? Can the existence of a policy community composed of Commission and elite business interests provide a complete explanation of the resulting MCR framework? What other possible variables influenced the outcome? Does a policy community exist at the implementation level? If not, does the original merger control policy community cease to exist once the MCR is implemented or does it continue to monitor policy performance? If there exists no definable policy community at the implementation phase, how might one explain the development of the trends of collective dominance and portfolio power? Has the MCR framework given rise to much public sector activism (MTF activism)? How much autonomy does the agency have in the given policy? Finally, based on the answers to these questions, what has been the effect of merger policy on the overall competition system of the EU? In order to answer these questions, the methodology that informs this study must be presented.

2.3 Methodology

As forwarded in Chapter 1, one of the aims of this study is to evaluate the political, legal and economic dimensions of the policy area concerned in order to present a more complete analysis. A consequence of such a goal is that a substantial number of secondary sources were relied upon. However, that is not to say that this study is devoid of original empirical sources and materials. In order to test preliminary hypotheses and provide the theoretical assumptions sustenance, a number of data collection methods were employed, which included face-to-face open-ended interviews, analysis of both public and private documents and e-mail/phone correspondence.

"Interviewing is often important if one needs to know what a set of people think, or how they interpret an event or series of events, or what they have done or are planning to do"(Aberbach and Rockman 2002, 673). Because of this study's focus on actor

motivation and involvement in the formulation and implementation of European merger control policy, interviews were conducted in order to both confirm findings derived from public documentation and secondary sources and to obtain additional information about motives that may help explain actions and constraints in the policy-process concerned.

Because the interviews used in this study represent a small sample size, open-ended, more intense interviews were used to collect qualitative information. According to Nichols (1991) an open-ended interview is "an informal interview, not structured by a standard list of questions. Fieldworkers are free to deal with the topics of interest in any order and to phrase their questions as they think best"(131). This type of interview is based on the knowledge of, or assumption that, respondents have had a particular experience, on which they can elaborate. It allows the interviewees to describe in detail the situation, as it is meaningful to them, and allows the interviewer to freely probe and ask follow-up questions. According to Aberbach and Rockman (2002), open-ended questions provide a greater opportunity for respondents to organize their answer within their own frameworks. This increases the validity of the responses (675). Furthermore, Nichols (1991) explains that this style of interview allows interviewees to voice their own opinions and control the flow of the conversation, which highlights the fact that elites prefer to articulate and clarify their views. More structured, close-ended interviews do not allow for such elaboration.

In order to obtain research advice and guidance three preliminary interviews were conducted with two competition authority officials and one economic consultant. In all three cases, the respondents acted as experts about events, processes and institutions crucial to this study. The interviewees also acted as a type of 'sounding board' for testing preliminary ideas and hypotheses derived from prior research. Thereafter, over ten, more empirically substantial interviews were conducted during the thesis research.

Although arranging the interviews proved more challenging than first anticipated, the end result represented the occupational balance desired. Interviews were held with officials based out of the primary agency involved in merger policy – the MTF. Further interviews were made with competition lawyers and economic consultants from firms involved in both counseling both the Commission/MTF and firms involved in merger transactions as well as with sources within the large industrial organizations who

have been cited by others as being influential in the formulation of the MCR. Data was thus obtained by interviewing two officials of the Irish Competition Authority, one MTF rappourteur, one senior DG Competition official, two competition lawyers from different firms (Cleary, Gottlieb, Streen & Hamilton and White and Case LLP), two economic consultants from differing firms (Lexacon Consulting and NERA Economic Consulting) and two representatives of the ERT and UNICE respectively. Additional follow-up, phone and e-mail correspondence was also conducted. Apart from those sources formally interviewed, other sources contacted were affiliated with DG Competition of the European Commission; AmCham, McDermott, Will & Emery; Debevoise & Plimpton LLP; Freshfields Bruckhaus Deringer; RBB Economics; Sidley Austin Brown & Wood; Clifford Chace and Wilmer Cutler & Pickering. Apart from helping to 'fill in pieces of the puzzle,' the sources interviewed and contacted represented 'gatekeepers' in the sense that they provided critical unpublished documentary evidence including formal policy proposals, follow-up correspondence, internal position papers, case proceedings and in some instances, sources provided case decisions before they were made public. Taking into account Berry's (2002, 682) statement that "for projects where depth, context, or the historical record is at the heart of data collection, elite interviewing using broad, open-ended questioning might be the best choice," the combination of such interviews with documentary evidence and carefully selected secondary sources provides this study with a solid methodological and empirical base.

The next chapter, Chapter 3, examines the formulation of the 1989 Merger Control Regulation (MCR). It will be argued that the developments point to the emergence of what is referred to as the 'merger control policy community' that was comprised of two main sets of actors – European Commission officials and representatives of elite corporate Europe - that acted in unison at this stage of policy development. It will be argued that these actors had self-supporting, interdependent, private interests and pursued political activity that was ultimately isolated from the general public and other social actors. Chapters 4 and 5 then offer a detailed analysis of the trends of collective dominance and portfolio power, respectively. These chapters make reference to key merger case decisions in an effort to offer a clearer picture of how the actors interacted in the decision-making process when the MCR was implemented. It

will be argued that merger control depicts a highly insulated policy environment where both specific-firm actors and members of DG Competition's Merger Task Force interact on a regular basis. The relationships between these actors can be highly contentious and in some instances major conflict can erupt between the MTF and firms, and likewise between the Commission and the Courts. The emergence of the trends of collective dominance and portfolio power epitomize this conflict and constitute examples of the Commission trying to further extend its policy competence in the realm of merger policy, thereby fulfilling its policy entrepreneurial interests. The ability of the Commission to inject collective dominance and portfolio power to the list of possible tools available to the MTF to scrutinize mergers suggests that decisions taken at the implementation level may effectively change the nature of decisions originally taken by the policy community in the formulation stage – pointing to a type of 'feedback dynamic.' In order to explain the development of the policy community and the actions of the actors involved in the implementation of EU merger policy, it will be argued that attention must be focused on both overlapping, self-supporting private interests as well as individual self interests. The conclusions highlight the main findings of the research and the broader generalizations that may be drawn from it.

Chapter Three

Filling A Regulatory Gap: The Merger Control Policy Community

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Introduction

Answering the first of the two posed research questions, the aim of the chapter is threefold. First, it addresses the question of which actors were involved in the policy-making process when the MCR rules were formulated and why they participated. It is argued that Commission and elite economic actors forged a working relationship during the creation of the Single Market Programme and that this relationship became more defined and eventually evolved into what will be termed the 'merger control policy community,' when the actors' interests where directed at producing a version of the MCR that would gain the support of the Council of Ministers. Moreover, integrated into the actor analysis is a review of the main features and operations of the MCR. Secondly, an overview of how DG Competition has applied the MCR to European M&A activity during the first 12 years of operation and how its architects dealt with the theoretical questions and problems posed in the broader literature on competition/merger policy will be presented in order to better understand developments examined and explained in Chapters 4 and 5 where collective dominance and portfolio power are analyzed respectively. This chapter concludes with an assessment of the developments in the formulation of the MCR and the motivations of the actors involved.

3.1 The Seeds of a Policy Community: Economic Interests and the Single Market

As previously mentioned, scholars of the single market and European public policy have suggested that the White Paper/SEA package was neither the result of pure Commission entrepreneurship nor the result of the Council dictating terms to national governments. The 1992 Programme reflected an aggregation of Member States' interests

that refracted through the EC's institutional structure, and ultimately embodied a delicate consensus reached in 1985/86. Generally speaking, the 1992 Programme covered a broad range of policy and institutional issues. The common thread holding the Programme together and making it an attractive compromise for Member State governments was the enhancement of both the EC's governance competence and capacity by increasing the *efficiency* of the decision-making machinery (Armstrong and Bulmer 1998, 29). Of course this enhanced efficiency was to ultimately provide the other core tenant of the Programme - the inherently neo-liberal notion of a competitive single European market. It is this ultimate goal that spurred Corporate Europe's support for and participation in the drafting of the Commission's White Paper and subsequent involvement in the creation of EU merger rules.

As large exporters, investors and employers, European firms stood to gain most from a truly integrated market and thus felt the need to be involved in the policy-making process. The Commission understood that in order for the single market to materialize it would have to open dialogue with economic elites to ensure their backing and involvement in the Programme – evidence of the interdependent character of the EU policy-making process. Thus, the Commission helped to ensure that Corporate Europe's voice was heard at the highest political levels, eventually enabling industry to have a definitive say in the precise content of the White Paper. Evidence of dialogue between the two sets of actors is seen in the work of Cameron (1992) and latter backed up by Coen (1997 and 1998) who explains that the Thorn Commission of the early 1980s openly encouraged businesses to pursue European-wide economies of scale. It promoted cross-national alliances among firms specializing in telecommunications, electronics, and computers to pool and share their technological expertise, thereby creating in one sector of the economy a prototype of the industrial structure that might exist in a single market (Cameron 1992, 52). The fact that economic actors demanded a privileged EU policy-making position given increased regulatory competences from the state-level to Brussels has been well documented.[1] In turn, these demands were "met with concomitant supply

[1] Several pieces have been influenced by this school of thought attempting to understand business' influence on EU policy-making given the new centre of European governance. For example, see Cowles (1998 and 1996) and Bennett (1997).

of access to the policy-process by political actors in EU institutions seeking policy expertise"(Hix 1999, 206).

Of particular importance here is the role of elite economic actors, in the form of the European Roundtable of Industrialists (ERT), had in the creation and later implementation of the 1992 Programme. As a representative explained, "the ERT was formed to respond to the crisis of 'Eurosclerosis' and to make a business-driven input into the policy debate. The ERT represented an answer to Commissioner Davignon and Ortoli's question of 'who do we talk to when we want to talk to European industry."[2] The ERT pushes relentlessly to change the way that Europe is managed, claiming that industry is entitled to a system that delivers results: an EU which functions like an integrated economic system with a single center of overall decision-making (Richardson 1998). As discussed in Chapter 1, the early 1980s presented an economic crisis to Europe and the corporate elite felt that the Community institutions could not handle it alone. "The trouble was that the European economy was floundering and political leaders did not seem to understand why. The business leaders who founded the ERT had clear and simple ideas on how to deal with the two main problems: bad polices and fragmentation."[3] In 1982, this impasse drove Pehr Gyllenhammar (CEO of Volvo) to start campaigning for an overall scheme "to spur growth, and to build industry and infrastructure in Europe"(Cowles 1995, 503). In close consultation with Etienne Davignon, then Commissioner for Industry, and with the support of Umberto Agnelli of Fiat and Wisse Dekker of Philips, Gyllenhammar drew together a cross-sectoral group of leading European CEOs. The ERT's inaugural meeting unveiled its Commission ties from the start, gathering together 17 CEOs and Commissioners Davignon and Francois Xavier Ortoli (Finance). Before discussing ERT's involvement in developing the Single Market Programme, it is important to understand the nature of the ERT and how it compares with other umbrella lobby groups at the EU level.

All members of the ERT are chairmen or chief executives of leading European companies - there are no heads of small companies. The ERT is a club of giants. However, membership is personal and not corporate. As one ERT representative put it

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[2] Eric Shea, Interview with a ERT representative, May 5 2001.
[3] Eric Shea, Interview with a ERT representative, May, 5 2001.

"the personal commitment of our members is of paramount importance and it is the standing of the individual as a businessman in his own country and in Europe more generally that makes him a member or not. It is important that members can be counted on to spread ERT messages back among his own national politicians."[4] Apart from those who are members, the ERT also defines itself by who is not a member. There are no banks, insurance companies or airlines, for example. The concept of 'industrialist' is all-important and that is what defines members' common interest. By pushing to strengthen the European economy by arguing that European inner frontiers served no useful purpose and that all polices affecting the movement of business should be centralized at the EU level, ERT members stood to strengthen the positions of their companies. The effectiveness of the ERT lay in its ability to identify policy issues where it cold demonstrate that the interests of European business in general could be broadly reconciled with the interest of the European public, as perceived by political decision makers. From the start the ERT always thought 'big,' which was one of its greatest assets. According to a member of the ERT's Internal Market Support Committee (IMSC):

> Communications in Brussels are relatively open and busy Commission officials, like those in most member states will find time to listen to a company or federation expert who holds key information. The problem facing groups like UNICE is that the very committee structure that enables it to speak with great authority on specifics make it harder to be crisp and forceful on broader issues. This is where ERT comes in. Although ERT deals with broad issues, such as completing the single market and infrastructure, it does do 'detail work' on those specific policies which it feels are imperative to implementing the larger ideas.[5]

Here lay the ERT's window of opportunity. It only handled the very big issues, those of overwhelming importance to the European economy as whole. It would only deal with politicians at the highest levels, and once ERT was 'in the door' with its single market idea, contact intensified with the Commission President and contacts with governments became more focused on the rotating Presidency of the Council. The method of communication with politicians always revolved around a two-pronged attack: face-to- face meetings followed up by reports outlining the ERT position. Regular meetings between the Commission and ERT began in 1985 when Commission President Delors set up an 'on the record' meeting to discuss ERT goals (See Doherty and

[4] Eric Shea, Interview with a ERT representative, May, 5 2001.
[5] Eric Shea, Interview with member of ERT's IMSC, May 5 2001.

Hoedeman 1994). From its modest beginnings, the ERT's access to European Commissioners has become unchallenged, and it also enjoys privileged connections with members of the increasingly powerful European Parliament (Balanya, et al. 2000, 20-1).[6] The ERT's unparalleled access to top decision-makers stands in sharp contest with the influence wielded by other non-governmental groups such as trade unions, small businesses and environmental groups. Eurogroup, a lobby group representing small businesses (a category into which 99% of European firms fall) has to wait weeks for an appointment with a civil servant. Likewise the European Environmental Bureau has managed to meet only once in two decades with the Commission President. Other lobby groups when questioned about the influence of the ERT, responded that the ERT is no longer a lobby group, but has become part of the EU apparatus (See Doherty and Hoedeman 1994).

Tuning to the specifics of the single market idea, late 1984 saw the Commission put forth the original blueprint that would later become the Single Market Programme. However, as alluded to in the first chapter, Member States were apprehensive to such a proposal and complained that it lacked a defined timetable. ERT chairman Wisse Dekker responded in 1985 by launching a far more ambitious proposal for a five-year plan to achieve what the Commission had already proposed. Dekker's proposal, *Europe 1990: An Agenda for Action*, which was featured in the ERT document *Changing Scales* (1985), was sent to various Member State and Commission officials. The pressure from Corporate Europe for the unification of European markets was the jump-start the Commission needed. Jacques Delors, the new Commission President adopted the ERT's proposal and some months later Industry Commissioner Lord Cockfield published his White Paper which became the basis for the SEA. The similarities between the White Paper and the ERT proposal were striking with the only substantial difference being the 1992 deadline for Member State compliance instead of the ERT's overly optimistic 1990 deadline. Once the industry-inspired single market package was proposed the ERT, on the Commission's behalf, vigorously lobbied undecided national government leaders. According to Richardson, a former ERT Secretary General, "Wisse Dekker of Philips

[6] An interesting note is that a few years later, both Commissioners quite their posts and moved to the corporate world, becoming ERT members themselves as CEOs of the Belgian holding company Societe Generale de Belgique and the French oil company Total respectively.

made it his main priority for four years. Bearing in mind that when it was launched governments were not very keen, we helped a lot to push it through"(Balanya, et al. 2000, 22). In the words of the ERT:

> Governments are at the mercy of conflicting pressures and severe constraints. Indeed, the powerlessness of governments is one of the important themes of our time. What ERT does is help and encourage governments to move in certain directions. We do this by providing analysis and advise, by posing questions and influencing the general climate of opinion and by warning of the consequences of mistaken policies. In other words, we add to the pressures (See Cowles 1995, 81).

It is imperative to acknowledge that the ERT did not merely articulate its interests. Herein lay the roots of a self-supporting relationship that was later manifest in negotiating the MCR examined later in this chapter: on the one hand, as discussed by Cowles (1995), elite economic actors knew that EC institutions were understaffed and in need of expertise and thus actively politically organized themselves in order to shape the EC's policy agenda.[7] On the other, as discussed by Greenwood and Cram (1996), taking full advantage of the opportunities presented by the common market, elite corporate actors relied on the EU institutions for information on, for example, standards of service cultures, employment practices and price traditions. Access to this type of information was clearly crucial for firms within the constraints of 'bounded rationality'[8] and seeking to minimize the uncertainty of the environment in which they operated. In order to secure the availability of consistent, reliable sources of information, firms needed to network, both with other firms and with the European institutions (Greenwood and Cram 1996, 453). As a result of these resources dependencies and a shared 'dream' of a thriving European internal market, both the Commission and elite corporate actors exemplified by the ERT, behaved like political entrepreneurs and forged a close relationship that would ultimately evolve into a policy community when confronted by a regulatory hole in the 1992 Programme represented by a lack of a merger control regime.

In short, the ERT assumed many of the roles that had previously been reserved for Member States and thus became a political actor in its own right (Cowles 1995, 522-23).

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[7] The establishment of the ERT and others like it represented important new collective fora that sought to collectively represent European industrial interests at the EU level. By organizing in this way and presenting a unified vision of Europe, these organizations developed legitimacy in the public sphere and thus were considered 'politically safe' policy partners by the EC institutions.

[8] Bounded rationality here simply means that an actor behaves in a manner that is nearly optimal with respect to its goals as its resources will allow.

Considering the success of this Commission-ERT coalition that produced the 1992 Programme, Peterson and Bomberg (1999), along the lines of Coen, highlight two critical features of EU decision-making. Firstly, "the Commission usually offers leadership at the super-systemic level only when its agenda is supported by a unified constituency of powerful private actors." The second is that such coalitions "have the luxury of concentrating on whichever level of governance they believe to be the most receptive to their preferences and demands"(Peterson and Bomberg 1999, 68-9). These observations add strength to arguments such as Bouwen's (2002) that the Commission "looks for a policy community which may provide a source of grass-root and European level information" and Gardener's that the lesson to be learned from the ERT's success with the Commission is that Eurocrats generally prefer dealing with principles, not intermediaries (1991, 66).

Patchwork Law: Early EC Merger Control Via Articles 85 and 86

The founding fathers of the EEC were explicitly concerned with preventing collusion (cartels) and price discrimination along national lines; explicit reference to merger control was absent.[9] However, as pointed out by Amato the 'competitive norms' enshrined in the Treaty of Rome were surrounded by other norms that stressed their subordinate value in relation to integration of the market:

> the climate of the 1950s through the early 1980s in Member States and the Commission itself was such as to bring competition up against a limit, sometimes explicit, sometimes implicit, in the industrial and agricultural policies which, for public ends, used means incompatible with it (Amato 1997, 44-5).

According to Frazer (1992) if anything, the primary concern within Europe at that time was to encourage concentration in order to build up larger firms capable of competing in world markets. The building of European Champions during the 1970s exploited the image of Community competition policy that was formulated in the mid-1950s. As presented in Chapter 1, the Commission was successful in 'selling' the notion that economic integration was the primary path to prosperity in Europe and thus focused on creating and administering the rules needed to achieve that goal. The economic and

[9] However, as pointed out in Chapter 1, the ECSC did provide merger control.

political events of the 1970s called into question the progress of integration and there was increasing pressure put on the Commission to drop the 'long-term' integration initiative and focus on short-term measures to protect European national economies and strengthen the competitiveness of their firms. As Gerber (1998) writes, the new situation not only made policy formation more difficult, but enforcement as well, presenting DG IV with a dilemma. The pressure was on to enforce the competition laws more vigorously in order to maintain the momentum of integration. Whereas during the foundational period the Commission's primary role was to participate with the Court in 'making law' – by the 1970s it had to pay greater attention to securing compliance with the norms that had been established. "There was little point to having a sophisticated competition law if its dictates could be ignored with impunity" (363). Thus, DG IV began to enforce Articles 85 and 86 with increasing vigor and eventually turned its attention to mergers that represented the anti-competitive conduct it was targeting. The only problem was, regulating mergers was not a part of Community competition law at that time.

The Commission understood that in order to regulate mergers at the Community level, it would have to do so using only Articles 81 and 82 EC (ex 85 and 86). There seems little doubt that these articles were not intended to be used by the Commission to control mergers. Nevertheless, concern within DG IV over this gap in its powers was felt even during its first decade of active operation. In a memorandum in 1966 it admitted that the concentration of undertakings following transfer of shares or assets was not covered by Article 85 (Goyder 1998, 379). However, the possibility of utilizing Article 86 as a means to control mergers was not overlooked by DG Competition. Despite considerable doubts within the Commission, it sought out a test case and an opportunity arose in the early 1970s. The case chosen for this attempt was the *Continental Can* case (*Continental Can* 1973).

Although the specific facts of the case will not be presented here, it should be noted that the ECJ judged that the Commission's factual and market analysis failed to support its conclusion that Continental Can held a dominant position in the German market for various lightweight containers for preserved food. Despite suffering a defeat on the facts, on the main issue of principle it gained a surprising victory. As Goyder (1998) points out, the Court chose to interpret Article 86 in a purposive way to give effect

to the spirit of the Treaty and to ensure consistency between Articles 85 and 86. Unfortunately, though the Commission won the victory relating to the applicability of Article 86 to mergers by companies already with a dominant position which, therefore, gave it in principle better standing for the future on such issues, the task of winning the subsequent broader campaign so as to obtain effective substantive and procedural control over mergers proved considerably more difficult (381-2).

Wishing to capitalize on the Court's favorable ruling, the Commission sought to expand and institutionalize its newfound power during the last part of the 1970s and into the 80s. The Commission proposed the first draft of the MCR to the Council in 1973 where it faced major political opposition from Member States, especially the UK and Germany. It was found that the proposed regulation was too broad in scope – bringing under it a very large number of mergers – of which numerous Member States were unwilling to concede authority. Although DG Competition was initially denied a Council Regulation pertaining to Community mergers it continued to push its agenda throughout the rest of the 1970s. The inability of the Commission to gather Council support for the MCR further highlights the difficulties facing Community institutions during the 1970s. There was no Member State interest in new Community competences at this time: all attention was on national economic performance and the enforcement of existing law and policies. Subsequent realization within DG Competition that the scope competition law would have to be modified led to new MCR drafts being put forward to the Council in 1982, 1984, 1986 and 1988. It is important to highlight that it was not until the Sutherland Commission of the early 1980s began 'stirring up' the MCR debate within the Council and business community that attitudes began to change.

Commissioner Sutherland indicated numerous times in public that failure by the Council to beak the political deadlock would leave the Commission no alternative but to rely on Articles 85 and 86 for the purposes of merger control. Both Member State governments and economic actors were skeptical of this suggestion, given the many substantive procedural difficulties involved. As will be highlighted later, the mid-1980s saw heavy backing and involvement of elite industrial actors in the development of a 'neo-liberal' version of the Single Market of which the MCR was a part. It was not until the third MCR draft (1984) that the Commission began seriously considering the views of

corporate actors on the proposed legislation and its willingness to be involved in the policy process. This was because, according to Gerber (1998): "Foremost among its (competition law) enemies have been the representatives of 'big' industry. From their perspective, competition laws are generally seen as unwanted constraints on their decision-making prerogatives, and thus they have typically opposed, often vigorously, the enactment, development and enforcement of competition laws" (8). The prospect of re-launching Europe based on a distinctive neo-liberal outlook altered industry's attitude towards competition policy. As put by the ERT, "one of our goals in conjunction with the single market idea was to develop Community policies to replace national ones. This included merger control and the ERT pushed Member States to imitate Community competition law. This was all pushed for the sake of overall economic efficiency in the long-term."[10] However, the overall sentiment in the Council during this time towards the control of Community mergers was still negative despite the growing skepticism about DG Competition's reliance on articles 85 and 86 to control them. This skepticism was amplified in November of 1987 when the ECJ judgment in the *Philip Morris* case (*BAT and R.J. Reynolds* v. *Commission and Philip Morris* 1987) case was voiced. In its decision, the Court concluded that some mergers might also fall within the scope of article 81 (ex 85), which deals with restrictive arrangements between undertakings. As will be shown below, the *Philip Morris* decision was the spark the Commission needed to push once again for the adoption of the MCR. The *Philip Morris* judgment brought home to the parties concerned the realization that control based on a new regulation might be far better than reliance on the unpredictable consequences of that case (Goyder 1998, 383-4). It also exemplified the unique relationship between the Commission and the ECJ throughout the implementation of Community competition law.

One of the institutional features of early Community competition policy was that the ECJ did not have a defined role and as a consequence it had to mold its own. During the early implementation of EC competition policy the Court used the 'law' as a central tool to promote economic integration, structuring the competition system to achieve that goal. It looked to the future and aimed at guiding the Commission in its development of competition policy. As EC competition law became more pronounced it became

[10] Eric Shea, Interview with member of ERT's IMSC, May 5 2001.

common to see the Commission develop new ideas that were then given authoritative force through ECJ decisions (Stein 1981, 25). The Court established, for example, a practice of providing the Commission with what Goyder refers to as 'windows of opportunity.' According to this practice, the ECJ would go beyond the facts of the case at hand to indicate its willingness to support particular lines of development of competition law (413). Thus, one of the principles applied by the ECJ is that of teleology – interpreting phenomena by the purposes which they serve (Brown and Jacobs 1983). In other words the Court seeks to give effect to what it conceives to be the 'spirit' rather than the letter of the Treaties. The teleological approach is a central tenet of the jurisprudence of the ECJ and its usage was seen in both *Continental Can* and *Philip Morris*. The overall effect of this approach according to Goyder (1998) was to increase the jurisdictional prerogative of the Commission and to reduce those of the Member States (96-105).

However, during the 1970s the relationship between the ECJ and Commission became tenser, as the Court began regularly annulling Commission decisions under Articles 85 and 86. As mentioned above, the Commission and especially DG Competition was pressured to focus on compliance issues during this time. As Gerber (1998) points out, a possible reason for the Court's increased rigor may have been a concern that the "Commission might go too far, too fast in the competition law area, thereby spawning resistance to competition law enforcement and impairing the effectiveness of what has become a critically important tool of integration (362). As the results of *Continental Can* exhibited, despite the ECJ's demand for increased evidence from the Commission, the 'idea' behind the case was upheld. As will be shown, although the use of a teleological approach by the Court decreased as the 'new' integration imperative took root throughout Europe, it re-appeared when dealing with Commission rulings under the MCR.

3.2 The Formation of the MCR: Interests Come Together

As covered above and in Chapter 1, most Member States during the 1970s employed the interventionist approach to economic and industrial policy, which

encouraged state engineered mergers, tremendous subsidies and heavy state procurement favoring domestic firms. It then follows that the political motivation (of the Commission) behind the MCR vision originally centered on the concern that excessive capture of Member States' competition procedures by national interests would inevitably lead to industry capture in the form of European monopolies that national authorities lacked the power or the incentive to control, especially as Neven points out, if they could represent themselves as national or even European champions (1993, 194). Understanding the possible implications of such a situation the Commission felt it necessary to propose an EC regulation pertaining to mergers. As one consultant argued:

> From the very beginning, but especially after the rejection of the 1973 draft, the Commission leadership and especially those within DGIV understood that in order for the merger regulation to be passed both Member State governments and the business community would have to be consulted and to some extent appeased.[11]

For the Commission, and similar to developments surrounding the 1992 Programme, Corporate Europe was the key to MCR development not only because it would be the primary beneficiary of the regulation, but because it also possessed two key bargaining chips: essential technical information and the ability and motivation to influence anti-MCR Member States. The first point adds strength to that of Gardner's in which he explains that low-ranking officials in the Commission that are assigned to develop proposals in a highly technical area become reliant on companies and trade associations for information. He states that "counterparts in the national ministries of EC countries may be reluctant to share technical information with him because they are fearful of adverse economic consequences for 'national champion' firms or because they resent the growing displacement of national regulatory authority by the Commission"(1991, 66). However, on the other hand the Commission understood that national governments, in the form of the Council of Ministers, held the key to policy passage. As such, the Commission had to present a policy draft that would enable Member States to consider relinquishing national law to Community law and at the same time consider various concerns of the ERT and UNICE.

It is important to acknowledge that elite economic actors, especially UNICE, had voiced its appreciation for a Commission led regulation regarding mergers and joint

[11] Eric Shea, Interview with Economic Consultant, March 23 2001.

ventures since the early to mid 70s. Although not involved in the drafting of the original 1973 draft for the MCR, UNICE was asked numerous times by the Commission for its input. In the organization's words, "amendments recently proposed by the Commission it its 1973 draft Regulation take little account of the fundamental criticisms made of it by UNICE. With the present (1982) draft it is particularly doubtful whether, given the extent of fundamental controls, the European Commission could ensure that the Community aspect of concentrations should prevail. UNICE's objections to the draft remain fundamental"(1982, 1). It was not until the 1984 draft that specific industrial wants' were voiced and considered by the Commission. The turning point that affected the Commission's approach to the development of the MCR, as discussed above, came in the form of 1992 Programme and the ERT. According to an ERT council member[12] and various correspondence between the organization and the Commission between late 1983 and 1984, Commissioner Delors was agreeable with the ERT's position that the regulation of concentrations must be conducted at the Community level because national governments could not be trusted to implement merger rules that meshed with the goal of economic integration. The ERT emphatically emphasized that the vast majority of European firms no longer supported the idea of European champions, tariff barriers and interventionist industrial policy. And as put by an official of DG Competition, "the option to present the Council with the argument that merger control was imperative to the success of the Single Market made it much easier for Member States to justify forfeiting their regulatory powers."[13] Thus, by granting elite economic actors 'insider' status when it came the development of the Single Market, the Delors Commission effectively guaranteed that it would be given support for drafting a merger regulation that would eventually gain acceptance by the Council.

Reiterating one of the major points made above, the ERT was both the spiritual progenitor of the 1992 process and is the single most powerful business group in Europe (Gardner 1991, 77). Along the same lines, the attitude of economic actors towards the creation of a Community-wide merger regulation was unmistakable in the early and mid 1980s. The completion of the internal market in 1992 would give rise to a major

[12] Eric Shea, Interview with member of ERT's IMSC, May 5 2001.
[13] Eric Shea, Interview with DG Competition Official, May 6 2001.

restructuring of companies in the EEC. National controls on company restructuring, being based on different national criteria, where considered incompatible with the existence of a truly integrated market and the increasing geographical extension of a large number of markets. Corporate Europe's vision is reflected in Eberlein's (2001) argument that market consolidation went had in hand with (neo-liberal economic) globalization and resulted in an exponential growth of mergers throughout the 1980s. Garrett and Mitchell (2001) further highlight the constraining policy effects of globalisation throughout the 80s and 90s that allowed the Commission and elite economic actors to strengthen their argument for Community-wide merger control (149).[14] Following from this, one may reasonably argue that post SEA policy developments saw the Commission try to increase its stronghold of power in the area of merger regulation which was increasingly necessary given global economic dynamics, without isolating the very object of its regulation – economic interests.[15]

After the SEA came into force, the ERT concentrated on ensuring its speedy implementation of which Community merger control played a major part. Between 1987 and 1992, members of the ERT's Internal Market Support Committee had a profusion of meetings with government and Commission representatives (Cowles 1995, 519-20). In a television interview, Jacques Delors recognized the "continuing pressure" of the ERT, claiming that it was "one of the main driving forces behind the Single Market"(Cowles 1995, 522). This suggests that one cannot underestimate the influence of elite economic actors in the development of any policy that falls within the Single Market policy sphere. The relationship between elite economic actors and EU policy makers in the 1980s and 90s was summed up best by the ERT's appreciative Assistant Secretary-General Caroline Walcot: "During the presidency of Jacques Delors relations between Europe's industrial leaders and commissioners became closely entwined. The Commission is the motor in Europe and an internal revolution has taken place under Delors. It is less bureaucratic now. It listens more"(Cowles 1995, 524). Considering the relationships and contacts

[14] The two main constraining effects are, " (a) increasing competition in international goods and services markets and (b) the ability of the holders of capital to move money around the world in search of higher rates of return."

[15] This is precisely the argument that found itself at the forefront of European debates in the 1990s about the crisis of the welfare state and its dependence on capital.

previously established in the buildup to the Single Market Programme and the fact that both actors shared the goal of making European industry globally competitive, it is not surprising that the Commission felt comfortable involving elite corporate actors in the form of the ERT and UNICE in subsequent MCR negotiations. Taking into account Majone's (1991) claim that "the real costs of most regulatory programmes are borne directly by the firms and individuals who have to comply with them," the next section offers evidence that during the development of the MCR, elite industrial actors and the Commission proved once again to be natural policy partners and thus developed a policy community.

3.3 Interest In Action: Evidence

"The MCR provides, in essence, that concentrations that have a community dimension are subject to Community regulation and removed from the jurisdiction of the national competition law authorities" (Gerber 1998, 378). This fact justifies focusing attention primarily on the actors that developed and implemented the MCR: the Commission and elite industrial actors. The role of Member States in the development of merger policy was minimal. However, as is the case with all Community policies, the Council is the gatekeeper allowing Commission proposed policies to become law. Thus the interests of some Member States do find their way into policy proposals. Although Germany, the UK and France did push for alterations dealing with the jurisdiction and criteria of the MCR, the overall effects were minimal in comparison to the provisions set by the members of the merger control policy community. Put into historical context the Commission (via the logic of the Single Market) and the ECJ (via the *Philip Morris* decision) effectively shaped the incentives of the Member States by altering the status quo, so that while the Council took the ultimate decision, it did so in the shadow of the actions of those two actors, while also being pressured by the likes of the ERT. As Allen (1996) writes: "From the Commission's perspective the great advantage of this merger regime, using Article 85, was the uncertainty it generated. European business was left uncertain as to its legal responsibilities and began lobbying for an EC Merger Regulation. This served to put pressure on the doubting Member States to settle on the MCR. By a

combination of luck and skill the Commission had managed to create a problem which the Council felt could be eased only by passing the legislation it had previously refused to consider (171)."

The main issues covered by the MCR can be broken down into three distinct sub-issues: jurisdiction, test and criteria, and time frame. Apart from being of primary importance to the Commission and elite corporate actors, the first two issues also provoked Member State feedback. The following subsections analyze these issues respectively and offer evidence supporting the argument that elite economic actors both influenced and cooperated with the Commission in order to produce a draft of the MCR that satisfied their 'collective' interests and at the same time 'appeased' Member State concerns.

3.3.1 Jurisdiction

There were three main issues related to jurisdiction: double jeopardy, turnover thresholds and joint ventures. With regard to the first of these, arguably one of the largest concerns for corporate actors, the main concern here was the risk that firms would find themselves facing scrutiny from competing competition authorities vying with each other for jurisdiction. Prior to the establishment of the MCR, depending on the scope of the merger, firms involved would have to notify the competition officials of each country affected by the transaction. A major detraction of merging in Europe was the fact that multiple competition agencies would scrutinize the same deal – sometimes resulting in conflicting findings. The risk of double jeopardy was not just that it would increase uncertainty, but that the effective decision about a merger would be taken by the most restrictively inclined authority (See ERT 1988 and 1989; UNICE 1987, 1988a, 1989 and 1999). The Commission has always maintained that one of the primary aims of the MCR was to make all mergers that satisfied the established thresholds (whatever they may be) applicable to Community regulation only, thus making the Commission the 'one stop' companies needed to make for merger approval. The so-called 'one-stop shop' principle was met with stiff resistance from Member State governments, but was of paramount importance to economic actors who fought hard for absolute clarity on the

issue. The ERT stated "there should be a clear line of demarcation between national and Community authorities with the bias toward Community level jurisdiction"(1988, 2). UNICE lobbied heavily for clarification on the issue and in numerous position papers presented to the Commission stated, "UNICE has consistently maintained its opposition to double barriers. It is unacceptable that such barriers should continue to be enshrined in the draft regulation despite the Commission's assurances to the contrary received on previous occasions"(1989, 1). During the negotiations of the final MCR draft, the ERT (1989) proposed to the Commission that "concerns of national authorities regarding the effects of such a merger on distinct markets within their territories could be taken into account by the Commission in so far as is adequate (and in the way the Commission decides) in reaching its decision on EC-compatibility or EC-incompatibility"(1). It must also be pointed out that most in the Commission echoed the general jurisdiction concerns of corporate actors. They felt that in the absence of the MCR with a one-stop shop principle, national authorities would intervene in the passage of many, quite harmless mergers on the basis of alleged threats to national interests (Rosenthal 1992). Thus, both actors made clear that the MCR would cover both private and public sector companies. The prominence of state-owned industry in France and Italy made this important to Germany and the UK.

In this situation, it is obvious that elite corporate actors and the Commission shared interest in excluding the application by Member States of their national competition laws to mergers. Although in one sense the Commission would be losing the power to act on its own initiative in respect of mergers unless the merger satisfied the turnover thresholds, it felt those mergers that it would have control over would be among the largest and those that presented the greatest economic significance. However, one must be reminded that the Commission never had a clearly defined role for merger control at the Community level prior to the creation of the MCR. As mentioned above, the Commission had to rely on a patchwork of Court decisions to control mergers under Articles 81 and 82. From this perspective, the Commission sought not to relinquish any powers of investigation but, rather, sought to extend them.

In the end the elite corporate umbrella organizations were successful in getting the non-ambiguous wording it wanted. According to Article 21(1) of the MCR, the

Commission alone has competence to examine mergers with a Community dimension, even if they only involve firms based in the same Member State. Moreover, Article 21(2) states that no Member State may apply its national legislation on its own initiative to such a merger.[16] However, Member States pressured the Commission to include a few 'exceptions' to the Article 21(1).[17]

The final hurdle to the adoption of the MCR with regard to jurisdiction came from the Member States, especially Germany, who expressed concern that some mergers having a Community dimension might seem innocuous to the Commission, yet might be harmful to competition at the domestic level. The origins of this concern can be traced to the wishes of the Bundeskartellamt (better know as the Federal Cartel Office - FCO) in that it was concerned that some of the technical criteria for judging the effects of a merger were less rigorous than those under German competition law. Thus, Article 9 of the MCR, referred to as the 'German Clause,' provides a mechanism whereby the Commission can, at the request of a Member State, refer a notified concentration back to the competent authorities in that state. The second exception to complete Commission jurisdiction is a rather unique exception: the 'Dutch Clause.' Under Article 22(3) MCR a Member State, or two or more Member States acting jointly, may request that the Commission should investigate a merger, even though it falls below either of the Community thresholds. As will be shown below, the smaller countries such at the Netherlands wished for lower thresholds than those ultimately agreed upon. The Dutch Clause was a way for these states to 'pass the buck.' Article 22(3) requests have been rare, only a total of six have been made since 1990. During the early days of the MCR, Article 9 requests were rare as well, however these referrals have subsequently increased, which may be at least in part in recognition of the desirability of ensuring that decisions are taken at the appropriate level. The fact remains that there are many markets that are no wider than national boarders and in some cases narrower than this (Whish 2001, 758-65). There has been a total of 53 Article 9 referrals, 22 of which where total referrals to Member States (See table 3.1). A third exception to the Commission's sole jurisdiction is

[16] When the Commission clears an operation having a Community dimension the Member State is precluded from opposing the operation, including provisional measures, such as the suspension of voting rights.

[17] Refer to Appendix A for full MCR text.

Article 21(3), which provides that Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by the MCR. A Member State may whish to oppose a concentration for reasons other than its effect on competition and for this reason the Commission has applied this article very stringently. It has been invoked only on a few occasions – three to be exact.[18]

Although the ERT and UNICE voiced its reservations about the aforementioned exceptions, it was made clear by the Commission that they where just that – exceptions to its sole power to investigate transactions under the MCR that would be used in a limited way. Up until this point the Commission has kept its word. The Combined usage of all the exception Articles has resulted in a total of 65 decisions out of the 2194 final decisions the Commission has made since 1990. That is significantly less than 1% of the total decisions taken under the MCR and is something firms can live with.

The level of the turnover thresholds represented the second part of the jurisdictional issue that concerned corporate actors. One of the most heated battles during the MCR negotiations centered on the possibility that the original 2000 million Euro world-wide turnover threshold would be elevated by the Commission in order to appease Member State concern. The thresholds that were being negotiated would clearly demarcate the Commission's jurisdiction – a merger falling within the thresholds would be subject to the MCR. Corporate Europe had a vested interest in seeing that the thresholds were kept at the lowest possible level so that it could maximize the number of mergers subject to MCR jurisdiction. The ERT explicitly told the Commission that both the worldwide and European turnover thresholds should be reduced in order to equalize the conditions in the market place to the greatest degree. In negotiations, the ERT (1989) argued that it "would support the lowest feasible threshold level and accordingly, the target thresholds should not exceed two thousand-million ECU"(1). Likewise the Commission too had an interest in keeping the thresholds low so that it could have authority over the greatest possible number of merger transactions. However, the threshold issue proved to be one of the few battles elite corporate actors (and the Commission) lost (almost) completely.

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[18] The three cases are: *Lyonnaise des Eaux SA/Northumbrain Water Group; Independent Newspaper; and Thomson-CSF/Rascal.* All requests where made by the UK.

The debate over thresholds was central to Council negotiations. The smaller states (and Italy) favored a lower threshold. In some cases, for instance the Netherlands (and Italy), there was no domestic legislation to prohibit mergers: no national competence was to be lost. For the small, highly interdependent economies, the national market was not the relevant geographical market for appraising mergers, thus they were strong supporters of the Commission's proposed low thresholds. However, for Germany, the UK and France there was a concern that low thresholds could have three major and, in their view, negative effects. Low thresholds would include mergers with a largely domestic effect (and in France especially, mergers which might be acceptable as promoting national champions). They involved transferring national competence and placing trust in the Commission. Finally, for the UK and Germany they involved transferring the powers of national agencies: the FCO, the Monopolies and Mergers Commission and the Office of Fair Trading. At various stages the governments of these states favored a threshold of 10,000 million Euro.

In a last minute concession the Commission agreed to raise the worldwide turnover to 5000 million Euro and this, along with the previously mentioned exception articles, proved to be the compromises that solidified a 'yes' vote in the Council. The Commission promised a review of the MCR in 1993 in which it would propose to lower the thresholds to 2000 million Euro. As it turned out this review did not occur until 1997 and the Council denied the Commission's request for lower thresholds. However, foreseeing this, both the ERT and the Commission prepared an alternative proposal that eventually gained the Council's approval during the 1997 review. According to the Commission's XXVIIth Report on Competition Policy (1997) a new category of merger transaction is now covered under the MCR.

> The Community will now be responsible for mergers meeting the following four conditions: (i) the combined worldwide turnover of all the companies concerned must be more than ECU 2.5 billion and (ii) the combined turnover of all companies concerned must be more than ECU 100 million in each of at least three Member States. In addition, so as to ensure that mergers with cross-border effects are also included, (iii) the turnover of each of at least two of the companies concerned must be more that ECU 25 million in each of those same thee Member States and (iv) the Community-wide turnover of each of at least two of the companies must be more than ECU 100 million. These measures will enable economic realities to be reflected more accurately and will provide companies with greater legal certainty and increase administrative efficiency by extending the 'one-stop shop'(50).

While the first two criteria represent the original thresholds set in Article 1(2) of the MCR the last two expanded the MCR's jurisdiction to those transactions with a reasonably large turnover in at least three Member States. This was a major victory for corporate actors who wanted to expand the one-stop shop principle to a greater number of transactions from the very beginning. However, it became even more important as time passed because throughout the 1990s there were a growing number of transactions with pan-European and global effects. Thus, an increasing number of mergers had to be notified to an increasing number of Member State competition authorities. Corporate Europe felt, as did the Commission, that without modification the MCR would quickly lose its utility.

The third jurisdictional issue related to the type of joint ventures that would fall into the MCR's scope. As with the thresholds, the ERT and UNICE wished for as many joint ventures to be analyzed under the MCR as possible, not only because of the one-stop shop principle, but because the substantive test under Article 81 was much more stringent than the one adopted under the MCR. The Commission decided to propose to all Member States that all concentrative, full function joint ventures would be considered under the MCR. All other (co-operative) joint ventures would have to be scrutinized under Article 81. As a result of this compromise a number of companies, with Commission backing, sought to have their transactions counted as mergers in order to avoid treatment under the slower procedures. One competition lawyer stated that the Commission is eager to allow a deal to fall under the MCR instead of the Art 81 procedure, which a more natural reading would have prescribed. The keenness of the Commission to approve merger transactions has given firms and their legal advisors considerable bargaining power (Neven 1993, 149).

However, despite the fact the Commission was more than willing to accommodate firms' interests as above, both the Commission and corporate interests pushed for an amendment to the MCR that would bring under its control all types of joint ventures. After heavy lobbying by UNICE of Member State representatives during the mid 1990s, the Council decreed during the 1997 MCR review that all full function joint ventures, whether falling in the concentrative or co-operative category, must be dealt with by the MCR. Again corporate Europe was pleased with the results of the 1997 review.

The negotiations on the various jurisdictional issues presented above provide a clear picture of the policy actors involved. The three main actors were the Commission, elite corporate actors and the Council, with the former two actors working together to present an acceptable draft to the latter who then formally signed off. Of particular importance is the fact that on most of the issues both the Commission and corporate actors shared a common interest, exchanged information, and pushed for the same end – evidence that the policy community approach is the most useful of the theories that helps one to understand developments in this particular case. What is even more striking is that even in the instances that the policy community did not get its way (thresholds and joint ventures) it managed to reverse those 'loses' seven years later, which highlights the fact that not only did the Commission and elite corporate actors work together in the negotiation phase, but this relationship carried over to the implementation phase.

3.3.2 Test and Criteria

The second major issue that concerned corporate interests was the test in which merger proposals would be subjected under the MCR. The earlier drafts of the regulation were not clear on a number of issues dealing with the test and criteria the MTF would use in its analysis. It was made clear that the corporate umbrella organizations preferred the substantive test for the MCR to be based on Article 82 (ex 86) instead of Article 81 (ex 85). Article 81 deals with agreements and restrictive practices. The main test used by the DGIV under Article 81 centers on the question of whether or not a transaction prevents, restricts or distorts competition. There is also room under Article 81 for the Commission to used non-competition based criteria to assess certain transactions. Article 82 on the other hand states that: any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited. As one can see, in basic terms the Article 81 test is much broader and cumbersome. This is precisely why the previously cited *Philip Morris* decision was instrumental in cementing corporate Europe's involvement in the policy process. The *Philip Morris* decision worried firms and Member State governments alike because it was not clear what specific powers were granted to the Commission to deal with mergers under Article 85. Corporate actors

feared that if the MCR test was based on Article 81 it would have a more adverse effect on a greater number of mergers than if it where based on the 'dominance' test of Article 82. Indeed this would have been the case according to one high-ranking competition official whose opinion is that:

> Article 81 would have been a much better basis for the merger regulation because it would have enabled the MTF to apply it to broader types of mergers – such as those that deal with collective dominance issues. This goes to the heart of the current debate about the 'dominance test'. It is off – it does not incorporate everything (all the scenarios) that a merger regime should have at its disposal.[19]

Lobbying by corporate actors for the inclusion of the dominance test was relentless:

> The new wording of Article 2(2) regarding the definition of criteria of compatibility give UNICE cause for great concern. It considers that the regulation should refer to creating or strengthening a dominant position. It also asks that reference be made to effective competition being *significantly* impeded (Tyszkiewicz 1988).

The ERT told the Commission it should only be able to block those mergers that would demonstrably eliminate effective competition in the relevant market. It should be made clear that the concentrations creating or strengthening a dominant market position should not *per se* be incompatible with the Common Market. Substantial change of the competitive structure of the Common Market should not be a criterion for incompatibility with the Common Market (ERT 1988, 1-2). UNICE hit a nerve in the Commission when it suggested it base the 'dominance test' on the definition of effective competition as defined in the ECJ's ruling in *Continental Can*. It made sense for the Commission to use the Article 86 test because it did have some experience applying it to mergers since *Continental Can*. The 1986 draft, although not absolutely clear, hinted that the dominance test was chosen: "the language of Article 2 MCR is similar to that of Article 86, both referring to concentrations which 'create of strengthen a dominant position"(Goyder 1998, 394). This backs up the then Commissioner for Competition Leon Brittan's assessment that "in view of the similarities in terminology and criteria to be applied it is nevertheless reasonable to assume that the dominance test under the regulation will be roughly equivalent to the one used under Article 82 (ex 86) of the Treaty (Goyder 1998, 351).

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[19] Eric Shea, Interview with High Ranking Irish Competition Official, March 1 2002.

It was not until the final draft that the 'dominance test' was clearly stated as being applicable to mergers under the MCR. A brief read of Article 2(2) and (3) MCR will show that all of the requests of elite corporate actors where granted:

> A concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market.
>
> A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market.

During the subsequent implementation of the MCR a debate centered on the dominance test presented in the above Articles arose. It is unclear whether the MTF was to interpret both of the Articles together or separately. The Articles refer to the creation or strengthening of a dominant position as a result of which effective competition would be significantly impeded. It could be that the second idea is merely a statement of the consequences of the first, in which case it adds little. An alternative view is that the Commission must satisfy both parts of Article 2(3) if it is to block a concentration. In this case a concentration that strengthens a dominant position, but only to a marginal extent, might escape prohibition: the second test would provide to be of minimum importance, since the concentration would not have hindered competition significantly. Furthermore it could be that reference to impeding effective competition meant that the Commission should take a dynamic view of the market and consider whether harm to competition is likely to be transitory or permanent: it should act only in the latter situation (Whish 2001, 773). Previewing events during the implementation phase of the MCR, it was this approach by the Commission which led to its first prohibited merger in 1992. In the *de Havilland* case the Commission said that the proposed merger would create a dominant position and added, "this dominant position is not merely temporary and will therefore significantly impede effective competition"(*Aerospatial-Alenia/de Havilland* 1991, para.72). Some years later the ECJ's decision in *France v Commission* established that there must be a causal link between the concentration and the deterioration of the competitive structure of the market for the MCR to apply. In that case the ECJ was considering whether a 'failing firm' defense existed under the MCR and held that a merger should not be blocked where the firm would have failed anyway

and its market share would have gone to the acquirer, since the merger did not cause the creation or strengthening of dominance (*France and others v. Commission* 1998).

Regardless of the on-going debate surrounding the dominance test, the above cases help demonstrate that the desires of elite Corporate Europe have been upheld. The former case displayed that the MTF must find that a merger will significantly impede competition in a permanent sense, while the latter case further demonstrated that a causal link that connects a proposed merger to negative impacts on the structure of the market must be established in order for a merger to be prohibited.

Apart from the actual test, the ERT also pushed hard for the Commission to stipulate that only competition based criteria may be considered in ruling a transaction permissible or impermissible. The criteria for judging merger proposals should be clear and flexible and the administrative procedures permit rapid decisions (ERT 1988). As was the case with the dominance test, the draft regulation still possessed ambiguous criteria for the assessment of merger proposals. There was debate within the Council regarding what kind of criteria should be used to address merger proposals.

When the Commission had launched its first draft in 1973, the UK had the longest-standing merger control legislation, revised in the 1973 Fair Trading Act. German legislation giving the power to prohibit mergers was introduced for the first time in 1973. The UK's legislation set the criteria according to which the MMC is to appraise the effect of mergers, upon referral by the minister. The fist two of these relate to competition criteria and the consumer interest; the third is more ambiguous in that is supports economic efficiency through competition. The fourth and fifth, however, are orientated towards the public interest through; the maintenance and promotion of the balanced distribution of industry and employment in the UK; and the maintenance and promotion of competitive activity on the part of UK producers and suppliers in foreign markets. The 1973 German legislation introduced strongly competition-oriented legislation, but with the possibility of the Federal Economics Minister using a political override to reject the recommendation of the FCO report. The original MCR proposal inclined toward the UK's inclusion of public interest concerns. Article 1(3) provided an exception for "concentrations which are indispensable to the attainment of an objective which is given priority treatment in the common interest of the Community." Subsequent

drafts sought to refine the text of this exception. Germany, which had objected to a public interest provision in 1973, realized that EC legislation pertaining to mergers was approaching and thus began to attach strong conditions. Meanwhile, developments in the UK saw its merger control embrace a more competition- based approach.

Other countries, including France were content with the inclusion of a public interest exemption in the MCR. However, the French position derived from industrial policy consideration while Italy, Spain and Portugal based their support for a public interest clause on the grounds of regional policy. They did not want mergers to exacerbate regional imbalances within their states. In the end, it was the UK/German positions that predominated in the MCR. Ideology was significant in the UK position but it was reinforced by British doubts about the trustworthiness of the Commission. The German position was less ideologically motivated and more product of domestic institutional bargaining. The German position involved preparation at the cabinet level: an unusual situation in German European policy-making, and indicative of the issue's importance (Bulmer 1986, ch. 2). The final stages of negotiating the MCR within the Council coincided with the German debate surrounding the proposed MBB/Daimler-Benz merger. The FCO recommended against the merger, but he Federal Economics Minister over-ruled its recommendation. For its part, the FCO saw the merger as indicating how any public interest clause in the EC legislation could rapidly lead to ineffective merger regulation if implemented by those less concerned with competition criteria than itself. Furthermore, both the ERT and UNICE suggested to the Commission and later to the Council that mergers should be appraised by reference to the competitive structure of the real economic market (which may be wider than the EEC), to international competition and to technical or economic progress (See ERT 1989; UNICE 1988b, 2). Once again the Commission agreed with elite corporate actors and inserted its various requests into Article 2.

As a result of all this the Council ultimately agreed to tight competition-based criteria, and regional or industrial policy considerations were relegated to the recitals and notes recorded in the Council minutes. Leon Brittan has said:

> It was determined that the MCR should not be used as a way of imposing an industrial policy in Europe, although there were quite a number of participants in the debate who wanted to do just that. Whether it was because they whished to create European champions, or wanted to allow social considerations to have an important impact, they wanted the wording of the

> Regulation to be sufficiently broad for the Commission to be able to consider matters going well beyond the effects of the merger on competition in the relevant market. In the end, the supporters of an industrial policy were effectively beaten back, and the Regulation gives clear primacy to the competition criterion, with only the smallest nod in the direction of anything else (2000, 3).

According to Article 2(1) the Commission shall take into account: the need to maintain and develop effective competition within the Common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outside the Community. Other criteria are the economic and financial power and market position of the parties and also of their suppliers and consumers; legal and other barriers to entry; trends of supply and demand in relevant markets; and development of technical and economic progress. As Goyder points out "the assessment of concentrations under the ECMR necessarily looks to the future, seeking to answer the question 'what effect will this transaction have, if implemented, on competition in the relevant geographical and product sector'"(1998, 394).

One of the more interesting factors in reaching agreement within the Council was the consent of the French to such a competition-oriented approach. The principle explanation for this lay in the fact that it saw Germany as a major obstacle to the strategic interest of French companies in the Single Market (France believed it was still confronted by the conditions under which the ECSC was created). It was the French view that German competition authorities discriminated against foreign purchases of German companies. The French government came to the conclusion that it could more readily trust a supranational agency than the national ones. Moreover, even if it wanted a public interest provision in the MCR, as president of the Council in the second half of 1989, it could offset the loss of this by taking the credit for the successful conclusion of negotiations. According to an ERT representative this was exactly the line ERT took with France. "In general the French leaders were the most receptive than any to ERT contacts – or perhaps the ERT's French members were more persuasive."[20]

Examination of the criteria set forth in the Articles of the MCR suggest that the regulation has resolved the 'criteria debate' in favor of a substantive test based solely on competition law considerations. The principal criterion is whether the merger would

[20] Eric Shea, Interview with a ERT representative, May, 5 2001.

create or strengthen a dominant position that would significantly impede effective competition. A merger that is found likely to have such an effect will be prohibited as being incompatible with the common market (decision under Article 8.3). The concept of dominance was defined by the ECJ in the *United Brands* case as: "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers"(*United Brands v. Commission* 1978).

The inclusion of the 'technical and economic progress clause' however, presents the sole exception to the MCR's 'competition only criteria' and was hard fought for by both the ERT and UNICE. The inclusion of this provision implies both an efficiency defense and a balancing approach, such as might be found under Article 81(3).[21] Whether this means that a greater negative impact on competitive structure will be required where there are some efficiency benefits to a concentration may be difficult to determine in the abstract. However, given the dual requirement that the contribution to technical and economic progress be to consumers' advantage and that there be no obstacle to competition, it would appear that the technical and economic progress 'defense' is subject to overriding competition law concerns (Venit 1990, 523). However, the fact that the technical and economic progress provision exists gives firms, as well as the Commission more negotiational latitude during actual merger case investigations, something that still irritated the German constituency. For firms, it is a possible argument that can be used to get a merger through the MCR that normally would have been prohibited. For the MTF, the provision is an additional tool it can use to justify its decision.

[21] Generally speaking an efficiency defense argues that if the efficiencies resulting from a particular transaction outweigh its detrimental effects on competition, the merger should be allowed. The reference to a 'balancing approach' simply means that if an efficiency defense is a possible consideration in the MTF's analysis, it must 'balance' the possible efficiencies of a merger with the possible detriments to overall competition.

3.3.3 Time Frame: The MCR's Procedural Steps

The last issue of great concern for elite corporate actors was the timeframe of merger investigations. One aspect of European Competition policy that firms had always disliked was the cumbersome characteristics of the anti-trust regime. As pointed out by Neven, when the scale and intrusiveness of anti-trust activity reflect a desire for empire-building by bureaucrats – this can impose potentially large costs for business, chiefly by increasing the uncertainty and the delay to which firms are exposed. As a result, pressure from industry has been quite successful in ensuring that the time limit for merger approvals is kept low (Neven 1993; UNICE 1989, 193).

As seen in the top part of Figure 3.1, which presents a general overview of the different stages of the evaluation process, it was accepted that all mergers with a EU dimension must be notified to the MTF within one week of its formal announcement, but both the Commission and corporate interests have insured that if desired, merging parties may speak with DG IV officials prior to formal notification. These so-called 'pre-notification discussions provide a forum for firms involved to take part in an open discussion with competition officials about any potentially 'affected markets.' Cini and McGowan argue, "these informal discussions are encouraged by the Commission as they enable the MTF to identify and address in a co-operative manner possible difficulties that may arise from a merger. It is during these encounters that problems are ironed out and disputes resolved"(125). In the words of one Brussels based competition lawyer:

> The pre-notification discussions play a huge role in the biggest mergers. There is almost always conflict between the companies and the MTF at the start, but common ground is usually reached. In the majority of cases, the MTF try very hard to make mergers work if at all possible and the business community likes this.[22]

According to Article 10 of the MCR, once formal notification is made then Phase I investigations ensue. This lasts for up to four weeks and results in a decision under Article 6. There are three possible outcomes. (1) The merger does not fall within the scope of the regulation, (2) the merger does not raise any serious doubts and is approved, (3) the merger raises serious doubts and further investigation is warranted. In the last of the possible outcomes, further investigation is called the Phase II investigation stage. At

[22] Eric Shea, Interview with Competition Lawyer, March 22 2001. Also see (Neven 1993, 148).

this stage the Advisory Committee on Concentrations is asked for its opinion and the phase can last up to four months. An interesting point here is that "although the MTF claims to pay more than mere lip service to the Advisory Committee's opinion, the truth of the matter is that the Committee has minimal influence on the Commission's decision and is likely to be ignored if its opinion strays from the preliminary decision drafted by the Commission"(Maciver 1991, 762). Once again there are three possible outcomes to a Phase II investigation: approval, prohibition, and conditional approval. With this in mind, it is important also to understand the basis of the MTF's substantive analysis during these investigation procedures.

The first step in the MTF's assessment of a merger's effect on competition is the definition of the relevant market and the market position of the firms concerned. The approach adopted under the MCR is similar to that under Article 82: "a relevant market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their process and their intended use"(Commission 1997, 5). The MTF's methodology has proven to be orientated towards demand-side substitutability. The relevant market is frequently defined rather narrowly and sometimes the MTF finds it appropriate to distinguish separate markets (sub-markets) for the same product group, which correspond to different categories of customers having distinct demand characteristics (Neven 1993, 92-5). However, the MTF may also investigate whether it is appropriate that supply substitutability (the ability of other manufacturers to switch production to the merging parties' products) should be integrated into the product market definition. Finally, the Commission may examine price evidence (levels, elasticity and correlations) to determine to what extent such evidence may complement findings based on other criteria (Commission 1994, point. 273). The MTF leaves the precise definition of the relevant market open where the parties' aggregate market shares do not appear to indicate dominance on the narrowest possible market.

Defining the relevant geographic market is the next step in the MTF's analysis of the possible effects of a merger. The geographic market is a defined area in which the product or service concerned is marketed and where the conditions of competition are sufficiently homogeneous for all economic operators, so that the effect on competition

can be evaluated rationally (Commission 1997, para.143). The MTF, in the early years of the MCR, used to define the relevant geographic market mainly on a country-by-country basis because of the tendency of suppliers to organize their distribution network within each national market and of the consumer preference to by 'national'. Due to the continuing realization of the Common Market, recent events have shown that national markets are becoming more and more integrated and the Commission in 1997 stated that it would take into account the continuing process of market integration (point.32). Throughout the later part of the 1990s it was stressed by both the Commission and elite corporate actors that the measures adopted and implemented in the Common Market Programme to remove barriers of trade and further integrate the Community markets cannot be ignored when assessing the effects of a transaction. Consequently, more recent cases have seen the MTF define geographic markets more broadly than in the past in order to take into account the growing 'europeanization' or 'globalization' of the markets (Commission 1999b, point.134).

Once the MTF complete all of the steps and assessment procedures and presents its findings to the Commission as a whole, it is then that a final decision is made on the merger. However, all of this must occur within the timeframe established in the MCR. Although the Commission had set out the specific time limits in its last three drafts, the umbrella organizations still desired more clarity. UNICE stated that it was "essential that the regulation state the legal effect of the time limits set down in Articles 6(2) and 8 being overrun. If the Commission makes no pronouncement within the time limit the decision should automatically be deemed positive"(1989, 2). As with a great majority of corporate demands, the Commission yielded to the request in 1987. Article 10(6) states that where the commission fails to reach a decision within the prescribed time scale, whether in Phase I or Phase II, the concentration will be deemed to be compatible with the common market. If the Commission decides to prohibit a merger in the allotted timeframe, the firms involved are entitled to lodge an appeal to the ECJ or CFI (Cini and McGowan 1998, 124).

The 'Merger Control Policy Community'

Taken together, all the negotiations around these three main issues – jurisdiction, test and criteria, and time frame - produced an acceptable draft in 1988, which subsequently became law on 21 December, 1989 and came into force on 21 September, 1990. It should be noted that during the formal legislation process the European Parliament was consulted by both the Commission and Council in accordance with EU law. However, there was minimal Parliamentary debate or feedback. As one high-ranking consultant in Brussels stated: "Once the Council agreed on the final MCR draft, that was it. The Parliament was not even a minute concern because in those days the Commission owned the EP even though the MCR became law after the SEA."[23] This point is clarified somewhat by Gardner (1991) who points out that the Parliament has been reluctant to use its negative powers (veto power under the co-operation procedure), fearing that this would hinder the accomplishment of the basic goal it shares with the Commission – speedy completion of the 1992 process"(36).

In the end, the establishment of the MCR can be said to have removed numerous national competition constraints and replaced them with a one-stop-shop for merger control in the EU, something that satisfied both the interests of the Commission and elite economic actors. For firms a codified directive on merger control meant easier attainment of reorganization and consolidation in the global economy, but also, more importantly it meant limiting potential abuses of Commission power over economic actors that may have otherwise occurred in absence of clearly defined rules. A supranational merger regime also represented a more predictable regulatory environment wherein the role of elite corporate actors would be better defined. This idea verifies Sandholtz and Stone Sweet's (1998) hypothesis that, "companies with an interest in cross-national sales or investment will press for the reduction of national barriers, and for the establishment of regional rules and standards"(15).

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[23] Eric Shea, Interview with Economic Consultant, March 23 2001. Because the MCR became law after the SEA, the EP theoretically could have presented amendments and exerted pressure on both the Council and the Commission to take its opinions seriously under the cooperation procedure. However, the EP's power is still purely conditional on the Commission and Council preferences.

In broad terms, the passage of the MCR was a moral victory for the EU institutions as a whole because it saw national authority forfeited to 'European' authority. More specifically for the Commission it represented a long awaited (15 year) political victory, and more importantly new policy powers and institutional autonomy to help further push the integration initiative. Both parties, according to Neven (1993) felt that the MCR would facilitate merger activity that might otherwise be prevented on narrowly nationalistic grounds or discouraged by red tape and the risk of double jeopardy (194). Taking this into account, the MCR can be viewed as offering industry a degree of protection against various threats – the threats of inefficient interventionism of national governments. It is beyond doubt that the Commission actors responsible for the merger regulation believed that it would benefit corporate interests, and could therefore expect them to favor the new merger regime. This point clearly highlights the theoretical debate presented at the end of Chapter 2. Elite corporate actors seek to fulfill its private interests regardless of the institutional setting. In the private sector it seeks profits by searching out ways of serving consumers better, in the public sector it seeks profits by searching out ways to influence the policy-making process. In one setting consumer welfare is enhanced and in the other, consumer welfare is reduced as a byproduct of a process in which economic actors strive for protection from unwelcome 'threats'(McChesney and Shughart 1995, 23). Following this logic, it can be argued that both sets of actors gained a powerful policy ally whose support for further integrationist policies could be counted on. The interest of elite corporate actors in being involved in these policies stemmed from their desire to capitalize on the Commission's enhanced credibility in the realm of competition and other regulatory policies (compared to the various merger rules of the nation states). In the view of the elite umbrella groups, the Commission had more political power than national authorities and could thus deal with multinational corporations more efficiently by developing a more credible and coherent competition policy (Gatsios and Seabright 1989). The hopeful end result is to create a more predicable and business-friendly regulatory environment. By the same token, the Commission relied on Corporate Europe's on-going policy support to ensure future policy passage through the Council and monitoring of such policies.

Clarifying the overall policy dynamics, then, when the MCR was negotiated actors representative of UNICE and the ERT as well as the European Commission would thus act interdependently and seek the establishment of merger control based on their own self-supporting goals. From this perspective, the 'community' revolving around both actors can be understood in the sense that they were representative of the united interests of elite corporate Europe and that of main Directorate Generals within the Commission, including DG IV (Competition), II (Economic and Financial Affairs), III (Industry), and VII (Transport) which all keenly supported the idea of merger control in order to create a truly single, integrated European market (Armstrong and Bulmer 1998).[24] In more detail regarding the calculation of interests of these two main sets of actors, the Commission, in general, and DG Competition, in particular, warmly welcomed merger control regulation based on interests to extend regulatory power. As Peterson and Bomberg (1999) state, "the Commission (could) use the MCR to set policy where it has been unable to before"(72). Moreover, along the lines of Coen (1998) and the Commission (2002a), great weight was given by the Commission to discuss the nature of the regulation along with those economic interest which were prepared to establish some form of 'European credibility,' so as not to appear as unilaterally promoting a framework for regulation. By appearing to accommodate elite corporate actors' demands for the creation of a 'level playing field' and a 'one-stop shop' for merger control, the Commission was successful in securing a 'strong' policy partner and expanding its policy competence via a new area where it would be the sole EU institutional actor.

As presented above, Member State participation in setting the content of the MCR was prompted by the agenda set by the policy community and thus was minimal – resulting in only two significant concessions: the German clause and the thresholds. The majority of debate in the Council dealt with inter-negotiations between the 'big three' countries. Along the lines of Smith (1993) by incorporating these two concessions, one of which would be reviewed in three years, the members of the policy community were able to "set the rules of the game." This is because in the realm of competition policy and merger policy more specifically, the Commission is supervised only by advisory committees, which are unable to overturn decisions. Thus the Commission, by gaining

[24] Also Ibid.

policy passage, gained substantial discretion. Moreover, the institutional barriers to a Council revision of the MCR are extremely high – it requires a unanimous vote of the Member States. Hence, the default condition to such a threat is the status quo, meaning that in the absence of unanimous agreement on policy revision, the powers of the Commission stand.

It is also significant to note that the insular nature of the policy community that emerged in negotiating the MCR is illustrated not only by the virtual exclusion of policy input from EU institutions beyond the Commission, but also the exclusion of groups such as labour during the policy's formulation. This supports Cavanagh *et al's* (1995) observation that policy communities, compared to broader issue networks, generally deny access to any groups that fail to share the interests and goals of its members. Although the empirical evidence relating to the employment impact of mergers and acquisitions is extremely limited, the absence of labour from the MCR negotiations is nevertheless surprising because mergers are generally accompanied by a wave of instability and anxiety, which leads to disruptions or even the elimination of traditional bargaining units, making it more difficult to safeguard employment and working conditions. Therefore, mergers often have a profoundly destructive impact on company level industrial relations (Gugler and Yurtoglu 2004, 3). As de Boyer *et al.* (2000) state "the re-negotiation of representative structures and collective bargaining arrangements can often take many months, often with uncertain outcomes for the trade union side. It is not unusual for staff representation bodies or other forms of employee representation to be removed entirely as the result of merger."

Despite the fact that mergers "significantly reduce the demand for labour" organized labour gained no representation in the negotiations of the MCR: alone, Commission officials and corporate umbrella groups designed the MCR to serve as many of their interests as possible while winning the Council's approval for policy implementation (Gugler and Yurtoglu 2004, 4). This point again reflects the closed community aspect of this particular policy process. As Hoar (2000) argues, Brussels was.... a real 'dialogue city' for business and policy-makers," when it came to MCR negotiation. In the creation of the MCR, both parties agreed that these goals might not

benefit everyone, including workers. As leaders of DG Competition would later state with regard to the goals of the MCR,

> It may be that, in the short term, efforts to improve the competitiveness of firms by means of mergers or acquisitions involve restructuring and thus loss of jobs. However, this does not change the fact that improving firms' competitiveness on the global market is the only effective way to ensure the growth needed to create business (DGIV 2001).

Although the absence of labour in the MCR negotiations is enough to lead one to dismiss corporatism as a possible explanation on the basis that there is no evidence of a fixed, tripartite power consisting of the sate, labour, and capital, this fact may also dismiss pluralism since there is no evidence that the policy process was equally open to an unlimited number of actors. Other reasons why pluralism is an ill fit is the fact that the MCR negotiation process was well organized and both sets of actors were concerned with policy implementation – something pluralism does not account for. Another illustration of a lack of a corporatist process is that the cooperation between the Commission and elite corporate actors was based solely on *their* interests and not on the 'public interest' as corporatist systems purport. Moreover, the involvement of elite corporate actors in this particular policy process is not an example that can be used to support elite theorist arguments because economic actors could not and did not act unilaterally. They needed the Commission as a policy partner - with the result being that it did win most of its policy preferences, but not all of them.

Keeping this in mind, the use of policy communities, as characterized by the Rhodes model, informed by private interests is justified in this case for several reasons. First, a limited number of participants (Commission and elite corporate actors) operated in a largely insulated fashion, while other interests were consciously excluded. Second, there is evidence of interaction between the community members, each with their own goals, when particular issues were discussed. As shown, both actors voiced their concerns about the specific issues negotiated – jurisdiction, test and criteria, and time frame. Third, there was a consensus between elite corporate actors and the Commission as well as a consistency in values and policy outcomes shared by them. Although both sets of actors were guided by their respective self-interests, the shared goal of the creation

of an efficiently operated merger policy to complement the Single Market served to unite the actors. Fourth, the interaction between the actors was based on resource bargaining. As a consequence of the EU's institutional organization the Commission was viewed by economic actors as being the most logical policy partner since it had the 'power' to create a credible and coherent merger policy. On the other hand, elite corporate actors were viewed by Commission actors as being the immediate beneficiary of such a policy and thus relied on its expertise in research and market analysis as well as its influence in the Council. Extending on this last point, the MCR negotiations highlighted the interaction and interdependence between public and private actors, which can be characterized as a relationship based on elements of conflict and cooperation.

3.4 Twelve Years of European Merger Control: Managing Merger Mania

While this chapter has predominately examined and explained the type of policy community that was manifest during the formation of the MCR, it is necessary to briefly consider a snapshot of merger activity since 1990, how the MTF has coped with the challenges of regulating such activity and how the addition of merger control to EU competition law has altered the system as a whole. By addressing these issues one will be in a better position to understand the emergence of the two trends examined in the next two chapters.

Although merger policy can have several aims, it is generally thought that its core purpose is to ensure that mergers do not jeopardize conditions for competition as previously mentioned. Mergers eliminate any competition that exists between the merging parties and reduce the number of firms competing in the market. Where this reduction has a substantial effect on overall market competition, the market will be less oriented to consumer and efficiency goals, even in the absence of breaches of competition law. Acquiring business through successful competition for custom in the marketplace is one thing; acquiring business through merger is another, at least when competition is jeopardized. Most mergers raise no serious prospect of an increase in market power. In such cases, there is usually no reason for intervention unless, perhaps, public policy objectives (other than competition-oriented objectives) are jeopardized by the merger.

However, sometimes a merger presents a serious prospect of a detriment to competition. As alluded to in Chapter 1, if it were not for merger control laws, no doubt many more such mergers would happen. The core purpose of merger policy is to prevent the prospective anti-competitive effects of such mergers through appropriate remedies, including prohibition if necessary. Thus, merger policy works *ex ante*: it seeks to restrain those mergers, which, if allowed to go forward, would likely reduce competition.

As above, European merger control concerns itself exclusively with those mergers that either strengthen or create a dominant position. The criteria for assessing whether or not a dominant position is created or strengthened are based solely on competition concerns, with the possibility for efficiency gains to affect the overall decision. Therefore, it is possible by "showing that a merger has adverse consequences on competition or that it would increase prices is not enough to block it: under the MCR the finding of a dominant position is a necessary condition for prohibiting a merger"(Motta 1999b, 7). As clearly demonstrated earlier in this chapter, representatives of elite industrial Europe fought very hard to persuade the Commission to adopt a substantive test based on Article 86 rather than 85. This strengthens the idea that European merger control regards competition and economic efficiency over consumer welfare. Despite these seemingly stringent criteria, the MTF has been very active since the MCR came into force.

As Scherer and Ross (1990) point out, within the corporate world there are frequent spikes in merger activity and 'Merger Mania' is the term now used to describe these bouts of high merger activity (153-9). The merger waves of the mid to late 1980s, and the most recent wave of mergers in the mid 1990s serve as examples. From 1998 to 2000 the degree of merger activity in Europe was unparalleled. Commission (1999c) data shows that 292 mergers had been notified to it in 1999, which was an increase of 24% from the previous year and a 70% since 1997. In 2000 the number of notified mergers increased to 345 (2000b). A noteworthy general observation of the 90s global merger boom was the increase in transactions values. There was an increase in total world cross-border mergers from $237bn in 1995 to $797bn in 1999, and a fourfold increase in average deal size over the same period.[25] Over the past decade very large

[25] Financial Data obtained from KMPG

mergers have occurred in various sectors with activity particularly concentrated in telecoms, oil and gas, banking, the automotive, food and publishing industries. As previously discussed the anticipation of the single market, economic globalization and the creation of EMU and the Euro Zone are all factors that have fueled this massive repositioning of firms via mergers in the EU. According to the Commission's *European Economic Supplement* the motives for mergers within the EU have changed since the mid-1980s. It is the Commission's view that diversification, rationalization and synergies are less important now than the expansion and strengthening of market positions. Thus, firms in the EU are carrying out strategic asset seeking and according to the Commission (2000a) there are still enormous efficiency gains to be made in industries where reduction in competition from mergers is slight. Industrial sectors have correspondingly become more concentrated. As a consequence, the possibility for a reduction of competition within these sectors is of prime concern for the Commission and highlights the importance of merger control.

As seen in Table 3.1, which outlines the main statistics held by the Commission regarding decisions taken under the MCR since September 1990 when the MCR came into force until 31 July 2003, the Commission has made 2260 final decisions regarding mergers. 54 were Article 6 (1) (a) decisions stating that the notified transaction was not a merger or full-function joint venture or did not have a Community dimension, 2147 were cleared in the first phase, 113 entered into an in-depth second phase investigation. Of these 113 cases 85 were declared compatible with the Common Market with a majority of those declared compatible via compulsive remedies, while only 18 mergers have been prohibited outright. In addition, a total of 166 mergers were abandoned following objections raised by the Commission.

The aforementioned data suggests not only that the MTF has had to deal with an increasing amount of merger notifications, but also an increasing sophistication and complexity of cases. The significance of this is compounded by the fact that the number of MTF staff have not been increased in order to deal with the ever-growing complexity of its workload. During the 1990s DG Competition was staffed by 420 persons, of which half were staff-level professionals (rapporteurs). The professional staffing of DG Competition was extremely 'lawyer-heavy', with a ratio of approximately seven lawyers

to every one economist.[26] This imbalance was translated to the MTF, since its staff was cherry-picked from DG Competition, elsewhere in the Commission and seconded from national competition authorities. Thus, the 50 officials that made up the 'early' MTF were more inclined to apply the MCR procedurally correctly, but on occasion, produce inaccurate economic analysis. During the fist half of the 1990s the ratio of decided notifications to MTF case-worker was less than 2:1. In 2000 that ratio was nearly 8:1, which represents a fourfold increase in the MTF's workload. "Even if one take into account the increased competence which the officials have undoubtedly gained through intense experience, which is, in any event, balanced by the increasingly complex and sophisticated nature of the transactions submitted for control, such an increase cannot be good" (Overbury 2000, 450). However, despite being 'stretched to the brink,' the MTF has evolved into an effective regulatory agency with a great deal of power. Although the MTF's ratio between lawyers and economics did strike a balance during the early 2000s, there still remained a lack of precise economic analysis in a number of high profile cases which invited criticism from the Courts, firms and practitioners alike.[27]

However, despite this and other criticisms, during the dozen years since its adoption the MCR has evolved into an integral part of EU competition practice. Unlike other areas of Community competition law, where few formal decision have been adopted, the MCR has produced a rich and extensive jurisprudence that provides guidance to a variety of issues, including market definition and the substantive assessment of transactions affecting a broad array of markets. Of the operations notified, by far the largest proportion has involved joint ventures (around 48% of all notified transactions), with the remainder comprising acquisitions (38%), takeover bids (8%), and other forms of concentration (8%). As to the market sectors examined, over 20% of all transactions have involved oil, gas, mining, and chemical markets; another 20% have

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[26] The fact that there existed such a disparity between the number of lawyers and economists reflects the culture of early EC competition law. As mentioned in chapter 1, the EC competition system reflected a kind of administrative/judicial mix in which the Commission makes most decisions but operates within a judicial framework. The goal of DG IV during this early period was to 'make' competition law, devise procedures and explain all of this to Member States. Thus, the majority of DG IV had to be lawyers or possess a strong legal background. Over time, the need for economic analysis has surpassed or at least is on par with that of legal certainty.

[27] The recent amendments to the MCR in 2004 has among other things, appointed a 'chief economist' to DG Competition.

concerned consumer products; about 14% concerned financial and insurance markets; and 10% have involved the wholesale and retail trade. The other major categories have been telecommunications, media, and transport (Commission 1999b, 89).

Overall, one can be safe in saying that the Commission has been highly active, and the pace of it activity has been accelerating. This is certainly true for the fist ten years of the MCR's operation. Table 3.2 divides the twelve-year period in question into three periods, one comprising nearly three-quarters of that time (from September 1990 to December 1997), the second from January 1998 to August 2000, and the third from September 2000 to July 2003. Looking at the second period, there were significantly more cases notified than in the first, so the acceleration has been substantial. Although only eighteen mergers have been prohibited, many more have seen their approval subject to conditions, either after phase II investigation or to an increasing extent after the Phase I. Chiefly because of the increase in Phase I conditions, the proportion of cases that can be said to be directly influenced by the operation of the MCR has risen from a little over 10% in the first period to nearly 14% in the second. Regarding the third period, due to the worldwide economic downturn in the early 2000s the merger wave slowed as the numbers reflect. However, despite the downturn, nearly 10% of those cases were openly influenced by the MCR. It must be noted that since the cases under review involve all the largest corporate transactions in the EU, these percentages must count by any standard as substantial influence.

The emergence of merger control as the central tenant of the EU competition law has had fundamental implications for the whole of the competition system. It is important to understand that just prior to the MCR's inception there was a noticeable decline of 'activist' ECJ decisions. As discussed above, the Court during the first few decades of EC Competition law offered a number of forward-looking decisions and steered the Commission along the 'integration track.' It would seem that when the single market was re-launched some of the Court's intellectual leadership felt that it no longer needed to play as aggressive a role as it had in the past because other institutions like the Commission where now in a position to carry more of the burden of integrating the Community (Koopmans 1986, 925). The Commission has certainly not shied away from this opportunity. The establishment of the MCR and the increased case-load it brought to

DG Competition began to relegate the ECJ to an 'administrative court' in that its primary purpose is to hear matters of a 'procedural' nature and make sure that the Commission performs its functions correctly and operates within the rules it itself has established. As Gerber purports: "As the courts play a lesser role in setting the agenda of competition law and shaping its central decisions, there is less reason for the Commission to structure its decision-making by reference to the courts' methods (1998, 374).

From its inception, the MCR became the cornerstone of EU competition policy with the Commission as its 'custodian.' Because of its unrivaled autonomy in this area, there was a fundamental shift from the judicial components of the Commission's activity to more political or bureaucratic ones. The Commission has certainly "moved to set the agenda for competition law and provide new momentum for the system. In doing so it has tended to move toward the center of the system as the Community's courts have inched away from it. The impact on the system is likely to be fundamental, for, in essence, it would substitute an administrative institution for a judicial institution as the driving force within the system" (Gerber 1998, 381). In a recent speech ex-Competition Commission Mario Monti seemed to have confirmed this:

> The Merger Regulation, far from standing in the way of industrial restructuring in Europe, has facilitated it, while ensuring that it did not result in damages to competition. It has provided a 'one-stop-shop' for the scrutiny of large cross-border mergers, dispensing with the need for companies to file in a multiplicity of national jurisdictions... above all, we have put in place a merger control system which is characterized by the complete independence of the decision-maker, the Commission, and by the certainty that mergers will be exclusively assessed for their impact on competition (Monti 2002).

Clearly the significant amount of discretion and autonomy afforded to the Commission and subsequently to the MTF suggests that the EU competition model is based on administrative decision-making – where the Commission makes most decisions regarding objectives to be pursued. Moreover, the Commission's role as investigator, prosecutor, and judge in EU merger control gives it significant power and latitude to satisfy internal agendas. Although the vast majority of the Commission's decisions regarding mergers and joint ventures have been free of conflict and criticism, there have been cases where it has tried to extend its policy competence by either broadening the applicability of the MCR or by relying on disputed economic theories and speculating about future anti-competitive conduct to justify its decisions. The concepts of collective

dominance and portfolio power and the trends that evolved around them represent instances where internal Commission agendas where pursued despite the conflict they sparked with firms and the Courts.

During the early 1990s the MTF began to apply the MCR to mergers that would lead to a collectively dominant position - that is to say a dominant position held by more than one firm. Likewise, the mid to late 1990s saw the MTF attempt to apply the MCR to conglomerate mergers that showcased firms uniting complementary products in which one or more firms would enjoy significant market power. This kind of scenario has been termed 'portfolio power' by the Commission. In both cases, there is no explicit mention in the MCR about these concepts or the circumstances they produce. Nevertheless, the MTF has actively been trying to expand the MCR's scope to cover scenarios in which collective dominance and portfolio power arise as a result of a merger. This has resulted in strained relations with both the firms involved as well as elite corporate actors since the economic basis of the two trends is controversial and the boundaries of the policy are being challenged. As a consequence, the Community Courts re-established themselves once again as both friend and foe to the Commission.

Chapters 4 and 5 are dedicated to the trends of collective dominance and portfolio power respectively. It will become evident that the 12 cases analysed in the following chapters deal almost exclusively with Phase II investigations spanning the twelve-year period depicted in Table 3.2. Of these cases, 6 represent prohibitions: two of which are identified with the collective dominance trend and four identified with the trend of portfolio power. Apart from presenting a detailed analysis of the dynamics which help produce case outcomes during merger investigations, the following trend studies offer critical insights and explanations for 33% of all prohibited mergers since 1990.

Conclusion

The MCR negotiations and the issues on which they hinged, provide a clear picture of the policy actors involved. The two main actors were the Commission and elite corporate actors, which took the lead by working together in an insulated policy

environment. The third actor, the Council, acted more as a gatekeeper and eventually approved an acceptable draft that was largely formulated by the main two actors. Of particular importance is that on the substantive issues of the MCR the actors of the policy community operated in an insular fashion, were guided by their own self-supporting goals when negotiating, exchanged information to the exclusion of others, attained consensus, and ultimately achieved a similar outcome from which both would benefit – evidence that the policy community approach is the most useful in understanding this particular case. What is even more striking is that even in those instances where the actors did not achieve their objectives (thresholds and joint ventures) they managed to reverse those 'loses' several years later during the 1997 MCR Review - evidence that the actors would continue to work together during the implementation phase.

In sum, although one may argue that the creation of the MCR was a direct result of closed, collective action by representatives of elite industrial Europe and the Commission that can be explained based on the self-supporting private interests of both actors, how 'extendable' are the characteristics of the developed community when actual merger decisions based on MCR rules were taken? Although the review of the actual legislation and its procedures as well as the empirical data provided is useful in evaluating the progress of the MCR and the Commission's application of it, it does not shed light on the policy dynamics that lead to case decisions. Is it the case that the Commission, having complete institutional power in this policy area can ignore its community partner's interests? Or is it, as was the case in the developmental phase that the Commission and elite corporate actors are still dependent on each other to further their interests in the implementation phase? If this is indeed the case, are the actors involved in the later phase any different from those in the former? To this end, we turn to a more detailed analysis of the two major trends that have evolved since the MCR's implementation and the major cases that define them.

Chapter Four

Examining and Explaining Collective Dominance and European Merger Control

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Introduction

While the previous chapter examined and explained the policy-process when the MCR was formulated, this chapter and the following one seek to answer the second main research question, namely, why did the trends of collective dominance and portfolio develop during the implementation of the MCR? In order to offer a clearer picture of which actors were involved in the decision-making process during the implementation phase, what motivated them, and which self-interests were served, this chapter examines the trend of collective dominance, while Chapter 5 analyses portfolio power.

The entry of the MCR into Community law in late 1989, although viewed by most as being an important step in the regulation of the Single Market, saw a considerable amount of scepticism surrounding its implementation. Scepticism surrounded whether or not the Commission's resources would prove adequate to the workload; would the European system really ensure speed, a one-stop-shop and the legal certainty that the Commission's procedures in other areas of competition policy has so conspicuously failed to provide? In retrospect, its seems obvious that the MCR has silenced the critics. In twelve years the MTF has dealt with over 2,500 of the largest merger transactions in the EU in an expeditious manner, producing a rich jurisprudence. However, during this time it has also become evident that the Commission, in its effort to address perceived 'holes' in the Regulation, has strayed in its policy 'thinking' by introducing concepts such as collective dominance and portfolio power. Consequently, the Commission opened itself up to new scepticism, especially from firms and the legal and economic communities because the introduction of these trends seriously decreases their ability to analyse and predict with a reasonable level of certainty – how certain categories of mergers are assessed by the MTF.

Beyond a detailed discussion explaining what these concepts entail, this chapter, like Chapter 5, presents numerous case studies in order to map the policy evolution of the trends. The broad goals of this chapter are thus twofold. First, the economic and legal meanings of the concept of collective dominance are presented. Secondly, a discussion explaining how and why this was introduced into EU merger control is made. In so doing, an integrated discussion analysing which actors were involved in the implementation phase of the policy in question follows. It will be argued that in contrast to developments found during the formulation phase, there exists no 'community' of resource dependent, like-minded actors seeking to fulfil collective interests. Instead the implementation phase represents a more disaggregated policy environment defined by the actions of three main actors: the MTF, firms and the Community Courts. Before considering a more detailed analysis of the issues surrounding collective dominance, a general overview of the concept is offered in order to situate it within the MCR debate.

An Overview of the Issue of Collective Dominance

When the MCR entered into force in 1990 Competition Commissioner Brittan succinctly emphasized both the MTF's objectives and the Commission's will to apply its newly granted powers by stating that:

> My task is to discover which mergers stifle competition. They will be stopped. All others will proceed. All mergers with a Community dimension will benefit from the one-stop-shop regime. We have clarified and simplified the law in an area which was full of uncertainties and complications. The Community's single market now has a proper system of merger law and policy to ensure that its benefits are passed on to consumers and will lead to the enhancement of competitive industry (357).

Brittan's comments eased some of the pessimists' concerns (namely Germany and the UK) and, more importantly, preoccupations of elite industrial actors. Nevertheless, there remained widespread anxiety throughout Corporate Europe concerning the implementation phase. Would the relationship forged and the 'collective spirit' shared between the likes of the ERT, UNICE and the Commission during the formulation of the MCR continue or would Commission bureaucracy take advantage of the greater autonomy afforded to it by the MCR and seek to further self-serving agendas?

When the MCR was developed, it was argued that the Commission sought to regulate in order to increase the efficiency of and further promote the Single Market by closing a perceived 'whole' in the current competition system, while elite Corporate Europe sought to have rules clearly and centrally defined at the EU level in order to facilitate the ensuing corporate restructuring of a 'European market.' It will be shown that despite not being an issue during the development of the MCR, the Commission was nevertheless concerned about the regulation's ability to control mergers that would lead to market situations in which several firms would hold a 'collectively dominant' position. Collective dominance is usually referred to as a situation in which a small number of large firms are able to co-ordinate their behavior resulting in the creation or maintaining of anti-competitive prices. It was not until 1992 that DG Competition Commissioner Brittan suggested that a gap existed in the Regulation with regards to collective dominance and that the MTF should incorporate such arguments into its merger analysis. As Armstrong and Bulmer (1998) point out, "the Commission had effectively changed the law (MCR) through an administrative decision"(113). The concerns of the ERT and UNICE as well as specific firms became instantly obvious: collective dominance analysis changed the parameters of the game – it compromised the predictability and scope of the decision-making process that was ascertained during the formulation phase. As Kuhn argues, in such a complicated area of economic analysis the MTF created a set of ad hoc tests for collective dominance and this has effectively opened a Pandora's box of valid, invalid, and hard to evaluate arguments, some of which left merging firms no possibilities to disprove the MTF's claims (2002, 1).

After the MTF made use of it in several cases in the early to mid 1990s, the concept of collective dominance was recognized by the ECJ in joined cases *France and others v Commission* in 1998 and later confirmed by the CFI in *Gencor v Commission* (*Gencor Ltd. v. Commission* 1999). Despite these favourable rulings, the collective dominance concept was still surrounded by ambiguity because of the MTF's efforts to continually expand its scope - firms, economists, and practitioners argued that there was an extremely low standard of proof for collective dominance cases relative to that of single firm dominance cases. In the now infamous 2002 CFI decision on the *Airtours* appeal case (*Airtours plc. v. Commission* 2002) the Court ruled against the Commission,

claiming that the MTF's original assessment in the *Airtours/First Choice* case (*Airtours/First Choice* 1999) was a 'forced fit' in terms of collective dominance - the ramifications of the judgement benefited firms and practitioners alike because the Court clarified the test for collective dominance so that future cases would become more predictable. As such, the Court effectively constrained the Commission's policy entrepreneurship in this area.

The following chapter will demonstrate that the day-to-day operation of EU merger control presents a very different picture than the one found during the formulation of the policy. Because the Commission's powers over merger policy are based on strong MCR provisions, it does not need to engage in power dependence relationships with other actors to 'make' and 'sustain' policy. Furthermore, in contrast to the unity displayed by elite industrial interests during the formulation phase, one cannot treat economic actors (firms) as a unitary actor within the context of the implementation phase because the 'merger game' involves competing firms that do not share common interests. Thus, merger control can be characterized as a 'mixed-motive game,' where the MTF evaluates arguments presented by those firms party to a merger transaction as well as competitors who have an interest in seeing the transaction blocked or altered. The implication of such an environment is that the potential for conflict between competing interests is much higher in the implementation phase than was evident during formulation. This is because not only is there increased probability for conflict between firms, but also there exists the possibility of conflict between firms and the regulatory agency, especially if the latter seeks to implement policy changes that decrease firms' ability to play the game with a reasonable degree of certainty of the outcome. The emergence of the collective dominance trend and the MTF's use of it to expand the Commission's policy jurisdiction to examine mergers with possible oligopolist effects is an example of conflict within EU merger control policy.

However, it must be conveyed that although the emergence of the collective dominance trend resulted in strained relations between firms and the MTF, compromises were made and in a number of instances both parties benefited. It was not the case that the evolution of the collective dominance trend led to a massive number of blocked mergers; on the contrary, a significant number of cases dealing with the new concept

were permitted as a result of both negotiations between firms and MTF officials and, in some instances, judicial intervention.

With that said, the following discussion on collective dominance is divided in four sections. The first more fully explains 'collective dominance' in legal and economic terms and how it relates to the various oligopoly models developed in order to explain how firms act in situations where only a few firms occupy a market. The second section discusses the concepts that merger control regimes use to deal with oligopolistic markets. The terms unilateral and coordinated effects are discussed, as is the MCR's usage of 'dominance' to deal with both single and collective firm dominance. It will be argued that despite being well equipped to handle the former, the MCR's prescriptions for the latter situation are ambiguous at best. The third section discusses the emergence and usage of the collective dominance concept within the EU merger control framework. It will become evident that despite a rather conflict-free implementation, the MTF's introduction of the concept of collective dominance was and still remains controversial.[1] This section suggests that the Commission/MTF fulfilled its policy entrepreneurial interests while firms found themselves in an uncertain policy environment. In an effort to explain the emergence of the trend in question the fourth section maps the transmission of ideas between the Commission, MTF and the Courts and their effects on merger control policy via numerous case studies. The section thus offers a more detailed picture of which actors were involved in the MCR implementation decision-making process, what motivated them, and which interests were served. The chapter concludes with an assessment of the trend in question and the motivations that guided the actors involved.

4.1 Firms, Profits and Equilibrium: The Economics of Oligopoly and Its Relation to Collective Dominance

Collective dominance does not have a direct equivalent in the sphere of economics. It is a legal concept developed by the Commission to describe situations where a small number of large firms in a market are able to co-ordinate, not necessarily

[1] It was not until the most recent changes to the MCR (2004) that the issue of collective dominance was resolved. The new substantive test seeks whether a transaction would "significantly impede effective competition in the common market... in particular as a result of ... a dominant position." This was specifically done so that the test would cover transactions with 'non coordinated effects' such as collective dominance.

in an explicit fashion, their actions and maintain prices above the competitive level. Successful co-ordination requires not only being able to reach agreement on output and to monitor it, but also that some 'punishment' strategy is available to deal with 'cheating'(Lexecon 1999, 1). Since its introduction into merger analysis in the early 1990s, it is understood that 'tacit collusion' is the fundamental economic principle informing collective dominance. The Commission validated this view when commenting on the CFI's judgement in the *Gencor/Lonrho* case (*Gencor/Lonrho* 1996): "the question to assess in cases concerned with collective dominance is the likelihood of tacit co-ordination in the market" (Lexecon 1999, 23). The multitude of variables that can impact the sustainability of tacit collusion make predicting such behaviour by firms a risky business. Likewise, even if collusion is determined to be possible, this does not translate into firms actually colluding. Following from this, the economics that underpin collective dominance are complex and raise important issues. Because of this, we now turn to a review of the economic principles on which collective dominance is based in order to fully comprehend what the concept involves.

Although, the essential feature of oligopolistic markets is that firms recognize that their actions will influence the behavior of their rivals, or there is recognition of interdependence, Ross and Scherer (1990) argue "the problem of oligopoly is indeterminate because anything can happen." This underscores the major problem with such a theory: an enormous number of assumptions can be made by firms and as a result many different market-outcomes may be observed, ranging from competitive to collusive behavior. Because of the multitude of possible outcomes, oligopoly theory is one of the most contested and least successful areas of economics. As Stigler (1966) states, "the theory of price formation which oligopoly is, and for more than a century has been, one of the less successful areas of economic analysis, in spite of the fact that almost every major economist has thought about the problem, and a large number have written on it"(216).

The study of oligopoly was first limited to a static model that was developed in order to answer the question: if two firms have exclusive rights to a resource, then how much will the two, in the absence of any explicit communications, decide to sell? How will firm A respond to firm B's actions? Augustin Cournot first attempted to answer

these questions by assuming that each firm views the other's output decision as fixed. Although Cournot's theory dates back to the mid 1800s, it is still considered a mainstream oligopoly model because it still gives some key insights into how oligopolistic firms deal with their mutual interdependence.

Cournot's Model: A One-Shot Game

Not only is Cournot's work considered a cornerstone of both oligopoly theory and modern industrial organization, but his work is also considered a classic game theory model because his equilibrium pre-dates that of Nash's. According to Cournot once output decisions are assumed to be fixed, firms make their output decisions as though they were a market monopolist. "This process of each firm choosing an output conditional on the other's output choice is to be repeated. For every output choice by firm A, firm B is shown to have a unique profit-maximizing response and visa-versa"(Pepall, et al. 2002, 237). Cournot concluded that as a result of successive steps, an equilibrium implying positive profits for both firms would be produced. This Cournot-Nash equilibrium can be explained as the pair of output levels at which each firm's choice is the profit-maximizing response to the other's quantity. This verifies the idea that firms in an oligopolistic market structure recognize their mutual interdependence and, in so doing, restrict their output below that of perfect competition (although not by as much as a monopolist would). This finding demonstrates that even in its simplest form, oligopoly produces extremely varied outcomes. Rivalry between two firms can be expected to lead to an outcome somewhere between perfect competition and monopoly, but it can by no means be predicted exactly where the outcome lies. These results can be easily derived from a single-shot prisoners' dilemma game.

It is clear from the game represented by Table 4.1 that both firms would prefer to be able to communicate in order to arrange their defense in such a way to benefit both players – mutual cooperation RR.[2] However, because firms recognize their state of interdependence they restrict output to a point somewhere between the perfect competition and monopoly levels. They do not restrict their output all the way to the

[2] R in two-by-two games like prisoners' dilemma symbolizes Reward, where P stands for Penalty.

monopoly level, where both firms could maximize and enjoy their joint profit because that is an unstable equilibrium. The temptation to cheat and revert to the Cournot-Nash equilibrium is enticing for both firms because in the absence of communication, each can either choose the dominant strategy – to defect (PP) which will produce the lowest prices - or choose the dominated strategy and receive the sucker's payoff S (Tsebelis 1990, 62-3). It is also important to note that according to Brozan (1982), if one extends the Cournot model to games with more then two players, one will find that "as the number of sellers increases, the output approaches the competitive solution rather quickly ... so even if there is 100% collusion between firms, the price will be very near the competitive charge."

Taken as a whole, the static model of oligopoly does shed some light on how policies dealing with regulating markets should approach suspected collusive behavior between firms. The fact that there are few firms in a given product market and that these firms recognize their mutual interdependence is not enough to suggest anticompetitive behavior in the form of collective dominance. Oligopolistic interdependence exists in all oligopolistic markets. This interdependence is a necessary condition for collective dominance, but not a sufficient one since, as discussed previously, it can lead to very competitive outcomes as well as collusive ones. However, because the nature of relations between firms in an oligopoly are not static there is a need to dive deeper into oligopoly theory.

Tacit Collusion: Repeated and Infinite Games

The focus of 'dynamic' (as opposed to static) oligopoly theory questions how firms can reach and sustain a collusive outcome – outcome R,R – if the above game is played repeatedly or infinitely over time. The primary question asked is how a sustainable collusive outcome can be obtained without explicit agreement or collusions, specifically, only by means of coordinated behavior, or 'tacit collusion.' "This expression refers to firm behavior that gives rise to an anti-competitive market outcome in any other way than by binding contract. The common factor of these situations is that firms literally 'stick together' at a supra-competitive price level and do not compete in an

active way"(Tirole 1988, 207).[3] As will be argued throughout this chapter, it is tacit collusion and not just oligopolistic interdependence that leads to collective dominance.

According to Viscusi *et al.*, there are several important differences between the static one-shot game and the infinitely repeated Cournot game. Because a firm chooses output more than once, forming a strategy is complicated. Second, each firm will receive information over time in the form of past prices and quantities. Though firms choose output simultaneously in a given period, each firm can observe the other firm's past outputs as well as the resulting market price. Finally, each firm acts to maximize the sum of its discounted profits rather than just today's profit (Viscusi, et al. 1995, 113).

The study of tacit collusion by economists has given way to mixed results. One interpretation is that collusion is not a sustainable equilibrium in a repeated game since cheating in the last period is always the dominant strategy. However, the work of Axelrod suggests that if the game is played several times, and if there is some uncertainty over whether other players are perfectly rational, patterns of collusion may emerge. This can be demonstrated by using Axelrod's (1984) 'Tit-for-Tat' strategy. Here a player will cooperate on his first move and then do whatever the other player did on the previous one. By using this strategy, one will defect once after each defection and cooperate when the other player cooperates. Thus, players react quickly to cheating, but revert back to the collusive outcome if the rival does so.[4]

Infinitely repeated games, or 'supergames' as they are often termed, differ from repeated games in that there is always the possibility of retaliation or punishment of a cheating rival in the future. The problem here is that a large number of different equilibrium outcomes can result – some of which are collusive while others are competitive. Notwithstanding, the theory does identify some conditions in which the collusive outcome becomes more sustainable. However, the sustainability of this outcome depends on the ability of firms to detect and respond to cheating by rivals. If this is indeed the case, then the likelihood of prolonged sustainability increases with the severity of the punishment.

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[3] It is worth noting that in economic theory, market outcomes are defined as prices and quantities.
[4] Also see whole of ch. 2.

A review of the theory of tacit collusion reveals that by interacting repeatedly, firms may be able to maintain higher prices by tacitly agreeing that any deviation from the collusive path would trigger some sort of retaliation. To be sustainable, retaliation must be sufficiently likely and costly to outweigh the short-term benefits from 'cheating' on the collusive path. These short-term benefits, as well as the magnitude and likelihood of retaliation, depend in turn on the characteristics of the industry or market. This form of collusion has a simple interpretation: firms trust each other to maintain collusive prices; but if one of them deviates, trust vanishes and all firms start acting in their short-term interest (Ivaldi, et al. 2003, 5-6). However, there may be more effective ways to support collusive conduct - more sophisticated forms of retaliation may inflict tougher punishments and thereby allow sustaining higher collusive prices. As Viscusi *et al.* points out, in contrast to the one-period game, some tacit collusion games do show that firms are able to produce at the joint-profit maximum without either firm having an incentive to cheat and this is made possible because a firm's output decision is dependent on the past behavior of its competitors and because firms value future profits. Thus, if a firm cheats, it raises its current profits, but the punishment of future collusion breaking down lowers future profits because of the inevitable punishments.

Although the above overview of the major facets of oligopoly theory offers no clear-cut policy prescriptions regarding collective dominance, it does offer insights into the nature of competition and the interaction in markets with only a few competitors. It indicates which market conditions may lead to various types of behavior, thus making it possible to identify some general criteria of market structure and conduct for the assessment of collective dominance. Most importantly it has shown that citing the existence of an oligopolistic market is not enough to prove that firms within that market are or will become collectively dominant. It must be shown that the firms within that market are colluding tacitly in order to achieve joint profit maximization.

Because of the various factors that can affect the sustainability of collusion, determining the likelihood that firms will actually collude is extremely difficult.[5] The fact that firms could sustain collusion does not mean that they actually succeed in doing

[5] A non-exhaustive list of factors that affect collusion among firms are: high concentration levels, stable and symmetric market shares, similarity of cost structures, stagnant demand, inelastic demand, homogeneous products, and low levels of technological change. (See Viscusi et al. 1995, ch.5).

it. As Ivaldi *et al.* points out, in particular, firms may well compete in each period as if it were the last one, even if there is another equilibrium in which they could maintain monopoly pricing in each and every period. It is thus impossible to rely on a theoretical analysis alone to determine whether collusion is actually taking place (Ivaldi, et al. 2003, 59-60). Thus, it is obvious that predicting future collusive behavior by firms in oligopolist markets is a difficult task facing any competition authority.

With the basics of oligopoly theory presented it is now appropriate to consider how the goals of merger policy in general, and EU merger policy, in particular, deal with this problem. By doing so, the concept of collective dominance will be further clarified as will be its use in EU merger policy analysis.

4.2 Oligopoly and EU Merger Policy: Unilateral, Coordinated Effects and Dominance

Merger control regimes recognize that it may be preferable, on occasion, to prevent the acquisition of market power since it can frequently prove difficult to control the exercise of such power once acquired. Thus, an efficient merger control regime should seek to identify and, where appropriate, apply the 'negative' aspects of competition by stopping those mergers that would allow a firm or firms to acquire undue market power, while at the same time support the 'positive' aspects of competition by placing minimum difficulties in the way of all other mergers that enhance competition (See Goyder 1998, 572). As mentioned in Chapter 1, mergers can be categorized into three types: horizontal mergers which are those between firms in the same market; vertical mergers which involve firms at different levels in the production/distribution chain; and conglomerate mergers between firms in unrelated industries. Competition problems arise most frequently in the case of horizontal mergers as they involve a reduction in the number of competitors. In general, however, concerns only arise in markets where there are relatively few competitors or where the merging firms have a disproportionately large market share. Vertical mergers may create competition concerns if they block rivals' access to essential raw materials or to distribution outlets. Conglomerate mergers are generally considered less likely to pose a threat to

competition, although there may be the risk that the merged firm will use profits in one sector to finance predatory pricing in another.

Mergers may hinder competition by raising one of two major types of potential problems. The first are 'unilateral effects' that arise when a merger creates or strengthens a dominant position enabling a firm to raise price unilaterally. As Kuhn (2002) summarizes:

> Unilateral effects are very well defined. They are the equilibrium price changes that can be expected to arise from the changed incentives for short run profit maximization by merging firms. The price effects of mergers from unilateral effects are driven by the impact of the merger on the short run best responses of firms. There are well-established empirical methods to assess the order of magnitude of such effects (4).

The second problem that mergers may lead to are 'coordinated effects' which may arise because a merger may facilitate the operation of a collusive agreement. Coordinated effects then refer to the reduction in welfare caused when the merger enables a collusive equilibrium to emerge in the market. This is where collusion, tacit or otherwise, comes into play. Thus, collusion in the realm of merger policy refers to firms' attempt to reach, via a merger, the joint profit maximizing outcome, resulting in higher prices and lower output than the competitive levels. In effect, it represents a reduction in competition in the market with other possible consequences on top, such as a reduction in the rate of innovation or level of quality. Even though firms may be acting independently from each other, as in the case of tacit collusion, they reach a 'coordinated' outcome. The merged firm is only able to raise its prices if its rivals match this increase and if every firm in the oligopoly fears a return to competitive prices and profits if it undercuts its rivals. As pointed out above, market conditions must be such that firms are able to reach terms of coordination, to detect and to punish deviations from these terms. Thus, coordinated effects result from an anticipation of coordinated actions and re-actions such that market power is exercised by collective action. Put simply, "the coordinated effects of mergers are nothing else but the impact of the merger on the tightness of the constraints that determine the range of possible behaviors in a particular market"(Ivaldi, et al. 2003, 5).

Since the definition of collective dominance is the control that several firms hold together in a market, it is clear that if collective dominance has been created or strengthened by a merger, the merger has produced coordinated effects. However, the MCR does not use the language of unilateral and coordinated effects. Rather, it refers to

mergers creating or strengthening a dominant position. As mentioned in the previous chapter the term dominance which the MCR is centered on was imported from Article 82 of the Treaty. The judgments of the ECJ involving Article 82 decisions and especially the *Philip Morris* decision, have produced a definition of dominance as being:

> a situation of economic power held by a firm, which allows it to hinder effective competition in the relevant market. It puts the firm in a position to exert considerable influence on the conditions in which competition is to develop and to act without having to take that into account (Commission 2000b).

The Commission has used this definition in its merger cases where the question posed was whether the merger would create or strengthen dominance significantly and thus impede effective competition.

Referring to the ECJ's definition of dominance, many have argued that the definition suffers from ambiguity and is not economically sensible. However, since the MCR's entry into force a clear consensus has formed that one would inevitably have to interpret the ECJ's definition as referring to what economists call 'market power.' As Whish (2001) argues, a dominant position has therefore been widely referred to as a position of substantial market power enjoyed by a firm. Following from this, the "creation or strengthening of a dominant position" through a merger would be translated into the "creation or strengthening of substantial market power through the merger"(219). Given this, the association of dominance concepts in mergers and those of unilateral and coordinated effects can be made based on the definitions above.

Although this thought process clearly links EU merger control practice with economic theory, the problem of connecting dominance concepts to coordinated effects in EU merger control remains because it presupposes that the MCR expressly allows for a 'collective dominance violation' as per the definition of dominance under Article 82.[6] As seen in the *Alcatel/Telettra* case (*Alcatel/Telettra* 1991) however, the MCR only speaks explicitly to unilateral effects or dominance arising from a single firm.

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[6] The dominance test under Article 82 begins with: "Any abuse by one or more undertakings of a dominant position ..." This is in contrast to the test under the MCR which starts with: " A concentration which creates or strengthens a dominant position...."

During *Alcatel/Telettra*, which involved the merger of the dominant suppliers of telephone transmission equipment in Spain, the Commission asked whether the merging firm could behave to a significant extent independently from possible competitors in Spain. It answered negatively on the grounds that its competitors were well-established firms and would therefore not be hurt by the combination. However, this line of inquiry can cause the analyst to miss (collective) market power where it exists since the nature of tacit collusion is not explicit. Therefore, assessing the potential competitive harm of the merger on other firms in the market is not enough – the potential for tacit collusion between the new firm and the existing firms must also be assessed. Moreover, it is in tension with applications of the concept of dominance under Article 82, where the Commission has recognized dominance at market shares as low as 40% and in markets that include a few other healthy firms. In other words Article 82 includes, in the concept of dominance, a market structure in which the leading firms can expect its competitors to cooperate when prices are raised because they all will profit; growth to dominance does not necessarily entail hurting the competitors.

The practice of merger control by the MTF has shown that the appropriate economic estimation of whether a merger creates incentives for the merging firms to significantly increase the price is often not possible on the basis of available data. For this reason the MTF created an informal standard that any merger leading to a market share above 40% creates the presumption that single firm dominance is obtained. The existence of such a benchmark has been applauded by both economists and practitioners alike since it allocates the burden of proof between the MTF and the merging firms. In Kai-Uwe Kuhn's words, "at a market share of around 40% economists would generally feel relatively comfortable with the idea that market power could be a considerable problem"(10).

However, collective or 'oligopoly power' can be created or entrenched by a merger that creates many different firm/market share ratios. For example a merger may result in three 33 1/3% firms, or four 25% firms. Mergers that create these kinds of market conditions clearly interfere with the explicit Treaty goal, expressed in Article 3(f), of assuring undistorted competition within the EC. As Fox (1991) argues, mergers which lead to collectively dominant positions are more common than those that lead to single

dominance. Yet, as illustrated by the above arguments and example, markets dominated by two, three or four firms are by definition not within the model of single-firm dominance (742). Specifically, the above example of MTF analysis highlights the deficiency in the application of the MCR to cases where outright single firm dominance could not be established, but the merger still represented potential harmful effects to competition via collusion. Echoing Commissioner Brittan's concerns later expressed in 1992, Fox pointed out that "a new European merger jurisprudence (the use of collective dominance arguments) would recognize that the continued existence of important competitors or potential competitors does not necessarily defeat the case for dominance. This recognition would bring merger jurisprudence more closely into line with Article 86 (82) jurisprudence"(742). These concerns set the context for the development of collective dominance, an evolution to which we now turn.

4.3 The Evolution of The Collective Dominance Agenda: Commission Interests Exposed

Brittan's 1992 public acknowledgement of a regulatory hole in the MCR framework represented the beginning of the Commission's 'crusade' to include collective dominance arguments in the MTF's merger analysis. Nevertheless, Whish (2001) has shown that the MTF looked for problems of tacit coordination when investigating mergers from the earliest days of the MCR. He argues that this was not surprising given the fact that a study carried out for the Commission by Kantzeback and Kruse[7] in 1986 suggested that it should be the aim of competition policy to prevent situations arising which form a hotbed for tacit collusive behavior(482).

During the development of the 1986 draft MCR the Commission commented on the Kantzeback and Kruse study (henceforth, K&K study) and its relevance to merger policy. The Commission stated that one of the principal objectives behind the then proposed merger regulation was to prevent the creation of market situations which will result in stable collusion between oligopolists (Whish 2001, para.331-3). This study concluded that there were two essential features of collective dominance:

[7] See Commission (1986, 285).

(i) a concentrated market in which a small number of enterprises account for most of the turnover without any single enterprise holding a dominant position; and

(ii) a high degree of interdependence as concerns the decision-making process of these enterprises.

Regarding the latter point, the study noted that the reduction of competition in a tight oligopoly does not necessarily lead to tacit collusion, although the latter "may, however, arise from the fact that the members of the oligopoly become aware of their interdependence and of the probably unfavorable consequences of adopting a competitive attitude"(Whish 2001, para.331).

The existence of the K&K study suggests that even prior to the adoption of the MCR, the Commission had begun serious deliberation on two fronts. First is the possibility that a merger control regulation might be used to regulate mergers in concentrated markets even where the concentration did not create or strengthen an individual dominant position. Secondly, the Commission envisioned relying on a theory of collective dominance to do so, even where there was no prior history of collusion. At first glace, given the existence of this report, it is surprising that the MCR lacks wording that would possibly enable the MTF to analyze a merger using a theory of collective or joint dominance. The inclusion of a collective dominance phrase in Article (2) of the MCR would have clearly enabled the MTF to scrutinize mergers other than those that created single firm dominance. However, in retrospect one may argue that those Commission officials who were involved in the drafting of the MCR understood the possible negative consequences of such an inclusion.

As discussed in the previous chapter, MCR negotiations were not easy and even though the MCR took roughly 15 years to become policy it was not until the 1984 draft negotiations that the interests of elite corporate actors where taken into account by the Commission. The policy community forged with peak employers organizations and the Commission was a delicate one prior to the 1986 draft as there were major issues that had to be resolved in order for negotiations to proceed. It is possible that although Commission interests wished to introduce the idea of expanding the scope of the dominance test to include collective dominance arguments, it was agreed not to do so on the basis that it might have jeopardized further involvement of elite economic actors in the discussions. Rehashing arguments presented in chapter 3, it was clear to the

Commission that elite industrial actors especially the ERT, were the key to MCR passage in the Council.

Sources interviewed stated that mention of collective dominance concerns by the Commission would have placed strains on its relationship with the business community because it would have made the MCR less appealing to corporate actors by expanding the scope of the dominance test. It must be remembered that during negotiations the ERT and UNICE fought hard for the specific wording of Articles 2(2) and (3) of the Regulation. Clearly they pushed for a narrower interpretation of Article 82: instead of basing the test of the notion that "*any* abuse by one or more undertakings of a dominant position..." the MCR reads "A concentration which creates or strengthens *a* dominant position...." A DG Competition official interviewed in 2001 suggested that "collective or joint dominance concerns were on the minds of the Commission negotiators during the talks leading up the adoption of the Regulation."[8] It was latter said that the German position of wanting an exception to the Commission's sole jurisdiction as to where a concentration would be particularly harmful at the domestic level was based on the concern of oligopolistic conditions that may arise. Although those interviewed stopped short of providing a definitive answer, it was suggested that the existence of the 'German Clause' within the Regulation's framework effectively killed two birds with one stone: it satisfied the German (and UK) concerns of case referrals to the Member States and a the same time went some way to elevate the Commission's collective dominance dilemma. As one official stated, "it (the Commission) did not have to fight for a broader reading of the dominance test based on Article 82, which would have most definitely been met with stiff resistance from the business lobbies, since cases dealing with collective dominance that were concentrated within a particular Member State or States could be relegated to the competition authority of that state(s)."[9] However, as argued below this did not occur – the Commission seldom agreed to refer cases to Member State jurisdiction. Instead, besides drawing from conclusions of the 1986 commissioned K&K report, the Commission used the fact that the UK and Germany already had merger rules relating to

[8] Eric Shea, Interview with DG Competition Official, May 6 2001.

[9] Ibid. Also Eric Shea, Interview with Competition Lawyer, March 22 2001., Eric Shea, Interview with High Ranking Irish Competition Official, March 1 2002. Also see Whish and Sufrin (1992).

collective dominance situations to justify such an inclusion in the MCR (Whish 2001, 482).

As will be discussed below, firms viewed collective dominance as a dangerous tool because of its complex economic basis. As Kuhn argues, the use of collective dominance in EC merger control enables the MTF to "obtain even wider discretion to block virtually any merger that creates suspicion, even if hard data cannot confirm this view. This move towards more discretion has the undesirable effect of an associated creeping reversal of the burden of proof in merger cases (12)." With this in mind, the policy dynamics concerned are clear: the fact that the Commission actively researched and discussed the possibility of altering the MCR draft to include collective dominance arguments to block mergers, but did not push for such an inclusion so as not to undermine its relationship with elite economic actors again highlights the highly interdependent nature of the 'merger control policy community.' However, as hinted to above and will now be discussed, once the MCR come into force the Commission and the MTF acted unilaterally to pursue its collective dominance agenda.

Apart from the two aforementioned justifications used by the Commission to pursue its agenda, it was also the case that soon after the MCR came into force in 1990 the MTF felt strongly that the 40% single firm dominance threshold traditionally applied to merger cases was too high.[10] As Kuhn (2002) states, "there seemed to be an implicit intention to use joint dominance as a device to lower the market share threshold at which mergers could be blocked without further direct proof of market power"(13). In other words Kuhn strongly suggests that it became a widespread view amongst MTF officials that the 40% market share level for a presumption of competition reducing mergers was too high and introducing the use of collective dominance arguments was a way to address these concerns in the Commission without formally changing the standards of single firm dominance analysis stipulated in the MCR. Without fully confirming the threshold issue, one MTF official stressed that there was an evident perception within the MTF since the

[10] As discussed previously, the appropriate economic estimation of whether a merger will create incentives for the merging firms to significantly increase price is often not possible on the basis of available data. For this reason European level merger control has created an informal standard that any merger leading to market shares above 40% creates the presumption that single firm dominance will be obtained.

1991 *Alcatel/AEG Kabel* case[11] that the original dominance test was too narrow and should be either changed or read more broadly to incorporate concentrations in which multiple firms are market-dominating – that is where multiple firms have significant market share of greater than 30%."[12] Likewise, commentators such as Korah (1999) agreed that the European dominance market share test was so high that significant coordinated effects could not be captured. Furthermore, the development of the Commission's collective dominance agenda must also be analyzed within the context of the criticisms levied against it by Germany and the UK for being too lenient in its application of the MCR and the political backlash (by France and Italy) of its decision in the *de Havilland* case. It is clear that in order to appear more 'strict' and focused on considering only competition based criteria in its merger assessments, the MTF actively sought to include 'collective dominance thinking' into its analysis, thereby creating a kind of "artificial concept" in which it could "shoehorn" the decisions it wanted to make into a framework that was "not really appropriate for them" (See evidence presented by Kay and the Competition Law Association in UK European Union Committee's Thirty-Second Report 2002). It is because of this informal or 'backdoor' policy tactic employed by the Commission that economically appropriate standards of proof for collective dominance cases did not arise until firms began to complain and the Courts became involved.

The unilateral development of a collective dominance concept thus represented a win-win situation for the Commission/MTF in the form of three payoffs. First, although the addition of collective dominance analysis to the MCR framework would only affect a small percentage of mergers, these would be very significant (as the below analysis of the case law will show). Following from this, the introduction of the concept would broaden the Commission/MTF's competence and policy jurisdiction without Council approval by allowing it to use a wide range of arguments as to why a merger may increase market power. According to Kuhn (2002), the Commission effectively lowered the presumption

[11] In this case the German FCO made an Article 9 request for referral on the basis that the merger would create a situation of oligopoloistic dominance because three suppliers would have together held more than 50% of the market. As mentioned above, German competition law does presume that three or four firms having the highest market shares are presumed dominant. The Commission did not grant the German request.

[12] Eric Shea, Interview with MTF Official, May, 6 2001.

for 'problem' mergers to include even those transactions leading to total market shares well below 30%. The net result for the MTF is now more obvious: besides a wider jurisdiction in which to act it also gained a substantially wider discretion to scrutinize suspicious mergers. Secondly, by addressing oligopolistic market structures in its analysis, the MTF would be able to deflect much of the German and British criticisms pertaining to the lenient treatment of mergers under the MCR and further reduce instances of referrals to Member States under Article (9). Thirdly, the increasingly complex caseload that would result from the addition of collective dominance cases and the ability of the MTF to meet the demands of these cases would help establish its 'elite' reputation as an adaptable, efficient and approachable agency within DG Competition. As shown in the next section, the effects of the Commission and MTF's entrepreneurship via the use of collective dominance were dramatic for those cases deemed to involve possible tacit collusion.

Although firms were initially concerned about the use of collective dominance when Commissioner Brittan announced that the Commission would actively seek to fill the perceived hole in the regulation, it was not until the MTF began to use its newly acquired discretion to scrutinize merger deals that corporate fears surfaced. Firms understood that if their merger was labeled by the MTF as a 'collective dominance case' the deal would be very difficult to push through unfettered. As such, in the realm of MTF collective dominance analysis it was impossible for firms to predict the outcome of *any* deal because there were no set criteria to be used as reference (Voigt and Schmidt 2003, 90-101).[13] Furthermore, once mergers raised collective dominance issues, firms could not defend themselves. For instance, if they argued that the market was not likely to produce a collusive relationship because significant punishments were not credible, the MTF could turn around and say that punishment mechanisms are not necessary for collective dominance. It then would become incumbent on the firms to prove that their merger did not cause significant unilateral effects, even if the deal fell below the 40% threshold. At the same time, coordinated effects could be systematically found based on unquantifiable structural 'checklist' criteria such as multi-market contact, homogeneous

[13] This study was commissioned by the ERT.

products, stagnant demand and similarity in cost structures (Lexecon 1999).[14] Firms contacted by Kuhn (2002) suggested that the added discretion of the MTF was slowly reversing the burden of proof in merger cases from the competition authority to the firms involved. Moreover, besides these direct negative effects there is also the fear – held by firms and practitioners alike - that by allowing the standard for automatic intervention from the traditional 40% benchmark, it would reduce the pressure on the MTF for rigorous analysis of cases (Kuhn 2002, 12-13). A study commissioned by the ERT thus seemed to suggest that *primae facie*, fewer cases would then be subject to substantial review by the Courts and the MTF would be subject to even less scrutiny and consequently face even less frequent sanctions for unfair decision-making (Voigt and Schmidt 2003, 99).

Despite outlining concerns regarding the concept of collective dominance into EU merger control, one may argue that in reality the concept was not a major conflict issue between firms and the MTF. The concerns of economic actors focused more on the development of the concept's criteria and scope - for the initial collective dominance concept of the Commission contained no clear framework as to what factors contributed to such a market structure. As discussed in more detail below, through the use of pre-notification and remedy negotiations firms were able to a large extent direct the concept's development in such a way that its concerns of predictability and agency accountability were taken into account. As the below trend analysis will demonstrate, when conflicts of interest arose firms worked with the MTF to find avenues that would allow mergers to proceed. In some instances when negotiations failed, firms engaged the accountability device stipulated in the MCR framework by appealing Commission decisions to either the ECJ or the CFI. It will be shown that through negotiations and Court judgments (some teleological) a clear definition and prescription of collective dominance analysis has emerged. The trend of collective dominance took roughly ten years to clarify and during that time there were numerous case conflicts between the MTF and firms and between the Commission and the Courts. However, for the most part, few

[14] Although there exists no agreed 'test' for collective dominance, in the MTF's view the following factors in a market are typically thought to facilitate co-ordination: high concentration levels, stable and symmetric market shares, similarity of cost structures, stagnant demand, inelastic demand, homogeneous products, low levels of technological change. These characteristics have become known as the 'checklist.'

mergers were blocked on the basis of collective dominance and the actors involved were able to further their individual interests.

The next section offers detailed analysis of numerous merger cases, including those that were appealed. The cases examined are in chronological order[15] and represent the major decisions that define the emergence and extension of the collective dominance trend.

4.4 Mapping the Collective Dominance Trend: Cases In Point

The dual purpose of the following section is to examine which actors were involved when the MCR rules where put into practice and what their motives were by presenting a study of the major cases that define the collective dominance trend. The integrated discussion of the case law outlined in Table 4.1 will produce a 'map' in which one can trace the evolution of collective dominance and how the 'concept' was transmitted between multiple actors, namely the Commission/MTF, firms and the Courts, over time. According to Goyder (1998) analysis of the framework for the application of the detailed rules of the system cannot, by itself, provide answers to questions arising during the implementation of the detailed system of rules. It is therefore appropriate to examine the case-law of the Commission and Courts in order to answer these questions (See 565). Thus, the following 'linear' analysis will provide explanation of collective dominance's development and persistence.

With the MTF seeking a case where it could establish its *de facto* ability to control mergers leading to potentially collective dominant positions, it tried to incorporate such analysis in the *Varta/Bosch (Varta/Bosch 1991)* and *Alcatel/AEG Kabel* (*Alcatel/AEG Kabel* 1991) cases. The former merger saw the creation of a duopoly in Spain with each party holding a 45% of the Spanish market. However, the Commission declared the deal compatible with the Common Market based on the MTF's findings that effective competition from other firms existed within the entire Community. Likewise, the latter case saw three companies hold an aggregated market share of more than 50% in

[15] In an effort to make the below case analysis more fluid, appeal cases and the merger cases for which they are based are presented together even though the appeal judgments were handed down several years after the original Commission decision.

the German market. Again the Commission allowed the merger, denying the existence of an oligopoly because of the lack of structural links between the three companies.

Despite reluctance to use collective dominance arguments in the above cases, an occasion did arise in early 1992; the *Nestlé/Perrier* case (*Nestle/Perrier* 1992) represented the first occasion where the MTF required commitments from the parties as a condition for clearing the merger that it considered would create or strengthen a collectively dominant position. Consequently the decision attracted enormous attention, since it demonstrated that the MTF was prepared to intervene on the basis of collective as well as single firm dominance under the MCR. *Nestlé* was an important collective dominance case because it was the first time the MTF intervened in a merger based solely on the concept. For "it (MTF) would not have had power to demand the commitments in the absence of a finding of collective dominance"(Whish 2001, 483).

Setting the Collective Dominance Precedent: Nestlé/Perrier

In February 1992, the multi-national Swiss-based food conglomerate, Nestlé, notified the Commission of its intention to acquire all of Perrier, a French bottled water-company. The proposed merger would have left Nestlé with 48% of the French market for mineral water, with the next largest supplier being BSN with a 20% share. However, in a bid to squeeze the deal past the MTF, Nestlé agreed to sell Volvic (one of Perrier's leading brands) to BSN if the merger was approved. Estimated post-merger market shares with the Volvic deal would have left Nestlé with 37% and BSN with 31% of the market. The MTF was concerned that even with the Volvic deal, the merger posed significant problems for competition in the French market for bottled source water. Although the sale of Volvic would have eliminated the threat of a Nestlé monopoly, the MTF believed that Nestlé and BSN would become collectively dominant.

After notification of the merger and preliminary Phase I analysis, a deeper Phase II investigation into the merger ensued. As mentioned in the previous chapter, this kind of investigation is best characterized as an informal and closed process involving only the rappourteurs, high-level MTF officials as well as the firms concerned and in some instances third parties such as competitors. Relative to the 'merger control policy community,' wherein actors within the Commission led by DG Competition and the elite

umbrella organizations were involved in the formulation of the MCR, the actors involved during regulation of the merger process based on MCR rules consists of more specific actors - namely the MTF, specific merging firms and the Community Courts.

As conceptualized in Figure 4.1, in geometric terms the relationship between the two policy phases can be likened to larger and smaller co-centric circles fitting within the same plane, where the formulation phase – represented by the policy community - is the larger and the implementation phase the smaller. Although this case sees the implementation phase consisting of members of the MTF leading the *Nestlé/Perrier* merger investigation and specific members from Nestlé, Perrier and other third parties, one may hypothesize that other 'implementation games,' consisting of members of the MTF analyzing a specific merger as well as members of relevant merging firms for each case, exist within the evolution of this issue area. Quite clearly, the key members of the merger control policy community at the formulation phase helped define, or cement, which actors would participate in the implementation phase: to some degree those in the latter are specific actors within the former. In fact, there may even be some 'overlap' between the actors within the two phases as well: leaders of DG Competition, for example, were prime movers within the policy community that formulated the MCR, while also key in the functioning of the MTF. However, as mentioned above, the fact that the firms involved in the implementation phase change with every case, these actors cannot be treated in the same way that elite corporate actors such as the ERT and UNICE were treated in the formulations phase: firms in the context of MCR implementation do not represent a unitary actor. Thus, there exists no possibility of conceptualizing the relations between MTF and economic actors as a 'policy community.' Yet, as will be discussed later while analyzing the actions of the MTF which used the *Nestlé/Perrier* case (and other cases to be mentioned) as a means to increase its jurisdictional power and set policy where it was not previously defined by the MCR, it does not necessarily follow that decisions taken within the implementation phase are bound within the scope of outcomes emanating from the formulation phase. This points to the idea that there is feedback from the implementation phase, ultimately affecting the nature of the originally formulated policy over time as will be seen in the *Nestlé/Perrier* case. The ability of the

Commission via the MTF to effectively change the MCR framework so as to fulfill its interests is evidence of policy entrepreneurship according to Laver (1997, 84).

Near the end of the Phase II investigation the MTF actually considered blocking the deal. However, a last second concession by Nestlé at the end of Phase II was sufficient enough to gain approval with the support of Competition Commissioner Brittan, the MTF offered Nestlé a deal where the latter was forced to dispose of eight of its lesser brands to a single approved buyer who could not sell them to BSN or back to Nestlé within a ten-year period. These eight brands represented approximately 20% of the market and, if Nestlé agreed, the sale of Volvic to BSN would be indefinitely held. Besides the creation of a new third entity, the estimated post remedy market shares were not particularly different from the bid involving the Volvic sale. DuBois (1992) states that, "after the remedy, both Nestlé and BSN would have roughly 30% of the market"(3).

From this perspective, it is difficult to explain the remedy based solely on economic grounds. Deeper economic analysis shows that both the pre-and post merger market shares of Nestlé and BSN were significantly high. By prescribing a remedy - taking from Nestlé and creating a third entity - the market positions of the two firms were effectively more symmetrical without their combined market share falling at all. This, according to standard economic analysis, would increase the temptation for Nestlé and BSN to collude. In other words, the divestiture actually strengthened the duopolistic structure of the market: the very thing the MTF was supposedly trying to remedy. With this in mind, allowing Nestlé to re-negotiate and alter the original merger bid indicates that the MTF preferred not to create difficulties for the merger proposals and exercised its discretion towards merger approval (Neven 1993).

With this in mind, the ultimate decision to approve the merger, in which both MTF officials and representatives of the merging firms participated in less than transparent conditions, can be explained based on the self-supporting private interests of the participants: the MTF had an interest in extending its (and ultimately DG Competition's) institutional power while economic actors had an interest in breaking into new markets and thus increasing market power. Both actors could not have achieved their own goals unless there was respect for each others' goals, coupled with fear of the threat that each represented should a satisfactory solution to both parties not be achieved.

In more detail, the MTF's ultimate interest was to use *Nestlé/Perrier* as a test case to establish a precedent in which it could investigate and possibly prohibit mergers that would lead to oligopolistic market structures. Such a power was not clearly defined in the MCR and it would have not been possible to achieve had the MTF not accepted the remedy solution given by economic actors who sought to increase their market power. As will be shown below, subsequent merger and appeal cases have firmly established a collective dominance policy within the MCR framework. Given this, the MTF was able to effectively extend its institutional power to deal with mergers that were hitherto not clearly defined. Moreover, prohibiting the *Nestlé* case outright would have been a major risk by the Commission since it would have increased the probability that the firms involved would appeal the decision to the ECJ or CFI. Although the majority of past Court decisions dealing with substantive competition issues have helped solidify various Commission positions and initiatives, a negative finding in this case would have been devastating. Apart from the usual costs of time, trouble, and potential loss of credibility associated with judicial review, a decision for the plaintiff by the Court would have halted the MTF's collective dominance agenda. By allowing the merger with conditions, the Commission was successful in appeasing the firms and thus sidestepped potential appeal, while at the same time quietly establishing a collective dominance president. This adds strength to Broscheid and Coen's argument and further highlights that Commission actors are sometimes political entrepreneurs in certain situations (Broscheid and Coen 2002).

Based on previously raised ideas of related policy phases, the actions of the MTF also point to the theoretical conceptualization that although actors in the implementation phase may have also participated in the formulation of the MCR, their actions are not static: they have the ability to influence the nature of the policy itself that was previously negotiated by the 'merger control policy community,' reflecting a type of dynamism or 'feedback' between both policy phases (as indicated by the arrows in Figure 4.1). One could argue that this insight was clearly reflected in the MTF's desire to use the *Nestlé/Perrier* case to carve out a new niche of 'collective dominance' previously undefined in the MCR. With this said, it is important to further explain what is meant by the concept of 'feedback' used in this study. By feedback, it is meant that decisions made

at the implementation phase, affect the nature of the regulation that was earlier developed at the formulation one. Even though it has been suggested that there is a type of 'overlap' between the actors involved in both phases, 'overlap' itself does not necessarily mean that 'feedback' will take place. In other words, the idea of 'feedback' does not presume that actors are commuting across the two phases, something which may be verified with empirical evidence examining the actions of actors. Rather, 'feedback' as used in this thesis simply suggests that decisions made at one level (in this case the implementation phase) help change the nature of the decisions previously made at the other (the formulation phase). From a different vantage, no feedback occurs if a policy is implemented without there being a resultant change in the nature of the original policy: for example, a decision made based on MCR rules does not result in any change on the nature of mergers which can be regulated by the Commission. In the particular case of *Nestlé/Perrier*, the implementation phase resulted in a decision being adopted that helped define collective dominance, something originally outside of the scope of the originally formulated MCR. In so doing, a new niche was carved by the Commission into merger control regulation that was previously non-existent. From this perspective, there was 'feedback' because decisions taken at the implementation phase actually changed the nature of the policy previously negotiated and one can measure that this feedback existed because the nature of merger regulation subsequently changed.

In a similar vein, economic actors, seeking to increase market shares and hence profits, had to be fearful of the potential threat that the MTF represented if it would have blocked the deal outright, while respectful of the MTF's institutional goals. Had firms been stubborn and not respected the idea of pursuing a remedy solution in order to meet the MTF's goals, an approved merger would have not been achieved, ultimately leading to decreased profits. Avoiding this scenario, business took a reasonable strategy by seeking a 'Commission demanded compromise' in order to attain increased market power. Analyzing the French markets for both still and sparkling water before the merger bid, Nestlé had a 20% and 5% share in those markets respectively. Perrier for the same markets had a 35% and 50% share (See Fleming 1992).[16] The approved merger, despite not developing as Nestlé originally envisioned, entailed the disappearance and acquisition

[16] Statistics where formulated by Morgan Stanley for the Commission.

of a rival firm in Perrier while enabling Nestlé to firmly establish itself in the lucrative French bottled water market where it would have otherwise remained marginal.[17]

The exclusive structure of merger negotiations between MTF officials and firms is further reflected by the absence of labour interests. Because of the negative effects of the merger on employment, labour's virtual role is even more significant. Despite its inability to directly negotiate with both parties, labour nevertheless attempted to influence the outcome through the Community's legal channels. After Commission approval of *Nestlé/Perrier,* workers from Grandes Sources, one of the mineral water springs making up Perrier, lodged an ECJ appeal on the basis of improper consultation. Awaiting the ECJ's decision, labour also requested to the Court of First Instance (CFI) to have all redundancies and transfer of control of Perrier to Nestlé temporarily suspended, subject to the results of the ECJ's inquiry (See ((*CCE v Commission* 1992) and ((*CCC de la Societe Anonyme Vittel v Commission* 1995)). Ultimately, labour lost on both fronts. The CFI decided that it was the Commission's job to rule on mergers according to a strict timetable and the Court refused to take action that might interfere with the merger. The ECJ also sided with the Commission, although the judge stated that "the rights of workers during merger operations merited profound study"(Anonymous 1993). The harsh treatment by the MTF and the Courts of labour's concerns during the Nestlé case both underlined and foreshadowed labour's future effects on merger decisions.

The above example of labour's unsuccessful attempt to influence the merger decision-making process indicates that labour is rarely afforded any 'real' prior information in regards to a proposed merger. As de Boyer *et al.* (2000) explains: "this shows the limitations for example of European Work Councils bodies which generally only meet once a year and rarely have any significant enforceable rights to scrutinize information on a proposed merger in good time or to take part in the decision-making process in away which could endure the continuation of a positive company level social dialogue"(5). As seen in the other cases examined below, subsequent mergers dealing

[17] One of the findings by the MTF was that the French bottled water market was a mature and stable one dominated by long-time established brands which attracted great consumer loyalty. In the past there have been numerous efforts by other non-French companies to enter the market: all of them failed. This made for a "great prize" for Nestlé if the merger was allowed.

with collective dominance reveal that 'workers rights' have not been represented or considered by the MTF for various reasons.[18]

The above discussion highlights how the *Nestlé/Perrier* case provided a base for establishing a collective dominance precedent. Citing the entrepreneurial character of the Commission, it is obvious why the MTF chose it as its test case. Post-*Nestlé* comments from Commission officials emphasized the importance of the MTF retaining the ability to challenge collective as well as single dominance mergers, provided that the increase of concentration resulting from the transaction is itself significant (Commission 1994). The degree of intensity of competition and stability of market shares between the oligopolists will always be relevant as well as any structural links. The amount of market transparency will also be important and the MTF placed reliance on a number of factors that tended to increase or decrease it. These include the existence of published price lists, price negotiations in competitive bidding processes, the variety of products and the ability of customer specification to require the maintenance of such heterogeneity (Goyder 1993, 407). These factors, as well as others it would develop, would guide further decisions over the next 10 years to which we now turn that deal dealing with collective dominance.

The Usage and Evolution of the Collective Dominance Precedent: From Kali und Salz to Airtours/First Choice and Back

The events of *Nestle/Perrier* clearly signaled the Commission's willingness to implement its internal collective dominance agenda. However, future events regarding its advancement should be considered in the context of larger Commission initiatives. As promised during the MCR negotiations, the Commission together with the ERT and UNICE began to lobby the Council for the reduction of the jurisdictional thresholds. An initial survey of Member State positions, however, revealed fundamental opposition to the Commission's proposal from Germany and the UK (which found the Commission's enforcement too lax), and from France (which found it too strict), and so in August of 1993 the new Commission Commissioner, Karel van Miert, withdrew the Commission's

[18] It is an established norm that the MTF does not consider employment concerns when reviewing mergers. Another high-profile merger decision that was openly questioned by labour was the *WorldCom/Sprint* merger of 1999 where unions protested outside Commission headquarters.

proposal, bluntly saying, "what is the point of proposing something if you know it won't be accepted" (Commission 1993)? Instead, Van Miert proposed to continue with the existing thresholds for three more years and concentrate on internal issues such as horizontal guidelines and oligopoly issues. The inability of the Commission to have the Council consider a reduction in the thresholds serves to further illustrate the first two 'payoffs' mentioned above. The Commission, instead of pursuing a 'losing' battle with reluctant Member States, diverted its energies to scenarios where it could increase its jurisdictional power without Council approval. Collective dominance is an example of this and analysis of the case law suggests that after withdrawing the threshold proposal, the Commission and MTF became more aggressive in advancing the collective dominance agenda.

Less then a year after the *Nestlé/Perrier* decision a case emerged that tested the Commission's collective dominance precedent. The *Kali und Salz/MdK/Treuhand* case (*Kali und Salz/MdK/Treuhand* 1993) concerned the proposed joint venture between, Kali und Salz AG, and the Treuhandanstalt (Treuhand), which was established under public law for restructuring former state-owned enterprises of the German Democratic Republic.[19] The joint venture aimed to combine the potash (mineral fertilizer) and rock-salt businesses of 'Kali und Salz' with those of the former East German producer Mitteldeutsche Kali AG (MdK), where the Treuhand was the only shareholder. The MTF distinguished two relevant geographical markets: (i) the German market and (ii) the rest of the Community. It was found that the merger increased the market shares in Germany but that the acquired company was a 'failing firm' and therefore the merger was not the cause for the deterioration of the competitive structure. This finding was consistent with economic actors' wishes voiced in pre-investigation negotiations; representatives of K&S argued vigorously that MdK was a 'failing company' and pressured the MTF to agree to this before Phase I investigations commenced. In principle the failing firm defense can be invoked when a merger that would otherwise be blocked due to its adverse effect on competition is permitted when the firm to be

[19] The Treuhand is an institution of German public law. It assumed a *de facto* liability for failing enterprises. It has the task of privatizing and using public property in accordance with the principles set out in the Law. Specifically it has to adapt the structure of the economy to the requirements of the market while taking particular care to protect the redevelopment measures being taken by enterprises to become competitive.

acquired is a failing firm, and an alternative, less detrimental merger is unavailable. It was argued by the firms that following a 30% fall in demand over the preceding five years, MdK was facing bankruptcy (it was surviving only due to support from the Treuhand, which could not be continued due to EC Treaty provisions on state aids) and its market share would most likely go to K&S.

Although convincing the MTF to adopt the failing company defense, the investigation into the second market surprised the firms in question. Within the Community it was found that the merger led to a dominant duopoly held by the new entity and its major competitor, the French SCPA, increasing their aggregated market share from 50% to 60% (Kali und Salz 15%, MdK 10%, and SCPA 35%). The Commission, as in *Nestlé/Perrier*, decided to allow the merger under the condition that Kali und Salz/MdK sever its links with SCPA. As Whish points out, despite SCPA not being party to the merger, the MTF concluded that if consummated, the merger would have made it collectively dominant with Kali und Salz (484). Although K&S agreed to the MTF's proposed concessions, the firms affected by the deal were not pleased and appeals were lodged against the Commission's final decision by both K&S and from the French government on behalf of SCPA.

Interestingly this case involved the MTF making use of the possible negative effects on labour if the merger was not cleared in the German market, in contrast to *Nestlé/Perrier*. Recital 13 of the MCR states that the Commission consider the objective of strengthening the Community's economic and social cohesion when appraising a merger. In this case, after application of the 'failing firm defense,' the MTF stated that due to the severe structural weakness of the East German region the merger would be 'positive' because the withdrawal of MdK from the market would otherwise have serious consequences (Zwirska 2003, 28). Nevertheless, the MTF did not allow for direct representation of labour when arriving at this decision. Although there was opposition to the merger from the French member of the Advisory Committee to Concentrations, these concerns were not labour related. MCR rules stipulate that merger cases subject to phase II investigations must attain the theoretical approval of the Advisory Committee. Through this Committee other interests who may have been excluded from previous decision-making, such as labour or the environmentalist lobby, can theoretically raise

concerns. However, "although the MTF claims it pays more then mere lip service to the Advisory Committee's opinion, the truth of the mater is that the Committee has minimal influence on the Commission's decision and is likely to be ignored if its opinion stray from the preliminary decision drafted by the MTF (Maciver 1991, 762).

The above case dynamics reinforce three ideas previously raised. First, the options for labour to be directly involved in the MCR decision-making framework are relatively limited, which points to the insulated nature of the merger control process. Secondly, with its voiced commitment to 'competition only' criteria and labour's absence from the merger negotiation table, it is interesting that the MTF made mention of Recital 13 in this case to justify its analysis and subsequent decision despite the systematic marginalization of labour concerns by the agency in a vast majority of its prior cases. This again highlights that the MTF, in certain situations, acts as an opportunistic policy entrepreneur. The third dynamic is the willingness of the firms involved and those affected by the Commission's decisions to engage the Courts if, after negotiation, disagreements persist between the actors involved. As the ongoing case analysis demonstrates, these dynamics would be reoccurring.

March 1998 saw the ECJ deliver its verdict on the *Kali und Salz* decision.[20] The judgment of the Court in *France v Commission* clearly stated that the Commission had not adequately established that a collectively dominant position would be created or strengthened. Consequently the ECJ found the Commission's decision to be deficient and the Court thus revoked it (para.259). While affirming the Commission's motivation behind its analysis, the ECJ held that there is a high standard of proof to establish collective dominance and that the MTF did not live up to this standard in its assessment of the *Kali und Salz* case.

Nevertheless, although the Commission lost on the facts of the case, the Court did offer the Commission a victory: the ECJ confirmed that collective dominance fell within the scope of the MCR. As such this decision held several important contributions for the application of the MCR regarding collective dominance. Firstly, *Kali und Salz* confirmed

[20] The case was appealed to the ECJ because a Member State (France) was involved. All other cases – where a Member State is not the plaintiff – are dealt with by the CFI. The CFI was developed specifically to deal with competition issues arising from conflicts between private parties and EU institutions.

that the MCR could be applied to mergers that gave rise to positions of oligopolistic dominance. Previous legal concerns raised regarding the lawfulness of the application of the MCR to the creation of more than one company were laid to rest with the Court's ruling. Secondly, the judgment impacted the way in which the MTF conducts its economic appraisal of collective dominance concerns in future cases.

Regarding the later contribution, in its decision the ECJ commented how the Commission should fulfill its commitment concerning merger control in general. It is a crucial declaration worth citing at length:

> The basic provisions of the [Merger] Regulation, in particular Article 2 thereof, confer on the Commission certain discretion, especially with respect to assessments of an economic nature (para.223).
>
> Consequently, review by the Community judicature of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations (para.224).

Hence, the Commission exercised certain discretion in applying Article 2, something one may argue it was obliged to do because the MCR rules are not precise enough. Because of this, coupled with the fact that every case situation is unique, the interpretation of MCR rules might differ considerably from case to case.

Despite this discretion, the Commission must also execute a high level of economic analysis in its evaluation. This economic standard underlines that the Commission has to offer proof before it can block a merger. This strong onus of proof was implied when the ECJ rejected the Commission's arguments regarding three factors: market shares, structural links and competitive constraints by third parties. In this part of the judgment, another aspect of the economic standard is given direct attention: the necessity to consider dynamic effects in the analysis. The flexible approach to merger analysis employed by the Court and prescribed to the Commission is dictated by the complex economic analysis required for an assessment of the risks of collective dominance. As Kantzenback (1995) writes:

> The implication for practical competition policy, especially the application of European merger control, is that the factors inhibiting or encouraging collusion have to be determined on a case by case or sector by sector basis (3-4).

As for the factors that may contribute to a collectively dominant position, the ECJ did not provide an exhaustive list, nor did it prioritize them; more specifically, it did not state that economic or structural links between the collectively dominant firms are either the most important factor or even a requisite factor at all – this question would be answered by the CFI in *Gencor v Commission*. The ECJ considered the impact of the structural links on the facts of the case, given that the MTF had placed emphasis on them, and disagreed with its assessment. In the Court's view, the Commission failed to demonstrate that the structural links on which it had relied were capable of sustaining a finding of collective dominance. However, it does not follow from this that the ECJ was saying that structural links were a pre-requisite for a finding of collective dominance. Rather, it was merely suggesting that, if the Commission adopted a decision on collective dominance on the basis of structural links, its reasoning of those links must be convincing (Whish 2001, 486).

Although there was a general consensus among economists that oligopolistic dominance should be dealt with under the MCR, doubts remained regarding whether or not collective dominance fell within the scope of the MCR as a legal matter. These concerns were particularly dealt with in Advocate General Teasaro's opinion when on behalf of Kali und Salz and SCPA, he argued to the Court that collective dominance was not covered by the Regulation. Specifically Teasaro pointed out that there were no procedural safeguards in the MCR for a firm in the position of SCPA: that a firm could be found to be collectively dominant without itself having brought the situation about. Rejecting Teasaro's argument, the Court reaffirmed its teleological approach and used earlier judgments such as *Continental Can* and *Philip Morris* where it had relied on fundamental goals embodied in Article 3(g) of the Treaty in order to avoid a lacuna in EU law. The ECJ concluded that given the recitals of the MCR it is to apply to concentrations insofar as they are likely, because of their effect on the structure of competition within the Community, to prove incompatible with the system of undistorted competition envisaged by the Treaty. To find otherwise would be partly to frustrate the purpose of the Merger Regulation. The Advocate General also invoked the 15th recital, which prescribes that concentrations are in principle compatible with the Common Market: if the undertakings concerned have a combined market share of less than 25%

that would mean that the MCR only could be applied to single firm dominance. In the Court's view that recital could not be relied on in order to establish the non-applicability of the MCR to collective dominance. According to the Court, the presumption of that recital was not developed in any way in the operative part of the Regulation.

In sum, the firms involved welcomed the annulment by the ECJ of the Commission's decision. The Commission was forced to clear the merger without commitments in *Kali und Salz/MdK II (Kali und Salz/MdK II 1998)*. However, despite a victory in the short-term for firms, the Court did validate that collective dominance was covered by the MCR. The preparatory work of the Regulation shows that the Member States (except Germany and the UK) represented in the Council did not agree on the question of control of oligopolies – because it was never an issue during MCR development negotiations. Nevertheless, the ECJ's teleological approach and reliance on MCR preamble recitals during *Kali und Salz* yielded the conclusion that neither the legal basis of the MCR, nor the wording of its Article 2 excluded its application to oligopolies. Indeed, there would have been a lacuna in EU competition policy if oligopolistic markets were left aside. The approval of the concept gave confidence to both the Commission and to national authorities in applying the theory of collective dominance to merger cases. Legally this interpretation of the MCR does not seem to be very controversial and the issue has not been raised in any later decision or judgment. The legal concerns that could be (and would be) raised regarded rather the scope of collective dominance and consequently the problem of unpredictability, both of which were long-term concerns of elite corporate actors as well as specific firms.

A closer examination of the ECJ's decision in this case suggests that the Court firmly established its role in EU merger control by embracing a more balanced judicial methodology. By giving credence to the Commission's collective dominance concept, the Court reverted to its teleological approach used throughout much of the early decades of the EC competition law system where it looked to the future and aimed at guiding the Commission in its development of competition policy. Moreover, the Court purposely interpreted the MCR according to its own conception of what was necessary to achieve the integrationist goals of the Treaty by directly linking MCR provisions to Article (3) of the Treaty. However, this teleological approach has been blended with administrative

control where the Court is obligated under the MCR rules to apply a principled set of controls on the discretionary action of the Commission, or as seen in Germany, to restrain the initiatives of administrative decision-makers (Gerber 1998, 352). By annulling the Commission's findings in *Kali*, the ECJ fulfilled its administrative function, thus highlighting the 'love-hate' relationship it shares with the Commission: on one hand the Court actively promotes a powerful Commission and supplies it with 'political progress' on a conceptual and symbolic level, but on the other hand minimizes the economic consequences by imposing stringent evidentiary and procedural requirements on the Commission. As the continuing case law analysis will suggest, the teleological/administrative approach of the Court(s) would continue to play a pivotal role: the Commission's collective dominance agenda would be guided while also constrained by the judiciary.

As will be seen in cases that followed *Kali und Salz.MdK II* the business community generally agreed with the *idea* of collective dominance, but disagreed in numerous cases about its application. Once the Court affirmed that the MTF could investigate mergers based on collective dominance fears, elite corporate actors invited the Commission to develop collective dominance into a coherent substantive economic concept from which the impact of globalization on merger policy could be rationalized and made accessible to European companies. In the words of the ERT (1994):

> The Commission should be careful in using the legal concept of collective dominance. In those EU markets where competition is determined by globalization and rapid technological change, collective dominance is impossible: globalization and rapid technological change are at odds with many preconditions for collective dominance.... A working definition of collective dominance must take into account the aim of competition law and policy which is to protect competition, not competitors (7).

While awaiting the Court's Judgment in *France v Commission*, in April 1996 the next major case saw the Commission declare incompatible with the Common Market the proposed merger in the platinum sector between Impala platinum, controlled by the South African company Gencor, and Lonrho Platinum Division (LPD), a subsidiary of the British Company Lonrho PLC. The Commission concluded that the merger would have led to the creation of a duopoly that would have dominated the world market for platinum and rhodium and, subsequently, impede effective competition in the Common Market. The parties argued that a relatively low proportion of their sales took place in the EU and

the operation would, therefore, have only a minor impact on the Common Market. However, because the platinum market is a world market and prices for platinum are set at the world market level, anticompetitive effects of the operation would be felt in the European Community (for example through higher prices for all the platinum sold in Europe). The merger between Gencor and Lonrho would have enabled the two companies to reach roughly the same market shares in the platinum market as the other South African Group, Amplat[21] (approx 35% each). The other major world supplier was Russia with an approximate market share of 25% with half of the supplies coming from stocks that the Commission felt were exhausted. In its concluding decision, the Commission (*Gencor/Lonrho* 1996) described the concerned market as being ologopolistic:

> In conclusion, an economic analysis of competition and dominance in the platinum industry has to start with the premises that the four main suppliers are aware that prices are influenced by their output decisions and that supply at the margin is insufficient to prevent monopolistic practices. It is in this perspective that the subsequent analysis of oligopolistic dominance as a highly likely consequence of the merger should be seen.

Gencor/Lonrho was the first proposed merger that was prohibited under the MCR on grounds of collective dominance. It is consequently also the first time that the Court upheld a Commission's decision blocking a merger under the MCR on the same basis. In *Gencor v Commission* (*Gencor Ltd. v. Commission* 1999) the CFI repeated the crucial assertion of the ECJ in *France v Commission* that the Commission has at its disposal certain discretion, particularly regarding assessments of an economic nature. Moreover, the CFI confirmed the high economic standard the Commission has to adhere to in its investigations (para.164). Regarding the facts of the case however, the CFI upheld the decision by the Commission on all points raised by the applicant.

Of vital interest here is the fact that Gencor (and Lonrho) were South African firms apparently unfamiliar with recent EU merger policy developments. This view can be deduced from the fact that Gencor argued that the MCR did not cover collective dominance and did not allow the MTF to block mergers outside the sphere of the Community (Ainsworth 1999, 4). Specifically, Gencor appealed on a number of grounds: it argued that the Commission did not have extra-territorial jurisdiction; mergers which create or straighten a collective dominant position are not covered by the

[21] Anglo-American Platinum Corporation

MCR; the Commission was wrong to find that the merger would create such a situation; and the Commission was wrong not to accept the commitments offered. In light of the ECJ's decision in *France v Commission* and the MTF's past success of applying the concept to its cases, the CFI clearly stated that collective dominance was covered and reiterated that the MCR applied to all concentrations with a Community dimension as defined by Art 1 and that this does not require the undertakings to be established in the Community or production activities covered by the merger to be carried out within the EU.

The CFI's judgment in *Gencor v Commission* concerned several delicate matters of the scope of the MCR. The creation of a joint venture between the two firms would have created a collectively dominant position for the new entity and a third party and thereby reduce from three to two the number of companies controlling the platinum reserves in South Africa. These reserves were estimated to account for nearly 90% of the world reserves of platinum. The merger would have reduced asymmetries between the companies, which generally renders coordination of activities. The Commission also pointed out that by bringing together a high-cost producer and a low-cost producer would result in an elimination of asymmetries in cost between the two firms. Together with a considerable fragmentation of marginal supplies, this was likely to increase the collective dominance as a result of the merger. The Court concluded that the concentration would have had the direct and immediate effect of creating the condition in which abuse was not only possible but also economically rational, given the structure of the market (*Gencor* v *Commission* para.94). The Court also recognized that the Commission emphasized the importance of a thorough economic investigation in order to find what 'checklist' factors in oligopolistic markets typically facilitate coordination. Among these were: high concentration levels, stable and symmetric market shares, similarity of cost structures, stagnant and inelastic demand, homogenous products, and low levels of technological change.

As previously mentioned, passed behavior indicates that the MTF usually tries to find ways to allow mergers via negotiations and remedies however, this case presented the Commission the opportunity to exercise it ultimate power to prohibit and in doing so effectively cemented collective dominance analysis into the MCR framework. As it

turned out, the CFI's subsequent judgment was highly profitable for the Commission/MTF in the policy sense because the Court disagreed with all of the arguments presented by Gencor and backed the MTF's interpretation of the facts. Clearly the Court felt that both the MTF's economic analysis and the Commission's conceptualization of collective dominance met judicial standards set in *Kali.*

There is no doubt that the decisions by the CFI and the Commission in this case clarified and built on the view taken by the ECJ in *France v Commission,* thus furthering the MTF's collective dominance agenda. It was found that structural links are not necessary in order to conclude that a merger would lead to the threat of collective dominance. In order to clarify its past rulings, the CFI clearly stated that:

> In its judgment in the 'Flat Glass' case [the CFI] did not lay down the existence of economic links as a requirement or restrict the notion of economic links to the structural links relied on by the applicant. The Commission is therefore entitled to understand that notion as including the relationship of interdependence which exists between the members of a tight oligopoly (para.270).

The decision of the CFI adds that this 'interdependence' would, in an oligopolistic market with the appropriate characteristics, enable firms to "anticipate one another's behavior" and to be "strongly encouraged to align their conduct in the market, in particular in such a way as to maximize their joint profit by restricting production with a view to increasing prices." It was further suggested that this behavior would occur from an anticipation of coordinated actions and reactions:

> In such a context, each trader is aware that highly competitive action on its part designed to increase its market share would provoke identical action by the others, so that it would derive no benefit from its initiative. All the traders would thus be affected by the reduction in price levels. That conclusion is all the more pertinent with regard to the control of concentrations, whose objective is to prevent anti-competitive market structures from arising or from being strengthened. Those structures of an oligopolistic kind, in particular, cause prices to increase without having to enter into an agreement or resort to a concerted practice (para.276).

This suggests that in *Gencor/Lonrho* the concept of collective dominance was matched to the economic notion of tacit collusion in all but name. The Court further clarified that explicit collusion will have to be dealt with under Articles 81 and 82, not under the MCR and that the focus of merger control shall instead be on whether the merger will increase the feasibility of co-ordination or tacit collusion.

Gencor/Lonrho and its appeal case represent the solidification of the MTF's agenda in respect to collective dominance. As Figure 4.2 suggests, building on prior

cases and 'windows of opportunity' provided by Court jurisprudence, the MTF was able to effectively carve out a policy niche for collective dominance analysis within the original MCR framework. The establishment of what now can be considered the 'trend' of collective dominance can be narrowed to four pivotal decisions. Although the *Nestlé/Perrier* case represents the beginning of the trend and set the stage for future MTF 'collective dominance' intervention the *Gencor* decision was widely seen by many as more significant because it undoubtedly broadened Community merger control (Korah 2000). Together, the two appeal cases (*France* and *Gencor v Commission*) provided legal certainty to the MTF's efforts to use collective dominance analysis as a means to control mergers. Firms accepted the broadening of the framework and welcomed the decision since it confirmed that the MTF has a high burden of proof in the form of substantial economic standards to live up to. Also, by emphasizing the connection between collective dominance and solid economic theory, the Courts effectively enhanced the probability that future collective dominance cases would become more predictable. Consequently, the CFI gave both actors involved what they were seeking. Although still not completely convinced that the concept was fully clarified, firms were now able to use 'checklist' criteria as well as economic theory to evaluate the probability of approval of mergers that might contain collective dominance concerns and the MTF likewise gained a solid legal and procedural basis for incorporating collective dominance arguments into merger analysis and thereby expanded its policy competence.

One sees that the tight match between the Commission's interpretations of collective dominance and the economic concept of tacit collusion was adhered to in subsequent cases after 1996. Of these, the *Price Waterhouse/Coopers* case (*Price Waterhouse/Coopers & Lybrand* 1999) stands out for the language and reasoning it shares with an economic analysis of tacit collusion. Although the merger was ultimately cleared by the MTF, the case demonstrates the evolution of the Commission's mindset after *Gencor* and contains the first practical evidence of the MTF's interest in expanding the scope of collective dominance.

Price Waterhouse/Coopers concerned the merging of two of the so-called 'Big-Six' accountancy firms. Apart from re-affirming the CFI's judgment that structural links need not apply to collective dominance cases and that it is committed to use the checklist

criteria set out in its previous cases, the Commission commented on the importance of the number of players:

> The risk of the creation of oligopolistic dominance arises in large part from the existence of the general characteristics described in paragraphs 98-101 [the checklist].[22]
>
> From a general viewpoint, collective dominance involving more than three or four suppliers is unlikely simply because of the complexity of the interrelationships involved, and the consequent temptation to deviate; such a situation is unstable and untenable in the long term (para.112).

Although this statement may be too general in order to add economic insights, in the legal sense it clearly defines how many firms could make up an oligopoly. Moreover, this declaration confirms a preference of the MTF to interpret the concept of collective dominance as a duopoly. Nevertheless, the MTF investigated *Price Waterhouse* because it felt there was a possibility of a collectively dominant position being established by more than two firms. The case also introduced the possibility of using more dynamic factors[23] – outside the structural checklist factors – to evaluate mergers that raise collective dominance concerns. After experimenting with the possibility of expanding the scope of collective dominance, the MTF felt comfortable in doing so in its next case. This decision would prove to have negative consequences for the MTF and ultimately the Commission.

The Commission was ready in September 1999 to use its expanded policy competence granted to it by the CFI to question the highly controversial *Airtours/First Choice* case. This case is significant due to two aspects. Firstly, directly contradicting what it had hinted to in *Price Waterhouse*, the MTF sought to extend the concept of collective dominance from including duopoly to a merger reducing the major firms in the market from four to three. In *Nestlé/Perrier*, *Kali und Salz* and *Gencor*, the proposed merger would have led to a duopoly in the post-merger market. In *Price Waterhouse* the merger was cleared since there would have been four major market players after the merger. Secondly, the nature of the market involved gave rise to a special argument on firms' strategic behavior. Thus, the MTF applied the concept of collective dominance to

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[22] In this case the checklist characteristics which were reviewed were; price inelasticity, stagnant demand, product homogeneity, market transparency, rate of innovation, and structural links.

[23] Dynamic factors mean broader, more fluid factors such as the role of fringe firms, future commitments of the firms in question, the firms' growth potential as well as the markets,' innovation, ad product differentiation.

an industry whose features were different from those that characterized industries involved in the previous cases.

Airtours demonstrated that after the merger there would have been three major vertically integrated firms left in the concerned market: Airtours/First Choice, Thomas Cook and Thomson that would have held over 80% of the U.K. short-haul package holiday market. A main market characteristic was that firms' decisions were referring to two different periods: a planning stage and a selling season stage. During the former, firms choose their capacity for the following 12-18 months without knowing demand, where capacity refers to seats on charter flights and hotel rooms. After the planning stage, the selling season follows in which the exact level of demand is disclosed and market prices are chosen on the basis of demand. Thus, under the selling season, firms' decisions are influenced by the capacity constraints determined in the previous planning stage. According to the Commission:

> tour operators need to operate at high levels of capacity utilization... in order to maintain profitable short-haul operations. Matching capacity and demand is therefore critical to profitability, especially since package holidays are perishable goods – given a package loses all its value unless it is sold before its departure date (para.60).

In order to match capacity with demand, considerable price discounts or even price wars occur when the departure dates approach.

The Commission gave an affirmative answer to the question whether the leading firms in the post-merger market would be likely to hold a collective dominant position. It was argued that the crucial question concerning the market players' activities in the short-haul package holiday market was how much capacity would be placed on the market. In order to attain additional customers, price competition is unlikely because firms cannot change the chosen capacity during the selling season. Therefore, firms are unable to serve more customers than which they have capacity. Consequently, the collusive outcome is likely to occur on capacity competition during the planning season. Profits are directly related to the level of capacity and the coordination on price is unnecessary.

Airtours, on the contrary, claimed that collective dominance was not likely to occur after the merger since tacit collusion was unlikely to become effective because the four main conditions would not be fulfilled. (i) There would be little to gain from deviation and a lot to lose from being punished, (ii) an agreement would be easy to reach

and deviation could be detected, (iii) effective punishment could be implemented immediately, and (iv) punishment would not be costly for those implementing it (para.148). Regarding punishment, Airtours argued that since capacity could only be increased marginally during the season, firms could not be punished immediately through a large increase in capacity. Neither punishment through price competition nor through a large increase in capacity for the following season was likely to take place. Price competition was not really effective since the firms could not serve additional customers and punishment in the following season would inflict a lower cost due to discounting and would no longer have a clear association to the deviation (para.149). In a surprising exchange, the Commission responded to Airtours' statements by saying "In particular it is not necessary to show that there would be a strict punishment mechanism"(para.55,150).

This surprising statement does not seem to fit into the arguments of previous cases, especially compared with the judgment in *Gencor/Lonrho*, where the possibility of punishment was considered. Instead, the Commission formulated what seems to be a new question:

> What matters for collective dominance in the present case is whether the degree of interdependence between the oligopolists is such that it is rational for the oligopolists to restrict output, and in this sense to reduce competition in such a way that a collective dominant position is created (para.155).

From this case it follows that tacit collusion, with its inherent punishment mechanism in order to sustain collusion is not considered the core element of the concept of collective dominance. Neither structural nor the more dynamic factors that the MTF developed over the past ten years to deal with collective dominance cases were fulfilled. Thus, the decision constituted a radical break in the MTF's analysis and decision process.

Consequently, the decision to prohibit the merger outraged both the firms involved and practitioners alike. As Korah (2000) writes:

> Not only did the Commission extend *Gencor* from duopoly to a merger reducing the major firms from four to three, it also forbade a merger in a dynamic market where the product was not homogenous and where the methods of marketing the product are changing with the advent of the internet.
>
> The decision has left current practice in confusion. We no longer know on what theory the Commission is working and it is impossible to advise firms whether mergers have a good chance of being cleared (315).

Airtours promptly appealed the Commission's decision to the CFI. As one observer noted, "the forensic demolition by the Court of First Instance of the Commission's decision to block the proposed merger of Airtours and First Choice in 1999...was seen as a watershed in EU merger policy"(Lexecon 2002a, 1). In other words, the Court accepted virtually all Airtours' arguments and was severe in its criticisms of the MTF's analysis. The judgment of *Airtours v Commission* was remarkable because it fully embraced the economic concepts underlying the interpretation of collective dominance as that of capturing coordinated effects. For the fist time, the CFI defined collective dominance with reference to the essential ingredients for collusion in the economic sense (or tacit coordination in the language of the Court).

The CFI's judgment also expressly makes it a condition for collective dominance that it must be credibly possible to maintain a common policy of elevated prices and that for such a policy it is central to show that in the market environment credible punishments are plausible. This effectively put the standard economic analysis of collusion at the heart of the definition of collective dominance. Similarly consistent with economic theory, a dominant position requires that coordinated action can significantly raise prices. That is, the MTF must show that the presence of other competitors or entry do not limit the possibility to collectively raise prices. Furthermore, it has been included in the definition of collective dominance that the market must be sufficiently transparent in the sense that competitors can monitor each other's actions for collective dominance to be an issue(*Airtours* v *Commission* para.62). It then follows that the CFI's judgment affirms that collective dominance analysis and coordinated effects analysis are the same.

This decision by the Court translates into considerable progress for applying more rigorous economic reasoning to collective dominance cases. It was found by the Court that the MTF's understanding of economic theory in this case was insufficient. For example, in the pleadings the Commission accepted Airtours' contention that economic theory showed that demand volatility makes tacit coordination more difficult by increasing 'noise' and thereby making cheating harder to detect, but argued that economic theory did not apply in this case, an assertion that was emphatically rejected by the Court (Lexecon 2002a, 2).

During the appeal, Airtours argued that the original decision was a 'forced fit': the characteristics of the foreign package holiday market were not conducive to the establishment of tacit coordination. The Court clearly shared this view, and was sharply critical of the empirical and theoretical analysis undertaken by the Commission. Furthermore, Member State officials as well as those in the legal, economic and academic communities were unimpressed with the use of collective dominance in its present form. In the UK's view, although the *Airtours* judgment did "not undermine the concept of collective dominance, it did make clear the very high level of proof that the Commission was required to meet in order to block a merger on such grounds" (European Union Committee 2002). However, according to supplemental evidence provided to the UK's European Union Committee by professor John Kay of Lexecon consulting, Derek Morris of the UK Competition Commission and representative from the Competition Law Association "there still remains a lack of clarity over the concept and it seems the MTF would rather 'shoehorn' assessment into the slightly artificial construct of collective dominance" (European Union Committee 2002).

In summary, the Court highlighted four main points. First that the MTF/Commission did not prove that the market was sufficiently transparent for the oligopolists to monitor capacity at the time that capacity was set. Secondly, the Commission erred in asserting that market shares resulting from acquisitions should not be taken into account and therefore that market shares were relatively stable. Third, the Commission's analyses of demand growth and demand volatility were also fundamentally flawed. And finally the Commission failed to give sufficient weight to the responses of fringe players and consumers to the postulated reduction in output and increase in prices (Lexecon 2002a).

As previously noted, the concerns of firms at the beginning of the collective dominance trend were threefold: it was felt that the introduction of collective dominance analysis would enable the MTF to create a set of *ad hoc* tests for mergers deemed susceptible to collective dominance. In so doing, the MTF would have increased discretion to use various hard-to-defend arguments not grounded in sound economic theory to scrutinize mergers. This would lead to the reversal of the burden of proof in merger cases - instead of the MTF having to prove its case beyond doubt, the firms in

question would have to prove to the MTF that the collusive aspects of their mergers were minimal. Taken together, policy practice in collective dominance cases would ultimately become unpredictable.

Clearly the reversal of the burden of proof and the predictability concerns of economic actors that were further heightened after *France v Commission,* played an important role in a majority of the remaining collective dominance cases and especially in *Airtours*. Specific firms wishing to merge were locked into case-by-case conflicts with the MTF where firms would plead that their merger did not raise collective dominance concerns. Consequently, the majority of collective dominance cases were allowed to proceed, but not without major bargaining between the actors involved and, in some critical instances, Court mediation. On the other hand, elite corporate interests were trying to persuade the Commission to establish clear, economically based criteria for collective dominance analysis. This policy situation reaffirms the previous idea that the actors involved in the MCR's implementation define policy outcomes on a case-by-case basis and also help influence the pre-negotiated nature of the policy itself. It also suggests that the motivations of the actors in the collective dominance issue area are the same as in the rest of the policy area with one notable exception. Firms are generally guided by their interests to consolidate and accumulate market power in a fair, open and competitive single European market. While the MTF shares the latter interest of firms, it also possesses internal agendas to broaden its policy jurisdiction and institutional power that, when given the opportunity, it will pursue.

With this in mind, one may argue that *Airtours v Commission* represented the end of the Commission's collective dominance policy evolution: the 'window of opportunity' had been slammed shut by the Court. The CFI's decision clarified the meaning of collective dominance as a concept and it specifies the relevant avenues of investigation. Unlike in its *Gencor* decision, it confirmed that a clear tripartite test is needed in order to find collective dominance. The three aspects are: emphasis on the transparency and corduciveness of the market, the sustainability of alignment of conduct (punishment mechanism), and the potential influence of consumers and the competitive fringe. The conclusion of the appeal also saw both the Court and the Commission accept that *all* merger decisions must be based on prospective economic analyses of the particular

markets in question. All of these confirmations point not just to a victory for Airtours but also to a policy victory for all firms seeking to merge within Europe. For the most part, the Court gave firms a reason to relax their concerns.

The evolution of the collective dominance trend spanned some twelve years and its implementation was the result of numerous conflicts of interests between the Commission/MTF and firms that were settled either by mutually beneficial negotiations or the Courts. Generally, the majority of cases analysed in this section share a common characteristic with the majority of Phase II investigations carried out under the MCR: merger assessments are closed processes involving only MTF rappourteurs, high level Commission and MTF officials and firms with their various legal and economic representatives. This scenario is of course a direct by-product of the procedural rules developed and set by the participants in the policy community found during the formulation phase. Apart from the closed nature of the negotiation process it should be remembered that the Commission and MTF hold a substantial 'power position' within this policy area – as they have unrivalled autonomy and discretion to rule on issues it (they) see fit. Following from this, the ultimate decision to approve a merger, in which both firms and the regulatory agency participate in less than transparent conditions, can be explained based on the private interests of the participants: the Commission/MTF wanted to extend its policy competence and reinforce its reputation as a legitimate regulatory agency, while economic actors had interests in increasing market power and consolidating market activities. Both actors could not have achieved their own goals unless there was respect for each others' goals, coupled with fear of the threat that each represented should a satisfactory outcome to both parties not be achieved.

Based on the cases analysed here, one may conclude that merger negotiations are indeed 'one-shot games' where each player tests the other by advancing its interests as far as possible, but not to the point where the other player 'defects.' In other words, the above cases saw firms try to push their mergers through the MCR machinery unfettered, but when met with MTF resistance, negotiated as to not have their merger prohibited. Likewise, the Commission could not hastily prohibit mergers or demand too much outside the normal parameters of remedy solutions so as not to induce firms to engage judicial review. The result is usually a mutually acceptable outcome however, in the

context of collective dominance such outcomes benefited the Commission's entrepreneurial agenda to expand its policy competence, autonomy, discretion and ultimately its institutional power and reputation.

Conclusion

The above analysis examines and explains a number of merger cases in which collective dominance played a significant role. At the beginning of the MCR, it was unclear whether or not collective dominance formed part of European merger control because of its lack of explicit mention. The criteria for evaluating collective dominance have thus evolved out of cases decided by the Commission and the Courts with the former clearly setting the agenda. It has been demonstrated that it was not until the middle of 1991 that the Commission started to divert more attention to the issue of collective dominance: with *Nestlé/Perrier,* the MTF started to systematically analyze not only single dominance but also collective dominance. In further cases it has been shown that the MTF transcended analyzing collective dominance only in duopolies, and begun to test for collective dominance with more than two actors in a market.

In more detail, *Nestlé/Perrier* saw the MTF identify those structural factors (which later formed part of the 'checklist'), which would make an agreement between the newly created entity Nestlé/Perrier and BSN likely. In its first collective dominance case, the MTF concluded that more dynamic factors only played a marginal role. Ever since, whenever the structural factors have pointed to a high probability of collusive behavior, the proposed mergers have been modified or have been prohibited altogether. The analysis of *Nestlé/Perrier* suggests the MTF did not want to appear to be unilaterally pushing its collective dominance agenda on firms for fear of judicial review at this early stage of the Commission's collective dominance agenda. Firms on the other hand, understood that collective dominance would change the 'parameters of the game' but did not want to foster an adverse relationship with regulators for fear of having their merger prohibited and more generally jeopardizing future predictability of the *whole* merger control process, not only in instances of collective dominance. Consequently, the events

that defined this case highlight several dynamics that would latter play a part in subsequent collective dominance cases.

First, when faced with a conflict of interest, actions of both actors suggested they preferred to compromise a mutual beneficial 'remedy,' a strategy that also proved prudent in the next major case, *Kali und Salz*. Secondly, the underlying motivation for the Commission/MTF to compromise was guided by its fear of possible judicial review and its entrepreneurial goal of extending its policy competence via the establishment of a collective dominance president. These motivations suggest that the major actors were guided by their own interests and respect of the others' goals as well as the possible consequences of neglecting them. The third dynamic is based on the idea of related policy phases in that the actions of the MTF and Commission points to the previously raised theoretical conceptualisation that actors involved in the implementation of the MCR may form a part of the policy community established during the formulation phase. Furthermore, the fact that actors involved in the former can alter the nature of the policy developed by the latter suggests there is a type of 'feedback' between both policy phases (as previously indicated in Figure 4.1).

As one turns to subsequent developments, the cases that helped further the collective dominance trend displayed the same dynamics as those depicted in *Nestlé/Perrier* (See Table 4.1). However, as time progressed it became evident that both actors became more comfortable with their policy environment and thus grew more confident in challenging each other's positions.

The *Kali und Salz* case saw both firms and the Commission/MTF become more aggressive in both trying to achieve and defend their interests. The MTF vigorously argued that the merger would have created a Community-wide duopoly and thus ordered the firms involved to sever their links with SCPA. Although the firms privy to the merger agreed to the concessions, SCPA appealed the case. The fact that it did so signalled that firms were prepared to defend their interests if the MTF's 'remedies' were viewed as too intrusive. The action taken by firms in *France v Commission* proved to be critical since involving the Court was seen as an alternative to *fully* accepting MTF imposed concessions or Commission imposed prohibitions. The use of the Courts by

firms to 'temper' the MTF proved to be a valuable option in future cases and played a vital role in portfolio power cases, which is the subject of the next chapter.

The ECJ's judgment in *France v Commission* declared the Commission's decision in the *Kali und Salz* case as void because it had not given dynamic factors their due place. Simply considering market shares and structural connections between oligopolists was not sufficient for assuming a high probability of collusive behavior. Instead, the relevance of differences in capacity as well as the role of fringe firms would have to be taken into account (See Voigt 1998 and Bishop 1999). However, the ruling can be interpreted as mutually favorable to both parties since it ruled in favor of the firms, and also concluded that the MTF's analysis was legally grounded (albeit wrong) and thus collective dominance analysis could be incorporated in future cases. As in earlier Court cases which dealt with the MTF's merger policy practice - *Continental Can* and *Philip Morris* – the agency might have lost the battle (on the facts), but won the war (on substantive policy issues).

Notwithstanding the Court's decision, the Commission relied primarily on factors of market structure to analyze collective dominance cases. *Gencor* was the first collective dominance case to be prohibited and despite pointing to the importance of a thorough dynamic economic analysis, the MTF's arguments based on its 'structural checklist' were enough to block the merger. Subsequently, the CFI agreed with the MTF in *Gencor v Commission*. *Gencor* was also a significant case because it confirmed that that MCR's jurisdiction reaches far beyond the EU. Despite offering several possible remedy scenarios, the MTF decided to block the deal.

Evaluation of the collective dominance case law suggests that besides the *Airtours* case and appeal, the Commission and Court's *Gencor* decisions were the most critical because they represented a crucial refinement of the collective dominance concept. Together, both *Gencor* decisions implied that beyond the 'checklist' criteria there were other dynamic criteria which should be included in the MTF's analysis and suggested that the 'checklist' be refined. This was greatly welcomed by elite corporate actors since they maintained during most of the 1990s that the Commission should be careful in using the concept of collective dominance. The ERT, UNICE and AmCham urged the Commission

to consider 'economic reality' when considering the use of collective dominance arguments. In the ERT's (2000) words:

> In industries where fundamental changes are taking place, past competitive behavior cannot be indicative of future situations. ERT, therefore, invites the Commission – which is presently developing its 'check-list' for collective dominance – to define assessment criteria that appropriately reflect the impact of global competition, technological change and market dynamism (4).

With the MTF accepting that more dynamic factors were indeed relevant to collective dominance analysis in *Gencor*, firms began to feel the benefits of using the appeal option stipulated in the MCR. The Court's suggestion to the MTF to develop more sophisticated economic analysis and its reaffirmation that the agency has a high onus of proof upon it forced the MTF to refine its analysis.

The MTF displayed a greater willingness to incorporate dynamic aspects into its decisions in the cases following *Gencor*. An example can be found in the *Price Waterhouse* case when the MTF pointed out that there were substantial incentives to deviate from agreements although most of the checklist criteria indicated trouble. The Commission passed the merger without conditions or obligations, which represented the first collective dominance case cleared without conditions. It seemed that the evolution of collective dominance policy had halted and policy practice in this issue area would finally be formalized.

Riding on a wave of 'peak' confidence provided by the Gencor appeal and *Price Waterhouse*, the MTF decided to extend the scope of collective dominance to include mergers that would reduce the major firms in a market from four to three. In *Airtours*, the MTF's analysis and the Commission's decision to block this merger was a setback in regard to the use of both structural and dynamic factors. However, the MTF's collective dominance arguments went well beyond that of previous cases and thus further infringed on firms' interests. The decision to prohibit the merger collided with decisions that were judged exclusively on structural grounds (such as *Nestlé/Perrier*) as those in which dynamic factors played a more important role. The assumptions that were made by the MTF with regard to product homogeneity, the transparency of the market and the existence of barriers to entry all appeared to be highly controversial. The decision was already questionable solely on grounds of structural factors. Generally speaking this

decision showed that the Commission had *not* developed consistent criteria for evaluating the possibility of collective dominance.

To the delight of Airtours, elite corporate Europe and practitioners, the CFI remedied this situation by challenging the Commission to design empirical tests for the creation and strengthening of a collectively dominant position that would withstand careful scrutiny. Although viewed as a major defeat for the Commission, Competition Commissioner Monti (2002) agreed that as a "specialized competition court," it is appropriate for the CFI to "provide a meticulous and stringent review of the substance of the Commission's analysis." The Court effectively reaffirmed the argument professed by the ERT and UNICE throughout the concept's evolution by inferring that the establishment of a high evidential threshold is necessary in order to reassure business that agency intervention is unlikely. By establishing the appropriate test and criteria for the assessment of collective dominance and ordering the Commission to develop instruments to assist in the MTF's analysis, the Court has increased the probability that negotiations between the affected actors will result in mutually beneficial outcomes. With regard to collective dominance cases, the MTF will no longer be trying to carve out a policy niche in the MCR for collective dominance precisely because it has accomplished that over the last twelve years since the inception of the MCR. Likewise, firms will no longer be faced with trying to reverse the burden of proof back to the MTF and rectify the predictability of the decision-making process because the Court acted as a catalyst to rectify this.

In conclusion, it is worth considering a further 'time-sensitive' dynamic that is evident in this and the next trend study. It has been argued that over time, both firms and the Commission/MTF became more confident in advancing and defending their individual interests. On the one hand, the Commission through the MTF gradually became more aggressive in its 'collective dominance' thinking by first prohibiting the *Gencor* case out right and then by expanding the scope of the concept via *Airtours*. Thus, it is quite evident that as time progressed the MTF became more activist: it attempted to enhance its policy competence by expanding the scope of collective dominance and asserting its jurisdictional power. Clearly, as the trend matured the MTF become more entrepreneurial. As a consequence, firms became more defensive and the Courts become a major player. This points to the theoretical idea raised in Chapter 2, that the

characteristic of the implementation phase is not static: it may change over time because the private interests of some actors may become too self-centered.

The actions of the Courts throughout this trend study, especially the ECJ's decision in *France v. Commission* demonstrated that the judiciary did not simply intervene on the behalf of firms, but were guided by 'wider objectives' as well. Clearly, the Courts were willing to take a pro-active role in merger control and not just deliver administrative decisions. By blending teleology and administrative decision-making the Courts resolved conflicts, clarified policy and steered the Commission through the collective dominance issue. More importantly, the Courts effectively tied the inclusion of collective dominance into the MCR framework with the general 'spirit' of the Treaty and its integration initiative. However, although the Courts affirmed and gave legal life to the Commission's agenda, it also nullified a number of its merger decisions and squashed its attempt to broaden the scope of collective dominance. Reiterating a point made above, as the Commission and MTF became more entrepreneurial, merger decisions become more 'bold' and consequently Court judgments become more stringent, critical and prescriptive. These points together suggest that there is a definite 'time dimension' evident in this and the next trend study.

The objective of this chapter, along with the next, is to provide a snapshot of the policy environment surrounding the implementation of the MCR. Drawing on the above trend analysis one may draw the conclusion that outcomes in the implementation phase were dynamic. Before further discussion on these dynamics and the theoretical ideas raised above, the second trend analysis will be presented. Building on the findings in this chapter, the next will highlight how, when combined, private interest theory, policy entrepreneurship and the enhanced role of the Courts help explain developments in the implementation phase of EU merger control policy.

Chapter Five

Examining and Explaining Portfolio Power and European Merger Control

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Introduction

This chapter is concerned with examining and explaining the second main trend outlined in the second research question: the emergence of portfolio power analysis during the implementation of MCR rules. Similar to the previous chapter, the goals of this chapter are therefore to first analyze the economics and legal meanings of the concept of portfolio power and to secondly explain how and why this was introduced into EU merger control.

Referring to the *GE/Honeywell* merger of 2001 the CEO of General Electric – Jack Welsh – concluded: "This is the cleanest deal you'll ever see (I still believe that, and so did just about everybody except the European Commission)"(2001, 363). The controversy surrounding the Commission's prohibition of this merger centred on the 'portfolio power theory' developed by the MTF in the mid to late 1990s. Although no clear-cut definition exists, the MTF has argued that the holder of a comprehensive product line – a portfolio – may obtain a strong market position vis-à-vis its customers and can therefore more easily restrict entry of potential rivals and/or consolidate market power. As seen upon analysis of the different cases by the Commission, portfolio power is an umbrella term, utilizing numerous economic concepts, and thus, unlike collective dominance and its economic counterpart of tacit collusion, lacks a single definitional or comparable focal point. Moreover, the controversial aspect of collective dominance was the concept's scope and the MTF's expansion of it. In contrast, portfolio power lacks a coherent economic grounding and scope. As argued by Lexecon Consulting (2000), there are no workable criteria in relation to portfolio-based arguments: "In its current form, the portfolio power approach is made up of a number of disparate ideas which are not supported by a unifying economic theory"(2). Throughout the competition/antitrust world, portfolio power has numerous synonyms including portfolio effects, range effects,

indirect effects and conglomerate effects, all of which are viewed as vague terms relating to the pro and anti-competitive effects that may arise in mergers combining like or complementary products. For these reasons one may view portfolio power as an underdeveloped concept with questionable economic underpinnings.

Nevertheless, as was the case in the *Gencor* decision where the MTF prohibited the merger based on anti-competitive aspects stemming from the concept of collective dominance, the *GE/Honeywell* case represented the first merger to be prohibited based on the concept of 'portfolio power.' Not only did the concept's use create conflict between firms and the Commission/MTF, but it also sparked an international row between the Commission and US antitrust officials. The head of the US Justice Department, Charles James, sharply criticized the decision, saying it marked a "significant divergence" and later Treasure Secretary Paul O'Neil called the Commission's decision "off the wall"(Carney 2001). Clearly, the US felt that in contrast to the American emphasis on the consumer, the European version of merger control has a preoccupation with protecting competitors. Although the row has cooled over the last three years, both parties are still awaiting the CFI's judgement in GE's appeal case, which began in May 2004.[1]

Theoretically, conglomerate mergers, unlike certain horizontal and vertical mergers, do not conventionally raise competition concerns. The question of whether conglomerate mergers should be regulated at all is a matter of controversy: US anti-trust law long ago abandoned any interest in the conglomerate effects of mergers; however in recent years the MTF has expressed concern about the 'portfolio' or 'range' effects of some mergers(Whish 2001, 722-3). As mentioned in Chapter 3, all mergers including the conglomerate variety, may be notified under the MCR because the jurisdictional test in the Regulation is based on turnover, not on the impact of a merger on competition. However, the question arises whether, as a matter of substantive analysis, a conglomerate merger could be held to create or strengthen a dominant position and so be declared incompatible with the MCR. The emergence of the portfolio power trend has put that question to the test.

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[1] *General Electric v. Commission* (pending)

The concept of portfolio power was first introduced into EU merger control during the latter part of the 1990s when three major merger cases, which are referred to as the first of two triads of portfolio power cases, were decided. The cases included in this first triad are, *Coca-Cola/Amalgamated Beverages* (*Coca-Cola/Amalgamated Beverages* 1997), *Coca-Cola/Carlsberg* (*Coca-Cola Carlsberg* 1997) and *Guinness/ Grand Metropolitan* (*Guinness/Grand Metropolitan* 1997). However, one may point to earlier cases in which the MTF used aspects of the concept without explicit mention to its name (See *Aerospatial-Alenia/de Havilland* 1991) and (*Boeing/McDonnell-Douglas* 1997). One of the significant conclusions in the *Guinness/Grand Metropolitan* case was that despite the lack of increase in market share in some individual product markets, the existence of a portfolio – in this case a range of liquor brands - might create or strengthen a dominant position. This decision clearly defines some of the benefits that the holder of a comprehensive portfolio may enjoy: economies of scale and scope in marketing activities, stronger position vis-à-vis its customers, and greater potential for tying or other bundling techniques. Thus, on the basis of these decisions, the MTF considers portfolio effects as a factor which can contribute to confer a dominant position if the firm(s) concerned hold a significant share of the market, if its competitors are not able to benefit from a similar advantage and if customers are decisively attracted by the possibility of acquiring the various components of a product range from the same producer. As Giotakos (1998) points out "the anti-competitive likelihood of portfolio effects is based on the proposition that the combined portfolio of products/brands of the merged firm represents an essential facility for the downstream agents in a manner that the individual product lines of the undertakings pre-merger did not."

Recently the concept of portfolio power has received significant attention due to three major mergers, which are referred to as the second of the two triads of portfolio power cases that were prohibited by the Commission. Only a few months after the CFI overturned the Commission's decision in *Airtours*, the Commission suffered two further setbacks at the hands of the Court when it overruled the merger prohibitions of both the merger between the two main manufactures of electrical equipment in France, *Schneider/Legrand* and the merger between the world leader in carton packaging and a market leader in the design and production of packaging equipment and systems, *Tetra*

Laval/Sidel. As previously mentioned, the appeal case of the third merger of the second triad, that of *GE/Honeywell*, is still pending.

This above overview suggests that the development of the portfolio power trend shares many of the same dynamics present during the trend of collective dominance. The motives of the major actors involved during the development of both trends are consistent in that with regard to the latter trend, regulators pursued an internal agenda with the aim of developing a theory in which certain (undetermined) types of conglomerate mergers could be investigated and possibly blocked under the MCR. Again, the Commission's policy entrepreneurial tendencies created a situation where the desire of the agency to expand its competence/jurisdiction, develop policy without Council input and further promote its reputation as being 'tough' and 'adaptable' came in direct conflict with 'firm inspired' judicial review based on concerns of deteriorating predictability and accountably of MTF analysis. However, one difference is evident in the development of portfolio power compared to that of collective dominance: the Commission did not offer any formal statements concerning portfolio power or its heightened anxiety about potential 'problematic' conglomerate mergers before the MTF began using portfolio-based arguments to scrutinize the first triad of mergers. As the below case law analysis will demonstrate, the MTF's unilateral advancement of the portfolio concept displayed a marked decrease in dialogue between regulators and affected firms – evidence that the MTF pushed its agenda in a more concealed manor than that found during the collective dominance trend. Consequently, this resulted in more intense conflict with economic actors and the Courts, suggesting that portfolio power represents the most contentious development within EU merger control to date.

It was not until the conclusion of the third case of the fist triad (*Guinness/Grand Metropolitan*) that portfolio power concerns were officially acknowledged by the MTF as being the source of its reservations. This set off alarm bells throughout corporate, economic and legal circles because it was unclear what the concept of portfolio power entailed. Both UNICE and the ERT voiced their objections to the introduction of 'new' concepts such as portfolio power into merger control without the Courts reviewing the legality of the matter first. It was also argued by the ERT (2000) that a more economic-oriented application of merger control should be followed (5). Moreover, economists and

lawyers agreed with claims that the MTF was using portfolio power to attack efficiency gains in conglomerate mergers. In Whish's (2001) words, "the development of a doctrine that the enhancement of efficiency could be a ground for intervention is extremely controversial, and would considerably extend the Commission's ability to control concentrations"(777). According to one media commentator, "the development of collective dominance and hardened attitudes toward conglomerate mergers confirms that European competition authorities are now concerned with policy-making and not just appraisal." According to Peter Sutherland – chairman of Goldman Sachs International – "the role of the EC is to find ways to make mergers work rather than stop them" (Shearlock 2001, 3). Despite these voiced concerns the MTF quickly pursued its agenda and in so doing, blocked three subsequent mergers within a year, which effectively alienated firms who reacted defensively via rapid appeals to the CFI.

The conflict between the actors stemming from the introduction of the concept of portfolio power into EU merger control analysis represents an opportunity to expand and apply the theoretical arguments and actor analysis developed in the previous chapter to another trend. In an effort to present a complete and systematic presentation of the trend in question this chapter is divided into three sections. It will become clear that in contrast to collective dominance, portfolio power raised a more fundamental question. The collective dominance debate centered on a linguistic interpretation of the MCR: did the regulation pertain to the creation or strengthening of collective dominant positions? Portfolio power, on the other hand, represents more of a theoretical debate: could credible competition arguments be used to argue that a conglomerate merger could create or strengthen a dominant position as stipulated by the MCR? Because of the theoretical nature of portfolio power and the fact that it is an umbrella term loosely based on several complex economic concepts, the first section will provide an integrated discussion of what economic aspects help define and explain portfolio power and how it has been developed and used by the MTF to scrutinize conglomerate mergers. The economic concepts of tying and bundling, leverage theory and market foreclosure are discussed, as are the counter-arguments to the concept's usage presented by economic interests and international merger authorities. The next section turns to the case studies in which the emergence and usage of portfolio power by the MTF are mapped. As was the case in the

previous trend study of collective dominance, this section presents the facts and decisions of numerous merger cases integrated with actor analysis. The third section presents two main sets of conclusions. The first sums up the arguments and draws conclusions specific to this chapter while the latter presents broader, comparative, theoretically-based conclusions pertaining to both trend studies – collective dominance and portfolio power.

5.1 The Economics and Usage of Portfolio Power in EU Merger Control

The use of portfolio based arguments by the MTF in the mid 1990s constituted a new doctrine in EU merger control. The adoption of the theory was a significant development and since its first official use in the *Guinness/Grand Met* case, the concept of portfolio power and the MTF's use of it have been widely criticized because of its definitional vagueness. As set out by the OCED Roundtable on Portfolio Effects in Conglomerate Mergers (2002) "the principle antitrust concerns with regard to conglomerate mergers having portfolio effects seem to be that such mergers may *indirectly* solidify or magnify market power by facilitating various behaviours rather than directly by altering market structures"(23). This explanation highlights the major difference between portfolio power and the other trend considered in this study, collective dominance. The latter trend dealt exclusively with the direct effects of mergers on market structure (i.e. two firms in the same market merging) reducing the total number of firms in that market and thus directly impacting the structure of the market concerned. The emergence of portfolio power, on the other hand, allows the MTF to scrutinize conglomerate mergers that do not increase market shares in any relevant market.

The underlying economic rationale behind portfolio power is as follows: "the market power deriving from a portfolio of brands exceeds the sum of its parts"(Lexecon 2000, 1). In other words, on their own, the products offered by the parties to a merger and the market power derived from their sale are not dominant. However, once combined the products may produce a range or portfolio that would lead to a strengthening or creation of a dominant position. Thus, not all conglomerate mergers are susceptible to portfolio-based arguments but, rather, only those deemed by the MTF to

exhibit the possibility of anti-competitive activities such as tying or bundling.[2] The MTF, through its use of portfolio-based arguments over a five year period has argued that the likelihood for anti-competitive practices is particularly high if the merger unites products in which there was considerable pre-merger market power and if either product complements or displays both low marginal costs and a high positive correlation across buyers. However, before diving deeper into the MTF's use of the concept a more economic-based discussion of the 'various (economic) behaviours' that help define portfolio power and the possible sources of additional market power is required.

It was earlier suggested that the concept of portfolio power is an umbrella term and thus there is an inherent danger that it could be used to justify blocking or altering mergers having a number of potential anti-competitive effects, none of which can be convincingly enough established to be the sole justification for opposing a merger. It must be understood that standard merger analysis usually begins with the assessment of the areas that the merging parties' activities overlap either vertically or horizontally. However, the MTF during the mid 1990s became concerned with mergers that do not display a direct overlap between the merging firms. This growing focus on the 'indirect effects' of mergers means that the conventional analysis of mergers, based on assessing changes in concentration in appropriately defined relevant markets, may no longer be sufficient to identify all potential competition issues. In an effort to begin explaining the economics of the concept at hand, a logical starting point would be to consider portfolio power as a kind of 'indirect effect.'

The main indirect effects of conglomerate mergers that have concerned the MTF have been: the elimination of potential competition; the increased scope for retaliation; and the combination of dominant positions, raising the possibility of 'leverage' and ultimately market foreclosure. The straightforward rationale behind the first concern is that after a merger neither firm would remain as a potential independent competitor to the other. From this, there would be a higher probability that the new (merged) firm would eventually become dominant enough to deter other 'potential'

[2] Technically, tying or tie-in-sales as it is sometimes referred, is the practice of making the purchase of one good conditional upon the purchase of another, usually related or complementary good. Bundling is when two goods can only be purchased as a bundle at a fixed price. The most common form of bundling is mixed bundling, which refers to the selling of two products individually as well as in a bundle. These terms will be further clarified below.

competitors from entering the market(s). The second concern is based on the presumption that the new firm would have greater geographical coverage than either of the firms alone, and hence would be in a better position to 'retaliate' against competition from third parties by cutting prices in markets where the competitor is already established. In so doing, the merged entity would be able to increase the punishment that it could inflict upon a competitor to discourage it from competing. This kind of competition concern parallels that of tacit collusion, whereby there would presumably be a tacit agreement amongst firms whereby competitors coordinate the extent to which they attempt to gain market share in various territories, and face retaliation if they do not respect the 'agreement.' The 'leverage' concern purports that the merging of firms that were already dominant in their 'home' markets would further strengthen the dominance in these markets. Because the merged entity would be 'bigger,' the likelihood that the firm could raise entry barriers by increasing the scope for anti-competitive behaviour would be higher. Specifically, the merged entity would have the ability to 'leverage' its dominance from one market to another. The likelihood of this occurring increases because the parties to the merger could use their home markets as a base to compete in other markets by using profits earned in the former to undercut competition in the latter. Although all of these competition concerns constitute various 'indirect effects' of conglomerate mergers, some (if not all) of these arguments have been used by the MTF to scrutinize those mergers deemed to exhibit portfolio effects. In addition to these, there are other concerns that pertain specifically to portfolio-based arguments.

As already stated, the MTF approaches mergers that would bring together complementary product lines with caution because these conglomerate deals have the possibility of resulting in a company with a portfolio of brands across different relevant markets that could lead to portfolio power. In numerous cases the MTF has suggested that this in itself could create or strengthen a dominant position regardless of the lack of increase in market share in the individual product categories. Following this logic, the question arises: if there is a lack of an increase in market shares, what is the source of the additional market power that the concept of portfolio power purports? Analysis of merger cases involving portfolio-based concerns provides four possible answers to this question. The first two possibilities follow basic economic logic: the merged entity

would be more attractive (to consumers) because it would offer a portfolio or range of products and likewise, economies of scale and scope would be realized in sales and marketing. This second possible source of additional market power can be boiled down to the simple argument that the merged firm would be 'bigger' than either party alone and could lead to the merged firm unilaterally raising entry barriers. The increased possibility that the merged firm could use the threat of refusal to supply rival firms and/or consumers is the third possible source of market power. The final possibility is that the enhanced position of the merged firm would lead to a greater possibility that it would tie or bundle products. The latter possibility aired by the MTF is more technically economic in nature and thus warrants greater scrutiny.

Tying and Bundling

The case law regarding conglomerate mergers involving portfolio power suggests that the principle competition concerns of the MTF seems to be that such mergers may facilitate anti-competitive tying, bundling or closely related behaviour. For the purposes of this study, tying or tie-in-sales refers to the practice of making the purchase of one good conditional upon the purchase of another (usually a related or complementary good), while bundling refers to situations where the seller determines the exact proportions in which two products are purchased. A simple example used to distinguish the two is the fact that shoe manufacturers 'bundle' rather than 'tie' shoes with shoelaces. An example of tying is if a manufacture of computer printers specifically designed them to use only 'its' paper. Thus, the manufacture sells the printers with the condition that the buyer uses only its brand of paper. One may think of 'bundling' as 'tying' in fixed proportions. With this in mind, most markets display 'mixed' as opposed to 'pure' bundling. Mixed bundling refers to situations in which products remain available on a stand-alone basis, but are offered also as a package on discounted terms (i.e. the package price is less than the sum of the stand-alone prices of the components) (Lexecon 2001a, 1).

The majority of the economic literature on bundling considers how the strategy can be used as a price-discrimination tool by a multi-good monopolist - price

discrimination simply referring to the selling of two varieties of a product to two different buyers at different prices. A typical monopolist faces a pricing paradox when it has to set one price in the market for all customers. If its prices are too high it will lose sales and if they are too low it indirectly gives away profits to customers who would have been willing to pay a higher price. In the end, the monopolist chooses a price such that marginal revenue equals marginal cost. But, that trade-off is inefficient as there are customers willing to buy the good at prices above cost and there are those who are buying the good and yet are paying well below their value. In short, the monopolist would like to engage in price discrimination. This may not be practical given limited information about consumers or because of consumers' ability to engage in resale, but it follows that if a monopolist sells multiple goods, bundled pricing can help achieve higher profits by reducing the need for price discrimination.

Price discrimination is necessary only if customers have different values for the good(s) in question. It then follows that if it were possible to reduce customer heterogeneity, there would be less need to employ price discrimination. Bundling is a useful tool to reduce the heterogeneity in customer valuation because the combined customer value of a bundle is often less heterogeneous than the individual value of the components. This will be especially true if the values of components are negatively correlated. If this is the case, offering a bundle leads to more homogeneous valuations and thus the monopolist can capture more of the consumer surplus. However, the seller can do even better through a mixed bundle strategy. As previously stated, mixed bundling means that the components are also sold separately. To be profitable, the price of the bundle must be less than the total price of the components purchased separately. Even more than with pure bundling, the mixed variety allows one to charge different groups of self-selecting buyers different prices for the same goods.

Price discrimination motives for bundling may seem theoretically sound, intuitively however, they do not seem to be the most relevant motivations behind such a strategy. The above explanation for bundling implies that one is most likely to observe bundling in cases where two products have a negative correlation in value. However, if the goods in question that were sold together were positively correlated in value, then there would be no extra ability to price discriminate by selling the products as a bundle –

there would be an absence of reduction in the heterogeneity of valuations. Nor is there an ability to expand the market by discounting a bundle relative to the price of the components. All customers would buy the bundle or nothing. However, despite these reservations Adams and Yellen showed that price discrimination through bundling could be profitable even without a negative correlation in buyer valuations for bundled goods, and also without expressly assuming that the goods are complements. They went on to conclude that bundling could produce a wide variety of effects on total economic welfare depending on the levels of marginal costs and the distribution of valuations across consumers (See Varian 1989). This is important because even with mixed bundling there could be a loss in social welfare to the extent that some bundle buyers place a very high value on one of the bundled goods but value the other at less than its marginal costs of production. Of course these social welfare losses are contingent upon one using the theoretical model of 'perfect competition' as the point of reference.

Adams and Yellen (1976) made the valuable point that pure competition may not be the relevant benchmark. This point is particularly pertinent to this study because competition authorities must review mergers with an eye on both pre- and post-merger conditions. The pre-merger conditions are never 'perfect.' Thus prohibiting a merger in order to block bundling of products in which there is a high degree of pre-merger market power might make society worse off. In the context of reviewing a conglomerate merger involving portfolio effects, attention must therefore be devoted to whether the merger makes consumers worse off. Even if it were certain that such a merger would lead to a form of price discrimination through bundling and this discrimination would not be possible without the merger it would not necessarily mean that the merger would harm buyers. This, along with the previously raised reservations, highlights the difficulty in generalizing about the effects of price discrimination via bundling and suggests that there are other motivations for firms to engage in tie-in and bundle sales.

Although motivations for bundling and tying may include cost savings and overall efficiency, arguments more closely related to portfolio power and the interactions between the merged firm and its competitors refer to the *market power aspects* of tying and bundling. Although price discrimination does appear to be a concern of the MTF, more attention seems to be centered on the possible scenarios of merged firms using tying

as a means to exclude or restrict competitors in the tied product market and the use of tying or bundling to simply consolidate market power. It is to a detailed analysis of the idea of 'leverage' that we now turn.

The Economic Heart of Portfolio Power: Leverage Theory and Its Effects

The notion that a multi-product monopolist may try to extend its monopoly power in the tying/bundling market in order to eliminate competition or to extract additional monopoly rent from the market represents the basis for leverage theory. The debate surrounding the concept of market leverage pitted the followers of the Chicago School and those who questioned its simplicity. One of the central tenets of the Chicago School is that a monopoly producer of a good cannot increase its profits by tying/bundling the sale of this product with another product. Put simply, a monopoly profit can only be taken once. However, an important contribution to the leverage debate by Whinston (1990) demonstrated an exception to this generally accepted doctrine. It was shown that if there are significant economies of scale in the tied market, then tying raises unit costs for the competitors in that market. That in turn would tend to foreclose the market for the tied product competitors or at least reduce their ability to constrain price rises in their market - the end result being higher prices and increased total profits for the tying firm. Because traditional leverage theory only deals with pure bundling strategies – that is only selling complementary products as a bundle i.e. the products are not sold on a stand-alone basis - the effects envisioned by Whinston thus depend on the firm in question making a credible pre-commitment to tie/bundle. It is through this pre-commitment that the firm increases its chances to enhance its market power because it signals to potential competitors its desire not to accommodate their market entry.

The parameters of this game are rather straightforward: the incumbent firm commits itself to selling its two products, A and B, only together. Since the two products are sold together, an attack on one is an attack on both. According to Whinston's logic, if an entrant were to get any B customers, the incumbent would lose all of its customers. This is because, in his model, all customers have the same extra value from getting a bundle with A. Thus, in a second-stage pricing game, the incumbent has a great incentive

to price the bundle low so as to preserve the value it creates in the A market. The end result is that firm 2 finds it hard to beat the A-B bundle and chooses not to enter the market. It follows that the act of bundling/tying *does not* help the incumbent defend itself once the entrant is in the market. However, this is the very reason why these actions may be viewed as anti-competitive. The only way that the incumbent can earn any money is to ensure that the entrant makes zero sales. So even if a potential competitor has a cost advantage or a superior product in market B, it will still be deterred from entering because the incumbent can use its value in good A to cross-subsidize product B in the bundle and thereby deny the competitor any sales. As shown, traditional leverage theory points to the possibility of anti-competitive behavior by a merged entity via the raising of costs for actual or potential rivals. However, this theory only deals with tying/bundling as a means of excluding or restricting competitors in the market in question – it does not deal with scenarios dealing with the consolidation of market power. This is to say that leverage theory explains a firm's strategy to insulate itself from potential competition – it is a pre-emptive strategy. Dynamic leverage theory extends potential anti-competitive behavior to include the harming of buyers by limiting the profitability of entry into any of a number of products sold together.

Inspired mostly by the Microsoft case in the US, studies dealing with the dynamic effects of tying/bundling identify that the basic idea behind 'dynamic leveraging' is that a firm that has monopoly power in one market may want to reduce competition in a related market in order to protect its monopoly power in the tying market or to extend it to the tied market. A central issue in the Microsoft case was the U.S. government's claim that Microsoft had integrated or bundled its browser, *Internet Explorer*, directly into its operating system *Windows* as a means to eliminate the rival browser, Netscape's *Navigator*, from the market. The argument was that since Microsoft has monopoly power in the operating systems market, every consumer of *Windows* would now find *Internet Explorer* as the default browser thereby eliminating or greatly reducing Netscape's market share. Nalebuff (1999) developed this theory extension and hypothesized that tying/bundling might be harmful for buyers because it limits the profitability of entry and thus reduces competition in the long term. The Nalebuff model considers the incentives of a monopolist involved in two (complementary) products to bundle them together in

order to insulate its monopoly position by deterring new entry into the presently monopolized products (161). In order to clearly understand dynamic leveraging and differentiate it from traditional leverage theory, one can consider the following scenario: A firm (1) which is initially alone in the market for A faces a more efficient competitor (Firm 2) in the market for a complementary product (B). One would normally expect Firm1 to be content to allow Firm 2 to expand because that would help Firm 1 earn more profits in A. The game changes considerably if Firm 1 faces the possibility of competition in A and if there are significant economies of scale in B. In that case, Firm 1 might prefer to engage in practices having the effect of keeping Firm 2 small and inefficient. That would assist Firm 1 by denying a potential entrant in A the benefit it could derive through its customers having access to a high quality B component.

It is pointed out that bundling as an entry deterrent works best when there is a positive rather than a negative correlation across consumers in their valuations of the bundled goods. Importantly, it was found that although (as shown above) a successful trying strategy requires a credible pre-commitment to the practice, this may not arise in a bundling situation because bundling could prove to be the profit maximizing strategy even if the monopolist fails to deter entry. In the words of Nalebuff (1999):

> A firm that has only some components of a bundle will find it hard to enter against an incumbent who sells a package solution at a discount. This will be especially true when the consumers have positively correlated values for the components of the package or when the components are complements. Bundling also softens the harm done by a one-product competitor. The rival takes fewer customers away and prices don't fall as far (181).

This sheds some light on the correlation between bundling and the possibilities open to conglomerate mergers that combine products in which there is already considerable market power – such as the consolidation of market power. By tying two complementary products, a monopolist credibly makes entry in one component completely dependent upon success in the other. An entrant can gain access to consumers and earn a profit only if the entrant in the other product market is also successful. Tying thus makes the search for future profits less certain - reducing the entrants' incentive for investment and innovation (Choi and Stefanadis 2001, 52-3).

Building on his existing theory, Nalebuff (2000) considered situations where there was something less than a monopoly in each of the bundled products. Although incomplete it was concluded that:

> As powerful as bundling is to a monopolist, the advantages are even larger in the face of actual competition or potential competition. Selling products as a bundle can raise profits absent entry, raise profits even against established but uncoordinated firms, all the while lowering profits of existing or potential entrants and putting these rivals in the no-win position of not wanting to form a competing bundle. The only real disadvantage of bundling is the potential cost of inefficiently including items consumers don't desire (12).

Taken together, the Nalebuff models form the basis for analyzing the potential anti-competitive effects of conglomerate mergers involving mixed bundling. In particular the models offer insights on the short-run effects on pricing, market shares, and profits in the industry in question. Firstly, post-merger activity will see the merged firm reduce the price of the bundled item(s) and expand market share relative to the pre-merger situation. This is possible because the merged firm now has a range or portfolio of complementary products and can thus reduce the bundle price below that of the level the two merging firms would choose if acting independently. Next, the merged entity will raise prices of its stand-alone components since it has less to lose from raising prices because a proportion of those customers that switch away from the stand-alone components as a result of the price increase will simply switch to the bundle offered by the merged firm rather than to a competing firm. This will also lead to the raising of prices of components, which has the effect of raising the costs for 'mix-and-match' products – i.e. products including a component of the merged firm alongside a competitor's component. The response of rival firms to the loss of market share constitutes the third effect of mixed bundling. In response to the price cut by the merged firm for its bundled product, and price increases for the 'mix-and-match' products, rivals will theoretically cut prices in order to retain some market share. However, they will not cut prices as much as the merged firm since – in the absence of counter-merger – they cannot internalize the advantages resulting from owning complementary products. As a result, Nalebuff's models predict that rivals will fail to recapture all of their prior market shares and profits will fall – leading to the possibility of market exit of rivals and market consolidation by the merged firm.

Speculation on the long-term effects of such mergers has centered on research and development (R&D) incentives. It has been shown that the merging firm's R&D incentives increase at the expense of the rival firms' because mergers with bundling allow the merged firm to capture a larger market share in the appropriate market and can thus use its increased profits to lead a more aggressive R&D campaign. Choi (2003) concludes that because of the increased profits of the merged entity and the decreasing profits of rival firms, mergers involving bundling dull the R&D incentives for rivals. Because of this, there is a possibility of technical tying (or pure bundling as described by Whinston) for new generations of products, which would totally exclude rivals from the market (4-5). Other scholarly work dealing with the potential long-range effects of mergers involving the accumulation of a portfolio of products, concentrates on imperfect substitutable products and the realities of retail.

Most consumer products must be sold through retail outlets in order for consumers to actually attain the products in question. Consider the situation of a group of products typically sold in the same type of retail outlet. Assume that from the consumer's perspective these products are neither complements nor substitutes. Suppose further that retail outlets must stock a broad range of products in order to stay in business. It is quite possible that some retailers must stock all or almost all of the range of certain best selling or 'must have' brands in order to be competitive. One or more sets of such key products constitute groups of complements from the point of view of the retail outlets. This point may take on merger policy significance if a merger results in a considerable reduction in the number of competing sets of such complements. Under these conditions, a merged firm holding a comprehensive portfolio of brands along with a 'must stock' brand may be able to force the retailers to buy the 'full range' of products in order to raise barriers to entry and ensure that it will always remain alone in the monopolized market (Verge 2002, 4-5). By engaging in full-line forcing[3] or exclusive dealing the merged firm could effectively force the retailer to carry lesser known or secondary products through an 'all or nothing deal' and/or supply the 'must have' product(s) contingent upon an agreement to only stock the merged firm's products.

[3] Full line forcing simply means that a firm holding a range of products makes it contingent upon the buyer to by the whole range. (i.e. the buyer can not pick and chose which products to stock... it is all or nothing.)

The aforementioned long-range potential effects of conglomerate mergers involving portfolio effects highlight particular concerns of the MTF in recent merger cases. It was clear in the first triad of cases in the mid to late 1990s that the MTF was concerned with 'must stock' brands and full-line forcing. The dealings of the MTF in portfolio power cases first centered on the possibility of an increased range of 'must stock' products under the control of a single firm. The combination of a number of these products was thought by the MTF to increase the bargaining power of the portfolio owner. Regarding the second concern, the MTF argued that control over a large number of products would allow the suppler to 'pull through' secondary brands and thus lever into other markets as a result of control over a strong or 'must have' product. A third concern of the MTF in numerous portfolio cases deals with the shear size of the merged firm. It has been argued that the growth in overall size of the merged firm would give it increased market power, simply through its greater importance as a trading partner for its customers (See Lexecon 2000, 1-2). However, it has been argued, both by the firms involved in these cases and various scholars, that the MTF's economic analysis of these situations was insufficient. Furthermore, with regard to the third concern, does it mean that a merger between related products in distinct relevant markets can confer market power, without there being any change of market share? Although these concerns can be perceived as legitimate if the circumstances are right, critics have argued that the MTF has consistently failed to explain where exactly the 'extra' source of market power would come from and how joint control over a high-selling brand and a secondary brand can allow the suppler to 'force' the latter on reluctant customers. As was the case in several instances where the MTF used the concept of collective dominance to scrutinize a merger, criticism from firms, practitioners and the Courts focused on the lack of in-depth economic analysis to validate competition concerns.

These shortcomings and concerns bring up an important point about mergers that are considered to confer portfolio power: most have pro and anti competitive effects. As Choi (2003) explains, "in the event of any foreclosure of competitors, conglomerate mergers with mixed bundling would be predominantly anti-competitive. Even in the absence of such foreclosure effects, there is no clear-cut answer to how mixed bundling by the merging parties would affect consumer and social welfare. With heterogeneous

consumer preferences, some buyers gain and others lose"(24). On the other hand, conglomerate mergers uniting complements could result in important efficiencies benefiting buyers. Such mergers could lead to price drops even absent merger related efficiencies. The reason is that uniting complements under common ownership gives the new entity an incentive to lower the price of one (or all) complements in order to realize larger sales and profits on the other complementary product(s) it sells. Such efficiencies and internalized complementary pricing factors could mitigate against the merged entity raising prices above pre-merger levels. These insights present the paradox that faces the MTF when analyzing a portfolio merger. For almost every possible anti-competitive effect that may cause the MTF to block or alter a merger, there are numerous possible pro-competitive effects that could render the merger passable. By the same token, the above discussion also explains why firms took issue with the use of portfolio-based arguments to scrutinize mergers. Not only is the concept of portfolio power inherently complex and ill-defined but, also the MTF has relied heavily on speculative long-term future behavior of firms. Instead of focusing on the immediate competitive effects of mergers, the MTF has invested its energies on 'predicting' the future likelihood of firms engaging in tying, bundling and leveraging: all practices that, if deemed illegal via investigation, would fall into the sphere of Articles 81 or 82, not the MCR.

5.2 Mapping the Portfolio power Trend: Cases in Point

This section examines the motivations and actions of the actors involved in the implementation of the MCR – the Commission/MTF, specific firms and the Courts – in relation to the use of the portfolio power concept in EU merger control. The integrated discussion of the following cases will argue that for the most part, the Commission/MTF pursued its own entrepreneurial agenda without negotiating mutually beneficial remedies with the firms involved. The results being that private interests of the regulators 'hijacked' decision-making pertaining to 'portfolio' cases and consequently more elevated conflict between firms and the Commission/MTF arose. The explanation of these developments is thus based on private interest theory and represents the second purpose of this section.

This section largely illustrates the path taken by the Commission/MTF in order to install portfolio power into its arsenal of regulatory tools and how firms dealt with its introduction. As the below case analysis will demonstrate, especially those making up the second triad, MTF decisions were taken rapidly and there was a decreased effort to negotiate remedies with firms and in some cases, firms' recommendations were blatantly disregarded. The concealed and aggressive manor in which the MTF and Commission pursued their portfolio power agenda produced a 'backlash' of criticism from firms, corporate umbrella organizations, practitioners and economists. According to Frederickson (1998) a recent (1997-8) survey of firms revealed "a general dissatisfaction with the level of service of the MTF." It was argued that this was a result of under staffing and the pursuit of new theories to analyze mergers by the MTF (2) . Likewise, a 2003 article in the *In House Lawyer* argued that the MTF "holds excessive power and independence and a number of firms and consultants have accused MTF officials of arrogance and intransigence" (Holmes and Roy 2003, 2). These criticisms are in sharp contrast to the opinions shared by firms, consultants and lawyers in Neven's survey during the first few years of MCR enforcement. Here, the general conclusions suggested that these actors were 'happy' with the MTF's implementation practice and that its application of the MCR as been fairly lax. Moreover, it was suggested that the Commission is keen to approve mergers and that the MTF in particular is an efficient, open and approachable unit (Neven 1993, 138-149). Clearly over-time, the MTF and Commission have become more active and confident in both unilaterally defining and addressing issues they feel are problematic. Moreover, since the failure of the Commission to have Member States consider reducing the jurisdictional thresholds, the Commission has reacted to the German and UK's claim that its merger analysis is excessively lax by steadily becoming more interventionist. The events discussed below in relation to the portfolio power trend demonstrate the consequences of such aggressive activism.

Because the major cases to be examined occurred in triads, one will perceive a marked difference in actor activity during the second triad – *GE/Honeywell, Scneider/Legrand*, and *Tetra Laval/Sidel* – since, during these merger negotiations, firms were aware of the MTF's portfolio power theory, yet could not negotiate mutual

beneficial compromises. Although the CFI's judgment in GE's appeal case will not be handed down until sometime in 2005, considerable attention will be paid to the *GE/Honeywell* merger (*General Electric/Honeywell* 2001) because of its impact on both the portfolio power concept and the relational dynamics between various Community actors as well as competition officials in Washington. Simply put, *GE/Honeywell* is the most controversial and widely covered merger in the world and deserves a thorough analysis. However, because the Court's judgment is pending, *GE/Honeywell* will be presented as the third case study of the triad. As previously mentioned, the MTF prohibited all the mergers in the second triad, which spurred three separate appeal cases by firms. As in the previous trend study, the Courts played a major role in resolving conflict between actors, refining policy and guiding as well as constraining Commission action. As will be seen, this dynamic is even more prevalent in the case of portfolio power since, as alluded to above, MTF and Commission action became more aggressive and concealed and thus firms needed the CFI and ECJ to help maintain the predictability and accountability aspects of the policy environment.

Before presenting the six major cases that define the portfolio power trend as outlined in Table 5.1, the discussion would be incomplete without the mention of the most controversial merger decision taken by the MTF – albeit before the *GE/Honeywell* decision.

The De Havilland Case: The Seeds of Portfolio Power

The proposed merger of *Aerospatiale-Alenia/de Havilland* (ATR/de Havilland) in 1991 concerned the joint acquisition by the French firms Aerospatiale and Alenia[4] of the Canadian division of Boeing - de Havilland. The product market, although subdivided into three by the MTF, was that for small capacity turbo-prop commuter aircraft used for regional transport. Although this was a very early case, the MTF did not hesitate to find that the proposed merger would significantly strengthen ATR's position on commuter markets in particular because ATR would increase its worldwide market share in the important market for 40-59 seats from 49% to 64%. It would eliminate de Havilland not only as an actual competitor in this market and as a potential competitor in the market,

[4] Aerospatiale and Alenia formed a joint venture ATR.

but also for aircraft with 60 seats and over where ATR had a worldwide market share of 76%. Also, ATR/de Havilland would become the only manufacturer coving the whole range of commuter aircraft.

The blocking of the *de Havilland* merger received international coverage because not only was it the first merger prohibited under the MCR, but also because the French and Italian governments were outraged by the decision. According to Ross (1995), Commissioner Brittan took a hard line on the *de Havilland* case, writing to Delors that "we must not allow this merger to proceed," and planned to make the merger a test case to demonstrate the Commission's powers to scrutinize mergers based on the competition only criteria set out in Article 2 (3) of the MCR(175). Within the full Commission, however, Brittan was opposed by Delors, by the other French and Italian Commissioners, and by the Industrial Policy Commissioner Martin Bangemann, who argued that the merger would give European aircraft manufacturers the economies of scale they needed to compete on world markets. Finally after days of lobbying within the Commission by Brittan, the Commission voted narrowly, by nine votes to seven, to block the deal. Ross explains further:

> Beyond the other Commission liberals (Andriessen, Schmidhuber, and Christopherson), Cardoso, MacSharry, Dondelinger, Millan, and Marin all voted with Brittan. For each of these commissioners Brittan's hard politicking had been central. Most said simply that they were giving way to the "commissioner in charge," although others, including Millan (a British Labourite with whom Brittan almost never saw eye to eye) and Dondelinger, indicated that they disagreed with Brittan even though "giving way." Manuel Marin, the swing vote, gave an utterly incomprehensible argument to explain himself, but seemed to have traded his vote for help from Brittan on a pending project to reorganize the European fishing fleet, an essential Spanish dossier. When it became clear that he would lose, Delors, as was his usual practice, abstained (178).

Not only did the decision to block the merger clearly show how haphazard the Commission's decision-making process can be, but the strong French and Italian reactions further highlighted the continuing existence of conflicting conceptions of competition law's role in the EU.[5] The objections to the controversial decision were based on arguments that the Commission had been overly legalistic in applying the MCR and the ultimate decision was a stab in the back for the European aerospace industry,

[5] It should also be noted that the decision-making dynamics displayed in this case added impetus to German calls for an independent Cartel Office that would take the final decisions on mergers out of the hands of 'politicisized' commissioners. The German's had always felt that the Commission was granted too much autonomy and discretion in the area of merger control.

depriving it of an excellent opportunity to consolidate itself on the world market. An Alenia spokesman commented that the decision "raises questions as to whether Europe is capable of having an industrial policy which would enable European industry to meet the challenges of international competition"(Reynolds 1991, 697). According to Gerber (1998) the campaign was taken so seriously that "the French government was said to be threatening to seek the ouster of the entire Commission (381). Clearly the French and Italian Commissioners were pushing their longstanding 'default' position of including industrial policy considerations in merger decisions in order to meet the immediate needs of the Community. However, the 'Brittan contingent' - including Frans Andriessen, the heavyweight External Relations Commissioner who previously led Competition in the early 1980s – prevailed and in doing so set the an important precedent in demonstrating that the test of the compatibility of a concentration with the Common Market was its impact on competition"(Fox 1991, 738-9). Not only was this precedent in line with the actually wording of the MCR, but it also followed the 'spirit' of Articles 81 and 82 of the Treaty in that competition law - in all its forms - exist to promote economic integration by ensuing the 'competitiveness' of the Single Market. Although this and the former trend study suggest that over time, the Commission's actions and thinking in specific areas of merger control have increasingly been guided by entrepreneurial, self-serving motives it has also been argued and will be argued further that the Community Courts have defined their role in merger control by both evaluating Commission decisions and promoting the goal of economic integration.

Closer examination of the case at hand and the reasons used by the MTF to support its decision shows that although not explicitly mentioned, aspects of portfolio power theory were employed. More concretely, the MTF made extensive references to how the merged entity's larger product range could produce anti-competitive effects.

> ... unlike the competitors, the combined entity would have all the advantages of a family of commuters to offer. This may give rise to the ability, *inter alia*, of offering favorable conditions for a specific type of aircraft in mixed deals (Arospatial-Alenia/de Havilland 1992, para.30).

It appears that the MTF felt having a complete range of products in the sector would give ATR/de Havilland a significant advantage. The ownership of a wide portfolio and the ensuing advantages would allow the merged firm to bundle products.

However, increased bundling capability was not the only 'portfolio' concern in this merger. Intertwined with this concern was the expectation that the merged entity would be able to offer customers certain important advantages whose flip side would be higher future switching costs for buyers, and an increased probability of predatory pricing.

> The consumers will be faced with a dominant position which combines the most popular aircraft families on the market. Choice will be significantly reduced. There is a high risk that in the foreseeable future, the dominant position of ATR/de Havilland would be translated into a monopoly. The two competitors expect that the proposed concentration would lead to ATR/de Havilland pursing a strategy of initially lowering prices so as to eliminate the competitors at least in the key markets of 40 seats and above. Neither Fokker nor British Aerospace consider it possible for them to withstand such a price war. Consequently, both would leave the markets. In evaluating these statements, it is noted that such conduct could be rational since the proposed concentration would mean that ATR/de Havilland would exceed the threshold of market shares which would make such a pricing policy likely given that it would be the optimal profit-maximising strategy. Having established a monopoly, ATR/de Havilland would be able to increase prices without any competitive check (para.69).

Thus, the MTF concluded that the merger would strengthen the market position of the merged entity in the short run, while leading to the foreclosure of market competitors and thereby precipitating price increases in the long run. The merging firms argued that in the short term, the merger would have unambiguously benefited consumers, even though the combined market shares of the merged firm's competitors would have fallen somewhat. Nevertheless, the MTF considered the implications of the merger on future market conditions to outweigh short-term efficiencies.

Clearly, the decision to prohibit the *de Havilland* merger centered on the extreme market shares involved in the various defined product markets and the fact that the merger would have led to the creation of an outright monopoly. The aspects of portfolio power involved – bundling, range of products and foreclosure – were secondary arguments which added strength to the MTF's decision. Although some have written about the portfolio aspects of this particular case, these critiques did not surface until after the MTF actually used the term 'portfolio power' in the first triad of cases to describe the reasons why it took issue with aspects of these cases (See Neven 1993; Whish 2001; Cini and McGowan 1998; Ross 1995). The decision in this particular case adds insight to this study because, although not the centerpiece of the MTF's objections, aspects of portfolio power theory where used, which leads one to conclude that the MTF was predisposed to using such arguments in the future. In terms of mapping the

emergence of the portfolio power trend, one may contend that its seeds can be traced to the prohibition of the *de Havilland* case.

The First (Beverage) Triad: The Introduction of Portfolio Power

1997 turned out to be a busy year for the MTF with regard to the introduction of portfolio power into its merger analysis. Although the analyses of the first two beverage cases do not bear the term 'portfolio power' it is evident that aspects of the concept were considered. Because the below three cases were, for the most part, being examined simultaneously by the MTF it was able to test its various portfolio arguments in the first two cases and subsequently introduce the concept in the third case quickly. As already alluded to, the emergence of the portfolio power trend in European merger control and subsequent realization by firms of its existence took a different road than did the trend of collective dominance. As discussed earlier, the injection of a collective dominance policy into the MCR framework was preceded by a public acknowledgement by Commissioner Brittan that the Commission would be actively seeking to fill the regulatory hole present in the Regulation relating to situations of collective dominance. Although the inclusion of collective dominance arguments into EU merger policy was initiated by the Commission and carried out by the MTF in order to expand its regulatory scope, firms did not debate the basis for such an inclusion, and in most instances were able to negotiate mutual beneficial remedies. The ensuing conflict grew out of the MTF's motives for expanding the scope of the concept, thus blurring the predictability of the merger control process for economic actors.

When turning to portfolio power, however, one sees that the conflict between the Commission/MTF and firms in this instance dealt with two issues: (i) the concealed nature of the MTF's unilateral actions to apply the concept and (ii) the fact that the concept lacked solid criteria, scope, as well as coherent economic and definitional logic. Not only did the emergence of this trend significantly reduce the predictability of the decision-making process, but it also raised fundamental issues regarding agency accountability. Consequently, the ensuing conflicts between the actors were more intense than in the previous trend study. However, the swiftness of the MTF's actions during the

first two cases allowed minimal time for firms to react to the introduction of portfolio power and thus there was little opportunity for conflict to arise between the two actors.

January of 1997 saw the Commission decide the fate of the first of the three beverage mergers. Under the *Coca-Cola/Amalgamated Beverages Great Britain* merger, Coca-Cola Enterprises (CCE) would acquire sole control of Amalgamated Beverages GB (ABGB), the parent company of the British bottling company, Coca-Cola & Schweppes Beverages Limited (CCSB). CCSB bottles and sells a wide variety of soft drinks including Coca-Cola, Schweppes Mixers, Fanta, Sprite and Canada Dry. CCE is the world's largest bottler of Coca-Cola products and is, for the purposes of the Merger Regulation, controlled by The Coca-Cola Company (TCCC). Although the deal did not involve any aggregation of market shares or brands since CCE was not currently active in Great Britain, in order to assess the effects of the proposed acquisition the MTF had to determine whether the products supplied by CCSB constituted one or more relevant markets.

The parties involved were already active in the preparation, packaging, marketing, distribution and sale of commercial beverages. Both CCSB and CCE were leading members of the soft drinks bottling industry. The notifying parties argued that the relevant product market was that of commercial beverages, which consisted of a wide variety of products including carbonated soft drinks, drinks, fruit juices, and bottled waters. Yet, the MTF rejected this interpretation of the product market and concentrated its analysis on the carbonated soft drinks (CSDs) market and more specifically on 'colas,' since these drinks accounted for about 50% of all carbonated drinks. Consequently the MTF concluded, "that there is a relevant market for the supply of colas in Great Britain. However, for the purpose of assessing the present case, the question of whether and on what basis the market could be further divided can be left open, since a further segmentation of the markets would not materially alter the analysis of the present case"(*Coca-Cola/Amalgamated Beverages* 1997, para.94).

The MTF's analysis suggested that coca-cola was a 'must stock' cola and that Coca-Cola was the "prime motivator in the (cola) market." The fact that Coke constituted a must stock brand for wholesalers and multiple retailers conferred an advantage in that there was no alternative supplier and this in turn enabled CCSB to

negotiate satisfactory arrangements regarding terms, access to shelf space and promotional slots. Also, in addition to Coca-Cola, CCSB also held the widest portfolio of any soft drinks producer in Britain. Its ability to offer not only the world's leading cola but also a complete range of other soft drinks suggested that CCSB was indeed a dominant firm. A further strength of CCSB was the large volume generated by a combination of Coca-Cola and the brands in its portfolio which enabled CCSB to take advantage of economies of scale in purchasing, production, distribution and advertising. As a result, potential entrants into the cola market could face substantial entry barriers. The costs for a competitor to launch a new cola to compete against Coke would be astronomical and since Coke was considered a must stock brand the difficulties in obtaining access to the quantity and quality of shelf space necessary for success would be a considerable barrier.

Overall, the dominance of CCSB stemmed from its very high market shares of Coca-Cola in the overall cola market, its status as a 'must stock' brand as well as considerable economies of scale in production and distribution. These economies of scale are in addition to those arising from the sheer volume of Coca-Cola sales. Potential entrants into this market would face serious barriers to entry and neither customers nor competitors would be able to restrain the ability of CCSB to act independently of the other market competitors.

The MTF's investigation determined that CCSB was dominant in the British cola market and this dominance would be subsequently transferred to TCCC that would gain control of a fully integrated carbonated soft drinks portfolio in the UK. However, given in particular TCCC's pre-existing substantial influence over CCSB, the MTF concluded that the operation would not result in a strengthening of this dominant position within the meaning of the MCR. While it is clear that the new entity would enjoy substantial market power, that must be seen in comparison with the current structure of CCSB – in particular, through the presence of Coca-Cola in the current structure, as compared with its presence through CCE in the new entity. Moreover, the CCSB portfolio would remain the same (*Coca-Cola/Amalgamated Beverages* 1997, para.214). Because the merger would not have conferred more market power to CCSB, the MTF could not establish that a dominant position was strengthened. Thus, the merger was cleared unconditionally.

Although this particular merger passed with no adverse findings, the MTF did examine aspects of the deal that would be consistent with the use of portfolio power theory in future cases. The MTF examined whether the constitution of a broad range or portfolio of soft drink brands would confer on the Coca-Cola company the possibility to use its beverage portfolio to its advantage, for instance by leveraging its strong position in Coca-Cola (the tying market) into other products of the CCSB portfolio. Specific aspects of the portfolio power concept were cited by the MTF such as the existence of a broad *portfolio* for CCSB, Coca-Cola being a 'must stock' brand, the use of bundling/tying to produce discounts for retailers and the possibility of using Coke to 'pull through' lesser products in the portfolio. As was the case with collective dominance, the MTF waited for a 'test case' to employ its new concept. The same is true in this trend study. Despite all of the above portfolio aspects being present in this case, the MTF did not evoke the portfolio concept because doing so would not have had the desired effect. In order to set a policy precedent, the MTF would need to pick a case which it could either conditionally pass or block outright.

Following its first encounter with the Coca-Cola Company (TCCC), September of the same year saw the Commission give its second decision regarding the *Coca-Cola/Carlsberg* merger. The proposed merger would have lead to the creation of a joint venture and the transfer of assets between The Coca-Cola Company and Carlsberg. In the first stage, the operation would only affect Denmark and Sweden but would be extended, in the future, to cover the whole of the Nordic and Baltic regions. The operation concerned an amalgamation of the companies' soft drinks activities in these regions, as well as certain license agreements and a distribution joint venture with the Swedish brewer Falcon, which is jointly owned by Carlsberg and the Finnish brewing company Sinebrychoff. If allowed, the proposed joint venture would have established the entity Coca-Cola Nordic Beverages A/S (CCNB) in which Carlsberg A/S would hold 51% of the shares. CCNB would be responsible for the production, sale and distribution of Coca-Cola and other soft drink brands in the Nordic countries.

From the start the firms involved argued that the relevant product market should be the market for non-alcoholic beverages (NABs). However, the MTF opted for the argument similarly seen in the *Coca-Cola/Amalgamated Beverages* (1997) case, and

determined that the concerned market should be narrowed to carbonated soft drinks. The MTF did not go as far as it did in the previous case by narrowing the market further to include just colas because although "a number of elements suggest that there is a separate market for colas, it should be noted that whether the operation is analyzed in terms of colas alone, or in terms of all CSDs, the assessment would not materially change"(Coca-Cola/Carlsberg 1997, para.24). It was next determined that the merger would have competitive effects in both the Danish and Swedish markets at both the brand and bottling levels.

At the brand level, TCCC would acquire the know-how and production rights for certain CSDs from Carlsberg and Falcon in Denmark and Sweden respectively.[6] With regard to the bottling level, there would be two effects. The first would be the overall strengthening of TCCC's market power through its forward vertical integration. Moving from its role as a licensor to that of co-owner and co-decision maker of bottling operations represented a structural change. Secondly, the dominant position of Dadeko, which is the largest bottling company of CSDs in Denmark, would pass to CCNB and would be further straightened at the bottling level in two ways. TCCC's brand portfolio would be enlarged by the operation, and at the same time, the Carlsberg portfolio would be eliminated in Denmark. Furthermore, the Falcon portfolio would be weakened in Sweden. The MTF concluded that as a result of these structural changes, the merger would lead to the elimination of both actual and potential competition from Carlsberg in both Denmark and Sweden. It was pointed out that in Denmark, Carlsberg stated that it wanted to discontinue production of certain flavors it currently produced and in Sweden TCCC would acquire certain brands from Falcon. Because Carlsberg was bound by a shareholders agreement not to introduce any new flavors in the future and in Sweden Falcon was bound by non-competition agreements not to re-enter the CSDs markets, the MTF ultimately concluded that the strategic aim of TCCC in establishing CCNB was to capture the growth of the market for the brands owned by or licensed to TCCC. This merger, unlike the first Coke case which was a matter of internal restructuring, represented a new transaction putting into effect the joint strategy of two competitors

[6] In Denmark TCCC would reassign the rights to produce the CSDs to Dadeko (a Carlsberg subsidiary), whereas in Sweden it would retain these rights.

which would have structural effects on the industry. Given these findings, the MTF opened a Phase II investigation.

The main theoretical argument forwarded by the MTF was that the addition of a strong cola brand to an already existing strong portfolio of beverages would not only strengthen a dominant position, but lead also to market foreclosure. As demonstrated in the previous case, colas are the largest selling CSD flavor and are sometimes referred to as a 'traffic builder', which drives the overall CSD volume of a supplier. The MTF thus argued, in a fashion corresponding to the broad definition of portfolio power, that

> it is a considerable advantage for a suppler to have a strong cola brand in its portfolio. Furthermore, the inclusion of strong beer and packaged water brands, such as those of Carlsberg, in the beverage portfolio gives each of the brands in the portfolio greater market power than if they were sold on a 'stand alone' basis (*Coca-Cola/Amalgamated Beverages* 1997, para.69).

The idea that market power can be enhanced by the ownership of a portfolio of products represents the theoretical core of the portfolio concept. Since the distribution of CSDs was characterized by high economies of scale, the MTF rationalized that companies with the highest volume and the broadest portfolio of beverages in their distribution system will have the lowest costs and be able to reach the highest number of consumers. The addition of Coke to the pre-existing portfolio would in itself make TCCC and Carlsberg 'unrestrainable' in the CSD market. Likewise with regard to bottling, given the market shares of Dadeko and the other Carlsberg operations, whose portfolios, distribution systems and shareholdings in other brewers, the MTF concluded that none of the current competitors would be able to constrain the actions of Dadeko in the CSD market (para.71).

The MTF found that at the brand level TCCC was dominant and at the bottling level Dadeko (as bottler for TCCC and Carlsberg CSDs) was dominant. With the creation of CCNB, the dominant positions of TCCC and Dadeko (control which would have passed to CCNB) would be strengthened. In the Commission's words, "the operation will give TCCC decisive influence over which new CSD brands are launched on the Danish market"(para.101).

Faced with the inevitable prohibition of the deal, the companies involved: Coca-Cola Nordic Beverages A/S, Carlsberg A/S and The Coca-Cola Company offered certain

undertakings, following discussions with the MTF. These included: the sale of all Carlsberg's shares in Jyske Bryg Holding A/S (which held 62% of the shares and 49% of the share-holder votes in Bryggerigruppen A/S the current bottler of PepsiCo brands and the second largest CSD producer in Denmark) and the sale of all Carlsberg's shares in Dansk Coladrik A/S (which produces Jolly Cola, the third largest cola brand in Denmark). The remedies negotiated by the firms and MTF highlight the fact that the latter's major reservations concerned the 'future competitive effects' of the merger as a whole. In particular, Carlsberg's divestiture of its shares in Jyske Bryg which would allow Bryggerigruppen to become an independent second force in the Danish CSD market was a key condition set by the MTF because it would break the link between the two largest CSD producers in Denmark - Carlsberg and Bryggerigruppen. Conspicuously, but not surprisingly, specific portfolio-based concerns were not heavily emphasized in the negotiations, which had the effects of making the MTF's demands more appealing and decreased the probability that the firms would put up a significant fight via appeal. Interestingly, by successfully negotiating a deal the firms involved aided the MTF in establishing a major aspect that would play a prominent role in future portfolio power applications: the use of future competition predictions to validate portfolio-based arguments such as entry barriers and market foreclosure.

Although there was no direct reference to the idea, the basic theory of portfolio effects was evoked in this case. Clearly, at this point of the trend's evolution, the concept of portfolio power was ill-defined from a theoretical perspective. However, taken together, the Coca-Cola cases suggest that it relates to a situation in which a merger has the possibility of significantly impeding competition due to acquisitions of complementary products which enable it to become a 'full line' seller with whom customers may prefer to deal (OECD 2002). Generally, "the concept is that a firm with market power which acquires a fuller line may obtain 'portfolio power' which forecloses access to the market to single line firms and extends power from one market to another – a form of leveraging"(Bermann, et al. 2002, 973-4). Specifically, the MTF, through its first two case decisions, put forth numerous reasons why conglomerate mergers with portfolio effects could be deemed anti-competitive: (i) that such a merger will create economies of scale and scope that other firms will not be able to match; (ii) that the

merged firm will gain a decisive advantage over its competitors by virtue of its greater size and financial resources; and (iii) that the merger will facilitate the tying and bundling of complementary products in order to lever into other markets. It will be seen in the next case, *Guinness/Grand Metropolitan,* that these arguments would be linked and introduced under the umbrella of portfolio power. It is here where firms as well as the US Department of Justice began to take issue with the theoretical underpinnings of the concept of portfolio power.

On 16 May 1997, Guinness PLC (Guinness) and Grand Metropolitan PLC (Grand Met) notified their intention to merge all of their business activities into a new entity. Guinness's principal business activities were in the distilling and marketing of Scottish whisky (Scotch) and other spirits, and the brewing and marketing of beer. Grand Met was a UK group with a portfolio of interests in the food and beverages sector. By sales volume Grand Met and Guinness were respectively the first and second largest suppliers of spirits in the world with each party owning a number of leading international brands. The new company's worldwide turnover would have been over twice that of its two next largest competitors (Seagram of Canada and Allied Domecq of the UK).

On 6 June the MTF decided to continue its investigation into the proposed merger, which would have resulted in the creation of the world's largest company in the alcoholic beverages industry. The MTF expressed several concerns, including the significant overlaps resulting from the proposed merger, and the large portfolio of leading brands that would be brought together. It was found that the merged entity would result in significant overlaps in the spirits sector, with combined market shares of over 40% in the whiskey sector in certain European national markets. Furthermore, the parties would own such a share of whisky distilleries in Scotland that they might be able to influence the market position and pricing strategies of their competitors. The merger could have also resulted in significant overlaps in white spirits, in particular gin and vodka, in some national markets. Likewise, the MTF was also concerned that the merger would provide the parties, due to their ownership of a significant number of leading brands across a range of different spirit categories, with such a portfolio of 'must stock' brands as to provide a significant reinforcement of their bargaining position with their customers, whether wholesalers or retailers. As a result of these findings, it was evident to the MTF

that the merger had the possibility to give rise to a dominant position in one or more of the markets concerned. A Phase II investigation was subsequently opened.

Once again the definition of the relevant product market(s) proved to be a flashpoint between the MTF and the parties concerned. Following its consistent trend of narrowly defining product markets, the MTF concluded that every type of spirit constituted a separate product market and further determined that branding and brand name were key competitive characteristics in those markets. It was thus decided that the geographic markets were to be national despite arguments from Guinness and Grand Met that the correct market would encompass all of the EEA. The MTF found that the distribution within these markets demonstrated the importance of vertical integration in this particular case. Wholly owned subsidiaries were responsible for the exclusive distribution of products at a national level. In addition to distributing their own brands, the distributing subsidiaries of Guinness and Grand Met would distribute spirits of other firms. The MTF argued that "integration into distribution allows the supplier to maintain control over the marketing and distribution of the brands which it owns, thereby safeguarding the all-important image of those brands in the market-place"(*Guinness/Grand Metropolitan* 1997, para.20). However, the MTF felt that this third party distribution accounted for only a relatively small proportion of total distribution activity and thus was viewed as a minimal source of additional profits.

The main concerns of the MTF were portfolio effects: such effects were present because the holder of a portfolio of leading spirit brands may enjoy a number of advantages. In particular, the MTF felt that the position of a supplier of a broad range of spirits to its customers would be stronger than a supplier of a single spirit since it would account for a greater proportion of the customers' business. This is exactly the same argument that was made in *Coca-Cola/Carlsberg*. It was argued that a large portfolio of products would provide greater flexibility to structure prices, promotions and discounts as well as provide a greater potential for tying. These arguments were also put forth in *Coca-Cola/Amalgamated Beverages*. Moreover, a broader portfolio provides economies of scale and scope in sales and marketing activities and strengthens the force of a threat of refusal to supply. Both of these points were also made in the previous two cases.

However, unlike its decisions in these cases, the MTF did provide a list of factors that could lead to 'portfolio power' in *Guinness/Grand Met.*

In more detail, the factors established were: whether the holder of the portfolio has one or more leading brands in a particular market; the market shares of the various brands, particularly in relation to the shares of competitors; the relative importance of the individual markets in which the parties have significant shares and brands across the range of product markets in which the portfolio is held; and/or the number of markets in which the portfolio holder has a brand leader or leading brand. Third parties questioned by the MTF all confirmed that having a leading brand in all or most spirit categories would help sales of spirits in general. As such, the MTF confirmed the existence of a portfolio effect in the market. While it was true that end consumers purchase only a specific brand of spirit, not broad portfolios, the manufacturers often sell all of their products to intermediate retailers. It is this portfolio of products that is important to the intermediaries. Thus, by expanding the number of brands it distributes, the merged entity would be in a position to gain additional sales of its secondary brands. Overall, the MTF found that the strength of the portfolio effect varied from market to market. However the one place in which it was a significant problem was Greece.

In order to understand why Greece was a particular concern, one must consider that in addition to the anti-competitive effects already mentioned, the MTF also stated that portfolio power could be seen as a barrier to entry. First, a new entrant would need to develop a range of desirable products in order to counter the portfolio power of the merged firm. Without such a portfolio, a retailer might feel threatened by a potential cut-off of supply by the firm with portfolio power if the new entrant's products are purchased. Secondly, the vertical integration of the major industry players limits the supply of third-party distributors to assist new entrants. In other words, if there are few (or any) non-vertically integrated spirit firms then there will be no distribution available to distribute the new entrant's products. Even without these barriers, there would be significant costs of entry, as entrants would need to promote their brands heavily.

With these concerns in mind, the results of the MTF's analysis highlighted three competition concerns in Greece: the creation of a dominant position in whisky, the creation of significant portfolio power, and the creation of barriers to entry in spirits

through the use of the firm's distribution facilities. The merger would have brought together the high market shares in rum and gin of Guinness with the high market share in brandy of Grand Met. The merged firm would have been over four times as large as the next largest competitor in Greece, becoming the largest importer and distributor. Although not along the same dimensions, other EU states would have been negatively affected. For example, in Spain the merger would have lead to the creation of a dominant position in the Scotch whisky market. The merger would have also reduced the number of significant independent distributors in Ireland to two, as well as strengthen the dominant positions of the parties in Scotch whisky and brandy/cognac. The MTF also found that market dominance in Belgium/Luxembourg would be created in gin, vodka, and whisky. Both parties argued that the merger did not increase the market shares of the various liquor brands, but the MTF purported that the range of spirits, in itself, could create or strengthen a dominant position.

As a result, Guinness and Grand Met negotiated a remedy with the MTF which lead to numerous divestitures and terminations of activity. Apart from the most significant undertaking - the relinquishment of distribution of Bacardi in Greece – the parties agreed to divest Dewar's and Ainslie's brands of Scotch whisky, terminate the Wyborowa agency (vodka sales) in Belgium/Luxembourg, appoint an independent third party distributor for gin in Belgium/Luxembourg for at least nine years and dispose of certain interests in Ireland in order to ensure competition in distribution. In the end, the firms felt that the undertakings demanded by the MTF were 'workable' in that they did not 'doom' the deal.

This case was of major importance to the Commission's portfolio agenda because it offered a landmark definition of portfolio power: "in short the market power deriving from a portfolio of brands exceeds the sum of its parts"(para.38). According to the facts of the case and the MTF's interpretation of them, there are four possible sources of portfolio power as outlined by the OECD (2002) :

> (i) From the retailer's standpoint, if a firm has a sufficiently wide range of products, then the retailer might decide that it can save transactions costs by dealing with just a single firm. This kind of benefit is the same as the efficiency reason for bundling...
> (ii) Second, a portfolio of products would provide the firm with economies of scale and scope. There are fixed costs of distribution and storage, and if these fixed costs can be spread over more products then there are overall cost savings to the firm.

(iii) Third, a broad portfolio could increase the potential for tying and bundling. A wide range of brands provides opportunities to offer discounts on bundles of different products. Also, in theory, a firm could tie the availability of a leading brand in one market to the purchase of a secondary brand in an alternative market. This is similar to the effects of using a dominant brand to 'pull through' secondary brands or to 'full line force' – effects...

(iv) There is also a possible threat to refuse supply. This would basically lockout competitors with lesser portfolios (7-10).

The MTF clearly felt that there was an opportunity for significant economies in the distribution of the spirit brands of the merged firm. These economies would have unambiguously lowered the costs of bringing to the market all of the products of the firm. The MTF's view that efficiencies such as these are suspect and constitute investigation has become a hallmark in its decisions regarding portfolio power. As one commentator noted, "some of the language in *Grand Metropolitan/Guinness* on portfolio power seems to come close to suggesting that the added efficiency that would follow the transaction was a reason for condemnation"(Whish 2001, 779-80). Despite potential drawbacks for consumers when the MTF follows this logic, there are possible anti-competitive side effects from such efficiency advantages. For existing competitors, if the cost advantages are so great that competitors will be driven out of the market and once driven out unlikely to re-enter, then there could be concerns of higher prices in the future. However, in this particular case it was not suggested that the merged firm's main rivals would leave the market (Lexecon 2000, 1). Another potential concern about the distribution economies was that it would become harder for a new entrant in the spirits industry to obtain distribution rights. This line of reasoning closely resembles that of using bundling to create an entry barrier, something that was discussed above. Again, this concern was not explicitly brought up by the MTF in this particular case. Instead, the centerpiece of this case was that the merged firm would have the incentive to bundle prices.

It follows that if this bundling strategy were to be employed, the merged firm would offer a discount that increased with the number of different brands that a retailer purchased. This could have detrimental effects on rivals' product sales. Although this type of bundling and its theoretical effects where discussed earlier, it must be remembered that the firm must have market power in each of the bundled products and not be able to price discriminate amongst its customers for the bundled pricing to disadvantage rivals. Furthermore, such an advantage is one of lower prices to consumers, which should be generally encouraged.

Taken as a whole the three cases that make up the 'beverage triad,' which also represents the first of two triads of portfolio power cases, laid the groundwork for the use of portfolio arguments. The analysis of the Coca-Cola cases saw the MTF develop its portfolio power theory – building on its findings in the *de Havilland* merger. The *Guinness/Grand Met* case saw the MTF firmly establish portfolio power analysis as a possible tool to question and scrutinize conglomerate mergers. Not only was a definition of the concept presented, but so were the various factors that the MTF felt could lead to portfolio power.

Clearly, the aftermath of the *Guinness* case left firms wanting clarification of the 'new' criteria and theory used by the MTF. In retrospect, it would seem that the parties involved in both the *Guinness* and *Coca-Cola/Carlsberg* cases were blindsided by the MTF's analytical approach. It is obvious that in both cases, the parties – reacting to the problems pointed out by the MTF - scrambled to produce remedies that would enable the deals to be cleared. It was in the interests of firms in both cases not to appeal the Commission's decision because the remedies agreed upon still made the mergers valuable. Thus, negotiations between the actors produced mutual beneficial ends. Nevertheless, by exploiting firms' rational interests to salvage the mergers the MTF/Commission received most of the benefits from these exchanges by negotiating remedies strictly on its terms. Hence, the MTF made the most of the windows of opportunity offered and effectively pushed through its portfolio power agenda with minimal opposition.

In terms of policy dynamics, it is argued that the actors and the interests that guided and produced decisions were similar to those found during the collective dominance trend. Although the private interests of both groups of actors help explain the outcomes of the cases comprising the first triad, the entrepreneurial actions of the MTF quickly altered the established bargaining relationship it shared with firms. Thus, there is a marked difference relative to that found in the policy community that developed during the formulation phase. In the instance of portfolio power, firms involved in mergers simply wanted their deals to be passed and thus accepted the MTF's remedies. More importantly, the MTF had an interest in investigating these mergers on the basis of portfolio effects. If successful in persuading firms to accept undertakings to remedy

'problems' emanating from its portfolio power concerns, the MTF would have covertly established a precedent for the concept's future use under the MCR. The MTF's analysis and decision in *Guinness* clearly solidified its portfolio power agenda and resulted in criticism from firms, lawyers and economists. It their view, as mentioned above, Lexecon consulting argued that the concept of portfolio power was made up of a number of disparate ideas which were not supported by a unifying economic theory (See 2000). Similarly, European competition law journals, such as *Competition Law Insight* supported claims by economists that there is a case for regulatory intervention in conglomerate mergers *only* where it can be shown, through economic theory and detailed empirical evidence, that such mergers will lead to the foreclosure of competitors. "It is not sufficient for the Commission to show that a merged entity will have the ability to engage in certain practices such as leveraging or bundling – it must go much further than it has in *Guinness*" (Branch and O'Neill 2004, 8). Clearly there was a consensus that the MTF had not yet formulated a sound theory with clear decision criteria. This had consistent effects as those found in the previous chapter analyzing collective dominance: a firm's ability to predict merger investigations involving portfolio power was impossible, the added discretion of the MTF was reversing the burden of proof in portfolio cases from the agency to the firms involved, and this increased discretion and policy jurisdiction had reduced the pressure on the MTF for rigorous economic analysis of cases.

As a result of the developments outlined above, the ERT (2000) stated that the "introduction of 'conglomerate effects' into European Merger Control would be highly undesirable"(7). This statement by the ERT and the MTF's subsequent discounting of it, set the parameters for future developments and further substantiates that there exists no 'policy community' at the implementation level of EU merger control. In response to the MTF's early portfolio concerns, specific firms underlined the fact that the creation of a new company with a wider range of products via a conglomerate merger may have positive effects for the economy (by creating a more competitive company) and for consumers (because the price of product bundles are usually lower than the price of the products bought separately) (Condomines 2002, 4).

> A wide range of products is not always an indicator of dominance. It should only be so when it allows the firm in question to obtain significant cost savings by exploiting

> economies of scale and scope, or when there are consumers interested in purchasing the whole range of products. The fact that a firm is present in different product markets does not say anything about its dominance in one of them (Faull and Nikpay 1999, 134).

Despite these arguments the MTF became more aggressive and continued to apply and expand the concept of portfolio power to mergers in markets beyond beverages, including aerospace, electrical equipment and carton/bottle packaging. The end result being, three blocked mergers in the span of six months. Because of the quick succession of decisions and an unwillingness to negotiate remedies, firms responded via Court appeals. The arguments made during appeal by firms clearly indicated they as well as the elite peak organizations took issue with numerous aspects of portfolio power and saw no possibility for mutual beneficial negotiations. This was because of the MTF's intention in this instance, "to put the interests of competitors before those of consumers. In doing so the MTF has neglected the overall goal of merger policy"(ERT 2003, 7). Thus, it is evident that no only did firms not share overlapping interests with the MTF, but the elite peak organizations that negotiated alongside Commission actors during the formulation of the MCR also disagreed on the issue of portfolio power. This suggests that although they still work together on merger control issues such as reducing the jurisdictional turnover thresholds and the treatment of all types of joint ventures under the MCR, the members of the 'merger control policy community' do not engage in constant resource dependence when it comes to monitoring policy implementation. Moreover, the ability of the Commission to pursue its portfolio power agenda and change the parameters of merger analysis further illustrates the theoretical argument presented in Chapter 4 that actions taken in the implementation phase can have significant effects on the originally negotiated rules produced in the formulation phase. Subsequent criticism of the MTF's use of portfolio arguments was provided by the US DOJ, which echoed the concerns of firms and the ERT when it stated:

> we are very concerned that the 'range effects' theory of competitive injury that is gaining currency in certain jurisdictions places the interest of competitors ahead of those of consumers and will lead to blocking or deterring pro-competitive, efficiency-enhancing mergers. We are also concerned that the theory, unless more clearly defined, will lead to less predictability in antitrust enforcement (OECD 2002, 213).

As these developments and those to be analyzed below suggest, the policy environment became polarized on the issue of portfolio power. On one hand, the MTF

was intent on fulfilling its policy entrepreneurial tendencies by firmly establishing the concept within the MCR framework by not allowing firms to negotiate and thus prohibited mergers. On the other hand, because they were not granted the negotiable latitude they had grown accustomed, firms became more defensive and appealed each of the MTF's prohibitions. The tit-for-tat strategy engaged by both groups of actors indicates that not only did they not share overlapping interests, but also neither respected the other's interests. In this instance actor dynamics were based on opposing interests and the realizations of both actors' 'fears.'

The Second Portfolio Triad: Three Prohibitions and Three Appeals

In January of 2001 the MTF began its investigation into the proposed take over of Legrand by Schneider – both French firms (*Schneider/Legrand* 2001). The merger involved competition in the low-voltage electrical equipment sector with substantial competitive overlap between the parties in electrical switchboards, wiring accessories and other products designed for industrial use. From the onset, officials from both firms admitted that joining forces would allow them to take advantage of their highly complementary businesses and geographic spread in the low voltage sector. The new entity would be able to offer a unique product line. The global spread of the firm would be well balanced, with business in Europe (outside France) amounting to 37% of sales, North America representing 29%, France 20% and the rest of the world 14%. In each of these markets, the merged entity would occupy prime positions, which would afford it the chance to grow.

The MTF carried out an in-depth investigation which culminated in the transaction being prohibited and a divestment order requiring Schneider to sell its shares in Legrand.[7] The MTF found that the merger would have strengthened the parties' dominance in France and elsewhere in the overlapping electrical equipment markets. These overlaps were found in the markets for electrical switchboards (distribution boards

[7] In this case, the merger had already been completed before the Commission gave its final decision. French competition rules allow takeovers to proceed before a ruling is made. The public offer of exchange of shares announced by Schneider on 15 January 2001 was closed on 25 July 2001. Consequently, Schneider held some 98% of Legrand's shares. Under EU competition law, in the event a bid closes and the EU competition authorities subsequently object to the transaction, the bidder may be ordered to take divestiture or other action to restore competition – as illustrated by this case.

and final panel boards, together with their components, where the combined market share would have been between 40% and 70% depending on the country); wiring accessories (in particular, sockets and switches and fixing and connecting equipment, where combined market shares ranged from 40% to 90%), and certain products for industrial use (industrial pushbuttons and low-voltage transformers) or for more specific applications (for example, emergency lighting).

The MTF argued that if Legrand merged with Schneider, a product range of "unparalleled breadth" would be created. The merged entity would have a broader portfolio than any competitor and would also have unmatched coverage of European territory. The merger would also significantly reinforce the presence of both parties on the various national markets in which they did not previously have a dominant position (*Schneider/Legrand* 2001, para.656-60). The MTF charged that the particular strong positions in the sockets and switches markets would enable the merged entity to lever into new markets and reinforce its position on other product markets or other national markets. It would also be able to use its substantial presence on most geographic and product markets to undermine any attempt by its competitors to strengthen their own presence in markets which it has a leading position (para.663). As in earlier portfolio cases, significant emphasis was placed on the number of brands that the new entity would have under its control. The MTF claimed that the number and quality of the merged entity's brands would give it a significant competitive edge based on their role and importance to the function of the relevant product markets. This portfolio of brands would enable Schneider/Legrand to conduct differentiated, complementary commercial policies for each brand. Such policies would allow the new group to fine-tune its response to demand and competition in each of the market segments. In particular, it would be able to position brands to appeal specifically to the upper, middle and lower end of the market (para.671).

As a result of these competitive advantages the MTF argued that the merged entity would be able to put together complex bundled discounts and rebate schemes in order to be more attractive to wholesalers. This would inevitably lead – according to the MTF – to the merged entity forcing wholesalers to distribute its new product or product ranges which were not distributed previously (para.678). Taken together, these concerns

confirm the use of portfolio power analysis by the MTF in this case. Clearly the MTF felt that the large portfolio offered by the new firm would enable it to crush its competitors not only in most markets, but especially in France, because it would be able to gain exclusive dealings with certain wholesalers, thus leading to full-line forcing. The broader effects claimed by the MTF were that because of the financial strength and product, the merged entity would be able to use its already dominant positions to lever into new markets. All of these factors would ultimately lead to foreclosure in multiple markets.

Following from this and despite Schneider and Legrand outlining various alternatives in an effort to gain clearance, the undertakings were ultimately rejected by the MTF because, in its view, they would not restore effective competition. An interesting facet of this case, as will be discussed further below, was the fact that when the MTF presented the merging parties with its Statement of Objections, the portfolio concerns were not included. For the most part, the MTF's objections centered on the strengthening of a dominant position in the French market. Unaware of the MTF's various portfolio concerns, the proposed undertakings of the firms focused almost exclusively on the French market issue. Only after the undertakings were rejected did the MTF air its portfolio concerns. "The omission of the central argument used by the Commission in its Statement of Objections to block the merger is highly unusual... the Commission is usually highly accurate when it comes to procedural issues pertaining to merger investigations... it is the MTF's economic analysis which is usually wanting" (Freshfields 2002, 2). Why would such a mistake be made? Although speculative in nature, based on the past behavior of the MTF and the Commission in relation to the use of portfolio-based arguments one could convincingly argue that the omission of the portfolio concerns by the MTF points directly to its intent to advance its entrepreneurial agenda to expand the MCR's reach to include assessment of conglomerate mergers. Clearly the Commission felt strongly that this merger would create a dominant position and should not be allowed to proceed however as the CFI would latter argue, the portfolio arguments used to prove this did not seem to match the case. Thus, it is quite possible that the Commission – anticipating the parties to appeal - understood this and by not including portfolio reasoning in its Statement of Objections hoped that its additional

economic analysis would be enough to withstand possible judicial review. Needless to say, the prohibition decision was controversial at the time and Commissioner Monti had to withstand heavy pressure from French President Jacques Chirac to change his mind. Despite these pleas the merger was officially blocked and Schneider, arguing that its rights to defense were violated by the MTF in that the merger was blocked because of concerns not outlined in the Statement of Objections, appealed under the expedited appeals procedure in the hopes of salvaging the deal.

Only four months after its dramatic *Airtours* judgment, the CFI overruled the Commission's *Schneider/Legrand* decision. The CFI's judgment in *Schneider Electric SA v Commission* (*Schneider Electric SA v. Commission* 2002) explicitly stated that the MTF's economic analysis was vitiated by errors, omissions and contradictions, including the fact that the MTF wrongly assumed that dominance on the French market translated into dominance on other national markets. It was also found that the Commission in its final decision made both legal and procedural errors in opposing the deal. Specifically the Commission violated Schneider's rights of defense with respect to its objections relating to the French product markets. There were three main issued raised by the CFI.

First, the Court accepted in principle that the MTF's analysis as to whether the merger would lead to the creation or strengthening of a dominant position in the relevant national product markets through 'transnational' effects, that is, effects resulting from the presence of the combined entity across Europe. On the facts, however, the CFI found that the MTF merely added the position held by the merging parties on the various national product markets without reviewing these positions in detail and extrapolated certain characteristics of certain national product markets (in particular the French market). The MTF failed to demonstrate the relevance of these elements for its analysis of the competitive situation in the different national product markets under investigation. Moreover, the CFI analyzed whether the generalizations and the specific local examples relied upon by the MTF were supported by facts. On the basis of a very detailed and critical analysis of the contested parts of the MTF's reasoning, the CFI stated that it was not convinced by the agency's case.

On a second issue, the Court found that the MTF had failed to recognize that for some large projects the parties were in direct competition with the vertically integrated

downstream operations owned by some of their competitors, notably ABB[8] and Siemens. One could ask whether this should not have led to the conclusion that the large projects segment in fact constituted a separate market. However, the CFI had not been asked to review the product market definition in this case. It therefore concluded that the MTF was wrong in excluding from the market, the sales by the vertically integrated downstream operation. As a consequence, the Court found that the MTF had underestimated the market shares of the relevant competitors.

The third issue (and most crucial) raised concerned the violations of the parties' right to defense. In the administrative procedure, the MTF must issue a statement of objections detailing its preliminary findings on the compatibility of the merger with the Common Market, and must allow the notified parties to be heard on these objections prior to taking a negative position. Although the CFI granted that the statement of objections could not be expected to anticipate all the issues potentially raised by the parties, it stressed that it should at the very least contain all of the MTF's objections in sufficiently clear wording so as to allow the notifying parties to exercise their rights of defense. In the case at hand, the CFI found that the MTF had not clearly stated that one of its objections with regard to the French market related to a conglomerate/portfolio issue: the alleged strengthening of the position of Schneider in certain product markets because of Legrand's position in other product markets. This objection was used by the MTF to reject Schneider's undertakings and was only clearly stated in the final decision. The CFI therefore concluded that Schneider's rights to defense had been violated.

This finding was crucial since the deficiencies in the MTF's analysis did not apply to France. As previously mentioned, the Court found that the MTF was correct in concluding that the merger would lead to the creation or strengthening of a dominant position on the French markets, which the CFI considered would significantly impede effective competition - this was in fact not disputed by Schneider. In other words, if Schneider had not been successful in its claim that its rights of the defense had been violated, the CFI would have refused to annul the Commission's decision.

Obviously, the CFI's decision had a major impact on this particular case. However, the decision was not all 'bad news' for the Commission and MTF. Although

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[8] Asea Brown Boveri Ltd. One of the largest electrical engineering firms in the world.

its decision was annulled it was not because it employed its portfolio power concept. In fact, the CFI acknowledged that such a concept might be used by the MTF if the facts of the case warrant it. As was the case in *France v Commission,* the Commission was winning the war but lost the battle. The CFI clearly found that the MTF's economic analysis did not support the use of portfolio/conglomerate effects in this case, but accepted the Commission's conclusion that the merged entity would have a wide range of products and trademarks. However, it found "insufficient evidence that the parties could use this 'portfolio' to eliminate competition from suppliers with more limited product offerings"(See *Schneider Electric SA v. Commission* 2002).

Although, portfolio power was an important issue in *Schneider*, the appeal decision did not focus on this, per se. As shown, the appeal decision focused on the rights of defense of the plaintiff. The fact that the CFI ruled that the MTF overstepped its procedural grounds highlights the highly administrative nature of the CFI's role in the area of merger control. It must be acknowledged that in 1989 the CFI was specifically created to deal primarily with cases involving Commission competition law decisions. Although the CFI's decisions can be reviewed by the ECJ, the vast majority of its decisions are not appealed. As stated in pervious chapters, a consequence of the CFI's creation and the widespread opinion held by the ECJ's intellectual leadership in the late 1980s that the Court should become 'less activist' has greatly reduced the role of the ECJ in competition matters and especially in merger control (See Gerber 1998, 371-81). For the most part EU merger control has seen little, if any, occasions where the CFI has exercised the bold leadership that the ECJ displayed during the early decades of EC competition law. Although the highly technical nature of merger control leaves little room for the CFI to engage in aggressive, doctrinal based decision-making when called upon, the above analyzed case-law of both trends suggests that the Court has 'come into its own' and is clearly competent and confident in reviewing detailed economic arguments, the role of new theories and evaluating Commission actions in merger control. Following from this, it is argued here that although formally charged with duties of an administrative nature, the CFI has *defined* its role in merger policy by offering the Commission substantive guidance on the proper application and limits of economic arguments and interpretation while at the same time providing purely legal assessments

of procedural issues such as those disputed in *Schneider*. As will be shown below, the judgments of the CFI coupled with those of the ECJ in *France v. Commission* and *Commission v. Tetra Laval* demonstrate that the emergence of the two trends of collective dominance and portfolio power represented 'substantial' developments in merger policy and provided the Courts the opportunity to establish intellectual leadership and link events in merger control with broader Community goals.

However, with this said, because the CFI afforded only limited attention to portfolio power in its *Schneider* judgment, an air of uncertainty still surrounded the concept's use. The Court did not provide any guidelines or examples pertaining to the use of portfolio power in future cases as it did for collective dominance via the *Airtours* appeal. This would change three days later when the CFI annulled the Commission's decision to block the *Tetra Laval/Sidel* merger (*Tetra Laval/Sidel* 2001). The *Tetra* case and its subsequent appeal dealt almost exclusively with portfolio power.

On 18 May, 2001 the MTF received notification of the proposed merger whereby Tetra Laval S.A. of France, belonging to Tetra Laval B.V (Tetra) of the Netherlands, proposed to acquire the French company Sidel S.A. Tetra was the world leader and dominant player in liquid food carton packaging equipment and Sidel was the leading, but not dominant, maker of stretch blow-molding (SBM) machines used in the production of plastic (PET) bottles.[9] The MTF quickly established that PET packaging equipment and liquid carton packaging equipment represented separate product markets, although there was some degree of convergence. Predicting the MTF's product market definitions, Tetra stated in pre-notification negotiations that it was prepared to dispose of activities that created some minor overlaps. Consistent with the other portfolio cases, the MTF identified few horizontal or vertical concerns but decided to open a Phase II investigation where it focused on the portfolio effects of the transaction.

The MTF paid attention to those uses where carton and PET might in the future become practical alternatives: milk, juices, tea/coffee based drinks and fruit-flavored drinks, (called the "sensitive segment"). As explained by Lexecon Consulting (2002b), "today, very few of these products are packaged in PET – less than 1% of the markets for milk and juice and figures around 25-30% for the other markets where volumes are very

[9] Polyethylene Terephthalate

small"(1). Despite these facts, the MTF contended that, although plastic is not used much today in these applications, it will be used increasingly in the future owing to technological change. Such change would permit better barriers for light and oxygen which currently significantly limit the use of PET for milk and juice. The MTF foresaw within the next five years a massive increase in PET usage at the expense of carton for these end-uses. Building on the experience of deciding the cases of the beverage triad and *Schneider*, the MTF felt confident that it had successfully established a portfolio power policy within the MCR framework. As such, The MTF advanced two principal theories of anti-competitive harm in its in-depth investigation of this case: elimination of potential competition and leveraging to create dominance in PET.

The MTF opposed the merger on three grounds. First, it argued that the merged firm would be able to leverage its existing dominant position in aseptic carton packaging to create a dominant position in the PET packaging equipment market. The MTF relied on its own predictions of an emerging common pool of customers that would increasingly need both carton and PET packaging materials and argued that the merged firm would have the ability and incentive to engage in practices such as tying and bundling (*Tetra Laval/Sidel* 2001, para.328-45). According to the MTF, such practices would lead to the foreclosure or marginalization of Sidel's competitors from the market for PET packaging equipment, in particular SBM machines (para.370).

Secondly, the MTF asserted that the merger would reinforce Tetra's dominant position in aseptic carton packaging and packaging equipment. It argued that, while constituting a separate product market, PET packaging equipment does represent a significant source of competitive pressure on carton packaging systems due to the increasing use of PET packaging in the aforementioned sensitive beverages sector (para.331). The MTF indicated that without the merger, Tetra would be expected to defend its position through innovation and price reductions for its carton packaging products, whereas it would be less inclined to do so if it could somehow "capture" customers switching from carton to PET packaging post merger (para.334).

Thirdly, the MTF found that the merged firm would be very strong in all end-use sectors of liquid packaging, particularly in what it defined as the "sensitive beverages

sector". According to the MTF, this overall strong presence would be sufficient to raise barriers to entry and marginalize competitors (para.346 and 64).

Although both parties to the merger felt strongly that the alleged leveraging issues were purely speculative, they did offer commitments that addressed the MTF's portfolio concerns. Firstly, Tetra decided to propose a divestiture of its SBM business to an independent third party. Secondly, Tetra undertook to divest its pre-forms business (PET Preform Business). Third, Tetra agreed to hold Sidel structurally separate from all Tetra Pak companies for a period of [...] years.[10] Sidel would be maintained as a separate legal entity and Sidel's shares would not be owned by Tetra Pak or any Tetra Pak subsidiary, but by a separate company belonging to the Tetra Laval Group. Lastly, Tetra undertook to grant a license for an indefinite term to an independent third party for Sidel's sensitive products and converter SBM business. In the view of the firms concerned, the first divestiture would eliminate any possible horizontal concerns in the low capacity SBM machines market. The Second divestiture would eliminate any possible vertical concerns arising from the channel conflict between the merged entity and converts. As for the concerns about leveraging and the strengthening of Tetra's dominant position in carton packaging, Tetra submitted that the package of commitments eliminated any possible competition concerns. The two divestitures would weaken the merged entity's position in the PET equipment market by limiting the merged entity's market share in SBM machinery and excluding performs from its PET offering. By removing Sidel for a period of [...] years from the SBM market for 'sensitive' products, the License would ensure that Tetra/Sidel could not leverage its dominant position in carton to gain dominance in PET packaging equipment, in particular SBM machines used for 'sensitive' products. In addition, the behavioral undertakings would prevent Tetra/Sidel from engaging in anti-competitive practices (para.411-23).

The MTF subsequently concluded that these commitments were insufficient to restore effective competition in the Common Market. According to the MTF the two divestitures would have a minimal impact on the position of the merged entity and the License agreement would not only be insufficient to remove the competition concerns, but also did not appear to be a viable option. Finally, the two behavioral commitments

[10] The number of years is undisclosed for confidentiality reasons.

were found insufficient without explanation (para.424). As a result, the Commission formally blocked the merger on 30 October 2000 and further pushed its portfolio agenda despite voiced reservations about such action by the CFI. The use of portfolio-based arguments forced the hand of the firms involved and thus the parties decided to appeal the decision under the expedited (fast-track) procedure introduced in February 2001.

Clearly, *Tetra* showcased all three of the MTF's major theories that comprise portfolio power mentioned earlier in this chapter. Regarding the first competition concern, namely the possibility of the merged firm to engage in bundling/tying in order to develop economies of scale and/or scope that rivals may not be able to compete against, both corporate Europe and US antitrust authorities posed the question: when, if at all, should the MTF block a merger on the grounds of a predication that prices would be lower and customers better off? The general literature on conglomerate mergers show that tying involving complementarity products and employed to price discriminate could result in enhanced output, and tend to increase welfare beyond what it would be without the merger. As previously mentioned, tying could also have positive effects in terms of fostering production efficiencies or in ensuring improved complementarity among products. To the extent that the merging firms enjoy large market shares and market power in complementary products, there will be a tendency for prices to decline post-merger because the effects of price drops in one product complement on profits of the other will be internalized instead of being ignored. As will be discussed below, the result of the *GE/Honeywell* case suggests that the MTF effectively accepted that any price reduction by a merged firm would result from the elimination of a pricing inefficiency. Taken to its logical conclusion, concerns could potentially be raised about any merger that produces efficiencies – for instance economies of scale or scope in production – that could render the merged company too efficient for its competitors to match (Lexecon 2001a, 1). It is quite clear from the MTF's analyses of conglomerate mergers involving portfolio effects that 'genuine' efficiencies, such as cost savings, are welcomed and count in favor of the merger however, lower prices that result from 'strategic behavior' do not count as 'efficiencies' and may be regarded as anticompetitive.

Usually, as in the US and Canada, cost savings are welcomed precisely because they tend to lead to lower prices. Indeed, this is why reductions in variable costs are

treated more favorably than reductions in fixed costs. As long as the cost savings are credible and merger-specific, they should count in favor of the merger. The ERT (2000) felt that "we see no economic basis for the Commission's hostility to price reductions resulting from the combination of complementary products"(3). On the contrary, if one concludes, as did the MTF in the above cases, that combining complementary products will give the merged entity an economic incentive to set lower prices, that should be stronger evidence in favor of the merger than mere cost savings, which may or may not be achieved and passed through to customers (Patterson and Shapiro 2001, 8). Furthermore the OECD (2002) concluded that " it is difficult to think of a historical example in which an efficiency-enhancing merger has actually led to consumer harm, and thus hard to imagine basing antitrust policy on an 'efficiencies offence'"(224). The willingness of the MTF to overlook the positive effects and emphasize the potential anticompetitive aspects of such mergers further highlights the entrepreneurial character of the MTF and its determination to further its own interests at the expense of firms and the broader aims of competition.

Moreover, the cases examined have seen the MTF assume that a merged firm may gain a decisive advantage simply due to its size. While size may be an advantage in some circumstances, it is wrong and dangerous to assume that bigger equals more powerful or that access to 'deep pockets' will necessarily allow a firm to outspend its opponents and win contests for market share. US authorities, as well as European firms equate this practice by the MTF to the discredited 'big is bad' doctrine of the 1960s. Both practices involve hostility when large, financially strong firms seek to expand into new markets by acquiring significant players in those markets. Both involve hostility towards the use of financial strength to engage in what are unquestionably pro-competitive activities such as offering discounts or attractive financial terms to customers (Patterson and Shapiro 2001, 5).

Elite economic actors especially took issue with the MTF's view that large firms combining complementary products would be able to raise entry barriers and/or facilitate an environment conducive to foreclosure via leveraging. The ERT and UNICE have, for some time, pressed the Commission to reconsider how it approaches entry barriers and potential competition. As it stands, when assessing barriers, the MTF wants to evaluate

whether entry would be likely and timely. It states, "The appropriate time period should depend on the specific capabilities of potential entrants"(Commission 2000b). This implies that the MTF only plans to take potential competition into account, if potential competitors can be specifically identified. The ERT feels that this is too narrow of an approach because it overlooks the possibility that new entrants may come not only from related product and geographical markets, but also from entirely different ones and completely new firms, particularly from highly innovative new start-up companies, financed by venture capital. This concern is particularly important in portfolio cases since these cases involve conglomerate merges in which potential competition can come from any of a number of markets (ERT 2003, 3). The way in which potential competition was stressed in the above portfolio cases served to fuel the argument that in many cases there is a double standard, and yet in others there seems to be no standard.

> The Commission intends to assess mergers with potential competitors by drawing on similar methods as for mergers between actual competitors. This appears inconsistent: in mergers between actual competitors, the Commission usually takes the view that entry can hardly have an offsetting effect, whereas in a merger with a potential competitor, it is now to be taken into account explicitly (ERT 2003, 7).

Deciding to block a merger on grounds that it will lead to lower prices and eventually exit means giving up the predicated immediate benefit of lower prices in favor of the speculative, long-term possibility of price increases. As was the case with *Airtours*, the MTF's agenda to expand its policy power and the confidence that emerged as the trend evolved, was quickly 'checked' by the Court.

Consistent with its findings in its *Schneider* case, the CFI confirmed that the MCR does not prevent the MTF from using conglomerate/portfolio analysis as the basis for intervening in mergers, as long as "a dominant position would, in all likelihood, be created or strengthened in the relatively near future and would lead to effective competition on the market being significantly impeded"(*Tetra Laval BV v. Commission* 2002, para.153). The CFI distinguished between conglomerate mergers that immediately change the conditions of competition on a second market due to a dominant position in a first market, and conglomerate mergers that could create or strengthen a dominant position only after a certain time period and as a result of the conduct of the merged firm on the first market. In the latter case, the Court stressed that it is not the structure resulting from the transaction itself that would create or strengthen a dominant position,

but rather the future conduct in question. Since the effects of conglomerate mergers are generally considered the be neutral or even beneficial, the CFI held that proof of anti-competitive effects in such cases "calls for a precise examination, supported by convincing evidence"(*Tetra Laval BV v. Commission* 2002, para.155).

The CFI held the view that when the MTF bases its assessment on the incentives for future anti-competitive conduct of the merged firm, as it did here and in all its other portfolio cases, it "must also consider the extent to which those incentives would be reduced, or even eliminated, owing to the illegality of the conduct in question, the likelihood of its detection, action taken by the competent authorities, and the financial penalties which could ensue"(para.159). In its review of the *Tetra* case, the MTF based its analysis on a theoretical view of Tetra's post merger incentives, without taking into account the real-world consequences of a strategy based on those incentives and how those consequences might affect the alleged behavior. The CFI also held that the MTF must consider behavioral commitments offered to address speculative concerns regarding future behavior. As a result, the CFI took "account only of conduct which would, at least probably, not be illegal"(para.162).

As such, the CFI focused on the three principle arguments raised by the MTF in its decision: (i) leveraging of carton dominance into the market for PET packaging equipment; (ii) strengthening of Tetra's dominant position in carton packaging; and (iii) overall reinforcement of dominance in the packaging of sensitive products. The CFI concluded that the MTF had failed to establish any of these claims to the requisite legal standard.

In more detail, the first argument addressed by the Court was the MTF's assertion that a dominant position in PET equipment markets could be created through leveraging from Tetra's dominant position on the carton markets. It confirmed, as a preliminary matter, that leveraging from one market to another is possible where the products in question are ones which the customer finds suitable for the same end-use. In this respect, the MTF was entitled to rely on factors such as the willingness of customers to use both carton and PET packaging simultaneously and the strong position of Tetra on the carton market, which would give it a 'first mover' advantage as to carton customers which decided to switch to PET. With growth in the PET market foreseeable (although not

nearly at the 'exponential' levels forecast by the MTF), the CFI held that the merged firm would have the *possibility* to engage in leveraging practices.

Having established such a possibility, the CFI then turned to the MTF's assessment of the incentives for the merged firm to engage in such leveraging. Here, the CFI found that the MTF's conclusions were not based on sufficient evidence and contained assessment errors. It particularly found that the MTF's growth projections for PET in relation to liquid dairy products and juice were not supported by facts. The MTF did not adequately take into account Tetra's existing obligations resulting from the *Tetra Pak II* case: not to engage in predatory or discriminatory pricing and to provide discounts solely to the basis of volume. It also failed to give sufficient weight to Tetra's proposed commitment to keep Sidel and Tetra Pak separate for a period of ten years and, perhaps most importantly, its commitment not to make any joint offerings of Tetra Pak carton packaging equipment and Sidel SBM machines. The CFI also found that the MTF overestimated the merged firm's future position on multiple markets. With regard to the market for SBM machines, the CFI found that the Commission failed to provide convincing evidence demonstrating that SBM machines should be classified on the basis of end-use (with special emphasis on the packaging of sensitive products). On the contrary, the Court confirmed the generic nature of SBM machines. The MTF's assertions with respect to the ability of the merged firm to make bundled offers of SBM machines and PET performs, as well as to the strengthening of Sidel's position on the market for low-capacity SBM machines, were both vitiated by the failure of the MTF to take into account Tetra's commitments to divest its perform business and its low-capacity SBM machine business. In addition, the MTF again failed to adequately assess growing competition on these markets. Lastly, in assessing the leveraging opportunities in high-capacity SBM machines, the MTF failed to address adequately competing packaging materials (such as glass and HDPE[11]) and underestimated the competition provided by the three principal competitors of the merged firm.

Turning to the argument dealing with the strengthening of dominance in carton packaging, in asserting that the merger would strengthen Tetra's dominant position, the MTF relied on two elements: the alleged incentives by Tetra not to reduce carton

[11] High Density Polyethylene

packaging prices and to stop innovating in carton post merger. The Court held that these assertions were not proven. With regard to pricing, the CFI found that PET is considerably more expensive than carton and that many customers would consider switching to PET only if carton prices rose by 20% or more. In these circumstances, the MTF failed to show why the merger would affect Tetra's incentive to lower prices, in particular given that sales of carton packaging systems are clearly more profitable that one-off PET equipment sales. The CFI also found that innovation in carton packaging is not due to pressure from PET packaging but driven by demand from carton customers. The MTF did not show why customer demand could not continue to be the driver of such innovation. In the CFI's blunt assessment, there is no reason to suppose that Tetra would be less inclined to continue innovation in carton, given that other carton packaging producers would obviously benefit from a failure to do so. With the first two pillars of the MTF's case annulled, the CFI rapidly dismissed the MTF's third argument (mutual reinforcement of dominant positions in carton and PET packaging equipment).

One may deduce that this judgment, like *Airtours*, was of major importance for the future development of the substance and procedure of EU merger control. In this judgment, the CFI did not rule out the possibility that portfolio power might in some context provide a valid basis for prohibiting a merger. However, the Court imposed a high evidentiary burden on the MTF and ultimately the Commission, making clear that portfolio theories must be grounded in objective and cogent factual evidence. In the CFI's words, "since the effects of a conglomerate-type merger are generally considered to be neutral, or even beneficial, the proof of anti-competitive conglomerate effects of such a merger calls for precise examination, supported by convincing evidence, of the circumstances which allegedly produce those effects." The CFI significantly found that the MTF cannot simply base its forward-looking analysis on the assumption that the merged firm will engage in leveraging practices that violate Article 82 EC. The Court also required a thorough analysis of the predicted foreclosure effects, rather than mere assertions that competitors in the target market will be 'marginalized'.

Because Tetra offered a number of behavioral commitments in its negotiation with the MTF, the Court's criticism centered heavily on this fact, implying that it did not share the MTF's reservations as to behavioral remedies. The Court's findings show how

conglomerate concerns in future cases could be resolved.[12] The subsequent ECJ judgment in *Commission v. Tetra Laval* further solidified this finding as well as others.

In this appeal case the Commission charged that the CFI had committed various errors of law in applying the standard of proof, and in not upholding its findings in relation to market definition and portfolio power. The ECJ rejected all the grounds of appeal raised by the Commission and in particular it held that although the Commission has a margin of discretion in assessing economic matters, it does not prevent the Courts from reviewing the Commission's interpretation of economic information (*Commission v Tetra Leval* 2005). The ECJ held that such a review is all the more necessary in the case of a prospective analysis conducted in respect of a merger with conglomerate effects (para 39). Perhaps most importantly the ECJ exercised its teleological methodology when it asserted that mergers are *legal* unless they can be shown to be anti-competitive and impede competition in the Common Market under Article 2 MCR. By linking its and the CFI's particular economic arguments to the broader aims of EU merger/competition policy, the ECJ effectively reminded the Commission of the ultimate purpose of competition policy: to maintain a competitive environment within the Common Market so as to promote further integration. In other words, the use of portfolio-based arguments to investigate mergers may be used in the pursuit of this goal, however such arguments should be used cautiously and when engaged, must be complemented by sound economic proof and methodology.

The case-law analyzed confirms the extent to which the CFI's analysis of merger decisions heavily focuses on both its previous judgments and the factual record built during the Commission's administrative procedure. This combined with the ECJ's 'forward' reasoning in *Commission v. Tetra* more clearly define the judiciary's role in merger policy. While the CFI reviews the 'nuts and bolts' of Commission decisions, but has increasingly felt comfortable in providing more substantive review, the ECJ – filling the role it had established for itself at the beginning of the competition law system – views Commission decisions through the lens of broader Community goals. In the span

[12] This may be an important pre-cursor of the Court's likely analysis in the pending *GE/Honeywell* case, in which the MTF rejected out of hand a comprehensive set of behavioral remedies designed to prevent bundling by the merged firm.

of only one year (2002) the Courts overturned three Commission merger decisions[13] on three major grounds: inability to substantiate its economic theories, disregard for firms' procedural rights and inefficient economic analysis. Regarding specific events during the portfolio trend, the CFI's severe censuring of the MTF in *Schneider* and *Tetra*, and latter by the ECJ in *Tetra v. Commission* essentially reversed the burden of proof in cases involving portfolio power from firms back onto the MTF. However, it is yet to be seen if the CFI will go as far as it did in *Airtours* and prescribe specific tests and criteria for the MTF's portfolio analysis. Perhaps the *GE* appeal judgment will provide further clarification. Although highly critical of the Commission's analytical deficiency, the Courts did however support the Commission's inclusion of the concept of portfolio power into EU merger control and by doing so also furthered showed its support for the Commission's highly discretionary role in merger control. This again highlights the 'love-hate' relationship between the two institutions.

Clearly, the actor dynamics analyzed above indicate that the Commission is the agenda setter in the area of merger control and this has in many instances been confirmed by the Community Courts. However, when the Commission seeks to unilaterally advance 'creative' agendas such as collective dominance and portfolio power, it has a propensity to increasingly neglect the interests of firms and therefore produce a conflict-filled policy environment. The actions of the Courts have proven to be a 'balancing act': on one hand court decisions have endorsed Commission agendas while also prescribing 'acceptable' conditions for future Commission action relating to those agendas. On the other hand, by clarifying the concepts advanced by the Commission and exercising their judicial review function, the Courts help maintain the predictability and accountability of the 'merger system' - thereby alleviating the immediate and future conflict between regulators and firms. This suggests that the judiciary is a kind of structural force – providing a stable policy environment in which actors can communicate and produce negotiated policy decisions. The implication of all of this for future contentious merger cases emanating from Commission driven agendas is that not only should the Commission pay careful attention to building a detailed factual record based on sound economics, but its decisions should possess contextual references to larger

[13] *Airtours, Schneider* and *Tetra*

policy and Community goals as well as prior judicial case law. This is not only important for the outcome of the Commission's administrative procedure itself, but is also the best insurance policy on appeal.

Although it is difficult to render concrete conclusions about the 'lasting' effects of the *GE/Honeywell* case on both the development of the portfolio power trend and its future use in EU merger control, as its subsequent appeals case is still pending, it is nevertheless an extremely important case. Not only was *GE/Honeywell* a landmark case for European merger control because of the international controversy sparked, but also because it marked the first case to be blocked based on portfolio-based arguments. The theoretical precedents set during this case and the protest arguments put forth by the firms involved mirrored those displayed in the other cases of the second triad. It follows then, that analysis of this case is warranted.

On 3 July 2001, the Commission declared the proposed merger between the U.S. companies General Electric (GE) and Honeywell incompatible with the common market (*General Electric/Honeywell* 2001). The merger had previously been unconditionally cleared by the U.S. anti-trust authorities. This decision came at the end of an in-depth Phase II investigation which resulted in the finding that the combination of the leading aircraft engine maker with the leading avionics/non-avionics manufacturer would create/strengthen a dominant position in various relevant markets in the aerospace sector including the markets for jet engines, avionics, non-avionics and engine starters. Furthermore, the merger would also affect the market for small marine gas turbines in the industrial sector. Additionally, one of the critical factors of the assessment of the case was the combination of GE's financial strength and vertical integration into aircraft purchasing, financing and leasing with Honeywell's leading positions on various markets such as corporate jet engines, avionics and non-avionics products.

This merger was the largest deal ever to be proposed in the EU. A key driver to merge was the desire of GE and Honeywell to combine their complementary product lines in the civil aerospace industry. In the final decision, the great majority of the business activity of GE and Honeywell was not at issue in this case. The products of concern to the MTF accounted for significantly less than 10% of GE's annual revenues, and about a quarter of Honeywell's revenues (Patterson and Shapiro 2001, 2). The

willingness to block the *GE/Honeywell* merger was clearly based on the conglomerate concerns deriving from the MTF's portfolio power approach. From the onset the MTF stated that its portfolio case was based on the theory that the merged entity would engage in "foreclosure through packaged offers"(*General Electric/Honeywell* 2001). The MTF argued that a combined GE/Honeywell would have the ability and incentive to offer customers attractive discounts encompassing GE's engines and Honeywell's avionics and non-avionics products, offering products not hitherto available to consumers and eventually driving out potential competitors (para.350). In particular, the MTF was concerned that the merged entity would engage in "mixed bundling, whereby complementary products are sold together at a price which, owing to the discounts that apply across the product range, is lower than the price charged when they are sold separately"(para.351).

The MTF's analysis began with the finding that GE was already dominant in the market for large commercial aircraft engines. This finding rested almost entirely on GE's large (65%) and growing share of outstanding orders for aircraft engines. Although this high market share indicates possible dominance, U.S. authorities believed it to be misleading since this market share was almost entirely dependent on a single sole-source contract with Boeing for its 737 aircraft. Excluding those sales would have produced a much more balanced spread of market shares: GE 44%, Pratt & Whitney (PW) 23%, and Rolls Royce (RR) 27%. In the view of the Federal Trade Commission (FTC) and DOJ, these shares reflected more closely the actual competitive dynamics of the market, where the customers described the competition as "fierce," resulting in what the MTF acknowledged as deeply discounted engine prices (para.111). The American side also took issue with the MTF's findings that Rolls Royce and Pratt & Whitney were no longer in a position to constrain GE's behavior. Both companies had growing revenues and profits and were investing heavily in the development of their next generation engines. As of January 2001, both had actually outperformed GE in engine contracts on the three major airframes[14] offering a choice of engines. Rolls Royce in particular said publicly that it expected its installed base to practically double over the next five years as a result of market share gains (Kolasky 2001, 6). It was shown by the DOJ that new engine

[14] An airframe simply refers to the body of an aircraft – the aircraft without the engines.

contracts to date that year confirmed its view that GE was nowhere near dominant: year-to-date GE won 42% of contract awards, PW 32% and Rolls Royce 27%. Clearly, if the MTF had adopted the same view as its U.S. counterpart it would have been clear that GE was losing rather than gaining ground. As a result, what the MTF called "GE's toolkit for dominance" – its immense size and financial resources and its aircraft leasing arm, GECAS – would have been viewed as much less threatening.

The second market of concern was that of large regional jet engines. GE and Honeywell were the only engine suppliers whose engines had been certified for large regional jets sill in production. At the time there were four manufactures of such jets - Embraer, Bombardier, Fairchild-Dornier and BAe Systems. This market was the fastest growing of all the jet markets and the parties forecasted that sales over the next 20 years would be very high. Through the combination of factors that will be discussed below, GE won all of the recent engine competitions held for new platforms and secured 90% of the orders for engines for large regional jet aircraft. As indicated above, Honeywell is the other supplier to that market. Together, the two firms therefore accounted for the whole market. In addition, the MTF also concluded that Honeywell's leading position in the market for medium corporate jet engines would have been strengthened (*General Electric/Honeywell* 2001, para.11-12).

The MTF clearly stated that GE's dominant position in several jet markets resulted from a variety of factors: GE's consistently high and increasing market shares; its vertical integration into aircraft purchasing, financing and leasing; its financial strength through GE Capital, its financial arm; as well as its strong position on aftermarket services. According to the MTF, the fist key factor in GE's 'tool kit of dominance' was GE Capital. Noting that GE had the world's largest market capitalization, it was argued that GE Capital offers GE businesses enormous financial means, enabling it to take more risks in product development than its rivals and offer customers heavy discounts on the initial sale of engines, recouping such discounts through sales of spares and repairs. It was argued that a merger would allow GE's competitive advantage to subsequently extend to Honeywell (para.107-14).

The next factor cited by the MTF that contributed to GE's dominance was its vertical integration into aircraft purchasing, financing and leasing activities through GE's

Capital Aviation Services (GECAS). It was argued by the MTF that GECAS would only buy Honeywell products, which would help create a dominant position for the merged firm. Subsequently, MTF officials concluded that GE was a unique firm in the aircraft engine industry because it could afford to encourage and pay for exclusivity and capture aftermarket, leasing and financial revenues. From an airframe manufacture's perspective, selecting GE allows it to access the largest customer base of airlines and secure a significant order of its aircraft through GECAS. The MTF purported that no other engine manufacturer had the size, financial strength or vertical integration to replicate such offers. By using the purchasing leverage of GECAS, GE can presently, and in the future, shift jet engine market shares to the benefit of GE's Aircraft Engine Division (GEAE).

In response to the use of GE Capital to further strengthen GE's various market positions, DOJ authorities felt that GE's market capitalization size was competitively irrelevant. Secondly, more generally, an increase in aggregate firm resources does not necessarily mean that any one division of the enterprise will obtain capital more readily or more cheaply than its rivals. Capital markets generally work very efficiently and there is no obvious reason, save some clearly defined market imperfection, why GE's cost of capital for a particular project should be any lower than that of its rivals. Third, to the extent that GE does have access to cheaper capital, that is a source of efficiency just like any other valuable asset, be it machinery, knowledge, or management skills. Cheap capital serves to lower prices and promote innovation. Blocking a merger because of GE's lower capital costs is therefore objectionable for the same reason as blocking a merger because of any other efficiency. Lastly, it was the view of the U.S. authorities that the MTF's GE Capital theory was troubling because it lacked any limiting principle (Kolasky 2001, 7-8). Under this new variant of the old 'deep pockets' theory, neither firm could merge with companies that hold a leading position in any capital-intensive business with high entry barriers.

Concerning the GECAS portion of the case analysis, it was vehemently argued by GE and the DOJ that the MTF's story was not supported by the facts. GECAS's share of aircraft purchases was less than 10% and given this small market share there was no evidence that GECAS's policy of purchasing only aircraft equipped with GE engines had or could foreclose rivals from the market. It was also shown that GECAS was not a

significant customer and that the claims that it could 'seed' airlines with GE engines because of the importance of commonality were seriously overstated; in fact, 90% of the world's aircraft were in mixed fleets.

Turning to the concern that GE and Honeywell would engage in mixed bundling by offering a package of GE engines and Honeywell avionics and non-avionics systems, US officials felt that Honeywell brought nothing to the deal. However, this argument proved to be the center for the MTF's portfolio based concerns. The MTF stated that the sale of complementary products through packaged deals might have taken several forms including mixed bundling, pure bundling and technical tying. It was argued that the incentives for the merged entity to sell bundles of products could have evolved over the short to medium term. For instance, when new generations of aircraft platforms and aircraft equipment would be developed, the merged entity could have also been expected to engage in technical bundling – that is, to make its product available only as an integrated system. In the short term, the merger would have affected suppliers of avionics products. Because of the assumed lack of ability to match the bundled offers, rivals would lose market shares to the benefit of the merged entity and experience immediate damaging profit shrinkage. As a result, the merger was likely to lead to market foreclosure and substantial lessening of competition in these areas (*General Electric/Honeywell* 2001, para.352-55).

In addition to the creation of a dominant position through bundling/tying of GE and Honeywell products and services, the MTF also found that bundling would also be a factor in the strengthening of a dominant position in the market for large commercial aircraft engines. The MTF stated that given the complementary nature of GE and Honeywell products and services and their either dominant or leading respective market positions, the merged entity would have the ability to engage in foreclosure practices, such as the bundling of engines, avionics and non-avionics products as well as related services towards airlines. On the market for engines, the proposed transaction would therefore have the effect of strengthening GE's existing dominance. Such dominance could have also been strengthened visa-a-vis airframers. The foreclosure of GE's competitors through their inability to counter GE's success in obtaining any platform exclusivity was expected to increase and could have occurred as early on as the launch of

the next project (para.357-60). The MTF clearly felt that bundling would lead to a re-allocation and therefore to a shift in market share in favor of the merged entity to such an extent that GE's competitors would be unable to cover their fixed costs and would eventually exit the market. An interesting facet to the investigation was that Barry Nalebuff (whose work is discussed above and who was the first to write on portfolio power) advised GE in this case and evaluated the possibility of using portfolio-based arguments to scrutinize the merger. Nalebuff's (2001) conclusions were that the bundling model of portfolio power simply did not fit the competitive realities of aerospace markets, with highly differentiated products, powerful buyers, and individually negotiated transactions. He further found that "when a model is built that takes into account the nature of competition in this industry, we do not find that product bundling creates an advantage"(43).

Taken together, all of the proposed competitive harms outlined by the MTF depended on its prediction that rivals would be forced to exit in the face of a strengthened Honeywell. However, the basis for this predicted exit is unclear since Honeywell's competitors included large, financially healthy firms like United Technologies, BF Goodrich, and Thales, each with important competitive advantages of their own. In addition, the aerospace markets concerned were characterized by powerful buyers like Boeing and Airbus, with a strong incentive to maintain competition in the supply of avionics and non-avionics systems. These strong rivals, either independently or with the support of these powerful buyers, had a wide range of counter-strategies available, including mergers and teaming arrangements[15] among themselves. The MTF's dismissal of the later strategy was particularly ironic, given that GE's allegedly dominant position in engines resulted from just such an arrangement and that the MTF declared one year earlier that teaming arrangements were an effective counter-strategy in its *Allied Signal/Honeywell* decision (Kolasky 2001, 10).

Despite numerous proposed undertakings from GE and Honeywell and face-to-face meetings between the respective CEOs and Competition Commissioner Monti, the merger was prohibited. This was the first time portfolio arguments were used to prohibit

[15] Teaming agreements involve two or more parties agreeing to jointly pursue a contract or group of contracts.

a merger and it was also the first time that the Commission prohibited a merger between two U.S. based companies that had already been cleared by regulators in Washington. Naturally, reaction to the decision was strong. Both GE and Honeywell publicly claimed that their proposals to meet the MTF's antitrust concerns were rejected without due process. Furthermore, GE claimed that the Commission had already made up its mind to block the deal before any concessions were made. "For every divestment we offered, the Commission would come back asking for more" (See Lunsford and Maremont 2001). The fact that the MTF was unwilling to except firms' undertakings – as was the case in all of the portfolio cases in the second triad - suggests that the MTF wanted to use *GE/Honeywell* as a portfolio test case.

Looking back on this monumental decision, the chosen route to prove market dominance was unusual. The MTF's major finding was that the merged firm would have the incentive and ability to bundle GE engines with Honeywell avionics. This theory of bundling did not rely on strategic behavior by the merged firm, as the MTF reasoned that mixed bundling would be a commercially rational profit-maximizing strategy. The MTF considered that prices could be expected to fall in the short term as customers switched to the cheaper bundle offered by the merged entity. Furthermore, it was found that GE's and Honeywell's competitors would be unable to respond to the merged firm's bundle and would be marginalized and forced to exit the market (See Hargreaves and Hill 2001; Priest and Romani 2001).

Reacting to these findings, the firms involved criticized the MTF's arguments on six grounds. Firstly, the hypothesized product discounting should have been regarded as pro-competitive. Secondly, the theory of 'mixed bundling' cited in the Statement of Objections was not robust and was based on incorrect assumptions about how engines and other components are selected and purchased in the aircraft industry. Thus as Lexecon Consulting (2001a) pointed out, there was no basis for concluding that competitor exit was a likely outcome of the merger (2). Thirdly, the parties argued that the evidence showed that customers typically purchased the relevant products based on their individual merits, as the MTF itself had found eighteen months earlier when it stated "although packages of avionics and non-avionics have existed, they nevertheless are rare"(See *Allied Signal/Honeywell* 1999, para.69). The fourth issue taken was that

industry experience showed that companies with broader product lines did not inevitably come to dominate individual product categories. Fifth, Boeing and Airbus, which did not oppose the merger, were quite capable of implementing procurement policies to protect their own interests and those of their airline customers. Sixth, the claim that rivals such as Rolls Royce, Pratt & Whitney, and Rockwell Collins would be weakened and ultimately exit the industry was both contrary to historical and current evidence and purely speculative (Patterson and Shapiro 2001, 3-4). Indeed, the MTF offered no empirical evidence or timeframe for such an occurrence in its competitive assessment. For these reasons GE decided to appeal the Commission's decision to the CFI. Although a successful appeal would not lead to the merger being re-instituted, it could have a major impact on future dealings with the MTF.

Critiques and the exceptional media coverage of this case have shown that industrialists, economists and lawyers agree that the MTF's analysis was unorthodox and erroneous. Firstly, the MTF's most general concern was that prices would fall, not rise. The idea that bundle discounts could be an anti-competitive strategy was novel to this case. Although portfolio power was considered in other cases, the analysis focused on distribution efficiencies rather than pricing strategies. The MTF, through its decision in *GE/Honeywell*, set a precedent that if lower prices result from a merger but can be traced to pricing efficiencies, they will be viewed anti-competitive. According to Kevin Arquit, a competition expert who was short-listed to head the DOJ's antitrust division "if a company becomes very efficient after a merger, the Europeans are not going to allow it" (Hargreaves and Spiegel 2001). Schmitz (2002) criticizes the decision on this basis:

> Although it is probably true that the new company would indeed have the potential to bundle and it cannot be ruled out that at one point in time it might engage in this behavior, using this potential to concluded that the merger would strengthen a pre-existing dominant position within the meaning of Article 2 MCR is questionable... Describing the question of whether it is permissible to block a merger because of possible future bundling as theoretical, hardly fits the impact it has... The tool for this investigation is and must be Article 82 EC, not the MCR.

Following form this, the overwhelming issue that concerned parties had with this decision was that not only were questionable 'portfolio effects' used to analyze the merger, but theories were developed specifically for this case that relied heavily on long-term future illegal behavior and according to media reports, a vast number of these arguments were 'lifted from competitor's case briefs.

According to reports in the *WSJ* during the months of June and July 2001, when word of the *GE/Honeywell* merger hit Europe lawyers for United Technologies, a key rival and victim of GE's takeover bid for Honeywell,[16] teamed up with those from Rolls-Royce and began holding regular meetings with Enrique González-Díaz, the MTF's top man. By November of 2000 lawyers of both companies lined up a battery of economists who quickly set to work developing theories they hoped the Commission would use to block the deal (See Lunsford and Maremont 2001). According to Cohen (2001), "Rolls-Royce was prepared to argue that a combined GE/Honeywell would engage in bundling. United Technologies on the other had could not embrace this theory because it would likely face accusations of bundling were it to pursue Honeywell again in the future" (B1). During a profusion of meetings and phone calls in Brussels and Washington with European Commission advisors, the United Technologies lawyers argued that GE's aircraft-leasing business used and would continue to use its clout to pressure airplane makers to buy GE engines – this referred to the GECAS part of the merger. According to Laurent Petit, an MTF official, the United Technologies 'outreach' was helpful in clarifying an anti-trust concern that the Commission had already identified but had no evidence for. Christopher Bright, one of GE's lawyers put it more bluntly: the Commission "subcontracted their investigation to United Technologies (Cohen 2001).[17] As analyzed above, during the actual merger hearings in May 2001, the Commission based much of its case on both the bundling and GECAS arguments, which turned out to be based on theories the Commission shared with competitors Rolls-Royce and United Technologies.

The case insights provided above illustrate three points of relevance to this study. First, the fact that the MTF had already considered the GECAS aspect of the merger, but "had no evidence" to support such claims, but latter was provided such evidence form United Technologies clearly highlights the entrepreneurial character of the

[16] United Technologies is the owner of Pratt & Whitney and had almost closed a merger deal with Honeywell before GE stole it away.

[17] It should also be noted that in support of United Technologies' position, James Robinson, a former president of what is now called Fairchild Dornier GmbH, a German aircraft maker, submitted an affidavit claiming that his company bought GE engines in 1998 as part of a quid pro quo: In return, it was said that GE secretly assured Fairchild it would buy its airplanes. Interestingly, Mr. Robinson now works for United Technologies. It was latter found however, that no such written pact existed and Robinson conceded he had made a mistake (Cohen 2001).

MTF. It used information provided by competitors to strengthen its case for using portfolio power to question the merger. Secondly, such heavy reliance on 'secondary' analysis provided by competitors suggests that like in *Airtours*, the Commission's case points to a 'forced fit' in terms of using its theory to scrutinize a merger where the characteristics of the markets concerned were not conducive to the establishment of portfolio power. In so doing, the MTF effectively extended the use of portfolio arguments from branded products (beverages) to the aerospace and avionics industries with the hope of 'opening the door' even further in the future. Despite numerous warnings (most notably from Barry Nalebuff) that the use of a mixed bundling model and the vertical integration (GECAS) argument did not fit these kinds of markets, the MTF still used them to yield conclusions. There was also lack of empirical proof to enrich its foreclosure theory, but the MTF went ahead and used it too to build its case against the merger. Ironic here was the fact that portfolio power, as applied in the Coke cases and in *Guinness/Grand Met*, was still an ambiguous concept. Wishing to expand its (uncertain) scope, the MTF used it in this case, which resulted in a "baseless decision" according to those parties that represented GE during its appeal (See Lexecon 2001a). Thirdly in more general terms, when compared to the common interests and resource dependency shared by elite peak industrial groups and Commission officials that formed the basis of the 'merger control policy community' during the formulation of the MCR, the dynamics of this case clearly support the claim made in this and the previous chapter that firms are not 'united' in the implementation phase of merger control: for each merger there are firms 'for' and 'against' the transaction.

At present, the Commission, Corporate Europe as well as the international anti-trust community is awaiting the CFI's decision in *GE v Commission*. Regardless of the outcome of the appeal, it would seem that 'opportunities for bundling' when there are no conventional overlaps are now part of the MTF's checklist of issues to be investigated. If a proposed merger involves complementary products, then the merging parties can expect to answer questions on bundling issues and their effects on competitors. Also, it is difficult to escape the conclusion that the sheer size of the merged firm – both its total scale (not just in aerospace) and its range of civil aerospace products – was a source of unease in this case. Conglomerate scope and 'financial strength' were extensively

discussed in the decision, suggesting that these factors alone can be a source of concern because of the competitive advantage they can confer on the merged firm (Patterson and Shapiro 2001, 4-5). Most importantly, the most far-reaching element of this case's reasoning was the reliance on predictions of competitor exit as the principle cause of harm. For the reasons given above, the MTF's willingness to rely on the foreclosure theory as part of its reasoning in prohibiting the merger was surprising because empirical evidence did not support its use. The repercussions of employing this theory irregardless of the facts of the case means that mergers with a short-term pro-competitive impact can risk prohibition if there is any prospect – even if remote in both time and probability – that it may lead to competitor exit. These actions, when taken as a whole raise important questions about what the MTF, and ultimately the Commission, considers to constitute adequate proof in its merger decisions.

In summery, the MTF's mixed bundling and foreclosure theories in *GE/Honeywell* do not appear to stand up to the close economic scrutiny prescribed by the CFI in its *Schneider* and *Tetra* judgments. The MTF advanced very little empirical evidence for many of its somewhat speculative theories and predictions. For this reason, combined with the lack of economic scrutiny displayed in its decision and the fact that the majority of arguments used by the MTF in this case were subsequently applied to *Schneider* and *Tetra*, both of which were prohibited and later overturned by the Court, it is highly probable that the Commission will be dealt another defeat by the CFI in 2005. However, effects of the Commission's decisions in *GE/Honeywell* were immediately felt in the corporate, legal and economic communities. Not only did the predictability issue become a broader concern, but the MTF's actions in this case clearly pointed to its interest to expand its policy competence as far as possible. "From GE's perspective, dealing with the MTF increasingly seemed like a through-the-looking-glass tumble into an unfamiliar world where process-oriented technocrats, answerable to no one, made law and changed the rules as they saw fit" (Lunsford and Maremont 2001). As Olivier d'Ormesson of Linklaters & Alliance explains "Frankly speaking, we're finding it difficult to advise our clients because of the EU's application of untested economic theories such as collective dominance and portfolio power"(Canoe 2001, 2).

Taken as a whole, the MTF's analytical shortfalls evident during its investigations of the second triad mergers, namely insufficient evidence and economic analysis, use of novel theories and lack of regard for the procedural rights of firms all point to its self-serving interest to increase its institutional power, policy competence and reputation as a strict regulatory agency. As argued throughout this chapter, although the general dynamics found in this trend study remained consistent with those during the collective dominance trend, the relational dynamic between the Commission/MTF and firms became more conflict filled because of the MTF's increasingly aggressive, unilateral strategy.

5.3 Conclusions

Main Conclusions from the Study of Portfolio Power

The overall policy picture that emerged from the above analysis of MTF case decisions was grim for firms. It seemed that any conglomerate merger that would bring together like-products sold to the same customer base might be enough to raise serious competition concerns within the MTF. This scenario was disadvantageous for many large companies wishing to expand their activities into neighboring or related markets, because a company's most promising means of expansion with the lowest risk of disappointment is to use their existing knowledge and skills in such a market. From a public policy perspective the situation was confusing since economics suggests that there can be no automatic presumption against this type of merger. Against this background, the clarification provided by the Courts was timely and important to economic actors, economists, practitioners and the Commission.

Apart from providing a glimpse of the rather 'rocky' start to the Commission's effort to establish itself as a legitimate regulatory agency in the realm of merger control, analysis of the *de Havilland* merger did confirm that the Commission leadership at the time wished to use the MCR to promote a competition based Single Market. This was in contrast to the view held by other commissioners and Member States that Community industrial policy should be incorporated into merger analysis in order to 'build up' European firms. Further, the case showed that although not the primary focus of the

MTF's reservations, aspects of portfolio power were used to argue why the deal would ultimately be blocked. Specifically the MTF made numerous references to how the merged entity's larger range of products would increase its capability to bundle through mixed deals and hence lead to the possibility of utilizing market power in one market to sell in another. Further analysis of this case shows that the MTF felt that as a result of it leveraging ability, the merged firm would have the ability and incentive to predatory price and thus force competitors out of the markets concerned. Taken together, these concerns represent the pre-curser to the MTF's eventual introduction of its leverage theory, in which a merged firm with an already dominant or nearly dominant position could, via bundling/tying, lever its market power in one market into another. In the MTF's view, the strength of the firm's portfolio along with its ability to lever would make it easier to raise entry barriers and in all likelihood lead to market foreclosure. As seen above, this theory became the overwhelming portfolio effect cited by the MTF to scrutinize portfolio cases.

The first Coca-Cola case witnessed the MTF examine whether the creation of a broad portfolio of soft drink brands would confer on the Coke company the possibility to use its beverage portfolio to its advantage by leveraging its strong position in the tying market into other products of the portfolio. Subsequently in the same product sector, the MTF examined whether the creation of a portfolio of carbonated soft drinks, packaged water and beer might give each of the brands in the portfolio greater market power than if they were sold on a stand-alone basis. The conclusion of *Coca-Cola/Carlsberg* stated that such a portfolio would strengthen the existing position of one of the firms in the tying market. In retrospect, it is clear that the MTF was developing and testing its various portfolio theories in the Coke cases. The former displayed the MTF developing its leverage theory and in the latter the MTF confirmed that a portfolio of products alone could strengthen the market position of a firm. Although conflict between firms and the MTF did not emerge until the conclusion of the *Guinness* case, the MTF's actions before and during the Coke cases foreshadowed the eventual conflict between the two groups of actors. The fact that the MTF did not inform firms or peak industrial organizations of its concerns relating to portfolio issues as it did with collective dominance made the ensuing conflict inevitable.

Apart from not claiming foreclosure would result because of levering, the *Guinness/Grand Met* case saw the convergence of the MTF's earlier raised portfolio theories. The assessment was based on idea that when elements of market power are combined, the whole may be greater than the sum of the parts. Therefore, although individual leverage possibilities might have existed prior to the merger, the combined leverage possibilities, through tying, become greater than the sum of the individual pre-merger possibilities. With this said, the common thread present in the first triad of cases was that the MTF considered the ability of firms to leverage power in one market to the benefit of a product in another complementary, non-competing but closely related market. This argument, along with two other issues, namely the creation or strengthening of a dominant position due to the presence of a portfolio and the elimination of competition (actual or potential), proved to be predominant in the cases of the second triad. By forcing firms to accept remedies based on these issues the MTF was successful in establishing a precedent for portfolio power's use in future cases. Subsequent merger investigations saw various firms as well as the ERT and UNICE argue that the majority of the MTF's arguments pertaining to portfolio power were unproven and vague and that their use would seriously decrease the effectiveness of the merger control regime. As was the case with collective dominance, it was argued that predictability and agency accountability would become blurred. As a result of the MTF's conscious disregard for the interests of economic actors and continued efforts to broaden the concept's scope, the prospects for mutual beneficial negotiations declined steadily and the role of the Courts within merger control became more pronounced. Although the verdict in the *GE/Honeywell* appeal is still pending, the aftermath of the other two cases, especially *Tetra*, confirmed that the MTF's implementation of portfolio power was flawed. The Court's views on portfolio power highlight this and proved to be 'good news' for economic actors given that their major concerns of predictability and institutional accountability were addressed.

The *Tetra* judgment provided a detailed analysis of the CFI's views on portfolio/conglomerate effects theory. The CFI confirmed that the MTF can examine conglomerate mergers but attacked its analysis and lack of supporting evidence. It was found that the MTF's decision was based on three theories: leveraging, elimination of

potential competition and strengthening of the merged entities' overall market position. The CFI acknowledged that the merger would have enabled leveraging to occur but found that the MTF failed to prove that the merged firm would have an incentive to engage in leveraging.

Both *Schneider* and *Tetra* saw the MTF, as it did in *GE/Honeywell,* examine the potential future conduct of the parties with respect to the possible portfolio effects stemming from tying and bundling. Again, the CFI criticized the MTF for its lack of analytical rigor in assessing the evidence to support its theory. The MTF failed, in *Tetra*, to adequately address the likelihood of abusive conduct by the merged firm, something which the Court considered highly unlikely. The CFI concluded that market dynamics would have prevented the merged entity from bundling products or engaging in tying in order to lever into a secondary market. Additionally the Court held that the mere fact that the acquiring firm already holds a clear dominant position may be an important factor. However, this alone does not justify a finding that a reduction in the potential competition which that firm must face constitutes a strengthening of its position. The CFI expressed a clear preference towards evaluating the effects of competition rather than the size of the parties.

As mentioned above, this specific portfolio theory was developed during the Coca-Cola cases and first applied in *Guinness/Grand Met.* Because of the seemingly successful introduction of the theory into EU merger policy, the MTF felt confident in applying it to future mergers even though the umbrella concept of portfolio power was by no means clearly defined nor were specific criteria set for future use. As it turned out, it seems the MTF was over-confident and possibly underestimated the response from firms. This possibility is forwarded because if the MTF took into consideration the past responses of firms to adverse decisions involving 'new' theories, such as collective dominance, that it should have predicted that the firms would engage the Courts. However, it may have also been the case that the MTF acknowledged the deficiencies of its portfolio theory but decided to aggressively implement its agenda anyway. Evidence of this possibility was seen in the *Schneider* case when the MTF tried to sneak its portfolio concerns past firms by not including such concerns in its Statement of Objections.

Apart from the case specific portfolio power issues, firms also won on the procedural and undertakings fronts. In both the *Schneider* and *Tetra* cases, the CFI criticized the MTF for failure to strictly adhere to its own procedural rules. The CFI emphasized that these rules serve to proved legal certainty to the parties as well as provide the parties with the opportunity to exercise their rights to defense. Failure to comply with the procedural rules will result in the decision being annulled. The *Tetra* judgment, in particular, opened the possibility for firms to offer behavioral remedies in cases where portfolio issues of a behavioral nature arise: leveraging concerns can be remedied by an undertaking not to engage in bundling and other such practices. This was subsequently supported by the ECJ when it rejected the Commission's appeal that the CFI overstepped its role. Consequently, the clarification of these issues directly addressed economic actor's accountability concerns. As was the case with collective dominance, but more pronounced in the portfolio trend, firms clearly felt that the Commission's role as both prosecutor and judge in competition issues made accountability difficult to uphold and transparency impossible. The insulated nature of EU competition policy in conjunction with the significant discretion afforded to the Commission help feed its policy entrepreneurship tendencies. The ERT (2000) raised a specific problem in regard to merger policy when it recognized that a large portion of merger approvals are conditional on the parties giving undertakings resulting in disposals and/or the altering of future conduct. This issue was again raised in regards to portfolio power:

> These undertakings are given under pressure, with the Commission saying that it will refuse clearance unless satisfactory promises are made. Companies have no means of challenging the Commission or questioning the need for the undertakings. This situation needs to be rectified (5).

As for the other major concern of firms, that of predictability, the portfolio judgments have eased this anxiety, but not to the same extent as the collective dominance judgments did. Comparison of the *Tetra* and *Airtours* appeal judgments highlight the fact that the former does not represent a bookend for the Commission's portfolio power policy evolution as the latter did for collective dominance. Although the Court acknowledged that portfolio-based arguments might be used to scrutinize conglomerate mergers, it offered neither a clearer definition of the concept or a set of criteria and tests

to guide such investigations. It may be the case that the CFI's pending *GE* judgment will clarify these issues. Nevertheless, both *Schneider* and *Tetra* judgments were severely critical of the MTF's economic analysis when the CFI expressed significant concern over the MTF's ability to prove its theories. These cases involved complex economic assessments on the part of the MTF and in each case the economic analysis was found wanting. However, consistent with its prior history of reviewing Commission based competition decisions, the Courts also provided the institution with broader powers to examine mergers. Although highly critical of its analysis and procedural oversights, the Courts confirmed that portfolio power is coved by the MCR and is consistent with the goals of the Treaty. Taken together, The Court made clear that competitive harm flowing from conglomerate mergers is inherently more difficult to predict that in the case of conventional horizontal mergers, and that particularly robust economic and factual analysis is required if any adverse conclusion is to be reached in such cases. This is entirely in line with the aforementioned modern economic consensus on the subject. As a representative from Lexecon Consulting (2002b) summed it up: "it would be wrong to think that portfolio theories have been completely discredited, but it is certainly true that they must be handed with care in competition policy applications – and never more so than in merger control"(2).

In conclusion, the above analysis purports that the emergence of the portfolio power trend in EU merger control can be explained by the intent of the Commission/MTF to implement an agenda in which the regulators could broaden their policy competence and institutional power without formal consultation with the Council. The ability of the Commission to purse such an agenda highlights the vast degree of autonomy and discretion afford to it by the MCR rules. By taking advantage of this scenario and exploiting numerous 'windows of opportunity' provided by emerging case law, the Commission was successful in changing the parameters of the rules earlier established by the policy community during the formulation phase. This points to the non-static nature of the implementation phase and the existence of feedback between both policy phases. It also suggests that actor dynamics in both phases are markedly different. Because the Commission needs not to engage in resource dependency with economic actors in the implementation phase, there exists no possibility or incentive for the actors to from a

'policy community' in the sense of the one established by Commission and elite industrial actors during the formulation of the MCR. As the case dynamics presented indicate, regulatory and economic actors are locked into case-by-case disputes where shared interests do not play a significant role. Instead, the individual interests of these actors are usually at odds with each other, resulting in actors' 'fears' playing a larger role in the implementation phase, which increases the possibility of conflict – especially when the regulatory agency is viewed by others as engaging in self-serving behavior.

Although the developments and persistence of the portfolio power trend points to the entrepreneurial actions of the Commission/MTF, the role of the Courts proved to be equally important. The multiple roles of the Courts have been identified above. Firstly, the CFI effectively exercised its basic function to assure that the Commission as the sole institutional actor responsible for merger control performs its functions correctly and operates with the rules outlined in the MCR. Secondly, by doing so the CFI further developed its grasp of technical economic concepts and thus was able to critique numerous Commission decisions effectively. This had a dual effect: (i) it demanded increased economic analysis and reasoning from the Commission and in a number of cases 'tempered' its portfolio agenda and (ii) the Court provided the Commission guidance on the future use of the portfolio power concept. Lastly, by balancing its administrative duties with teleological methodology the ECJ, and to an increasingly extent, the CFI, linked Commission action with the broad goals of competition. The judgments of the Courts thus produced policy 'wins' for all actors involved in the implementation phase.

Comparing Portfolio Power and Collective Dominance

Although developing at different time periods during MCR implementation and at different paces, the trends of portfolio power and collective dominance share two main dynamics that generally characterize the whole of the MCR implementation phase. First, the above trend studies have demonstrated that outcomes derived from the implementation phase were dynamic and resulted in a type of feedback between the two policy phases. Because the rules previously negotiated by the merger control policy

community during the formulation phase become redefined by the Commission/MTF in order to achieve self-serving goals during the implementation of the MCR, the idea was raised that the relationship between the two policy phases is not necessarily static. That is, it did not necessarily follow that decisions taken by the Commission and MTF were bound within the scope of outcomes emanating from the formulation phase. The trend studies clearly indicate this to be the case, as the Commission was able to increase its regulatory domain by establishing new collective dominance and portfolio power policies that had not previously existed within the MCR framework.

The second main dynamic pertains to the motivations of the actors. Although the policy environment facing the actors in the implementation phase is different from that found at the formulation phase in that merger control involves a succession of 'mixed motive games' in which firms present arguments to the MTF who then evaluates them and decides the proper course of action, the motives of actor behavior continue to point to private interests. One implication of this scenario is that there is a greater probability for conflict between actors since there exists no shared interest among them. The chances for conflict increase if some actors pursue self-interests without considering the interests of others. In both trend studies, the Commission/MTF sought to increase institutional power, firms sought to reap the economic benefits of mergers and the Courts wanted to establish an active role in merger control. Regarding the trend of collective dominance, it was argued that for the most part, both the MTF and firms were able to further their own interests via negotiations and playing on each others 'fears.' In the case of portfolio power, the MTF's entrepreneurial tendencies and pursuit of its unilateral agenda resulted in a higher degree of conflict, highlighting the consequences of neglecting the interests of firms. These internal dynamics suggest that although actors may try to obtain their goals through different means, the motivating force of private interests remains constant and guides these actions.

By voicing its intention in the early 1990s to introduce collective dominance arguments into the MCR the Commission was able to avoid initial conflict related to firms' resistance to the inclusion of the concept. Although the majority of collective dominance case decisions resulted from mutual beneficial negotiations between the actors, the trend was not free of conflict. Although the firms privy to the *Kali und Salz*

merger agreed to the MTF's concessions, a third party (SCPA) questioned the MTF's authority to use collective dominance arguments in its analysis. SCPA's actions signaled that firms were prepared to defend their interest if the MTF's demands were viewed as too intrusive. The Commission's *Airtours* decision saw the MTF try to expand the scope of collective dominance analysis, which produced heightened conflict with firms because it directly infringed on their interests of maintaining predictability via clearly delineated criteria. The subsequent conflicts that emerged during the portfolio power trend suggested that firms were prepared to defend themselves from an overzealous Commission/MTF. In all three of the contested cases – *GE, Schneider* and *Tetra* - firms reacted to the Commission's agenda to expand its policy competence at their expense.

Generally, both trend studies saw the Commission and MTF act on policy entrepreneurial impulses in order to secure 'payoffs' such as the expansion of policy competence and institutional power; the ability to alter policy without Council interference and to further establish a reputation as a 'vigorous' regulator. One of the most glaring differences between the two trends was the relative lack of interaction between the MTF and firms during the evolution of the portfolio power trend. This lack of communication stemmed from the fact that the Commission pursued its portfolio power agenda without first announcing its concerns. This is in direct contrast to the Commission's public statement pertaining to its collective dominance agenda. Unaware of the MTF's intentions, firms involved in the *Coca-Cola/Carlsberg* and *Guinness/Grand Met* cases negotiated the appropriate remedies in order for the mergers to be cleared. The cases that comprised the first portfolio triad clearly indicated that the MTF was covertly developing the various theories associated with portfolio power in order to carve out a policy niche. By negotiating what seemed to be mutually beneficial remedies to these cases, firms enabled the MTF to introduce a precedent for the use of portfolio power-based analysis into the MCR framework. Subsequently, in the span of six months the MTF prohibited three mergers based on various portfolio effects. In response, firms appealed the decisions to the CFI and by doing so questioned not only the MTF's authority to use portfolio power in its merger analysis, but also questioned the economic and legal integrity of the concept and to some extent the 'credibility' of the MTF.

The portfolio power trend particularly demonstrated the fragility of the relationship between regulators and firms. By ignoring firms' concerns and proposed remedies and pursuing its entrepreneurial agenda, the MTF set the stage for conflict. By becoming increasingly aggressive in promoting portfolio-based arguments, the MTF made it harder to advance its agenda because it made judicial review inevitable. The separate appeals by Airtours, GE, Tetra and Schneider highlights how quickly the policy environment can deteriorate because of one actor's interests becoming too selfish. The MTF's intent to broaden the scope of collective dominance proved to be a step too far as did the inclusion of the concept portfolio power into EU merger control. Considering both trends, it is apparent that the frequency and scope of conflict between firms and regulators (and between regulators and the Courts) increased over time. This points to the previously raised idea that as time progressed, the MTF became more entrepreneurial. During the collective dominance trend the MTF became more comfortable in advancing its interests and tried to increase the scope of the concept so as to affect more mergers. Trying to capitalize on the confidence it gained from its experiences during the collective dominance trend (particularly from the *Gencor* case), the MTF turned its attention to portfolio power where it decided to advance its second agenda. Over time as the trend of portfolio power began to mature, the Commission became more unilateral and creative in its policy thinking.

As discussed throughout this study, the role of the Courts had always been an important part of the evolution of EU competition policy. As discussed in Chapter 3, the ECJ played a vital role in expanding the Commission's power to investigate mergers under Articles 81 and 82 with the landmark cases being *Continental Can* and *Philip Morris*. Gerber (1998, 373) has argued that as a result of the decreasingly 'activist' role of the ECJ in competition law and the creation of the CFI as an administrative Court in the late 1980s, the Courts began to play a more marginal role in the competition system compared to the early decades where their role was more defined. Although this generalization may hold true in a majority of EU competition settings, this study has argued that the trends of collective dominance and portfolio power represented 'substantive' developments in merger control that demanded the attention of the Courts. Following from this, both trends represented opportunities for the judiciary to once again

assert its intellectual influence and leadership in the realm of competition law. The evolution and implementation of collective dominance, although determined and guided by interests held by the Commission and MTF, was dotted by several important judicial decisions. Appeals advanced by firms highlighted 'conflict issues.' The ruling in *France v Commission* was interpreted as being mutually favorable to both firms and the MTF since the Court ruled in favor of firms, but also concluded that the MTF's collective dominance analysis was legally grounded, albeit incorrect in this case. Latter, in the *Airtours* appeal case, the Court reaffirmed its previous decisions dealing with the concept's usage by inferring that the establishment of a high evidential threshold is necessary in order to reassure the business, economic and legal communities that agency intervention is unlikely. Likewise, in the portfolio appeal cases (*Schneider* and *Tetra*) the CFI clarified the legality of the concept's use, but also concluded that the use of portfolio effects must be justified by precise economic analysis.

One may argue that over the course of the two trends, the Courts did not just simply mediate and clarify policy. The CFI's judgments in *Airtours, Tetra* and *Schneider* clearly censured an 'out of control' MTF that was acting without respect for others' interests. When considered as a whole, the jurisprudence provided by all the appeals over the course of both trends demonstrate that the Community Courts have the power and will to constrain Commission behavior when such actions are seen as inconsistent with the administrative procedures set in the MCR and the broad goals of competition embodied by the Treaty and MCR provisions.

Consequently, the Courts played a critical role in defining the nature and outcomes of both collective dominance and portfolio power trends, but their judgments have also had profound repercussions for the field of merger control more generally. So many judicial developments could no go unnoticed and the unprecedented string of unfavorable rulings has led to increased pressure on the Commission to review the way it conducts the merger review process. The tangible result of this pressure is that the Courts have triggered legislative reform in the form of the Commission's 2001 Green Paper on

reforming the control of concentrations in the EU. This has subsequently produced a new Merger Control Regulation (Regulation 139/2004).[18]

In summary, the development and inclusion of the concepts of collective dominance and portfolio power into European merger control can be explained by the actions and motives of two supranational institutions – the Courts and the Commission – and firms. Taking advantage of its role as the agenda setter in the realm of merger control, the Commission over time, increasingly became more aggressive in asserting its policy entrepreneurial goals of establishing the usage of collective dominance and portfolio-based arguments in order to scrutinize a greater number of mergers and further consolidate its institutional power. In so doing the Commission effectively changed the 'rules of the game' that it and peak industrial groups established during the formulation phase and produced a conflictive policy environment in which firms' behavior became increasingly defensive. In an effort to salvage both short and long term interests, firms appealed multiple cases to the Community judiciary. The Courts subsequently treated the emergence of the two trends as substantial developments in EU competition policy and thus seized the opportunity to (re) establish their intellectual leadership in EU merger policy. As Commission aggression increased and its decisions became bolder - as was particularly displayed by the latter trend – the role of the Courts became more pronounced and important. The judgments of the Courts supported the Commission's efforts to expand its competence via the inclusion of the concepts of collective dominance and portfolio power in the MCR framework, but also proved to constrain Commission behavior by criticizing its economic analysis and disregard of firms' procedural rights and ultimately reversed a number of its decisions. The actions and reasoning of the Courts presented here suggests that besides acting according to its 'mandate' to review appeals brought by firms, the judiciary had both 'wider' and more

[18] Because the new MCR was being negotiated and came into force during the writing of this study it has not been referenced to. However a brief overview of the major changes include a new substantive test which now covers 'non co-ordinated' effects and strikes a balance between the dominance and significant reduction of competition test; Jurisdictional reforms which further strengthen and clarify the German and Dutch clauses; New investigation timetable and new powers of enforcement for the Commission which include the extension of the Commission's timetable for completing its investigations in both Phase I and II assessments. This change was made specifically to give firms more time to discuss remedies with the Commission. Additionally, the Commission has been given more power to request information from firms, examine books and records, conduct oral interviews and dawn raids on business promises. The new Regulation came into force May 1, 2004.

'self-serving' objectives in mind when it handed down its judgments. These developments imply that while the Commission clearly holds substantial autonomy and discretion in the realm of merger policy, the extent to which it can exercise and extend these attributes via policy entrepreneurship largely depends on the interests and reaction of firms and its complex relationship with the Community judiciary.

CHAPTER SIX

CONCLUSIONS

This thesis analyzed the formulation of the EU Merger Control Regulation (MCR) and its implementation via the trend studies of collective dominance and portfolio power. More specifically this thesis has had two main objectives. The first has been to examine and explain which actors were responsible for the negotiation of the MCR and why they felt the need to participate. It has been argued that by examining the reasons for the creation of merger control regulation at the European level and by identifying the primary actors involved, one may gain a clearer picture of the policy dynamics that produced the MCR. Thus, the second objective has been to explain why the previously mentioned trends of collective dominance and portfolio power developed since the MCR's implementation in 1990. Similar to the analysis of policy formulation, it was argued that by identifying the main actors and the motivations that both guided and constrained their actions, one would be a better position to explain developments during the implementation phase.

Pursuit of the aforementioned main objectives produced three distinct arguments, which formed the explanatory and theoretical basis of the thesis. First, it has been argued that the negotiations pertaining to the content of the MCR occurred in what was termed the 'merger control policy community,' which was made up by representatives of the Commission and elite industrial interests in the form of the ERT and UNICE. Secondly, when turning to the implementation phase it was argued that the Commission/MTF, freed from its resource dependency with elite economic actors, pursed internal agendas pertaining to the inclusion of collective dominance and portfolio power-based arguments within the MCR framework in order to expand and consolidate institutional power. As argued in Chapters 4 and 5, the actions of the Commission with regard to these developments highlight its propensity to act as a 'policy entrepreneur' when faced with windows of opportunity. Thirdly, it has been argued that developments in both policy

phases can be explained by private interest theory. This concluding chapter has two main objectives. The first is to summarize the main findings by explaining actor participation during the MCR's formulation and subsequent implementation. The second objective is to highlight the broader significance of this work for students of public policy.

With these objectives in mind, the first part of this chapter argues that while a policy community may define the nature of a political system's regulations – in this case the EU's regulation of mergers – the entrepreneurial actions of the regulatory agency that implements the rules can potentially change the policy's nature. As previously purported, the Commission's introduction of the trends of collective dominance and portfolio power into the broader MCR framework essentially altered the 'rules of the game.' It will further be argued that the developments in both the formulation and implementation phases requires focus on actors' private desires and fears that both guide and constrain them, while preventing others from participating in the decision-making process. Following this, the second part attempts to highlight the significance of this work for the study of economic/regulatory policy-making at the supranational/European level. It will be argued that by making distinctions between the actions of actors in both policy phases, one may be in a better position to understand developments in other domestic and supranational policy areas. It will also be suggested that more attention must be paid to the private desires/interests and fears of policy-makers in the policy process.

As examined in Chapters 1 and 3, the literature notes that the 1992 Programme led to a massive repositioning of firms within the EU because multinationals realized that centralization of market regulation would significantly reduce business transactions costs. Individual companies as well as Euro-groups were consequently some of the most vocal proponents of the 1992 Programme and it has been well documented that these actors demanded, a subsequently attained, privileged policy-making access.[1] In turn, these demands were "met with concomitant supply of access to the policy-process by political actors in EU institutions seeking policy expertise"(Hix 1999, 206). However, the above chapters also pointed out that throughout much of the EC's existence, the business

[1] Several pieces have been influenced by this school of thought attempting to understand businesses influence on EU policy-making given the new centre of European governance. For example, see (Cowles 1998 and 1996; Bennett 1997).

community was usually skeptical and, in many cases, abrasive to the Commission's efforts to promote economic integration and establish Community competition law.

As argued in Chapter 3, the political and economic events of the 1970s seriously handicapped the Commission from advancing its long-term economic integration initiative that it had successfully 'sold' to the Member States in the 1950s. It has been well documented that from the mid 1960s to the early 1980s national governments shied away from the EC integration project and concentrated on national economic performance and the enforcement of existing laws and policies. The majority of these policies promoted massive state intervention in national economic markets and the build-up of 'national champions.' It was a widespread opinion that such interventionist policies would enable European firms to compete effectively in world markets. With little national support for EC integration at this time the Commission began concentrating on enforcing the norms that it and the ECJ had established over the past decade and a half. It was actually during this 'lull' in the integration project that the Commission became aware of the need for Community competition law to control mergers. While enforcing the competition rules laid out in Articles 85 and 86 of the Treaty, it became increasingly apparent that a significant number of anti-competitive activities within the EC derived from mergers.

Following the ECJ's landmark *Continental Can* judgment, the Commission sought to expand and institutionalize its newfound power to scrutinize mergers during the latter part of the 1970s and early 1980s by proposing several draft proposals for a Council regulation for the control of Community mergers. It was during this time that national political elites and policy-makers recognized that the strategies of state procurement and national champions had failed to reverse Europe's economic and industrial situation. Soon after, the idea of European integration was given new life by elite European industrialists.

The formation of the ERT in the 1980s is a solid illustration of Corporate Europe's support for a 'neo-liberal' based Single Market. It was felt that because Member States and EC officials were incapable of unilaterally launching a single market initiative, elite economic leaders would have to help shape the rules of the market. In fact, in wake of the ERT chairman's, Wisse Dekker's, proposal in 1985 to re-invent

Europe via the Single Market, the Commission President, Jacques Delors, adopted the ERT's proposal that later resulted in Industry Commissioner Cockfield's White Paper which was the basis for the SEA (See Balanya, et al. 2000, 22).

This thesis examined how the events during the development of the SEA helped solidify the self-supporting relationship later manifest in negotiating the MCR: on the one hand as discussed by Cowles (1995), elite economic actors knew that EC institutions were understaffed and in need of expertise and thus actively politically organized themselves in order to shape the EC's policy agenda. And on the other, as discussed by Greenwood and Cram (1996), elite corporate actors relied on the EU institutions for information such as standards of service cultures, employment practices and price traditions (453). Access to this type of information was clearly crucial for rationally acting economic actors seeking to minimize the uncertainty of their operating environment: in order to secure the availability of reliable sources of information, networking with European institutions was pursued.

With these arguments in mind, when turning to the development of the MCR, the empirical evidence provided in Chapter 3 suggested that Commission authorities and members of the ERT and UNICE felt the need for supranational merger control for two main reasons. First, As Eberlein (2001) argues, market consolidation went hand in hand with (neo-liberal economic) globalisation and would result in an exponential growth of mergers throughout the 1980s. The Commission thus sought to increase its stronghold of power in a regulatory policy process which was increasingly necessary given global economic dynamics, without necessarily isolating the very object of their regulation - industrial interests - if the single internal market was to reach its fullest potential. UNICE and the ERT also realized that if the internal market was to become a tangible entity, massive corporate mergers and restructuring follow and thus sought to gain a foothold in its regulatory policy-process. The second main reason for the need of supranational control of Community mergers was to limit Member State involvement in this area of competition policy. Based on their passed interventionist policies of the 1970s, national governments could not be fully trusted to implement merger rules that would complement the Single Market. Furthermore, with the exception of Germany, the UK and to some

extent France, the vast majority of Member States did not have established competition law systems and for that matter, merger control regimes.

Considering the relationships and contacts previously established in the buildup to the Single Market Programme and the fact that both actors shared the belief that the only way of achieving their shared goal of making European industry globally competitive was to propel Community economic integration by establishing and expanding a strong supranational competition law system, it is not surprising that the Commission felt comfortable involving the ERT and UNICE in subsequent MCR negotiations (Armstrong and Bulmer 1998). Given these empirical findings, the theoretical argument posed in Chapter 3 thus argued that as a result of resource dependencies and a shared vision, the Commission and elite corporate actors forged a close relationship that ultimately evolved into a policy community when confronted by a regulatory hole in the 1992 Programme. This strengthens arguments such as Bouwen's (2002) that the Commission seeks policy communities that may provide a source of grass-root and European level information.

When attempting to better understand the theoretical development of the policy community, with regard to the calculation of interests of the Commission in general, and DG Competition in particular, it was argued that these actors warmly welcomed merger control regulation because the Commission could use the MCR to set policy where it has been unable to do so before and thus increase its own institutional power position. Moreover, along the lines of Coen (1998), great weight was given by the Commission to discuss the nature of the Regulation along with those peak industrial groups prepared to establish some form of 'European credibility.' Furthermore, these peak organizations - especially the ERT - made it known that it had the ability and the incentive to pressure reluctant Member States to accept the idea of Community merger control. By accommodating Corporate Europe's demand for the creation of a 'level playing field' and a 'one-stop shop' for merger control, the Commission was successful in securing a 'strong' policy partner and expanding its policy competence via a new area where it would be the sole EU institutional actor. Turning to overall interests of elite corporate interests, a codified directive on merger control would not only aid in attaining its goals of reorganization and consolidation in the global economy, but also, more importantly, limit potential abuses of Commission power over economic actors that may

have otherwise occurred in absence of clearly defined rules. With regard to potential abuses, business fears were based on a previous ECJ decision regarding the *Philip Morris* case that further established Commission authority to investigate mergers, which the *Continental Can* judgment had provided more than a decade before. Based on the *Philip Morris* ruling, and the idea that companies considered it inefficient and costly to gain the approval of multiple national competition authorities when merging, elite corporate interests felt that a supranational merger regime offered a more simplified and predictable regulatory environment. These motivations further highlight that elite industrial Europe bought into the 'new' notion of 'European capitalism' promoted by the Single Market imperative.

The 'four freedoms' guaranteed in the Treaty can be understood as a 'decision' in favor of an economic constitution which met the conceptions of the ordo-liberal school with regard to the framework conditions for a competitive market system. As discussed in Chapter 1, ordo-liberalism called for a transaction economy in which economic conduct was organized by private enterprises on the basis of their evaluation of the incentives and disincentives created by economic competition. Thus, it was argued that centralized governmental decisions should flow from the principles embodied in the economic constitution and be constrained by those same principles. Likewise, the legal system must create and maintain the conditions of complete competition that would allow that type of economic system to function most effectively (See Gerber 1998, ch.7). Since the primary goals of economic actors are to reduce costs, uncertainty and governmental controls on their activities, the business community favored the ordo-liberal based Community approach to integration in which competition law – including merger control – was viewed as the 'center' of the Programme.

Because the fundamental rationale behind the creation of the MCR was to remove the maximum number of mergers from national jurisdictions and place them in the jurisdiction of the Commission the specific dynamics of MCR negotiations presented in this study focused almost exclusively on the motivations and actions of supranational actors. However, despite this 'top down' approach to policy-making it was pointed out that the interests of Member States did find their way into the MCR's contents. Because the Council holds the 'formal' power to enact policy it may exercise substantial influence

on the make-up of specific policies. However, it was argued here that creation of EU merger policy represented a kind of exception. The combination of the increasing momentum of the integration initiative; the uncertainty generated by the ECJ's *Philip Morris* judgment; heavy lobbying by the likes of ERT of Member State governments and the fact that a great majority of Member States who were not equipped to deal with merger control and thus grasped the opportunity to concede such power to the Commission produced a politically advantageous policy window for the members of the policy community to create policy with minimal outside intervention. Despite minimal Council involvement, this thesis examined how Germany, the UK and France did push for alterations dealing the jurisdictional thresholds and assessment criteria of the Regulation.

Consequently, the MCR negotiations hinged on three major issues: the jurisdiction of the MCR and Commission control; the test and criteria that would be used to analyze merger proposals; and the time limits placed on the Commission to make a decision. After three drafts (1984, 86 and 88) the outcome of the negotiations resulted in the inclusion of a vast majority of demands put forth by the ERT and UNICE. However, there were two issues where both the Commission and the umbrella groups had to compromise with the Council in order gain complete policy passage. The inclusion of the German and Dutch clauses into the MCR framework represented victories for both those Member States wishing for a mechanism whereby the Commission can, at the request of a State, refer a notified merger back to the competent national authorities and for those Member States that wanted the Commission to have jurisdiction over a greater number of transactions by allowing national authorities to defer 'domestic' mergers to the Commission. More central to Council negotiations was the issue of the turnover thresholds, where again there was a split in Member State attitudes. The smaller states favored lower jurisdictional thresholds and were happy with those proposed by the Commission (2,000 million Euro). However, Germany, the UK and France pushed for higher thresholds (10,000 million Euro) in order to limit the impact of supranational control on domestic mergers and national regulatory authorities. In the end, the Commission proposed a 5,000 million Euro threshold that proved to be the compromise that solidified a 'yes' vote from the Council. Despite these Member State inspired

changes, the establishment of the MCR can be said to have removed numerous national competition constraints and replaced them with a one-stop-shop for merger control in the EU.

The MCR negotiations provide a clear picture of the policy actors involved and their motivations. Clearly, the two main actors in MCR development were the Commission and elite corporate interests: as a consequence of the Commission's lack of available resources, it was dependent on outside private interests to provide technical expertise and apply pressure on reluctant Member State governments. The result was that the Commission had strong incentives to 'network' with groups such as the ERT, which eventually lead to the creation of an insulated policy community. Although the passage of the MCR institutionally rested in the hands of the Council, its role in the development of detailed legislation was limited in time and scope. However, by incorporating various Member State demands, the members of the policy community effectively 'locked' the rules of the game in place. Thus, the actor dynamics and policy environment present during the MCR's development indicate the inadequacy of the alternative theoretical models discussed in Chapter 2 and justify the use of the policy communities approach informed by private interests.

According the Rhodes' (1986, 1988) depiction of a policy community, the relationship between Commission and elite industrial actors may be categorized as such for four reasons. First, a limited number of participants operated in a largely insulated fashion, while other interests, such as labour, were consciously excluded. This suggests that members of policy communities, as opposed to larger issue networks, generally deny access to groups that fail to share the interest and goals of its members. Second, there is evidence of interaction between the community members, each with their own goals, when particular issues were discussed. As shown, both actors voiced their concerns about the specific issues negotiated. Third, there was a consensus between elite economic actors and the Commission as well as a consistency in values and policy outcomes shared by them. Although both sets of actors were guided by their respective self-interests, the shared goal of the creation of an efficiently operated merger policy to complement the Single Market and reduce Member State involvement served to unite the actors. Fourth, the interaction between the (public and private) actors was based on resource bargaining.

As a consequence of the EU's institutional organization, the Commission was viewed by corporate Europe as being the most logical policy partner since it had the 'power' to create a credible and coherent merger policy. On the other hand, the Commission understood that European industry held two key bargaining chips: essential technical information and the ability and motivation to influence stubborn Member States.

While Chapter 3 examined and explained the policy-process when the MCR was formulated, Chapters 4 and 5 tackled the second main research question, namely, why did the trends of collective dominance and portfolio power develop during the implementation of the MCR? It was argued that in contrast to the actor and policy environment dynamics present in the formulation phase, there exists no 'policy community' of resource dependent, like-minded actors seeking to fulfil collective interests in the implementation phase of EU merger control. Instead, the study of the two trends presented a more disaggregated policy environment defined by the actions of three main actors: the Commission/MTF, firms and the Community Courts. Because the Commission's powers over merger control are based on strong MCR provisions, it did not have to engage in power dependence relationships with other actors to 'make' or 'sustain' policy. Further, because merger control is to a large extent about dealing with a mixed motive game faced by a set of firms that self-evidently do not share a common interest, one cannot treat firms as a 'unitary' actor. The implication of such an environment is that the potential for conflict between competing interests is much higher in the implementation phase than was evident when the MCR was formulated. This is because not only is there increased probability for conflict between firms, but also there exists the possibility of conflict between firms and the Commission/MTF, especially if the latter seeks to act on entrepreneurial impulses that would challenge the way firms play the 'merger game.' This study has argued that the emergence of both trends represent occasions where the Commission's policy entrepreneurship produced tangible policy changes that expanded its policy jurisdiction and institutional power at the expense of firms' ability to predict outcomes.

It was explained that although the MCR's entry into force in 1990 was viewed by most as being an important step in the regulation of the Single Market, there was a considerable amount of scepticism surrounding its implementation. Although history has

shown that the Commission has efficiently dealt with a significant amount of the largest mergers in the world since 1990, during this time it had also become evident that the Commission, in its effort to address perceived 'holes' in the Regulation, strayed in its policy 'thinking' by introducing concepts such as collective dominance and portfolio power. Consequently, the Commission opened itself up to new scepticism from the corporate, legal and economic communities because the introduction of these trends seriously decreased the ability to analyse and predict with a reasonable level of certainty how a merger is assessed by the MTF.

Chapter 4 specifically examined the emergence of the trend of collective dominance and whether if formed part of European merger control. Collective dominance refers to a situation where a small number of large firms are able to co-ordinate their behavior resulting in the creation or maintaining of anti-competitive prices. It was not until 1992 that DG Competition Commissioner Brittan suggested that a gap existed in the Regulation with regard to collective dominance and that the MTF should incorporate such arguments into its merger analysis. The criteria for evaluating collective dominance thus evolved out of cases decided by the Commission and the Courts. The case studies presented in Chapter 4 demonstrated that it was not until the middle of 1991 that the Commission started to divert more attention to the issue. With *Nestlé/Perrier,* the MTF started to systematically analyze not only single dominance but also collective dominance. In further cases it has been shown that the MTF transcended analyzing collective dominance only in duopolies, and began to test for collective dominance with more than two actors in a market.

The analysis of *Nestlé/Perrier* suggests that the MTF did not want to appear to be unilaterally pushing its collective dominance agenda on firms for fear of judicial review at this early stage of the Commission's collective dominance agenda. Firms on the other hand, understood that collective dominance would change the 'parameters of the game' but did not want to foster an adverse relationship with the regulators for fear of jeopardizing future predictability of the merger control process. Consequently, the events that defined *Nestlé/Perrier* highlight several dynamics that would become manifest in subsequent collective dominance cases. First, when faced with a conflict of interest, actions of both actors suggest that they preferred to compromise a mutual beneficial

'remedy,' a strategy that also proved prudent in the next major case, *Kali und Salz*. Secondly, the underlying motivation for the MTF to compromise was guided by its fear of possible judicial review and its entrepreneurial goal of extending its policy competence via the establishment of a collective dominance president. These motivations suggest that the major actors were guided by their own interests as well as by respect of the others' goals and the possible consequences of neglecting them. The third dynamic is based on the idea of related policy phases in that the actions of the MTF and Commission point to the theoretical conceptualisation that actors involved in the implementation phase may 'overlap' and form a part of the policy community established during the formulation phase. Furthermore, the fact that actors involved in the formulation of policy can later alter its nature during the implementation phase suggests there is a type of 'feedback' between both policy phases (as indicated in Figure 4.1). Reaffirming the argument made in Chapter 4, although there is a type of 'overlap' between actors involved in both phases of the policy analysed here, this does not necessarily mean that 'feedback' will take place. The term 'feedback' is used in this study to suggest that decisions made at one level (in this case the implementation one) can change the nature of the decisions previously negotiated at the other (the formulation phase). It does not presume that actors are commuting across the two policy phases.

Subsequent developments related to collective dominance suggest that as time progressed it became evident that both actors became more comfortable with their policy environment and thus grew more confident in challenging each other's positions. The *Kali und Salz* case saw the MTF vigorously argue that the merger would have created a Community-wide duopoly and thus ordered the firms involved to sever their link with SCPA. Although the firms privy to the merger agreed to the concessions, SCPA appealed the case. The fact that it did so signalled that firms were prepared to defend their interests if the MTF's 'remedies' were viewed as too intrusive. The action taken by firms in *France v Commission* proved to be critical since involving the Court was seen as an alternative to *fully* accepting MTF imposed concessions or Commission imposed prohibitions. The use of the Courts by firms to 'temper' the Commission proved to be a valuable option in future cases and played a vital role in portfolio power cases.

The ECJ's judgment in *France v Commission* declared the Commission's decision in the *Kali und Salz* case as void because simply considering market shares and structural connections between oligopolists was not sufficient for assuming a high probability of collusive behavior. The end result of the appeal was that the ECJ's ruling was mutually favorable to both parties since it ruled in favor of the firms, and also concluded that the MTF's analysis was legally grounded (albeit wrong) and thus collective dominance analysis could be incorporated in future cases. As in earlier Court cases that dealt with the MTF's merger policy practice - *Continental Can* and *Philip Morris* – the agency might have lost the battle (on the facts), but won the war (on substantive policy issues).

The findings presented in Chapter 4 suggest that besides the *Airtours* case and appeal, the Commission and Court's *Gencor* decisions were the most critical because they represented a crucial refinement of the collective dominance concept and confirmed that that MCR's jurisdiction reaches far beyond the EU in that foreign companies that do not have a base in Brussels (or the EU) are at a serious disadvantage in the merger decision-making process. Although the *Gencor* prohibition pointed to the importance of a thorough dynamic economic analysis, the MTF's arguments based on its 'structural checklist' were enough to block the merger. Together, both *Gencor* decisions implied that beyond the 'checklist' criteria there were other dynamic criteria which should be included in the MTF's analysis and suggested that the 'checklist' be refined. This was greatly welcomed by firms and peak business organizations since they had maintained during most of the 1990s that the Commission should be careful and consider 'economic reality' when considering the use of collective dominance arguments.

The MTF displayed a greater willingness to incorporate dynamic aspects into its decisions in the cases following *Gencor*. An example can be found in the *Price Waterhouse* case when the MTF pointed out that there were substantial incentives to deviate from agreements although most of the checklist criteria indicated trouble. The Commission passed the merger without conditions or obligations, which represented the first collective dominance case cleared without conditions. It seemed that the evolution of collective dominance policy had halted and policy practice in this issue area would finally be formalized. However, the *Airtours* case saw the MTF argue that the reduction

of four major firms to three constituted collective dominance. The decision to prohibit the merger collided with decisions that were judged exclusively on structural grounds (such as *Nestlé/Perrier*) as well as those where dynamic factors played a more important role. The assumptions and analysis used by the MTF during this case were highly controversial and indicated that the Commission had *not* developed consistent criteria for evaluating the possibility of collective dominance.

The CFI's subsequent appeal decision was severely critical of the MTF's analysis and challenged the Commission to design empirical tests for the creation and strengthening of a collectively dominant position that would withstand careful scrutiny. The Court effectively reaffirmed the argument professed by elite economic actors throughout the concept's evolution by inferring that the establishment of a high evidential threshold is necessary in order to reassure business that agency intervention is unlikely. By establishing the appropriate test and criteria for the assessment of collective dominance and ordering the Commission to develop instruments to assist in the MTF's analysis, the Court made it easier for the actors to achieve mutually beneficial outcomes. With regard to collective dominance cases, the Commission/MTF will no longer be trying to carve out a policy niche in the MCR for collective dominance precisely because it has accomplished that over the last 12 years since the inception of the MCR. Likewise, firms will no longer be faced with trying to reverse the burden of proof back to the MTF and rectify the predictability of the decision-making process because the Court acted as a catalyst to rectify this.

Turning to the emergence of the portfolio power trend, Chapter 5 analyzed a significant number of cases in the mid to late 1990s and early 2000s where the Commisison/MTF argued that the holder of a comprehensive product line – a portfolio – may obtain a strong market position vis-à-vis its customers and can therefore more easily restrict entry of potential rivals and/or consolidate market power. It was examined how portfolio power is an umbrella term, utilizing numerous economic concepts such as leveraging, tying and bundling, and thus, unlike collective dominance and its economic counterpart of tacit collusion, lacks a single definitional or comparable focal point. Moreover, while the controversial aspect of collective dominance was the concept's

scope and the MTF's expansion of it, portfolio power, in contrast, lacked a coherent economic grounding and scope.

In terms of empirical evidence, Chapter 5 demonstrated that although the actor and policy environment dynamics remained consistent with those found during the collective dominance trend, the way in which the Commission introduced portfolio power was different and so were firms' subsequent responses. The Commission did not offer any formal statements concerning portfolio power or its heightened anxiety about potential 'problematic' conglomerate mergers before the MTF began using portfolio-based arguments to scrutinize the first triad of mergers. The MTF again tried to fulfil its policy entrepreneurial interests, but this time it did so in a more covert manner. By not notifying relevant interests about its intentions, the Commission set the stage for substantial future conflict.

Apart from underscoring how 'political' the Commission's decision-making process can be and that there still remained conflicting conceptions among Member States of the role of competition law in the Community, analysis of the *de Havilland* merger investigation demonstrated that although not the primary focus of the MTF's reservations, aspects of portfolio power were used to argue why the deal would ultimately be blocked. Specifically, the MTF made numerous references regarding how the merged entity's larger range of products would increase its capability to bundle – through mixed deals – and hence lead to the possibility of utilizing market power in one market to sell in another via leveraging. Taken together, these concerns represented the pre-curser to the MTF's eventual introduction of its leverage theory, in which a merged firm with an already dominant or nearly dominant position could, via bundling/tying, lever its market power in one market into another. Subsequently, this theory became the overwhelming portfolio effect cited by the MTF to scrutinize targeted cases.

The *Coca-Cola/Amalgamated Beverages* case witnessed the MTF examine whether the creation of a broad portfolio of soft drink brands would confer on Coke the possibility to use its beverage portfolio to its advantage by leveraging its strong position in the tying market into other products of the portfolio. Subsequently, the MTF examined whether the creation of a portfolio of carbonated soft drinks, packaged water and beer might give each of the brands in the portfolio greater market power than if they were sold

on a stand-alone basis. The conclusion of *Coca-Cola/Carlsberg* stated that such a portfolio would strengthen the existing position of one of the firms in the tying market. In retrospect, it is clear that the MTF was developing and testing its various portfolio theories in the Coke cases. *Coca-Cola/Amalgamated Beverages* displayed the MTF sorting out its leverage theory while in *Coca-Cola/Carlsberg* the MTF confirmed that a portfolio of products alone could strengthen the market position of a firm. Although conflict between firms and the MTF did not emerge until the conclusion of the *Guinness* case, the MTF's actions before and during the Coke cases foreshadowed the eventual relational breakdown the actors.

The *Guinness/Grand Met* case saw the convergence of the MTF's earlier raised portfolio theories. The assessment was based on the idea that although individual leverage possibilities might have existed prior to the merger, the combined leverage possibilities, through tying, become greater than the sum of the individual pre-merger possibilities. With this said, the common thread present in the first triad of cases was that the MTF considered the ability of firms to leverage power in one market to the benefit of a product in another complementary, non-competing but closely related market. This argument, along with two other issues, namely the creation or strengthening of a dominant position due to the presence of a portfolio and the elimination of competition (actual or potential), proved to be predominant in the cases of the second triad. By forcing firms to accept remedies based on these issues the MTF was successful in establishing a precedent for the use of portfolio power in future cases.

As the trend's evolution progressed, the conflict between actors became more evident. Firms along with their legal and economic consultants argued that the majority of the MTF's arguments pertaining to portfolio power were unproven and vague and that their use would seriously decrease the effectiveness of the merger control regime. As was the case with collective dominance, firms argued that predictability and agency accountability would become blurred. As a result of the MTF's conscious disregard for the interests of economic actors and continued efforts to broaden the concept's scope, the prospects for mutual beneficial negotiations were minimized and the role of the Courts became more pronounced. Although the verdict in the GE appeal is still pending, the aftermath of the *Schneider and Tetra* cases confirmed that the MTF's implementation of

portfolio power was flawed. The Court's views on portfolio power highlight this and proved positive for those interests concerned with predictability and institutional accountability.

The cases that made up the second portfolio triad examined in Chapter 5 saw the MTF apply and expand the portfolio power concept to markets other than beverages. In so doing, all of the firms involved in these mergers lodged complaints with the CFI based on the inappropriate application of portfolio power, the lack of rigorous empirical analysis and a disregard for firms' right to defense. Although the *Tetra* judgment confirmed that the MTF may examine conglomerate mergers based on portfolio effects, the CFI subsequently criticized the MTF for its lack of analytical rigor in assessing the evidence to support its various theories. The MTF failed to adequately address the likelihood of abusive conduct by the merged firm – which the Court considered highly unlikely. The CFI expressed a clear preference towards evaluating the effects of competition rather than the size of the parties. Likewise in *Schneider*, the CFI criticized the MTF for failure to strictly adhere to its own procedural rules. The Court emphasized that these rules serve to provide legal certainty to the parties as well as provide the parties with the opportunity to exercise their rights to defense; failure to comply with the procedural rules will result in the decision being annulled. The CFI's *Tetra* judgment as well as the ECJ's subsequent judgment in the Commission's appeal, opened the possibility for firms to offer behavioral remedies in cases where portfolio issues arise. Consequently, the clarification of these issues directly addressed concerns of the corporate, legal and economic communities. However, it is yet to be seen if the CFI's *General Electric* ruling will have the same effect that its *Airtours* judgment had on the collective dominance trend.

Taken together, both trend studies saw the Commission and MTF increasingly act on policy entrepreneurial impulses in order to expand policy jurisdiction. The latter trend particularly demonstrated the fragility of the relationship between regulators and firms. By producing bolder decisions and ignoring firms' concerns and proposed remedies, the Commission/MTF made it hard to advance self-serving interests because it made judicial involvement inevitable. The separate appeals by Airtours, GE, Tetra and Schneider highlight how quickly the policy environment can deteriorate because of one actor's

interest becoming too selfish. Considering events in both trends, it is apparent that the frequency and scope of conflict between firms and regulators and between regulators and the Courts increased over time. Clearly, as the trends progressed the Commission became more unilateral and creative in its policy thinking and thus became more entrepreneurial, resulting in increasingly critical judicial decisions.

Despite not being a major actor in the formulation phase of the MCR, this thesis clearly indicates that the role of the Community Courts should not be overlooked in the implementation phase. Although there existed an internally-inspired movement within the ECJ during that late 1980s to curtail activist decisions in the area of Community competition law and the fact the CFI was created primarily to act as an administrative Court, both Courts treated the emergence of the two trends as 'substantive' developments in merger control and thus seized the opportunity to establish their intellectual influence and leadership in this realm of competition law. Both trend studies were dotted by numerous important judicial decisions that saw the Courts combine elements of teleology with more administrative methodology in order to define the nature and outcomes of collective dominance and portfolio power arguments. Where the ECJ judgments in *France v Commission* and the Commission's *Tetra* appeal clearly sought to legitimize the Commission's actions by linking the concepts to the broader integrationist goals of the MCR and the Treaty, the CFI judgments dealt with the more factual elements of cases and clearly censured an overly activist Commission. On the one hand, the case law of both Courts demonstrates that on substantive issues, such as the inclusion of collective dominance and portfolio based arguments within the MCR, the judiciary usually sides with the Commission and provides it with policy victories. On the other, however, the Courts have shown an increased propensity to challenge the economic analysis and procedural conduct of the Commission by reversing a significant number of its merger decisions. It was argued that the overall effect of the Courts' 'structural' force in the area of merger control is that it triggered a Commission review of all aspects of the policy which subsequently lead to the creation of a new Merger Control regulation in 2004.

Given the above findings on both the formulation of the MCR and the subsequent trends of collective dominance and portfolio power seen during the policy's implementation phase, there are two main conclusions to be taken from the study. With

regard to the first main conclusion, theoretical ideas were presented about different sets of actors found throughout different phases of a policy process within the same issue area. In particular, it was argued that during the formulation phase of the MCR, one witnessed the existence of a 'merger control policy community,' comprised of several DGs within the European Commission led by DG Competition as well as representatives of elite corporate Europe from organizations such as the ERT. However, when MCR rules were put into practice, the actors involved became more numerous and to some degree more specific. As the trend studies have shown, the main actors were the Commission/MTF, firms and the Community Courts.

It was argued that there exists 'overlap' between the formulation and implementation phases in that representatives of the Commission were main players within the policy community that formulated the MCR, while also being crucial in determining how the MTF would function and, more importantly, having the final say in all decisions taken under the MCR. In this sense the Commission was the 'formulator' of the policy and latter became the 'implementer' of merger control. On the other hand, outcomes of the implementation phase were dynamic and eventually resulted in a type of feedback between the policy phases. Because rules previously negotiated by the members of the policy community had become redefined in the implementation phase to achieve the entrepreneurial goals of the Commission/MTF, this points to the idea that the relationship between the two policy phases is not necessarily static. This was particularly seen when the Commission/MTF was able to use the concepts of collective dominance and portfolio power as a means to increase regulatory domain by establishing 'new' policies that had not previously existed within the MCR framework.

The second main conclusion suggests that actor behavior in both policy phases is based on private interests, which in one setting motivated an interdependent, self-supporting bargaining relationship based on resources and shared goals, and in another promoted an environment where actors sought individual interests and were guided by 'fear' of each other's actions. When the MCR was developed, it was argued that the Commission sought to increase supranational and decrease domestic policy jurisdiction so as to regulate in order to increase the efficiency of the Single Market, while elite corporate actors sought to have rules clearly defined at the supranational as

opposed to the domestic level so as to foster a more efficient and business-friendly regulatory environment in the Single Market. Although the policy environment facing the actors in the implementation phase was different from that found at the formulation phase in that merger control involves a succession of 'mixed motive games' in which firms present arguments to the MTF who then evaluates them and decides the proper course of action, the motives of actor behavior continue to point to private interests. As the trend studies demonstrated, the Commission/MTF sought to establish itself as a more 'sophisticated' bureaucracy by creatively and purposely selecting 'test cases' in order to advance policy competence and further establish institutional autonomy. Additionally, firms sought to reap the economic benefits of mergers that would be investigated by a centralized regulatory agency, while the Courts wanted to establish an active role in merger control. The major implication of this situation is that there is a greater probability for conflict between actors since there is no shared interest among them. Regarding the collective dominance trend, it was argued that both the MTF and firms were largely able to further their own interests via negotiation and playing on each others' fears. In the case of portfolio power, the Commission and MTF's entrepreneurial tendencies and pursuit of a unilateral agenda resulted in a higher degree of conflict, highlighting the consequences of neglecting the interests of firms. Those consequences came in the form a multiple instances of judicial review, which produced conflict between the Commission and the Courts. Although it did not self-initiate its enhanced role in European merger control, appeals filled by disgruntled firms produced numerous windows of opportunity for the judiciary to establish a more pronounced institutional role and re-introduce its intellectual leadership in the area of Community competition law. These dynamics suggest that although actors may try to obtain their goals through different means in different settings, the motivating force of private interests remains constant and guides these actions.

Implicitly, the literature on policy entrepreneurship points to the various policy networks linking the Commission with a range of actors.[2] This study has demonstrated that EU policy-making constitutes a rich empirical field for adopting the community/network concept. Since the Commission is a member of a dual-executive

[2] See (Pollack 1997; Cram 1997; Laffan 1997; Moravcsik 1999).

along with the Council and does not hold a 'power-monopoly,' its policy style is based on co-operation and negotiation implying a considerable degree of openness towards organized interests. However, this study along with arguments put forth by scholars such as Broscheild and Coen (2002), suggest that the Commission invites only those actors that have proven themselves in the Brussels policy arena over a period of time and share interests in a particular policy area (24-5). The Commission has the ability and substantial leeway to seek policy partners who possess the information needed to 'solve' policy problems. Based on this, the Commission acts as a policy entrepreneur on two levels. First, the Commission identifies areas that it feels are in need of legislation and works with selected actors to produce effective policy. The second level, along the lines of Laver (1997), demonstrates that policy entrepreneurs have their own private interests and thus have a propensity to deviate from the established policy package once the policy is implemented in order to accommodate its own interests (84). With this in mind, in an effort to provide a comprehensive analysis of EU merger control, policy communities were used to *describe* the decision-making that shaped the MCR and private interest theory was used to *explain* policy developments and actor behavior in the formation phase. With regard to the implementation phase, private interest theory was used in tandem with the concept of policy entrepreneurship in order to explain policy developments.

Although this thesis does not contend that policy communities or policy entrepreneurship powered by private interests represents a 'grand' conceptual framework to explain everything about the EU, it does represent a way in which one can analyze cross-systemic policy developments. With this in mind, it is useful to attempt to extract general lessons from this study that may be of value to students of European politics and public policy. Indeed, one may justifiably argue that any generalization must be made in caution: because this study has focused on EU merger policy, deeper research is still needed in other areas of EU policy-making. Nevertheless, this study may still offer insights and suggestions that can be verified or falsified by other scholars in future work.

As discussed earlier, the objective of this study was to explain the formulation of the MCR and the subsequent trends of collective dominance and portfolio power – its objectives were not to verify or falsify a grand theory of European integration such as

intergovernmentalism or supranational governance. Nevertheless, it may be useful to see if the findings of this study can add to the 'grand theorist' debate. The actions of the Commission and elite industrial interests in the formulation phase clearly point to a 'top-down,' supranational account of policy making wherein main participants belonged to a community that remained relatively free from outside influence. Developments in the formulation phase of Community merger policy are thus consistent with arguments developed by authors such as Sandholtz and Zysman (1989) as well as Sandholtz and Stone Sweet (1998), who highlight the importance of the 'supranational governance' perspective: in order to explain EU integration, they argue that focus should also be made on developments at the EU institutional level, particularly the European Commission, as well as the European Parliament and the ECJ. Sandholtz and Zysman (1989) particularly highlight the Commission's policy leadership as an agenda-setter and policy entrepreneur that identifies policy problems, mobilizes support from transnational interests, exploits openings in the political opportunity structure, and calculates strategically how to achieve various goals including integration. As one turns to developments in the implementation phase of merger control, the high degree of discretion and autonomy afforded to the Commission/MTF allowed for the advancement of entrepreneurial objectives in the form of the inclusion of collective dominance and portfolio power into the MCR framework and further highlights that European merger policy and more generally, competition policy, are largely Commission driven. Likewise, the increased importance of the Courts during the implementation phase further supports supranational governance views of integration since, according to Peterson and Bomberg (1999), "intergovernmentalists have almost naturally tended to miss the importance of the Courts in the integration process" (15). However, it must be kept in mind that the 'supranationalist' nature of these policy developments may be a function of the policy area/domain compared to others, such as CFSP, whose development can be best explained by looking at ideas raised by intergovernmentalists (Chari and Cavatorta 2003, 25-29).

With this said, this study did present (limited) evidence that could support intergovernmentalist views as seen in the work of Moravcsik (1991, 1998, 1999). Although the Commission does command a substantial degree of autonomy and

discretion in the merger control policy area, its actions where nonetheless constrained by the Council in certain instances. Although it was argued that the Commission and the ECJ effectively shaped the incentives of the Member States by altering the statures quo, Germany, the UK and France were able to have their interests included in the MCR. Moreover, throughout much of the MCR's early existence, Member States rebuffed Commission initiatives to lower the jurisdictional thresholds and clarify issues dealing with joint ventures. This suggest that although the Commission was successful in altering the MCR 'informally' via policy entrepreneurship, its efforts to 'formally' change policy were constrained by the Council – evidence that intergovernmental arguments can come into play even in situations where the overall policy dynamics clearly point to a more supranational interpretation.

In sum, the findings of this study represent a 'mix-bag' as far as the grand theories are concerned. Although developments concerning merger policy may be viewed as more consistent with ideas raised by scholars writing on supranational governance when compared to those raised by intergovernmentalists, even supranational governance is deficient in two areas of concern. As discussed by Cowles (1995) it does not take into account fully the role of economic actors in the formulation of policy and that supranational and economic actors involved in the integration process partake in it because they are also motivated by entrepreneurial/private desires while implementing policy. This again highlights the danger of using 'grand' theories of integration designed to describe, explain and predict the broad thrust and path of European integration to or explain *specific policy outcomes* that arise from this process.

Regarding the 'private interests' of actors in both policy phases, although it is true that European integration studies have pointed to them all along, there is a body of literature, as discussed in Chapter 2, which states that regulatory bureaucracies are motivated by public interests. It was argued that there are inherent tensions in the 'public interest' model wherein in one setting actors such as firms are assumed to be self-interested and in the other, regulators are assumed to be publicly-interested. This study suggests that while policy may be employed to promote the public's interest, it is also used to further the private interest of all actors involved in the policy process. Consequently, the use of private interest theory and policy entrepreneurship to explain

developments in European merger policy brings into question the 'status' of 'integration logic' in the decisions of the main institutional actors analyzed: the Commission and Courts.

With regard to the Commission's interest to further economic integration, it was clear during the formulation phase that this goal influenced and guided Commission behavior and provided impetus to developments that would increase its jurisdictional power within the European competition law system. In fact, the Commission and peak industrial groups 'pitched' the idea of a Community merger control to the Council as being an 'extension' of the integration project. However, Commission actions during the implementation phase as depicted by the two trend studies neither confirm nor deny that the goal of economic integration played a role in the Commission's thinking. Although it is possible that the Commission had an interest in furthering integrationist goals by introducing the concepts of collective dominance and portfolio power so that it could control those 'problem' mergers that it could not before, the position purported in this thesis was that the Commission and MTF pursued the establishment of those concepts because it would benefit various self-serving interests such as the expansion of policy competence. Although not taken into account in this study, Gerber (1998) provides a possible explanation for the lack of integrationist thought by the Commission in the area of competition policy. He argues that because of the success of the integration project in the late 1980s and early 1990s, its role in the competition law system has become less important – causing those who administer the system (the Commission) to face fundamental questions about what it is doing and why. The removal of the "integration imperative" necessarily alters competition law goal structures and the discourse associated with them. Without it, Gerber argues there will be increased pressure on DG Competition decision-makers to articulate other goals with far more care than in the past (388-9). Based on this, it is possible that the two trends analyzed above represent the Commission's reaction to the decreasing importance of the integration initiative. Although these assumptions remain unexamined, they are nonetheless interesting and offer students of EU policy-making with possible avenues for research.

In a similar vein, the 'structural' force of the Courts during the implementation phase of European merger control highlights its longstanding role in the realm of

Community competition law: by both constraining and promoting Commission action the Courts were able to minimize conflict between actors and maximize benefits pertaining to integration. However, the presumption that the Community judiciary was simply trying to 'further' integration through its judgments in the realm of merger control is contentious. It was argued throughout this study that the decisions of the ECJ linked Commission agendas to economic integration while CFI judgments, for the most part, ensured that the Commission was correctly applying economic principles and procedural rules. By backing the Commission when it came to substantive policy issues, but severally criticizing it on points of law, the judiciary was able to both promote integration, albeit to a limited extent, and establish its intellectual leadership in merger control. Furthermore, if one takes into account Gerber's thesis, the actions of the judiciary may be interpreted as acknowledging the need for deeper case analysis due to the Commission's 'retooling' of the system to achieve a set of objectives different form those it has served in the past. Nevertheless, the fact that the judiciary had other interests besides those of integration suggests that as an institution, it too has the propensity to act as a policy entrepreneur. This is consistent with the work of Alter (1994), Burley and Mattli (1993), Slaughter (1998) and Stone Sweet (1998) and again points to the importance of identifying the major actors and acknowledging the private interests which serve to both guide and constrain their actions.

In conclusion, this thesis has studied the development and subsequent implementation of Community merger control at the supranational level. While the analysis of the collective dominance and portfolio power trends provided insight into how the MCR has been implemented and how the Commission's approach to certain types of merges has 'creatively matured,' it is also important to acknowledge what the general implications of the addition of merger control are for the Community's competition system as a whole. As argued in the earlier chapters of this thesis, during the first three decades of Community competition law the system was centered on administrative decision-making, which operated within a firmly established judicial framework. Although the Commission made most of the decisions within the system, it did so under the 'guidance' of the ECJ. Prior to the 1980s, the Commission established competition law rules primarily through the process of adjudication. That is, the Commission would

evaluate individual cases and determine their compliance with the norms of the system – as they had been interpreted by the ECJ. The creation of Community merger control marked a fundamental change in the way the Commission established competition law rules. No longer was adjudication the primary tool. Instead, the Commission began 'legislating' in order to directly and more quickly establish competition rules. In so doing, the Commission strengthened its institutional power in the competition law system and reduced that of the judiciary. Consequently, the result of such legislation was that the Commission became the central actor because its decisions automatically became the authoritative rules of the system. The overall implication of such a shift in institutional power is that the competition law system became more administrative and less judicial.

The enactment of the MCR not only underscored this shift, but also clearly suggested that the most pressing aspects of EC competition law would be dealt with increasingly by the Commission and not national competition authorities. This has literally changed the landscape of competition policy in Europe. Being the sole institutional actor, the Commission has greatly enhanced its potential for influencing many European and international business transactions. The inclusion of the collective dominance and portfolio power concepts within the doctrine of the MCR clearly exemplifies this. Interestingly, the path taken by the Commission to establish the two concepts followed an 'adjudication logic': the Commission and MTF sought test cases to establish precedents for each concept's future use. Through subsequent cases, which included judicial backing on substantive issues, the Commission was able to 'informally' widen the MCR's doctrine with respect to those mergers involving collective dominance and portfolio aspects. However, although the use of adjudication in this situation is broadly similar to its use during pre-MCR competition law, its use also serves to underscore a fundamental difference. It was argued that Commission decisions regarding the concepts of collective dominance and portfolio power were largely motivated by entrepreneurial interests, which subsequently caused the Commission to overlook the 'legality' of its actions. Although initial judicial action was based on its mandate to 'check' via appeal, the Commission's policy thinking in specific cases, a number of judgments suggest that the Courts saw an opportunity to re-establish a leadership role in the competition law system.

The unprecedented sting of negative judgments against the Commission in 2002 exposed numerous deficiencies in the MTF's analysis as well as some serious limitations of the merger control system. The most visible implication of this has been the establishment of the 'new' 2004 MCR, which certainly represents the opening of a new chapter in the history of European merger control and European competition law more generally. Although a thorough review of the 'new' rules governing Community control over mergers is outside the scope of this study, such developments raise important questions not only about the future of the competition law system and the MCR's role within it, but also the future influence of judicial ideas and norms on the Commission's administrative procedures. Are we witnessing the Courts purposely inching their way back into the competition limelight and thereby restoring its powerful guiding force in the competition system or is the judiciary's resurgence to be short lived? Will the Commission become more tentative in exercising its powers in the realm of merger control? If so, will it become more active in other areas of the competition system? Using the research uncovered in this thesis as a foundation, scholars may seek to address these significant questions in future work.

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Appendix A:

Text of MCR And 1997 Amendments

COUNCIL REGULATION (EEC) No 4064/89

of 21 December 1989 on the control of concentrations between undertakings

THE COUNCIL OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European Economic Community, and in particular Articles 87 and 235 thereof,
Having regard to the proposal from the Commission
(1), Having regard to the opinion of the European Parliament
(2), Having regard to the opinion of the Economic and Social Committee
(3), Whereas, for the achievement of the aims of the Treaty establishing the European Economic Community, Article 3(f) gives the Community the objective of instituting 'a system ensuring that competition in the common market is not distorted';

Whereas this system is essential for the achievement of the internal market by 1992 and its further development;
Whereas the dismantling of internal frontiers is resulting and will continue to result in major corporate re-organizations in the Community, particularly in the form of concentrations;

Whereas such a development must be welcomed as being in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community;

Whereas, however, it must be ensured that the process of re-organization does not result in lasting damage to competition; whereas Community law must therefore include provisions governing those concentrations which may significantly impede effective competition in the common market or in a substantial part of it;

Whereas Articles 85 and 86, while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not, however, sufficient to cover all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty;
Whereas a new legal instrument should therefore be created in the form of a Regulation to permit effective monitoring of all concentrations from the point of view of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations;

Whereas this Regulation should therefore be based not only on Article 87 but, principally, on Article 235 of the Treaty, under which the Community may give itself the additional powers of action necessary for the attainment of its objectives, and also with regard to concentrations on the markets for agricultural products listed in Annex II to the Treaty;

Whereas the provisions to be adopted in this Regulation should apply to significant structural changes the impact of which on the market goes beyond the national borders of any one Member State;

Whereas the scope of application of this Regulation should therefore be defined according to the geographical area of activity of the undertakings concerned and be limited by quantitative thresholds in order to cover those concentrations which have a Community dimension; whereas, at the end of an initial phase of the implementation of this Regulation, these thresholds should be reviewed in the light of the experience gained;

Whereas a concentration with a Community dimension exists where the aggregate turnover of the undertakings concerned exceeds given levels worldwide and throughout the Community and where at least two of the undertakings concerned have their sole or main fields of activities in

different Member States or where, although the undertakings in question act mainly in one and the same Member State, at least one of them has substantial operations in at least one other Member State; whereas that is also the case where the concentrations are effected by undertakings which do not have their principal fields of activities in the Community but which have substantial operations there;

Whereas the arrangements to be introduced for the control of concentrations should, without prejudice to Article 90 (2) of the Treaty, respect the principle of non-discrimination between the public and the private sectors; whereas, in the public sector, calculation of the turnover of an undertaking concerned in a concentration needs, therefore, to take account of undertakings making up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them;

Whereas it is necessary to establish whether concentrations with a Community dimension are compatible or not with the common market from the point of view of the need to preserve and develop effective competition in the common market; whereas, in so doing, the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty, including that of strengthening the Community's economic and social cohesion, referred to in Article 130a;

Whereas this Regulation should establish the principle that a concentration with a Community dimension which creates or strengthens a position as result of which effective competition in the common market or in a substantial part of it is significantly impeded is to be declared incompatible with the common market;

Whereas concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the common market; whereas, without prejudice to Articles 85 and 86 of the Treaty, an indication to this effect exists, in particular, where the market share of the undertakings concerned does not exceed 25 % either in the common market or in a substantial part of it;

Whereas the Commission should have the task of taking all the decisions necessary to establish whether or not concentrations of a Community dimension are compatible with the common market, as well as decisions designed to restore effective competition;

Whereas to ensure effective control undertakings should be obliged to give prior notification of concentrations with a Community dimension and provision should be made for the suspension of concentrations for a limited period, and for the possibility of extending or waiving a suspension where necessary; whereas in the interests of legal certainty the validity of transactions must nevertheless be protected as much as necessary;

Whereas a period within which the Commission must initiate a proceeding in respect of a notified concentration and a period within which it must give a final decision on the compatibility or incompatibility with the common market of a notified concentration should be laid down;

Whereas the undertakings concerned must be accorded the right to be heard by the Commission as soon as a proceeding has been initiated;

Whereas the members of management and supervisory organs and recognized workers' representatives in the undertakings concerned, together with third parties showing a legitimate interest, must also be given the opportunity to be heard;

Whereas the Commission should act in close and constant liaison with the competent authorities of the Member States from which it obtains comments and information;

Whereas, for the purposes of this Regulation, and in accordance with the case-law of the Court of Justice, the Commission must be afforded the assistance of the Member States and must also be empowered to require information to be given and to carry out the necessary investigations in order to appraise concentrations;

Whereas compliance with this Regulation must be enforceable by means of fines and periodic penalty payments; whereas the Court of Justice should be given unlimited jurisdiction in that regard pursuant to Article 172 of the Treaty;

Whereas it is appropriate to define the concept of concentration in such a manner as to cover only

operations bringing about a durable change in the structure of the undertakings concerned; whereas it is therefore necessary to exclude from the scope of this Regulation those operations which have as their object or effect the coordination of the competitive behaviour of independent undertakings, since such operations fall to be examined under the appropriate provisions of Regulations implementing Article 85 or Article 86 of the Treaty; whereas it is appropriate to make this distinction specifically in the case of the creation of joint ventures;

Whereas there is no coordination of competitive behaviour within the meaning of this Regulation where two or more undertakings agree to acquire jointly control of one or more other undertakings with the object and effect of sharing amongst themselves such undertakings or their assets;

Whereas the application of this Regulation is not excluded where the undertakings concerned accept restrictions directly related and necessary to the implementation of the concentration;

Whereas the Commission should be given exclusive competence to apply this Regulation, subject to review by the Court of Justice;

Whereas the Member States may not apply their national legislation on competition to concentrations with a Community dimension, unless the Regulation makes provision therefore; whereas the relevant powers of national authorities should be limited to cases where, failing intervention by the Commission, effective competition is likely to be significantly impeded within the territory of a Member State and where the competition interests of that Member State cannot be sufficiently protected otherwise than by this Regulation; whereas the Member States concerned must act promptly in such cases; whereas this Regulation cannot, because of the diversity of national law, fix a single deadline for the adoption of remedies;

Whereas, furthermore, the exclusive application of this Regulation to concentrations with a Community dimension is without prejudice to Article 223 of the Treaty, and does not prevent the Member States' taking appropriate measures to protect legitimate interests other than those pursued by this Regulation, provided that such measures are compatible with the general principles and other provisions of Community law;

Whereas concentrations not referred to in this Regulation come, in principle, within the jurisdiction of the Member States; whereas, however, the Commission should have the power to act, at the request of a Member State concerned, in cases where effective competition would be significantly impeded within that Member State's territory;

Whereas the conditions in which concentrations involving Community undertakings are carried out in non-member countries should be observed, and provision should be made for the possibility of the Council's giving the Commission an appropriate mandate for negotiation with a view to obtaining non-discriminatory treatment for Community undertakings;

Whereas this Regulation in no way detracts from the collective rights of workers as recognized in the undertakings concerned,

HAS ADOPTED THIS REGULATION:

Article1 Scope

1. Without prejudice to Article 22 this Regulation shall apply to all concentrations with a Community dimension as defined in paragraph 2.

2. For the purposes of this Regulation, a concentration has a Community dimension where;

(a) the aggregate worldwide turnover of all the undertakings concerned is more than ECU 5 000 million, and

(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

3. The thresholds laid down in paragraph 2 will be reviewed before the end of the fourth year following that of the adoption of this Regulation by the Council acting by a qualified majority on a proposal from the Commission.

Article 2 Appraisal of concentrations

1. Concentrations within the scope of this Regulation shall be appraised in accordance with the following provisions with a view to establishing whether or not they are compatible with the common market. In making this appraisal, the Commission shall take into

account:
(a) the need to preserve and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or without the Community;
(b) the market position of the undertakings concerned and their economic and financial power, the opportunities available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an Obstacle to competition.
2. A concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market.
3. A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market.

Article 3 Definition of concentration
1. A concentration shall be deemed to arise where:
(a) two or more previously independent undertakings merge, or
(b) one or more persons already controlling at least one undertaking, or - one or more undertakings acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings.
2. An operation, including the creation of a joint venture, which has as its object or effect the coordination of the competitive behaviour of undertakings which remain independent shall not constitute a concentration within the meaning of paragraph 1 (b). The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity, which does not give rise to coordination of the competitive behaviour of the parties amongst themselves or between them and the joint venture, shall constitute a concentration within the meaning of paragraph 1 (b).
3. For the purposes of this Regulation, control shall be constituted by rights, contracts or any other means which, either separately or jointly and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:
(a) ownership or the right to use all or part of the assets of an undertaking;
(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.
4. Control is acquired by persons or undertakings which:
(a) are holders of the rights or entitled to rights under the contracts concerned, or
(b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.
5. A concentration shall not be deemed to arise where:
(a) credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing the sale of all or part of that undertaking or of its assets or the sale of those securities and that any such sale takes place within one year of the date of acquisition; that period may be extended by the Commission on request where such institutions or companies justify the fact that the sale was not reasonably possible within the period set;
(b) control is acquired by an office holder according to the law of a Member State relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings;
(c) the operations referred to in paragraph 1 (b) are carried out by the financial holding companies referred to in Article 5 (3) of the Fourth Council Directive 78/660/EEC of 25 July 1978 on the annual accounts of certain types of companies (4), as last amended by Directive 84/569/EEC (5), provided however that the voting rights in respect of the holding are exercised, in particular in relation to the appointment of members of the management and

supervisory bodies of the undertakings in which they have holdings, only to maintain the full value of those investments and not to determine directly or indirectly the competitive conduct of those undertakings.

Article 4 Prior notification of concentrations
1. Concentrations with a Community dimension as referred to by this Regulation shall be notified to the Commission not more than one week after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest. That week shall begin when the first of those events occurs.
2. A concentration which consists of a merger within the meaning of Article 3 (1) (a) or in the acquisition of joint control within the meaning of Article 3 (1) (b) shall be notified jointly by the parties to the merger or by those acquiring joint control as the case may be. In all other cases, the notification shall be effected by the person or undertaking acquiring control of the whole or parts of one or more undertakings.
3. Where the Commission finds that a notified concentration falls within the scope of this Regulation, it shall publish the fact of the notification, at the same time indicating the names of the parties, the nature of the concentration and the economic sectors involved. The Commission shall take account of the legitimate interest of undertakings in the protection of their business secrets.

Article 5 Calculation of turnover
1. Aggregate turnover within the meaning of Article 1 (2) shall comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of sales rebates and of value added tax and other taxes directly related to turnover. The aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in paragraph 4. Turnover, in the Community or in a Member State, shall comprise products sold and services provided to undertakings or consumers, in the Community or in that Member State as the case may be.
2. By way of derogation from paragraph 1, where the concentration consists in the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts which are the subject of the transaction shall be taken into account with regard to the seller or sellers. However, two or more transactions within the meaning of the first subparagraph which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the last transaction.
3. In place of turnover the following shall be used:
(a) for credit institutions and other financial institutions, as regards Article 1 (2) (a), one-tenth of their total assets. As regards Article 1 (2) (b) and the final part of Article 1 (2), total Community-wide turnover shall be replaced by one-tenth of total assets multiplied by the ratio between loans and advances to credit institutions and customers in transactions with Community residents and the total sum of those loans and advances.
As regards the final part of Article 1 (2), total turnover within one Member State shall be replaced by one-tenth of total assets multiplied by the ratio between loans and advances to credit institutions and customers in transactions with residents of that Member State and the total sum of those loans and advances;
(b) for insurance undertakings, the value of gross premiums written which shall comprise all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurance undertakings, including also outgoing reinsurance premiums, and after deduction of taxes and parafiscal contributions or levies charged by reference to the amounts of individual premiums or the total volume of premiums; as regards Article 1 (2) (b) and the final part of Article 1 (2), gross premiums received from Community residents and from residents of one Member State respectively shall be taken into account.
4. Without prejudice to paragraph 2, the turnover of an undertaking concerned within the meaning of Article 1 (2) shall be calculated by adding together the respective turnover of the following:
(a) the undertaking concerned;
(b) those undertakings in which the undertaking concerned, directly or indirectly;
- owns more than half the capital or business assets, or
- has the power to exercise more than half the voting rights, or
- has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or

- has the right to manage the undertakings' affairs;
(c) those undertakings which have in an undertaking concerned the rights or powers listed in (b);
(d) those undertakings in which an undertaking as referred to in (c) has the rights or powers listed in (b);
(e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or powers listed in (b).
5. Where undertakings concerned by the concentration jointly have the rights or powers listed in paragraph 4 (b), in calculating the turnover of the undertakings concerned for the purposes of Article 1 (2);
(a) no account shall be taken of the turnover resulting from the sale of products or the provision of services between the joint undertaking and each of the undertakings concerned or any other undertaking connected with any one of them, as set out in paragraph 4 (b) to (e);
(b) account shall be taken of the turnover resulting from the sale of products and the provision of services between the joint undertaking and any third undertakings. This turnover shall be apportioned equally amongst the undertakings concerned.

Article 6 Examination of the notification and initiation of proceedings
1. The Commission shall examine the notification as soon as it is received.
(a) Where it concludes that the concentration notified does not fall within the scope of this Regulation, it shall record that finding by means of a decision.
(b) Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market.
(c) If, on the other hand, it finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to its compatibility with the common market, it shall decide to initiate proceedings.
2. The Commission shall notify its decision to the undertakings concerned and the competent authorities of the Member States without delay.

Article 7 Suspension of concentrations
1. For the purposes of paragraph 2 a concentration as defined in Article 1 shall not be put into effect either before its notification or within the first three weeks following its notification.
2. Where the Commission, following a preliminary examination of the notification within the period provided for in paragraph 1, finds it necessary in order to ensure the full effectiveness of any decision taken later pursuant to Article 8 (3) and (4), it may decide on its own initiative to continue the suspension of a concentration in whole or in part until it takes a final decision, or to take other interim measures to that effect.
3. Paragraphs 1 and 2 shall not impede the implementation of a public bid which has been notified to the Commission in accordance with Article 4 (1) by the date of its announcement, provided that the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of those investments and on the basis of a derogation granted by the Commission pursuant to paragraph 4.
4. The Commission may, on request, grant a derogation from the obligations imposed in paragraphs 1, 2 or 3 in order to prevent serious damage to one or more undertakings concerned by a concentration or to a third party. That derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition. A derogation may be applied for and granted at any time, even before notification or after the transaction.
5. The validity of any transaction carried out in contravention of paragraph 1 or 2 shall be dependent on a decision pursuant to Article 6 (1) (b) or 8 (2) or (3) or by virtue of the presumption established by Article 10 (6). This Article shall, however, have no effect on the validity of transactions in securities including those convertible into other securities admitted to trading on a market which is regulated and supervised by authorities recognized by public bodies, operates regularly and is accessible directly or indirectly to the public, unless the buyer and seller knew or ought to have known that the transaction was carried out in contravention of paragraph 1 or 2.

Article 8 Powers of decision of the Commission
1. Without prejudice to Article 9, each proceeding initiated pursuant to Article 6 (1) (c) shall be closed by means of a decision as provided for in paragraphs 2 to 5.
2. Where the Commission finds that, following

modification by the undertakings concerned if necessary, a notified concentration fulfils the criterion laid down in Article 2 (2), it shall issue a decision declaring the concentration compatible with the common market. It may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to modifying the original concentration plan. The decision declaring the concentration compatible shall also cover restrictions directly related and necessary to the implementation of the concentration.
3. Where the Commission finds that a concentration fulfils the criterion laid down in Article 2 (3), it shall issue a decision declaring that the concentration is incompatible with the common market.
4. Where a concentration has already been implemented, the Commission may, in a decision pursuant to paragraph 3 or by a separate decision, require the undertakings or assets brought together to be separated or the cessation of joint control or any other action that may be appropriate in order to restore conditions of effective competition.
5. The Commission may revoke the decision it has taken pursuant to paragraph 2 where:
(a) the declaration of compatibility is based on incorrect information for which one of the undertakings concerned is responsible or where it has been obtained by deceit, or
(b) the undertakings concerned commit a breach of an obligation attached to the decision.
6. In the case referred to in paragraph 5, the Commission may take a decision pursuant to paragraph 3, without being bound by the deadline referred to in Article 10 (3).

Article 9 Referral to the competent authorities of the Member States
1. The Commission may, by means of a decision notified without delay to the undertakings concerned and the competent authorities of the other Member States, refer a notified concentration to the competent authorities of the Member State concerned in the following circumstances.
2. Within three weeks of the date of receipt of the copy of the notification a Member State may inform the Commission which shall inform the undertakings concerned that a concentration threatens to create or to strengthen a dominant position as a result of which effective competition would be significantly impeded on a market, within that Member State, which presents all the characteristics of a distinct market, be it a substantial part of the common market or not.
3. If the Commission considers that, having regard to the market for the products or services in question and the geographical reference market within the meaning of paragraph 7, there is such a distinct market and that such a threat exists either:
(a) it shall itself deal with the case in order to maintain or restore effective competition on the market concerned, or
(b) it shall refer the case to the competent authorities of the Member State concerned with a view to the application of that State's national competition law. If, however, the Commission considers that such a distinct market or threat does not exist it shall adopt a decision to that effect which it shall address to the Member State concerned.
4. A decision to refer or not to refer pursuant to paragraph 3 shall be taken where:
(a) as a general rule within the six-week period provided for in Article 10 (1), second subparagraph, where the Commission has not initiated proceedings pursuant to Article 6 (1) (b), or (b) within three months at most of the notification of the concentration concerned where the Commission has initiated proceedings under Article 6 (1) (c), without taking the preparatory steps in order to adopt the necessary measures pursuant to Article 8 (2), second subparagraph, (3) or (4) to maintain or restore effective competition on the market concerned.
5. If within the three months referred to in paragraph 4 (b) the Commission, despite a reminder from the Member State concerned, has taken no decision on referral in accordance with paragraph 3 or taken the preparatory steps referred to in paragraph 4 (b), it shall be deemed to have taken a decision to refer the case to the Member State concerned in accordance with paragraph 3 (b).
6. The publication of any report or the announcement of the findings of the examination of the concentration by the competent authority of the Member State concerned shall be effected not more than four months after the Commission's referral.
7. The geographical reference market shall consist of the area in which the undertakings concerned are involved in the supply of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring

areas because, in particular, conditions of competition are appreciably different in those areas. This assessment should take account in particular of the nature and characteristics of the products or services concerned, of the existence of entry barriers or of consumer preferences, of appreciable differences of the undertakings' market shares between neighbouring areas or of substantial price differences.
8. In applying the provisions of this Article, the Member State concerned may take only the measures strictly necessary to safeguard or restore effective competition on the market concerned.
9. In accordance with the relevant provisions of the Treaty, any Member State may appeal to the Court of Justice, and in particular request the application of Article 186, for the purpose of applying its national competition law.
10. This Article will be reviewed before the end of the fourth year following that of the adoption of this Regulation.

Article 10 Time limits for initiating proceedings and for decisions
1. The decisions referred to in Article 6 (1) must be taken within one month at most. That period shall begin on the day following the receipt of a notification or, if the information to be supplied with the notification is incomplete, on the day following the receipt of the complete information. That period shall be increased to six weeks if the Commission receives a request from a Member State in accordance with Article 9 (2).
2. Decisions taken pursuant to Article 8 (2) concerning notified concentrations must be taken as soon as it appears that the serious doubts referred to in Article 6 (1) (c) have been removed, particularly as a result of modifications made by the undertakings concerned, and at the latest by the deadline laid down in paragraph 3.
3. Without prejudice to Article 8 (6), decisions taken pursuant to Article 8 (3) concerning notified concentrations must be taken within not more than four months of the date on which the proceeding is initiated.
4. The period set by paragraph 3 shall exceptionally be suspended where, owing to circumstances for which one of the undertakings involved in the concentration is responsible, the Commission has had to request information by decision pursuant to Article 11 or to order an investigation by decision pursuant to Article 13.
5. Where the Court of Justice gives a judgment which annuls the whole or part of a Commission decision taken under this Regulation, the periods laid down in this Regulation shall start again from the date of the judgment.
6. Where the Commission has not taken a decision in accordance with Article 6 (1) (b) or (c) or Article 8 (2) or (3) within the deadlines set in paragraphs 1 and 3 respectively, the concentration shall be deemed declared compatible with the common market, without prejudice to Article 9.

Article 11Requests for information
1. In carrying out the duties assigned to it by this Regulation, the Commission may obtain all necessary information from the Governments and competent authorities of the Member States, from the persons referred to in Article 3 (1) (b), and from undertakings and associations of undertakings.
2. When sending a request for information to a person, an undertaking or an association of undertakings, the Commission shall at the same time send a copy of the request to the competent authority of the Member State within the territory of which the residence of the person or the seat of the undertaking or association of undertakings is situated.
3. In its request the Commission shall state the legal basis and the purpose of the request and also the penalties provided for in Article 14 (1) (b) for supplying incorrect information.
4. The information requested shall be provided, in the case of undertakings, by their owners or their representatives and, in the case of legal persons, companies or firms, or of associations having no legal personality, by the persons authorized to represent them by law or by their statutes.
5. Where a person, an undertaking or an association of undertakings does not provide the information requested within the period fixed by the Commission or provides incomplete information, the Commission shall by decision require the information to be provided. The decision shall specify what information is required, fix an appropriate period within which it is to be supplied and state the penalties provided for in Articles 14 (1) (b) and 15 (1) (a) and the right to have the decision reviewed by the Court of Justice.
6. The Commission shall at the same time send a copy of its decision to the competent authority of the Member State within the territory of which the residence of the person or the seat of the undertaking or association of undertakings is

situated.

Article 12 Investigations by the authorities of the Member States

1. At the request of the Commission, the competent authorities of the Member States shall undertake the investigations which the Commission considers to be necessary pursuant to Article 13 (1), or which it has ordered by decision pursuant to Article 13 (3). The officials of the competent authorities of the Member States responsible for conducting those investigations shall exercise their powers upon production of an authorization in writing issued by the competent authority of the Member State within the territory of which the investigation is to be carried out. Such authorization shall specify the subject matter and purpose of the investigation.

2. If so requested by the Commission or by the competent authority of the Member State within the territory of which the investigation is to be carried out, officials of the Commission may assist the officials of that authority in carrying out their duties.

Article 13 Investigative powers of the Commission

1. In carrying out the duties assigned to it by this Regulation, the Commission may undertake all necessary investigations into undertakings and associations of undertakings. To that end the officials authorized by the Commission shall be empowered:

(a) to examine the books and other business records;

(b) to take or demand copies of or extracts from the books and business records;

(c) to ask for oral explanations on the spot;

(d) to enter any premises, land and means of transport of undertakings.

2. The officials of the Commission authorized to carry out the investigations shall exercise their powers on production of an authorization in writing specifying the subject matter and purpose of the investigation and the penalties provided for in Article 14 (1) (c) in cases where production of the required books or other business records is incomplete. In good time before the investigation, the Commission shall inform, in writing, the competent authority of the Member State within the territory of which the investigation is to be carried out of the investigation and of the identities of the authorized officials.

3. Undertakings and associations of undertakings shall submit to investigations ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the investigation, appoint the date on which it shall begin and state the penalties provided for in Articles 14 (1) (c) and 15 (1) (b) and the right to have the decision reviewed by the Court of Justice.

4. The Commission shall in good time and in writing inform the competent authority of the Member State within the territory of which the investigation is to be carried out of its intention of taking a decision pursuant to paragraph 3. It shall hear the competent authority before taking its decision.

5. Officials of the competent authority of the Member State within the territory of which the investigation is to be carried out may, at the request of that authority or of the Commission, assist the officials of the Commission in carrying out their duties.

6. Where an undertaking or association of undertakings opposes an investigation ordered pursuant to this Article, the Member State concerned shall afford the necessary assistance to the officials authorized by the Commission to enable them to carry out their investigation. To this end the Member States shall, after consulting the Commission, take the necessary measures within one year of the entry into force of this Regulation.

Article 14 Fines

1. The Commission may by decision impose on the persons referred to in Article 3 (1) (b), undertakings or associations of undertakings fines of from ECU 1 000 to 50 000 where intentionally or negligently:

(a) they omit to notify a concentration in accordance with Article 4;

(b) they supply incorrect or misleading information in a notification pursuant to Article 4;

(c) they supply incorrect information in response to a request made pursuant to Article 11 or fail to supply information within the period fixed by a decision taken pursuant to Article 11;

(d) they produce the required books or other business records in incomplete form during investigations pursuant to Article 12 or 13, or refuse to submit to an investigation ordered by decision taken pursuant to Article 13.

2. The Commission may by decision impose fines not exceeding 10 % of the aggregate turnover of the undertakings concerned within

the meaning of Article 5 on the persons or undertakings concerned where, either intentionally or negligently, they;
(a) fail to comply with an obligation imposed by decision pursuant to Article 7 (4) or 8 (2), second subparagraph;
(b) put into effect a concentration in breach of Article 7 (1) or disregard a decision taken pursuant to Article7 (2);
(c) put into effect a concentration declared incompatible with the common market by decision pursuant to Article 8 (3) or do not take the measures ordered by decision pursuant to Article 8 (4).
3. In setting the amount of a fine, regard shall be had to the nature and gravity of the infringement.
4. Decisions taken pursuant to paragraphs 1 and 2 shall not be of a criminal law nature.

Article 15 Periodic penalty payments
1. The Commission may by decision impose on the persons referred to in Article 3 (1) (b), undertakings or associations of undertakings concerned periodic penalty payments of up to ECU 25 000 for each day of the delay calculated from the date set in the decision, in order to compel them:
(a) to supply complete and correct information which it has requested by decision pursuant to Article 11;
(b) to submit to an investigation which it has ordered by decision pursuant to Article 13.
2. The Commission may by decision impose on the persons referred to in Article 3 (1) (b) or on undertakings periodic penalty payments of up to ECU 100 000 for each day of the delay calculated from the date set in the decision, in order to compel them:
(a) to comply with an obligation imposed by decision pursuant to Article 7 (4) or 8 (2), second subparagraph, or
(b) to apply the measures ordered by decision pursuant to Article 8 (4).
3. Where the persons referred to in Article 3 (1) (b), undertakings or associations of undertakings have satisfied the obligation which it was the purpose of the periodic penalty payment to enforce, the Commission may set the total amount of the periodic penalty payments at a lower figure than that which would arise under the original decision.

Article 16 Review by the Court of Justice
The Court of Justice shall have unlimited jurisdiction within the meaning of Article 172 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payments; it may cancel, reduce or increase the fine or periodic penalty payment imposed.

Article 17 Professional secrecy
1. Information acquired as a result of the application of Articles 11, 12, 13 and 18 shall be used only for the purposes of the relevant request, investigation or hearing.
2. Without prejudice to Articles 4 (3), 18 and 20, the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information they have acquired through the application of this Regulation of the kind covered by the obligation of professional secrecy.
3. Paragraphs 1 and 2 shall not prevent publication of general information or of surveys which do not contain information relating to particular undertakings or associations of undertakings.

Article 18 Hearing of the parties and of third persons
1. Before taking any decision provided for in Article 7 (2) and (4), 8 (2), second subparagraph, and (3) to (5), 14 and 15, the Commission shall give the persons, undertakings and associations of undertakings concerned the opportunity, at every stage of the procedure up to the consultation of the Advisory Committee, of making known their views on the objections against them.
2. By way of derogation from paragraph 1, a decision to continue the suspension of a concentration or to grant a derogation from suspension as referred to in Article 7 (2) or (4) may be taken provisionally, without the persons, undertakings or associations of undertakings concerned being given the opportunity to make known their views beforehand, provided that the Commission gives them that opportunity as soon as possible after having taken its decision.
3. The Commission shall base its decision only on objections on which the parties have been able to submit their observations. The rights of the defence shall be fully respected in the proceedings. Access to the file shall be open at least to the parties directly involved, subject to the legitimate interest of undertakings in the protection of their business secrets.
4. Insofar as the Commission and the competent authorities of the Member States deem it necessary, they may also hear other natural or legal persons. Natural or legal persons showing a legitimate interest and especially members of the administrative or management organs of the

undertakings concerned or recognized workers' representatives of those undertakings shall be entitled, upon application, to be heard.

Article 19 Liaison with the authorities of the Member States

1. The Commission shall transmit to the competent authorities of the Member States copies of notifications within three working days and, as soon as possible, copies of the most important documents lodged with or issued by the Commission pursuant to this Regulation.
2. The Commission shall carry out the procedures set out in this Regulation in close and constant liaison with the competent authorities of the Member States, which may express their views upon those procedures. For the purposes of Article 9 it shall obtain information from the competent authority of the Member State as referred to in paragraph 2 of that Article and give it the opportunity to make known its views at every stage of the procedure up to the adoption of a decision pursuant to paragraph 3 of that Article; to that end it shall give it access to the file.
3. An Advisory Committee on concentrations shall be consulted before any decision is taken pursuant to Articles
8 (2) to (5), 14 or 15, or any provisions are adopted pursuant to Article 23.
4. The Advisory Committee shall consist of representatives of the authorities of the Member States. Each Member State shall appoint one or two representatives; if unable to attend, they may be replaced by other representatives. At least one of the representatives of a Member State shall be competent in matters of restrictive practices and dominant positions.
5. Consultation shall take place at a joint meeting convened at the invitation of and chaired by the Commission. A summary of the facts, together with the most important documents and a preliminary draft of the decision to be taken for each case considered, shall be sent with the invitation. The meeting shall take place not less than 14 days after the invitation has been sent. The Commission may in exceptional cases shorten that period as appropriate in order to avoid serious harm to one or more of the undertakings concerned by a concentration.
6. The Advisory Committee shall deliver an opinion on the Commission's draft decision, if necessary by taking a vote. The Advisory Committee may deliver an opinion even if some members are absent and unrepresented. The opinion shall be delivered in writing and appended to the draft decision. The Commission shall take the utmost account of the opinion delivered by the Committee. It shall inform the Committee of the manner in which its opinion has been taken into account.
7. The Advisory Committee may recommend publication of the opinion. The Commission may carry out such publication. The decision to publish shall take due account of the legitimate interest of undertakings in the protection of their business secrets and of the interest of the undertakings concerned in such publication taking place.

Article 20 Publication of decisions

1. The Commission shall publish the decisions which it takes pursuant to Article 8 (2), where conditions and obligations are attached to them, and to Article 8 (2) to (5) in the Official Journal of the European Communities.
2. The publication shall state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 21 Jurisdiction

1. Subject to review by the Court of Justice, the Commission shall have sole competence to take the decisions provided for in this Regulation.
2. No Member State shall apply its national legislation on competition to any concentration that has a Community dimension.
The first subparagraph shall be without prejudice to any Member State's power to carry out any enquiries necessary for the application of Article 9 (2) or after referral, pursuant to Article 9 (3), first subparagraph, indent (b), or (5), to take the measures strictly necessary for the application of Article 9 (8).
3. Notwithstanding paragraphs 1 and 2, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law. Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph. Any other public interest must be communicated to the Commission by the Member State concerned and shall be recognized by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law before the measures referred to above may be taken. The Commission shall inform the

Member State concerned of its decision within one month of that communication.

Article 22 Application of the Regulation
1. This Regulation alone shall apply to concentrations as defined in Article 3.
2. Regulations No 17 (6), (EEC) No 1017/68 (7), (EEC) No 4056/86 (8) and (EEC) No 3975/87 (9) shall not apply to concentrations as defined in Article 3.
3. If the Commission finds, at the request of a Member State, that a concentration as defined in Article 3 that has no Community dimension within the meaning of Article 1 creates or strengthens a dominant position as a result of which effective competition would be significantly impeded within the territory of the Member State concerned it may, insofar as the concentration affects trade between Member States, adopt the decisions provided for in Article 8 (2), second subparagraph, (3) and (4).
4. Articles 2 (1) (a) and (b), 5, 6, 8 and 10 to 20 shall apply. The period within which the proceedings defined in Article 10 (1) may be initiated shall begin on the date of the receipt of the request from the Member State. The request must be made within one month at most of the date on which the concentration was made known to the Member State or effected. This period shall begin on the date of the first of those events.
5. Pursuant to paragraph 3 the Commission shall take only the measures strictly necessary to maintain or restore effective competition within the territory of the Member State at the request of which it intervenes.
6. Paragraphs 3 to 5 shall continue to apply until the thresholds referred to in Article 1 (2) have been reviewed.

Article 23 Implementing provisions
The Commission shall have the power to adopt implementing provisions concerning the form, content and other details of notifications pursuant to Article 4, time limits pursuant to Article 10, and hearings pursuant to Article 18.

Article 24 Relations with non-member countries
1. The Member States shall inform the Commission of any general difficulties encountered by their undertakings with concentrations as defined in Article 3 in a non-member country.
2. Initially not more than one year after the entry into force of this Regulation and thereafter periodically the Commission shall draw up a report examining the treatment accorded to Community undertakings, in the terms referred to in paragraphs 3 and 4, as regards concentrations in non-member countries. The Commission shall submit those reports to the Council, together with any recommendations.
3. Whenever it appears to the Commission, either on the basis of the reports referred to in paragraph 2 or on the basis of other information, that a non-member country does not grant Community undertakings treatment comparable to that granted by the Community to undertakings from that non-member country, the Commission may submit proposals to the Council for the appropriate mandate for negotiation with a view to obtaining comparable treatment for Community undertakings.
4. Measures taken pursuant to this Article shall comply with the obligations of the Community or of the Member States, without prejudice to Article 234 of the Treaty, under international agreements, whether bilateral or multilateral.

Article 25 Entry into force

1. This Regulation shall enter into force on 21 September 1990.
2. This Regulation shall not apply to any concentration which was the subject of an agreement or announcement or where control was acquired within the meaning of Article 4 (1) before the date of this Regulation's entry into force and it shall not in any circumstances apply to any concentration in respect of which proceedings were initiated before that date by a Member State's authority with responsibility for competition.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

COUNCIL REGULATION (EC) No 1310/97 of 30 June 1997 amending Regulation (EEC) No 4064/89 on the control of concentrations between undertakings

THE COUNCIL OF THE EUROPEAN UNION, HAS ADOPTED THIS REGULATION:

Article 1
Regulation (EEC) No 4064/89 is hereby amended as follows:

1. in Article 1:
(a) paragraph 1 shall be replaced by the following:
1. Without prejudice to Article 22, this Regulation shall apply to all concentrations with a Community dimension as defined in paragraphs 2 and 3;
(b) paragraph 3 shall be replaced by the following:
3. For the purposes of this Regulation, a concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:
(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than ECU 2 500 million;
(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than ECU 100 million;
(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than ECU 25 million; and
(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 100 million; unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.`;
(c) the following paragraphs shall be added:
'4. Before 1 July 2000 the Commission shall report to the Council on the operation of the thresholds and criteria set out in paragraphs 2 and 3.
5. Following the report referred to in paragraph 4 and on a proposal from the Commission, the Council, acting by a qualified majority, may revise the thresholds and criteria mentioned in paragraph 3.`;

2. in Article 2, the following paragraph shall be added:
'4. To the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 85 (1) and (3) of the Treaty, with a view to establishing whether or not the operation is compatible with the common market.
In making this appraisal, the Commission shall take into account in particular:
- whether two or more parent companies retain to a significant extent activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market,
- whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.`;

3. in Article 3, paragraph 2 shall be amended as follows:
(a) the first subparagraph shall be deleted;
(b) in the second subparagraph the phrase 'which does not give rise to the coordination of the competitive behaviour of the parties amongst themselves or between them and the joint venture` shall be deleted.

4. in Article 5:
- paragraph 3 shall be replaced by the following:
'3. In place of turnover the following shall be used:
(a) for credit institutions and other financial institutions, as regards Article 1 (2) and (3), the sum of the following income items as defined in Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions

(*), after deduction of value added tax and other taxes directly related to those items, where appropriate:
(i) interest income and similar income;
(ii) income from securities:
- income from shares and other variable yield securities,
- income from participating interests,
- income from shares in affiliated undertakings;
(iii) commissions receivable;
(iv) net profit on financial operations;
(v) other operating income.
The turnover of a credit or financial institution in the Community or in a Member State shall comprise the income items, as defined above, which are received by the branch or division of that institution established in the Community or in the Member State in question, as the case may be;
(b) for insurance undertakings, the value of gross premiums written which shall comprise all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurance undertakings, including also outgoing reinsurance premiums, and after deduction of taxes and parafiscal contributions or levies charged by reference to the amounts of individual premiums or the total volume of premiums; as regards Article 1 (2) (b) and (3) (b), (c) and (d) and the final part of Article 1 (2) and (3), gross premiums received from Community residents and from residents of one Member State respectively shall be taken into account.
(*) OJ No L 372, 31. 12. 1986, p. 1.`;
- in paragraph 4, the introductory sentence shall be replaced by the following:
'4. Without prejudice to paragraph 2, the aggregate turnover of an undertaking concerned within the meaning of Article 1 (2) and (3) shall be calculated by adding together the respective turnovers of the following:`;
- in paragraph 5, the introductory sentence shall be replaced by the following:
'5. Where undertakings concerned by the concentration jointly have the rights or powers listed in paragraph 4 (b), in calculating the aggregate turnover of the undertakings concerned for the purposes of Article 1 (2) and (3):`;

5. in Article 6:
(a) in paragraph 1:
- in point (b) the following subparagraph shall be added:
'The decision declaring the concentration compatible shall also cover restrictions directly related and necessary to the implementation of the concentration.`;
- point (c) shall be replaced by the following:
'(c) Without prejudice to paragraph 1 (a), where the Commission finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to its compatibility with the common market, it shall decide to initiate proceedings.`;
(b) the following paragraphs shall be inserted:
'1a. Where the Commission finds that, following modification by the undertakings concerned, a notified concentration no longer raises serious doubts within the meaning of paragraph 1 (c), it may decide to declare the concentration compatible with the common market pursuant to paragraph 1 (b).
The Commission may attach to its decision under paragraph 1 (b) conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.
1b. The Commission may revoke the decision it has taken pursuant to paragraph 1 (a) or (b) where:
(a) the decision is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit, or
(b) the undertakings concerned commit a breach of an obligation attached to the decision.
1c. In the cases referred to in paragraph 1 (b), the Commission may take a decision under paragraph 1, without being bound by the deadlines referred to in Article 10 (1).`;

6. in Article 7:
(a) paragraph 1 shall be replaced by the following:
'1. A concentration as defined in Article 1 shall not be put into effect either before its notification or until it as been declared compatible with the common market pursuant to a decision under Article 6 (1) (b) or Article 8 (2) or on the basis of a presumption according to Article 10 (6).`;
(b) paragraph 2 shall be deleted;
(c) paragraph 3 shall be amended as follows: the words 'paragraphs 1 and 2` at the beginning of the paragraph shall be replaced by the words 'paragraph 1`;
(d) paragraph 4 shall be replaced by the following:
'4. The Commission may, on request, grant a

derogation from the obligations imposed in paragraphs 1 or 3. The request to grant a derogation must be reasoned. In deciding on the request, the Commission shall take into account inter alia the effects of the suspension on one or more undertakings concerned by a concentration or on a third party and the threat to competition posed by the concentration. That derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition. A derogation may be applied for and granted at any time, even before notification or after the transaction.`;

(e) paragraph 5 shall be replaced by the following:

'5. The validity of any transaction carried out in contravention of paragraph 1 shall be dependent on a decision pursuant to Article 6 (1) (b) or Article 8 (2) or (3) or on a presumption pursuant to Article 10 (6). This Article shall, however, have no effect on the validity of transactions in securities including those convertible into other securities admitted to trading on a market which is regulated and supervised by authorities recognized by public bodies, operates regularly and is accessible directly or indirectly to the public, unless the buyer and seller knew or ought to have known that the transaction was carried out in contravention of paragraph 1.`;

7. in Article 8:

(a) paragraph 2 shall be replaced by the following:

'2. Where the Commission finds that, following modification by the undertakings concerned if necessary, a notified concentration fulfils the criterion laid down in Article 2 (2) and, in the cases referred to in Article 2 (4), the criteria laid down in Article 85 (3) of the Treaty, it shall issue a decision declaring the concentration compatible with the common market. It may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market. The decision declaring the concentration compatible with the common market shall also cover restrictions directly related and necessary to the implementation of the concentration.`;

(b) paragraph 3 shall be replaced by the following:

'3. Where the Commission finds that a concentration fulfils the criterion defined in Article 2 (3) or, in the cases referred to in Article 2 (4), does not fulfil the criteria laid down in Article 85 (3) of the Treaty, it shall issue a decision declaring that the concentration is incompatible with the common market.`;

8. in Article 9:

(a) paragraph 2 shall be replaced by the following:

'2. Within three weeks of the date of receipt of the copy of the notification a Member State may inform the Commission, which shall inform the undertakings concerned, that:

(a) a concentration threatens to create or to strengthen a dominant position as a result of which effective competition will be significantly impeded on a market within that Member State, which presents all the characteristics of a distinct market, or

(b) a concentration affects competition on a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market.`;

(b) in paragraph 3:

- point (b) shall be replaced by the following: '(b) it shall refer the whole or part of the case to the competent authorities of the Member State concerned with a view to the application of that State's national competition law.`,
- the following subparagraph shall be added: 'In cases where a Member State informs the Commission that a concentration affects competition in a distinct market within its territory that does not form a substantial part of the common market, the Commission shall refer the whole or part of the case relating to the distinct market concerned, if it considers that such a distinct market is affected.`;

(c) paragraph 10 shall be replaced by the following:

'10. This Article may be re-examined at the same time as the thresholds referred to in Article 1.`;

9. in Article 10:

(a) in paragraph 1, the following text shall be added at the end of the second subparagraph: 'or where, after notification of a concentration, the undertakings concerned submit commitments pursuant to Article 6 (1a), which are intended by the parties to form the basis for a decision pursuant to Article 6 (1) (b).`;

(b) at the beginning of paragraph 4 the phrase 'The period set by paragraph 3` shall be replaced by the phrase 'The periods set by paragraphs 1 and 3`;

10. in Article 18:
(a) in paragraph 1 the words: 'Article 7 (2) and (4)` shall be replaced by the words 'Article 7 (4);
(b) paragraph 2 shall be replaced by the following:
'2. By way of derogation from paragraph 1, a decision to grant a derogation from suspension as referred to in Article 7 (4) may be taken provisionally, without the persons, undertakings or associations of undertakings concerned being given the opportunity to make known their views beforehand, provided that the Commission gives them that opportunity as soon as possible after having taken its decision.`;

11. in Article 19, the following text shall be added at the end of paragraph 1: 'Such documents shall include commitments which are intended by the parties to form the basis for a decision pursuant to Articles 6 (1) (b) or 8 (2).`;

12. in Article 22:
(a) paragraphs 1 and 2 shall be replaced by the following:
'1. This Regulation alone shall apply to concentrations as defined in Article 3, and Regulations No 17 (1), (EEC) No 1017/68 (2), (EEC) No 4056/86 (3) and (EEC) No 3975/87 (4) shall not apply, except in relation to joint ventures that do not have a Community dimension and which have their object or effect the coordination of the competitive behaviour of undertakings that remain independent.`;
(b) paragraph 3 shall be amended as follows:
'3. If the Commission finds, at the request of a Member State or at the joint request of two or more Member States, that a concentration as defined in Article 3 that has no Community dimension within the meaning of Article 1 creates or strengthens a dominant position as a result of which effective competition would be significantly impeded within the territory of the Member State or States making the joint request, it may, insofar as that concentration affects trade between Member States, adopt the decisions provided for in Article 8 (2), second subparagraph, (3) and (4).`;
(c) paragraph 4 shall be replaced by the following:
'4. Articles 2 (1) (a) and (b), 5, 6, 8 and 10 to 20 shall apply to a request made pursuant to paragraph 3. Article 7 shall apply to the extent that the concentration has not been put into effect on the date on which the Commission informs the parties that a request has been made. The period within which proceedings may be initiated pursuant to Article 10 (1) shall begin on the day following that of the receipt of the request from the Member State or States concerned. The request must be made within one month at most of the date on which the concentration was made known to the Member State or to all Member States making a joint request or effected. This period shall begin on the date of the first of those events.`;
(d) in paragraph 5 the phrase 'or States` shall be inserted after the phrase 'within the territory of the Member State`;
(e) paragraph 6 shall be deleted;

13. in Article 23:
(a) these phrase 'time limits pursuant to Article 10` shall be replaced by the phrase 'time limits pursuant to Articles 7, 9, 10 and 22`;
(b) the following subparagraph shall be added: 'The Commission shall have the power to lay down the procedure and time limits for the submission of commitments pursuant to Articles 6 (1a) and 8 (2).`

Article 2
This Regulation shall not apply to any concentration which was the subject of an agreement or announcement or where control was acquired within the meaning of Article 4 (1) of Regulation (EEC) No 4064/89, before 1 March 1998 and it shall not in any circumstances apply to any concentration in respect of which proceedings were initiated before 1 March 1998 by a Member State's authority with responsibility for competition.

Article 3
This Regulation shall enter into force on 1 March 1998.

List of Tables and Figures

Table 3.1 – General Commission Merger Statistics

Sept 21 1990 to July 31 2003	90	91	92	93	94	95	96	97	98	99	00	01	02	03	Total
Number of notified cases	12	63	60	58	95	110	131	172	235	292	345	335	279	125	2312
Cases withdrawn - Phase 1			3	1	6	4	5	9	5	7	8	8	3	0	59
Cases withdrawn - Phase 2				1			1		4	5	6	4	1	0	22

II.) FINAL DECISIONS

														31/07	
Article, kind of decision...	90	91	92	93	94	95	96	97	98	99	0	1	2	3	Total
6.1 (a) out of scope Merger Reg.	2	5	9	4	5	9	6	4	6	1	1	1	1	0	54
6.1 (b) compatible	5	47	43	49	78	90	109	118	207	236	293	299	240	122	1936
(b) comp.w.commitments(6.2)		3	4		2	3		2	12	19	28	13	10	7	103
Total 6.1 (b) + 6.2	5	50	47	49	80	93	109	120	219	255	321	312	250	129	2039
9.3 partial referral to M.S. (ph.I)			1		1			6	3	1	4	6	9	1	32
9.3 full referral to Member States				1			3	1	1	3	2	1	4	6	22
Total 9.3 (ph.I)			1	1	1		3	7	4	4	6	7	13	7	54
Phase I	7	55	57	54	86	102	118	131	229	260	328	320	264	136	2147
9.3 partial referral to M.S.(ph.II)										1		0	0	0	1
8.2 compatible		1	1	1	2	2	1	1	3	0	3	5	2	1	23
8.2 compatible with commitments		3	3	2	2	3	3	7	4	8	12	10	5	5	62
8.3 prohibition		1			1	2	3	1	2	1	2	5	0	0	18
8.4 restore effective competition								2				0	2	0	4
Total 8		5	4	3	5	7	7	11	9	9	17	20	9	6	112
Phase II		5	4	3	5	7	7	11	9	10	17	20	9	6	113
Total final decisions	7	60	61	57	91	109	125	142	238	270	345	340	273	142	2260

III.) PHASE II PROCEEDINGS INITIATED

														31/07	
Article, kind of decision...	90	91	92	93	94	95	96	97	98	99	0	1	2	3	Total
6.1 (c)		6	4	4	6	7	6	11	12	20	19	22	7	7	131

Source: European Commission, DG Competition

Table 3.2 – EU Merger Control 1990- July 2003

	1990-1997	1998-2000	2001-2003
Number of notified cases	701	872	679
Cases withdrawn	30	35	16
Commitments in Phase 1	14	59	25
Commitments in Phase 2	23	24	18
Prohibition	8	5	5
% influenced by MCR	10.7%	13.5%	9.4%

Table 4.1 - Collective Dominance Case Law

** Year indicates when decisions/judgments were handed down – not the notification year..*

YEAR	*CASE*	*INSTITUTION*	*DECISION TYPE*
1992	Nestle/Perrier	Commission	Passed with Commitments Art. 8(2)
1993	Kali +Salz/MDK/Treuhand	Commission	Passed with Commitments Art. 8(2)
1998	France v. Commission	ECJ	Overturned Commission
1996	Gencor/Lonrho	Commission	Prohibited Art. 8(3)
1999	Gencor v. Commission	CFI	Backed Commission
1998	PriceWaterhouse/Coopers & Lybrand	Commission	Passed Art. 8(2)
1999	Airtours/First Choice	Commission	Prohibited Art. 8(3)
2002	Airtours v. Commission	CFI	Overturned Commission

Table 4.2 – Oligopoly Prisoners' Dilemma

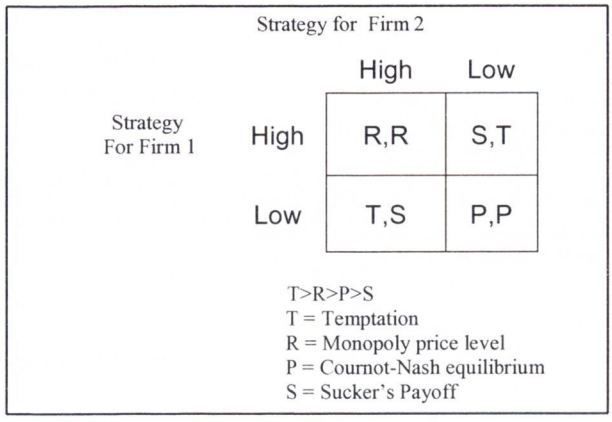
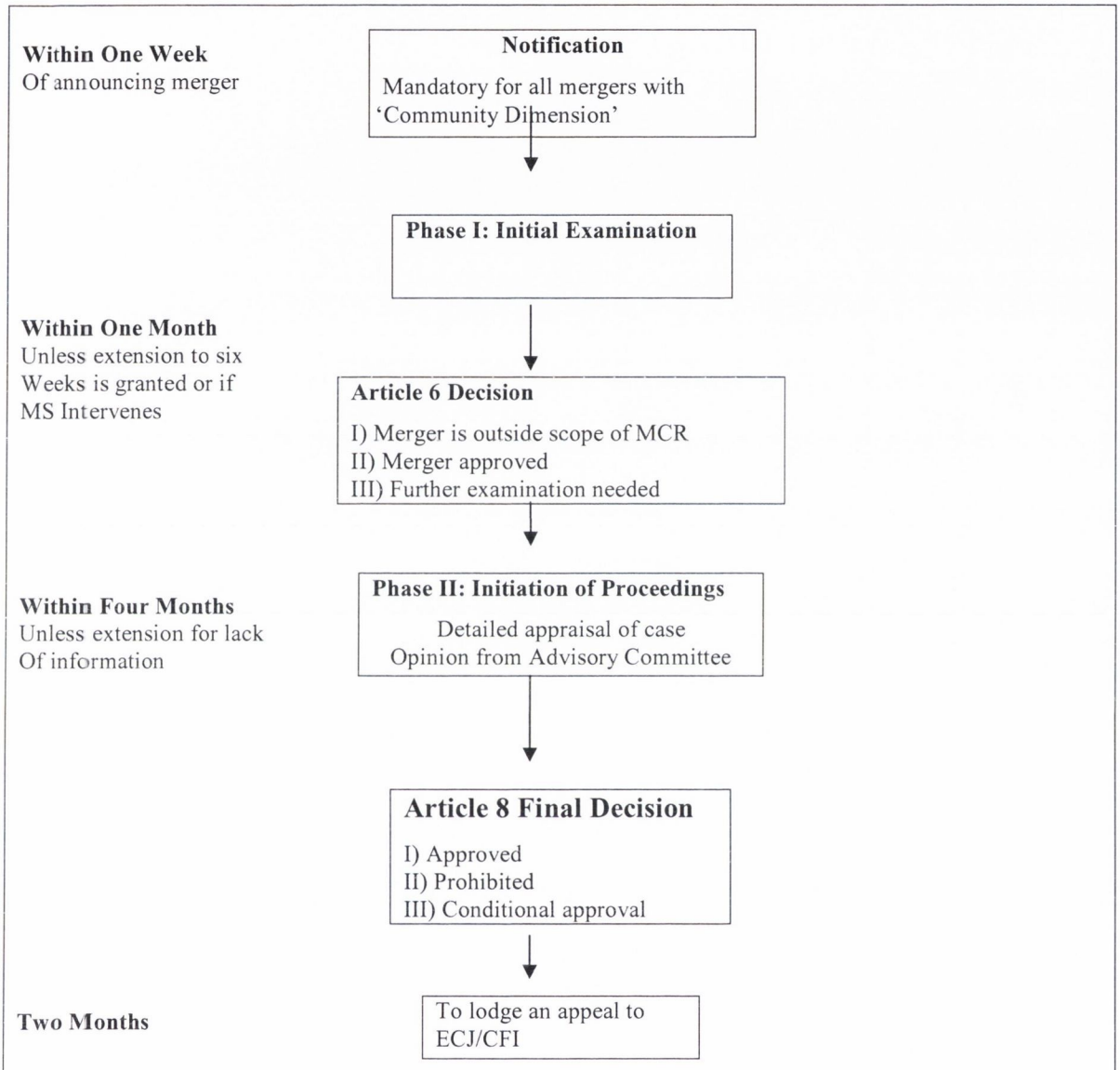


Table 5.1 - Portfolio Power Case Law

** Year reflects when decisions/judgments were handed down – not the notification year.*

YEAR	*CASE*	*INSTITUTION*	*DECISION TYPE*
1991	Aerospatiale/Alenenia/DeHavilland	Commission	Prohibited Art. 8 (3)
1997	Coca Cola Enterprises/ Amalgamated Beverages Great Britain	Commission	Passed Art. 8(2)
1997	Coca Cola Company/Carslberg	Commission	Passed with commitments Art. 8(2)
1997	Guinness/Grand Metropolitan	Commission	Passed with commitments Art. 8(2)
2001	GE/Honeywell	Commission	Prohibited Art. 8(3)
2005	*GE v Commission*	*CFI*	*Pending*
2001	Schneider Electric/Legrand	Commission	Prohibited Art. 8(3)
2002	Schneider v Commission	CFI	Overturned Commission Decision
2001	Terta Laval/Sidel	Commission	Prohibited Art. 8(3)
2002	Tetra v Commission	CFI	Overturned Commission Decision
2005	Commission v Tetra Laval	ECJ	Dismissed (Backed CFI's original judgment)

Figure 3.1 – MCR Procedure Flow-Chart



Note: Procedures specified in Regulation 4064/1989 (EEC). Criteria for 'Community-Dimension' based on aggregate turnover world-wide (5bn. Euro and above) and in the Community (250m.Euro), unless two-thirds of latter in only one Member State.

Figure 4.1. European Merger Policy Phases

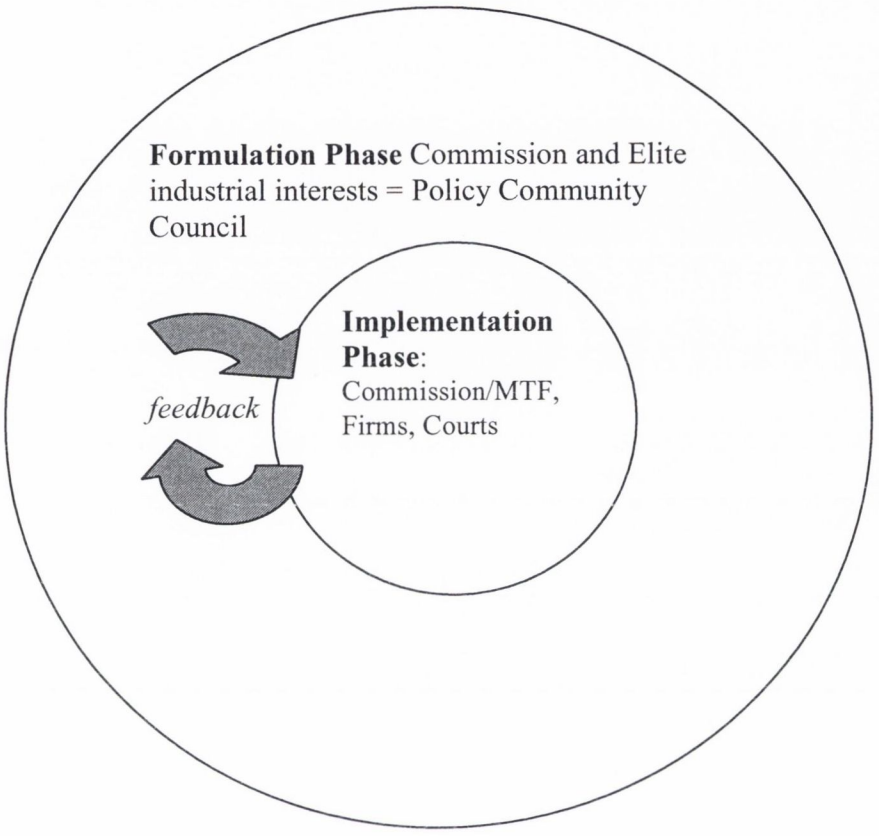


Figure 4.2: *The Creation of the Collective Dominance Trend*

Nestlé/Perrier (1992) + *Gencor/Lonrho* (1996) + *France v. Commission* ECJ (1998) + *Gencor v .Commission* CFI (1999) → Establishment and Solidification of Collective Dominance Policy