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**Doctoral Thesis**

## Rethinking the history of European level merger control: A critical political economy perspective

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**Rethinking the history of European level merger  
control.  
A critical political economy perspective**

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Hubert Buch-Hansen,  
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# 1. Introduction

Two seemingly irreconcilable, yet related forces are at play in the contemporary global economy. On one hand, many international markets are characterised by strong competition between companies. According to the prevailing wisdom, this state of affairs should not be lamented. As neoclassical economists never get tired of pointing out, free competition is a mechanism that brings about all sorts of positive things in capitalist societies, in that it ‘provides everyone with the widest opportunities for business and produces the best sectoral and spatial allocation of resources’ (Jovanovic, 2005: 269). This is also a view endorsed by most members of the economic and political elites, not least in the European Union (EU). For instance, the former President of the European Commission (henceforth the Commission), Romano Prodi, mentioned competition in the same sentence as values such as democracy and human rights when he outlined his vision for the EU in a speech delivered to the European Parliament in 2001:

‘Our ultimate goal is to consolidate a European Union that can guarantee our citizens’ prosperity and peaceful co-existence on the basis of democracy, *competition*, solidarity and unconditional respect for human rights’ (Prodi, 2001, emphasis added)

The current President of the Commission has also made it clear that he strongly believes in the benefits of competition (Barroso, 2005) as has on numerous occasions, the Competition Commissioner Neelie Kroes, for instance suggesting that ‘[i]t is not through protectionism, but through competition that firms innovate, strive to get the best from their people, make the most effective use of their resources, push up quality and push down prices.’ (Kroes, 2005)

On the other hand, one can also witness how an increasing number of mergers and acquisitions (M&As) between large transnational corporations are resulting in a massive concentration of economic power. All previous records were broken in 2006 when the value of M&As on a global scale reached \$3.79 trillion, which was an increase of 38 percent compared to 2005. In December 2007, the financial press could report that even this record had now been surpassed. Despite a significant fall in the number of M&As in the second half of the year, the total value of such deals in 2007 was an astonishing \$4.74 trillion (*Financial Times*, 2007g). M&As are a response to competition: through greater size it is hoped that the company can undercut its competitors and hereby increase its profit margin (Bowles *et al.*, 2005: 276). But at the same time, M&As reduce the

number of competitors in a given market. As such they might ultimately threaten to weaken competition if they generate a market structure characterised by oligopoly, or undermine competition altogether if one company obtains monopoly status.

If competition is a force which is widely considered to have many positive effects it is thus not something that can be taken for granted to exist. Laws designed to protect/generate it to varying extents have therefore appeared in most parts of the world. In Europe such competition policies mainly emerged after the Second World War, not only at the national level but also at the supranational level with the establishment of the European Coal and Steel Community (ECSC) in 1951 and the European Economic Community (EC) in 1957. Gradually, a competition policy ethos has developed in which the Commission, or rather its Directorate-General for Competition (henceforth; the Competition DG), has far-reaching powers to regulate cartels, market dominance, state aid and mergers. It is undeniable that competition policy is at the core of economic governance in the EU and has been so for quite awhile. The relatively limited ability of member states to interfere in the day-to-day activities of the Commission in this policy area has led some commentators to suggest that competition policy is the ‘first supranational policy in the European Union’ (McGowan & Wilks, 1995).

### **1.1. The purpose of the thesis**

The focus of this thesis is one “component” of EC competition regulation, namely that of *merger control*. Today merger control arguably constitutes ‘the cornerstone of EU competition policy’ (McGowan & Wilks, 1995: 152) but this has not always been the case. Indeed, one can identify four phases in the history of European level merger control: the 1950s, where merger rules were included in the 1951 *Treaty Establishing the European Coal and Steel Community* (henceforth the ECSC Treaty) but not in 1957 *Treaty Establishing the European Economic Community* (henceforth the EC Treaty)<sup>1</sup>; the 1960s and 1970s where attempts to provide the Commission with powers to regulate mergers were made but by and large failed; the 1980s where the member states, after 16 years of negotiations, reached agreement on the Merger Control Regulation (MCR) in 1989; and the 1990s onwards where the Commission began regulating large mergers under the MCR, which was revised in 2003-2004 as part of a wider reform of EC competition law. The *overall purpose* of this thesis is to shed light on the overall history of European level merger control. It thus seeks to

answer the following research question: *what were the main causes of the major developments in the European level merger control area?* This is to be achieved by answering a series of sub-questions, each identifying one or more major developments (or “dependent variables”) to be explained:

1. Why were merger rules not included in the EC Treaty when such provisions were contained in the ECSC Treaty?
2. Why did the Commission’s proposals for a MCR fail to gain support from the member states in the 1970s and most of the 1980s?
3. Why was it eventually possible to adopt a MCR and why was designed the way it was?
4. How has the MCR been implemented by the Commission and how can the revision of it in 2003 be explained?

To answer these questions, the history of European level merger control will be analysed from a critical political economy perspective. Later on it will be explicated in greater details what this perspective entails, but it should be emphasised here that this perspective differs significantly from those normally applied in studies of this policy area. For one thing, even a cursory glance on the literature dealing with competition regulation (in the EU and elsewhere) will reveal that it is massively dominated by contributions from economic and legal perspectives. Although such contributions can certainly be valuable and offer interesting insights, it cannot be denied that the bulk of them focus purely on economic or legal themes, hereby ending up providing a somewhat narrow and self-contained perspective on competition regulation<sup>2</sup>. There might be various reasons why economists and lawyers continue to dominate the literature, but surely one of the more important ones is that those who approach the topic from other academic disciplines are likely to be perplexed by the dry language and overly technical terminology used not only in the bulk of this abundant literature but also by the Commission. The representatives of the Commission are only happy to confirm the impression that its competition policies concern economic and legal technicalities, rather than bigger political questions. This could, for instance, be witnessed in the wake of the controversial 2004 Microsoft case, in which the Commission among other things imposed a fine of 497 million Euros on the company because it was held to abuse its dominant market position. Here Competition Commissioner, Mario Monti made it clear that EC competition policy ‘is a matter of law and economics, not politics’ (quoted in Levy, 2005: 131).

The critical political economy perspective advocated in this thesis is based on three basic, and to some extent related, premises. First, competition policy, in the EU and elsewhere, is precisely as political as all other forms of regulation. That is, it results from political struggles and serves to benefit certain groups in society more than others. Second, it is only possible to make sense of social phenomena, competition regulation included, if they are situated and seen in the context of the whole of which it they part. This means that developments in the competition/merger regulation area should be analysed not only in the light of concrete micro-processes such as negotiations and the day-to-day implementation of competition rules, but also in the context of broader, and by no means static, phenomena such as capitalism, competition, class, regulation and the wider ideologies/discourses that prevail at a given juncture. Third, and related to this, reductionist explanations cannot be accepted as valid. In the social world there is never ‘a cause without cause’ (Jessop, 2002a: 23), and indeed only accounts of social phenomena that assign explanatory power to structures, ideas *and* agents can be satisfactory.

By basing the perspective adopted in this thesis on these premises, the examination of developments in the merger area differ not only from the analyses found in the legal and economic literatures, but also from the way competition regulation (and thus merger control) has so far been analysed in the relatively few political science analyses that deal with this topic. Most of these have emerged from the mid-1990s onwards and have certainly done much to illuminate various aspects of EC competition policy, providing fascinating insights into the regulatory and institutional dimensions of this area (see e.g. Bulmer 1994, Cini & McGowan, 1998; Wilks, 2005b). But it is not unfair to suggest that the various theoretical perspectives they have put to work in the competition field are generally not based on the above-mentioned premises. Probably as a result of this, most political science contributions have emphasised the political nature of competition policy insufficiently; they have generally failed to place the evolution of competition policy in a broader context, concentrating instead on competition policy and institutional issues alone; and in most cases they have not assigned importance to both agency, structures and ideas<sup>3</sup>. Hence, although quite a few of the analyses in this thesis draw on the findings of some of these political science contributions, the overall form and content of the former differ quite a bit from that of the latter.

## 1.2. Outline of the thesis

In addition to this introductory chapter the thesis contains seven chapters. In **Chapter 2** the philosophical foundations of mainstream EU studies (EUS) and of the theoretical and empirical work in the chapters that follow are explicated. It is argued that the two prevailing paradigms in mainstream EUS, namely rationalism and constructivism, are based on philosophies that prevent them from conducting anti-reductionist research on European integration. Against this background, a version of the philosophy of science known as “critical realism” is introduced as the philosophy underpinning the thesis’ critical political economy perspective and the analyses of the developments in the merger control area.

In **Chapter 3** a critical political economy perspective designed to help us to shed light on the history of European level merger control, is outlined. This theory is, as just mentioned, grounded in critical realist philosophy and has been developed through dialogues with various empirical data and theoretical literatures. In this chapter, concepts such as capitalism, competition, class fractions, capital actors, regulation, ideas of regulation, states, supranational institutions and programming are theorised before it is described how the theoretical perspective will be applied in the following chapters.

In **Chapter 4** the introduction of European level competition regulation in the period stretching from the early post-war years to the early 1960s, is explored. In particular, this chapter seeks to explain three “phenomena”, namely the merger rules of the ECSC Treaty, the missing merger provisions in the EC Treaty, and the adoption of the so-called Regulation 17 through which the EC Treaty’s competition rules were fleshed out. Hereby it seeks to answer the first sub-question posed in section 1.1 above. The chapter focuses both on concrete negotiations and the role played by capital actors *and* on the broader context, not least the post-war world order of embedded liberalism, the adoption of competition rules in Germany’s emerging “social market economy” and France’s state-led form of capitalism, and the economic situation in these two countries.

In **Chapter 5** the evolution of EC competition regulation in the 1960s and 1970s is investigated, focussing in particular on the failure of the member states to reach agreement on the merger regulation rules that were proposed by the Commission in the early 1970s. Its purpose is thus to

provide part of the answer to the second sub-question posed in the previous section. The failure to reach agreement is seen in the (to some extent intertwined) contexts of embedded liberalism and the “American Challenge”, the wider European integration process in the 1960s and 1970s *and* economic and regulatory developments in the France, Germany and the UK. At a more concrete yet related level, the failure is seen as the result of the relative weight of the constellations of agents subscribing to particular ideas in the negotiations over the concrete proposal.

In **Chapter 6** the broader developments in EC competition regulation in the 1980s are examined, with the adoption of the MCR in 1989 being the main phenomenon to be explained. Hereby the chapter should allow us to answer the second and third sub-questions. First the broader contexts in which the negotiations over the MCR took place are mapped, focussing in particular on the crisis of embedded liberalism and the neoliberal turn, the neoliberalisation of national competition regulation in the UK, France and Germany *and* the re-launch of European integration. The revitalisation of EC competition policy and the renewed negotiations over a merger control regulation is analysed against this background, while the importance played by business actors, the European Court of Justice (henceforth: the Court) and pro-active Competition Commissioners is also taken into account. The chapter ends with an analysis of the form and content of the MCR, arguing that it reflected some remarkable shifts in the positions of the various agents involved directly or indirectly in the negotiations.

In **Chapter 7** the focus is on EC competition regulation in the period from 1990 to 2007. Its main purpose is to answer the fourth sub-question and it thus seeks to explain EC merger regulation in the 1990s onwards and especially the processes resulting in a revised MCR that came into force in 2004. These phenomena are seen against the broader context of neoliberal hegemony and the transnationalisation of capitalism, the neoliberalisation and reform of the various components making up EC competition policy, some developments in the wider European integration process and the “Europeanisation” of national merger control. In a postscript to the chapter the challenges to the neoliberal type of competition regulation are considered.

**Chapter 8** is the concluding chapter. It summarises the substantive argument advanced in Chapters 4 to 7 and then moves on to consider some theoretical alternatives to the critical political economy perspective on supranational regulation presented in Chapter 3. Moreover it is discussed how this

perspective could be further developed and finally the alternative agenda for the study of EC competition policy of which this thesis forms part is outlined.

### **1.3. Sources**

The questions regarding how the critical political economy perspective on supranational regulation has been constructed and how it will be applied in the analyses of the broader developments in the merger area will be dealt with in Chapter 2 and 3. There is thus no need to go into a discussion of this here. Instead this section will provide an account of the various sources upon which the analyses in Chapters 4 to 7 draw and reflect briefly on how they are used. First of all, it can be noted that the analyses rely on a wide range of both primary and secondary sources. Although both type of sources are used in all the chapters in question, the chapters dealing with the early period from the 1950s up to the end of the 1970s (Chapters 4 and 5) draw less on primary sources than do the analyses of the period stretching from the 1980s onwards (Chapters 5 and 6). The main reason for this is simply that it has been much easier to locate primary sources that were of relevance to the analyses of the more recent period. This said, an important part of the data collection process consisted in visiting the archives of Westminster (London), the Commission (Brussels) and the European Trade Union Confederation (Amsterdam). Documents found in these archives are used in the analyses in especially Chapter 5.

One of the most important primary sources used in the analyses is different documents issued by the different EC institutions. These include transcripts of debates taking place in the European Parliament, the official opinions of the Parliament and the European Economic and Social Committee and in particular a number of reports and proposals made by the European Commission. These transcripts, opinions, proposals and reports are used to map the views of the EC institutions (or rather the agents located within them) and their activities in the merger field. To illuminate the views of various other agents who have played a role in the merger/competition area, the analyses also rests on position papers, memoranda and reports from business groups (such as the European Roundtable of Industrialists), non-business groups (such as the European Trade Union Confederation), national competition authorities (such as Germany's *Bundeskartellamt*) and governments. This type of source is taken for what it is, namely documents that can help us to understand the worldviews of particular agents with particular perceived interests.



In addition to this, many analyses draw on various sources of law, including the ECSC and EC/EU Treaties, Regulation 17/62, the MCR (Regulation 4064/89 and, after the revision, 139/2004), rulings made by the Court and decisions made by the Commission in the competition field (for an overview, see the section on “legal sources” at the end of the list of references). The credibility of the latter can hardly be questioned but of course, particular interpretations of them can.

With a view to illuminate the broader economic context in which European merger regulation has evolved, some of the analyses also draw on quantitative data. Such data stems, for instance, from the Commission’s annual reports on competition policy, the Competition DG’s webpage and national competition authorities – and have in some cases also been reproduced from the secondary literature. In particular, such data are used to establish tendencies in the number, scope and magnitude of mergers. “Tendencies” is the key word here: it has to be recognised that the documentation of developments in the merger area was rather imperfect, especially at the EC level prior to the adoption of the 1989 MCR, as companies obviously did not have to inform the Commission about their M&A activities. Data collected by national competition authorities in the 1960s and 1970s should also not be seen as precise reflections of economic reality and, as the criteria on the basis on which they have been collected are, to say the least, unclear, no attempt to make direct comparisons of M&A activity in the different countries in this period, are made. As already mentioned, however, it is maintained that such data can be used to say something about tendencies in, for instance, the number and scope of mergers (were they primarily intra- or international?). The analyses also draws on data, taken primarily from secondary sources that can be used to illuminate the general economic situation at various junctures – data on for instance GDP growth, inflation and unemployment rates.

According to Moravcsik (1998a: 82), ‘[t]he reliability of a source is a function of the extent to which the activity it documents is one in which it is costly to manipulate or misstate the truth’. Consequently, he recommends against basing research on a source like newspaper articles and news magazine reports as journalists do not really give their readers a chance to evaluate the reliability of their sources and may be at least as interested in telling an interesting story as in providing an accurate picture of reality. Although I agree that it is problematic if research is based on such sources to a very large extent, I see no problem in using them as supplement to other sources. As such, the reader will occasionally find references to/quotes from articles and reports in newspapers

such as the *Financial Times*, *The Times* and the *Wall Street Journal* as well as from a magazine like *The Economist*. Moreover, the analyses does also to some extent draw on news bulletins, *Agence Europe* and *Europe Daily Bulletin* which are valuable sources when trying to get factual information about various events in the EC/EU institutions. It should be noted that such sources do not provide the decisive information with which the thesis' analyses stand or fall. But even journalists can provide interesting perspectives on concrete developments which it is worth referring to and their articles/reports can contain valuable supplementary information and eloquent quotes by politicians and others. In one case, namely in some analyses of the most recent developments (see section 7.9), information from newspapers is used as the main source simply due to the lack of other sources.

The final type of primary data used in the empirical analyses is information gathered through interviews conducted by the author. In order to strengthen the analyses in Chapters 6 and 7 I have interviewed a couple of persons who played key roles in, and/or have key insights into, the merger control area. More precisely I have interviewed three diplomats who were directly involved in the negotiations leading up to the revision of the MCR; a senior official of the Commission's Competition DG who was also involved in these processes; a representative of the Union of Industrial and Employers' Confederations of Europe (UNICE) with in-depth knowledge of the competition policy area; Etienne Davignon, the former Vice President of the Commission and Commissioner responsible for industrial affairs; Peter Sutherland who was Competition Commissioner from 1985-1989 and later a key member of the European Roundtable of Industrialists; Leon Brittan who was Competition Commissioner from 1989 to 1993; and Jonathan Faull who was an important member of Brittan's cabinet and directly involved in the processes leading up to the adoption of the MCR in 1989.

More information about the various interviews appears in endnotes to Chapters 6 and 7 although the location and exact date of the interview is not mentioned in those cases where the interviewees wished to remain anonymous. All interviews were "semi-structured": on one hand, I had prepared a number of questions designed to confirm or disconfirm the knowledge I already had and to bring about new information but on the other hand the interviewees were given plenty of opportunities to tell their own story. With one exception, all interviews were recorded and in cases where they were conducted in languages other than English, quotes have been translated by the author<sup>4</sup>. By selecting interviewees of very high quality (measured by their knowledge of and/or impact on the evolution

of EC merger regulation) I hope and think that the information they have contributed with does strengthen the analyses significantly. This said, their “stories” do not constitute the definitive truth and may be coloured not only by their position but perhaps also in some situations by the reputation they would like to leave behind. Ideally speaking I would have liked to conduct a few more interviews. In particular I would have liked to talk with the Competition Commissioners succeeding Sutherland and Brittan, but unfortunately my efforts to make an appointment with them failed.

As already mentioned, these various primary sources are to no small extent supplemented with secondary sources – that is, with various research publications. Indeed, with a view to present nuanced and robust analyses, I have taken care to base them on as rich and diverse a literature as possible. So for instance, the analyses rest on work by both political scientists, (international) political economists, legal scholars, historians and economists – and in doing this they draw on both “mainstream” and “critical” scholarship. To recapitulate, then, the thesis draws on a wide range of empirical sources which should enable me to carry out reliable analyses and thereby also allow me to reach valid conclusions.

#### **1.4. Intended contributions**

With this thesis I intend to make a three-fold contribution to the existing literature. First, at the meta-theoretical level, the thesis seeks to move beyond the debate between rationalists and constructivists and launch (a version of) critical realism as a fruitful alternative to the philosophies underpinning these prevailing paradigms in EUS. This contribution consists not only in showing the merits of critical realism at the philosophical level but, crucially, also in actually making use of critical realist insights at the levels of theory and empirical research.

At the theoretical level the thesis aims at introducing a critical political economy perspective on regulation that can be used to link merger control, but probably also other areas of regulation, to the broader whole of which it forms part. This perspective does in particular draw inspiration from neo-gramscian perspectives in EUS and International Political Economy (IPE) as well as from the works of Bob Jessop, but it does also seek to “transcend” these sources of inspiration in some important respects. It is hoped that this perspective will be a useful addition to the critical tradition in EUS

(and perhaps IPE) – but also that it will not be considered altogether unconvincing/useless by those analysing competition policy by means of more conventional approaches.

Last but not least the thesis aims to present new knowledge about EC competition policy, which, despite its importance, ‘is one of the least understood of all the European Union’s policies’ (Cini & McGowan, 1998: 1). The thesis seeks to remedy a significant gap in the existing literature by providing a longitudinal, yet up-to-date, analysis of the broader evolution of the EC merger control area. In particular, the thesis provides the, to my knowledge, first study of the processes leading up to the revision of the MCR in 2003. But it also supplements existing studies of less recent developments, such as the negotiations over the MCR in the 1980s, with additional knowledge (obtained, for instance, through interviews). Moreover, the different perspective from which competition policy is analysed in this thesis means that aspects that are often downplayed or not dealt with in other studies are brought into light, a prime example being the role played by transnational business groups.

## **2. Beyond rationalism and constructivism: the critical realist alternative**

This chapter focuses on the philosophical<sup>5</sup> foundations of mainstream EU studies and of the theoretical and empirical work in the chapters that follow. It is divided into five main sections and a conclusion. The first part introduces the philosophical terminology and outlines on what grounds philosophical positions can/should be criticised. In the next two sections the philosophical foundations of the two prevailing paradigms in mainstream EUS, namely rationalism and constructivism, are then critically discussed<sup>6</sup>. Here it is argued that the philosophies in question are rather problematic and that this has some serious consequences at the levels of theory and empirical analysis. Against this background the fourth section outlines some key features of the philosophy of science which is known as critical realism. It is argued that critical realism constitutes a promising (if, by and large, overlooked) alternative to the philosophies prevailing in EUS – and this is thus the philosophy underpinning the theoretical and empirical chapters that follow. In the fifth section it is explicated how critical realism is operationalised in the present thesis.

### **2.1. Philosophy of science**

Before we enter the terrain of philosophy of science in the sections to follow, it seems appropriate to clarify a few things. First of all it is perhaps necessary to explicate why it is important to deal with philosophy of science issues. It would certainly appear that many students and researchers do not let philosophy of science questions distract them too much if at all. After all, why not just develop and test theory against empirical data and then leave the difficult philosophical issues to the people in the philosophy department? The answer to this question is that there is no way to escape philosophy of science, as all scientific approaches in one way or another implies a philosophical position. This means that even those of us who are actually more interested in doing genuine social research than in engaging in abstract philosophical sophistry *do* have a very good reason to take philosophy of science seriously. Only through the philosophy of science is it possible to explicate, analyse and discuss all the implicit but basic understandings framing our social scientific practice. If

we choose not to do this, as many researchers and students do when they are too busy moving on, we will not be able to relate to these basic understandings in a conscious and active manner (Buch-Hansen & Nielsen, 2005: 11)<sup>7</sup>.

The second thing to clarify is what “philosophy of science” means. In the present context I use “philosophy of science” as a concept that covers ontological and epistemological issues. **Ontology** means “theory of being” and concerns what exists in the world and how. Following e.g. Outhwaite (1987) we may distinguish between *philosophical* and *social ontology*<sup>8</sup>, where the former deals with abstract philosophical questions such as whether a reality exists independently of our knowledge of it (the realism vs. idealism question), and the latter concerns questions related to the nature of the social world, for instance regarding the relationship between agents and structures. We can say that a social ontology ‘is an abstract model – or articulation – of social being’ (Patomäki, 2002: 77). **Epistemology** means the “theory of knowledge” and concerns what we can know about the world and how. Here we may distinguish between what could be called *general epistemology*, which concerns general questions regarding knowledge and *social epistemology*, which concerns the conditions of knowledge production in the social domain – and which would thus, for instance concern the nature and purpose of social science.

This brings us neatly to the final point, which is to clarify how epistemology and ontology are related to each other and to other important concepts. According to Bhaskar (1975: 36-38, 1989: 13), philosophers of science have traditionally privileged epistemology over ontology. That is, they have been more concerned with the conditions for the production of knowledge, than with being. Indeed, there has been a tendency among philosophers associated with empiricism and positivism to ignore ontology or to regard it as altogether unscientific to deal with such “metaphysical” issues. One of the merits of Bhaskar’s work is that it breaks fundamentally with this tendency and argues that ontology should be given primacy over epistemology, as the latter presupposes the former. Take for instance positivism. Here it is argued that the purpose of science is to discover laws and regularities. This epistemology, however, presupposes a worldview according to which the world is actually to a large extent characterised by such regularities. In other words, it presupposes a particular ontology. If we relate this to the various types of ontology and epistemology mentioned above, we can say that general epistemology presupposes a philosophical ontology, whereas a social epistemology always presupposes a social ontology. It is important to emphasise that this does *not* mean that social scientists and philosophers in practice always start from ontology and

then choose a “corresponding” epistemology. On the contrary, the problem (!) is that they often start from a particular (epistemological) conception of what social science should be like, and then make the (often implicit) social ontology “fit” that conception.

As already mentioned above, the position one takes (consciously or not) at the abstract level(s) of ontology and epistemology has consequences for one’s scientific practice. This, I would argue, can be seen if we now move on to look at **theory**. Obviously the construction and application of theories is an important part of the social scientific enterprise. So what impact does epistemology and ontology have on social scientific theory? My tentative suggestion would be that *social ontology regulates a theory’s content whereas social epistemology regulates its form*. If, for instance, one subscribes to a social ontology according to which social structures are much more important than agents, this will be reflected at the theoretical level (where particular important structures are identified). In this sense social ontology “regulates” the content of the theory, which is also to say that it does not determine its content. At the level of ontology it can, for instance, be argued that the social world contains structures, but meta-theories ‘cannot tell us *what* structures the world contains or how they differ. These are entirely matters for substantive scientific investigation’ (Bhaskar, 1979: 7).

Likewise, the social epistemology to which one subscribes will have consequences for the form of the theory. Indeed, there will be huge differences in the way, say, positivists, critical realists and hermeneuticists understand the purpose of theory and thus on the form they give their theories. If, for instance, one considers the purpose of social science to be the identification of regularities through the testing of hypotheses (as many positivists do), then obviously it will be a clear priority to construct clear and parsimonious theories from which it is possible to derive testable hypotheses. This will typically not be a priority for a hermeneuticist, for whom the purpose of social science is to understand the meanings social agents attach to their actions (to simplify slightly). Because of such differences at the level of philosophy of science, it would make no sense to suggest a general definition of what (the purpose of) social scientific theory is, but it is perfect sense to define it in relation to particular philosophy of science positions.

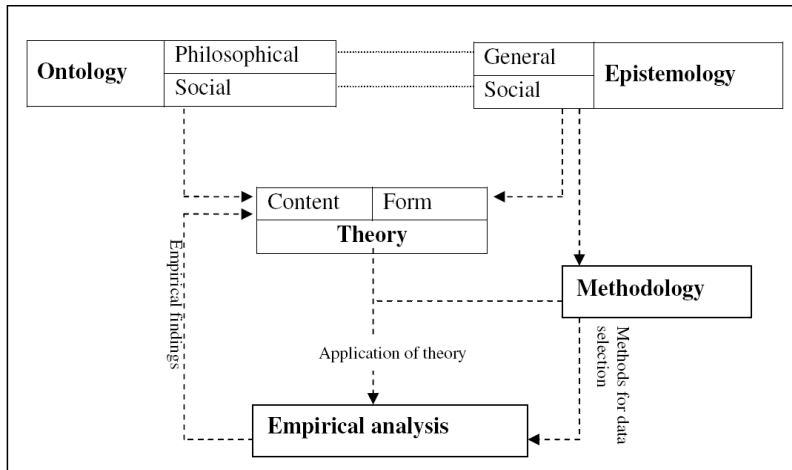
This brings us to **methodology**, which ‘relates to the choice of analytical strategy and research design which underpins substantive research’ (Hay, 2002: 63). More specifically I would suggest that methodology concerns two main issues: the choice of appropriate methods for the selection

(and perhaps collection) of empirical data and the question about how theory should be applied to the analysis of these data. In doing this, methodology is influenced, but not determined, by the chosen epistemological position (and thereby also indirectly also by the ontological position). So, to give an example, a positivist will often (but of course, not always) prefer to link theory and empirical data through the testing of hypothesis, and select data that can be quantified (as this enables him or her to make generalisations). Finally it should be mentioned that the empirical findings that result from the **empirical analysis** may (or may not) make it necessary for the researcher to modify or discard the theory. But it will *not* (at least not in the short term) lead to modification or discarding of the philosophy of science, as this has not been (and cannot be) put to empirical test.

In Figure 2.1 an attempt has been made to schematically illustrate the way the various concepts introduced in this section are related. I am fully aware (and so should the reader be) that many social scientists and philosophers, critical realists included, define and relate the concepts in all sorts of other (possible and impossible) manners. It is precisely because of this confusing state of affairs that I have chosen to devote a section to the clarification of the way I think the terminology ought to be used. One should also be aware that things are often much more complicated than the way they are represented in the figure, but it will suffice for the purpose it is to serve in the present context. The main point that has been made here is that *philosophy of science matters* and that it actually matters a great deal. As social researchers we cannot choose whether or not to base our scientific practice on philosophy. It is *by definition* based on philosophy and consequently, as Collier (1994: 16) puts it, ‘the alternative to philosophy is not *no* philosophy, but *bad* philosophy’. If we want to do proper social science we should thus do our very best to ensure that our scientific practices are based on convincing philosophy of science. Of course, philosophical reflection in no way guarantees outstanding social scientific research, but ignorance of crucial philosophical questions is a good way to achieve the opposite result.



**Figure 2.1: philosophy and social science**



Source: based on own idea

If the importance of philosophy of science, and in particular of ontology, has been established the crucial question then becomes how to assess the validity of different ontological positions. As already indicated above, one of the defining characteristics of ontological questions is that they, unlike other types of questions, cannot be answered empirically: regardless of the quantity and quality of our empirical material, we will never be able to find definitive answers to ontological questions (Hay, 2002: 62). The reason is, among other things, that we do not have unrestricted access to the truth about the phenomena we study, that our social ontology influences our analyses and subsequent conclusions. This, of course, is the very reason why it is important to deal with ontological questions. However, if ontological questions cannot be settled in any “empirical courtroom”, and if not all ontologies are equally valid, then it is evident that we need another measure against which the plausibility of different ontological positions can be evaluated. This measure should *not* (at least not exclusively) be one’s own ontological position! For instance, it would probably be a waste of time to evaluate the ontological underpinnings of the rationalist and constructivist paradigms in EU studies against the standards of critical realism: rationalists and constructivists could simply refuse to acknowledge the validity of the premises on which the critique is based (this, to be sure, would probably also be the reaction of a critical realist who was being accused by a positivist for not living up to positivist standards). Another approach is therefore needed if we want to appraise the relative strength of different ontologies.

I am aware of two such approaches, both of which are plausible in my view. The *first* approach quite simply follows from Harré’s comment that ‘[i]n the end the choice of ontology is largely justified pragmatically – how much of the phenomena of interest does it enable us to comprehend in

a fruitful and constructive way' (1997: 178). In other words, we should base our scientific work on the ontology that enables us to get the most comprehensive perspective on the phenomenon we are analysing<sup>9</sup>. We could call this **the pragmatic approach**. The *second* approach is more complicated and is inspired by what philosophers sometimes call *immanent critique*. To put it briefly, the point here is to demonstrate that a paradigm (or a philosophy of science) is internally inconsistent or, if it is consistent, causes problems that it is unable to handle on its own premises (Bhaskar, 1979: 154). As Bhaskar puts it, 'philosophical arguments, like all good arguments, are arguments which involve discussion of your opponents', your antagonists', beliefs or values. In other words, you do not start from what you believe; you start from what you discussants believe. And if you believe that they are wrong or that their views need refining, then you have to show that in terms of their system of beliefs or values' (quoted in Buch-Hansen, 2005). The strength of this method, which will hereafter be called **the immanent approach**, is that theories or paradigms are criticised on the basis of premises that their protagonists defend. Potentially, this can make the critique highly invalidating.

In sections 2.2 and 2.3 below a tentative (and thus far from perfect, let alone complete) attempt to apply these two approaches in combination to a critique of the philosophies of science underlying the two prevailing paradigms in EU studies is made. The argument to be advanced is that social epistemologies and social ontologies regulate, respectively, the form and content of rationalist and constructivist theory in a problematic way (in relation to the pragmatic approach) as it prevents its proponents from studying parts of social reality in a comprehensive and fruitful way. It is furthermore demonstrated, that proponents of both paradigms acknowledge the importance of the aspects of social reality they tend to neglect in their scientific practice. This is, of course, interesting in relation to the immanent approach. This argument is made by looking into the important issues of the agency-structure relationship and the role of the ideational.

The former question concerns how to conceptualise the relationship between agency and structure in a way that acknowledges the importance of both. Agency denotes the ability of agents, whether individuals or groups, to act upon situations and it 'implies a sense of free will, choice or autonomy – that the actor could have behaved differently' (Hay, 2002: 94), whereas structure refers to the context within which agents operate. To conceptualise this relationship in a fruitful way is less straightforward than it might sound: indeed, it has been a focus of sociological attention since the origins of the social sciences in the eighteenth and nineteenth centuries (Carter, 2003: 149). But not only is it an old problem. More significantly, it is also an important problem, and according to some

scholars, *the* most important theoretical problem in the social sciences (cf. e.g. Archer, 1995: 65; Carlsnaes, 1992: 245; Lloyd, 1993: 43). This is due to the importance of agents and structures in the social world and to the fact that it is impossible to offer explanations of events in the social world without appealing to some understanding of the agency-structure relation. Indeed, ‘all scientific theories embody an at least an implicit solution to the “agency-structure problem”’ (Wendt, 1987: 337). The challenge is to break with the two ways of conceptualising the relation between agency and structure that have traditionally been dominant within social theory, namely structuralism and individualism. In their pure versions these positions either picture agents as marionettes (structuralism) or as omnipotent puppet-masters (individualism) instead of acknowledging that *both* agency *and* structure matter (McAnulla, 2002). Nowadays the vast majority of scholars *do* acknowledge this. However, it is not nearly enough to know that both agency and structure matter. The real challenge is to explain *how* they are related and, subsequently, to incorporate this explanation in substantial theories. In relation to what I referred to above as the “pragmatic approach” this means that a social ontology that acknowledges both agency and structure and accounts for their relation should be preferred to an ontology that fails to do this.

The other question concerns how to acknowledge the importance of both the ideational aspects of social reality (e.g. ideas, discourses, values and norms) and its non-ideational (or “material”) aspects (see also Porpora, 1993: 215). There is a long tradition for reducing the ideational to a by-product of the material (materialism) or vice versa (idealism) in explanations of social phenomena. Today, however, it is widely agreed that social phenomena should be explained with reference to *both* material *and* ideational factors. Indeed, as Georg Sørensen (1998: 91) notes, ‘One would be hard pressed to find examples of theorists who would argue that the social world is purely materialist or purely idealist’. In what follows we will thus investigate whether rationalists and constructivists take into account both the material and the ideational in a reasonably balanced manner or if their positions actually end up being either materialist or idealist. In relation to the “pragmatic approach” this means that a social ontology that acknowledges both the material and the ideational, and which takes into account the importance of both in relation to preference formation, is to be preferred to an ontology that fails to do this.

In the following two sections, where the philosophical foundations of the rationalist and constructivist paradigms in EU studies are discussed, it is necessary to paint with a broad brush. This means that although I have done my utmost to present the two paradigms in a fair and balanced

manner, it is not possible to do full justice to, let alone cover, all the different theories and perspectives that form part of the paradigms. Having said this, the arguments advanced here do in my opinion apply to the vast majority of rationalist and constructivist studies.

## **2.2. The rationalist paradigm in EU studies**

According to Pollack (2001: 233), theories such as neorealism (e.g. Grieco, 1996), rational choice institutionalism (e.g. Garrett, 1992, Garrett & Tsebelis, 1996) and liberal intergovernmentalism (e.g. Moravcsik 1993, 1998a) are ‘all part of an emerging rationalist research programme which is rapidly establishing itself as the dominating paradigm in European integration theory, at least in the United States’ (see e.g. Pollack, 2006 for a good overview of this paradigm). This paradigm can be seen as part of the wider rationalist paradigm in International Relations (IR), a paradigm that was facilitated by the gradual and partial fusion of the (neo)liberal and the (neo)realist traditions that took place in the 1980s and 1990s<sup>10</sup>. Like the broader rationalist paradigm in the social sciences, the rationalist paradigm in EUS is grounded in a neo-positivist social epistemology<sup>11</sup> according to which the main purpose of social science is to identify patterns of regularity in the social world in order, if possible, to ultimately facilitate the predictions of events (Neuman, 2003: 71; Stoker & Marsh, 2002: 6). In accordance with this conception of social science, rationalist theories will often take the *form* of sets of statements about causal relations in the social world and, as a result, theories often appear as simplified models of the much more complex reality that they aim to explain. From such theories, falsifiable hypotheses are derived and, subsequently, empirically tested. The ideal is that such tests function as the basis for further refinement of the theories - if the latter are not discarded because their explanations and predictions turn out to be wrong.

This social epistemology requires a particular social ontology according to which social reality is characterised by a high degree of regularity. At the same time, however, rational choice theory (RCT) is claimed to be based on “methodological individualism”, the view that ‘[t]he elementary unit of social life is the individual human action’ (Elster, 1989: 13). If this view is to fit the social epistemology described above, then it necessitates a particular conception of agents. RCT is, thus, based on the assumptions that agents behave rationally, meaning that they act in a utility maximising way in order to realise their ordered preferences<sup>12</sup>; and that they are very well informed about the context in which they operate and the effects of their actions. The result is identical agents

who can be expected to act in precisely the same way when confronted with identical situations and, thus, agents who do not disturb the orderliness of the social reality envisaged by RCT. Although rationalists do, at times, stress that the rational agent is a simplification of reality and that the concept should be understood merely as a heuristic device (see e.g. Keohane, 1984: 70), a distinction between a “heuristic” and an “actual” agent is rarely made in practice. The assumptions translate into a *de facto* social ontology that influences the *content* of rationalist theory.

Among critics of the rational choice paradigm, including many constructivists in EUS is a widespread assumption that RCT entails a highly individualistic or even voluntaristic perspective on agency. For instance, Risse (2004: 161) writes that the ‘prevailing theories of European integration – whether neofunctionalism, liberal intergovernmentalism, or “multi-level governance” – are firmly committed to a rationalist ontology which is agency-centred by definition’. Along the same lines, Koelbe (1995: 235) writes that ‘[t]he problem for rational choice analysis is ... that it attempts to ignore social structure in its analysis of human action’, and the rational choice scholar Peter Nannestad (1991: 422) states that it would clearly ‘not be consistent with RCT to consider the strategies of actors to be structurally determined’ and thus ‘structural or institutional determinism is precluded as a valid type of explanation’ (my translation from Danish). Although it might be the case that some versions of RCT can be justifiably characterised in these ways, this does not apply to the rationalist theories in the field of EUS. Conversely, leading rationalist theories such as liberal intergovernmentalism, neorealism, rationalist institutionalism and some versions of neofunctionalism<sup>13</sup> are better described as structuralist perspectives.

The structural bias in RCT follows from the conception of agents described earlier. By substituting real agents with identical, well-informed utility maximisers, the preferences and “choices” of such agents become a question of the context in which they operate (Hindess, 1984: 270; Porpora, 2001). That is, because RCT substitute real agents with calculating robots without any individuality, and whose behaviour is therefore ‘oddly mechanical’ (Hollis, 1994: 248), we do not even have to look at the agent in order to know how s/he will act<sup>14</sup>. All we need to do is to look at their environment. Consequently, as one rational choice scholar explains, ‘the rational-choice approach is unconcerned with individuals or actors ... the prevailing institutions (the rules of the game) determine the behaviour of the actors’ (Tsebelis, 1990: 40). To be sure, this type of structuralism differs from other types of structuralism by its focus on agents and their “free” choices. But the point is that the “methodological individualism” of RCT does not imply a genuine notion of agency in that a free

choice is neither free nor, indeed, a real choice, if it is always already given by the context in which the agent operates (see also Hay, 2002: 103-104; Hay & Wincott, 1998).

The liberal intergovernmentalism (LI) of Andrew Moravcsik (1998a), which is the most developed rationalist theory of integration (see e.g. Friis, 1998; Pollack, 2005; Schimmelfennig, 2004), can serve to illustrate this point. LI is based on strong rationalist foundations and entails the view that agents are 'purposively directed toward the achievement of a set of consistently ordered goals or objectives' and choose between 'alternative courses of actions on the basis of a utility function' (Moravcsik, 1993: 481). Moreover they are assumed to make choices on the basis of nearly perfect (although not full) information about the consequences of their actions (Moravcsik, 1998a: 23). Indeed, as Moravcsik himself puts it, in 'a world in which the future consequences of actions are unknown ... LI would make little sense' (1995: 626).

Now, LI combines a liberal theory of preference formation with an intergovernmentalist theory of interstate bargaining in order to explain European integration. National preferences arise in the context of domestic politics, where they are formed on the basis of the preferences and actions of the most powerful societal groups. The government aggregates these preferences into a national position, and European integration is then seen as the outcome of choices made by national leaders who consistently pursue their national preferences in international bargaining (Moravcsik, 1998a: 18-85). It has often been suggested that LI is an agency-centred theory that fails to explain where the preferences of the societal groups come from (see e.g. Hix, 1994: 9; McSweeney, 1998: 101; Risse-Kappen, 1996: 56; Panke & Risse, 2007: 93-94). Yet Moravcsik does, in fact, very clearly explain that 'I employ a *structural* theory of those preferences. My structural approach...employs trade flows, competitiveness, inflation rates, and other data to predict what the economic preferences of societal actors – and therefore governments – should be' (Moravcsik, 1999: 377). Because economic preferences are derived from economic structures, 'shifts in preferences should follow the onset and precede the resolution of shifts or trends in economic circumstances' (Moravcsik 1998a: 50).

It is only because LI is based on the assumption that agents are rational and very well-informed about their context that changes in economic structures can be expected to translate directly into specific preferences. Only structures matter here, because '[p]references are by definition causally independent of the strategies of other actors' (Moravcsik, 1997: 519, see also 1998a: 24-25). This is

no different at the intergovernmental level, where it is not considered necessary to study the interaction between state representatives in order to explain the outcome of the interstate negotiations. The liberal intergovernmentalist couldn't care less about the creativity, charisma, persuasiveness, negotiating abilities and so on of particular agents. It is precisely because agents are assumed to be rational in the sense explained above that the outcome of bargains can supposedly be derived from the context in which the state representatives are situated.

The problem with this 'structural perspective', as Moravcsik (1998a: 501) bluntly calls it, is that changes in the economic structures are not theorised. In other words, the relationship between economic structures and agents is conceptualised in mono-causal terms: structures determine and explain the behaviour of agents, whereas shifts in the economic structures are not explained. European integration is hereby presented as an essentially structure-driven process, as the one and only choice for Europe. Moreover, the liberal intergovernmentalist concept of structure is under-theorised so that LI, somewhat paradoxically, ends up as an agent-centred theory devoid of agency *as well as being* a structural-determinist theory lacking a genuine concept of structure.

A further implication of the neo-positivist aspirations to discern patterns of regularities is that rationalists have to downplay the importance of the ideational aspects of reality. This is not to say that rationalists are unaware of the importance of ideas. Indeed, one of the interesting developments in IR and EUS in the 1990s was that prominent rationalists made great efforts to incorporate ideas into their theories and models (cf. Goldstein & Keohane, 1993; Weingast, 1995). There were different reasons why ideas suddenly appeared on the rationalist agenda (see Borrás, 1999: 6-7), but the main reason probably was that the rationalists were unable to get rid of a number of anomalies within the limits of pure rational choice models. For instance, Garrett & Weingast's (1993) attempt to incorporate ideas in their rationalist analysis of the establishment of the Single Market was, among other things, motivated by the fact that conventional rationalist models proved unable to explain the choices of (rational) agents in situations with "multiple equilibria", that is, situations where more than one choice is rational. However, it quickly became apparent that the extent to which rationalists are capable or willing to take ideas seriously is rather limited. Most importantly, they maintain that ideas and preferences are separate variables and that the former has no impact on the formation of the latter (Laffey & Weldes, 1997: 207). Instead, ideas are ascribed a certain importance in relation to the realisation of preferences, as rationalists consider ideas to be "functional tools" that can be used by agents to achieve what they want (Blyth, 2002: 308-309;

Jacobsen 1995: 10). Accordingly, it is no great surprise when two prominent rationalists summarise the way they understand the importance of ideas in the following manner:

‘...the force of ideas is neither random nor independent. Only certain ideas have properties that may lead to their selection by political actors and to their institutionalization and perpetuation. It is not something intrinsic to ideas that gives them their power, but their utility in helping actors achieve their desired ends under prevailing constraints’ (Garrett & Weingast, 1993: 178)

Moravcsik has also, on more than one occasion, signalled that he takes ideas seriously. For instance he writes that

‘...collective ideas are like oxygen or language; it is essentially impossible for humans to function without them. They are ubiquitous and necessary tools to coordinate social life... In this sense, there is little point in espousing or rebutting the proposition that ‘ideas matter’, because it is trivial’ (Moravcsik, 2001b: 229)

As one might suspect, however, these remarks are not translated into actual theory. Moravcsik is in complete agreement with other rationalists on this issue and does not let ideas influence the formation of preferences. Indeed, ‘[i]n the LI account of integration, ideas are present but not causally central. They may be irrelevant or random, or, more likely, they are “transmission belts” for interests’ (Moravcsik, 2001b: 229). Moravcsik’s conclusion is thus unambiguous: ‘in the process of European integration, structural economic incentives have created economic ideas, not the reverse’ (1999: 378).

This highly restricted notion of ideas is not coincidental but follows logically from the social epistemology underpinning rationalist research. If rationalists were to concede that agents do not act mechanically in accordance with material incentives in their context but, rather, that a multitude of other (moral, religious, nationalistic, cultural etc.) ideas and motives inform their actions, then they would also be forced to concede that it is impossible to predict how agents will act in a given situation merely by looking at the context. This, in turn, would completely undermine the foundations upon which RCT rests.

In order to conclude this discussion of the rationalist paradigm in EU studies we will now briefly attempt evaluate the attractiveness of rationalist social ontology using the two approaches mentioned in section 2.1 (although it will obviously not be possible at this point to assess its



*relative* attractiveness). In relation to the *pragmatic approach* the rationalist social ontology quickly runs into trouble. In order to make the ontology fit a restrictive social epistemology the behaviour of (rational) agents is ultimately explained with reference to social structures and to make things worse the importance ascribed to ideational factors tends to become marginal. The verdict thus has to be that rationalist social ontology appears rather unattractive (in absolute terms) as it only allows its proponents a rather one-sided perspective on social reality. It is more difficult to assess the rationalist approach in relation to the *immanent approach*. But for instance one can note a remarkable inconsistency between, on one hand, the *significant* importance rationalists ascribe to ideas when not engaged in the construction of (rationalist) theory – as when Moravcsik (2001a: 185) states that '[s]urely few domains are more promising than the study of ideas in the process of European integration' – and, on the other hand, the *very modest* role ideas are then allowed to play in rationalist theories and explanations of social events. This contradiction is one example of the way rationalist philosophy places significant restrictions on rationalist theorising and thus on the empirical focus of rationalist analysis.

### **2.3. The constructivist paradigm in EU studies**

In order to understand the background for the emergence of a constructivist paradigm in EU studies it is necessary to briefly look at developments within the wider field of IR. As mentioned above, a rationalist paradigm emerged in IR when the (neo)liberal and the (neo)realist positions gradually and partly merged in the 1980s and 1990s. This provoked a number of attacks from postmodernist/poststructuralists, or “reflectivists” as they are called in IR jargon<sup>15</sup>, who rejected the epistemological and ontological assumptions underlying rationalism. For instance, the reflectivists rejected the existence of an objective reality that it is possible to obtain knowledge about. The idea is that since our theories about the world actually *construct* this world and establishes what counts as facts, then there is no valid knowledge that competing theories can be evaluated in relation to. With the appearance of reflectivism, the IR field was split between two camps that had little to talk to each other about. On one side neo-positivists/rationalists like Keohane (1988) and Østerud (1996) maintained that it is possible to obtain valid knowledge about the social world whereas, on the other side, postmodernists/poststructuralists like Ashley (1987) and Smith (1996, 1997b) rejected that this should be possible. In this hostile climate “constructivism” was launched as a sort of middle way between rationalism and reflectivism, which, to put it crudely, combined the faith in social science

of the former with the latter's focus on the ideational side of reality (e.g. Adler, 1997; Wendt, 1992, 1995).

From the mid-1990s constructivism has also made its entry in EU studies where it is now the main "challenger" to the dominant rationalist paradigm (Pollack, 2001)<sup>16</sup>. Indeed, as one of the paradigm's well-known protagonists is happy to announce, '[c]onstructivist approaches to the study of Europe are trendy' (Checkel, 2006: 58). The constructivist paradigm contains a much broader range of positions than the rationalist paradigm does, and the former paradigm is thus much less homogenous than the latter. Some constructivists subscribe to positions that come close to reflectivism (for example, Diez, 2001a). Others follow in the footsteps of Alexander Wendt in IR (see Wendt, 1999; Fearon & Wendt, 2005) and downplay meta-theoretical differences between constructivism and rationalism and, in some cases, even argue in favour of methodologies usually associated with neo-positivism (e.g. Checkel, 2001; Risse, 2004; see also Pollack, 2005: 24). Because of this there has been considerable confusion on what "constructivism" actually involves (Fierke & Jørgensen, 2001: 4; Risse, 2004: 159).

Bearing this heterogeneity in mind, it is still possible to point to some shared features. In terms of social ontology, constructivists believe that social reality is an inter-subjective domain that is made meaningful by the people who inhabit it and who construct it through their actions (Kratochwil, 2001: 16-17). Constructivism is 'based on a social ontology which insists that human agents do not exist independently from their social environment and its collectively shared systems of meaning' (Risse, 2004: 160). The cultural and institutional environment in which agents are located is thus understood as having a strong impact on the creation of the preferences and identities of agents – and, therefore, also on the way agents behave. In terms of social epistemology, the constructivist paradigm belongs to the hermeneutic or interpretivist tradition. This tradition claims that we need to understand the meanings that agents themselves attach to their actions and the way such meanings are inter-subjectively constructed if we want to explain social phenomena (Adler, 1997: 328; Marsh & Furlong, 2002: 27; Risse & Wiener, 2001: 200). In this view, the main purpose of theory is to work as 'a guide to empirical exploration, a means of reflecting more or less abstractly upon complex processes of institutional evolution and transformation' (Hay, 2002: 47). This implies a less parsimonious *form* of theory than the one preferred by rationalists – and, in fact, constructivists in EUS have often based empirical analyses directly on abstract social theories such as Habermas'

theory of communicative action (Risse-Kappen, 1996), Searle's theory of speech acts (e.g. Fierke & Wiener, 2001) and Giddens' structuration theory, to which we shall return below.

Most constructivists (unlike reflectivists) believe that it is possible to obtain valid knowledge about social reality – and that it is therefore possible to construct theories that can be evaluated against this reality. According to Risse & Wiener (2001: 200), the constructivists share 'an epistemological commitment to truth-seeking, and the belief that causal generalization in the form of middle range theories ... is possible'. This statement is, however, more accurate in relation to the (often American) constructivists who do not want to distance themselves too much from the rationalists (e.g. Checkel, 2001; Haas, 2001; Wendt, 1999), than it is in relation to the more radical constructivists who identify more with "reflectivism" than with rationalism (see for instance, Wind, 1997).

It is, of course, well known that constructivists like Wendt (1987) and Dessler (1989) were decisive in placing the agency-structure question on the IR discipline's agenda. In EUS, constructivists have also been at the forefront in emphasising the importance of this question – as when Wind (2001: 32) states that 'basic reflections on ... agency and structure are the necessary starting point for theorising about European integration today' (see also e.g. Diez, 2001b or Rosamond, 2001). Constructivists argue that agents and structures are codetermined or "mutually constitutive", neither being subordinate to the other. Yet one may in fact question whether constructivists in EUS generally subscribe to (meta)theoretical frameworks that conceptualise the agency-structure relationship in balanced and/or convincing ways.

One of the theoretical frameworks that has been utilised by a rather large number of EUS scholars is the *sociological institutionalism* of March & Olsen (1989)<sup>17</sup>. According to this view, institutions play a major role in shaping the expectations, preferences, experiences and interpretations of agents. Moreover, agents are assumed to follow a "logic of appropriateness", meaning that their actions are guided by their understanding of what will be the most appropriate behaviour in relation to the existing rules. Thus, '[t]he individual personality and will of political actors is less important; historical traditions as they are recorded and interpreted within a complex of rules are more important. A calculus of political costs and benefits is less important; a calculus of identity and appropriateness is more important' (March & Olsen, 1989: 38). Unsurprisingly, sociological institutionalism has often been criticised for giving institutional structures clear primacy over

agents, hereby underestimating the importance of agency (cf. e.g. Gorges, 2001; Hall & Taylor, 1996; Koelbe, 1995). It thus lends support to Checkel's remark that 'Constructivists, despite their arguments about mutually constituting agents and structures, have advanced a structure-centered approach' (1998: 342). Without doubt, this is a type of structuralism that differs from its rationalist counterpart in that it operates with a more explicitly conceptualised notion of structure. Yet the problem remains that sociological institutionalism is only capable of explaining institutional stability; in order to explain institutional change, it has to rely on the inclusion of non-institutional exogenous variables (Gorges, 2001: 141).

Other constructivists in EUS have flirted with Anthony Giddens's so-called *structuration theory* (see, in particular, Christiansen & Jørgensen, 1999 and Wind, 1996, 2001). Structuration theory seeks to overcome the dualism between agency and structure through 'a reworking both of a series of concepts linked to each of these terms, and of the terms themselves' (Giddens, 1979: 53). In particular, the concept of social structure is redefined and now refers to 'rules and resources' that only exist "virtually" as memory traces in the instantiation in social practice (Giddens, 1979: 64-66; 1984: 25). This concept clearly differs greatly from more conventional conceptions of social structure, for instance by making structures internal to the activities of agents. This means that even if one accepted that Giddens has succeeded in transcending a dualism, this is 'a rather different dualism to that which now attracts attention to the theory of structuration' (Hay, 2002: 121; see also Jessop, 1996: 124).

This is one of a number of reasons that structuration theory has been severely criticised (see e.g. Archer, 1995; King, 2000; Parker, 2000). Taking into consideration the absence of persuasive responses to this critique, it is rather surprising that constructivist scholars in EUS can maintain that it is 'a convincing model of transformation and societal reproduction' (Wind, 2001: 64). Indeed, until the critique of structuration theory is repudiated there are good reasons to dispute this claim and, instead, endorse Parker's remark that 'the moment of structuration theory passed some time ago. It still figures prominently in routine social theoretical talk, but its force is only that of a tired conventional wisdom' (2000: x; see also Buch-Hansen, 2002)<sup>18</sup>.

Let us now move on to the issue of the ideational. Some constructivists in IR have declared that they take the "middle way" with regards to this question – that is, a position that takes into account both the ideational and the material. Indeed, as Adler (1997: 325-326) explains, 'constructivists

stand at two intersections – that between materialism and idealism, and that between individual agency and social structure’. Adler defines constructivism in relation to this “first intersection” when he writes that ‘[c]onstructivism is the view that the manner in which the material world shapes and is shaped by human action and interaction depends on dynamic normative and epistemic interpretations of the material world’ (Adler 1997: 322, italics removed). As a careful reading of this quote reveals, however, only a rather limited significance is ascribed to the material: apparently the material has no effects *independently* of agents’ interpretations of it. It thus becomes clear that Adler is not really taking a middle position, but rather a position that gives clear primacy to the ideational over the material. Other IR constructivists openly acknowledge that they give primacy to the ideational (see, for example, Wendt, 1999: 1, 32)<sup>19</sup>.

This ideational bias also pervades the constructivist contributions to EU studies, where the importance ascribed to material factors is minimal. For instance, in their introduction to a collection of constructivist contributions to EUS, three eminent constructivists first acknowledge the importance of “material reality” and then go on to write that ‘constructivism focuses on ... such diverse phenomena as, for example, intersubjective meanings, norms, rules, institutions, routinized practices, discourse, constitutive and/or deliberative processes, symbolic politics, imagined and/or epistemic communities, communicative action, collective identity formation, and cultures of national security’ (Christiansen *et al.* 2001: 3). In a similar vein, Checkel mentions ‘[d]eliberation, discourses, norms, persuasion, identity, socialization, arguing’ (2006: 58) as key concepts in the constructivist paradigm. What is noteworthy here is, that material factors are barely mentioned, nor do they play a significant role in the other chapters of the book. Various ideational phenomena seem to be the constructivists’ paramount concern.

So whereas they (rightly) criticise rationalists for underestimating the significance of various ideational phenomena, constructivists themselves end up almost completely ignoring the significance of the material. Nowhere do constructivists in EUS actually deny the existence or importance of material factors – rather, it appears that they have little or nothing to say about them! This ideational bias in the social ontologies and substantive work of the constructivists is related to the interpretivist epistemology to which they subscribe: it allows them to focus on the way agents use ideational factors to interpret material factors, but does not direct them towards an investigation of how the material influences the ideational. This means that the ambition to take material factors

seriously has rarely been translated into concrete constructivist research, which, as van Apeldoorn *et al.* (2003: 30) have also noted, ‘in practice has tended towards idealism’.

In terms of the *pragmatic approach* this ideational bias is of course precisely as problematic as rationalism’s materialist bias. The consequence is that only certain parts of social reality can be studied in a comprehensive and fruitful manner, whereas other parts are more or less neglected. Having said that, the constructivist social ontology is less restrictive than the rationalist equivalent and can thus be seen as somewhat more attractive. In terms of the *immanent approach* it has to be concluded that constructivists have in practice generally failed to live up to their own ambition of taking the “middle way” in relation to the agency-structure and ideational-material questions. In relation to the latter question this has to be seen to some extent in relation to the interpretivist social epistemology, as it creates a certain bias in favour of the ideational aspects of social reality. What we have here is thus a contradiction at the heart of the constructivist paradigm between the proclaimed intention to take the “middle way” and an epistemological position that will never allow constructivists to do this.

To recapitulate, both rationalists and constructivists ground their research in problematic philosophies that prevent them from dealing with social reality in its entirety. What has emerged in EUS is, to simplify somewhat, a tacit division of labour through which rationalists deal with the material aspects of reality, whereas constructivists focus on the ideational aspects. This bias in the research on European integration is rather problematic and unsatisfactory as it, to a large extent, emanates from underlying philosophies. It is not justified by the reality studied by EU scholars which, as hardly anyone would want to dispute, contains a *mixture* of material and ideational factors.

Some EU and IR scholars have responded to this by tentatively suggesting a combination of elements from rationalism and constructivism (see e.g. Jupille *et al.* 2003; Fearon & Wendt; 2005). At first glance this might seem like a logical and attractive solution, especially as one paradigm seems to have strength where the other has a weakness, and vice versa, in relation to the question of the ideational and the material. However, as Patomäki & Wight (2000: 213-215) have rightly pointed out in a discussion of the attempts in IR to find a middle ground position between reflectivism and positivism, namely constructivism, a synthesis between two problematic positions results not in an improved position but simply in a problematic position. As they put it, ‘two wrongs

do not make a right'. This also applies to the attempts to "bridge" rationalism and constructivism in EUS and IR. Not only is it open to grave doubts whether a synthesis could provide a coherent and non-biased social ontology; it is also improbable that a coherent view of the nature and purpose of social scientific practice can be formulated on the basis of the diverging social epistemologies underpinning the two paradigms. In this situation it might be worth considering what an alternative position, namely critical realism, has to offer.

#### **2.4. Bringing in critical realism**

Critical realism is a philosophy of science that constitutes a full-blown but constantly developing alternative to, on one hand, different types of (neo-)positivism and, on the other hand, different types of interpretivism. It is associated with the early works of British philosopher Roy Bhaskar (see Bhaskar, 1975, 1979) and has gradually gained popularity throughout the social sciences in various fields such as sociology (e.g. Archer, 1995), history (Lloyd, 1993), economics (e.g. Lawson, 1997) and political economy (e.g. Jessop, 2002; Nielsen, 2002). Even in IR a few critical realist contributions have appeared (e.g. Patomäki, 2002; Wight, 2006). Despite these developments, however, this philosophy has so far not really made inroads into EUS, although a few scholars working in this field have employed specific insights from it (see Bailey, 2006; Dyson & Featherstone, 1999; van Apeldoorn, 2002).

It is not the intention to provide a comprehensive "introduction to critical realism" in what follows. This is neither necessary nor possible in the present context (see e.g. Buch-Hansen & Nielsen, 2005, Collier, 1994 or Sayer, 2000 for such introductions). Moreover, it is important to stress that CR is not a completely unambiguous or homogenous position. To be sure, critical realism is to a large extent defined by a number of core features. Yet those scholars who identify with CR disagree on all sorts of things and one does not have to search long in the literature to find variations in the way central concepts in the critical realist terminology are used. Thus, instead of seeing CR as a narrow and well-defined position, it should be seen as a multidimensional spectrum with absolute limits (critical realism is e.g. *not* a type of positivism or postmodernism) but also with inclusive openings, which leave room for rather divergent positions in relation to various questions (Buch-Hansen & Nielsen, 2005: 104)<sup>20</sup>. Consequently, neither Roy Bhaskar nor anyone else enjoys a monopoly of *the* one and only true version of critical realism. So although the following account draws extensively

on the works of Bhaskar and other critical realists, it also represents an attempt to develop and explicate CR in certain respects.

So what are the core features of critical realism? At the most general level, critical realists make a distinction between the *intransitive dimension*, consisting of the reality that exists independently of our knowledge of it, and the *transitive dimension*, consisting of our knowledge at a given time (Bhaskar, 1975: 21-24; 1979: 11-17). Hence, ontology concerns the intransitive dimension, whereas epistemology deals with questions related to the transitive dimension. These two dimensions are out of sync with each other, changes in one of them does not necessarily lead to changes in the other: ‘Transitive knowledge and intransitive objects, beliefs and beings, thought and things, descriptions and referents, can each now change without a corresponding change [...] in the correlative term on the other side of the [transitive dimension/intransitive dimension] divide’ (Bhaskar, 1986: 52). According to the philosophical ontology of critical realism, reality is *deep, stratified, differentiated* and *open*. That is, reality contains a level of structures and mechanisms that sustain and generate events and phenomena regardless of whether these are observed/observable or not (see e.g. Bhaskar, 1975: 56); these structures and mechanisms are hierarchically ordered in a number of strata where higher strata presuppose lower and less complex strata (see e.g. Bhaskar, 1975: 113; Moll, 2004), reality contains a number of complex objects with structures that provide them with very different causal potential and liabilities (see e.g. Sayer, 1992: 104-109); and reality is not a closed system where consistent regularities of the type “when event A, then event B” are likely to occur over longer periods of time (see e.g. Bhaskar, 1986: 107; Jessop, 2005: 53).

This worldview obviously has epistemological implications. In negative terms, an implication of the openness of the world is that it becomes impossible to make precise predictions of the future. Science should thus primarily be *explanatory* rather than attempting to be predictive (Bhaskar, 1979: 27; 1986: 107; although see Næss, 2004 for some important qualifications). In positive terms, Bhaskar argues that the essence of science consists in the *movement* from knowledge of manifest events and phenomena to generation of knowledge of the mechanisms and structures that have caused and sustained such events and phenomena (Bhaskar, 1975: 143-228; 1989: 20). The production of such knowledge is a human activity situated in social relations. New knowledge builds upon and transforms existing knowledge and is in this sense a *social product*. Or as Bhaskar almost poetically puts it, ‘the already known is the indispensable means for the production of the unknown; models, analogies and so forth provide the only type of craft a science can set sail in as it



embarks on its voyages of discovery, the only kind of resource it can bend and shape as it labours on its work of transformation' (1986: 55). Knowledge is also *fallible* – that is, it is never certain let alone definitive. This is reflected in the fact that, over time, new theories and explanations complement, refine and ultimately replace the theories and explanations hitherto regarded as correct. This indicates that knowledge is historically conditioned and usually possible to be improved upon (Bhaskar, 1986: 60). This does not relieve us of our obligation to produce research that, to the best of our knowledge, is valid, nor does it mean that the production of valid knowledge is out of our reach. But it means that the aspirations to produce the “definitive account” of some social phenomenon should be consigned to the dustbin.

Let us now turn our attention towards realism's *social* ontology<sup>21</sup>. At the heart of this we find an account of the agency-structure relation. Or more precisely, we find at least three different, but nevertheless cognate, accounts: Bhaskar's *Transformational Model of Social Activity* (Bhaskar, 1978; 1979: 45-47); Margaret Archer's *Morphogenetic Approach* (see Archer, 1982; 1995; 1998); and Bob Jessop's *Strategic-Relational Approach* (see Jessop, 2001; 2005). Notwithstanding this, all critical realists, like constructivists, argue that both agency and structure matter and that the two presuppose each other. Yet, in this view it would probably be considered inaccurate to say that the two are “mutually constitutive”, as this would seem to imply that agents, so to speak, create structures at the very same time that they are affected by them. In contrast to this, most if not all critical realists maintain that structures are always the outcome of human activities undertaken in the past, not in the present time. This means that, at any given point in time, agents are confronted by *pre-existing* structures that they then contribute to either reproduce or transform through their activities. Such structures confront the agent as an objective phenomenon that influences him or her regardless of the way they understand this phenomenon (if they interpret it at all). For instance, economic crises such as the Great Depression in the 1930s or the Asian financial crisis of the late 1990s have very real effects on the life of millions of people regardless of whether they understand the complex causes of the situation or not. Thus, as Isaac (1987: 78) remarks, ‘social life is only partly constituted by the concepts of its participants. It is also constituted by a set of enduring structural relationships that are likely opaque to their participants’ (see also Bhaskar, 1989: 4). More precisely, structures are both facilitating, in that they are the necessary condition for the social activities of agents (Bhaskar, 1979: 35), and constraining as they, although they never determine the actions of agents, exert ‘an objective influence which conditions action patterns and supplies agents with strategic directional guidance’ (Archer, 1995: 196, emphasis removed).

In order to link agency and structure Bhaskar introduces the notion of the *position-practice system*. The idea is that agents occupy particular structural *positions* (such as a job or the role as family man) that are associated with particular resources, constraints, predicaments and powers and which motivate their “occupiers” to engage in particular *practices* (Bhaskar, 1979: 51, see also Porpora, 1989: 200; 1993). No postulates are made that agents are infinitely locked to one position, or that such positions are static over time or that the practices of an agent can ever be reduced to the positions s/he occupies. For instance, José Manuel Barroso is only able to make “presidential decisions” because of a position-practice system which currently constitutes him as President of the Commission. In ten years time he will no longer hold this position. But it is possible that, during Barroso’s term of office, the “presidential position” will be transformed through his and other agents’ activities. Furthermore, it is perfectly conceivable that had another person been elected president instead of Barroso, then this person would not have made the same decisions.

On one hand, then, critical realism claims that structures and structural positions are highly important in that they condition all social activities. On the other hand, however, this does not result in a social ontology that downplays the importance of agency. To be sure, critical realism does not offer an “agent theory” of the kind that tells us that agents operate by a “logic of appropriateness” or that they are all rational utility maximisers. For reasons discussed in the previous two sections, a perspective that claims to take agency seriously must resist the temptation to fall back on such assumptions, convenient as they may be. Critical realism entails the view that although the practices of agents are intentional, agents also have very different qualities that influence their (positioned) practices. They can be charismatic or drab, diligent or lazy, skilful or incompetent, intelligent or obtuse, and so on. They may occasionally operate according to logics similar to those identified by rationalists and constructivists. But whether agents do so is an empirical question, not something that can be settled at the ontological level. In the real world, as opposed to in the fictional universe of RCT, agents only have partial knowledge of their structural context and of the exact consequences of their actions. This is because social reality is populated by a high number of real agents (as opposed to predictable robots) who act in sometimes uncoordinated ways upon structures and phenomena that are related to a wider set of, often unacknowledged, structures. Consequently, unintended structural consequences often follow from the intentional practices of agents (Bhaskar, 1979: 42-44).

As mentioned above, structural positions facilitate and constrain practices. In order to understand the behaviour of an agent, however, it is also necessary to look at his or her preferences. On one hand, preferences are not simply reducible to positions. As agents do not have perfect knowledge of their context, they have to rely on particular (fallible) interpretations of social reality when formulating their preferences and strategies (Hay, 2002: 209-10). This means, as constructivists have often (and rightly) pointed out, that preferences are informed by various ideational factors and that they, in some situations, are endogenous to the interactions between agents. On the other hand, agents always interpret the world from a particular position and this tends to have an impact on their ideational inclinations. On this anti-reductionist view, then, the ideational has material effects through the activities of agents, just as material circumstances have an impact on the ideational (see also Hay, 2002: 210). To sum up, the social ontology of critical realism suggests that the social world is populated by a large number of real agents whose positioned practices are never structurally determined but always informed by various ideas. This means that social phenomena, such as the EU or the regulation of competition, should be understood as contingent (possible but not necessary) outcomes of the interactions between a large number of such agents.

Clearly this has epistemological implications. Here we need to distinguish between the general epistemology that was outlined above and critical realism's social epistemology. To be sure, some continuity between the two is plausible. What should be preserved are the notions that knowledge is both fallible and a social product. This is as true in relation to social scientific knowledge as it is in relation to other types of scientific knowledge. But what seems slightly more problematic is to argue that social science, like other types of science, concerns the search for underlying structures and mechanisms – especially if it is not clarified (as it is often the case) what is meant by the concept of “mechanism”. So what is a mechanism? Porpora suggests that a ‘system of relationships among social positions may itself constitute the sort of causal mechanism that critical realists have in mind’ (1989: 199). And in the postscript to the second edition of *The Possibility of Naturalism* Bhaskar writes that in the past he has often used ‘the term “structure” and “generative mechanism” as if they were synonyms’ but that he now considers it better to use the concept of (generative) mechanism ‘to refer only to the causal powers of ways of acting of structures things’ (1998: 170). Later Bhaskar has explained the meaning of the concept in the following way:

‘A mechanism is just something that makes something else happen – you could say that water boils because of its molecular structure. You could say, analytically, that this level of the non-actual real is deeper, it describes the level behind; this can

sometimes be inside, it can sometimes be smaller as in the case of molecules, but it can also be wider (quoted in Buch-Hansen, 2005: 61)

This would clearly seem to indicate that mechanisms *cannot* just be reduced to social structures as if the latter were the only things that made something happen in the social world. Indeed, this also follows logically from the social ontology that has been outlined above. As it will be remembered, it was emphasised that social change and stability follows from the interplay between agents and structures over time, and a case was furthermore made for the importance of the hermeneutic or ideational aspects of social reality.

If we are being serious about this, clearly it should be reflected in our social epistemology – and thus also when we define what we see as the purpose of our social scientific activities. Accordingly, I consider it to be the primary overall purpose of my social scientific practice (in this thesis and in general) to explore the *structurally conditioned and ideationally mediated interplays between agents and the outcomes of such interplays*. This conception of social science is compatible with the general epistemology of critical realism, as the identification of underlying structures is still seen as a crucial aspect of social science. Yet by explicitly adding agency and ideational factors to the equation it also transcends it, and does indeed require us to think again about the concept of mechanisms. Now, when asking what precisely made something else happen we are in effect asking what *caused* it (see also Sayer, 1992: 104). Here it might be useful to bring in the distinction sometimes made between material and efficient causes. In the social world social structures are examples of entities that can function as *material causes* of activity: that is, they condition (facilitate and constrain) the activities of agents and cause effects through the actions of agents. But only agents can act – that is, only their actions can be *efficient causes* (Lewis, 2000: 257-258; 2002: 20; see also Porpora, 1993: 215).

As mentioned agents do not only act in a structural context: they also act on the basis of certain (sometimes shared) ideas or ideational factors. Such ideas are not “efficient causes” (ideas cannot act for themselves), but nor would it seem entirely appropriate to refer to them as material causes. On this basis I suggest that three types of mechanisms are by definition (that is, *always*) involved in causing or blocking any given social events and phenomena: *agential mechanisms* that consist of the agency exercised by (individual and collective) agents; *ideational mechanisms* that consist of ideas, discourses (including ideologies), values, norms etc. on the basis of which agents interpret the world and that shape their preferences and identities; and *material mechanisms* that consist of the

non-ideational structures and structural positions that condition practices as well as of other non-ideational entities. According to this view, social science involves a movement from the knowledge of a manifest phenomenon (say, the adoption of a regulation) to the generation of knowledge of the combinations of the agential, ideational and material mechanisms that were the most decisive ones in bringing that phenomenon about.

This movement is, for different reasons, rarely easy. For one thing, a multiplicity of mechanisms are generally involved in causing phenomena (Bhaskar, 1979: 55) – a point that clearly also applies to many of those phenomena that are of interest to EU scholars. Moreover, these mechanisms are not always directly observable; for instance, social structures only manifest themselves through their effects. But critical realism *cannot, does not and should not attempt* to provide us with “how-to-do-social-science” cookbook recipes of the kind sometimes found in especially American methodology textbooks<sup>22</sup>. As such it does not provide an answer to the question of how one identifies mechanisms (although see e.g. Danermark *et al.*, 2002: 108-12 or Sayer, 2000: 19-29 for some helpful suggestions). As Bhaskar writes, ‘it is the nature of objects that determines their cognitive possibilities for us’ (1979: 31). Consequently, critical realism leaves it to social scientists to determine what methods and procedures will be relevant in identifying the causes of the concrete social phenomena they are interested in (see also Buch-Hansen & Nielsen, 2005: 64; Wight, 2007: 385). In the next section it will be elaborated how critical realism it “put to work” in this thesis.

## **2.5. From philosophy to theory...**

As Bhaskar (1991: 141) points out, critical realism is a philosophy not just *about* but also *for* science. It becomes a philosophy for the sciences by serving as an “underlabourer”: that is, it can provide a philosophical framework that in various ways can be “connected” to substantive theories and empirical research<sup>23</sup>. But it is still one thing to outline a philosophy of science position; quite another to make use of this philosophy in social scientific research. Many philosophers of science (critical realists included) apparently feel content by just discussing philosophy and theory and do not really engage in the troublesome task it is to do empirically informed research (Buch-Hansen & Nielsen, 2005: 64-65). It is not for me to suggest that this cannot be legitimate and important work. But as Brante (2001: 186) is surely right to note, it entails ‘a risk that we end up like Freud’s patient who always polished his glasses but never put them on’. In this section it is thus the task to begin

the process of putting on the glasses – that is, of making sure that this philosophy is actually connected to the critical political economy perspective outlined in the next chapter.

In the previous section the exploration of the structurally conditioned and ideationally mediated interplays between agents and the outcomes of such interplays was identified as the primary overall purpose of the social sciences. In the present thesis, where we seek to explain the history of European level merger control, the task is thus to identify the (combinations of the) most important ideational, agential and material mechanisms at different junctures. Critical realism cannot help us much in this endeavour: it is *not* a theory of competition regulation, European integration or any other concrete matters – and nor can it become so for the simple reason that it deals with a different level of abstraction. At this level, it cannot be specified *what* agents, structures and ideas we should regard as significant (see also Bhaskar, 1979: 7). In other words, we will need the assistance of a more substantive theory that is compatible with, yet irreducible to, the critical realist position described in the previous section. This theory, namely the critical political economy perspective on regulation, is outlined in Chapter 3. In what follows it is explained in what sense this theory is “critical realist” and how it has been constructed.

As mentioned in section 2.1 my suggestion is that social ontology regulates a theory’s content whereas social epistemology regulates its form. Having outlined a social ontology according to which social change and stability emerges from the structurally conditioned and ideationally mediated interplays between agents, it would clearly not be acceptable to suggest a theory that explains everything with reference to, say, social structures. As regards the *content*, then, any kind of theoretical reductionism is ruled out from the outset and anything less than a theory that ascribes importance to specific agential, material and ideational mechanisms and the way they are related must be regarded as insufficient. Moreover, it follows from a critical realist position that one should not analyse the parts of the social world in isolation from the greater whole of which they form part. Rather theoretical perspectives should aid what Ollman (2003: 14) refers to as dialectical research. Here one ‘begins with the whole, the system, or as much of it as one understands, and then proceeds to an examination of the part to see where it fits and how it functions, leading eventually to a fuller understanding of the whole from which one has begun’ (Ollman, 2003: 14; see also Dean *et al.*, 2006: 23-24). The theoretical perspective should thus allow us to understand merger control in context.

Moreover, critical realists assert that ‘most social phenomena [...] in general have to be explained in terms of a multiplicity of causes’ (Bhaskar, 1979: 55). This seems to suggest that a theory which attempts to explain phenomena with reference to one set of mechanisms only might be problematic. This relates to the *form* of the theory. In a somewhat different context Bob Jessop distinguishes between *strong* and *weak theory*. Whereas the former purports to explain a phenomenon with reference to a single set of mechanisms, the latter is understood as ‘a useful set of guidelines’ that ‘would point us towards the most important factors which conjointly shape that “complex synthesis of multiple determinations” we are studying’ (Jessop, 1990: 249). The theory to be presented in the next chapter is in this sense a “weak theory” that makes no attempt to single out the “cause without cause”, the “grand mechanism of everything”.

One compelling reason why only a “weak theory” can be formulated here is that it is to be applied to the analysis of a rather long period of time, stretching from the early post Second World War years to present time Europe. As even the most cursory glance at the literature dealing with the developments of capitalism and its regulation during this time span will reveal, it was an era characterised by fundamental transformations. What we need when we try to shed light on a period like this is thus a theoretical perspective that allows us to take into account such fundamental transformations; *not* yet another theoretical straitjacket that prevents us from doing this because the world is assumed to be essentially unalterable<sup>24</sup>. A more general point is that “strong theories” are by definition deeply political in that they advocate a somewhat closed and mechanical perspective on the existing social reality hereby leaving no hope for a significantly different world (Cox, 1996: 89 and Wight, 2006: 8 make a similar point). If we claim to take agency seriously we cannot advocate strong theory – and indeed no truly convincing “strong theory” of, say, the state, international relations, regulation or European integration can ever be constructed as this would imply neglect of the open-ended nature of history and politics (see also Hay & Lister, 2006; Jessop, 1990: 249).

What this means more concretely is that the theoretical perspective outlined in Chapter 3 has to be formulated in a rather general way, thereby leaving plenty of room for different agents, ideas and structures to play a role. It thus seeks to identify particular mechanisms as being the most important to the explanation of economic regulation while, crucially, at the same time remaining open to the importance of other mechanisms as well. Besides introducing a number of concepts and accounting for their relation it also identifies some *tendencial* causal relationships. Readers anticipating a

parsimonious and unambiguous theory that can account for the history of European level merger control with reference to a few mechanisms (or “independent variables”) might just as well prepare for disappointment.

In a discussion of the differences in the possibility of measurement in the natural and social sciences, Bhaskar writes that ‘the *conceptual* aspect of the subject matter of the social sciences circumscribes the possibility of measurement’ in a ‘fundamental way. For meanings, cannot be measured, only understood’ (1979: 59). This leads him to suggest that in the social sciences, ‘precision in meaning now assumes the place of accuracy in measurement as the a posteriori arbiter of theory’ (1979: 59). The irony that Bhaskar of all people would stress the need for conceptual clarity will not be lost on those who have struggled to understand his own prose. Indeed, as a reviewer of *The Possibility of Naturalism* (which reads rather easily compared to most of Bhaskar’s later works) bluntly put it, this book ‘is written in the worst form of jargon that I have seen since my lawyer drew up the mortgage on my house’ (Ruse, 1981: 495). Nevertheless this is an important point that deserves to be taken seriously. In outlining the theoretical framework in the next chapter great care has thus been taken to define or explain all the important concepts introduced.

The critical political economy perspective presented in Chapter 3 has obviously not just come out of the blue. It has been developed through three dialogues: a dialogue with the empirical sources described in section 1.3 (various empirical data/accounts of European integration, capitalism and developments in the competition policy domains); a dialogue with various theoretical literatures; and finally a dialogue with the critical realist framework outlined in the previous section, with which the theory clearly had to be compatible. These dialogues have not been completed for the simple reason that they cannot be completed. As Aglietta explains,

‘Theory [...] is never final and complete, it is always in the process of development. The progression of thought does not consist simply of hypothetico-deductive phases; these rather alternate with dialectical phases. It is the dialectical phases that are most important, and make history something other than the exposition of conclusions already implicitly contained in an axiomatic system’ (Aglietta, 1979: 15-16).

I share this view that theory construction should follow a dialectical path and involve reciprocating movements between the theoretical and empirical levels. Such a process has elsewhere been well described with the word “iterative” (see Ougaard, 1988: 74), designating a sort of spiral trial and error process where one continuously moves back and forth between analysing empirical data on



the basis of the theoretical framework, and revising the theoretical framework on the basis of empirical findings. This process ‘does neither involve letting the theory dictate the empirical data, nor letting empirical data speak for themselves, but both-and’ (Ougaard, 1988: 73, my translation from Danish).

In principle, such iterative processes can go on forever. As Aglietta points out above, the result is that theory is never complete – and the same goes for the empirical analyses and the meta-theoretical framework. Yet for practical reasons it is of course at some stage necessary to “stop the pendulum” and put pen to paper. This is also the case in relation to the present study where the knowledge I present (and have) about the developments in the merger control area and elsewhere is fallible and incomplete and where there is indeed room for improvement at all levels of abstraction. It is thus possible, and indeed likely, that new empirical information that contradicts some of the sources used in the present study emerges or that other theoretical concepts than those I propose can be shown to be more suitable to the analysis of the history of European level merger control. Rather than lamenting this, it should be regarded as one of the basic conditions in the social sciences.

This procedure of theory construction raises the question of what the theory to be presented in Chapter 3 is a theory *of*? I first and foremost consider it a theoretical perspective that can help to shed light on the establishment, reproduction and transformation of regulatory regimes, hoping and suspecting that its central components will be (or relatively easily can be made) useful in analyses of many other aspects of regulation and integration than the one analysed in the present study. For that reason I refer to it as a critical political economy perspective on regulation. But clearly it is a theory that has been made specific to be able to shine light on developments in the merger control/competition policy area. It thus pays much more attention to phenomena like competition, mergers and merger control than “general” theories of regulation would do. Whether it will in actual fact also be a fruitful perspective in contexts other than the one I deal with here is a question I have to leave open. The perhaps more important question of how the theoretical perspective is linked to the empirical analyses is answered in section 3.7.

Finally, anticipating charges that the content of the following five chapters has got little to do with critical realism, it should be stressed that indeed the philosophical framework will not be in the foreground in these chapters. That is, concepts associated with critical realism will only rarely be used explicitly here. This is no coincidence but a deliberate decision that follows logically from

what has been said above; philosophical terms do not belong in theoretical and empirical expositions. Implicitly the critical realist social ontology and epistemology will, of course, be present as the various levels of abstraction are intertwined. That is, the crucial notion of ideational, agential and material mechanisms appears in the form of theoretical concepts that are relevant in this context: concepts such as “ideas of regulation”, “programmers” and “concentration of capital”. As such both the theory and the empirical analyses that follow are grounded in critical realism.

## **2.6. Concluding remarks**

Both the rationalist and the constructivist paradigms in EUS are grounded in philosophies that only allow their proponents to study some parts of social reality in a comprehensive manner, leaving other parts more or less neglected. Rationalists tend to reduce agents to rational utility-maximisers who act in accordance with incentives in the structural context and, thus, leave no room for real agency. In addition, the ideational is given no real significance in comparison with the material. Constructivists have, in practice, failed to live up to their own ambition of taking a middle position in relation to these issues. They have prioritised the ideational at the cost of the material and have, generally speaking, not managed to conceptualise the agency-structure relationship convincingly.

Against this background critical realism was brought in as the alternative philosophical framework that will underpin the present work. Critical realism neither can nor should replace substantive theory – neither is it a magic formula that can guarantee outstanding research. But unlike the philosophies that give rise to ontologically biased research on European integration and politics, critical realism offers a “permissive” social epistemology and a “rich” social ontology which allows a focus on a broad spectrum of reality. According to this philosophy (at least the version presented here) social phenomena and events are the outcome of structurally conditioned and ideationally mediated interplays between agents, and social science involves a movement from the knowledge of a such phenomena and events to the generation of knowledge of the combinations of the agential, ideational and material mechanisms that were the most decisive ones in bringing those phenomena and events about. In the next chapter we turn to the task of outlining a theoretical perspective that can help us to identify the mechanisms that caused the overall development in the way mergers were and are regulated in Europe.

### **3. Theorising regulation. A critical political economy perspective**

‘Theories are the crown of science, for in them our understanding of the world is expressed’ (Harré, 1985: 168)

The purpose of this chapter is to unfold a theoretical perspective that can help us to shed light on the history of European level merger control in the subsequent chapters. The chapter is divided into seven main sections. First, the theoretical perspective is placed in the context of critical perspectives in EUS. In the following sections the main concepts and ideas of the perspective are then explained. These include capitalism and competition (section 3.2), class fractions and capital actors (section 3.3), regulation and ideas (section 3.4), states and supranational institutions (section 3.5) and programming (section 3.6). Before a concluding section summarises the key points, section 3.7 describes how the theoretical perspective will be put to work in the following chapters.

#### **3.1. Critical perspectives in EU Studies**

The perspective to be outlined in this chapter belongs to the “critical theory” tradition in EUS/IPE. Despite their differences, the theories in this tradition have important features in common. Most importantly, they do not take the current neo-liberal type of governance and integration in Europe for granted. Unlike the conservative theories making up the mainstream in EUS, they do not see this order as “rational” or superior to any imaginable alternative (see also van Apeldoorn *et al.*, 2003 for an insightful critique of such theories)<sup>25</sup>. Instead they ask how this order came into being and seek to highlight its problematic features (see also Cox, 1996: 89; van Apeldoorn, 2002: 16-17). Importantly, the difference between critical and conservative theories is not that the former are more “normative” than the latter: the difference is that critical theorists generally make no secret of their (normative) wish to see changes in the existing social order, whereas conservative theorists often pretend (and perhaps believe) that they are just providing neutral and non-normative accounts of European integration and governance.

Another defining feature of critical research is that it seeks to place the particular object it seeks to explain in the context of the broader whole of which it forms part (Cox, 1996: 89; see also Ollman, 2003: 14)<sup>26</sup>. The current work is no exception. Throughout the thesis the developments in the field of EC merger control will be seen in the light of broader ideational and material developments, hereby bringing it into line with the critical realist position outlined in Chapter 2. Although a focus on such macro-trends cannot (and does not) replace analyses of concrete political micro-processes in the merger field, it is maintained that any adequate analysis of the history of European level merger control needs to situate the phenomenon in the broader contexts of which it forms part. These contexts include not only national and European level competition regulation more generally but also the broader transformation of capitalism and the way it is regulated at different levels and in different European countries (see also section 3.7 below).

As mentioned above, one can identify various strands of critical research on European integration<sup>27</sup>. Of the critical analyses of the integration process and the EU that have emerged over the years quite a few are written from what could be called classical Marxist perspectives. Here European integration and politics is explained by means of time-honoured Marxist features such as value theory, the tendency of the rate of profit to fall, the concentration/centralisation of capital and of course the struggle between labour and the capitalist class(es). Examples of this type of work include Mandel (1970; 1975), Poulantzas (1974), Cocks (1980), Bonefeld (2001; 2002) and Carchedi (2001). But many more could be listed<sup>28</sup>. To be sure, these contributions are very different and indeed often incompatible and their authors often make no secret of (what they perceive as) the grave and inexcusable mistakes of other “so-called” Marxists let alone of course all non-Marxist scholars<sup>29</sup>. Reacting against developments in the EU and frustrated with bourgeois scholarship on European integration some of these classical Marxist scholars have ended up with some rather unsubtle, unsubstantiated and thus also untrustworthy analyses of the subject (see e.g. Callinicos, 1994; Carchedi, 2001). In other words, they end up going to the opposite extreme of the uncritical perspectives of the mainstream. Needless to say this is not a particularly fruitful way forward.

A more forward pointing strand of critical research dealing with European integration and politics are the neogramscian contributions that appeared from the 1990s onwards. The “classical Marxist” type of work on European integration does generally not serve as an important reference point for such contributions. But drawing on the seminal works in IR/IPE of Robert W. Cox (1987, 1996), Stephen Gill (1990; 1993) and/or Kees van der Pijl (1984) neogramscian scholars have illuminated

how social (mainly class) forces working in and through states and supranational institutions have shaped the integration process. Although the neogramscians bring into the foreground class struggles and do subscribe to a “transnational historical materialism” (Overbeek, 2000; van Apeldoorn 2004) this is a further developed and unconventional type of Marxism. Important neogramscian contributions dealing with matters related to European integration include Bieler (2002), Bieler & Morton (2001a), Cafruny & Ryner (2003), Gill (1992; 1998), Overbeek (2003), van Apeldoorn (2002) and van der Pijl (1984; 2006). Due to its roots in the work of Gramsci this literature is sometimes referred to as the “Italian school” (see e.g. Jessop & Sum, 2006b). But this is rather misleading as we are dealing here with a diverse range of neogramscian perspectives rather than with a unified theory or school (see also Morton, 2001). Like their classical Marxist colleagues, neogramscians take a critical stance in relation to European integration (or more precisely, in relation to integration of the neoliberal type). But it is a somewhat more informed and tempered critique. And the principal merit of the neogramscian perspectives lies not so much in their aspiration to be critical as in their ability to serve as central elements in an exciting and progressive research programme that, over the years, has dealt with topics related to numerous aspects of European integration and politics (although not yet the competition policy area).

The theoretical perspective outlined in this chapter first and foremost draws inspiration from the neogramscian contributions in the field of EUS and IPE. This said, it is by no means a loyal restatement of one of the existing neogramscian perspectives and it does indeed seek to develop these in certain respects. This is done by bringing in some concepts and ideas of my own (constructed through the iterative process described in section 2.5) as well as some elements from the work of other scholars, most of whom are associated with historical materialism if the latter is understood in its broadest sense. In particular, Bob Jessop’s work has served as a major source of inspiration here. Whether the resulting theoretical perspective on regulation deserves to be labelled a neogramscian (or for that matter a historical materialist) theory is an open question. Personally I think of it as a post- or neo-neogramscian perspective on regulation and elsewhere jokingly referred to an earlier version of it as the “Copenhagen Perspective” (Buch-Hansen, 2006)<sup>30</sup>. In any case, the main concern has been to develop a theoretical perspective that can be useful in the empirical analyses that follow, not to come up with new grandiose labels.

### 3.2. Capitalism and competition

Contemporary western societies are capitalist societies. This is not to say that all phenomena in such societies can be reduced to manifestations of capitalism and its functioning. But in social spaces where the economic sphere is capitalist, this sphere will generally be dominant vis-à-vis the other spheres in the sense that it is able to impose its primary logic on institutions in other spheres more than they are able to impose their primary logics on the economic sphere (see also Jessop, 2000, Lipietz, 1983: 19). The logic overshadowing other logics in capitalist economies is that of capital accumulation, with “capital” denoting accumulated wealth that can be used to accumulate more wealth. Indeed, ‘[c]apitalism as a historical system is defined by the fact that it makes structurally central and primary the endless accumulation of capital’ (Wallerstein, 2000: 147, 2004: 24; see also Jessop, 1990: 152 on the notion of “capital”).

In order to understand this it is necessary to take a closer look at what capitalism is. To be sure, any attempt to provide a general description of capitalism runs into the problem that the particular forms of capitalism have varied from location to location and over time. Indeed, ‘capitalist relations are themselves subject to profound historical alteration and to major variations between one socio-economic formation and another, depending on the history of struggle and social movements’ (Lipietz, 1983: 19, see also Robinson, 2004: 4-5). When trying to make sense of the history of European level merger control in Europe by conceptualising it as a phenomenon related to the nature of capitalism (see also van Apeldoorn, 2002: 45) one thus needs to not only look at the different models of capitalism in the core European countries (namely Germany, Britain and France), but also to look at the broader transformation of capitalism that has taken place in the past fifty years or so. We will come back to this below.

Even though capitalism is a phenomenon that has to be grasped in a longitudinal perspective, the core features of capitalism remain the same. At a general level, capitalism is an economic system in which a large number of firms using privately owned capital goods and wage-labour produce and sell goods and services with the intention of making a profit. This process is also known as “the circuit of capital” and was represented by Marx with the formula  $M-C-P-C'-M'$ , signifying a process where money (M) is used to buy commodities (C) that are used in the production (P) process in order to create new commodities (C') the sale of which results in the generation of more money (M') than were present at the beginning of the process (Robinson, 2004: 15). Capital

accumulation is premised on the ability of the capitalist to realise profit by producing and, crucially, selling goods and services and capitalists thus tend to allocate their resources to different fields of production on the basis of expectations of profit (Jessop, 2002a: 16). It is the labour power consumed in the production process that is the main source of real added value and which, ultimately, makes possible this process where capital expands through the successful reinvestment of past profits. In other words, a distinguishing feature of capitalism is its commodification of labour: workers exchange their capacity to work for a wage and then accept the right of their employer (the capitalist) to reap the profit (or absorb any losses) that results from the sale of the goods and services they have produced. This brings us to the point that capitalist societies are class societies; a point that we come back to in the next section.

Expansion/growth is an absolutely necessary condition for capitalism because without such growth capital accumulation cannot take place - which, in turn, renders the realisation of profit impossible. This is the light in which the historical development of capitalism as a system which has continued to expand outwards ever since its inception should be seen. However, the process of capital accumulation is not unproblematic but on the contrary pervaded by contradictions (see e.g. Jessop, 2002a: 20-21). One contradiction which is particularly relevant in the context of the present study arises because capital accumulation generally takes place in the context of *competition*, viz. the process of rivalry between particular companies in their struggle for profits. Companies inhabit positions in a market where they compete with other firms for profit and where the firm which is more efficient is likely to gain more profit than its competitors. This creates a spiral of competition which Pierre Bourdieu has described aptly in the following way:

‘It [competition, HB] springs from the actions and reactions of the agents, who, short of opting out of the game and falling into oblivion, have no choice but to struggle to keep up or improve their position in the field, i.e. to conserve or increase the specific capital which is only created within the field. In so doing, each one helps to subject all the others to the often intolerable constraints arising from competition. In short, no one can take advantage of the game, not even those who dominate it, without being taken up and taken in by it’ (Bourdieu, 1981: 307-09<sup>31</sup>)

In its strongest form competition faces capitalist firms as an objective threat ‘which strikes not at the margins of the profits and the outputs of the existing firms but at their foundations and their very lives’ (Schumpeter, 1947: 84). It is an objective threat in the sense that, even though economic agents can interpret and choose to react to the competition they are exposed to in different ways,

their interpretations will not make competition go away. And the consequences can be disastrous (seen from the perspective of the individual firm) if their interpretations are wrong. Competitive pressures are thus very real as are their effects.

In the long run only the strongest survive while the rest are either absorbed by other companies or simply perish. As Marx put it, ‘competition rages in direct proportion to the number, and in inverse proportion to the magnitudes, of the antagonistic capitals. It always ends in the ruin of many small capitalists, whose capitals partly pass into the hands of their conquerors, partly vanish’ (1965: 626). The result is a tendency towards concentration of capital by which we will understand the organic growth of particular capitals as well as the ‘...concentration of capitals already formed, destruction of their independence, expropriation of capitalist by capitalist, transformation of many small into few large capitals’ (Marx, 1965: 625)<sup>32</sup>. M&As are thus one important mechanism through which the concentration of capital takes place and here we may crudely distinguish between three forms of this type of capital concentration: (1) the form that involves the merging of firms located in the same country and which does thus only lead to concentration at the national level; (2) the form that involves the merging of companies located in different EC/EU countries and which does thus lead to supranational concentration; and (3) the ‘form of “international” concentration under the force of the logic of an internationalized and internalized reproduction of capital which entails in the European context the fusion of European capital with foreign capital or rather the absorption of national companies by the American multinationals’ (Moschonas, 1996: 20).

Certainly other mechanisms are at work in the capitalist system: for instance various forms of legislation (including competition laws) or economic crises might slow down, block and indeed temporarily dissolve the process of concentration. The existence of such countervailing mechanisms means that there will be periods where no or little concentration of capital takes place. The rhythm of concentration is, in other words, far from constant (see also Poulantzas, 1975: 145). Yet we are nevertheless dealing with an inherent feature of capitalism, which is likely to manifest itself over a longer period<sup>33</sup>. If we think about capitalist markets in terms of position-practice systems (see section 2.4), we can say that their inbuilt positions encourage practices that ultimately lead to concentration at a general level and thus, also to subsequent transformations of the positions of the system<sup>34</sup>. Although we are dealing here with a *tendency* rather than with a law set in stone, this *does* create a significant contradiction at the heart of capitalism. On the one hand, competition is a driving force in capitalism – a force that most economists believe to have a number of desirable



effects, for instance, providing firms with an incentive to innovate and cut prices, hereby benefiting the consumer (see e.g. Eekhoff & Mock, 2004 or Murray & Johnstone, 2005). Yet on the other hand, particular firms refer to avoid competition, as this puts them in a situation where they are able to increase their profits. Consequently, '[c]apitalism is driven by competition, yet capital must always seek to thwart competition' (Wood, 2003: 22). Wanniski (1992: 18) captures this contradiction well when he notes that 'Marx was extremely close to the truth' when he discovered that '[c]apitalism could not succeed because capitalists would sow the seeds of their own destruction. That is, if capitalism *requires* relentless competition, yet capitalists are doing everything they can to *destroy* competition, we have a system that is inherently unsustainable – as with animals who devour their young'.

Principal means through which capitalist firms can ease the competitive pressures they are faced with are various forms of collusive arrangements and M&As. The latter 'can offer firms the immediate freedom from the nuisance of having to compete with each other. They can thereby avoid the need to earn their monopoly power the hard way, by persuading enough customers to buy their products' (Neven *et al.*, 1993: 11-12). If the merging parties are big enough (relative to the market(s) in which they operate) the merger will result in some degree of market power – that is, the ability to influence the price taken for the produced good or service. This obviously makes such mergers potentially very profitable. Importantly, mergers are thus both *responses to* and *elements of* the concentration of capital: firms often merge in response to (expectations of) concentration in the markets in which they operate, thereby contributing to further concentration in that market (see also Chapman, 2003: 312). But concentration at the system level does not happen because those in charge of individual firms want it to happen. Generally, the purpose of a merger is to improve the competitive position of the firms involved in various respects. Thus, the tendency of concentration is to a large extent an unintended consequence of their intentional strategic actions. And it is an unintended consequence that threatens to negatively affect the accumulation of capital at the general level if it is not controlled in one way or the other. This is one important context in which the widely perceived need for regulation of competition should be seen. However, before we can address this theme, we first need to bring in some notions of agency.

### 3.3. Agency: class and beyond

In the *Communist Manifesto*, Marx and Engels famously suggested that '[t]he history of all hitherto existing society is the history of class struggles' and that the capitalist societies of their time were 'more and more splitting up into two great hostile camps, into two great classes directly facing each other: Bourgeoisie and Proletariat' (Marx & Engels, 1992: 3). The latter class, the proletariat or workers, consists of those who have to sell their labour power in exchange of a wage or salary in order to survive, whereas the bourgeoisie or capitalists are those who get their income not from direct labour but who own the means of labour (land, tools, raw materials) thereby enabling them to extract surplus value created by the workers. In other words, capitalism is premised upon the exploitation by one class of the other class<sup>35</sup>, hereby giving rise to the class struggles referred to by Marx.

When thinking about class we need to distinguish between its structural and agential dimensions. At first a class is defined with reference to the position of its members in the economic structure: 'A person's class is established by his objective place in the network of ownership relations ... His consciousness, culture, and politics do not enter the *definition* of his class position' (Cohen, 1978: 73). This is the objective or *structural* dimension of class. But classes only become driving forces of history insofar as a circle of their "members" unite – that is, when a group of agents occupying similar class positions (hereby constituting what Marx calls a "class-in-itself") develop a common class consciousness, articulate their common preferences and then work for their realisation (thereby becoming a "class-for-itself"). Insofar as such groups work to further what they perceive of as the interests of the class to which they belong, rather than just their own narrow interests, then we can talk of class agency. As these remarks suggest, it is thus crucial to distinguish between the structural aspect of class and the process of *class formation*: 'that is, the moment when class becomes the basis for collective action; a movement from class structure to class agency' (van Apeldoorn, 2002: 21; see also Wright, 1985: 9-10)<sup>36</sup>.

Needless to say, the complex late (or post-) modern societies we live in can hardly be described adequately in terms of struggles between two large classes. Indeed, as was already acknowledged by Marx himself, society 'by no means consists only of the class of workers and the class of industrial capitalists' (quoted in Bottomore, 1983: 75) and in the short final chapter of *Capital III* he mentions how, in England, 'the stratification of classes does not appear its pure form' as the lines of

demarcation are obliterated by ‘middle and intermediate strata’ (Marx, 1966: 885). Indeed, the emergence of large middle classes in contemporary societies constitutes a challenge to Marxist class perspectives, but does not in itself invalidate such approaches. In the present context it is not necessary to go into a discussion of this (but see e.g. Wright, 1985). We can simply note the existence of a literature that convincingly testifies to the continued relevance of class analyses in the contemporary world<sup>37</sup>, which is indeed a world in which a small minority still owns the vast majority of the economic resources and where most people have to sell their labour power in order to sustain a tolerable standard of living.

Moreover, the “polar opposites” of the two fundamental classes (capitalists and workers) are internally fractionalised in various ways rather than constituting unified wholes. The defining feature of a *class fraction* is that its members perform similar economic functions in the process of capital accumulation, the result being that they tend to have specific ideological inclinations organically related to these functions (van der Pijl, 1989: 11; 1998: 49-53; see also Hudson, 2005: 18). This is interesting in relation to the process of class formation as it might result in, say, capital fractions with vastly different outlooks and preferences, resulting in class struggle between these capital fractions, not only between classes<sup>38</sup>. As Overbeek (1990: 25) notes, ‘[c]onflicts between fractions of capital tend to transcend the competition between individual capitalists, because these conflicts do not take place within the existing framework of the economic, political and ideological conditions for capital accumulation but are concerned with changing these conditions’.

The fractionalisation of capital can take place along different axes that give rise to different conflicts. One axis is the one hinted at by Overbeek (1990: 25) when he explains that capital fractions are ‘groupings of capitalists with structurally comparable positions in the overall circuit of capital’. This gives rise to a fractioning of productive and circulative capital which manifests itself at the concrete level as two fractions, viz. those of industrial versus money capital, with members of the latter fraction having a much more liberal outlook than those of the former (Overbeek, 1990: 25-27; Overbeek & van der Pijl, 1993: 3-5; van der Pijl, 1984: 4-8). But fractioning can also take place along other axes. For instance, it has been suggested that it can take place between monopoly and non-monopoly capital (see e.g. Poulantzas, 1975: 144-145). And others have pointed to the spatial aspect of capital accumulation. Here the main question concerns whether accumulation is a phenomenon that predominantly takes place at the national level or whether it is transnational in its orientation (Overbeek & van der Pijl, 1993: 5-7; Robinson, 2004: 49-53; van Apeldoorn, 2001: 72-

73). It is in particular this latter axis of fractioning that is relevant to the present study, where a central theme is the way in which the regulation of mergers in Europe increasingly came to be displaced from the national to the supranational level.

This brings us to the point that classes are not a static phenomenon. Over time, the significance of particular fractions changes in dialectical interplays with the transformation of capitalism itself. As mentioned above, M&As both contribute to and are a response to the concentration, and thus ultimately the internationalisation, of capital. Cross-border mergers thus in fact constitute one of the most important mechanisms through which the material basis for the formation of transnational classes comes into being (Robinson, 2004: 57-62). Indeed, such mergers are crucial means through which firms that have previously been oriented toward national markets expand their activities beyond the national level and become transnational – and through which firms that already span more than one country become increasingly transnational. Mergers are thus a mechanism through which transnational class fractions in the *structural* sense emerge and are consolidated. As structure is prior to agency, cross-border mergers, or for that matter the internationalisation of capital they contribute to bring about, do not in themselves guarantee the emergence of transnational class agency. But they serve as a crucial structural precondition for such agency.

Now, when analysing a concrete phenomenon, say policy-making in the EU, it quickly becomes clear that we do not encounter a number of easily identifiable class fractions each defending a distinct position in a political battle. Alas, social reality is more complex. If one looks at the business groups seeking to influence developments in the EU one will see that they differ in nature. Some groups can indeed be seen to “represent” fractions of capital: the European Roundtable of Industrialists represents transnational (primarily industrial) capital (see section 6.3 for more details), whereas a group such as the European Roundtable of Financial Services represents transnational money capital. BusinessEurope (previously UNICE), the members of which are national business federations, presents itself as ‘the voice of business’ in Europe. However, although it does, as such claim, to represent Europe’s capitalist class as a whole it seems that it, since the late 1980s, has predominantly sought to further the interests of transnational capital (see e.g. van Apeldoorn, 2002: 102-103). National business federations are also often directly involved in lobbying processes at the European level, but whether they defend the interests of nationally or internationally oriented companies located in the country in question is not a foregone conclusion. Still other groups may, so to speak, cut across the axes defining class fractions. In particular, it is not unusual to see groups

representing both national and transnational companies operating within a particular sector of the economy (say agriculture or chemicals).

While this does not mean that the notion of class fractions becomes irrelevant, it does seem that a concept that can supplement it when studying concrete micro-processes (such as those leading up to the adoption of a treaty or a regulation) is needed. Against this background, the concept of *capital actors* (see also Chari & Kritzinger, 2006: 54-56, 217-220) will tentatively be used in the chapters that follow to denote individuals that are members of the capitalist class as well as groups/organisations that seek to further the interests of smaller or larger segments of this class. Unlike the concept of capital fractions this concept can thus be used to describe more traditional interest groups and single issue groups, while emphasising that the latter's agency is related but not reducible to a class position.

In most political economy perspectives, including the neogramscian contributions in EUS and IPE, business actors (whether in the form of the “capitalist class”, particular “class fractions” or merely “capital actors”) are considered to be very important, and often *the* most important, agents in the explanation of political outcomes (such as the adoption of a regulation). The perspective advocated here does not dispute that business actors are particularly important, as long as it is acknowledged that they are not the only important agents and that there are significant limitations to their ability to shape political outcomes and the course of history. Other important agents in political decision-making generally include not only policy-makers such as ministers and parliaments, but also various diplomats/bureaucrats and other institutional actors as well as interest groups/organisations not representing business. Neglecting the significance of such agents, for instance by reducing them to powerless servants of the capitalist class, is highly misleading. Before elaborating on these points in sections 3.5 and 3.6 below, we shall now develop some concepts that can make intelligible the phenomenon of regulation.

### **3.4. Regulation and ideas**

As hinted at above, the expanded reproduction of capitalism cannot be secured by markets or market actors alone. Markets do not represent some sort of God-given order that existed prior to and despite of various extra-economic “interferences”. On the contrary, markets are social constructs

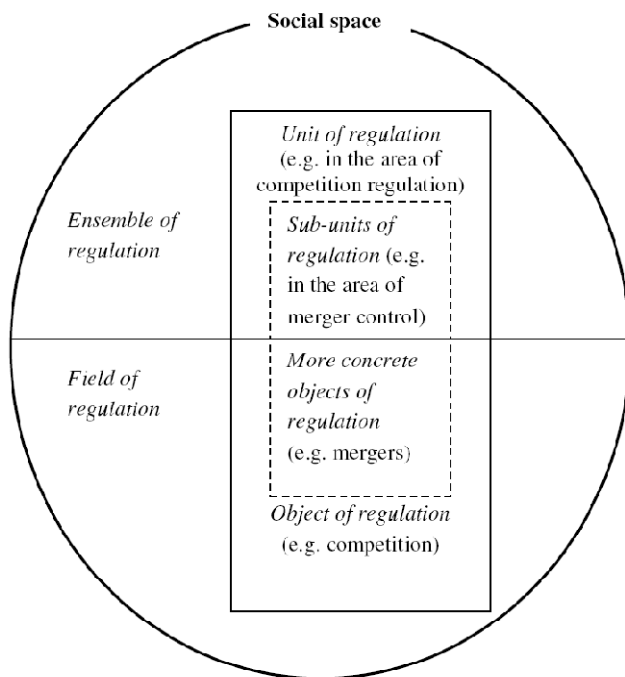
that only exist because of the existence of extra-economic spheres that includes education, nature, security, the family etc. *and* the interventions by legal-regulatory and political institutions (see also Horn & van Apeldoorn, 2007: 211-215). The reproduction of capitalism thus ‘depends on its achieving an inherently unstable balance among market-oriented economic supports whose efficacy depends on their location beyond market mechanisms’ (Jessop, 2002a: 19). This “balance” is by definition unstable and thus temporary due to the contradictions at the heart of capitalism and the inherently dynamic nature of this system. Over time, then, the continued accumulation of capital depends on gradual transformations and eventually replacement of the various “supports” (see also Joseph, 1998).

Now, one of the “supports” consists of various forms of regulation of the economic system. Regulation theorists, at least those associated with the dominant Parisian School, use the concept of “regulation” in a very inclusive sense to refer to all those extra-economic mechanisms that stabilise the accumulation of capital (see e.g. Jessop & Sum, 2006a: 15, 44; Torfing, 1994: 95; see also Boyer, 1990: 117-123 on different Parisian notions of regulation). In the present context, the concept of regulation is used in a more narrow and indeed also more conventional sense, viz. as different types of interventions in (parts of) the economic sphere by political and legal-regulatory institutions<sup>39</sup>. In any given form or model of capitalism, the economic system is regulated in a number of ways by institutions that are generally located at different scales (see also section 3.5). Indeed, the way the economy is regulated is a defining feature of the model of capitalism itself.

In the analyses that follow in Chapters 4 to 7 we need concepts that are not primarily designed to be applied to analyses of regulation of the whole economy in a given social space. Or rather, we need a conceptual architecture that links specific forms of regulation, such as the control of mergers, to the way capitalism is regulated more generally in various social spaces. In what follows, we will refer to the totality of regulatory practices in a given social space (such as a country or a region) and the institutions “carrying them out” as the *ensemble of regulation*<sup>40</sup> whereas the part of this social space that is subject to regulation is denoted the *field of regulation*. A given ensemble of regulation is made up of multiple *units of regulation*<sup>41</sup>, each defined in relation to some *object of regulation*<sup>42</sup> forming part of the wider field (competition, trade, environment, monetary issues etc.). Moreover, a particular unit of regulation can often be seen to consist of various *subunits of regulation* that relate to a number of somewhat more delimited or concrete objects of regulation. For instance, competition regulation may involve regulation of “objects” such as mergers, cartels, state aid etc.

Importantly, such (sub)units are not isolated entities but are instead often connected to other (sub)units of regulation in a given social space as well perhaps to (sub)units of other social spaces. It is thus important to analyse them in the context of both the transformation of capitalism and of the way capitalism is regulated.

**Figure 3.1: Conceptualising regulation**



Conceptualised in these terms, the Competition DG and its regulatory practices (which are obviously based on various rules) constitute a unit of regulation in which the regulation of mergers is but one subunit. One important purpose of the latter is to ensure that the merger activities of companies are conducive or at least not destructive to the accumulation of capital at the more general level. As such it can be understood as an attempt to, *among other things*, establish a mechanism that seeks to remedy one of the inbuilt contradictions in the economic sphere – that is, as a mechanism designed to block or eliminate the workings and effects of other mechanisms. This does not necessarily mean that merger control primarily serves to *prevent* a high number of mergers from taking place: it can just as well serve to *facilitate* certain mergers if this is considered desirable. Whether merger control actually succeeds in having the intended effects is obviously a completely different matter.

As the above remarks indicate, the form and content of competition policies is not something that is carved in stone. Moreover, it is not the case that such policies can be reduced to an automatic or functionalist response to the needs of the economic sphere. Capitalism cannot “speak for itself”: it cannot articulate its preferences for and against particular interventions in the economic sphere. Only agents have opinions about how capitalism should be regulated and only agents can subsequently act on them. And such opinions are informed by certain ideas that may or may not come to be institutionalised. Competition policy, like all regulation, is thus based on particular ideas, and the latter are, in turn, related to broader discourses that prevail at a given juncture.

This would seem to suggest that just as we can look at regulation from different perspectives (that is, in terms of ensembles, units and subunits), so it might also be fruitful to operate with different levels of ideas of regulation. Here we will distinguish between three such levels, defined in terms of their relative degree of concreteness (see also Table 3.1 below). At the highest level of abstraction we have *general discourses of regulation* (GDR). These are overall perspectives or philosophies on how the economy in a given social space ought to be regulated. Such discourses (or sets of ideas) relate to the overall nature of the ensemble of regulation and thus also to particular models of capitalism. So, for instance, neoliberalism is a GDR that *inter alia* prescribes a market oriented form of regulation (and which resonates well with the Anglo-Saxon model of capitalism), whereas mercantilism is a GDR that, among other things, ascribe an important role to states in protecting and promoting domestic industries, for instance, through active industrial policies (hereby resonating well with the model of state-capitalism) (see e.g. Coates, 2000 or van Apeldoorn, 2002: 72-78 on various models of capitalism). To be sure, when looking at concrete ensembles of regulation it will generally be possible to identify traits of different GDRs. Notwithstanding this, one GDR will be dominant and thereby define what model of capitalism we are dealing with.

At the next level we have *unit-specific discourses of regulation* (USDRs). Such discourses so to speak “emerge” out of GDR and translate them into perspectives on regulation in particular areas. That is, they deliver the broader ideational content to the different (sub)units of regulation, in particular with respect to their overall content, form and scope. So for instance, we can identify various USDRs each providing a particular perspective on what purposes competition policy (including merger control) should serve and what concrete “objects” it should target (content), how it should be enforced (form) and what jurisdiction it should cover (scope). This is why competition policy cannot just be defined, as does for instance, Nicolaides (1994: 9), as ‘practices and policies



that seek to exclude or discriminate against rival firms or that intend to reduce competition among incumbent firms'. "Competition policy" is a label that, properly used, can be attached to regulation that serves various purposes (including the partial elimination of competition), and that can involve very different ideas about how competition should be regulated, if it should be regulated at all. Motta (2004: 17-26) lists a number of objectives that competition policies have pursued in different contexts: economic welfare, consumer welfare, protection of smaller firms, promoting market integration, guaranteeing economic freedom, promoting fairness and equity and fighting inflation. So, to use poststructuralist jargon, it is a "floating signifier" (Laclau & Mouffe, 1985: 113) that can be filled with different sorts of content<sup>43</sup>.

This can be seen if we take a small excursus and glance superficially at the economic literature. For one thing "competition", which is a highly central concept here<sup>44</sup>, is defined in incompatible ways in classical and neoclassical theory (see e.g. McNulty, 1968: 649 for details). More importantly, however, different schools of competition theory have gradually emerged and very different competition policy implications follow from these. Suffice it to mention perhaps the two most influential schools, viz. the Harvard and Chicago Schools. Proponents of the *Harvard School* regard a "polypolistic" market structure in which firms have small market shares (and thus little market power) to be the optimal state of affairs (e.g. Clark, 1940: 241). In order to reduce or prevent concentration, the Harvard School calls for interventionist competition policies that can serve a large number of both economic and non-economic policy goals, including efficiency, innovation, consumer welfare, protection against unfair competition, international competitiveness, economic integration of regions and low unemployment (see e.g. Budzinski, 2003: 7, Young & Metcalfe, 1994: 120). Members of the *Chicago School* like Stigler, Demsetz and Friedman reject the notion that government interventions into the market structures are necessary in order to prevent monopolies from coming into being and thus deny the need for comprehensive competition policy regimes. Instead they generally recommend that policy makers leave the job of establishing an equilibrium to the "invisible hand" of the market (see e.g. Friedman, 1999: 6-7). However, some Chicago scholars do in fact accept the need for competition policies that prohibit cartels and horizontal mergers resulting in extreme concentration (Voigt & Schmidt, 2003: 18)<sup>45</sup>. Nevertheless this is clearly a *laissez-faire approach* to competition regulation, especially when compared to the Harvard School approach.

Elements from these and other scientific perspectives can be integrated into particular USDRs and can indeed be used to turn a GDR into somewhat less abstract perspectives in a particular area. But this is of course not to say that USDRs are necessarily always informed by economic theory. In the analyses contained in Chapters 5 to 7, four main USDRs on EC merger control are identified: (1) a *national-mercantilist perspective* that was oriented towards national industrial policy and the creation of “national champions” while opposing European regulation of mergers; (2) a *Euro-mercantilist perspective* that was oriented towards European level industrial policy and the creation of “European champions”, insisting that such considerations should be taken into account in the EC’s regulation of mergers; (3) a *neoliberal perspective* according to which politically independent authorities should regulate mergers on the basis of objective competition criteria only; and (4) a *centre-left perspective* according to which the effects on unemployment and the rights of workers should be taken into consideration in the regulation of mergers (see section 5.5 for more details). Each of these USDRs represents a distinct perspective on the desired content, form and scope of merger control. The relative weight or significance of these perspectives has changed considerably decisively over time, corresponding with the shifting constellations of agents formulating their preferences and positions on the basis of them, something that was, in turn, related to broader ideational and economic developments. The significance of these USDRs is thus that not only were they reflected in the positions of the agents involved in the long process leading up to the adoption of the MCR in 1989; some of them were also reflected in the MCR itself, in the implementation of this regulation as well as in the reform of the MCR in 2003.

Now, a USDR offers a somewhat abstract perspective on the desirable regulation of a particular part of the field of regulation without actually showing how this perspective can be turned into practice. This brings us to the lowest level of abstraction where we have *concrete ideas of regulation* (CIRs). These ideas, which to some extent emerge out of USDRs, serve as the basis on which actual regulation is implemented. To put it differently, actual regulation can often be seen to reflect a compromise between various CIRs. To use merger control as an example, this could be concrete ideas about the threshold level (precisely when should mergers be regulated by national institutions and when should they be regulated by supranational institutions), about what concrete tests the Competition DG should apply in its regulation of mergers and ideas about the ideal decision making procedures and time-limits in the assessment of mergers. Because many CIRs are grounded in, but of course not reducible to, a USDR and thus ultimately also a GDR these higher-order ideas/discourses are reflected in actual regulation. It is thus important to keep in mind that CIRs and

the way they are manifested in actual regulation concerns more than mere technicalities. Ultimately CIRs are attempts to translate higher order discourses (USDR and GDR) into practice and such discourses are thus inherently political in that they, if institutionalised, will tend to favour particular groups in society at the cost of others. The perspective outlined here thus breaks with the tendency in the new governance literature in EUS (e.g. Majone, 1996) to see the EC/EU as ‘an apolitical, positive-sum resource allocation’ (Johansen, 2001: 119).

**Table 3.1: Ideas of regulation**

<i>General discourses of regulation (GDR)</i>	Overall perspectives or philosophies on how the economy in a given social space ought to be regulated
<i>Unit-specific discourse of regulation (USDR)</i>	Translate GDRs into perspectives on regulation in particular areas such as competition policy
<i>Concrete idea of regulation (CIR)</i>	Translate USDRs into actual regulation (which often reflects a compromise between several CIRs)

### 3.5. States and supranational institutions

When dealing with a phenomenon like European level regulation of mergers it is difficult, if not impossible (and certainly inexpedient) to ignore the role played by the national states and the EU. Indeed, much can be and has been written about the nature and functions of both states and a phenomenon like the EU. As regards the latter it has, for instance been conceptualised, as a regime (Hoffmann, 1982), as a federation (Burgess, 2000), a political system (e.g. Hix, 1999; Kelstrup, 1993), a political platform (Johansen, 2001), a new form of political domination (Schmitter, 1991) and even as an “onion” (De Neve, 2007). Similarly, it is well-known that “the state” has been theorised in a number of different ways from various perspectives (compare e.g. the various understandings of the state to be found in the edited volumes by Hay *et al.*, 2006 and Berg-Sørensen & Greve, 1998). In other words, it is not a foregone conclusion how one should conceptualise the states and the EU. In the present thesis where we are mainly interested in their role as regulators of capitalist economies, it is by no means the ambition to develop a full-blown theory of the capitalist state or supranational institutions.

If we look briefly at the way the state is conceptualised by the neogramscian scholars in IPE and EUS it is perhaps interesting to note that many of them would seem to have adopted a somewhat narrower view of the state than that of Gramsci. Indeed, the latter analysed the state in a highly inclusive sense where civil society was, at times, considered part of the state (see Gramsci, 1971: 261-263; also Jessop, 1982: 146-147). But from a neogramscian perspective the state 'is regarded as a structure within which and through which social forces operate rather than an actor in its own right' (Bieler & Morton, 2001b: 18). This view is more or less confirmed by Bastiaan van Apeldoorn, one of the scholars associated with the neogramscian "Amsterdam perspective", who writes that it 'tends to see the state only as an arena for (transnational) class forces' (2004: 168, see also van Apeldoorn, 2002: 46-47). Here the state is seen as distinct from yet fundamentally shaped by forces in civil society (mainly class forces) (although see Cox, 1996: 479) and state power is understood as something that emerges from social forces<sup>46</sup>. The EU and other international institutions are essentially conceptualised in these terms as well: that is as a supranational arena or structure or terrain in and through which social forces operate.

The neogramscian perspective on the state and supranational institutions certainly has its merits and does indeed constitute a major step in the right direction compared to the perspectives offered by the realist and liberal schools in IR/IPE/EUS. However, it is still a somewhat one-dimensional notion that, with respect to states, does not really take into account the various "moments of stateness" (Hay, 1996: 9) or "aspects of statehood" (Ougaard, 2004: 66) such as the state as a nation, the state as a territory, the state as an entity that enjoys a monopoly on the legitimate use of violence, the state as an institutional ensemble and so on. More importantly in the context of the present thesis, is the danger that the neogramscian perspective leads to an inadequate perspective on the regulation of capitalism (including competition). That is, a perspective that would tend to reduce regulation to a reflection of the "balance of power" between the various social forces of the day.

What needs to be taken into account here is that, whereas states and supranational institutions are on one hand crucially influenced by underlying class compromises and often seek to accommodate the preferences expressed by the prevailing social forces in society, they also at the same time possess a significant degree of independence from such forces. That is, whereas various social forces can and often do provide inputs into policy processes, they rarely get to design the rules on the basis of which the objects in the field of regulation are regulated. Political decision-makers, bureaucrats and others, who act on the basis of ideas of regulation that may or may not diverge from those of the

prevailing social forces, generally leave their imprint on the various (sub)units of regulation. Hence, rather than perfectly reflecting the outcome of class conflicts, states and supranational institutions ‘act as a distorting mirror to reproduce a highly imperfect reflection of these conflicts and one that imprints its own image on their resolution’ (Hall, 1986: 233).

This would seem to indicate that rather than reducing the state and the EU to structures, terrains or arenas where class struggles take place, it might be more precise to conceptualise both as ensembles of institutions, that are *inter alia* form part of various (sub)units of regulations making up the wider ensemble of regulation. Needless to say, “institution” is one of those concepts that social scientists tend to use almost indiscriminately to refer to more or less everything under the sun<sup>47</sup>. But here we will understand institutions to be, at the most general level, a variant of what was earlier on termed as a position-practice system (see section 2.4). That is, it is basically an ensemble of related positions that engender particular practices (without determining them). Institutions perform particular tasks and are distinguished from other position-practice systems by their ability, in principle at least, to communicate and act as one agent when interacting with their environment (which in part consists of other institutions) – despite being composed of positions filled by a number of individuals. To be sure, all decisions in an institution are made by such institutional agents. But they are made “on behalf” or “in the name” of the institution, not of the institutional agents themselves, and this is what enables the institution to appear as an agent in itself. This is a deliberately narrow concept of institutions that does not, for instance, cover the buildings of a hospital, democracy, property rights, marriage, contract enforcement, table manners or money (and which has much in common with what is sometimes called “organisations”).

To say that the EU and its member states can be conceptualised as “ensembles of institutions” is to provide an “empty” definition that leaves open all the questions regarding the precise purpose and functions of states and supranational institutions. This is a deliberate choice. Of course it is well known that, say, states have played and do play a substantial role as regulators of capitalist economies, for instance providing ‘stability and predictability by supplying an elaborate legal and institutional framework, backed by coercive force, to sustain the property relations of capitalism, its complex contractual apparatus and its intricate financial transactions’ (Wood, 2003: 17). Moreover, it is possible to put together long lists of tasks performed by the capitalist state (see e.g. Hudson, 2005: 98 and Jessop, 2002a: 45). But although it is possible to point to certain characteristic features of the national state, it is crucial to emphasise that the numerous ways in which state institutions

(like supranational institutions) relate to the field of regulation within a given social space are far from static; they may vary greatly from institution to institution, from one social space to another and from epoch to epoch (Hay, 1996: 5, see also Flinders, 2006). This is what makes it impossible to articulate a strong theory that captures the essence of the state and or the EU in terms of a single mechanism.

This is also a main reason why the either-or logic embedded in much of the mainstream theoretical literature on European integration is problematic. Here the relation between states and supranational institutions has of course been a central theme since the 1950s. But for decades the mainstream of EUS was (and to some extent still is) pervaded by what has been referred to as the “supranationalist-intergovernmentalist dichotomy” (Branch & Øhrgaard, 1999). Advocates of the former position argued for the importance of supranational institutions and in some cases suggested that they would to a smaller or larger extent replace national states (Haas, 1958; Lindberg, 1963), whereas the intergovernmentalists saw the EC as merely a regime or an international organisation and moreover, regarded European integration as a process that states were in charge of, and that they would remain more or less unaltered by (Grieco, 1996; Moravcsik, 1998; Taylor, 1982). Yet this was, in fact not only a mainstream phenomenon. A similar disagreement can be seen in the early Marxist studies of European integration. Here one group of scholars argued that the state would more or less automatically be replaced by new supranational structures when capital accumulation could no longer adequately be facilitated within the boundaries of nation states (e.g. Mandel 1970, 1975; Murray, 1975). And other scholars argued that one crucial role of the state is to ensure the coherence in society which is why it cannot be taken for granted that it will be replaced by new supranational structures just because it does no longer sufficiently match the needs of the “economic base” (see e.g. Deubner, 1979; Poulantzas 1974).

Considering the relationship between the member states and the EC/EU with the benefit of hindsight, it can indeed be concluded that the latter has developed into more than just an international organisation/regime. As any decent textbook on European integration will testify, the portfolio of the EC/EU institutions has expanded significantly over the years and indeed Community law has come to enjoy primacy over national law (see e.g. Weiler, 1999). Yet on the other hand, supranational institutions like the Commission, the Court or the Parliament have not replaced or marginalised nation states as crucial centres of regulation. States, or perhaps rather national governments, remain the primary “scale managers” that have a decisive say when it comes

to determining at what level (sub-national, national, supranational) the regulation of particular objects should be placed (Hudson, 2005: 110). The supranational institutions are related to institutions at the national (but also regional and international) levels and institutions at various levels may thus have part of the responsibility for the management of the same unit of regulation within Europe (say, competition policy). As such the EC/EU is best seen ‘as one element within a more complex multiscalar and multidimensional system of governance and regulation in Europe’ (Hudson, 2003: 58; see also Holman, 2004).

### **3.6. Programming institutions**

Although it is impossible to construct a convincing “strong theory” of states and supranational institutions, it is of course, relevant to consider how such ensembles of institutions come to perform their specific tasks with respect to the various objects of regulation. One way of thinking about this is to say that such institutions have been “programmed” (for instance through the adoption of treaties and regulations) in particular ways that define their concrete tasks, objectives and working procedures and thus also the way they are supposed to regulate concrete objects in a given social space. States and the EU are thus, *inter alia*, ensembles of institutions each programmed in different ways, on the basis of particular ideas of regulation, more precisely USDRs and CIRs

We will refer to the group of agents involved in the programming of an institution as the “programmers”, being well aware that not all the agents involved in a programming process are actually capable of influencing the outcome of this process. Of interest here is obviously *who* the programmers are – or rather where they are positioned. Here one distinction can be made between external and internal programmers. The *external programmers* are those who are involved in the programming of an institution from a position located outside this institution. A new institution is the outcome of external programming, but over time external programmers do not enjoy the monopoly of deciding the institution’s development. This is, of course, because the positions making up political and legal-regulatory institutions (whether national or supranational) are not just empty slots filled with robots that can be programmed in accordance with the preferences of various external programmers. On the contrary, they are populated with real individuals who will often attempt to influence the workings of the institutions on the basis of motives related, for instance, to their past experiences, their personal ideological inclinations or simply their desire to further their

own careers. Such *internal programmers* are often neglected, or their importance is downplayed, in society-oriented perspectives such as the neogramscian ones, where the focus is primarily on “external programmers” in the form of various class forces.

An institution may come to be more powerful in relation to other institutions than was intended by those who programmed the institution in the first place. Cox puts it this way: ‘Institutions reflect the power relations prevailing at their point of origin and tend, at least initially, to encourage collective images consistent with these power relations. Eventually, institutions take on their own life...’ (Cox, 1996: 99). Indeed, internal programmers may be able to gradually “re-programme” an institution. This means that it is often difficult for institutional “architects” to fully foresee let alone control the long-term development of institutions, which is by the way a well-known theme in the “historical institutionalist” literature (see e.g. Pierson, 1996; Thelen & Steinmo, 1992). But re-programming is of course also something external programmers can initiate in order to influence the way an institution (or an institutional ensemble) is managing its tasks – for instance, in order to bring an institution “back on track” or in response to developments in the field of regulation.

As programming often takes place through processes or struggles in which a large number of different types of agents with diverging preferences may be involved, the programming of institutions is often a compromise rather than something that is carefully planned by rational actors. Consequently, not only the wider ensemble of regulation but also the (sub)units of regulation in a given social space may contain a number of ‘irrelevant, residual, marginal, secondary, and even potentially contradictory elements’ (Jessop, 2002b: 106). When dealing with a group of programmers we may make a second distinction between those who are directly and those who are indirectly involved. Governments involved in international bargains over some regulation or treaty would be a prime example of *direct programmers*, whereas the various lobbyists, expert groups, foreign governments and other actors who attempt (and perhaps manage) to influence direct programmers can be denoted as *indirect programmers*. Generally speaking, class fractions and capital actors will thus fall into the latter category. Also, it can be noted that whereas the direct programmers generally interact with each other in the programming process, indirect programmers do not necessarily do that. The types of programmers are summed up in Table 3.2.



**Table 3.2: Types of programmers**

<i>External programmers</i> Those agents located in a position outside the institution that is being programmed.	<i>Internal programmers</i> Those taking up a position inside the institution that is being programmed.
<i>Direct programmers</i> Those directly involved in the programming of institutions (e.g. legislators)	<i>Indirect programmers</i> Those who successfully influence the direct programmers (e.g. class fractions, lobbyists, expert groups, foreign governments)

Institutions/institutional ensembles enjoy a degree of “operational autonomy” (Jessop, 2000: 330; 1990: 102) which, although it is not absolute (see below), is nevertheless a necessary precondition for them to be able to perform their tasks. In fact, the institutions making up the state and the EC/EU are to some extent operationally autonomous in a double sense: that is, not only vis-à-vis, say, powerful capital actors, but also vis-à-vis each other. The operational autonomy between two given institutions can be assumed to be particularly strong if they operate in different social spaces or if we are dealing with different types of institutions. As an example of the latter, a legal institution like a court cannot be fully controlled by a political institution, say a parliament. The latter can pass legislation, but the way it is interpreted and implemented by the former over time cannot be fully controlled. To put it differently, courts and parliaments *have* to be operationally autonomous from each other if they are to perform their respective tasks properly. This means that there is no central control room from which entities like the modern state or the EU can be fully steered, and that consequently there is no single agent (or single type of agents) who is able to take on the job as captain. In order to understand the development of given units of regulation over time, one thus needs to study the dialectical interplay between the various external and internal programmers.

Despite its notion of operational autonomy the perspective outlined here does thus not imply the ‘kind of “water- and airtight” separation of the political from the economic sphere as is the case with neoclassical economics and non-Marxist political theory’ (Moschonas, 1996: 27). As already mentioned, capital accumulation is the most important driving force in capitalist societies (see also Joseph, 2002: 210). This means that in any capitalist society, political power is closely related to economic performance. Indeed, the determination of political power is dual: ‘by its institutional *form*, access to political power is determined through the rules of democratic and representative

government, by its material *content*, the use of state power is controlled by the course and the further requirements of the accumulation process' (Offe & Ronge, 1975: 140). These two dimensions are, however, related in the sense that political decision-makers can only expect to remain in power insofar as they manage to create conditions conducive to production and the accumulation of capital (see also Lindblom, 1977: 172). Despite the operational autonomy of regulatory, political and/or legal institutions from capital actors, the different orders are thus in effect "substantively interdependent" (Jessop, 2000: 330, 1990: 102). That is, whereas such institutions depend on the economic resources generated by capitalist firms, the latter depends on various forms of regulation that they cannot provide themselves (and nor can the market).

Since the capitalist class is divided along different axes and since particular capital actors may therefore well have different, and possibly directly contradicting, preferences with respect to the preferred type of regulation it is not necessarily straightforward for the direct programmers to determine what preferences to "comply with". Moreover, one should not take the above remarks to suggest that political decision-makers are incapable of acting against the expressed preferences of economic groups or that the preferences of all non-economic groups are necessarily ignored. But the point remains that successful capital accumulation is always an essential policy consideration due to political systems' dependence on economic prosperity. Political decision-makers therefore constantly have to find ways to facilitate accumulation while at the same time making sure not to disappoint their electorates too much.

Now, in the process leading up to the establishment of a new institution, or the re-programming of an institution forming part of an already existing (sub)unit of regulation in a given social space, a number of competing ideas of regulation will often be articulated and promoted by various programmers. Whether an idea is actually institutionalised depends not so much on how "good" it is, as on whom its advocates are. That is, it clearly matters whether the support for a particular idea of regulation comes from a powerful direct programmer (say, a government of a core EU member state) or if it comes from an indirect programmer with few resources (say, a non-governmental organisation or an "expert"). In practice, changing constellations of internal/external and direct/indirect programmers may support a particular idea of regulation – and the relative political/economic weight of such constellations over time will do much to explain the impact (or lack of impact) of the particular idea. In turn, it should be recalled that political and economic

weight is related to structures and structural positions. As such agential, material and ideational mechanisms all need to be taken into account.

This brings us neatly to the notion of *hegemony* which is often used to describe ‘a type of rule which predominantly relies on consent alongside coercion’ (Bieler & Morton, 2001: 20). Here we will both narrow down and broaden the concept. First, in the present context there is little need to retain the element of “coercion” in the definition of hegemony: that is, it seems plausible to think of it as something that merely relates to a significant degree of consent with respect to particular ideas of regulation (see also Jones, 2006: 52). Second, hegemony is one of those concepts that Marxist and neogramscian scholars have tended to use in an overly class-centric way, for instance when talking about “hegemonic class fractions”. In the present context, we do not operate with any notion of a “ruling class”, for the simple reason that classes or class fractions do not “rule” capitalist societies. Indeed, due to the double operational autonomy of political, legal and regulatory institutions, hegemony is not something that can be established by one type of institutional agents or by class fractions. This suggests that we ought to think of hegemony as a broader phenomenon. That is, as something that, to use the words of Jessop (1990: 336), must ‘emerge from the interaction of various social forces rooted in different orders so that they share common programmatic objectives despite their differing codes’<sup>48</sup>.

In the present context we can talk of hegemony if the vast majority of programmers of an institution subscribe to a particular GDR and particular USDRs so that disagreements pertain to the level of CIRs. That is, if programmers generally agree on the purposes the regulation of, say, mergers should serve but have certain disagreements regarding the practical details. The hegemony of particular ideas may thus lead to the marginalisation of those minorities who subscribe to different ideas. To be sure, hegemony is not a precondition for the programming of institutions as the programmers may subscribe to different GDRs and USDRs. However, a lack of common conceptions among key external programmers may of course lead to a more “blurred” or messy programming of an institution or even block its establishment entirely.

### **3.7. Putting theory to work**

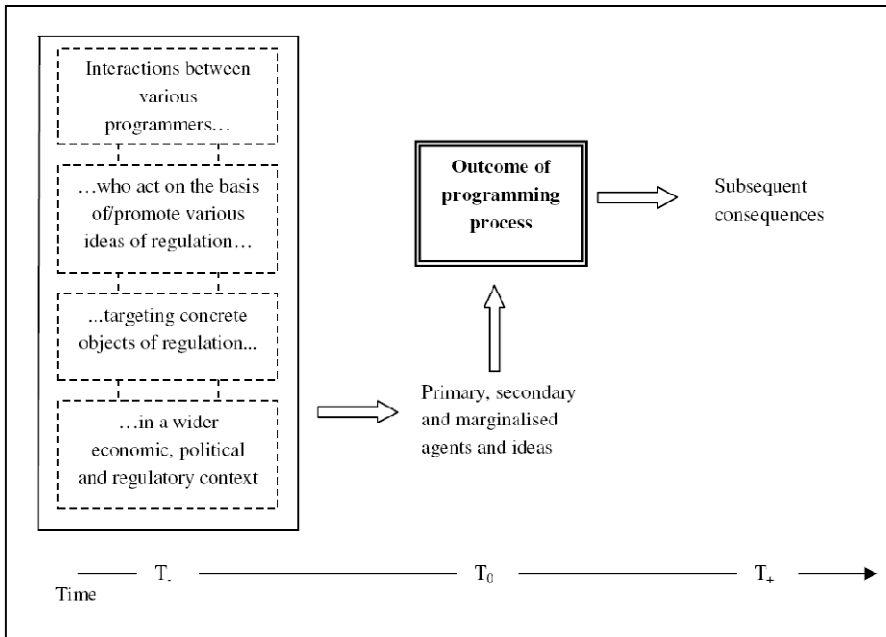
A crucial question confronting anyone engaged in theoretically informed empirical research is how to link theory and empirical analyses. In section 2.5 the procedure followed in order to construct the

theoretical perspective outlined above was explained. As it will be recalled, it has been developed through dialogues with not only critical realist philosophy and with various theoretical literatures; it has also been developed through iterative movements between theory and various empirical sources. This method of theory construction has implications for the way one can meaningfully apply the perspective in the analyses of the history of European level merger control. Certainly it would seem rather futile to perform the ritual of presenting a theory, deriving hypotheses from it (and hypotheses derived from other theories) and then showing how this theory is superior to the available alternatives. For one thing it would appear like a circular exercise, as hypotheses derived from a theory would be tested against empirical data that already informed the construction of this theory in the first place. Moreover, the perspective presented here is a “weak theory” (see section 2.5) which does not lend itself easily to the construction of testable hypotheses about the causal relationships between clearly demarcated independent and dependent variables.

Chapters 4 to 7 do therefore not serve as a theoretical testing ground. Instead they contain *empirical information that has been interpreted or “processed” through the theoretical perspective*. That is, the concepts and ideas presented in this chapter are integrated in a “historical narrative” about the developments in the merger area. It should be remembered that the phenomena to be explained in the different chapters are quite different: in Chapter 4 the main task is to explain why merger rules were not included in the EC Treaty when such provisions were contained in the ECSC Treaty; in Chapter 5 it is the failure to adopt a merger regulation in the early 1970s; in Chapter 6 it is the adoption and design of the 1989 MCR; and in Chapter 7 it is EC merger control in the 1990s and the revision of the MCR.

If only for that reason it is inexpedient to squeeze the analyses into a uniform straitjacket. To put it differently, the different chapters are not structured in a completely identical manner, nor are all components of the theoretical perspective used in all chapters. This said, the history of European level merger control is to no small extent explored by looking at key “programming outcomes” (such as the adoption of treaties and regulations) as the result of micro-processes that took place in broader contexts. Indeed, as it appears from figure 3.2 such outcomes are explained by looking at the interactions between different types of programmers who, located in a number of wider contexts, act on the basis of and/or promote various ideas of regulation targeting concrete objects of regulation.

**Figure 3.2: Studying programming processes**



Source: Own figure

Each of Chapters 4 to 7 thus start out by mapping the wider and by no means static contexts against which the developments in the merger area should be understood. It follows as a logical consequence of the content of this chapter that it is particularly relevant to focus on three types of contexts. A *first* context is the overall developments of the capitalist system and the way it was regulated in the period in question. Here the focus is on “mega-trends” such as the transnationalisation of capitalism and the shift away from the Keynesian welfare state towards neoliberal forms of regulation. A *second*, and to some extent related, context is the developments in the core member states, namely Germany, France and (from the 1970s) the United Kingdom (UK). Here attention will be paid to broader trends at the level of the ensemble of regulation and in the unit of regulation dealing with competition in these social spaces, with particular focus on the subunit dealing with merger control. Needless to say mergers, and the way this concrete “object of regulation” came to “transcend” the national social spaces, are of particular interest here. A *third* context is developments in the EC, that is, the overall “trends and events” in the integration process. Here the unit of regulation of which merger control came to form part, namely the EC competition unit, is of course of particular interest (needless to say, this third context is irrelevant to Chapter 4). As such, what follows in the next four chapters is not just the story of EC merger control but a much more comprehensive “narrative” of the transformation of European capitalism and the EC/EU.

Having outlined the broader contexts the task becomes to throw light on the concrete “micro-processes” leading up to “programming outcomes”, whether positive (such as agreement on a regulation) or negative (failure to reach agreement). A crucial aspect in explaining the outcome of (re-)programming processes is to identify the main ideas of regulation, more concretely USDRs and CIRs on merger control, and the (possibly changing) constellations of different types of programmers that formed their preferences and articulated their positions on the basis of these ideas. Hence, in the analyses that follow in the next four chapters an attempt to categorise the relative impact of different ideas of regulation at different junctures is made. Here we will tentatively distinguish between primary, secondary and marginalised programmers and ideas. The ideas most clearly reflected in the outcome will be categorised as *primary* and so will the programmers actively promoting these ideas. Programmers that passively support such ideas or actively support any other ideas of regulation that are reflected in the outcome are categorised as *secondary* and so are these “other ideas”. Finally, ideas of regulation that are not reflected in the outcome are categorised as *marginalised* and so are their “supporters”.

The purpose of this categorisation is to think about the impact of particular ideas of regulation in a systematic way. Unfortunately social reality does not lend itself easily to “categorisation exercises”: it is not always possible to identify all types of agents and ideas; that an idea has come to prevail does not necessarily mean that *all* of its supporters were equally “primary”; and the distinction between active and passive support for ideas is not always an easy one to make. The categorisations are thus thought of as being no more than tentative and thus also by no means perfect. To explain the relative impact of ideas of regulation at a given juncture one needs to look at the “balance of power” between the programmers, which is in turn related to the wider contexts. As such, the explanations of programming outcomes will refer back to contextual developments.

### **3.8. Concluding remarks**

In this chapter a critical political economy perspective on regulation has been outlined. This perspective seeks to make sense of the phenomena of mergers and merger control by seeing them, respectively, as parts of capitalism and capitalist regulation. Both the parts and the whole of which they form part are understood to be inherently dynamic and changeable phenomena. This necessitated the introduction of a number of relatively open theoretical concepts that can be used to

analyse the link between merger control and broader socio-economic and ideational developments over time: concepts such as “ensembles of regulation”, “unit-specific discourses of regulation” and “programming”. In the chapters that follow the history of European level merger control is analysed through the lenses of this theoretical perspective.

## **4. The establishment of a European level competition unit of regulation**

The purpose of this chapter is to explore the establishment of a European level competition unit of regulation in the period stretching from the early post-war years to the early 1960s. In particular it seeks to explain the inclusion of merger control provisions in the 1951 ECSC Treaty *and* the exclusion of such rules in the competition regulation provisions of the 1957 EC Treaty (in Article 66). Hereby it seeks to answer the first sub-question posed in section 1.1: ‘Why were merger rules not included in the EC Treaty when such provisions were contained in the ECSC Treaty?’ In addition to this the chapter also explains a third development, viz. the adoption of Regulation 17 through which the EC Treaty’s competition rules were fleshed out.

The chapter proceeds in six steps. The first three sections set out to map the broader context against which these “outcomes” should be understood, focussing respectively on the post-war world order of embedded liberalism, the adoption of competition rules in Germany’s emerging “social market economy” and the small and reluctant steps taken towards the introduction of such rules in France where a state-led form of capitalism was taking shape. In the next three sections the processes leading up to the three above-mentioned “outcomes” are then dealt with, exploring in turn the programming processes resulting in the inclusion of competition rules in the two treaties and the adoption of Regulation 17. A short conclusion summarises the findings.

### **4.1. Embedded liberalism**

The end of World War Two signalled the beginning of a new era where the United States (US) assumed leadership of the capitalist world. The new order that emerged, which is sometimes referred to as the *Pax Americana*, ‘was brought about through a change in the power relations among the major states, reflecting a decisive shift in their relative economic-productive powers’ (Cox, 1987: 212). On one hand, the new order marked a departure from the GDR that had prevailed since the end of the First World War. This discourse had given primacy to industrial capital over money capital; to the national over the international level; to active state interventions and social



protection over the invisible hand of the market. On the other hand, however, it did not constitute a return to a liberal order identical to the one characterising the *Pax Britannica* era (stretching from the 1820s to 1914). This system had given primacy to money capital over industrial capital; to the international over the national level; to the free play of market forces over state interference in the economy. What emerged after the Second World War was instead an order based on a synthesis that has been denoted as “embedded liberalism” (Ruggie, 1982) which allowed for ‘Keynes at home and Smith abroad’, to borrow an expression used by Gilpin (1987: 355). The new order involved the construction of national welfare states that were based on a compromise between organised labour and national industrial capital. But it ‘combined aspects of expanding production with a measure of re-liberalization in the international sphere. Trade, however, held priority over money capital (in line with the hegemony of the productive capital view)’ (Overbeek & van der Pijl, 1993: 6; see also *ibid*: 11-14; Rupert, 2007: 160-161).

Embedded liberalism, had originated in the US with the New Deal, and was then ‘projected on to Western Europe through the Marshall Plan’ (Overbeek & van der Pijl, 1993: 11). The American strategy in the post-war reconstruction phase was, on one hand, to transform the capitalist world, not least the Atlantic social space, into a zone where money, goods and technology could move freely – that is, to (re)create an open world economy. Yet on the other hand, the Marshall Plan which gave the Western European (henceforth European) countries a strong incentive to become incorporated in this economy (inter alia by breaking down barriers to trade) was also an attempt ‘to kick-start the transformation towards Fordism’ in Europe (van der Pijl, 2006: 38; see e.g. Jessop & Sum, 2006: 123-151 on Fordism).

As an occupying power in Germany, the Americans were in a good position to influence the developments in post-war Europe and they did indeed seize this opportunity (see Djelic, 1998 for a detailed account). Not least in Germany, of course. One of the policies pursued by the Americans and their allies was to take action against the cartels and significant concentrations in German industry. In the US, an extensive antitrust regime had evolved since the adoption of the 1890 *Sherman Act*. From 1914, the year the *Clayton Antitrust Act* was enacted as a supplement to the *Sherman Act*, this administration explicitly prohibited M&As that would “substantially lessen competition” (see e.g. Bork, 1978: 15-49 or Dumenil *et al.*, 1997 on the historical foundations of the US antitrust regime). In Europe, on the contrary, many industries had traditionally been shielded from competitive pressures, either through private arrangements or through regulatory interventions

(see Wigger 2008a: 111-116 for a good discussion of this). This was certainly the case in sectors of key importance such as coal and steel. In the steel sector, cartelisation was the rule, rather than the exception and had become an international phenomenon in the 1920s and 1930s, where the International Steel Cartel consisting of members from seven European countries had controlled a significant proportion of world production and exports. In the coal sector, private and state monopolisation was widespread in countries like Germany, France, Belgium and the Netherlands (see Schmitt, 1964: 103-104 for more details).

Cartels had traditionally been considered legitimate under German law and had in some cases even been compulsory (see Marburg, 1964). It was widely known, however that cartels and monopolies had served as an important factor for the rise of Adolf Hitler and the military power of the Nazis. Consequently, the US and her allies saw it as a precondition for future peace and democracy in Europe that German companies were downsized considerably (e.g. Monnet, 1976: 351; van der Pijl, 2006: 40). Naturally the Allies took particular interest in the Ruhr district which, at the time, constituted the industrial heartland of not only Germany but of Europe. With the so-called Potsdam Agreement, the Allies thus agreed that measures were required in order to de-concentrate vital sectors of the German economy: 'At the earliest practicable date, the German economy shall be decentralised for the purpose of eliminating the present excessive concentrations of economic powers as exemplified in particular by cartels, syndicates, trusts and other monopolistic arrangements' (Paragraph 12, Report on the Tripartite Conference of Berlin, quoted in Eyre 1999: 97).

Accordingly, the Allies imposed decartelisation laws on Germany during the years of occupation, under which companies in sectors such as chemicals, coal, iron and steel, banking and plastics were decartelised and often divided into smaller entities. To mention but a few examples, the giant chemicals company IG Farben was split into three new companies, namely BASF, Bayer and Hoechst (Goyder, 1993: 17)<sup>49</sup>. The *Vereinigte Stahlwerke* group, which had produced 40 percent of the Reich's crude steel output in 1937, was also broken up. After de-concentration its largest successor, August Thyssen Hütte (ATH), accounted for about 10 percent of the output in federal Germany (McLachlan & Swann, 1967a: 197). And in the banking sector, the *Grossbanken* were divided into 33 smaller units (Djelic, 1998: 165).

In the immediate post-war period, the European economies did generally not perform well in relative terms: in 1950 'Western Europe's GDP per person was 10 percent below that of Argentina; France's was over 15 percent lower, Germany's over one-third lower, Italy's 45 percent lower, Spain's less than half. Germany and Italy were poorer than Chile' (Frieden, 2006: 281). Accordingly, at first the overriding priority of the European countries was to simply recover and get back to pre-war production levels and living standards. However, from the early 1950s to the early 1970s the European economies, or rather the world of developed capitalism, experienced an exceptional economic boom, later sometimes referred to as the "Golden Age". In this period the world scale output of manufacturers quadrupled and world trade in manufactured goods increased tenfold (Hobsbawm, 1994: 258-261).

#### **4.2. Competition policy in Germany's "social market economy"**

In Germany, a long period of sustained growth and full employment, known as the "economic miracle" or *Wirtschaftswunder*, assisted the rehabilitation of the country greatly (Davies, 1996: 1074). Whereas the average annual growth rate as measured in GNP had been 1.06 % in the period 1914-1950, its annual average was an astonishing 8.6 % in the 1950-1959 period (Dormois, 2004: 12, 18). The "miracle" was fuelled by significant state aids for industry but was also due to the heritage from the *Reich*: 'German industrial capacity had been enormously expanded by the Nazi war economy and only marginally destroyed by Allied bombing and the subsequent dismantling of industrial installations' (Spohn & Bodermann, 1989: 82; see also Küster, 1974: 65). The modernisation of German industry in the 1950s also entailed the introduction of Fordist production methods. The political sphere was characterised by great stability after 1949 (the year where the Federal Republic was founded). According to one historian, 'West German politics were, frankly, unexciting' from this moment and onwards (Davies, 1996: 1074). A coalition government led by the Christian-Democratic Union (CDU) was in power for seventeen years (up to 1966) and sought to construct a system combining free markets with a welfare state, a so-called social market economy (*soziale Marktwirtschaft*). The main elements in this system was 'price stability, the creation of favourable conditions for production, a system of social security, and international free trade' and 'the regulatory role of the state in this approach was and still is by and large restricted to securing general conditions' (van der Wurff, 1993: 164-165; see also Jessop & Sum, 2006: 130-133).

Intellectually speaking, the social market economy was associated with the ideas of the ordoliberals of the so-called Freiburg School (for detailed accounts see Gerber, 1998: 232-265 or Smith, 1994: 16-20, see also Eucken, 2006 for a classic statement of ordoliberalism). According to ordoliberalism, the state should create a proper legal environment for the economy and maintain a healthy level of competition. If the state failed to take active measures to foster competition, ordoliberals feared that oligopolies or even monopolies would emerge, thereby undermining the advantages offered by the market economy. Ultimately this would also pose a threat to democracy since strong economic power can be transformed into political power (see also Lemke, 2001 on ordoliberalism). As Gerber (1998: 240-241) explains, many ordoliberals ‘sought an economy composed to the extent possible of small and medium-sized firms and thus a society with a minimum of “big business” and all ordoliberals ‘tended to view economic concentration with suspicion’.

The preservation of competition was thus a cornerstone in ordoliberalism, and there is no doubt that the advocates of ordoliberal ideas did shape the way regulatory institutions were programmed in post-war Germany. Certainly, such ideas can be detected in the German competition law that, after years of negotiations and heated debates, replaced the Allies’ decartelisation laws in 1957. The German competition unit of regulation came into being with the *Gesetz gegen Wettbewerbsbeschränkungen* (GWB) with which the politically independent *Bundeskartellamt* (BKartA) was programmed to take responsibility for combating cartels, a quite daunting task considering Germany’s history in this area. The BKartA was to be exclusively concerned with the preservation of competition, something that clearly fell in line with ordoliberal thinking.

On the other hand, however, ordoliberal ideas were far from hegemonic in Germany. This also had consequences in relation to the GWB. Its adoption was delayed for several years and previous drafts of the law would have implied much tougher policies on anti-competitive practices than those following from the law that was eventually adopted (Cini & McGowan, 1998: 9). In particular, it is noteworthy that the GWB did not include provisions for merger control, although mergers would clearly be one important mechanism through which concentration could take place. That merger provisions were initially left out of the GWB was due to strong opposition from large sections of German industry and their allies in especially the CDU and its sister party, the Christian-Social Union (CSU). Their argument was that ‘many German firms had not yet reached their optimal size,

and merger controls might have inhibited their doing so' (Gerber, 1998: 302). Although "ordoliberal forces" in both the BKartA and the SDP soon after the enactment of the GWB began pressing for such provisions (Gerber, 1998: 302-3), they did not become part of the German competition policy regime before 1973. In other words, the ordoliberals had not been entirely successful in their efforts to introduce a strong competition law at the national level. Accordingly, it is necessary to take a balanced view on the importance of ordoliberal ideas in Germany and acknowledge that although they were influential among important members of the political elite, they also had very strong enemies in both the economic and political elites.

Soon after the de-concentration processes had ended 'German industry was once again on the path of concentration and centralization' (Spohn & Bodermann, 1989: 85). Unfortunately the documentation of the magnitude of merger activities in the period prior to the adoption of the GWB leaves much to be desired – and the same goes for the merger activities in the other European countries in this period. But there is no doubt that a significant concentration of both industrial and money capital took place. For instance, a number of mergers took place in the banking sector in 1956, hereby allowing resurrection of the *Grossbanken* (van der Pijl, 1984: 164; see also Canelos & Silber, 1970: 30-33).

### **4.3. Competition policy in France's state-led form of capitalism**

In France, the war had cost approximately a quarter of the country's wealth, the infrastructure had been seriously damaged, agricultural and industrial production was very low compared to the pre-war levels and inflation was high (Dormois, 2004: 17). The path chosen here in order to bring the economy back on track was one of state-led growth. Indeed, there was a long tradition for economic interventionism by the French state, but now it was decided to use the state to spur significant transformations in an economy characterised by many small and stagnant producers (Hall, 1986: 139; Michalet, 1974). The state took control over key sectors of the economy: the Bank of France and several private banks were nationalised, as were the coal, gas, railroad and electricity industries along with Air France and the largest insurance companies. Moreover, a national planning board, the *Commissariat Général du Plan*, was created and given responsibility for the preparation of plans designed to enhance the performance of French industry (Hall, 1986: 140-141, 166-167). Among the members of the first planning board, which was led by Jean Monnet, it was generally

believed that industrial units in France were too small by international comparison. In their view, '[m]odernization meant concentration within each sector of industry, larger production units and firms, the adoption of machines and technologies that would make mass production possible, and a rationalization of management and production methods' (Djelic, 1998: 137). As later chapters will show, this positive attitude towards concentration of capital was to endure for many years in French economic and political circles.

The work of the planning board was mainly carried out in a number of Modernisation Commissions consisting of representatives from big business and labour as well as of experts and planning staff. The trade unions were however marginalised from the outset, and the two largest unions thus chose to boycott the proceedings for many years (Hall, 1986: 158; see also Cox, 1987: 229-230 for an interesting discussion of "two-tier corporatism" in France). In the words of one commentator, the Commissions 'have contributed largely toward bringing together the state on the one hand and large enterprises on the other' (Michalet, 1974: 113). Whereas the model of capitalism that emerged in Germany was one where the state was mainly preoccupied with creating and sustaining a legal framework within which companies could operate, the model that emerged in France was thus one where the state rather manifestly sought to steer the economy through the Plans, and where the ties between the big capitals (oligopolies and monopolies) and the political system were particularly strong. It is not possible to go into a discussion of the various ways in which this steering was carried out, let alone of the content of the various plans (but see Hall, 1986: 139-191; Djelic, 1998: 135-150). Suffice it to mention that the first plan, the so-called Monnet Plan, identified six sectors, namely coal, steel, electricity, transportation, agricultural machinery and cement, as the most crucial for the development of France's economy and outlined a detailed investment programme for each of these sectors (Hall, 1986: 142).

The attempt to put the French economy back on track through planning was apparently successful. As Hobsbawm (1994: 274) comments, '[t]his adaptation of Soviet ideas to a capitalist mixed economy must have had some effect, since between 1950 and 1979, France, hitherto a by-word for economic retardation, caught up more successfully than any other of the chief industrial countries with US productivity'. To be sure, the significance of the influx of American aid through the Marshall Plan should not be overlooked in this context. But in any case the *Trente Glorieuses*, the French version of the Golden Age, had begun, manifested by the fact that the average annual

growth rate as measured in GNP went from 1.15 % in the period 1914-1950 to 4.6 % in the 1950-1959 period (Dormois, 2004: 12, 18).

According to Venturini (1971; see also Haas, 1958: 81), France was the European country with the highest rate of mergers in the immediate post-war years. As already mentioned, the merger activity figures for this period are uncertain and inadequate. Bearing this in mind, data presented in Suleiman (1975), suggests that 849 French firms were involved in concentrations between 1950 and 1960, mainly in industries of mechanics and electronics (181), banking and insurance (183) and chemicals (149). These figures do not show whether the number of mergers was increasing in this period, nor do they document the extent to which these mergers were intra-national. However, other data show that the 500 largest French enterprises were involved in 536 mergers in this period and that the annual “number of operations of concentration” rose, although not in a constant manner, in the period. It thus increased from 21 (1950) and 9 (1951) to 68 (1959) and 75 (1960) (see Suleiman, 1975: 27-28). That such a relatively large proportion of the mergers involved the biggest capitals is probably not a coincidence but directly related to the fact that whereas the state did not take much interest in smaller companies, it directly attempted to promote concentration among the larger ones, a phenomenon that became more pronounced in the 1960s and 1970s with the conscious attempts to create “national champions” through industrial policies (see Chapter 5).

As this might also indicate, the French approach to competition was one that differed a great deal from the German and indeed there was no competition policy tradition in France (Venturini, 1971: 9). As such, mergers were not a concrete object of regulation at this juncture. It should be mentioned, however, that in August 1953 *Decree 53-704* was adopted, hereby adding to the *Price Control Ordinance* of 1945 (which gave the government the power to freeze wages and to control all prices) three articles dealing with the “Maintenance of free competition” (Article 59 *bis*, *ter* and *quater*). It appears from the first of these articles that:

‘All concerted actions, agreements, express or implied, understandings, or coalitions under whatever form or for whatever reason, which have as their object or may have as their effect the restriction of the full exercise of competition by placing an obstacle in the way of a lowering of production costs or sales prices or by favouring an artificial increase of the prices, are prohibited, except as provided in article 59 *ter*’

Article 59 *ter* exempts from prohibition those cases where it can be justified that the agreement will have the effect of ‘improving or extending the outlets of the production, or of assuring the

development of economic progress by way of rationalization or specialization’ (both articles quoted from Riesenfeld, 1960: 595).

Although the adoption of the *Decree* did signal that not all agreements between companies would be accepted, the inclusion of these rather broadly formulated exemptions reflect that it should not be seen as a radical departure from the path chosen in the past. The main reason why the provisions were passed at all was US pressure: in exchange for financial aid to the reconstruction of Europe, the Americans pushed for antitrust measures that would prevent distortions of free trade on national and global markets (see e.g. Pedersen, 1996). According to Dumez & Jeunemaitre (1996: 221), the French head of government only approved it ‘on condition that “no one would ever hear about it”, a political manoeuvre designed to pacify one of the parties in the governing coalition’. It is thus not terribly surprising that the rules were never strictly enforced. As one scholar put it, ‘cartels and similar combinations have been subjected to an ever increasing control and curbing of manifest abuses. But they still enjoy a wide area of toleration and legitimate action and, above that, there are many conditions or sectors of the economy in which the government considers combinations and their discipline as salutary and in the public interest with the attendant grant of privileges and subsidies’ (Riesenfeld, 1960: 587). Other commentators went somewhat further and wondered whether French competition regulation was not ‘an exercise in futility’ (see Jenny & Weber, 1975). In other words, the provisions were mainly included in the *Ordinance* for the sake of appearances and were, importantly, not designed to target mergers. Such provisions did not become part of French law before 1977 (Garnier & Asselineau, 1991: 43).

As regards the other countries that were to join the ECSC and later the EEC, Belgium and Luxembourg did not have any competition laws. In Italy the 1942 Civil Code did only to a limited extent regulate monopolies and restrictive practices and under the Dutch 1956 *Wet economische mededinging* (Economic Competition Act) cartels were permitted as long as they were not “abused”. On balance it seems fair to say that ‘competition law in the Six was in a primitive state’ towards the end of the 1950s (Goyder, 1993: 30).



#### **4.4. The first step: competition policy and the ECSC Treaty**

On 9 May 1950, the so-called Schuman Plan, named after French Foreign Minister Robert Schuman, was announced with a declaration. The idea was to establish a new supranational organisation that would place the ‘Franco-German production of coal and steel as a whole ... under a common High Authority’ and the Plan was presented as an important step towards a united Europe, as an attempt to overcome ‘the age-old opposition of France and Germany’ (Schuman, 1950). Moreover, the declaration vaguely hinted at the need for the competition rules that would later form part of the ECSC treaty by stating that ‘[i]n contrast to international cartels, which tend to impose restrictive practices on distribution and the exploitation of national markets, and to maintain high profits, the organization will ensure the fusion of markets and the expansion of production’ (Schuman, 1950). The Schuman Plan had first been drafted by Jean Monnet, the French civil servant who led the first planning board (see section 4.3 above). To understand how radical and remarkable it was one has to keep in mind the importance of coal and steel at the time. As Lovett (1996: 426) writes, coal ‘provided European industry with three-quarters of its energy needs. No wheel turned, no machine operated without coal’ and steel ‘occupied a position of unchallenged supremacy’ in this period, where plastic or composite materials had yet to be invented. With the plan the French thus ‘appeared to be surrendering control over two sectors vital both to the economic well-being of France and its physical defence’ (1996: 426).

Indeed, this initiative would never have seen the light of day had it not been because it was the only way in which the French could influence developments in Germany’s coal and steel sectors. At first, the French policy towards Germany had involved attempts to win control over the coal resources in the Saar and to prevent economic recovery in the Ruhr. This was understandable as the Ruhr had ‘become a synonym for the evil German military-industrial complex’ and as ‘its resuscitation would threaten France’s own economic revival’ (Dinan, 1999: 19; see also Scheingold, 1965: 226). But whereas France was capable of influencing developments in the Saar, for the simple reason that it formed part of the French zone of occupation, the Ruhr was British “territory” and not subject to French influence. And as the governments of the UK and in particular the US had come to the conclusion that Ruhr’s recovery was the key to the recovery of the European economies, they ‘gradually loosened the Ruhr’s economic shackles’, while a frustrated France could merely watch from the sidelines (Dinan, 1999: 20).

What made a common market for coal and steel an attractive solution to these problems was that it ‘would open for France a new outlet for her vastly expanded steel production, thus safeguarding the planning and investment for steel carried on in the four previous years by Monnet’s Commissariat du Plan, then beset by fears of having overinvested. The common market, finally, would assure a French coal supply from the Ruhr...’ (Haas, 1958: 242). Initially a bi-lateral arrangement with Germany was what the French had in mind, but it was soon decided also to invite other neighbouring countries who would be affected by the new organisation. Accordingly, six countries participated in the negotiations over the ECSC Treaty that began on 20 June 1950 in Paris. This made the negotiations somewhat more complex than they would otherwise have been, even though both the German and the French proved willing to make some minor concessions to the other countries (see e.g. Lovett, 1996: 431).

The inclusion of competition rules in the treaty that was to result from these negotiations was important for the French negotiators. Indeed, according to one commentator ‘[i]t was the intention and the goal of the architects of these communities to rely on competition as the principle auto-mechanism of their common markets and as a main force making for technological progress and economic growth’ (Riesenfeld, 1960: 575). But reaching agreement on such provisions proved very difficult. During the negotiations, in November 1950, Jean Monnet wrote to Robert Schuman that “substantive differences” still existed with regard to (among other issues) the competition policy provisions. And he then went on to describe the importance of such rules in the following way:

‘...the provisions on cartels and industrial concentrations affect the very substance of the Schuman Plan. The question is whether [...] the planned organisation will be the opposite of an international cartel, or whether the High Authority will have authority in name only, with the powers transferred by the governments to the European Coal and Steel Community actually being diverted and handed over to coalitions of private interests. In particular, these provisions must, without creating any discrimination or economic disadvantage for any of the Member States, ensure that it is impossible for firms in the Ruhr to rebuild the political power, which they wielded with such disastrous effects for Germany and for Europe as a whole’ (Monnet, 1950)

These remarks by Monnet suggest that the difficulties in reaching agreement on the provisions were due to the fact that the programmers were informed by some largely incompatible unit-specific discourses of regulation (USDRs). The main issue at stake was, to put it crudely, who was to determine the mode of operation of the coal and steel sectors. Was it to be determined by companies or by bureaucrats? In other words, some programmers subscribed to a discourse according to which

cartels and mergers should not be hindered by the new supranational institutions. If anything, they should be facilitated by them. And other programmers subscribed to a discourse according to which the preservation of competition through the establishment of a well-functioning European level competition unit of regulation was seen as desirable. Let us first take a look at the programmers who were informed by the former discourse, which can be thought of as the “pro-concentration USDR”.

The most significant opposition to the proposed competition rules came from indirect programmers in the form of German, French, Italian and Belgian capital actors. In Germany, such actors generally welcomed the Schuman Plan as they saw the projected ECSC as an opportunity to get rid of the above-mentioned decartelisation laws that had been imposed upon Germany by the Allies. However, although the German capital actors generally liked the prospect of a common market for coal and steel, they also wanted certainty that the new regulatory institutions would not prevent German re-concentration to a level corresponding to the size of French capitals. This was especially the case, as ‘massive concentrations in France’ had been ‘achieved since 1945’ and these concentrations would not be reviewable by the ECSC institutions as they had taken place prior to the establishment of the projected organisation (Haas, 1958: 81). Hence, ‘[o]bjections were raised against the anti-cartel features of the draft Treaty, which were derided as one more instance of the post-war mania to remake the European economy in the American image’ (Haas, 1958: 153).

In particular, the German steel industry lobbied the German government in order to persuade it to resist the inclusion of antitrust provisions. In a memorandum from the *Wirtschaftsvereinigung Eisen- und Stahlindustrie* submitted to Bonn on 4 July 1950, it was argued that, rather than giving an international bureaucracy in the form of the High Authority wide-ranging powers to intervene in the common market for coal and steel, the relevant trade associations should be allowed to play a much more important role in coordinating the activities in the market. That is, the *Wirtschaftsvereinigung* would have liked the ECSC to become a sort of international cartel where the High Authority would still have some limited powers, but where ‘a directorium of industrialists of all participating countries’ would in effect make the important decisions (memorandum quoted in Berghahn, 1986: 127). This was not regarded as an unrealistic scenario. Indeed, it was suggested that it would be impossible to avoid ‘certain coordinations in the fields of production, sales or prices – to mention merely the most important cartel elements’ and that, insofar this was considered

‘unacceptable, it is more practical not even to start work’ on the ECSC (memorandum quoted in Berghahn, 1986: 127).

In France, the ratification of the Schuman Plan ran into massive opposition from a broad range of capital actors. A campaign led by the *Chambre Syndicale de la Sidérurgie Française*, the national association representing the steel industries, attracted support from e.g. the Association of Engineering and Metal-processing Industries, representing more than 10.000 companies; the *Association de Cadres Dirigeants de l’Industrie pour le Progrès Social et Economique*, the members of which were a few hundred managers of large industrial companies; the *Confédération Générale des Petites et Moyennes Entreprises*, claiming to represent as many as 800,000 smaller companies; and not least the general employers’ general organisation, the *Conseil National du Patronat Français* (CNPF), representing most of the various capital actors and fractions of the French capitalist class (Ehrmann, 1954: 454-458, see also Berghahn, 1986: 128; Haas, 1958: 176-177). There were different reasons why French capital actors opposed the draft proposals of the ECSC Treaty. One reason was that Monnet and his staff had not consulted with the different business associations prior to the announcement of the Schuman Plan – and as if this was not bad enough, these associations soon discovered that they were only to be assigned an “advisory” role in the projected scheme. Yet there were also more substantive reasons for opposition. Of these, the most important was ‘true anxieties over future competition from participating countries, and especially from Germany’ (Ehrmann, 1954: 461).

Like it was the case in Germany, then, the anti-trust provisions became the main bone of contention. In particular, French capital actors strongly opposed the idea that some supranational bureaucracy should be granted the authority to enforce strict anti-cartel rules and to prevent them from merging. That they considered this to be an important question was also understood by the National Assembly’s *rapporteur* for the ratification bill who pointed out that if the articles containing the competition provisions ‘had not been incorporated, organised French industry would not have opposed the treaty’ (quoted in Ehrmann, 1954: 460). At the same time, however, the French capital actors would like somewhat different standards to apply to their German colleagues. If possible, Germany’s companies should be prevented from “re-concentrating” so that they would not grow beyond the size of industrial units permitted under the decartelisation laws. And if this was not possible, a (moderate) re-concentration process should be vigorously monitored and strictly regulated by the ECSC institutions, more precisely the High Authority. ‘What is wanted’, writes

Haas (1958: 185), 'is freedom for French firms to merge as they please coupled with careful supervision over the parallel German process'.

In Italy the two steel associations, Assider and Isa, were against the Treaty as was the Federation of Industrialists. This was, inter alia, related to the fact that the steel industry was undergoing a modernisation and concentration process in 1950-1951 and it was thus afraid that the ECSC would block this process via the anti-trust provisions (Haas, 1958: 199-200). Likewise, the Belgium steel industry had a number of objections to the emerging Treaty. For a while it joined forces with the coal industry in a campaign against certain parts of the Treaty, for instance arguing in a position paper of 7 December 1950 that the new organisation 'would completely curb the initiative and responsibility of firms and establish a complete *dirigisme* of the High Authority equivalent in fact to a disguised nationalization' (quoted in Milward, 2000: 80).

In the political sphere, a number of political parties also expressed their reservation *vis-à-vis* the anti-cartel provisions. In Germany, the position of the Social Democratic Party (SPD) was rather hostile towards most aspects of the Treaty, including the anti-cartel provisions, and also the right-wing liberalist Free Democratic Party (FDP), a party that was associated with the views of heavy industry (see Lovett, 1996: 445), was concerned with these provisions but decided in the end to support the Treaty. In France, opposition to the ECSC Treaty mainly came from the extreme left and right. The communists were against any form of integration due to its alleged negative consequences for the working classes of the participating countries. The Gaullist *Rassemblement du Peuple Français* (RPF) was not in principle against European integration, but raised numerous objections to the projected common market, arguing for instance that it would work primarily to Germany's advantage and result in French unemployment (Haas, 1958: 114-115). The ECSC was also opposed by the extreme right and left in Italy, and moreover the conservatives were worried about the effects of increased competition on Italian industry (Haas, 1958: 140, Eyre 1999: 103).

As this account shows, the group of opponents to ECSC competition rules included both a number of political parties and some powerful capital actors. The latter constituted important members of the fraction of industrial capital in France, Germany, Belgium and Italy. In France in particular, a wide range of capital actors (in addition to those of coal and steel) joined forces against the provisions. As mentioned above the "opponents" can all be categorised as indirect programmers. That is, all of them had to exercise their powers through the national governments if they were to

influence the programming of the new regulatory institutions. Moreover, they were not a homogenous group. Not only did they not coordinate their activities beyond national borders; their reasons for opposition also varied greatly. What unified them was that they did not want their national industries to be subject to ECSC antitrust regulation (even if they would not object to the imposition of such rules on their foreign competitors). Many of the capital actors argued that the treaty was *dirigiste*, although not in the sense that it prevented free competition: ‘*Dirigism* in the eyes of these businessmen was a term applied to any interference by officialdom which prevented them from doing what they wanted, including not competing’ (McLachlan & Swann, 1967a: 81). In their view, concentration and cartels were not an illness and indeed, de-concentration ‘ran counter to the basic instincts of the European business community’ (Lovett, 1996: 443). The terms of competition and fear of whether national industries would be competitive vis-à-vis the industries of other member states were thus clearly important concerns to all the adherents of the pro-concentration USDR.

Given the strong opposition to the proposed ECSC competition policy provisions among French, Italian, Belgian and to some extent German industrial capital actors, it is easy to understand why it was difficult to reach agreement on the establishment of a European level competition unit of regulation in the sectors in question. To be sure, there were also capital actors that more wholeheartedly gave their support to the Treaty. In France, Monnet managed to get the support from the coal and railroad industries. According to Ehrmann (1954: 473), it turned out to be important that these industries had been nationalised (see section 4.3): ‘Had the coal and railroad industries still been in private hands, and had the important media of communication which were at their disposal before the war joined in the campaign of the Steel Association, the treaty might not have found the necessary support in parliament’. Some “members” of the steel industry were also in favour of the Treaty, although their voice was often drowned in the noise from the capital actors that opposed the Treaty. As mentioned above, German business was generally in favour of the Treaty, even if many capital actors would clearly have preferred it if the competition policy provisions had not been included. On balance, however, this was still a price that many of them considered worth paying. Also in the Netherlands and Luxembourg, industry was generally in favour of the Treaty and its competition policy rules was not a major topic of discussion, although it is probably fair to say that many industrialists in these countries shared the same attitude towards cartels as their French and German colleagues (see Lovett, 1996: 442).

Despite the opposition to the Treaty from important capital actors in Germany, Italy and especially France, it was eventually adopted in the various Parliaments with rather large majorities. In the French National Assembly, it passed by a vote of 376 to 240; in the Bundestag by 232 to 143; in the Italian Chamber of Deputies by 275 to 98; and in the three Benelux countries, approval of the Treaty was almost unanimous (cf. Haas, 1958: 124, 132, 141, 143, 149, 150-151). In the three big countries the Treaty was carried through the national parliament with the support of the Christian Democrats. In France, the Christian-Democratic *Mouvement Républicain Populaire* (MRP), led by Robert Schuman, was one of the centre-right parties advocating the ECSC Treaty. Also the French Socialist Party (SFIO) did, in principle, support the ECSC Treaty but was concerned with the competitiveness of French industry and argued that it would be necessary to modernise and invest in industry independently of the High Authority (Haas, 1958: 116). In Germany leading members of the CDU were the most eager advocates of the ECSC but the Treaty was also supported, albeit somewhat more cautiously, by the smaller parties making up the governing coalition, namely The Refugee Party and The German Party. As mentioned above, the FDP also ended up supporting the Treaty (Haas, 1958: 129-30). In the Italian parliament the Treaty was supported by Christian-Democrats, Liberals, Social Democrats and Republicans (Haas, 1958: 141).

Although the circle of agents who supported the inclusion of competition rules in the treaty thus included the direct programmers in the form of the ruling political coalitions, as well as some business groups, Berghahn is surely correct to note that it is questionable if Monnet's programme 'could have succeeded against the combined phalanx of European heavy industry if a "federator" ... had not existed on whom he could ultimately rely' (1986: 132). This brings us to the role played by US government officials in the negotiations. As already mentioned in section 4.1 above, the US had been very keen to de-concentrate German industry, an ambition that was directly related to the prevailing antitrust USDR in the US. This USDR was not at all compatible with the culture of cartels and other forms of anti-competitive behaviour that existed in German industry and elsewhere in the European business communities. And hence the Americans did not want the ECSC to become, in the words of one commentator, a 'monster international cartel hidden beneath M. Schuman's diplomatic dress' (Parker, 1952: 381, see also Wigger 2008b). That competition had to be safeguarded by the new organisation was the view not only of leading US decision-makers such as Marshall Plan co-ordinator Paul Hoffmann and President Harry S. Truman, but also of important US capital actors. For instance, Berghahn mentions that the National Association of Manufacturers

contacted Schumann, requesting him to ensure that the ECSC did not become a giant monopoly or cartel (see Berghahn, 1986: 134-137).

Americans certainly did not take a direct part in the ECSC Treaty negotiations. Instead ‘they kept themselves well briefed about the proceedings. And the more clearly it emerged that the discussions were being pushed into an unacceptable direction by a cartel-minded West European heavy industry, the more Washington began to intervene’ (Berghahn, 1986: 134). The precise nature and magnitude of the American influence in relation to articles 65 and 66 is, however, a debated issue. Cini & McGowan (1998: 17) probably exaggerate somewhat when they suggest that ‘there is even some evidence to suggest that the precise wording of the ECSC competition provisions was insisted upon by the US representatives’. An apparently more accurate version is the one provided by Gerber (1998: 338-339) who writes that the competition law provisions were drafted by a US professor of antitrust, Robert Bowie (see also Monnet, 1978: 352-353), commented on in Washington, but then rewritten ‘in a European idiom’ by a draftsman of the *Conseil d’Etat* in Paris. As Gerber (1998: 338) comments, ‘the US role was concealed as much as possible for the fear that the project would be seen as controlled by the US and rejected by some participants on those grounds alone’.

That the governing political elite in Germany went against the preferences expressed by important capital actors and accepted the inclusion of competition rules in the Treaty, was not only due to presence of the US. It also has to be seen in the context of the influence of ordoliberal ideas on several members of Germany’s political elite, not least the Minister of Economics, Ludwig Erhard (CDU). However, not even the ordoliberals in the German government were willing to accept that their domestic capitals should be significantly smaller than their competitors in the new common market. On the contrary, they wanted to establish a framework that would allow the firms to compete on equal terms. In his *Memoirs*, Jean Monnet recalls how Erhard told him in a private conversation that ‘[w]e don’t understand why the Allies insist on decartelizing the industries of the Ruhr ... It’s as if you were deliberately trying to put German industry in an inferior competitive position *vis-à-vis* its partners’ (Monnet, 1978: 351). Although the ordoliberals did, as a matter of principle, advocate an anti-concentration position, this should thus not be mistaken for a lack of concern with the international competitiveness of German industry. So, on one hand the governments of the other future member states and the US were keen to prevent re-concentration of the German economy and in particular the former saw this as an opportunity to improve the



competitiveness of their own industries *vis-à-vis* German companies. Yet on the other hand, the ECSC was only acceptable to the German government because it was interpreted as a framework that would in fact establish a level playing field in the coal and steel sectors.

So let us take a look at the outcome of the negotiations, namely the ECSC Treaty which was signed in Paris on 18 April 1951. The Treaty committed the Six to pool their coal and steel resources by providing a common market for their coal and steel products, lifting restrictions on imports and exports, and creating a unified labour market. As regards the institutional structure of the ECSC this consisted of four principal institutions: the High Authority, a supranational institution which was programmed to take responsibility for achieving the Treaty's objectives and which was assisted by a committee consisting of representatives of both capital and workers; the Court of Justice which would ensure that the law was observed and which adjudicated disputes; a Council of Ministers consisting of representatives of the national governments which would have to approve the High Authority's most important decisions; and a Common Assembly consisting of 78 deputies from national parliaments, that, although it only had supervisory power, served to 'give the ECSC the appearance of direct democratic accountability' (Dinan, 1999: 25).

The ECSC Treaty contained some quite far-reaching rules that were designed to control the level of concentration in the coal and steel industries. Article 5 of the ECSC Treaty reads that the Community shall 'ensure the establishment, maintenance and observance of normal competitive conditions and exert direct influence upon production or upon the market only when circumstances so require'. The principal competition rules governing the coal and steel sectors are spelt out in Articles 65 and 66. Article 65 deals with anticompetitive agreements and the first paragraph of this article states that 'all agreements between undertakings, decisions by associations of undertakings all concerted practices tending directly or indirectly to prevent, restrict or distort normal competition within the common market (whether or not they affect trade between Member States) shall be prohibited'. The merger rules are set out in detail in Article 66. According to the first paragraph '[a]ny transaction shall require the prior authorization of the High Authority [...] if it has in itself the direct or indirect effect of bringing about [...] a concentration between undertakings' within the territory covered by the treaty. In other words, the treaty granted exclusive jurisdiction to the joint High Authority over all mergers and acquisitions (M&As) involving coal and steel companies regardless of the turnover of these companies.

The second paragraph stated that this authorisation would be granted by the High Authority insofar as the transaction would

‘not give the persons or undertakings concerned the power to determine prices, to control or restrict production or distribution or to hinder effective competition in a substantial part of the market for those products; or to evade the rules of competition instituted under this Treaty, in particular by establishing an artificially privileged position involving a substantial advantage in access to supplies or markets’

If, however, the High Authority did not find that a concentration fulfilled these conditions, it was authorised to ‘declare the concentration unlawful’ and to ‘order separation of the undertakings or assets improperly concentrated or cessation of joint control, and any other measures which it considers appropriate to return the undertakings or assets in question to independent operation and restore normal conditions of competition’ (Art. 66, paragraph 5).

The outcome of the programming process reflected that the ideas of some programmers prevailed, while others were marginalised. From the outset the primary programmers were the governments of Germany, France and the US. It was unthinkable that the ECSC would come into being, let alone would become a success, without the consent of all three. The inclusion of competition rules in the Treaty was thus above all something these three programmers had to agree upon. As we have seen, there were different reasons, both geopolitical and economic, why they were capable of agreeing upon some rather far-reaching rules. But it seems reasonable to claim that the rules would not have had this ideational content had the prevailing US antitrust philosophy and the ordoliberal discourse subscribed to by leading members of the German political elite not been compatible in relation to the questions of concentration and cartels. And in this context it was not insignificant that Monnet, who negotiated for France, ‘had a deep distrust of private associations between businessmen and a great belief in the power of public authority to make them compete’ (Milward, 2000: 81; see also Berghahn, 1986: 129). The resulting support for what could be called the “pro-competition USDR” made it possible to reach agreement on the anti-concentration and anti-cartel provisions of the ECSC, hereby marginalising the ideas advanced by those social forces who opposed the inclusion of such rules in the Treaty. Given the economic weight of the “opponents” it seems plausible to suggest that this would hardly have been possible, had not the US been present in Europe at the time.

As regards the other governments participating in the negotiations these can cautiously be categorised as secondary programmers in relation to the competition rules. To be sure, it is improbable that they actually influenced the content of articles 65 and 66 in any significant way (even if they to a limited extent influenced other parts of the Treaty). Yet as it seems that they did not disagree with or attempted to alter the content of these articles and as they were signatories of the Treaty it seems reasonable to place them in this category. The capital actors that supported the Treaty, limited in number as they were, can also be seen to belong to this category, albeit as indirect programmers.

**Table 4.1: ECSC Treaty merger rules - programmers and ideas**

	<i>Programmers</i>	<i>Ideas</i>
<i>Primary</i>	The governments of Germany, France (incl. Monnet) and the US	Pro-competition USDR informed by the US antitrust tradition and compatible with ordoliberalism.
<i>Secondary</i>	Governments of Italy and Benelux countries and a limited number of capital actors.	
<i>Marginalised</i>	Significant capital actors in France, Germany, Italy and Belgium.	Pro-concentration USDR

The ECSC began operating in August 1952 and Monnet was appointed the first President of the High Authority. But during its first five years the competition rules were only used to a rather limited extent. In fact, in this period High Authority ‘did not prohibit any concentrations, and its enforcement of other provisions was quite limited’ (Gerber, 1998: 342). In other words, those programmers who had expected the High Authority to take a hard line vis-à-vis the German coal and steel industries in their re-concentration process had every reason to be disappointed. In a number of cases the High Authority allowed German steel firms to acquire or merge with coal companies that had been part of their holding prior to the decartelisation process (see Schmitt, 1964: 120). This was not popular in all circles, especially not in France. For instance, the Gaullist Michel Debré, who was later to serve as French Prime Minister (1959-1962), complained in an inquiry to the High Authority in 1955 that ‘[i]t appears confirmed that, despite commitments made at least before the French Parliament, important reconcentrations operate in Germany now, and that others are in progress’ (quoted in Schmitt, 1964: 119). The response from the High Authority was that it could not be held responsible for any interpretations of the treaty that had been presented to the French Parliament prior to its ratification (*ibid*: 119)<sup>50</sup>. With the benefit of hindsight it seems reasonable to conclude, as do Leucht & Seidel (2007) that ‘Articles 65 and 66 were not

implemented successfully’ as the High Authority ‘failed to realize decartelisation in the six member states and allowed for the formation of a steel export cartel’.

#### **4.5. The next step: competition policy and the EC Treaty**

The decision to start the negotiations over a common market was taken by the governments of the Six at a conference that was held in Messina in 1955. In the final resolution of the conference, the governments declared that ‘the establishment of a united Europe must be achieved through the development of common institutions, the progressive fusion of national economies, the creation of a common market, and the gradual harmonization of their social policies’. It was moreover made clear that this ‘European Common Market free of internal duties and all quantitative restrictions’ would, among other things, require ‘[t]he development of rules assuring the free play of competition within the Common Market, particularly in such a way as to exclude all preferences of a national basis’ (Messina, 1955). In order to prepare the Treaty of this common market (the EC Treaty), a committee of representatives from the various governments, assisted by experts, was set up under the chairmanship of the Belgian Foreign Minister Paul-Henri Spaak.

The report of this group, the so-called Spaak Report, gave as one of the grounds for the need of a Common Market that ‘...in many branches of industry, the national markets offer the opportunity of attaining optimum dimensions only to firms enjoying a de facto monopoly. The strength of a large market is its ability to reconcile mass production with the absence of monopoly’ (quoted in Moschonas, 1996: 33)<sup>51</sup>. In order to ensure that competition was not undermined in this new large market, paragraph 55 of the report stressed the need for provisions that would ‘counteract the formation of monopolies within the Common Market’ and pointed toward some of the same features that were later to be found in the EC Treaty (quoted in Goyder, 1993: 24-25). However, unlike the ECSC Treaty, the Spaak report does not mention mergers with a word. The report was accepted with only small modifications by the Foreign Ministers of the Six at a conference in Venice in May 1956 and over the next ten months the more precise wording of the various articles was negotiated.

If we concentrate here on the negotiations over the establishment of a competition unit of regulation in the EC, the two USDRs that were identified in the analysis of the processes leading up to the

adoption of the ECSC Treaty's competition rules can once again be identified. That is, a discourse according to which rather strict competition rules were to be enforced by supranational legal-regulatory institutions (the pro-competition USDR) and another discourse according to which competition should only be regulated to a very limited extent (the pro-concentration USDR). As we have seen, it was due to the strength of the programmers advocating the former discourse (in the form of US antitrust philosophy and ordoliberal thinking) that merger rules had been included in the ECSC Treaty. However, in the interval between the two treaties the strength of this constellation of programmers had been weakened significantly and this was clearly reflected in the way the competition rules of the EC Treaty ended up being designed.

First, US influence in Western Europe had decreased by the time the EC Treaty was negotiated. With the US government not being a decisive factor in the programming process, the main driving force behind the relatively strict merger rules of the ECSC Treaty had vanished. Second, the French government which had worked for and supported the inclusion of strong competition rules in the ECSC Treaty, primarily in order to prevent re-concentration and re-cartelisation of German heavy industry, saw no reason to give the EC real powers to regulate competition. This difference in attitude was not least due to the radically diverging contexts in which the two treaties were negotiated. Most importantly, the threat of war appeared less imminent and the European economies were and had been booming for some years when the EC Treaty was negotiated (see section 4.1; see also Bayliss & El-Agraa, 1990: 141). When one adds to this the lack of a French competition policy tradition, the position of the French coalition government, led by Guy Mollet of the SFIO, is not terribly surprising. According to one historian, the French Ministry of Economics 'worked in close cooperation with French companies in order to define which agreements were best for the French economy' leading to a position according to which EC competition policy 'had to focus solely on prohibiting only the most protectionist agreements and tolerating most of the others' and where the Commission's role would merely be to 'coordinate the general framework of the different national competition policies in order to make them compatible' (Warlouzet, 2005: 66).

With neither the Americans, nor the French political decision-makers supporting strong EC competition rules the most important remaining advocate of such rules was the German Adenauer government, or rather those leading members of the German political elite who were influenced by ordoliberal thinking. These included, for instance, Ludwig Erhard, Walter Hallstein (the first president of the European Commission) and Hans von der Groeben (later to become the first

Competition Commissioner). It has been suggested that now the Germans ‘emerged as leaders’ in the competition policy area (Hildebrand, 2002: 161) and some scholars even go as far as to claim that ‘this time it was the Germans who were both to determine and to dictate the pertinent competition clauses in the Treaty’ (Bayliss & El-Agraa, 1990: 140). Although this latter statement is surely an exaggeration (see below), there is indeed no doubt that Germany did play a key role in pushing for the inclusion of the competition law provisions in the EC Treaty. According to Moravcsik (1998: 149), it was Erhard who had insisted on the call for competition policy provisions in the Spaak report and in fact this part of the report was written by von der Groeben together with the Frenchman Pierre Uri, who was one of Monnet’s associates (see also Laurent, 1970 for a detailed discussion of the activities of Spaak and his working group).

In the negotiations the Germans were, according to one scholar, ‘imbued with the ordoliberal orthodoxies so powerful in Germany and sought a strict form of competition law’ (Gerber, 1998: 343). This involved that the Commission was to become a supranational version of the BKartA that would be given far-reaching powers to enforce this law in such a way as to prevent anti-competitive practices in the member states. This tallies with what Hanns-Jürgen Küsters, a member of the German negotiation delegation, later explained, namely that both the French and the Germans ‘tried to transfer important basic elements of their national economic systems to the Common Market’ (quoted in Gerber, 1998: 343). The Dutch government advocated a position quite similar to the German, stressing the need to give the Commission decisive powers to regulate competition. This should not disguise that the programming process in this field was to a large extent a double-handed game: ‘once Mollet and Adenauer had laid out the path for the rest of the negotiations the smaller countries simply had to take what was handed down to them by the French and Germans’ (Milward, 2000: 217-218).

Another noteworthy aspect of the programming process is that the proposed competition rules did not come up against any grandiose campaigns from various capital actors. Whereas different industrial groups in the Six opposed various other parts of the proposed Treaty (see e.g. Kniazhinsky, 1984: 126-140), it seems that capital actors’ concern with the competition rules was very limited indeed. This might seem surprising; especially when the situation prior to the adoption of the ECSC Treaty is taken into consideration (see section 4.4). McLachlan & Swann (1967a: 82) do however provide us with various explanations for this. For one thing, the cartelisation culture was particularly strong in the coal and steel industries, meaning that the attitude of these capital

actors towards competition law did not represent the attitude of business as a whole. Another reason was probably the coal and steel industries' experience with the ECSC. As the High Authority had not enforced the competition rules rigorously, it seemed that those who had feared the regulatory behaviour of the new supranational bureaucracy had been proven wrong in this respect. Hence, capital actors had little reason to believe that the Commission was going to depart from this behavioural pattern. Last, but certainly not least, the proposed competition provisions were rather vague and flexible compared to the ECSC rules (see also below). Hence, it is probably correct to say that the prevailing view in European business circles at this juncture was that the area of competition regulation was not going to be a particularly prominent feature of the EC and consequently the various capital actors focussed their energy on other parts of the Treaty.

The outcome of the negotiations, the EC Treaty, was adopted on 25 March 1957 by the governments of the Six. Hereby the EC came into being, establishing a customs union with common external tariffs in which there would be free movement of goods, capital, services and persons (in principle at least – in practice there were numerous limitations). Article 2 of the EC Treaty provides that

‘The Community shall have as its task, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between States belonging to it’

Moreover, the EC Treaty also provided for common policies in fields such as agriculture and, to a rather more limited extent, transport and social policy. The institutional framework from the ECSC was continued, albeit with certain amendments. The High Authority was now renamed the Commission and its advisory committee (consisting of representatives of capital and labour) became the European Economic and Social Committee (EESC); the Common Assembly developed into the European Parliament (henceforth: the Parliament); the Court of Justice became the European Court of Justice (henceforth: the Court) and the Council of Ministers (henceforth: the Council) was given more weight vis-à-vis the supranational institutions (see e.g. Dinan, 1999: 31-33; Mazey, 1996: 30). Article 3 sets out the activities to be carried out by the Community in order to establish this Common Market and these shall include, Article 3(f)[3(g)] states, ‘the institution of a system ensuring that competition in the Common Market is not distorted’. Article 3(f) is made more concrete by a section in the EC Treaty entitled “Rules of Competition”, comprising of Articles

85-90[81-86]. Here a European level competition unit of level regulation consisting of four subunits is outlined. The subunits are cartels/restrictive business practices Art. 85[81]), abuse of dominant position (86[82]), public undertakings (90[86]) and state aid (92[87]). In other words, two subunits of regulation aimed at controlling the behaviour of companies, whereas two other subunits aimed at preventing undue state intervention in the market place.

In the present context Articles 85 and 86 are the most important. *Article 85(1)* prohibits ‘all agreements between undertakings, decision by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market’. This however, is softened somewhat in Article 85(3), which exempts certain forms of anticompetitive agreements insofar as they contribute ‘to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit’. *Article 86* prohibits ‘[a]ny abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it’ insofar as ‘it may affect trade between Member States’. It is thus not a sin in itself to hold a dominant position. The sin is to “abuse” it and Article 86 gives some examples of what abuse might consist of e.g. ‘directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions’ and ‘applying dissimilar conditions to equivalent transactions with other trading parties’.

In his *Memoirs* Jean Monnet looks back on the competition policy provisions in the ECSC treaty and claims that ‘[f]or Europe, they were a fundamental innovation: the extensive antitrust legislation now applied by the European Community essentially derives from those few lines in the Schuman Treaty’ (Monnet, 1978: 353). This view needs to be corrected somewhat. It is true that the provisions of the ECSC were a “fundamental innovation” as they, after all, established the first European level competition unit of regulation. But as the above account of the EC Treaty’s competition rules already serve to indicate, these rules differed in crucial respects from those of its predecessor. In fact, there were significant differences in terms of both form and content. As regards the form, Bulmer (1994: 427) points out that whereas the ESRC Treaty is a *traité-loi* which to a large extent specifies the regulatory content, the EC Treaty is a *traité-cadre*, which sets out a broader legal framework that needs much secondary legislation or jurisprudence from the Court in order to have any actual effects. To put it differently, whereas the competition rules of the ECSC Treaty embodied a number of CIRs, the EC Treaty’s competition rules were mainly formulated at



the more abstract level of USDRs, hereby making it less clear precisely how they were to be converted into regulatory practice.

As regards the content, the two treaties 'have very different emphases in their policies towards concentrations of economic power' (McLachlan & Swann, 1967a: 196). Although it is widely perceived to be the case that the competition policy provisions of the Treaty reflect ordoliberal thinking (see e.g. Gillingham, 2003: 249; Hildebrand, 2002; Monti, 2002a), this is only a half-truth. It is, to be sure, true that the EC Treaty's competition policy provisions can be interpreted precisely as an attempt to create a regime that fosters competition. According to one scholar they constitute 'a firm attempt to create a neoclassical liberal economic structure based on as close an approximation as possible to the "ideal type" of perfect competition' (Allen, 1977: 94). Moreover, it seems fair to suggest that had not the ordoliberals in the German government insisted on the inclusion of competition provisions in the Treaty, then such provisions would not have been included or at the very least they would have been even vaguer than they turned out to be. In this sense it is not too misleading to suggest, as does for instance Moravcsik (1998: 149), that competition policy was an area 'where Germany succeeded in imposing its views'.

However, even though the German influence was crucial Articles 85 and 86 fail to reflect a wholehearted commitment to ordoliberalism, let alone the perfect competition ideal type, in at least three respects. Not only are mergers and acquisitions not mentioned with a single word although they are surely an important mechanism through which competition can be undermined; Article 86 was drafted in such a way that it would not prohibit dominant positions (including monopolies) as long as no "abuse" was taking place (thereby potentially allowing for significant degrees of concentration); and Article 85(3) even makes it possible to exempt certain forms of anticompetitive agreements from prohibition. As McLachlan & Swann (1967b: 49) bluntly put it: 'Clearly the Treaty cannot be regarded as in any way an obstacle to concentration. On the contrary, by providing what is virtually a *carte-blanche*, it seems to permit the creation of market power even in situations where no real technical arguments could be urged in its support'.

Consequently, one could make the argument that the competition rules of the EC Treaty, in particular Article 85, had much in common with Articles 59 *bis* and *ter* of the French law (see also Warlouzet, 2005: 66). In fact it could be argued that in this respect the competition rules of *both* the

ECSC Treaty *and* the EC Treaty reflected French preferences, rather than reflecting German ordoliberalism, despite the widely diverging approaches to concentration they embody:

‘the severity of the ECSC régime was largely the result of attempts to placate French fears, while the comparatively permissive attitude towards the establishment of dominant positions adopted in the Rome Treaty accords completely with the French view (although it is by no means exclusively a French view) that the size of enterprises in Europe is frequently far below what is necessary if the benefits of large markets are to be achieved’ (McLachlan & Swann, 1967a: 218)

So even if the EC Treaty’s competition rules do to some extent reflect ordoliberal ideology, they also at the same time throw the door wide open to practices and developments that ordoliberals would not approve of. This suggests that just like ordoliberal ideas had powerful enemies inside Germany, so this was not a hegemonic discourse at the EC level. Articles 85 and 86 should thus be seen as a compromise reached by advocates of the two by and large incompatible USDRs. This compromise gave the proponents of ordoliberalism competition provisions but at the same time reflected the prevailing view of the French government and the vast majority of capital actors in the Six, namely that such provisions were not to serve as the basis for strict competition regulation. This is the very reason why, as one scholar puts it, ‘[i]t is difficult to see exactly what the objectives of competition policy were for those who drafted the Treaty of Rome’ (Motta, 2004: 14). The vagueness of the provisions simply reflects the diverging objectives of the direct programmers. This also explains why merger rules were not included in the EC Treaty. Although some programmers would have preferred it, the prevailing view at the time was that mergers were desirable rather than a danger: ‘Concentration was deemed to be a good thing as it assisted in the process of post-World War II economic reconstruction and helped to make West European industry competitive *vis-à-vis* U.S. big business’ (Cini, 2002: 247).

To recapitulate, the German and French governments would seem to be the primary programmers at this stage. The negotiators representing the two governments subscribed to two rather incompatible USDRs: the Germans to an ordoliberal discourse, the French to a pro-concentration discourse (which gave rise to the position that the EC should only be given the minimum of powers in this field). The French position was formulated in collaboration with national capital actors and the latter can thus be categorised as secondary programmers. The other governments participating in the programming processes seem to have been in agreement with either the French or the German positions in this area and they can also be placed in this category. As the proposed competition rules

did not come up against noticeable opposition from other governments, national capital segments or others it does not really make sense to talk of marginalised agents and ideas in this context.

**Table 4.2: EC Treaty competition rules - programmers and ideas**

	<i>Programmers</i>	<i>Ideas</i>
<i>Primary</i>	The governments of Germany, France.	Provisions were formulated vaguely in order to appear compatible with both pro-competition and pro-concentration USDRs.
<i>Secondary</i>	Governments of Italy and Benelux countries and certain French capital actors	
<i>Marginalised</i>		

#### **4.6. Regulation 17**

As mentioned, the competition policy provisions of the EC Treaty needed to be implemented through further legislation if they were to have any effect. For instance, the Treaty did not unambiguously explain ‘which institution should decide what constitutes an abuse under Article 86 or what agreements qualify for an exemption under Article 85(3)’ (Schwartz, 1993: 611). Instead its Article 87(1) reads: ‘Within three years of the entry into force of this Treaty the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly [European Parliament], adopt any appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86’. A Directorate-General (DG) within the Commission, namely the Competition DG<sup>52</sup>, was made responsible for the enforcement of the competition policy provisions of the EC Treaty.

This DG was thus given the task of making the proposal that would give effect to Articles 85 and 86. In the first years of its existence, then, the Competition DG was busy preparing what was later to become the famous Regulation 17/62, widely known as Regulation 17. The importance of this Regulation lies in the fact that it essentially programmed the Competition DG with potentially far-reaching tasks and powers, hereby opening the passage for the EC competition unit of regulation that was to develop over the years. The preparations took place on the basis of consultations with

the various member states as well as with experts and organisations and a number of meetings and conferences were held in the context of which the content of the regulation was discussed (Goyder, 1993: 35). Once the Competition DG had completed a satisfactory draft of the regulation, it first had to be accepted by the College, the supreme decision-making body of the Commission which consists of all the various commissioners (see e.g. Dinan, 1999: 205-236 or Hix, 1999: 32-41 on the institutional structure of the Commission) and was then passed on to the EESC and the Parliament (see Goyder, 1993: 36-37 on the proposals made by the Parliament).

Ultimately, however, the regulation had to be adopted by the Council (the institution consisting of the member states' ministers). The crucial negotiations, which took place in November and December 1961, has been described by Hans von der Groeben who had been appointed as the first Competition Commissioner, as 'extremely tense' (von der Groeben, 1987: 108). The main disagreements were between, on one hand, France and Luxembourg and, on the other hand, Germany, the Netherlands, Belgium and the Commission. A major disagreement concerned the degree of autonomy the Commission should enjoy in its decision-making. France and Luxembourg preferred a model where the member states concerned and the Commission would take joint decisions as this would prevent the Commission from undermining domestic industrial policies. The other countries supported the Commission's proposal which would not only grant the Commission a significant degree of autonomy but also arm it with significant powers to shape the evolution of the competition policy area.

Regulation 17 was unanimously adopted by the Council on 6 February 1962 and it came into force on 13 March. This regulation, which has been described as 'one of the most important ever enacted' (Wilks & Bartle, 2002: 164), gave the Commission 'power to apply Article 85 (1) and Article 86 of the Treaty', although it would be '[s]ubject to review of its decision by the Court of Justice' (Article 9, paragraph 1). It created a notification system under which existing and new agreements, decisions and practices of the kind described in the Treaty's Article 85 (1) had to be notified to the Commission if they were to be exempted from prohibition under Article 85 (3) (see Regulation 17, Articles 4, 5, 6 and 8 on notification requirements and the criteria for exemption). The Competition DG was given far-reaching powers to carry out its duties. It was empowered to 'undertake all necessary investigations into undertakings', including '(a) to examine the books and other business records; (b) to take 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'

(Article 14(1)). And in this context, it was also given the powers to impose fines on firms who failed to comply with the rules in various ways (Article 15). However, in making decisions, the Commission was required to consult with the ‘competent authorities of the Member States’ (Article 10(2)) and to hear the views of the “Advisory Committee on Restrictive Practices and Monopolies” consisting of officials from the member states (Article 10). Regulation 17 was noteworthy in that it ‘represented a drastic reversal in the traditional relationship between the Commission and the member states. Its enactment was one of the rare occasions after 1957 when member states agreed within the Council of ministers to limit their own competence by giving wide ranging powers to the Commission’ (Kon, 1980: 156).

Von der Groeben later interpreted the final agreement (Regulation 17) as a compromise between the two camps whereby ‘the Commission bears sole responsibility for decisions but processes are carried out in close and continuous association with the responsible authorities of Member States’ (von der Groeben, 1987: 110). Yet this is surely to grossly overstate the involvement of member state authorities in the Commission’s decision-making in this area. It is true that the Commission would be required to hear the views of the “Advisory Committee on Restrictive Practices and Monopolies” consisting of officials from the member states – but this committee was programmed with no decision-making power whatsoever. So what was created with Regulation 17 was in fact ‘a competition law system in which the enforcement of policy-making prerogatives were centred in the Commission and the role of national legal systems was marginalised’ (Gerber, 1998: 349). This clearly reflected German (in particular German ordoliberal) preferences more than it reflected anything else. That a member state like France was willing to give the Commission such powers was largely due to the limited importance of competition law at the national level. It was assumed that ‘competition law would play the same limited role in the Community that it played in the Member States’ (Gerber, 1998: 348). This partly explains why the French government was ready to “compromise”. The other part of the explanation is that it was willing to make concessions to the German government in order not to endanger agreements that had been reached in the agricultural policy area (see von der Groeben, 1987: 108, 110).

With this regulation the Competition DG was given a significant degree of operational autonomy, enabling it to ‘build up a policy incrementally and independently, without continuous reference to the Council of Ministers and without the need to achieve consensus amongst the member states’ (Allen, 1983: 213). It seems fair to suggest that, initially, this was not fully realised by neither

academics nor the direct programmers. For instance, one legal scholar suggested that Regulation 17 ‘grants to the Commission only very little regulating power’ (van Gerven, 1974: 41). Nor are there any reasons to think that the majority of the direct programmers in the Council fully understood the implications of the Regulation (see Wilks & Bartle, 2002: 164)

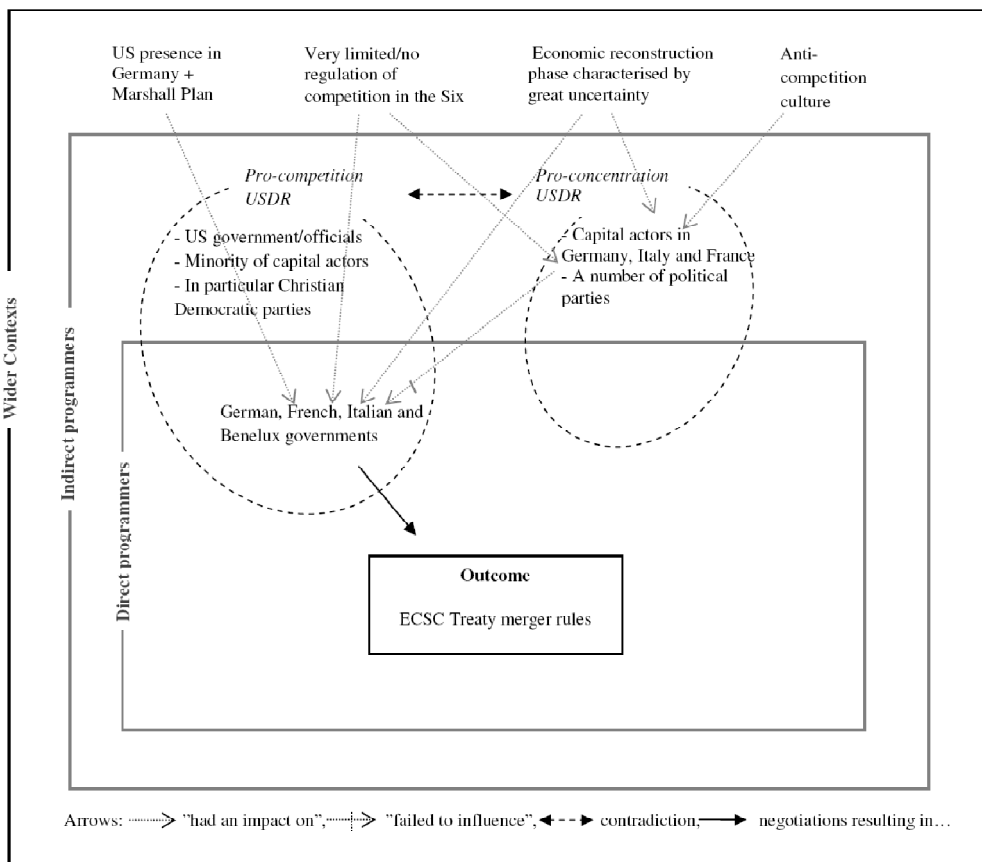
#### **4.7. In conclusion**

The main purpose of this chapter was to explain the inclusion of merger control provisions in the ECSC Treaty *and* the exclusion of such rules in the competition regulation provisions of the EC Treaty. With the enactment of the ECSC Treaty the first European level competition unit of regulation came into being<sup>53</sup>. Figure 4.1 below is an attempt to visualise the argument made in this chapter as to why merger rules were included in this treaty. In the processes leading up to the outcome (the merger rules) one can identify two major USDRs on the basis of which the various (all external) programmers articulated their positions. A constellation of indirect programmers which included the US government/government officials, a minority of capital actors in the sectors in question and majorities in the national parliaments (led by Christian Democratic parties) subscribed to the pro-competition USDR – as did all the direct programmers, namely the governments of Six.

That the governments were willing to programme the High Authority with the powers to regulate mergers (and competition more generally) was to no small extent due to a number of factors in the wider context. For one thing the presence of the US as an occupying power in Germany and as a donator of economic aid to the reconstruction process gave the Americans substantial influence on the outcome. The Americans pushed for the establishment of competition units of regulation at both national and European level and as the Europeans had little or no experience with this type of regulation at the time the ECSC Treaty was negotiated, they were prone to let the Americans have their way. This was of course also the case because merger and cartel rules of the Treaty were perceived of as an instrument that could prevent the “decartelised” German industry from “re-cartelising”, or more generally “re-concentrating”, in the context of the projected common market for coal and steel.

However, in the coal and steel industries an anti-competition culture had existed for long – both in Germany and in the other countries. A constellation (as opposed to coalition) of capital actors from in particular Germany, France and Italy vehemently opposed the inclusion of merger and cartel rules in the Treaty. Arguing on the basis of a pro-concentration USDR, they were against giving the High Authority the powers to prevent economic concentration. Indeed, having never been subjected to such regulation at the national level they saw no needs whatsoever for such rules. These capital actors were not the only indirect programmers subscribing to this USDR: a number of political parties were also took positions based on this discourse. The outcome of the negotiations reflected that none of those subscribing to this discourse were direct programmers *and* that they failed in their attempts to influence the latter. As such the discourse and its proponents ended up being marginalised whereas the pro-competition discourse and its “supporters” prevailed. In the end, the efforts of in particular the governments of the US, France (as personified by Monnet and Schumann) and Germany resulted in the inclusion of merger rules in the ECSC Treaty. The article containing these rules ended up being the longest article in the entire Treaty, ‘its length being proportional to the significance that was attached to the control of economic power at the time when the Treaty was being negotiated’ (McLachlan & Swann, 1967b: 44).

**Figure 4.1: Explaining the inclusion of merger rules in the ECSC Treaty**

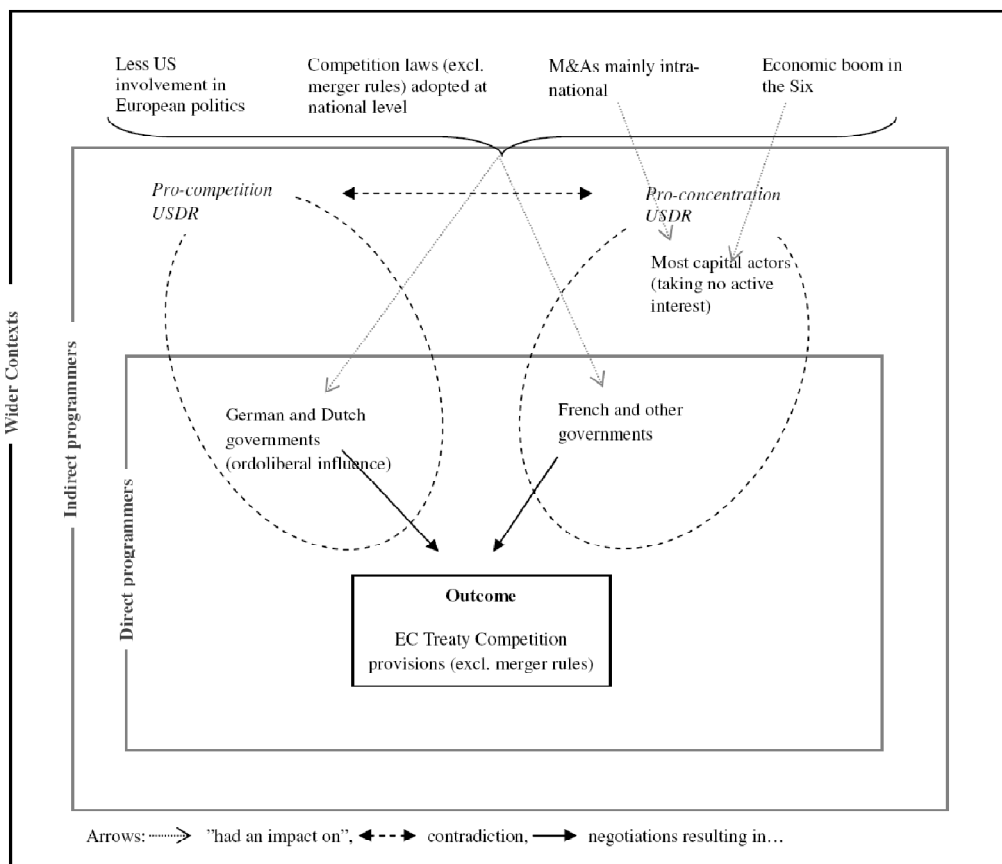


The EC Treaty, which was adopted a few years later, constituted the next real step towards the establishment of a European level unit of competition regulation. On one hand the scope of the rules in this treaty was much wider than the scope of its predecessor (covering not just the coal and steel sectors). On the other hand, Cini & McGowan (1998: 17) are clearly right to point out that the competition provisions in the EC Treaty were ‘a much watered-down version of the ECSC rules’. Unlike its predecessor it did not include any merger rules, reflecting that those who drafted the Treaty did not intend that the EC should be given powers to control mergers (see Goyder, 1993: 31, 386) – or perhaps rather that those programmers who were against the inclusion of merger rules had their way. The argument that has been advanced in this chapter with a view to explain this lack of merger rules is visualised with Figure 4.2. To put it succinctly, the negotiations took place in a radically altered political and economic context: the US was no longer an occupying power in Germany; competition laws had been passed at the national level, but due to opposition (especially in Germany) merger rules were not adopted; and an economic boom was gaining momentum throughout the capitalist world. If one adds to this that capital accumulation was still being



primarily oriented towards the national level, and that M&As generally taking place within the same state, then it is not terribly surprising that fewer programmers formulated their position on the basis of the pro-competition USDR this time around. Indeed two of the driving forces behind the inclusion of competition rules in the ECSC vanished in the changed circumstances. First, the US government was not pulling the strings in these negotiations and was not there to back up the European political elites against national capital actors. Second, the French government no longer advocated the inclusion of such rules but saw them instead as a potential obstacle to the concentration of capital. In other words, the ordoliberalism in the German government, backed up by the Dutch government were the main proponents of competition rules at this stage. That competition provisions, however vague, were after all included in the treaty was related to the fact that few (perhaps except the ordoliberals) expected competition policy to become a particularly important feature of the EC. Thus the French government decided to agree to include provisions the wording of which were rather ambiguous while the various national capital actors did not bother to oppose it.

**Figure 4.2: Explaining the exclusion of merger rules from the EC Treaty**



Some commentators have later suggested that it turned out to be less difficult to reach agreement on the competition rules in the ECSC Treaty than on the competition rules in the later EC Treaty because they only were to cover a specific industrial sector, rather than being generally applicable (see McGowan & Cini, 1999: 178). Yet as we have seen in this chapter, the opposite was in fact the case. The provisions of the ECSC Treaty were difficult to reach agreement on as they were opposed by important capital segments, whereas competition regulation was only taken seriously by a minority of those who were directly or indirectly involved in the negotiations over the EC Treaty. This was also the main reason, together with agricultural policy issue-linkages, why Regulation 17 came to include rather far-reaching rules that programmed the Competition DG with the powers to investigate, consult, make decisions, punish, exempt, and even conduct “dawn raids”. Only at a much later point in time did it become apparent that these rules could be (and were being) used to turn competition policy into a central feature of European level regulation.

## **5. The 1960 and 1970s: merger control in the era of embedded liberalism**

This chapter deals with the regulation of mergers in Europe in the 1960s and 1970s, focussing in particular on the unsuccessful attempt in the early 1970s to provide the Competition DG with powers to regulate large M&As. Hereby it contributes to answer the second sub-question posed in section 1.1: ‘Why did the Commission’s proposals for a MCR fail to gain support from the member states in the 1970s and most of the 1980s?’ It will be suggested that neither the 1973-proposal for a MCR nor the failure to reach agreement can be adequately understood without taking into account the impact of the (by no means static) contexts mentioned in section 3.7. The chapter thus starts out by exploring embedded liberalism and the American Challenge (section 5.1), the wider European integration process (section 5.2) and the merger subunits of regulation that were established in France, Germany and the UK (sections 5.3 and 5.4). Against this background the negotiations over the Commission’s MCR proposal are analysed in section 5.5 and an account of the stagnation of EC competition policy in the 1970s is provided in section 5.6. The main findings are summarised in section 5.7.

### **5.1. Embedded liberalism and the American challenge**

The era of embedded liberalism stretched from the 1950s to the early 1970s and is also often referred to as the era of *Atlantic Fordism* (e.g. van der Pijl, 1984: 233). As already hinted at in section 4.1, this stage ‘can be characterised as Fordism when considered at the level of the organization of production, as the era of the Keynesian welfare state when looked at from the level of society and state, and as the *Pax Americana* when looked at from the perspective of the overall organization of the capitalist world system’ (Overbeek, 1990: 87). As Jessop (2002a: 56-58) points out, Fordism should be understood as a multifaceted phenomenon. In the present context it will suffice to understand Fordism as a phenomenon associated with mass production techniques and/or as a mode of growth involving ‘a virtuous circle of growth based on mass production, rising productivity based on economics of scale, rising incomes linked to productivity, increased mass demand due to rising wages, increased profits based on full utilization of capacity and increased investment in improved mass production equipment and techniques’ (2002a: 57; see also Jessop &

Sum, 2006: 124-125). As mentioned in Chapter 4, Fordism was “exported” to Europe from the US (see Djelic, 1998 and van der Pijl, 1984 for detailed accounts). In particular the three big economies, namely those of France, Germany and the UK, ‘acquired a mainly Fordist dynamic with growth based mainly on expanding home markets’ but also a number of the smaller European societies moved towards mass consumption societies (Jessop, 2002a: 58).

The Fordist growth mode fuelling the post-war period of economic growth in Europe was stabilised by what Jessop has dubbed the “Keynesian Welfare National State” (KWNS). The KWNS was thus an important part of the ensemble of regulation in the era of embedded liberalism/Atlantic Fordism. It was *Keynesian* in the sense that it sought to promote full employment through counter-cyclical demand management policies (e.g. active fiscal policies); it was a *welfare* state insofar as it promoted the expansion of universal welfare rights to all citizens; it was primarily oriented towards the *national* level; and it was e.g. *statist* in the sense that it was state institutions that would compensate for the failure of markets to deliver e.g. economic growth or full employment (Jessop, 2002a: 59-61; see also Torfing, 2001: 278-279). Importantly, the KWNS did not emerge *in order* to make Fordism function: it was the contingent outcome of political struggles between various social forces, not an automatic response to the “needs” of the Fordist accumulation structures. More precisely, it came into being because of working class pressure for better wages and social security and because political and economic elites saw it as a way to minimise working class support for communism (see e.g. Lipietz, 1992: 5-8; Klein, 2007: 251-253). However, as the KWNS proved capable of facilitating Fordist growth, it was gradually embraced in both social democratic and conservative/Christian democratic circles (see also Lipietz, 1992: 12).

To be sure, it was not the case that identical KWNS suddenly existed in all European countries. As already hinted at in Chapter 4, where the focus was restricted to Germany and France, the welfare states emerging in the various European countries after the War differed in many respects. This was of course the case because they were the outcomes of political struggles. Yet the ensembles of regulation emerging in the various European countries were not completely different in all respects. By pointing to certain general similarities in the ensembles of regulation in the era of embedded liberalism, the KWNS scheme constitutes a useful supplement to a perspective that only emphasises differences.

How does the EC fit into this scheme? Certainly not as an attempt to establish some supranational version of the KWNS! ‘Indeed’, as Bonefeld (2002: 118) puts it, ‘the Treaty of Rome contains little, if anything at all, of what is commonly understood as Keynesianism or associated with so-called Fordism’. Contrary to what Bonefeld claims, however, this does not necessarily mean that the EC was established by the “ruling classes” in order to undermine the welfare state. The EC did rather amount to an attempt to stabilise and facilitate capital accumulation at the national level and as such most programmers did not intend the EC to replace the KWNS, but to support or, arguably, “rescue” it (Milward, 2000). This was not least to be accomplished by creating a large free market for the trade of goods produced by nationally based companies. Hence, the EC Treaty is a document predominantly (but not exclusively) incorporating a liberal GDR that emphasises the desirability of free trade and competition (see also Swann, 1983: 15). However, as we saw in the previous chapter (section 4.5) this was not translated into competition provisions that would necessarily enable EC institutions to effectively safeguard competition.

As mentioned the Common Market was to be shielded by external tariffs (see section 4.5). Obviously, this was a disadvantage to those US companies exporting to EC countries and consequently such companies were given an extra incentive to establish a commercial base inside the EC. This meant that a large number of American companies were drawn to the EC, especially prior to the completion of the Customs Union in 1968. In 1967 French journalist Jean-Jacques Servan-Schreiber’s book, *The American Challenge* was published. The book, which was widely discussed and quickly became a bestseller, argued that US companies were the main beneficiaries of the Common Market. According to Servan-Schreiber, Europe had been the target for an economic invasion by American industry. Americans had started up 3,000 new businesses in Europe since 1958 and had now outclassed European industry in sectors of vital importance such as chemicals and electronics.

The American companies had more economic resources and were much better managed and more flexible than their European counterparts. Servan-Schreiber thus warned that the Common Market was being overtaken by US companies and that immediate and drastic action was necessary if Europe was not to ‘become an annex of the United States’ (1968: 139). This was in large part related to the inability of European capital actors to come up with an adequate response to the American challenge. In many cases, they operated in markets where they were in various ways shielded from competitive pressures. Consequently they did not at all welcome the aggressive

strategies of US companies that were in many ways superior. This is, for instance reflected in a remark made in a 1967 declaration by UNICE:

‘It has become clear ... that certain American firms have been badly informed about the price mechanisms used in the European market – mechanisms which the various Continental rivals respect. A joint study of production costs has allowed us to set up rules which, while safeguarding competition, prove beneficial to all. We must not allow American firms, from lack of knowledge of our methods, to provoke a price war that would cause serious difficulties in the market’ (quoted in Servan-Schreiber, 1967: 17)

One of the several problems identified by Servan-Schreiber was that many European companies did not have the size necessary to compete with their American counterparts. Although *The American Challenge* probably did exaggerate the extent to which US enterprises were outclassing their European counterparts (see e.g. Holland, 1980: 68-71), Servan-Schreiber was neither the only nor the first to identify the insufficient size of European companies as a problem. In fact this had been a major concern to European, especially French, corporate actors for quite some time.

These concerns had not been diminished by a 1965 report by UNICE that contained a number of worrying figures. For instance, the report compared the 1963 size, measured by annual turnover, of the three largest companies in the EC with those of the US in the automobiles, chemicals, rubber, electronics, steel and petroleum sectors. It appeared from the data that in all cases, the US companies were bigger than their opposite number in Europe, with the European companies being only half their size in two-thirds of the cases. Moreover, it appeared that 11 out of 18 of the largest European companies in these key sectors were German, whereas only 3 were French (Swann & McLachlan, 1967a: 236-237). The state of affairs described with such figures, which were generally felt to be indicative of the general picture outside the sectors in question, were ‘at the root of European fears, especially French fears, of American competition’ (Swann & McLachlan, 1967a: 237). An important reason for the small size of European companies was that the vast majority of M&As were at this stage still *intra*-national. This appears from the Commission’s 1970 memorandum *Industrial Policy in the Community* according to which 257 mergers or takeovers between firms in different member state countries took place in the period 1961-1969, whereas 1861 mergers took place between firms in the same country in this period (Commission, 1970: 92)<sup>54</sup>. As one scholar commented, ‘[t]he record of fusion of enterprises across national frontiers must be accounted one of the failures of the EEC’ (Harrison, 1974: 190).

According to Servan-Schreiber this “failure” was partly due to the ‘almost insurmountable difficulties to business concentration’, including mergers, posed by ‘the diversity of legal and fiscal systems in the various Common Market countries’ (1968: 118). ‘Should the Italian and the Belgian industrialists unite their businesses and operate on an international level?’ he asked rhetorically, and then continued:

*‘They don’t know. They don’t even know if it is legal. So they wait. How can businessmen really believe they should stake their plans, their investments, indeed their whole future, on real economic integration when the member states of the Common Market still show their politics by preparing and managing national budgets – where each country is concerned only with its own individual efforts, even for advanced research that clearly demands European unity?’* (Servan-Schreiber, 1968: 116-17)

This analysis found support, and was further developed, in a study from the early 1970s by Renato Mazzolini. Based on interviews with the top managers of 154 major European companies in the Six and the UK, this study identified several reasons for the limited number of cross-border M&As. A number of the obstacles to such mergers were internal to the companies and their managers. These included language difficulties, management difficulties in evaluating potential foreign partners’ congruency with one’s own company, lack of professional skills in the management of European companies, lack of an analytical approach to marketing and finally the lack of international business skills (1975: 45-46). In addition to such “internal” hindrances, the study pointed to the existence of a number of legal and regulatory obstacles, including the lack of legislation permitting cross-border mergers to take place.

Finally a host of “bureaucratic obstacles” to international mergers were identified. Among the most important of these was political opposition, an obstacle mentioned by no less than 66 % of the interviewees. As Mazzolini (1975: 43) commented, ‘[t]his is unexpected and contradicts the official position of most government heads who are eager to picture themselves as Europeans and who frequently express their encouragement for transnational business’. Political opposition, which was thus disguised, could for instance, take the form of threats that a company would lose its subsidies from the state if it merged with a “foreigner”. There could be different reasons for such political opposition to cross-border mergers, such as preservation of a particular firms’ know-how within national borders and fear that a firm would invest less in its domestic operations if it merged with a

foreign company<sup>55</sup>. As one of Mazzolini's interviewees, a German executive put it: 'Politicians do not have a European mentality. They still think national and they consequently protect their national interests. They have no European Community feeling and they don't feel they are in the same boat with the other EC countries. Thus they defend their country to the detriment of the Community's best interest' (quoted in Mazzolini, 1975: 43)<sup>56</sup>.

## **5.2. European integration in the 1960s and 1970s**

Those who had hoped that the steps taken towards political integration in the 1950s would be followed up by new sweeping initiatives in the 1960s were soon to be disappointed. When looking at the EC system after 1962 (where Regulation 17 had been adopted) and up to the early 1980s it can roughly be described in terms of three phases: crisis from 1963 to 1969, renewed momentum from 1970 to 1972, and crisis/stagnation from 1973 onwards. Towards the end of 1958, the year the EC Treaty came into force, the Fifth Republic of France was formed and General Charles de Gaulle was elected its first president. This came to mark a turning point in the process of European political integration. Some of those who had been directly and indirectly involved in the programming of EC institutions 'had intended that the European Commission would become a technocratic, supranational European executive, embodying the European general will' (Mazey, 1996: 31). And in its early life the Commission, under the strong leadership of Walter Hallstein (who served as its President between 1957 and 1967), did indeed actively seek to push the European integration process forward. Yet if there had been a pro-European integration consensus prior to the election of de Gaulle, then this consensus no longer held. Lending his name to the political ideology of "Gaullism", above all entailing the idea of a strong French state that would play an important role in world politics and a France that was kept independent from foreign power, de Gaulle strongly opposed European supranationalism. From this viewpoint, the EC was only acceptable to the extent it could be used to further French interests – and undesirable to the extent it would weaken the sovereignty of the Fifth Republic<sup>57</sup>.

The role played by de Gaulle in especially two events has earned him the reputation as the villain who sabotaged the European integration process in the 1960s. First, there was the so-called "empty chair crisis" in 1965 where French ministers were ordered not to take part in Council meetings. The background was the Commission's proposal for financing the CAP which would have entailed a



significant increase in the powers of the Commission and the Parliament in this area at the expense of the member states. This directly contradicted everything Gaullism was about and the crisis was only solved at a meeting between the foreign ministers in January 1966 with the so-called Luxembourg Compromise. This informal agreement meant that when a decision was subjected to qualified majority voting, the Commission would postpone a decision if any Member State(s) felt that very important interests were threatened. As one scholar puts it, this ‘effectively confirmed the right of member states to veto EC legislative proposals, thereby reversing the federalist ambitions of the Commission’ (Mazey, 1996: 32).

Second, it was de Gaulle who vetoed British membership of the EC in 1963. The UK, Ireland and Denmark applied for membership in 1961 and their example was followed by Norway in 1962. The UK government, backed up by important British capital actors, had initially not joined the EC, most importantly because of the relationship to the Commonwealth countries. But already from the early 1960s, the Confederation of British Industry (CBI), which was at this stage dominated by large companies, began pressing for British membership (Overbeek, 1990: 100-102). The main reason for this was that the Common Market became an increasingly important destination for the export of British manufactured products<sup>58</sup>, making UK membership of the EC increasingly attractive for many British capital actors. De Gaulle’s veto was motivated by fears that British entry would threaten the CAP in the name of free trade and moreover mean that the EC would ‘become a colossal Atlantic community under American dominance and direction’ (de Gaulle, quoted in Dinan, 1999: 52). None of the four applicant countries joined the Community this time around but made their second application for membership in 1967. Again de Gaulle blocked British membership.

Although the political integration process stopped in the de Gaulle era, another form of European integration flourished in the 1960s and 1970s. Article 220 of the EC Treaty provides that the role of the Court is ‘to ensure that, in the interpretation and application of the Treaty, the law is observed’. If those who programmed the Court thought they had merely established a law enforcing institution this was certainly not all they got. Almost from the outset, the Court took full advantage of the high degree of operational autonomy it had been given, and which was only reinforced by the initial lack of political and public attention given to its work. Programming itself to perform the role as a motor of European integration, it gradually “constitutionalised” the legal system of the EC. That is, it transformed it from a system that was based on conventional international law, which applies only

to states, to ‘a new form of law, much more like the internal law of a state’ (Wincott, 1996: 171). In other words, in a phase which was characterised by a shift in the direction of intergovernmentalism and hence a sharp decrease in the number of political initiatives that would give the EC system more powers, a number of Court rulings radically transformed the nature of the EC legal order (see e.g. Weiler, 1999: 16-39 or Wind, 2001 for interesting discussions of this)<sup>59</sup>.

At the December 1969 Hague meeting, taking place not long after the resignation of de Gaulle in April and marking the beginning of a short phase of optimism with respect to the European integration process, the Six decided to open accession negotiations. Whereas the Norwegian EC membership was rejected in a 1972 referendum, the other three countries joined the Community in 1973. In the Conclusions of the summit between the political leaders of the (enlarged) EC in Paris on 19-21 October 1972, it reads that ‘the Member States of the Community, the driving wheels of European construction declare their intention of converting their entire relationship into a European Union before the end of this decade’ (EC Summit, 1972). One element in this by all means remarkable and unrealistic ambition to create a European Union in less than eight years was the desire to establish a European level industrial policy<sup>60</sup>. For instance, the British Prime Minister, the Conservative, Edward Heath, gave a speech in which he stated that

‘We need an industrial policy which will enable our manufacturers to realise the potential of a single market of 250 million people. We need a policy which will encourage the formation of European companies, which are able to stand on an equal footing with the industrial giants of the United States and elsewhere, and are capable of making full use of the inventiveness and talents of the European peoples, particularly in the products of advanced technology’ (Heath, 1972)

And in the Conclusions of the summit it is stated that

‘The heads of state or of Governments consider it necessary to seek to establish a single industrial base for the community as a whole. This involves a formulation of measures that ensure that mergers affecting firms established in the Community are in harmony with the economic and social aims of the Community’ (EC Summit, 1972, point 7)

Although the EC Treaty had not mentioned industrial policy in a word (Swann, 1983: 15), the Commission had already been exploring the possibilities of introducing such policies for some time at this stage. This is reflected in the publication of a number of memoranda in the early 1970s, not least the one already referred to above (see Commission, 1970; Cini & McGowan, 1998: 25). In this

memorandum the Commission suggested that the Community should actively support various forms of business integration, including cross-border mergers between firms that could engage in the development of new technologies (see Warnecke, 1975 for a discussion of industrial policy in the EC). Although such plans were initially well received by the member states, not least at the Paris summit, it became apparent over the course of the 1970s that they were, or to an increasing extent became, unwilling to put them into practice (see e.g. Swann, 1983: 138-139, 181).

Indeed, the summit came to mark the high point of Euro-optimism in the 1970s. In 1973 the Golden Age ended and the Crisis Decades in the developed capitalist world began. This was a crisis of embedded liberalism/Atlantic Fordism: that is, of the Fordist growth model, of the KWNS and arguably of *Pax Americana*. In the next chapter we will come back to this. Suffice it to mention here that from this point onwards ‘soaring inflation, rising unemployment, yawning trade deficits, and a worsening oil crisis undermined the EC’ (Dinan, 1999: 69). When the political leaders of the EC met at the next summit, which was held in Copenhagen on 14-15 December 1973, the Euro-optimism of the previous year was replaced with deep divisions and disinclinations to follow up the Paris summit conclusions. Although some steps were taken in the direction of increased European integration in the 1970s, (for instance, the so-called “currency snake” was introduced in 1972, the European Council was established in 1974 in the context of which the heads of state or government subsequently met regularly and in 1979 the first elections to the Parliament were held) the balance now tipped decisively in favour of those favouring intergovernmentalist arrangements and against those with federalist aspirations. This also meant that despite the apparent intentions, however short-lived they were, to seriously tackle the American challenge at the European level, the challenge was ultimately ‘taken up primarily along national lines’ (van der Pijl, 1984: 246-47). One important element in the strategies of most or all EC governments became to ‘promote *national* mergers to establish “national champions” in the Community area’ (Holland, 1980: 66, emphasis added) and in some cases also to subsidise specific companies or sectors.

### **5.3. Merger control in France and Germany**

In **France** the Fifth Plan (1965-1970) and in particular the Sixth Plan (1970-1975) had as important objectives to create a small number of giant companies who would be able to compete on world markets. These “national champions”, were ‘groomed to carry the colors of France on the battlefield

of the new international economic order' (Hall, 1986: 149). That is, not only were they meant to be competitive vis-à-vis companies based in other EC countries; they were also intended as a response to the "American challenge". This was made quite clear in the Fifth Plan which states that '[t]he benefits of the establishment of a European Common Market will not be fully realized unless French firms participate in the construction of larger conglomerates. Such European consolidation must be all the more encouraged and aided since, in a number of cases, only they will permit resistance to the financial and technical power of the large American firms' (quoted in Suleiman, 1975: 30-31). The French approach was thus to foster flagship companies by encouraging concentration both through state subsidies and by encouraging mergers between large companies. That this policy was not without effects appears from table 5.1. Bearing in mind that the figures should be treated with caution and only regarded as indicative, it seems safe to suggest that whereas no significant increase in the number of mergers taking place was recorded, the average value of mergers rose dramatically after 1965. Whereas the average 1960-1965 value of each operation as 3.38 million French francs it had risen to an annual average of 13.57 million French francs in the 1966-1969 period.

**Table 5.1: Number of M&As in France, 1960-69**

<b>Year</b>	<b>Number of operations of concentration</b>	<b>Average remuneration of each operation (millions of francs)</b>
<b>1960</b>	75	2.20
<b>1961</b>	70	3.28
<b>1962</b>	93	2.16
<b>1963</b>	131	2.27
<b>1964</b>	113	1.45
<b>1965</b>	96	2.90
<b>1966</b>	79	10.34
<b>1967</b>	57	13.21
<b>1968</b>	56	12.85
<b>1969</b>	72	17.87

Source: reproduced from Suleiman (1975: 27)

Even though giant companies were brought about in important industrial sectors, the new "champions" did not always perform as well as hoped for. According to Hall (1986: 149) many of them 'proved to be a massive drain on the public treasury without ever achieving the levels of efficiency that would have made them powerful competitors even for the French market'. Consequently, in the second half of the 1970s, the planning board began taking some interest in smaller companies in niche sectors that had hitherto been neglected.

When seen in the context of French industrial policy it is not surprising that the enforcement of the competition policy provisions that had been adopted in the early 1950s (see section 4.3) was very weak. However, in 1977 a number of additions to the competition law were adopted under the premiership of Raymond Barre. A new regulatory institution, the *Commission de la Concurrence*, was established and programmed with the powers to initiate and prosecute cases and to impose fines on companies who engaged in anti-competitive practices. Although some civil society organisations were allowed to make complaints to the *Commission*, it was the Minister of Economics who would have the final say and who could thus determine whether a company was to be punished for its practices. Moreover, merger control did now become part of French competition policy, albeit the subunit of regulation that was hereby established was almost doomed to be inefficient from the outset. The control was to be implemented by the government through an agency that formed part of the *Price Control Ordinance* department. No mandatory merger notification system was established but mergers that would result in a company with market shares exceeding 40 % and 25% for horizontal and non-horizontal mergers respectively could be examined by the *Commission*. Between 1977 and 1986 (where the system was changed) only 8 mergers were examined. Only one of these was prohibited by the *Commission*, namely the merger between Ashland Chemical France and Cabot Corporation, but due to procedural mistakes, this decision was subsequently overturned by the French Administrative Supreme Court, the *Conseil d'Etat* (Voillemot & Michel, 1988: 33). In fact it seems that the most important function of the merger provisions was that they could be (and on some occasions were) used by the government to prevent the acquisition of French companies by foreigners (Souam, 1998: 207-208).

The inclusion of merger provisions in French competition law was in part a response to the high degree of concentration that occurred in some sectors as a consequence of the French industrial policy in the 1960s and 1970s. According to Jenny (1990: 150), a ‘vocal minority of economists and public-policy-makers’ began calling for a strengthening of French competition law as they felt ‘that the lack of aggressiveness of French firms on international markets was partly a consequence of weak competition on their domestic market’. Interestingly, Jenny also links the adoption of French merger rules to the developments that were taking place at the EC level (see section 5.5 below). French planners were afraid that the EC merger control rules could be used by the EC Commission to ban mergers between large French companies, hereby undermining the further concentration of French industry, which remained an important element in French industrial policy.

Hence, ‘although public-policy-makers in charge of French industrial policy still believed in the positive effect of concentration and mergers, they were led to favour the adoption of some kind of merger control at the French level ... as a way to defeat the European merger-control project’ (Jenny, 1990: 151).

In **Germany**, the GWB was amended in 1965. Hereby the law was modified somewhat but remained oriented against cartels. No merger control provisions were included at this juncture but with the amendment a new system was introduced (in Article 23) under which mergers of a certain magnitude had to be notified to the BKartA (on the criteria, see Canellos & Silber, 1970: 32). It was only in 1973 that merger provisions were included in the GWB thanks to the efforts of the SPD/FDP coalition government. Five institutions were programmed to take part in the regulation of mergers: (1) The BKartA, which was given powers to investigate and regulate mergers with turnovers greater than DM 50 million. If the merger involved companies with aggregate turnovers of DM 2 billion or more, or one of the parties had a turnover of more than DM 1 billion, then pre-merger notification would be required. Otherwise post-merger notification would be sufficient. Mergers that would lead to or strengthen a position of market dominance were to be prohibited by the BKartA unless the involved firms could show that the merger would result in improved competitive conditions (Schwartz, 1993: 629); (2) the *Monopol-kommission*, which would publish opinions and reports on the developments regarding the climate of competition; (3) the *Kammergericht*, which would function as the first court of appeal against decisions made by the BKartA; (4) the *Bundesgerichtshof* (the Federal Supreme Court), which would constitute the highest instance of *legal* appeal; (5) and finally the Ministry of Economics, or more precisely the Minister of Economics who would be the highest instance of appeal and who was thus given the powers to overrule a decision by the BKartA to prohibit a merger. According to Section 24(3) of the GWB, s/he could do this ‘when in the specific case the restraint of competition is more than offset by the general economic advantages of the merger or when an overwhelming public interest justifies the merger’ (quoted in Baur, 1980: 459). Although the minister would have to permit a merger on the basis of a report from the *Monopol-kommission*, s/he would thus basically be allowed to do this on criteria chosen by her- or himself (Smith, 1994: 438-442; see also Wilks & McGowan, 1995 for more detailed discussions of the German regime).

The widespread view that German authorities have vigorously been pursuing a tough “competition über alles” approach to combat cartels and concentration at all costs (e.g. Cini & McGowan, 1998:

9; Woolcock *et al.*, 1991: 101-102) should be taken with a pinch of salt. As Cable (1979: 2, 24) noted, the stance towards cartels had in practice been permissive as numerous exemptions were granted by the BKartA. Thus, in 1973 there were over 200 legal cartels in Germany (Smith, 1994: 437). One scholar goes as far as to suggest that ‘Germany’s post-war political and economic rebirth has relied considerably, some might say excessively, on collusion among major industries, banks, and regional political bodies with mutual interests and holdings in one another’ (Schwartz, 1993: 627). Nor did the BKartA ban many mergers. Of the 582 mergers that were notified between 1973 and 1975 only 4 were prohibited (Schwartz, 1993: 629). And of the 10,849 mergers that were notified between 1974 and 1989, only 90 were prohibited by the BKartA. Nearly all prohibitions were appealed and ultimately less than half of them were upheld and became effective (Smith, 1994: 442). On a number of occasions in the 1970s, the Minister of Economics overruled BKartA decisions that had been backed up by the courts and gave his/her blessings to big mergers. The justifications given for this ranged from considerations of employment levels over preservation of petroleum supplies to the attainment of international competitiveness in specific sectors (for more details, see Baur, 1980: 460).

As table 5.2 shows, a very significant rise in the yearly number of mergers took place between 1960 and 1977. The increase was not constant, however. Whereas the development was relatively undramatic in some periods, namely the one from 1960-1968, other periods were characterised by merger waves. Prior to the inclusion of merger rules in the GWB in 1973 such a merger wave was experienced between 1969 and 1971 and, paradoxically, an almost explosive growth in mergers set in the very year these rules were enacted. At the end of the period, then, the yearly number of mergers was over 25 times as high as it had been in 1960.

**Table 5.2: Number of M&As notified under section 23 of the GWB, 1960-77**

<b>1960</b>	22	<b>1969</b>	168
<b>1961</b>	26	<b>1970</b>	305
<b>1962</b>	38	<b>1971</b>	220
<b>1963</b>	29	<b>1972</b>	269
<b>1964</b>	36	<b>1973</b>	243
<b>1965</b>	50	<b>1974</b>	318
<b>1966</b>	43	<b>1975</b>	448
<b>1967</b>	65	<b>1976</b>	453
<b>1968</b>	65	<b>1977</b>	554

Source: *Statistisches Jahrbuch* (as reproduced in Cable 1979: 5)

There is no doubt that significant concentrations of capital were allowed to take place through mergers. Many of the mergers that took place after 1973 did not involve firms of equal size and

were moreover conglomerate mergers (that is, they involved firms operating in different markets). The reason for this was that a loophole in the merger rules, namely the DM 50 million turnover threshold enabled large firms to merge with companies operating in markets dominated by small- and medium sized capitals. This, as Smith (1994: 446) notes, ‘led to a severe deterioration in the competitive structure of these markets, since between 1973 and 1979, 1,390 out of a total of 3,388 notified mergers were covered by this exemption’. Only with an amendment in the rules in 1980 was the loophole closed (see Smith, 1994: 439, 446).

As these remarks serve to indicate, it was only at the level of discourse that the competition unit of regulation that developed in Germany was one that valued competition above everything else. Certainly it was in practice far from living up to the ideals of the ordoliberals, allowing, as it did, for a significant cartelisation and concentration of the German economy. Indeed, the inclusion of merger provisions in the GWB constituted a genuine strengthening of the system. But the fact that a political decision-maker was elevated to a position where s/he was empowered to overrule BKartA decisions on the basis of various political motives ran directly counter to ordoliberal thinking.

One could thus argue that the broader synthesis between free markets and a social welfare state (the “social market economy”) was reflected in the area of competition regulation. That is, as a starting point it was the aim to preserve competitive structures along what we can call neoliberal lines: competition was to be regulated on the basis of objective criteria, such as clearly defined thresholds, rather than on the basis of political discretion (see section 5.5 below). Competition rules were enforced ‘by independent authorities, insulated from (short-term) political pressure’ (Woolcock *et al.*, 1991: 102). However, even if the BKartA was politically independent we have also seen that its decisions could be overruled by the Minister of Economics of the day and that it had indeed been rather generous in permitting mergers and cartels. The desire to preserve competition thus clearly had its limits, and could be (and was) dispensed with on occasions where it was considered convenient, for instance for broader social reasons.



#### 5.4. Merger control in the UK

As already mentioned, the UK joined the EC in 1973. Historically speaking, 'Britain can be regarded as the home ground of economic liberalism, dictating a minimum role of government, relying on the self-regulating market instead' (van Apeldoorn, 2002: 72-73). Indeed, the *Pax Britannica* era, stretching from the first industrial revolution and/or the end of the Napoleonic Wars to the beginning of the First World War, is associated with free trade and the freedom of finance. This was a consequence of the hegemonic status of the "liberal international" GDR promoted by Britain's finance capital sector, known as the City, which constituted the world's financial centre at the time (Overbeek & van der Pijl, 1993: 7-9; see also Cox, 1987: 123-147 on the liberal world order of *Pax Britannica*). However, a settlement involving a class compromise between labour and (in particular industrial) capital introduced a model of capitalism after the Second World War that, like the forms of capitalism emerging in France and Germany, combined market economy with a comprehensive welfare state. Initially, however, the emphasis was more on welfare than on free markets.

After winning the July 1945 election by a landslide the new Labour government implemented a programme that was, in the words of one scholar, 'the most radical of any administration before or since' (Hall, 1986: 70). This involved three main elements (Hall, 1986: 70-76): First, a comprehensive nationalisation process took place. The Bank of England was nationalised, as was *inter alia* the railways, the iron, steel, coal and gas industries along with the electricity sector and telecommunication company, Cable and Wireless (see also Overbeek, 1990: 114-119). Second, the commitment to introduce a welfare state in the UK that would provide the broad population with health care, social security, education and more. Third, the goal to achieve full employment by means of Keynesian counter-cyclical demand management policies. When the Conservatives took over from Labour in 1951, no dramatic policy shift took place although the iron and steel industries were denationalised. That is, the Conservatives, who were to remain in power for 13 years, came to endorse Keynesian economic policies and the continued development of the welfare state.

However, the post-war governments were still unable 'to prevent the British economy very quickly resuming the decline which had temporally been suspended by the Depression and the war' (Overbeek, 1990: 122)<sup>61</sup>. Initially, the political response to this was to let (what was left of) the private sector, operate on its own without too much interference from the state. And until the 1960s

state aid to industry was relatively small. However, during the 1960s and 1970s this changed (see Coates, 1999: 651-652 for some details). The 1964-1970 Labour government made some rather unsuccessful attempts to introduce interventionist industrial policies formed along French lines, for instance establishing the “Industrial Reconstruction Corporation” which was programmed to facilitate mergers. And especially after the recession hit in 1974, the same year a new Labour government took office, state aid channelled to declining industries became normal. According to Hall (1986: 52), the government spent £9290 million on state aid to nationalised and private companies between 1971 and 1979, hereby almost bringing UK spending on a par with the amounts used in France and Germany (measured as percentage of GDP).

In the field of competition policy, the UK was a pioneer: with the enactment of the 1948 *Monopolies and Restrictive Practices Enquiry and Control Act*, the UK was the first European country to establish a competition unit of regulation after the war (see e.g. Utton, 2000 for more details). Similar to the case in France and Germany, this happened against the background of American pressure which the UK had to comply with in order to receive the financial aid so badly needed in the reconstruction process (see Dumez & Jeunemaitre, 1996: 218). However, it was only with the 1965 Monopolies and Mergers Act that merger control became part of the UK’s competition unit of regulation. This time, the background was an explosion in the number of mergers taking place in late 1950s and early 1960s. According to one estimate, 3384 mergers took place in the UK between 1958 and 1962, whereas the number for the entire EC in this period was approximately 1000 (Overbeek, 1990: 124). The resulting level of concentration in certain sectors and other side effects of certain mergers caused political concern led to broad political support for the adoption of rules that could be used to control mergers (Paines & Reynolds, 1988: 185). Initially proposed by the Conservative government with a 1964 White Paper, the Monopolies and Mergers Act was passed in August 1965 under the Labour government supported by both the Conservatives and the Liberals and to some extent the Trade Union Congress (TUC), but opposed by the CBI (see Wilks, 1999: 195-204; Eyre, 1999: 67-68).

With the 1965 Act, the President of the Board of Trade (later to become the Department of Trade and Industry) could decide to refer mergers to the Monopolies Commission in cases where the merged companies would obtain a UK market share of one third or more or where the value of all acquisitions would exceed £5 million (Paines & Reynolds, 1988: 186). In 1973, the 1965 Act was replaced by the Fair Trading Act and the system was hereby given the institutional configuration

and content it was basically to have until it was reformed in 2002 (see Chapter 7). With the 1973 Act a new institution, the Office of Fair Trading (OFT), was programmed to screen all mergers. As no compulsory notification system was established, OFT staff had to perform this task by reading the financial press and other relevant publications, as well by following up on information provided by concerned companies and interest groups (Kryda, 2002: 255-256; Paines & Reynolds, 1988: 187). However, the Secretary of State for Trade and Industry retained the powers to decide whether or not mergers were to be referred to the Monopolies Commission, which was now renamed the Monopolies and Mergers Commission (MMC), for detailed scrutiny. And the Secretary of State was free to decide whether or not s/he would follow the recommendations of the MMC. In other words, a political decision-maker was empowered to take the final decisions.

In the UK system, mergers were to be regulated by “public interest” criteria not merely by whether or not they have anti-competitive effects. Thus, if a merger could be shown (by the MMC) to be against the public interest, the Secretary could either prevent the merger or order its dissolution (depending on whether it had already taken place or not)<sup>62</sup>. Section 84 (1) of the 1973 Act specifies that in assessing whether a merger is in the public interest, the MMC should among other things take into account the desirability

- ‘(a) of maintaining and promoting effective competition between persons supplying goods and services in the United Kingdom;
- (b) of promoting the interests of consumers, purchasers and other users of goods and services in the United Kingdom in respect of the prices charged for them and in respect of their quality and the variety of goods and services supplied;
- (c) of promoting, through competition, the reduction of costs and the development and use of new techniques and new products, and of facilitating the entry of new competitors into existing markets;
- (d) of maintaining and promoting the balanced distribution of industry and employment in the United Kingdom; and
- (e) of maintaining and promoting competitive activity in markets outside the United Kingdom on the part of producers of goods and of suppliers of goods and services, in the United Kingdom’ (quoted in Paines & Reynolds, 1988: 216)

In other words, then, consumer protection, export volumes and employment were made some of the criteria that could be used in the assessment of whether or not a merger was to be allowed.

A 1978 report entitled *A Review of Monopolies and Mergers Policy*, which was presented to the Parliament by Secretary of State for Prices and Consumer Protection, Roy Hattersley, dealt with

merger activity in the UK from the early 1960s. The annual number of mergers had fluctuated significantly between 1963 and 1977, displaying neither a clear upward nor a clear downward tendency (see table 5.3). Yet the report clearly stated that ‘[m]ergers have been an important source of increasing market power in the last decade’, with one-quarter of the 1500 mergers falling within the legislation resulting in the creation of strengthening of a statutory monopoly (Hattersley, 1978: 16). Despite this, less than 3 per cent of the mergers taking place since 1965 had been referred to the MMC, and of these ‘only 13 were found to be against the public interest and a further 15 were abandoned’, meaning that ‘under 2 per cent of mergers falling within the legislation have been prevented by present policy...’ (Hattersley, 1978: 17).

**Table 5.3: Number of M&As in the UK, 1963-1977**

<b>1963</b>	888	<b>1971</b>	884
<b>1964</b>	940	<b>1972</b>	1210
<b>1965</b>	1000	<b>1973</b>	1205
<b>1966</b>	807	<b>1974</b>	504
<b>1967</b>	763	<b>1975</b>	315
<b>1968</b>	946	<b>1976</b>	353
<b>1969</b>	907	<b>1977</b>	482
<b>1970</b>	793		

So what should we make of this brief account (in this and the previous section) of the merger subunits of regulation that appeared in France, Germany and the UK in the 1970s? In particular we should notice how key characteristics of the broader ensembles of regulation of which they formed part were reflected in their content and form! For one thing, the commitment to full employment underpinning the KWNS was to some extent brought into the regulation of M&As. In the UK the MMC was explicitly programmed to regulate mergers on the basis of “public interest” criteria which included the maintenance and improvement of employment levels, whereas it would be up to the political decision-maker to ban or allow mergers on such grounds in Germany and France. Moreover all three subunits were designed in such a way as to ensure that the emergence of big (Fordist) enterprises could be allowed even if they would undermine competition in the market in which they operated<sup>63</sup>. Although the competition authorities in the UK and, especially, Germany were programmed to safeguard competition, they could be overruled by the minister if their decision to ban a merger was not regarded convenient. This can hardly be regarded as a trivial matter in relation to a growth model where economies of scale, carried out by large corporations

engaged in mass production, played (and was perceived to play) such a vital role and where greater corporate size was considered a necessity if the American challenge was to be successfully dealt with. In sum, although the national subunits of regulation discussed here cannot meaningfully be denoted as “Keynesian” (as cannot any merger policies), it seems reasonable to suggest that they were nevertheless designed to supplement, or at least not contradict, the KWNS and its facilitation of Fordist growth.

### **5.5. EC merger control?**

As mentioned in the previous chapter (see section 4.5), a Directorate-General within the Commission, viz. the Competition DG, was programmed to enforce the EC Treaty’s competition rules. Through Regulation 17 it had been armed with powers that were potentially more far-reaching than those enjoyed by any other DG as well as a significant degree of operational autonomy vis-à-vis member states and other EC institutions. However, Regulation 17 gave rise to some unexpected problems, above all because it required companies to notify their agreements to the Commission before a specified deadline. The result was that by 1 February 1963 the Commission had received an overwhelming total of 34,500 notifications of bilateral agreements between companies (Goyder, 1993: 50). For a new and modestly staffed regulatory institution like the Competition DG it was impossible to handle this excessive workload<sup>64</sup>. The solution was that the Council extended the powers of the Competition DG by approving the introduction of the so-called block exemption system in 1965, hereby giving the Commission the powers to exempt entire groups of agreements from regulation (see e.g. Cini & McGowan, 1998: 66-69 or Goyder, 1993: 56-73 for more details). Allen (1983: 214-215) provides an account for how the DG then went on to categorise, group and exempt agreements, for instance exempting certain “exclusive dealing” and “cooperation” agreements.

Moreover, the precise portfolio, working procedures and indeed organisation of the Competition DG was not yet settled. As a matter of fact the DG, ‘had to create an entire substantive and procedural system and explain it, frequently to governmental and business leaders unfamiliar with such norms, and/or dubious of their legitimacy’ (Gerber, 1998: 353). Given the lack of experience with competition policy at the national level this was no small task. During the 1960s and 1970s, the EC competition unit of regulation thus gradually took shape through processes of internal

programming in the Competition DG and of external programming carried out by in particular the Court but also to some extent by the wider Commission and the member states. In its early years the Competition DG was almost exclusively preoccupied with the cartel sub-unit of regulation, meaning that the questions of state aid and economic concentration were neglected (see Cini & McGowan, 1998: 22).

However, from the mid 1960s the DG began exploring its powers in the field of merger control. We have already seen that the EC Treaty mentioned no such powers, nor did of course Regulation 17. But in 1963 the Commission appointed an expert group to, among other things, ‘examine the connection between concentration and the application and interpretation of Article 86 and also the possibilities of justifying compulsory notification for enterprises with a strong position on the market for mergers and for particular practices covered by Article 86’ (Commission, 1964: 58). Partly on the basis of the work of these experts, the Commission published a memorandum in December 1965, later to be known as “the 1966 Memorandum”, in which it made its own views concerning the applicability of Articles 85 and 86 to concentrations clear. Contrary to the opinion of the experts (see Schwartz, 1993: 615) the Commission stated that Article 85 would not be applicable to mergers, a point that was later repeated in its *Ninth Report on the Activities of the Community* where it reads that ‘[t]he ban on cartels (Article 85) is, in the Commission’s opinion, neither intended nor suitable to prevent the domination of a given market by mergers or other forms of combination’ (1966: 81). However, the Memorandum suggested that Article 86 might be applicable to the regulation of mergers in cases where a merger could result in the monopolisation of a particular market. According to Goyder (1993: 387), this suggestion was made ‘in spite of considerable doubts even within the DGIV’. It was then decided to find out whether this interpretation was, or could be made, valid by testing it in practice, hereby possibly also achieving a ruling from the Court (see Goyder, 1993: 387).

Perhaps because of the French hostility towards the EC from the mid to the late 1960s, the Commission waited until the early 1970s before picking a case. It then chose what was later to be known as the *Continental Can* case. To put it briefly, American company Continental Can, a producer of metal containers and various other packages, had gained control over the largest German producer of metal packages, SLW. In collaboration with British company Metal Box, Continental Can furthermore planned to set up holding company Europemballage with the intention of purchasing the majority of shares in Dutch company TDV, which was a leading manufacturer of

metal packages in the Benelux countries. SLW and TDV had both specialised in metal caps for glass containers and the packaging of crustacea, fish and meats. When the Commission found out about these plans it threatened to charge Continental Can and Europemballage with violation of the Treaty's Article 86(1). It believed that Continental Can had achieved a dominant position in the Common Market's markets for "packaging of crustacea, fish and meats" and "metal caps for glass containers" and that the company would be guilty of abusing this dominant position if Europemballage bought TDV. Metal Box withdrew from the deal, whereas Continental Can went ahead and, via Europemballage, bought the vast majority of shares in TDV.

The Commission thus opened proceedings against Continental Can and ultimately decided to prohibit the concentration. Continental Can appealed against this decision to the Court which in its ruling of 21 February 1973 went against the Commission. The Court found that the Commission had applied a too narrow definition of "markets" in its decision. Rather than seeing the firms in question as operating in some highly specialised market for "packaging of crustacea, fish and meats" and "metal caps for glass containers" the Court found that they should be seen as operating in the much wider general market for packaging (where Continental Can could not be seen as abusing a dominant position). The Commission's decision was thus annulled. But what was much more remarkable was that the Court accepted the Commission's interpretation of article 86 as being applicable to mergers that would strengthen a dominant position. As Gerber (1994: 117) explains, '[t]raditional legal analysis provided little support for this use of article 86. The text of the treaty did not indicate that article 86 was applicable to acquisitions. On the contrary, it seemed to indicate that the article was not applicable to such cases'. Ignoring this, the Court instead referred to 'the spirit, general scheme and wording of article 86, as well as to the system and objectives of the Treaty' (Court, 1973: p. 243).

The Competition DG's potentially significant powers combined with the potential of competition law to facilitate market integration, made the DG a highly interesting "partner" for the Court. In fact, both institutions had a strong interest in a partnership. The Competition DG would have to enforce the competition rules if the Court was to make any rulings in this area, and the Court needed to support the DG's interpretation of the rules if its work was to have any effect (Gerber, 1998: 354). Hence, a close relationship developed between the two institutions in which

‘the Commission tended to follow the lead of the Court, thereby taking full advantage of the Court’s symbolic status and its relative immunity from political pressure. The Court’s decisions were largely shielded from such pressures because they were understood as applications by a neutral, non-political body of juridically-determined principles, and thus the Commission could achieve a degree of political security by operating in the Court’s “tow”’ (Gerber, 1998: 354)

From the mid 1960s onwards, then, the Court interpreted the competition provisions using the teleological method also used in the wider constitutionalisation of the Treaty (see section 5.2 above): it interpreted the provisions ‘according to its own conception of what was necessary to achieve the integrationist goals of the Treaty’ (Gerber, 1998: 353). The Court clearly believed that a strong Commission would be desirable, and in interpreting the competition provisions it thus sought ‘to interpret the competition provisions so as to give the Commission the greatest possible scope for intervention’ (Wyatt & Dashwood, 1980: 281; see also Goyder, 1993: 493). It is probably not too far to suggest that the Court established itself as the most important external programmer of the Competition DG in the 1960s and 1970s once Regulation 17 had been adopted.

However, even the Court could not provide the Competition DG with an effective merger regulation instrument. Although the *Continental Can* ruling constituted a small victory for the Commission, the problem remained that Article 86 only refers to companies that can be proven to *abuse* a “dominant position” (that is, their oligopoly or monopoly status). This meant that not only was it not *in itself* unacceptable if a company had a dominant position; a further implication was that the Commission was not allowed to prohibit a merger that was likely to result in a dominant position in the market *in advance* (Allen, 1977: 102). In practice, the Competition DG was thus given the rather difficult task to regulate mergers that had already taken place<sup>65</sup>. Consequently, and not least in response to the positive signals that had been coming from the Member State governments at the 1972 Paris summit (see section 5.2 above), the Commission presented its first proposal for a merger control regulation in July 1973 (Commission, 1973a). Just like the proposals that were to follow it, it had its legal base in Article 87 and Article 235 of the EC Treaty (see also Commission, 1973b). The latter states that ‘If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, *acting unanimously* on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures’ (emphasis added). In other words, a merger control regulation could only become reality insofar as



it was actually wanted by all the direct programmers: a veto from a single Member State would be enough to prevent its adoption.

The main points in the 1973-proposal can be summarised as follows: the Commission should be notified three months prior to any merger which would either produce a yearly turnover of 1,000 million units of account (hereafter: ECU) or which already involved firms with a yearly turnover of ECU 1,000 million. If the Commission within 90 days estimated that a notified merger would potentially be problematic it would then have an additional nine months (!) to make its final decision. In principle all mergers hindering competition could be blocked by the Commission. Exempted, however, would be smaller firms with a yearly turnover of less than ECU 200 million *and* concentrations within industries ‘which are indispensable to the attainment of an objective which is given priority treatment in the common interest of the Community’ (Commission, 1973a: article 1 (3)). This second exemption is particularly interesting as it illustrates the contradiction between the aim to ensure competition in the market and the goal to create companies large enough to be able to compete with, in particular, American companies. This exemption would leave the Commission with significant discretionary powers, especially as it refused to clarify precisely on what grounds it could be made: ‘In the interest of preserving future flexibility for possibly changing Community needs, the Commission has resisted requests to specify in advance in what circumstances such exemptions will be granted’ (Commission, 1974: 16).

In order to convince the Council that there were good reasons to adopt the proposal, the Commission had produced a number of statistics showing how a significant increase in mergers had taken place in the Common Market (*Agence Europe*, 1973: 2). The Council consulted the Parliament and the EESC, both institutions that have no other competencies in this area than expressing their opinion when consulted, and both approved the Commission’s proposal with large majorities (Commission, 1981). However, in this connection, the Parliament did suggest some minor changes in the text – for instance, that the threshold in the proposal was changed from 1000 million to ECU 1250 million. Also the EESC proposed some amendments in the text. Among other things, it aired the opinion that the regulation ought not to be exclusively focussed on the impact of potential mergers on competition, but that it should also take other factors into consideration. These factors included ‘the commercial and regional interests of the Community, the industrial interests of the Community, notably the effect on small- and medium-sized businesses and the social interests of the Community, notably the impact on employment and the rights of the workers’ (EESC, 1974:

article 6). A more far-reaching formulation regarding this “social interest” and the rights of workers in merging companies was, however, voted down (with the votes 51 against 46) in the Committee (EESC, 1974: Annex).

Despite the support from the Parliament and the EESC, agreement could not be reached in the Council and the Commission’s proposal was thus not adopted. The main reason for this was that the various programmers advocated positions grounded in incompatible USDRs. Indeed, one can identify four such discourses, namely a national-mercantilist, a Euro-mercantilist, a neoliberal and a centre-left USDR. As can be seen from table 5.4 each of these constituted a distinct perspective on the desired content, form and scope of merger control<sup>66</sup>.

**Table 5.4: USDRs and EC merger control**

	<i>National-mercantilism</i>	<i>Euro-mercantilism</i>	<i>Neoliberalism</i>	<i>Centre-left</i>
<i>Content</i>	Oriented towards national industrial policy and the creation of “national champions”. Merger control must take this into consideration.	Oriented towards national industrial policy and the creation of “European champions”. Merger control must take this into consideration.	Merger regulation on the basis of “competition only” criterion. No industrial or social policy considerations in merger control.	The regulation of mergers should take into consideration effects on unemployment and the rights of workers
<i>Form</i>	Involvement by national political decision-makers in merger control	Little involvement from national political decision-makers, but the Commission should be given far-reaching discretionary powers in its regulation of mergers	No or little room for “political discretion” in the regulation of mergers. Regulation on the basis of clear and transparent rules.	Should allow for some degree of political involvement in order to ensure democratic accountability.
<i>Scope</i>	Only national regulation of mergers	EC level regulation of big mergers	EC level and possibly global regulation of big mergers. However, also nationalistic type of neoliberalism	Of secondary importance as long as social consequences are taken into consideration

The *national-mercantilist USDR* was oriented towards national industrial policy and the creation of “national champions”. France, Italy, Ireland and the UK belonged to the group of countries that wanted more than just competition criteria to be applicable in the regulation of mergers. These countries saw the proposed EC merger regulation as a potential limitation of their ability to pursue national industrial and social policy goals and were thus not willing to hand over competencies to the supranational level in this area (Allen, 1977: 107; Woolcock, 1989: 12)<sup>67</sup>. As regards the French

government, it did ‘not relish commission interference in its cosy and effective system of control, exercised by discrete telephone calls to corporate boardrooms’ (*Economist*, 1974b: 62). As we saw in section 5.3 above, the French even went as far as to introduce merger control at the national level partly in order to avoid supranational legislation in this field. The Italians had no competition unit of regulation worthy of the name and displayed ‘a profound lack of interest in allowing the commission to fill the vacuum’ (1974b: 62).

Capital actors can also be placed in the group that supported this position. Indeed, the main representatives of business in the different countries were not at this stage particularly concerned with whether mergers were to be regulated at the supranational level or they directly opposed that the EC was given competencies in this area (Jacobs & Steward-Clark, 1990: 80). As Allen noticed in his analysis of the reactions to the publication of the Commission’s 1973 draft regulation:

‘Neither the member states nor industrial interests such as UNICE and COCCEE [Committee of Commercial Organizations of the EC, HB] have been enthusiastic and this accounts for the lack of progress in the Council of Ministers. European business circles have over the years regarded trade restrictions and cartel arrangements as normal and have therefore regarded Community competition policy with considerable suspicion’ (Allen, 1977: 107).

In the UK, the CBI did not have confidence in the ability of the Competition DG to control mergers, and proposed ‘that investigations of mergers by the Community should be conducted by a body independent of the Commission’ (House of Lords, 1974: 2). A similar view was expressed by the International Chamber of Commerce (ICC) (*Economist*, 1973: 53). Moreover, the British Law Society’s Standing Committee on Company Law criticised the proposal at length in a Memorandum dated October 1974, for instance pointing out problems related to definitions, criteria and time limits (House of Lords, 1975: 2-3). In France, the CNPF opposed any form of EC merger control going beyond the scope of Article 86 (*Economist*, 1973: 53). It is thus not surprising that UNICE, the organisation representing national industrial federations in the EC, was also expressing strong reservations with respect to the proposed regulation (UNICE, 1974).

As mentioned above, majorities in the Parliament and the EECS were in favour of the proposed regulation. However, it appears from the transcript of the debates taking place in the Parliament on 12 February 1974 that both the Conservative Group and the European Progressive Democrats opposed the proposal. For instance, the Conservative peer, Lord Mansfield argued that

‘Basically the proposed powers which the Commission seeks in these matters are too cumbersome, too slow and too Draconian in that they will leave far too much to the discretion of the Commission, which will act as prosecutor, judge and executioner in its own court. They will be far too costly for the firms who wish to concentrate their undertakings’ (Parliament, 1974: 73; see also *Economist*, 1974a: 56-57)

And Mr Cousté of the European Progressive Democrats added that ‘in the final analysis we are against prior control of concentrations because we believe the European undertakings are not yet concentrated enough to successfully compete against the huge American and Japanese corporations. They are not yet big enough’ (Parliament, 1974: 74).

The *Euro-mercantilist USDR* was oriented towards European level industrial policy and the creation of “European champions”. It seems that the Commission was the principal supporter of this position (which was very similar to that advocated by Servan-Schreiber in *The American Challenge*) although some of the governments favouring industrial policies at the national level might also have been willing to accept a regulation based on European level industrial policy as long as it did not disturb their national activities in this field. This, however, made little difference as those programmers subscribing to the neoliberal USDR would not have accepted it.

The *neoliberal USDR* gave rise to a position according to which the EC (as well as national authorities) should regulate mergers on the basis of objective criteria and transparent procedures in order to protect the process of competition, and not intervene in the economy in order to promote particular sectors or firms. The neoliberal GDR entails a commitment to the separation of key institutions from democratic accountability (Gill, 1998; Harvey, 2005: 66). Advocates of the neoliberal USDR, which can be seen as originating in (or at least related to) ordoliberal thinking, did thus support a form of merger regulation that would leave little room for political discretion and thus a limited role for democratically elected policymakers. The German government, together with the Danish government, was the principle advocate of this “anti-EC-industrial policy” position. To be sure, the two governments were not enthusiastic about granting the Commission the powers to regulate mergers. But if it was to do so they were eager to ensure that merger control allowing for industrial policy goals to be pursued at the EC level would not come into being. In one sense this is a bit ironic, given that the German competition unit of regulation was far less strict than its proponents would generally like it to appear (allowing, as we have seen above, for both cartels and significant concentrations). However, under the German merger sub-unit (which had barely begun

operating at this stage) the use of non-competition criteria in the regulation of mergers was kept as a last resort. That is, it was not an instrument in the BKA's tool box but something the Minister could make use of now and then. Consequently, it is not terribly surprising that the German government wanted the Competition DG to regulate mergers strictly on the basis of competition criteria.

Finally, the *centre-left USDR* gave rise to a position according to which the Commission's regulation of mergers should take into consideration effects on unemployment and the rights of workers. This was, as we saw above, the position subscribed to by the majorities in the Parliament, namely the centre-left parties (see Parliament, 1974), and the EESC but some of the governments subscribing to the "national interventionist" position, such as the UK government (especially after Labour took office in 1974), were probably also sympathetic towards this perspective.

In the end, the national-mercantilists prevailed, hereby rendering it impossible to reach agreement on an EC merger regulation. That this position had so many supporters has to be seen in relation to the contexts described in the first part of this chapter. The low level of *inter*-national economic integration in this area was one important factor. As we saw in section 5.1, the limited number of cross-border M&As in Europe was the outcome of a complex combination of different types of obstacles to "international concentration". So for instance in the legal sphere there was no law to permit mergers to take place across borders, in the political sphere decision-makers often attempted to prevent national companies from merging with foreigners and in the economic sphere many companies were primarily oriented towards their national home markets. Had the concrete object of regulation, namely M&As, been a more international phenomenon at this juncture, it could have served as an argument for the establishment of a European level subunit of regulation.

To understand the timing of the 1973 proposal it has to be seen against the background of what proved to be a rather brief moment of pro-Europeanism and aspirations to create a strong EC industrial policy. But as governments chose to respond to the economic crisis of the 1970s by opting for national, rather than European, solutions, the proposal turned out to be well too optimistic regarding their willingness to transfer power to the Commission. Moreover, the threshold proposed by the Commission was 'extremely low' (Goyder, 1988: 323), and the proposed regulation would thus have given the Commission the powers to regulate a very large number of mergers that had previously fallen under the jurisdiction of national authorities. This, of course, was

in itself a major issue as member states were unwilling to accept an EC subunit of regulation that undermined or contradicted their national control of mergers (or in most cases lack of such control).

With the only serious pressure for a merger control regulation coming from the Court and the Commission no agreement could ultimately be reached in the Council. An increasingly impatient Competition DG could only watch from the sidelines while the negotiations over the proposal went on for years. The core countries, not least Britain, were not enthusiastic and engaged in what *The Economist* (1974d: 31) described as “spoiling tactics” in order to prevent progress in the negotiations. For instance, in September 1974 the Council requested four additional documents from the Commission’s working group in this area, leading to (justified) accusations by the Commission that some of the governments were systematically dragging out time in order to avoid making a final decision (*Agence Europe*, 1975: 4). And it appears from the Commission’s *Sixth Report on Competition Policy* that significant issues had still not been resolved in 1976. These included ‘the principle of premerger control and the legal basis of the proposed regulation, the field of application, the possibility of derogations from any prohibition, the notification of planned mergers and the decision-making procedure’ (Commission, 1977: 21). As Allen (1983: 229) later put it, the proposal ‘stagnated in the Council machinery for a number of years’ as it quite simply ‘lacked any real support as the economic climate progressively worsened and interest in competition declined’. Only in 1981 did the Commission submit a modified proposal to the Council.

### **5.6. The stagnation of the EC competition unit of regulation**

The proposal for a merger control regulation was not stagnating alone: by the early 1970s the whole EC competition unit of regulation had arrived at an impasse. The member states responded to the economic recession by *inter alia* increasing state aid and various measures designed to protect national industries from foreign competition (Dinan, 1999: 391-392). Under these circumstances the Competition DG was not capable of using the potentially significant powers it had acquired with Regulation 17: it had to tread cautiously if the continued existence of the unit of regulation (and hence of the DG itself) was not to be jeopardised. But it was not clear how it was to carry out its task in this situation: ‘Not only was it without clear policy priorities, but it was also struggling against the practical problems associated with an ever-rising tide of restrictive agreements,

concentrations and protectionist national subsidies, all of which made a mockery of attempts by DGIV to implement its policy effectively' (Cini & McGowan, 1998: 27).

The Competition DG had to adjust to this situation – to temporarily re-programme itself. To be more precise, the chosen strategy seems to have been one of turning a blind eye to even significant breaches of EC competition law if the enforcement of the latter would be politically controversial, whilst taking a great interest in relatively minor matters that would not arouse too much political attention. As Allen (1983: 232) puts it, '[t]he tenacity with which many of those working within DGIV adhere to the exact letter of the law on relatively minor technical matters, whilst ignoring more serious infringements in politically sensitive areas, can be said to reflect either a sensible and pragmatic awareness of political realities or, perhaps more accurately, a bureaucratic desire not to rock the boat'. Hence, the Commission deliberately took a very permissive stance in relation to concentrations, subsidies and cartels by applying the EC Treaty's article 85(3) in a highly generous manner. Despite the member states' widespread use of subsidies, the Commission prohibited only 21 instances of state aid in the 1970s (Allen, 1983: 217).

Although it took a somewhat tougher stance vis-à-vis cartels, the Commission and the Court on numerous occasions allowed their existence if they were perceived to help the integration of the nine national markets. And in some cases the Commission even promoted so-called "crisis cartels" – that is, temporary cartel arrangements between companies in sectors hit by recession. This allowed companies in sectors such as steel, coal, shipbuilding and textiles to temporarily stop their rivalry and instead coordinate activities and prices. The Commission did not only allow and support such anticompetitive practices for strategic reasons but also because it hoped that it would allow the companies and sectors in question to recover and hereby have long-term positive effects (see Cini & McGowan, 1998: 66; Dolan, 1983; Wigger, 2008a for more details). It should be mentioned, though, that on more than one occasion it was the DG for Industrial Affairs, which had been established in 1967 to promote cross-border cooperation between companies, rather than the Competition DG, that sought to sponsor crisis cartels. For instance, the Competition DG was very reluctant to permit a crisis cartel in the textile industry that had been promoted by the Commissioner for Industrial Affairs, Etienne Davignon as this arrangement was not regarded to fall under Article 85(3) (see Dolan, 1983).

Despite its good start in life in the 1960s, the Competition DG thus dragged on a languishing existence in the 1970s and early 1980s. It turned into ‘an uninspiring and fringe directorate’ which was perceived ‘as being too bureaucratic, too slow in dealing with cases and as suffering from low staff morale’ (McGowan & Wilks, 1995: 151). According to Allen, the Commission’s working procedures required the involvement of a seemingly endless string of officials with the result that it could easily take it three or four years to reach a decision in an average case. To make things worse, ‘[t]he slowness of this procedure is often prolonged by the attempts of frustrated officials to cut this chain which can result in internal frictions and thus further delays’, sometimes ‘for up to two or three years’ (Allen, 1983: 221-222).

Although this rather depressing state of affairs should in large part be explained with reference to the wider context in which the Competition DG found itself, the issue of leadership should also be briefly considered here. That is, one might consider the importance of who the occupant of the “competition commissioner” position is. This is particularly important as the Commission’s high-profile decisions are taken in the College, which consists of the Commissioners from the different DGs. Consequently, ‘[m]uch of the impact of any DG within the Commission rests on the ability of its Commissioner to act as a voice for its policy and to create coalitions of support with other Commissioners’ (Cini & McGowan, 1998: 43). In other words, the power of the Competition DG within the wider institutional ensemble of which it forms part is to no small extent related to the qualities of the Commissioner of Competition. As already mentioned the first occupant of this position was Hans von der Groeben who has been described as an ‘avid advocate of economic liberalism, determined to ensure that the Community as a whole should benefit from the fruits of the free working of the market mechanism’ (Holland, 1980: 13). Despite being put in charge of an area that was generally expected to be of limited importance in the EC, the result of von der Groeben’s efforts (which were supported by the ordoliberals in the German government) was that the Competition DG was given potentially very far-reaching powers with Regulation 17. It was also under his leadership that the Commission got its first group exemption powers and moreover began exploring the possibilities of introducing EC merger control (resulting in the 1966 Memorandum).

Von der Groeben’s successors in office were, to put it bluntly, not of his calibre. In 1966 he was replaced with Dutchman, Emanuel Sassen who served as Competition Commissioner until 1970 without achieving much. Next in the list of kings came Albert Borchette and Raymond Vouel, both from Luxembourg, serving respectively from 1970-1976 and 1977-1980. Whereas Vouel was

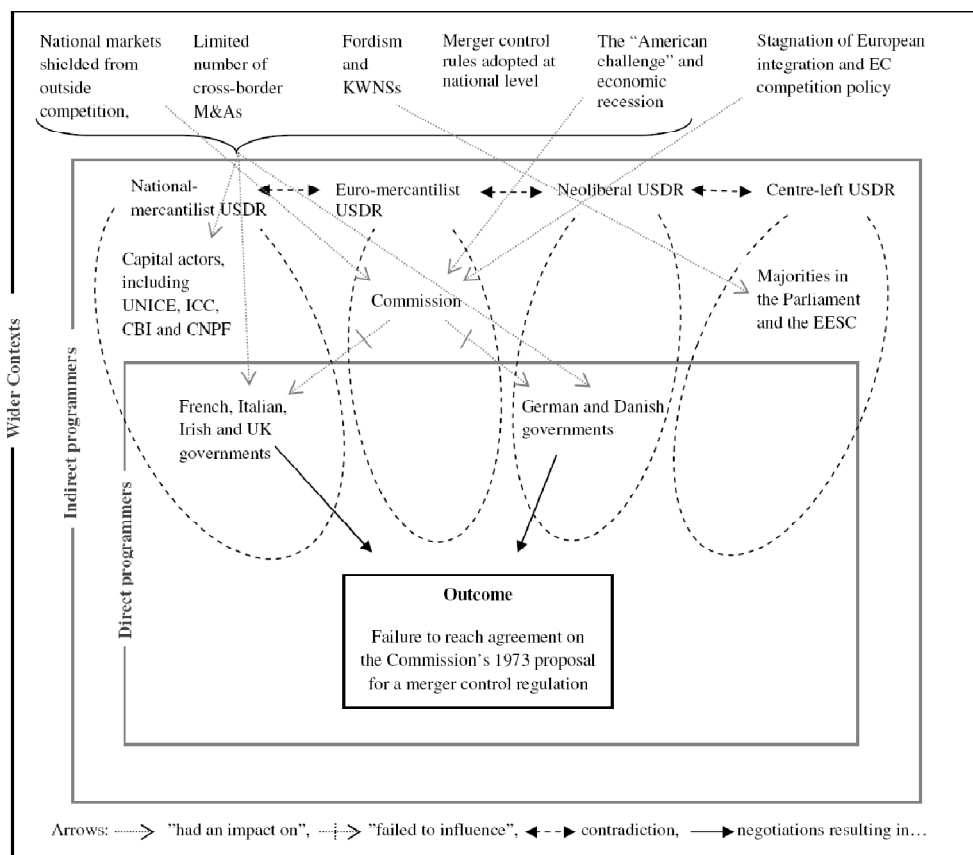


relatively anonymous and kept a low profile, Borchette was ‘very well respected’ (Cini & McGowan, 1998: 43; see also *Economist*, 1974c: 52) and the main architect of the first proposal for a merger regulation. Bearing in mind that it would not have been easy for anyone to draft a proposal that would satisfy all the involved parties, one might still wonder whether he could have played his cards better and made a proposal that would have been less unacceptable to the governments and capital actors: that is, a proposal involving a higher threshold (and thus a smaller jurisdiction for the Commission) and which would have given the Commission more reasonable time limits within which to assess notified mergers (instead of a whole year). However, if what has been said here about the diverging USDRs subscribed to by the various agents involved in the negotiation processes is correct, then even a more “realistic” proposal from the Commission would not have been sufficient to facilitate agreement in the Council. And in any case, one might speculate whether the “low-profile” Commissioners who followed von der Groeben did not in fact benefit the DG and EC competition regulation in the longer run. By adjusting to the context and enforcing the competition provisions in a very “generous” and creative way the Competition DG rode out the storm and ensured the survival of the unit of regulation of which it formed part.

### **5.7. In conclusion**

The main purpose of this chapter was to explain why the Commission’s 1973 proposal for a MCR ultimately failed to gain support from the member states. To this end, it focussed *both* on the positions of the various indirect and direct (and internal and external) programmers involved *and* on the broader contexts influencing the outcome of the negotiations. With Figure 5.1 an attempt has been made to visualise this.

**Figure 5.1: Explaining the failure of the 1973 MCR proposal**



The chapter identified four USDRs, each constituting a distinct perspective on the desired content, form and scope of merger control, to which various constellations of programmers subscribed: a national-mercantilist USDR the main proponents of which were the French, Italian, and British governments, most capital actors and some parties in the Parliament; a Euro-mercantilist USDR which gave rise to the position advocated by the Commission; a position grounded in a neoliberal USDR which was (at least in principle) favoured by the German and Danish governments; and a centre-left USDR which gave rise to a position subscribed to by majorities in the Parliament and the EESC, and probably also most trade unions. The outcome of the negotiations, namely that no agreement could be reached, reflected that the national-mercantilist position prevailed. To understand the “popularity” of this position, a number of factors need to be taken into consideration.

In the era of embedded liberalism capital accumulation was primarily oriented towards and organised at the national level. European capital actors generally operated in national markets that were shielded from strong outside competition, albeit the American challenge threatened to change

this state of affairs. In 1960s and 1970s the national business climate ‘was one dominated by national mergers and acquisitions, basing-point pricing, and even explicit market-sharing agreements’ (Franco, 1976: 146). Especially after 1973, when the Golden Age came to an end and a long and deep economic crisis began, did member states respond by opting for national, rather than European level, initiatives. That is, national industrial policies, often entailing various forms of state aid for declining industries, became an increasingly popular instrument in most or all member states, often in combination with various other forms of national protectionism. A major reason why no agreement on an EC merger regulation could be reached was thus fears among governments and capital actors that such rules could serve as an instrument for the Commission to interfere in what was considered to be the internal affairs of member states.

It is thus not surprising that the merger subunits of regulation that *were* established in the 1970s were established at the national level. Although the French, German and British subunits differed in important respects, they also shared two crucial similarities: political decision-makers were allowed to overrule the decisions made by competition authorities *and* various “public interest” criteria could be taken into consideration in the regulation of M&As. Hereby much was done to ensure that merger regulation would not contradict the full employment commitment underlying the KWNS and not obstruct concentrations that were deemed strategically important, even if they threatened to undermine competition. The latter was of course important in relation to the Fordist growth model where economies of scale, carried out by large national firms engaged in mass production, played such a vital role. In this way the broader class compromise between organised labour and industrial capital underlying the KWNS was also reflected in the merger subunit of regulations in the UK, France and Germany. Yet the differences in the national subunits also meant that the three governments ended up advocating positions that were not grounded in the same USDR. At the centre of Germany’s subunit of merger regulation stood the politically independent BKartA, programmed to regulate M&As on the basis of a “competition effects only” test (the Minister of Economics was the last appeal and only s/he could make decisions on the basis of “public interest” criteria). The German government was therefore unwilling to accept an EC subunit that would regulate mergers on the basis of industrial policy considerations and which would be subject to political influence. The British and French governments were, just like the German government and most capital actors, not particularly excited about EC merger control. However, if an EC merger subunit was to be established they wanted to make sure that they would be able to interfere in its regulatory practices. Obviously this meant that the negotiations quickly reached a deadlock.

If the external programmers (both direct and indirect) were not particularly keen on establishing an EC merger subunit of regulation, then the internal programmer, namely the Commission, was its strongest advocate. That the Commission “dared” to make its bold, Euro-mercantilist 1973 proposal in the first place was because it had been encouraged to do so by the member states in their short moment of Euro-enthusiasm and willingness to establish a strong EC industrial policy. However, once the tide turned the only genuine pressure for EC merger control came from the Commission, backed up by the Court and majorities in the Parliament and the EESC (although the latter two institutions advocated a somewhat more centre-left type of merger control). After the mid-1970s it became clear the Commission’s attempt to obtain genuine powers to control mergers (in addition to those granted to it by the Court in the Continental Can case) was going to fail. Once again the Competition DG was forced onto the defensive and the EC competition unit of regulation stagnated. At this juncture the ‘advocates of a strong competition policy seemed to be swimming against an ideological tide’ (Cini, 2000: 78).

## **6. The 1980s: the neoliberal turn and the EC Merger Control Regulation**

In this chapter we turn our attention to the developments in the 1980s. The main phenomena to be explained are the continued failure to reach agreement on an EC merger control regulation throughout most of the decade and the adoption of the MCR in 1989. Hereby the chapter should allow us to answer the second and third sub-questions (section 1.1), namely ‘why did the Commission’s proposals for a MCR fail to gain support from the member states in the 1970s and most of the 1980s?’ (which was partially answered in the previous chapter) and “why was it eventually possible to adopt a MCR and why was designed the way it was?”. The chapter is divided into seven main sections and a brief conclusion. Similar to the previous chapter, the first four sections deal with four “contexts” that had a decisive impact on the negotiations over the MCR. These were the crisis of embedded liberalism and the neoliberal turn (section 6.1); the gradual and partial neoliberalisation of the British, French and German merger subunits of regulation (section 6.2); the re-launch of European integration, with a particular focus on the role played by the capital actors in the European Roundtable of Industrialists (section 6.3); and finally the revitalisation of the EC competition unit of regulation in the 1980s (section 6.4). In the following three sections, we focus on the renewed negotiations over an EC merger control regulation (section 6.5) and the changing position of capital actors in the late 1980s (section 6.6), before analysing the form and content of the 1989 MCR by identifying the primary, secondary and marginalised ideas and agents in the programming process (section 6.7). A short conclusion summarises the findings.

### **6.1. The crisis of embedded liberalism**

By the early 1970s the Golden Age came to its end. The world economy entered a deep crisis which, especially after 1973, was reflected in sharp decreases in output, productivity and export growth combined with increasing unemployment and inflation in all industrial countries (see e.g. Glyn *et al.* 1990: 43-47 for figures). The crisis had various economic, political and social causes all of which cannot be discussed here (see instead e.g. Glyn *et al.*, 1990: 72-113; Jessop ,2002a: 80-90; Lipietz, 1992: 14-19 for details). Suffice it to mention but a few. The post-war economic boom was

in no small part due to the increase in productivity that resulted from the introduction of Taylorism and Fordist mass production in a number of sectors (see Chapter 5). However, there was a limit to how far such methods could be generalised and once this limit was reached it became difficult to increase productivity levels. In this situation, many Fordist firms began expanding into foreign markets with a view to achieve further economies of scale, in some cases leading to the emergence of multinational companies that could avoid national controls (Jessop, 2002a: 81). World trade now began growing much more than demand in the different countries. This was also related to the two “oil shocks” of the 1970s (see also Lipietz, 1983: 117-118). Fordist accumulation had come to depend on ever increasing quantities of oil at declining prices, but with the massive rise in oil prices orchestrated by OPEC, the oil importing countries now had to export more in order to be able to afford their energy imports. As Jessop & Sum (2006a: 126) explains, ‘with growing internationalization of production as well as capital flows and trade, it became harder to close the virtuous circuit of mass production and mass consumption within national economies’ (see also Lipietz, 1992: 18).

The crisis of the Fordist mode of growth was also due to growing discontent among the workers. By the end of the 1960s, the Fordist labour process with the “Taylorist” separation between those who design tasks and those who perform them was increasingly perceived of as inhuman and met with growing resistance from workers who demanded more job satisfaction. In addition to this, the high unemployment rates resulting from the economic crisis made the rather generous welfare systems associated with the KWNS very expensive. Initially, the political response to the crisis of Atlantic Fordism/embedded liberalism was to intensify the features of the KWNS, rather than to transform it radically (Jessop, 2002a: 90). However, as this did not lead to the desired results governments increasingly began to opt for new ways to facilitate economic growth. Although this obviously took different forms in different countries, neoliberal ideas of regulation gradually became influential in many European countries. Neoliberal ideas had of course been around for quite some time but in the course of the 1980s they were increasingly accepted by the political and economic elites (see also section 7.1 on the three moments of neoliberalism). At the international level, the OECD was at the forefront promoting neoliberalism, not least after 1977 where the so-called McCracken report was published. This report, which was produced by eight economists, prescribed far-reaching neoliberal reforms as the way to cure “sick” economies. That is, ‘the main drift of the recommendations was to pursue non-inflationary growth through tight monetary policy, prudent fiscal policy, reforms to

make markets function better (especially labour markets), and further trade liberalization' (Ougaard, 2004: 90).

Indeed, the neoliberal GDR prescribes a radical break with the KWNS type of regulation: 'For the public sector, it involves privatization, liberalization and the imposition of commercial criteria in the residual state sector; for the private sector, it involves deregulation and a new legal and political framework to provide passive support for market solutions' (Jessop, 2002a: 260; see also Harvey, 2005: 2). We have already described what neoliberalism involves as a perspective on the desired concept, form and scope of merger control in section 5.5 (as a USDR). Most importantly, it prescribes merger control that exclusively seeks to preserve competition. This is directly related to the way competition is perceived in the neoliberal GDR, namely as a phenomenon which can cause all sorts of good things by forcing companies to be competitive. In other words, the competitiveness of national or European companies in international or global markets is seen as something that cannot be brought about through interventionist state policies (such as state aids) but which needs to be facilitated by exposing companies to the forces of competition.

## **6.2. The neoliberal turn and national merger control**

In no member state was the break with the KWNS as sharp as in the **UK**, where the Conservative Thatcher government came to power in May 1979. Acting on the basis of neoliberal ideas of regulation the government, for instance privatised large parts of the public sector and succeeded in weakening the power of the unions significantly (Coates, 1999: 653). Moreover the Conservative government 'found little difficulty in denying itself in practice use of discretionary powers available under British statutes to promote national industrial-policy objectives' (Woolcock *et al.*, 1991: 98). All of this was part of the governments' commitment to restore what it perceived as the 'over-governed, over-regulated and over-taxed' UK economy of the 1970s (Coates, 2000: 193). However, the election of the new government did not lead to a comprehensive re-programming of the competition authorities, although some changes were introduced. For instance, the threshold above which authorities would be allowed to intervene in mergers was raised to £15 million in 1980 and then to £30 million in 1984, hereby increasing the scope for industries to restructure (Schwartz, 1993: 636). Moreover, the existing provisions dealing with the investigation of firms' anti-competitive practices were streamlined with the 1980 *Competition Act* (Cini, 2006; Utton, 2000:

276) and the 1989 *Companies Act* gave the OFT more negotiation power vis-à-vis companies seeking merger clearance (Kryda, 2002: 255).

Although the public interest criterion was retained in British merger legislation in the Thatcher era, some scholars have observed that now merger control became ‘exploited to redirect attention in an increasingly economics-oriented direction’ which was a phenomenon related to ‘the underlying shift in the political environment towards market-based economics that accompanied the election of Mrs Thatcher’s governments’ (Scott *et al.*, 2006: 7). More concretely this meant that, despite the continued existence of the public interest criterion, mergers were increasingly regulated primarily on the basis of their alleged effect on competition. This was especially the case after 1984 where the so-called “Tebbit Guidelines”, named after Secretary of State for Trade and Industry, Norman Tebbit, were issued, establishing (in a legally non-binding way) competition as the primary criterion in merger inquiries (see Wilks, 1999: 221-223 for a more detailed and nuanced account). In this sense the wider neoliberal shift taking place in the UK also became reflected in the regulation of mergers.

In **France** a socialist government, under Francois Mitterrand’s presidency, took office in 1981. As Gourevitch (1986: 185) observes, ‘[t]he ending of over two decades of right-center rule occurred just as the international economy was entering the worst depression since 1929’. In an attempt to restore the economy, characterised as it was by high inflation and rising unemployment, the new government lowered the minimum wage, reduced the workweek and hired 100,000 new workers. Moreover, 49 companies were nationalised and state aid to industry went from 25 billion francs in 1981 to 86 billion in 1986 (Schwartz, 1993: 633). The operation was, to say the least, not a great success. Partly due to the unfavourable climate in the international economy, the situation in France only got worse. Already in 1983 the government began opting for new solutions. After three consecutive devaluations, it decided to more or less discard Keynesian economic policies. In particular, it was the Minister of Finance, Jacques Delors, who advocated an acceptance of the market economy and who introduced a plan which aimed at reducing inflation in order to achieve international competitiveness (at the cost of high unemployment) (Dormois, 2004: 24). France remained within the European Monetary System and at this stage the government also began embracing European integration more wholeheartedly (see also Moravcsik, 1991: 51). Moreover, the Socialist government began “rolling back” parts of the industrial policy it had been introducing and this process was continued once a centre-right coalition led by Jacques Chirac gained majority



in the National Assembly in 1986. The new prime minister argued in favour of privatisation and indeed a rather limited number of state owned companies were sold before the Socialists regained their majority in the National Assembly in 1988. Yet one should not take this to mean that the French governments of the 1980s entirely turned their back on the *dirigist* policies of the 1960s and 1970s. As one scholar has observed, '[t]he step back from state interventionism was significant, but complex and ambivalent beneath the surface. France's wavering between *dirigisme* and privatization paralleled its ambivalence toward the European Community' (Schwartz, 1993: 634).

This was, for example reflected in the competition unit of regulation. For instance, the Chirac government adopted legislation that made it more difficult for foreigners to buy French companies and in the mid 1980s the inefficient 1977 merger control legislation was amended. The Ordinance of December 1986, which was apparently meant to liberalise the French economy (see e.g. Garnier & Asselineau, 1991: 44), introduced some changes in the existing competition unit of regulation. In particular one development deserves mentioning here. The *Commission de la Concurrence* was replaced with the *Conseil de la Concurrence*. Hereby a quasi-judicial institution which was independent of the Ministry of Economics, namely the Conseil, was programmed to function as the main enforcer of French competition law. This was significant as it substituted 'judicial oversight over interpretation and enforcement for political discretion' (Souam, 1998: 209), hereby representing a turn towards neoliberalism. However, it is also worth noting that in the sub-unit of merger control the Minister of Economics retained the decision-making powers that had been established with the 1977 law (see also Dumez & Jeunemaitre, 1996: 226). As two scholars pointed out in a publication from 1991, the number of merger decisions by the Conseil was very limited indeed: it had issued only six opinions on merger transactions at this stage (Garnier & Asselineau, 1991: 44).

In **Germany**, the SPD Government (which had been in power for 16 years) was replaced with the Christian Democratic (CDU/CSU/FDP) Kohl Government in 1982. This signalled a partial re-orientation of German politics in a more neoliberal direction, although it should be mentioned that such a shift had already taken place in the monetary unit of regulation in the mid 1970s, where the Bundesbank 'shifted away from a focus on growth ... to one emphasising economic stability, through a non-accommodating, hard money policy' (Schmidt, 2002: 70). In other words, the Bundesbank embraced a "monetarist" USDR entailing a commitment to ensuring low inflation above all other goals. As regards the economic policies of the Kohl government, these did not

constitute a radical break with the past (Jessop & Sum, 2006a: 145). The government believed that the best way to deal with the economic crisis was to promote free markets and to strengthen the international competitiveness of German industry through an increase in the flexibility of capital and labour, and through deregulation and tax reductions and through a reduction of the power of trade unions (van der Wurff, 1993: 176). However, this latter aspect did not amount to a frontal attack on the unions similar to the one launched by Thatcher: indeed, rather than trying to exclude them from influence, the Christian-liberal strategy was to tie them into the flexibilisation process (Jessop & Sum, 2006a: 139).

In the competition unit of regulation, where cartels had previously been the main concrete object of regulation, merger control became increasingly important in the 1980s. Against opposition from many German capital actors, the GWB was to a limited extent revised in 1980 in order to enable the BKartA to deal effectively with conglomerate and vertical mergers (see also Smith, 1994: 446). This was the only example of an external amendment of German merger legislation in this period, but as it turned out not to function as hoped for, the BKartA and the courts engaged in a process of internal programming in which they developed some instruments and procedures that could be used to deal more effectively with this sort of merger (see Gerber, 1998: 323-324 for details). An interesting development in the Kohl era was that merger regulation in practice tended to become less politicised, marking an “informal” neoliberal turn. To be sure, the BKartA had been programmed to be politically independent from the outset and did regulate mergers purely on the basis of their effects on competition. But whereas the Minister of Economics had overruled the decisions of the BKartA on some occasions in the 1970s, this became a rare phenomenon in the 1980s (see also Heidenhain, 1991: 67). Although the Minister remained the highest instance of appeal, it only happened on one occasion that a merger which had been prohibited by the BKartA was subsequently allowed by the Minister<sup>68</sup>. This can be seen as an intensification of the neo-liberal features of the German merger sub-unit of regulation.

### **6.3. European integration and the ERT**

The state of paralysis that the EC had found itself in the late 1970s continued into the early 1980s. The Community was enlarged with Greece in 1981 but apart from that the period is primarily remembered for Thatcher’s rather aggressive attempts to decrease what she considered to be the

unacceptably high financial burden of British EC membership. Indeed, from 1979 to 1984 the agenda was dominated by the British budgetary question and by increased awareness of the effects of the not-so-well functioning CAP (Johnson & Turner, 2006: 34). The national political leaders appeared unable or unwilling to take an initiative that could effectively give rise to the common market already envisioned in EC Treaty, a common market that was still effectively blocked by the continued existence of numerous barriers to the free movement of goods, services, persons and capital.

By the mid 1980s the European integration process gained momentum again. Jacques Delors had become President of the Commission in 1985, taking over from the rather anonymous Gaston Thorn (Luxembourg) who had served since 1981. Unlike his predecessor, Delors ‘possessed an abundance of ambition, competence, and resourcefulness’ (Dinan, 1999: 103) and decided to make the promotion of the single market his main project (see also Tsoukalis, 1997: 42-43). In the spring of 1985 the internal market Commissioner, Lord Arthur Cockfield, presented a White Paper in which almost 300 obstacles that had to be removed in order to truly integrate markets were identified (Commission, 1985a). The year 1992 was suggested as the date by which the internal market should be completed. The White Paper was endorsed by the European Council at their Milan Summit in June 1985 but as Delors pointed out on this occasion, this would not be sufficient: the implementation of the internal market had to be facilitated by institutional reform.

The Single European Act (SEA) which was adopted in 1986, and constituted the first major revision of the EC Treaty, was a response to this perceived need for institutional reprogramming – not only in the light of the “1992 programme” but also because Spain and Portugal were to join the Community in 1986. With the SEA most legislation related to the single market was now to be adopted with qualified majority (as opposed to unanimity) voting; the Parliament was given slightly more power in the decision-making processes with the so-called cooperation procedure; a new court, namely the Court of First Instance (CFI), was created in order to relieve the Court of some of its work; and the EC was given more competences in units of regulation such as environment, research and technology, and cohesion policy (see e.g. Bache & George, 2006: 160-163). Although Delors played an important role in the re-launch of European integration it would be erroneous to think that it can be explained solely with reference to his qualities as an agent. Indeed, he was only capable of making the difference he made because of the favourable context in which he found himself. In particular, the European Council had managed to reach a settlement on the budget issue

and to agree on a limited CAP reform in 1984, meaning that when Delors took office the political conditions were better than they had been for a long while (see Dinan, 1999: 103 for more details).

In addition to this, the developments that were taking place in the economic sphere turned out to be of decisive importance. More precisely, the increased internationalisation of the economy and the emergence of multinational companies in the 1970s created the material basis for the gradual transnationalisation of fractions of the capitalist class. During the 1980s such transnational social forces were to make a difference in relation to developments in the European level political sphere. In particular, the European Roundtable of Industrialists (ERT), which is identified by van Apeldoorn (2000: 157) as an important elite platform for an emerging transnational class, deserves attention here<sup>69</sup>. Consisting of top executives from a range of Europe's largest industrial companies, the ERT was formed in 1983 in order to push for a European level initiative that could help to end the economic crisis. At this stage large parts of industry felt threatened by competition from in particular American and Japanese companies and many business leaders had already for some time been frustrated with the EC's lack of drive and efficiency. However, no major political initiative was likely to be around the corner.

The ERT was formed against this background. Among its main initiators, in particular Pehr Gyllenhammar of Volvo (Sweden), who became the Roundtable's first Chairman, and Wisse Dekker of Philips deserve mentioning. Wisse Dekker publicly declared that 'If we wait for our governments to do anything, we will be waiting for a long time. You can't get all tied up with politics. Industry has to take the initiative. There is no other way' (quoted in Gutteridge, 2000: 16). However, the idea to create a European business elite forum was born by the Commission, or more precisely by Etienne Davignon, the Commissioner for Industry and International Markets, and Francois-Xavier Ortoli, the Commissioner for Economic and Monetary Affairs (and former President of the Commission). Although UNICE was formally the most important representative of European business, it had a reputation for being somewhat inefficient and was not held in very high regard by the political and economic elites (see also van Apeldoorn, 2002: 102). The two Commissioners desired a different type of interlocutor:

'when national governments have to speak with industry they speak with the federation of industry or business or whatever it's called in the different countries and the responsible business leaders are there. At the European level UNICE does not have that status. UNICE is a federation of federations. So you speak to the

officials of the federation which does not give you the feedback that you require ... and so with my friend Ortoli ... we told the business leaders that if they would come up with something, which involved significant business leaders, we would be ready to ask them questions and we would be ready to speak to them. So that was how it started' (Davignon, Interview<sup>70</sup>)

The ERT was what business leaders came up with. Originally composed by the leaders of 17 large European companies (including Shell, Fiat, Unilever, Renault and Siemens), the Roundtable constituted an interlocutor that differed a great deal from UNICE and any other business group operating at the European level. Because its members occupied positions as important managers of European industrial capital (with an attendant impact on growth and employment), the ERT constituted a force that had to be taken seriously by political decision-makers. As van Apeldoorn puts it, '[t]he political power of the ERT is ... directly related to the structural power of transnational capital'. This force was operating at different political levels: at the national level its members had direct access to government ministers; at the intergovernmental level ERT members would meet on a regular basis with ministers of the government taking over the Presidency of the EC<sup>71</sup>; and at the supranational level the Roundtable had very close connections to the Commission. As mentioned, Davignon and Ortoli had acted as midwives of the Roundtable and both of them took part in the first ERT meeting that took place in April 1983. Over the years what has been described as a "symmetrically interdependent" relationship developed between the ERT and the Commission: the ERT needs the Commission due to the latter's role as an important agenda setter in the EC/EU system, whereas the Commission needs the ERT due to its power vis-à-vis member state governments (see Holman, 2001: 171-172).

It is not only its power and influence that distinguishes the ERT from traditional lobby groups; the purpose of its operations is also of a different nature. Whereas economic lobby groups normally seek to further the (perceived) self interest of some smaller or larger group of companies (e.g. a particular sector), the ERT seeks to develop more general strategies in order to improve the overall business climate in Europe. As Davignon, who was later (in 1986) to become a member of the ERT himself in his capacity as chairman of Société Générale de Belgique<sup>72</sup>, puts it, 'The Roundtable would not ... deal with individual questions ... we would deal with general questions of interest to business, but not with sectorial issues' (Davignon, Interview).

Although the ERT is formulating strategies "on behalf" of business as a whole, it is doing this 'from the vantage point of a particular class *fraction*' (van Apeldoorn, 2002: 106), namely that of

transnational (and primarily industrial) capital. Yet, as shown by van Apeldoorn (2002: 118-123) a fractional struggle took place *within* the ERT in its early years. In its first five years a “Europeanist” fraction was dominant vis-à-vis a “globalist” fraction. The former fraction, the members of which did not perceive their companies to be truly globally competitive, wished for the creation of a European home market that, to some extent would shield them from competition from US and Japanese companies, and pushed for European level policies that could support the emergence of globally competitive “European champions”. That is, this fraction formulated its strategies on the basis of what we could call Euro-mercantilist ideas of regulation (see also section 5.4).

It was the members of the Europeanist fraction, including the abovementioned CEOs of Volvo and Philips, who began pushing for a European solution to the crisis in the immediate wake of the Roundtable’s creation. As some scholars have noted, the abovementioned 1985 White Paper was strongly inspired by plans for a single market drafted by Wisse Dekker already in 1983 (Cowles, 1995: 514-516), plans in which Dekker had suggested the need to set a target date for its completion (precisely as the Commission later chose to do). That the White Paper was endorsed by the European Council, was to no small extent due to the pro-active efforts of Roundtable members and once the SEA had been adopted, the ERT established an Internal Market Support Committee, consisting of ten ERT-members, which kept an eye on the actual implementation of the 1992-project. This group had several meetings with the Commission and Member State governments where it exercised strong pressure in order to ensure that they lived up to their promises (van Apeldoorn, 2002: 130).

The success of the Europeanist fraction in initiating the re-launch of European integration and in ensuring the implementation of White Paper is well documented (Cowles, 1995: 518-520). However, as van Apeldoorn points out, the internal market that emerged ‘in many ways did not turn out to be the kind of home market that many of the early Roundtable members (of the Europeanist fraction) had envisaged ... in the end, the internal market was not, or was only minimally, supported by the kind of “flanking” policies that the neomercantilists had hoped would nurture the growth of European champions and protect them against global competition’ (2002: 130-131). Indeed, the Euro-mercantilist ideas of regulation were losing momentum towards the end of the 1980s: at the EC level, member states like the UK and Germany blocked industrial policy proposals made by France and Italy. And the managers of transnational capital were also becoming increasingly wary of such interventionist policies. This was also reflected in the ERT, where the

ideological outlook became increasingly neoliberal concurrently with the strengthening of the globalist fraction. This was especially the case after 1988 where the Roundtable merged with the *Groupe des Présidents* the members of which were industrial capital actors oriented towards the global level (van Apeldoorn, 2002: 87-88).

#### **6.4. The revitalisation and transformation of the EC competition unit of regulation**

As described in the previous chapter, the competition unit of regulation had not become as prominent a feature of the EC as some programmers (namely the German ordoliberals) had originally hoped for. In the heydays of the KWNS most member states and capital actors did not genuinely perceive a need to strengthen the powers of the Commission in this area: capitalist production was primarily (but of course not exclusively) organised at the intra-national level and here concentration was generally regarded as a positive phenomenon which it was rarely considered desirable to prevent through regulation (whether national or supranational). The futile attempt by the Commission to obtain genuine powers in the merger regulation area in the early 1970s (beyond those granted to it by the Court in the Continental Can case) in no uncertain manner confirmed that member states were unwilling to equip it with additional powers. In this not-so-friendly environment the strategy followed by the Competition DG was to keep a relatively low profile and to interpret the rules rather generously in order not to create more enemies than necessary.

However, at the same time the significant degree of operational autonomy acquired through Regulation 17 enabled the Competition DG to incrementally expand its powers on a case-by-case basis, not least due to its “partnership” with the Court. In a long string of rulings throughout the 1970s, ‘the frontiers of competition law were pushed forward and its detailed application was clarified’ (Cini & McGowan, 1998: 29). In this period, then, the programming of the Competition DG was thus to a large extent delivered by the Court and the DG itself, rather than by member states and/or indirect programmers such as capital actors. However, incrementalism had its price. Both the Competition DG and the Court was overburdened with the high number of notifications and appeals that kept piling up, and hence the DG earned itself the widespread reputation of being ineffectual and incompetent. Indeed, by the end of the 1970s EC competition policy ‘was condemned as overcentralised and overambitious, as possessing inadequate decision-making and enforcement procedures, as proving too readily susceptible to political pressures, and as failing to

deliver what it promised' with the result that 'morale was at an all-time low within DGIV' (Cini & McGowan, 1998: 29).

That the 1980s witnessed a major revitalisation and transformation of the EC competition unit of regulation, which culminated with the adoption of the MCR in 1989, was related to the wider revival of the integration process in the mid 1980s. But the ground had been prepared by the Competition DG from the early 1980s, or more precisely after the appointment of Frans Andriessen (Netherlands) as new Commissioner of Competition in 1981. Andriessen's leadership style was much more proactive than that of his predecessors and his outlook was more neoliberal. That is, he saw competition as an inherently positive phenomenon, believing that the depressed European industry would prosper from being exposed to, as opposed to being shielded from, increased competition. Translating this into a neoliberal USDR, he now began promoting 'competition policy as a European-level response to the industrial malaise that had swept the region over the previous decade' (Cini & McGowan, 1998: 31). During the Andriessen era, the competition unit of regulation thus became an increasingly important and high-profiled element in the broader EC ensemble of regulation. As we will come back to below this also involved a renewed attempt on part of the Commission to obtain powers to regulate European level M&As.

In 1985, when Delors became president of the Commission, Irishman Peter Sutherland replaced Andriessen. Sutherland, an ex-attorney general and a former rugby player, had asked Delors for the job 'because of its economic importance, and because a close reading of the Treaty of Rome had shown him that, in theory, the commission had more power in this field than in any other' (Ross, 1995: 160). Eager to turn these theoretical powers into practice, Sutherland's became known for an aggressive style: a style that induced Delors to dub him the "little sheriff" (Schwartz, 1993: 639). The *Financial Times* described him as an 'increasingly controversial Commissioner' who 'stuns his opponents with shows of aggression, only to tie them up later in legal argument (skills which he learnt during training as a barrister)' (1987b). To an even larger extent than his predecessor, Sutherland was a neoliberalist and hence a strong believer in free competition. This ideological outlook resonated well with the abovementioned ideological developments taking place in some member states (above all of course the UK), and at the broader EC level, where a neoliberal GDR (translated into various USDRs) was gaining momentum. On the other hand, neoliberalism was not (yet) the hegemonic discourse: many agents in the political and economic elites still subscribed to (or had at least not completely abandoned) a national-mercantilist position. Although it was thus the



case that large segments of such elites were much more receptive to this ideology than they had been ten years earlier, the Commission's pro-competition discourse was certainly not universally embraced in the member states. This was not only reflected in the negotiations over the merger regulation (see section 6.6 below) but also in the state aid sub-unit of regulation.

Like it had been the case in the 1960s and especially the 1970s state aid to industry in the form not only of direct subsidies but also, for instance of tax breaks, loans and loan guarantees, continued to constitute an important element in most of the member states' industrial policies in the 1980s. According to one estimate, which was reported in *the Economist* (1988: 68), the EC governments aided industry with 93 billion Euros in 1986, an amount almost three times as large as the EC's entire budget. And in 1988 'state aid accounted for about 10 per cent of public expenditure or 3-5 per cent of GDP, in other words, a hugely distorting degree of cross-subsidy from the taxpayer to industry' (Wilks, 2005a: 124). Although the EC Treaty (Article 92) states that aid to industry which result in a distortion of competition are incompatible with the common market, the Competition DG had often chosen not to interfere. Each year from 1981 to 1986, the member states reported between 92 and 200 cases of state aid to the DG and the latter only acted against less than 10 per cent of these cases (Dinan, 1999: 385). Yet in the mid 1980s, after the appointment of Peter Sutherland and the adoption of the 1992-program, the DG began to take a much more proactive stance vis-à-vis the competition distorting forms of state aid. Obviously, this was a difficult task as member states were rarely eager to let the Commission obstruct their attempts to, for instance rescue declining industries. As a response to such difficulties Sutherland invented a new "naming and shaming" strategy where the size of state aid granted by each member state government was made public in periodic surveys (Wilks, 2005a: 124). Although the Commission's efforts did not eliminate the state aid phenomenon, it is indisputable that the amounts spent on state aid began to decrease significantly from the late 1980s onwards (see Chapter 7).

The Commission's attempts to force the Council to adopt a merger control regulation were intensified in the Sutherland era (see section 6.6 below). These attempts continued with undiminished zeal when Leon Brittan replaced Sutherland in early 1989 (as did the Competition DG campaign against state aid). Like Sutherland, Brittan was a 'genuine neo-liberal to whom a fully open market was the only industrial policy' (Ross, 1995: 130). To him the objective of the EC competition unit of regulation is 'to help European capitalism become more healthy, vibrant and competitive and prevent its decline into the cosy corporatism that so much of the European left used

to espouse' (Brittan, quoted in Allen, 2003: 64). Brittan's leadership style had much in common with that of his predecessor. Indeed, he has been described as 'a bulldog of a politician inside the Commission, determined to struggle for his own goals, armed with the personal self-confidence of a top class English barrister and backed by a top-notch cabinet' (Ross, 1995: 130). McGowan & Wilks (1995: 151-152) describe the common features of the two competition commissioners with the following words: 'Both were ambitious, energetic and dynamic personalities and seized the rare opportunity presented by the single market programme to advance both the spirit of competition and their own political futures. Both also possessed excellent public relations skills...' (McGowan & Wilks, 1995: 151-152). To this, one can add that 'Sutherland and Brittan were both extremely skilful negotiators, well-connected with industry, and also good negotiators with ministers' (Faull, Interview<sup>73</sup>).

Under the leadership of Andriessen, Sutherland and Brittan, the EC competition policy was revitalised and the Competition DG went from being 'an uninspiring and fringe directorate into one of the most prominent and important' (McGowan & Wilks, 1995: 151). But as already hinted at above, the agency of the three competition commissioners alone cannot account for the transformation of EC competition policy and of the DG. First, there is no doubt that the aforementioned transformations taking place in the wider context, not only in the wider institutional ensemble of which the DG formed part and in key member states, but also in the ideological climate and in the economic sphere, were preconditions for the revitalisation of EC competition policy. This is also the context in which the processes leading up to the adoption of the MCR in 1989 should be seen. Second, the revitalisation was made possible by the above-mentioned incremental evolution of EC competition law and the regulatory experience accumulated by Competition DG staff over the years. And thirdly, the revitalisation was accompanied with and reinforced by the recruitment of new staff, mainly lawyers from national competition authorities (NCAs) over the course of the 1980s (Cini, 2000: 79). Especially from the mid-1980s neoliberalism became the prevailing ideology (or GDR) within the DG. As Cini (2000: 85) explains, the neoliberal rhetoric of Competition DG staff

'...underpins a shared view of the world which almost goes as far as delineating good from evil and right from wrong. The language used to define interventionist or anti-competitive acts is almost biblical in the sense that images of *evil* firms or *good* governments simplify an extremely complex process of analysis. The biblical imagery can also be applied to the "missionary" zeal with which DGIV staff pursue

their cases. There exists amongst officials a shared commitment to the spread of DGIV values, not only within the EU but also globally'

### **6.5. Moving towards an EC merger regulation**

The negotiations over an EC merger control regulation resumed in the early 1980s. In June 1981 the Parliament complained that it had not been possible for the Council to reach agreement on the proposed 1973 regulation (cf. Parliament, 1981). The Commission and Andriessen agreed. Hence, in December 1981 an amended proposal for a merger regulation was issued. The proposal contains a number of revisions to the 1973 proposal, many of which were designed to show that the proposal only implied mergers with "community dimension". Indeed, it was suggested that the initially proposed threshold values were raised from ECU 200 million to 500 million (this refers to aggregate yearly turnover of the companies involved in a merger) (Article 1(2)). According to *The Economist*, 'Mr Andriessen reckons the regulation has a good chance of getting through this time, since he has had some encouragement from the new French government. Britain is expected to be pliable, too; but Italy is unpredictable' (*Economist*, 1981: 64). However, when reading the Commission's comments for the proposal, which contains a brief account of the position of the different member states, a somewhat different picture emerges. Here it appears that the Commission was anything but confident that the proposal was going to be adopted in the Council (see Commission, 1981: 1).

And indeed there turned out to be little reason for optimism on the part of the Commission. Like it had been case in the 1970s, the involved programmers subscribed to more or less incompatible USDRs: USDRs that by and large were similar to those identified in the previous chapter. This turned out to be decisive in relation to the two main bones of contention, namely the division of labour between the national and the supranational level *and* the criteria on the basis of which the Commission was to regulate mergers. Article 1(3) in the Commission's 1973 proposal already allowed for exemption from prohibition of mergers that were 'indispensable' for the realisation of goals that were in the general interest of the Community (see section 5.4). But for some countries this was not enough whereas others thought it went too far: 'France, the United Kingdom, Italy and Ireland have requested that exemption should also be possible on grounds of *national* industrial, regional or social policies. Germany and Denmark oppose this idea' (Commission, 1981: 3)<sup>74</sup>. In

other words, a number of member states, led by the governments of France and Italy, still advocated a position grounded in the national-mercantilist USDR. As regards the UK, the Thatcher government was certainly less in favour of industrial policies than its predecessors had been (see section 6.2). As such it would probably be misleading to categorise it as a proponent of national-mercantilism. It might be argued that the UK government was taking a particular nationalist position grounded in the neoliberal USDR – but then one should not forget that the “public interest” was still taken into consideration in the UK merger subunit of regulation, meaning that it had not yet been consistently “neoliberalised”. The bottom line is that at this stage the UK government was, to say the least, reluctant to cede any genuine powers to the Commission in this field.

Hence, it formed part of a group of important member state governments demanding that the Council was to play an important role in the regulation of mergers. In accordance with Article 19 of the Commission’s draft proposal an advisory committee was to evaluate the Commission’s decisions in specific cases. If the committee opposed a decision with qualified majority the Council was to be involved in the case. The member states could agree this far. But the question was what precisely the Council should be allowed to do in such cases. France, Italy and UK demanded that the Council should have the right to make the final decision regarding whether such mergers should be approved or not (Commission, 1981: 3). Obviously this would entail a more “intergovernmentalist” form of merger control regulation that would enable the member states to ensure that the Commission would be kept on a short leash.

Important European capital actors also opposed granting the Commission the proposed powers in the merger area. In particular, UNICE did certainly not welcome the draft proposal. It appears from a position paper dated 24 June 1982 that ‘UNICE’s objections to the draft remain fundamental’ (1982: 1). More precisely, UNICE had three main objections. *First*, that the criteria to be applied by the Commission were too unclear and that ‘[a] much more concrete approach than this is necessary’ (1982: 1). *Second*, that the proposed system would be far too bureaucratic: ‘It would be cumbersome, and the delay and uncertainty over a year or more, during which information would be leaked and pressure brought to bear, would mean the failure of a considerable proportion of the mergers of any significance’ (1982: 2). In this context it was questioned whether a European level system would be needed at all: ‘In fact, the degree of concentration in Europe, and in certain member states especially, hardly justifies a system of control involving the failure of schemes which might be vital to the industrial and trade future of the Community’ (1982: 2). *Third*, that the

draft proposal did not ensure that double control (that is, control at both national and supranational level) would not take place. The conclusion was thus clear: ‘UNICE is opposed to the present draft Regulation, which needs major reconsideration’.

The Commission and another group of governments, namely those of Germany, Denmark and the Benelux countries, wanted to give the Commission the right to make the final decision in merger cases (Commission, 1981: 3). They feared that the regulation of mergers would get too politicised if the Council was going to be the body that (in some cases) would make final decisions. In particular Germany and Denmark still insisted that the Commission should regulate mergers exclusively on the basis of competition criteria, not on the basis of industrial and/or social policy goals. Unlike the Commission which remained the main advocate of a position grounded in the Euro-mercantilist USDR (despite Andriessen’s personal inclination towards neoliberalism), these two member states remained the main proponents of a position grounded in the *neoliberal USDR*. The position grounded in the *centre-left USDR* was still articulated by majorities in the Parliament and the EESC. Like they had done in 1973, they backed the Commission’s draft proposal although certain amendments were also suggested this time. For instance, the EESC still wanted industrial and social policy goals to be taken into consideration by the Commission in its regulation of mergers (EESC, 1982). To sum up, it seems that at this stage little had changed in the Council since the 1970s. The Council was unable to reach agreement on a merger regulation and history repeated itself when, in February 1984, the Commission made a new proposal (Commission, 1984), which contained some rather minor amendments to the 1981 proposal (most importantly that the abovementioned threshold values were raised from ECU 500 to 750 million).

As mentioned in the previous section, Peter Sutherland took over the position as Commissioner for Competition from Andriessen in 1985 and from the outset of his tenure the adoption of a merger control regulation was a top priority to him. Yet, given the history of negotiations in the Council he was also aware that it was going to be easy for the Commission to obtain powers in this field. Hence a new strategy was designed:

‘The whole approach that we adopted from the very beginning was to test the application of Articles 85 and 86 to see what mechanisms would in any event allow for an approach to merger control outside the existence of a merger control regulation and thereby stimulating interest in looking at a regulation as such’ (Sutherland, Interview<sup>75</sup>)

In other words, in order to put pressure on the member states the Commission now began exploring its possibilities of regulating mergers *independently* of the adoption of a regulation in this field. As Sutherland openly put it, '[t]he issue is not whether Europe has a merger policy but what type it has' (*Economist*, 1988: 68). This new strategy was certainly more pro-active, one might say aggressive, than the one followed hitherto. Notwithstanding this, the Council turned down a new proposal for a regulation made by the Commission on 21 November 1986. This new proposal contained a number of minor amendments, of which the most important was that the Commission suggested abolishing the provisions in the regulation that would allow the Council to intervene in the Commission's decisions (Commission, 1986). This move towards neoliberalism contradicted the position defended by France, Italy and the UK in 1981 (see above) and did therefore not constitute the magic formula that made it possible to reach agreement in the Council.

The Commission's attempts to put the member states under pressure were eased significantly with the Court's ruling in the *Philip Morris* case in November 1987. This case had arisen when two tobacco companies, BAT Industries and R.J. Reynolds complained to the Commission about an agreement between two of their rivals, namely Philip Morris and Rembrandt Group. This agreement did not only give Phillip Morris control over half of the shares in Rothman Tobacco Holdings (one of the Rembrandt Group's subsidiaries) but also the right to veto a possible future sale of Rothman's shares. On the basis of its investigations the Competition DG concluded that the agreement had to be changed. Phillip Morris appealed the decision, but the Court decided to uphold its most important aspects and furthermore took the opportunity to comment on the applicability of Article 85 to mergers. Contrary to common perception, which was also the view articulated by the Commission in its 1966 memorandum (see section 5.4), the Court stated that Article 85 could be applied if a concentration resulted from the merger between two or more companies. In other words, the Court interpreted Article 85 to the effect that it would be applicable to the regulation of so-called "friendly mergers" (Cini & McGowan, 1998: 119).

With this ruling, which has been described as "ground-breaking" (Majone, 1996: 272), 'the Court was contradicting the mood of the member states as expressed in their refusal to accept drafts of a merger regulation placed before them in 1982 and 1984' (Wincott, 1996: 179). But the ruling should be seen as an element in the more general strategy of the Court (see section 5.2). As Gerber (1994: 109) explains

”the Court interpreted the treaty’s competition law provisions in light of its own conception of what was necessary to achieve the integrationist goals of the treaty. It conveyed a clear message that this goal-driven methodology was not merely to be one of many principles to be used in interpreting the treaty, but rather the dominant interpretive method”

There can hardly be any doubt that the intention of the Court was to assist the Commission in its efforts to put the member states under further pressure. If the governments had not already understood the message it was unmistakable now: the Commission was determined to obtain the competencies necessary to regulate mergers and the Court was willing to interpret the Treaty in creative ways in order to help it to succeed! The practical consequence of the *Philip Morris* ruling was that a regime with multiple controls of certain mergers arose – that is, regulation from both NCAs and the Competition DG. As one can imagine this created a lot of uncertainty and costs for some parts of industry, that now began to notify mergers to the Competition DG although no rules existed that demanded them to do this (Bulmer, 1994). Hence, when GEC/Siemens made a bid for Plessey in 1988, it chose to notify it to seven competition authorities; namely those of the UK, Germany, the Commission, Australia, Canada, South Africa and the US. Seven law firms were involved in this process (Woolcock *et al.*, 1991: 16). Although the different authorities reached similar conclusions in this particular case, it nonetheless made it clear that the existence of multiple national rules could turn out to be a major threat towards cross-border M&As, especially in a situation where their number was increasing rapidly (see below). Meanwhile Sutherland was determined to show the surrounding world that his threats of using Articles 85 and 86 to regulate M&As were not just empty words: in March 1988 he forced British Airways to give up some of the routes it had acquired when taking over British Caledonian, although the deal had been approved by the British competition authorities (Grant, 1994: 161; *Economist*, 1988: 67).

In the wake of the Philip Morris ruling in November 1987, the Council gave the Commission its permission to draft a new proposal for a merger regulation (McGowan & Cini, 1999: 180). In April 1988 the Commission presented its fifth proposal for a regulation (Commission, 1988a). The Council once again chose to consult the EESC and the Parliament. And in its opinion of 2 June 1988 the EESC once again emphasised the need for a regulation: a need that, according to the Committee, had become even more pressing with the Court’s ruling in the Philip Morris case. At the same time the EESC deplored the fact that the Commission had failed to take into account the previous opinions made by the committee. Among other things it was again emphasised that the

merger control regulation ought to ensure ‘that in concentrations of undertakings in the Community, account is taken of established employee rights’ (EESC, 1988).

The Parliament expressed a similar standpoint. In its report of 30 September 1988, the Parliament’s Committee on Economic and Monetary Affairs and Industrial Policy suggested 30 changes in the Commission’s proposal (Parliament, 1988a). The purpose of a number of these changes was to secure the rights of employees in merging companies. Among other things, it was suggested that the Commission, instead of just being concerned with competition in the Single Market, should also make its approval of mergers ‘contingent upon conditions and requirements designed to ensure that the collective workers’ rights are in force in one of the undertakings involved in the takeover are not restricted’ and it was furthermore suggested that the employees in merging companies should be given the right to be heard by the Commission during its review process (Parliament, 1988a: 10). On 26 October 1988, the Parliament gave its support to the committee’s changed version of the Commission’s proposal (Parliament, 1988b).

Against this backdrop and the ongoing negotiations in the Council, on 19 December 1988 the Commission presented a slightly changed version of its March proposal (Commission, 1988b), a version that did not contain any references to rights of employees in merging companies. In particular two articles in this proposal are worth mentioning here. First, Article 1(3) in which the Commission suggested that mergers with a total global turnover above one billion ECU or a Community-wide revenue of at least ECU 100 million should be subject to the Regulation. Second, Article 2(3), according to which, the Commission’s regulation of mergers, would not be solely based on pure criteria of competition. More precisely, this article states that in situations where certain mergers will lead to market domination ‘the competitiveness of the sectors concerned with regard to international competition and the interests of consumers shall be taken into account’ (Commission, 1988b). With this formulation it would seem that the Commission would be given the power to regulate mergers on the basis not only of competition criteria but also industrial and social policy goals. This was noteworthy, when one takes Sutherland’s neoliberal inclinations into consideration: he certainly didn’t believe in industrial policy. Indeed, as he has later explained, ‘I was always somewhat doubtful of that but it was part of the politics of getting a merger control regulation through. I mean, I have always been inclined to the view that competition policy should be uncontaminated by other issues’ (Sutherland, Interview). The continued inclusion of these provisions should thus be interpreted as an attempt to comply with the wishes of the countries



advocating a mercantilist position, in particular France and Italy, rather than as a reflection of the position of the Competition DG and its Commissioner. The latter would clearly prefer a neoliberal type of merger regulation á la the one favoured (and insisted on!) by Germany (on the various countries' positions, see section 6.7 below).

## **6.6. The changed position of capital actors**

There is no question that the relentless efforts of the Commission and to some extent the Court to induce the member states to reach agreement on a merger regulation turned out to be crucial for the eventual adoption of the MCR in 1989. Yet it also seems safe to suggest that this would have been an unlikely outcome if not important European capital actors had begun supporting EC regulation in this field. Before moving on to look at the positions of the various direct programmers and the negotiations in the Council, it is thus relevant to look at the crucial shift in the position of important European capital actors vis-à-vis EC merger regulation and the structural background against which it took place.

Whereas most capital actors had been opposed to (or at least been very sceptical towards the need for) the establishment of an EC merger subunit of regulation since the 1970s, this was to change after the mid 1980s. An important reason for this was the increased transnationalisation of European business which was reflected in (and partly caused by) the nature of the mergers that were taking place in Europe. Mergers had previously predominantly been an intra-national phenomenon, something taking place between companies located within the same country, rather than an international phenomenon. But this gradually began to change during the 1980s, as can be seen from the data presented by the Commission in its annual reports on competition policy dating from this period. This data shows that from the beginning of the 1980s and up to the eventual adoption of the MCR in 1989, a significant increase in the number of mergers between companies in different EC countries (EC level) and between companies located in member states and third countries (international level) took place.

**Table 6.1: Mergers and acquisitions at national, EC and international level 1983-1990**

	1983/1984	1984/1985	1985/1986	1986/1987	1987/1988	1988/1989	1989/1990
<i>National level<sup>1)</sup></i>	101	146	145	211	214	233	241
<i>EC level<sup>2)</sup></i>	29	44	52	75	111	197	257
<i>International level<sup>3)</sup></i>	25	18	30	17	58	62	124
<i>Total</i>	155	208	227	303	383	492	622

Source: Based on data from Commission (1985b, 1988, 1989, 1992), data collected by the Commission

1) Amalgamations of companies in the same Member State

2) Amalgamations of companies in different Member States

3) Amalgamations of companies in Member States and third countries with effect on the common market

As it can be seen from Table 6.1, it was the development in the number of EC level mergers that was most significant. Whereas only 29 EC level mergers took place in 1983/1984, this number had increased to 257 in 1989/1990. To put it differently, the proportion of EC level mergers out of the total number of mergers went from 18.7 % in 1983/1984 to 41.3% in 1989/1990. The increase in EC level mergers was most significant in the period after 1985 where the number increased from 75 such mergers in 1986/1987 to 257 in 1989/1990, in other words an increase of 242.7 %. In the same period the number of international mergers also increased significantly although at a lower level; viz. from 17 to 124. This is almost equivalent to a quintuplication in the number of mergers taking place at international level. The number of national mergers was larger but on the other hand, the increase in this type of mergers was moderate in this period: it rose from 211 in 1986/1987 to 241 in 1989/1990. It was thus in particular the developments in the number of cross-border mergers that are noticeable in the period preceding the adoption of the MCR. Or to put it differently, the number of this type of mergers exploded in a period where considerable uncertainty surrounded the existing rules in this area.

Geographically speaking, the largest number of mergers taking place in the period from the mid 1980s to the adoption of the MCR occurred in the three large member states: Germany, France and Britain. For instance, it can be mentioned that of the total 383 mergers taking place in 1987/1988, 122 involved France, followed by the UK with 106, Germany with 52 and Italy with 49 (Commission, 1988c: 216). That two new countries, Spain and Greece, became members of the EC in 1986, did not have a significant impact on the trends appearing from table 6.1 as only a modest number of mergers involved companies in these two countries in the years preceding the adoption of the MCR (cf. Commission, 1989: 233; 1992). The chemical industry was the sector in which the largest number of mergers took place: 56 of the 197 EC level mergers taking place in 1988/1989 occurred in this sector, and this number rose to 75 out of a total of 257 in 1989/1990 (Commission, 1989: 215-216; 1992: 443-445).

**Table 6.2: Mergers and acquisitions at EC level, 1987-1990, classified by aggregate turnover of the companies involved <sup>1)</sup>**

	1987/1988	1988/1989	1989/1990
> ECU 1 billion	108	163	237
> ECU 2 billion	80	123	176
> ECU 5 billion	44	79	115
> ECU 10 billion	25	55	74

Source: Based on data from Commission (1989; 1992), data collected by the Commission

1) amalgamations of companies in different Member States

Another matter of interest here is the size of the mergers taking place prior to the adoption of the MCR. It can clearly be seen from table 6.2 that the mergers taking place at EC level in the period from 1987-1990 involved an increasing number of companies with large aggregate turnovers. It is worth noting that the number of mergers involving an aggregate turnover of more than ECU 10 billion, was almost trebled in this period. If seen in relation to the trends that appear from table 6.1 this clearly indicates that a significant concentration of capital took place in the common market in this period (cf. Commission, 1987: 233; 1992: 443).

On the basis of information collected from the specialist press the Commission's report on competition policy from 1989 enumerates the motives that were mentioned in relation to the 383 mergers taking place in 1987/1988. The data shows that the desire to achieve a strengthened market position was the by far most important motive for merging, viz. in 25 % of the cases. Among other motives expansion and synergy are mentioned in 20 % of the cases and restructuring in 15 % of the cases. The desire to strengthen R&D was only mentioned in relation to 2 of the 383 M&As and this motive thus takes the last place on the Commission's list (Commission, 1989: 221). This seems to confirm what the secondary literature dealing with the economic context in which the adoption of the MCR took place: viz. that the growth in the number of cross-border mergers should be seen in connection with the member states' above-mentioned decision to make the internal market a reality by 1 January 1993 (the "1992" programme). As a consequence of this decision, a number of European companies could foresee a situation where they would be faced with considerably tougher competition than they had been used to. This made many companies realise that their national markets were insufficient if they were to survive the increased competition at EC level and internationally. This was the primary reason why a comprehensive restructuring process was set in motion (see also Tsoukalis, 1997: 82; Woolcock *et al.*, 1991: 11).

Now, there is little doubt that the tendency appearing from the data presented by the Commission was a real shift: that is, the number of all three types of M&As *did* increase in the period in question. However, one should keep in mind that companies were not required to notify their mergers to the Commission at this stage, and hence the data had been collected mainly on the basis of information ‘from the specialist press’. One consequence of this seems to have been a rather serious underestimation of the actual number (and perhaps also magnitude) of M&As taking place. There is no point in going into a long and tedious methodological discussion here. But fact is that in works by scholars who mainly draw on data collected by NCAs, a somewhat different picture generally emerges. Suffice it to give but a few examples, all taken from a study by Gray & McDermott (1989). In the *UK* a merger boom was taking place from around 1984. Prior to this year, the record level of spending on acquisitions had been £2.53 billion, set in 1972. This record was broken in 1984 when £5.47 billion was spent, a number which first rose to £7.09 billion in 1985 and then to an astonishing £14.9 billion in 1986. The number of mergers in 1986, namely 695, was approximately half the 1972 level, meaning that the mergers were now taking place between large companies. Indeed, ‘[i]n 1986 the value of the three largest bids equalled the 1985 total’ (1989: 11). From 1986 the number of UK mergers rose explosively; first to 1,125 in 1987 and then to 1,338 in 1988. The largest acquisition to take place in 1988 was when Swiss company Nestlè took over Rowntree in June 1988 in a £2.6 billion deal (1989: 10). In *Germany*, a record number of mergers was recorded in 1987: namely 887, of which 405 in one way or the other involved foreign companies. Similar to the case in the UK, some of these mergers took place between companies that were already large (see below). In public debates, such mergers were referred to as “elephant mergers” and in particular the SDU was arguing that the BKartA should do more to block them (1989: 15; also *Financial Times* 1986). In *France*, the level of merger activity was also rising, not least in the field of foreign acquisitions. These rose from 70 in 1985, over 134 in 1986, to 194 in 1987 (1989: 15). All in all, it seems fair to suggest, on the basis of these selective examples, that merger activity in Europe was probably at a somewhat higher level than that recorded by the Commission.

Having looked at some structural changes in the economic sphere, we now move on to consider the agential and ideational dimensions. As mentioned above, it is well documented that the ERT played an important role in relation to the re-launch of the European integration process in the 1980s (Cowles, 1995; van Apeldoorn, 2002). Some scholars have indicated that the Roundtable was also involved in the processes leading up to the adoption of the merger regulation in 1989. For instance,

McGowan & Wilks (1995: 152) write in passing that ‘the European Roundtable of Industrialists were at the forefront in pushing for EU merger control’ while Hix (1999: 219) also briefly suggests that the merger control regulation was adopted by the member states in response to ‘the rise in cross-border mergers in anticipation of the single market and to heavy lobbying by multinational firms (in the European Roundtable of Industrialists)’.

Although it is true that transnational capital actors supported the adoption of a merger regulation towards the end of the 1980s, it is crucial to clarify that their support for European level regulation was *not* something the Commission could just take for granted from the outset. Even after the mid 1980s, many in the business community had their doubts as to whether the Competition DG would actually be able to enforce merger regulation rules in a reasonable way that would not make life even harder for companies involved in cross-border mergers. In the DG the analysis was that without business support for the regulation, member states would not be under sufficient pressure to give the Commission powers in this field and hence it was vital to persuade important capital actors of the need for the regulation. Capital actors thus became important indirect/external programmers in the processes leading up to the adoption of the MCR in 1989.

In this context it proved important that a person of Sutherland’s calibre and ideological conviction was now in charge of the area. As one key member of Brittan’s cabinet explains, the Commission was lucky to have Sutherland (and later Brittan) as this enabled it ‘to get crucial support from industry at the time we needed it’ (Faull, Interview). Sutherland had to invest a lot of time and energy in order to achieve this support:

‘I spent a lot of time speaking to the corporate world at conferences, and individuals in powerful companies, the European Roundtable of Industrialists and so on, to make the point that the control of mergers at a national level ultimately meant the division of the internal market often on the basis of less than objective criteria and political influence and interference. And therefore the corporate world which in general, apart from small protectionist elements, wants a market economy structure to work should be in favour of a merger control regulation. And I think that we brought them onboard at an early stage, in general, the corporate world. A great deal of effort was spent on that in a lot of speeches and so on’ (Sutherland, Interview)

Several meetings between Sutherland and ERT members took place (Davignon, Interview; see also van Apeldoorn, 2002: 114). And so, although merger control was not one of the areas the ERT had initially involved itself in, its members gradually, and especially once the number of cross-border

mergers began to rise explosively, came to perceive of the adoption of an EC regulation as potentially desirable (Davignon, Interview). In this context it should not be overlooked that a number of “ERT companies” were themselves involved in mergers in the 1980s. Nestlé’s acquisition of Rowntree was already mentioned above as the biggest merger involving a UK company to take place in 1988. Here we can add that Nestlé’s CEO, Helmut Maucher, was a member of the ERT (from 1983-1999). British American Tobacco Industries, “represented” in the ERT by first Patrick Sheehy (1986-1995) and later Simon Cairns (1996-1998), acquired Eagle Star in a 968 million deal in 1983 (the largest acquisition in the UK that year). Unilever, from which a number of CEOs have been members of the ERT over the years, took over Brooke Bond in a £ 389 million deal in 1984 (Gray & McDermott, 1989: 10) and regularly bought up small- to medium-sized businesses in Europe in the mid 1980s. German chemicals producer Hoechst, represented in the ERT by Wolfgang Hilger from 1988 to 1994, acquired US company Celanese in a \$2.8 billion deal in 1987 (*Plastiques Modernes et Elastomeres*, 1987). Dutch electronics group Phillips, whose CEO Wisse Dekker played an important role in the formation of the ERT and served as its chairman from 1988 to 1992 (see above), acquired control over German consumer-electronics company Grundig in April 1984 (*Wall Street Journal*, 1984). And Germany’s biggest industrial group, Daimler-Benz, “represented” in the ERT by Werner Breitschwerdt (1986-1987) and Edzard Reuter (1988-1998) was involved in a mega-merger when it took over the AEG electrical company in a deal that was only reluctantly approved by the BKartA (*Financial Times*, 1986). In 1987 French company Thomson, the CEO of which (Alain Gomez) was an ERT member from 1987 to 1992, acquired the consumer electronics division of one of its biggest foreign competitors, US company General Electrics in a \$3 billion deal (*Financial Times*, 1987a). Gray & McDermott (1989: 15) point out that in Italy there was ‘an increasing number of foreign acquisitions by major companies such as Fiat, Ferruzzi, Olivetti and Pirelli’. Suffice it to say that CEOs/chairmen from all these four companies were ERT members in the 1980s. This is not intended as an exhaustive list; several other examples of “ERT companies” involved in M&As in this period could probably be cited. But the above will suffice to drive home the point that a number of ERT members were positioned in companies that took part in the “merger madness” of the mid 1980s and as such it was only natural that they also took an interest in the establishment of an EC merger sub-unit of regulation<sup>76</sup>.

The Roundtable’s position was first articulated in a standpoint paper of 1 June 1988. It is probably fair to suggest that it was not too pleased with the Commission’s April draft proposal. At a general level, the ERT was concerned that the proposal did not ‘sufficiently support corporate restructuring

in the E.C.’ (ERT, 1988a). More concretely it believed that the draft proposal, if adopted, would allow the Commission to prohibit concentrations that should in fact be allowed. ‘It should be made clear’, the standpoint paper thus states, ‘that the concentrations creating or strengthening a dominant market position should not per se be incompatible with the Common Market’. It then continues: ‘To block a concentration, the Commission should *demonstrate* that the concentration would *eliminate* effective competition in the relevant market’ (1988a, emphasis added). These remarks seem to suggest that the ERT was worried that the Commission would be able to block far too many mergers and that it, accordingly, would like to see its powers to do this significantly reduced.

Yet there is no doubt that the ERT was in favour of an EC merger regulation at this stage. In a press statement of 15 June 1988, the ERT made clear that ‘[a]ll concentrations having a Community dimension should be controlled and judged only at a Community level, and by a single procedure rather than having national and Community controls overlapping and contradicting each other’ (1988b). To this it was added that ‘[t]he criteria for judging merger proposals should be clear and workable and the administrative procedures permit rapid decisions’ (ERT, 1988b). Yet the draft proposal was considered to be a disappointment in this regard as the criteria ‘governing whether a concentration has a European dimension are unclear and unworkable’ (ERT, 1988a). It is interesting to note how the ERT used these rather imprecise formulations when talking about the criteria used in the regulation of mergers: that is, the ERT as a whole did not really “take side” with either the neoliberalist or the Euro-mercantilist USDR, although one might argue that the preference for “clear” criteria would bring it more into line with the neoliberal USDR (where discretion and political intervention in merger decisions was not welcomed) than with the Euro-mercantilist USDR. Whether or not this was the case, one might see the vagueness of the formulations in the light of the fractional struggle that was going on inside the ERT during these years. That is, the above-mentioned struggle where the globalist (and neoliberally inclined) fraction was only gradually beginning to prevail over the Europeanist (and more protectionist) fraction (see section 6.3). In any case, ERT members now actively began pushing for the establishment of an EC merger regime at meetings with the member state governments (ERT, 1988b; Davignon, Interview).

UNICE was one of the other significant capital actors that began supporting (in principle, that is) the adoption of a merger control regulation in the late 1980s. Again, this was to some extent due to the efforts of the Commission: ‘Certainly a lot of efforts were made with the employer’s federation, UNICE. And a lot of people went out and gave speeches, went to meetings, went to conferences, at

all levels in the DG...’ (Faull, Interview). That UNICE became actively involved in the processes leading up to the adoption of the MCR is reflected in the fact that it produced five declarations/position papers from November 1987 to December 1989. It appears from these that the greatest concern to UNICE was the establishment of a clear division of labour between the member states and the Commission, so that companies would not have to notify mergers to more than one authority. In other words, it argued strongly in favour of what was to become denoted as a “one-stop-shop” where mergers covered by the MCR would never be subject to national control.

The shift in UNICE’s position was of course not only (or for that matter, mainly) caused by the persuasiveness of the Commission. It was above all caused by the fact that the number of cross-border mergers was increasing explosively in a situation where the legal context was unclear to say the least: as mentioned above the existence of different by and large uncoordinated national merger subunits of regulation placed potentially significant administrative costs on merging companies and caused uncertainty regarding by what rules mergers would be regulated. The Commission and the Court had of course done what they could to increase the uncertainty of transnationally oriented capital actors. Heinz Kroger, the Head of UNICE’s Company Affairs division probably expressed the sentiment of such actors towards the end of the 1980s rather well, when he stated that ‘[w]e have the worst of all worlds at the moment - narrow national controls supplemented by a Community control where nobody knows which criteria apply. The sooner we get the regulation the better’ (*Financial Times*, 1988c). Some studies single out the Philip Morris ruling as the crucial turning point that triggered the shift in UNICE’s position (see e.g. Bulmer, 1994: 431; Woolcock 1989: 18). However, it is probably more correct to say that the ruling *intensified* business support for the regulation. The ruling was made on 17 November 1987, and UNICE had already stated in its position paper of 10 November same year that ‘UNICE is in favour of a Council Regulation providing for the observance of the rules of competition in the form of Community-level control of European-scale company mergers’ (UNICE, 1987). In other words, all the UNICE members (that is, the national central industrial and employers’ federations) were already at this point in favour of an EC level regulation, the only exception being the Federation of Danish Industries which ‘does not see the need for a regulation. This Federation would prefer to see the present situation maintained’ (UNICE, 1987: 1). The shift in UNICE’s position vis-à-vis the establishment of an EC merger subunit of regulation was probably also related to the fact that towards the end of the 1980s transnational corporations (TNCs) played the key role in a process where UNICE was streamlined.



Subsequently, TNCs have to a large extent assumed leadership in UNICE and other groups comprised of national federations (van Apeldoorn, 2002: 102-103).

Yet although UNICE did now in principle support the adoption of a regulation, it did not find it difficult to identify flaws and shortcomings in the Commission's draft proposals. In particular, these were criticised for not establishing a clear division of labour between authorities at national and supranational level (UNICE, 1988, 1989b). UNICE suggested that the Commission should make its decision regarding whether a merger should be blocked or not within two months of the notification. And furthermore it was suggested that the Commission should be given the opportunity to be somewhat flexible in its regulation of mergers to the effect that mergers 'which cannot be approved by the Commission under the rules of competition [are] to be authorised in the Community public interest' (UNICE, 1987). This latter statement clearly suggests that UNICE was in favour of a subunit of regulation that would (or at least could) entail control mergers on the basis of more than just competition criteria, just like the British regime. As such its position at this stage seems to have been formulated on the basis of a Euro-mercantilist USDR. Yet all in all UNICE did not find the Commission's draft of April 1988 to be very convincing: 'As it now stands, the text of the envisaged regulation is poorly drafted and difficult to understand' (UNICE, 1989a).

As mentioned the changed position of UNICE reflected that its member federations did now, albeit only in principle, support the adoption of an EC merger control regulation. In the UK, the CBI became strong supporters of EC merger control that would establish a one-stop-shop regime (see CBI, 1988). In July 1988 the *Financial Times* reported how the Director General of the CBI, John Banham, had told members of the American Chamber of Commerce at a lunch in London that in the new competitive environment that would exist when the internal market was completed in 1992, 'it was essential for the European Commission to have responsibility for competition policy and the control of cross-border mergers' (*Financial Times*, 1988b). In a memorandum of August 1988 the position of the CBI was articulated in more detail, for instance making clear that in the CBI's view 'the sole appropriate [merger] test is one based on market dominance' (pt. 9) and that the proposed 50 million ECU threshold 'should be raised to at least ECU 100 million (pt. 17). Other British capital actors also expressed their views. The UK-based *Institute of Directors* (IoD), representing several thousand company directors, also produced a discussion paper, in which they somewhat reluctantly expressed support for an EC merger regulation, insofar as this would in no way allow the Commission to pursue industrial/social policy goals. The promotion of competition was seen as

the only legitimate goal, and referring in an ill-concealed manner to the public interest criterion in the British merger regime, IoD warned against ‘the development in the Community of the ambivalence which besets competition policy in the UK’ (IoD, 1988, pt. 28). The *Bar Association for Commerce, Finance & Industry* also expressed support for ‘exclusive control of mergers of a European dimension by the European Commission, on the basis of competition criteria only’ (BACFI, 1988) in a memorandum of December 1988.

Despite the neoliberalist leanings of important representatives of British capital such as CBI and IoD, representatives of the two main capital fractions (productive and financial capital) in Britain were not necessarily unified in their position on the criteria of EC merger regulation. A main reason for this was the nature of the British corporate environment in the UK as compared to that of continental Europe. Whereas hostile takeovers were an almost unknown phenomenon in countries like Germany and France due to the existence of various “protectionist” arrangements and a specific company culture, this was not the case in under the company legislation in the UK’s more liberal model of capitalism. Some capital actors feared that with the rise in inter-national mergers this would put UK companies in an unfavourable situation where they would be exposed to take-over bids from foreign companies that were themselves shielded from such bids (*The Times*, 1988b). Although the proposed EC merger regulation (or for that matter EC competition policy more generally) did not directly concern this lack of “reciprocity” with respect to hostile bids, it did lead some of those capital actors operating in sectors particularly vulnerable to hostile takeover bids from foreigners to support ‘the retention in the merger Regulation of national public interest, as a means of blocking bids where reciprocity conditions are not met’ (Woolcock, 1989: 26). This gave rise to two conflicting positions in Britain’s capitalist class. Many “members” of the fraction of productive capital subscribed to the view that unless the other EC countries were willing to transform their systems in order to bring them into line with the British model, it would be necessary to implement measures that would generally make it more difficult to take over companies in the UK. Yet, as Woolcock (1989: 27) pointed out, this ran ‘against the interest of the British financial community in maintaining an open environment for investment’. In other words, whereas many members of the productive fraction tended to subscribe to a position grounded in a national-mercantilist USDR, the members of the financial fraction were generally advocating a position based on a neo-liberal USDR. The result was that ‘British business as a whole is split on the issue’ (1989: 27).

In Germany, the BDI was now in favour of a regulation, provided that it would entail a clear division of labour between the national and the supranational level so that merging companies would not need approval from more authorities than necessary. In other words, the BDI also wanted the above-mentioned one-stop-shop (Woolcock, 1989: 23). Also in France it was becoming clear to many capital actors that if they wanted to compete on a global level, 'French firms had to become global players themselves, and national controls in other EC countries were ... an obstacle to this aim' (Woolcock *et al.*, 1991: 16). However, some members of this elite were concerned with the Commission's proposed pre-notification system, worrying that it 'would offend French traditions of confidentiality' (Schwartz 1993: 648). Notwithstanding this, the CNPF began supporting the establishment of a European merger regime. Towards the end of the 1980s other capital actors also supported the adoption of an EC merger regulation. Among these were, for instance the *European Council of Chemical Industry Federation* (CEFIC) (*Agence Europe* 1988: 16), which is not surprising when taking into consideration that more cross-border mergers took place in the chemical sector than in any other sector (see above). US interests were also involved in these processes. *The American Bar Association* and individual American law firms were in contact with the Commission (Faull, Interview). *The EC Committee of the American Chamber of Commerce* (AmChamEU), the organisation in Europe representing the views of European companies of American parentage, also expressed its views on the Commission's draft proposals in 1988 and 1989 and did in this context demand a one-stop-shop system (AmChamEU, 1989).

The group of external/indirect programmers also consisted of some non-business groups. The *European Trade Union Confederation* (ETUC), the most important representative of trade unions at EC level, as well as some national trade unions were not opposed to the proposed merger control regulation. But they were concerned with the employees' rights in merging companies and thus wanted it to include some sort of employment test, so that the Commission would have the power to ban a merger if it would have devastating employment consequences (Armstrong & Bulmer, 1998: 100; Faull, Interview). BEUC, the European consumers' organisation, argued that the regulation should include a specific test about interests of the consumer. But the Commission's argument that the proposed regulation already covered such concerns via the text it included from Article 85(3) was accepted by the BEUC (Faull, Interview).

## 6.7. The establishment of an EC merger sub-unit of regulation

In order to explain the 1989 MCR, it is logical to first look at the positions of the German, British and the French governments. These governments were crucial direct programmers in the sense that a programming outcome that did not to some extent reflect their preferences was unlikely. Our focus here will mainly be on the two issues that, unsurprisingly, turned out to be the most controversial ones: namely the question about how far-reaching competencies the Commission should be given (the question of jurisdiction) and the question about the criteria that should be applied to the regulation of mergers (Woolcock *et al.*, 1991: 16; Tsoukalis, 1997: 81-82).

As we have seen Germany and UK differed from the other member states by having well-established national merger sub-units of regulation (see also Sturm, 1996). And as the only member state **Germany** had a national merger sub-unit which was based on stricter rules than the ones suggested in the Commission's April 1988 proposal. That is, it was stricter in the sense of being based on a pure competition criterion (at least at the level of the BKartA). This was reflected in the German position regarding how an EC merger regulation should look. The German position was that only an EC regulation based exclusively on the competition criterion would be acceptable. And this had been the view through all the 15 years that the discussions regarding the MCR had lasted at this point. As Jonathan Faull of the Commission recalls:

‘Germany had what it thought of as a very successful system with merger control and believed that anything we could do in Brussels would be less effective and that it was giving up to Brussels one of its major powers ... There was a real fear in Germany that giving up competition policy, which was the way they thought of it, to Brussels would lead to a less independent, more industrial policy, more social policy, a more employment based system’ (Faull, Interview)

As we have seen, this “competition only” view was firmly grounded in the neoliberal USDR, and was moreover incompatible with Article 2(3) of the Commission's 1988 draft proposals, where the door was thrown open for various forms of political discretion in the Commission's assessment of mergers (see section 6.4 above). Yet the government did support an EC regulation, and this was in fact expressed at the highest political level when Chancellor Helmut Kohl told the other heads of government at a meeting in the European Council in May 1988, that an agreement on a merger regulation was needed ‘very urgently’ (*The Times*, 1988a).

It has already been mentioned that at this stage (in the late 1980s) the BDI was in favour of a European level one-stop-shop regime. Yet German industry was not the only indirect programmer that sought to leave an imprint on the negotiations by influencing the government. During 1989 the politically independent BKartA, probably not delighted with the prospects of handing over some of its powers to another institution, involved itself in the ongoing debate in Germany and severely criticised the Commission's draft proposals. Described by the *Financial Times* (1988c) as the Commission's 'main critic outside the UK', the BKartA started a campaign in order 'to swing Bonn's cautious acceptance of the scheme into line with its own outspoken opposition'. Its President, Professor Wolfgang Kartte, pointed out that the proposed Article 2(3) in the Commission's December 1988 proposal would entail that market dominating mergers could be approved with reference to industrial policy goals.

The German government did not ignore the views expressed by the BKartA and entered the final negotiations with the demands that the Commission's right to make this sort of discretionary assessments had to be limited considerably, and that NCAs (in the German case, BKartA) should under exceptional circumstances be given the right to block mergers that the Commission had approved for political reasons. Ironically, the German government hereby in effect came to advocate the type of double control that German capital actors, as well as capital actors more generally were so keen to avoid (Woolcock, 1989: 23). In relation to the question about thresholds (and thus the scope of EC merger control) the German government advocated the view that these should be set at a high level, namely at a yearly turnover of ECU 10 billion. In other words, the Commission would be given the power to regulate mergers with an aggregate global turnover above this amount whereas all other mergers would fall under the competency of the member states. The consequence would be that only relatively few (and very large) mergers would be subject to the Commission's regulation. The German position in this question was probably based on the assumption that the national merger regulation regime was functioning well, so there was no need to give the Commission more power in this area than absolutely necessary.

As already mentioned the **UK** had established a merger sub-unit of regulation as the first country in Europe. Whereas the German government (and the BKartA) was keen to ensure that the Commission's merger regime would be as similar to their domestic regime as possible, the British government was keen to avoid the introduction of a European level merger regime that would be based on anything remotely similar to the British "public interest" criterion. For many years the

British government had opposed the idea of giving the Commission the power to regulate mergers at all. Yet although some members of the Conservative government remained reluctant, others began to perceive the need for a regulation. In particular, it was the Secretary of State for Trade and Industry, Lord Young of Graffham who succeeded in making the UK government take a more positive stand in relation to this question. Hence, in November 1987 the Minister for Corporate and Consumer Affairs, Francis Maude, who represented the UK government in the negotiations, informed his colleagues in the Council that although the UK government could not accept the proposals put forward by the Commission, it was now open-minded and willing to discuss a regulation (*The Times*, 1987). Or as it was expressed in an October 1988 Memorandum by the Department of Trade and Industry: ‘The UK has reserved its position on the principle of an EC merger control regulation, while expressing its willingness to take part constructively in discussions’ (DTI, 1988).

In other words, the British government was not in a hurry to give birth to a new European level merger subunit of regulation. At a meeting between the national ministers and the Commission in Luxembourg in June 1988, Maude was the only minister who rejected the need, in principle, for EC merger control. On behalf of the UK government he *inter alia* argued that the proposed thresholds were too low (meaning that too many companies would be subject to the Commission’s scrutiny); that the time limits suggested by the Commission were unacceptable; that Britain wanted to preserve the right to veto a merger decision made by the Commission if vital national interests were at stake; and that a system entailing industrial policy at the European level was unacceptable (*Sunday Times*, 1988a). As regards this latter point, the Under Secretary of the Department of Trade and Industry, Mr Treadgold, informed the House of Lords’ European Communities Committee that ‘the Government believes that the criterion for prohibition should be competition’ and added that ‘UK experience of the authorities trying to pick winners, the government believes, has shown how misguided that policy is, and therefore it does not want the Community to be tempted down that road’ (House of Lords, 1989: 78). We can thus conclude that with respect to the question of the criteria of merger regulation the position of the British government was now very similar to that of its German counterpart. Precisely like the German government it wanted to moderate the aforementioned Article 2(3) in the Commission’s proposal of December 1988, the article that gave the Commission some possibility to pursue other goals than ensuring competition in the internal market. Both governments were in other words subscribing to and advocating a position grounded in the neoliberal USDR. Regarding the question of threshold values, the UK government shared the

German view that these should be set at the high level of ECU 10 billion (Woolcock *et al.*, 1991:17). Again, this can be seen as reflecting that the government considered the national merger regulation regime to be well functioning and thus saw no reason to weaken it unnecessarily.

The French position in relation to the question of EC merger control shifted significantly over the sixteen years the discussions lasted. Unlike the UK and Germany, **France** did not have a particularly well developed national merger subunit of regulation and changing governments in France (and also Italy) had actively pursued industrial policies in order to create “national champions” that would be able to compete internationally. Fearing that the Commission would undermine their ability to pursue such policies, French governments had never been among the strongest advocates of an EC MCR, especially not one based on strict “competition only” criteria. Indeed, the domestic merger subunit had been established in the 1970s precisely with a view to avoiding such interference from the Commission (see section 5.3). Yet towards the end of the 1980s, the attitude of the French government began to change. Inside France a debate was going on between, on one hand, those who defended the traditional view that French industry had to be shielded from international competition and that the state should continue its attempts to foster national champions and, on the other hand, those who believed the introduction of a European level regime would be an advantage to French industry as it would make it easier for French firms to restructure across borders and moreover serve to strengthen France’s image as a pro-European country<sup>77</sup>.

The French government notwithstanding seemed to be increasingly in favour of an EC merger regulation as the end of the 1980s drew nearer. In June 1988 Edith Cresson, the French European Affairs Minister, made it clear that the French government did not in principle oppose an EC merger control regulation that would take precedence over national competition law (*Financial Times*, 1988a). However, she also made clear that the French did not want a regulation at any price. Commenting on the criteria of regulation in the Commission’s April 1988 proposal Cresson said that she considered them to be ‘too legalistic’ and inflexible, failing to ‘take into account the need for European firms to consolidate in the face of American and Japanese competitors’ (quoted in *Sunday Times*, 1988a). That she talked of European as opposed to French firms can be seen to reflect a shift in the position of the French government; namely a shift from position grounded in the national-mercantilist USDR towards a Euro-mercantilist position. This discursive shift was related to the explosive rise in cross-border mergers accounted for above. That is, those

governments who had traditionally been trying to facilitate economic growth through the promotion of “national champions” gradually realised that their national markets were too small, if companies that could compete internationally were to see the light of day. This induced a shift in the position of the French and Italian governments: ‘In the changed circumstances generated by the SEM there was something of a U-turn; both states transferred their wish for industrial competitiveness from the national to the European level. The French in particular wanted “European champions”, and a strong national presence in such firms’ (Armstrong & Bulmer, 1998: 100). Both governments now wanted the Commission to be able to pursue industrial policies precisely as the aforementioned Article 2(3) in the Commission’s December proposal would allow it to do. The two countries’ main concern was that the Commission would be too restrictive in its regulation of mergers and not take non-competition considerations sufficiently into consideration. In relation to the question of jurisdiction the French government preferred a threshold of 5 billion ECU (*Europe Daily Bulletin*, 1988), that is, a threshold lying between the British/German proposal of ECU 10 billion and the Commission’s proposal of ECU 1 billion .

In the centre of the negotiations stood the Commission (backed up by transnational capital actors), eagerly trying to draft a text that it would be possible for the direct programmers to reach agreement on. Within the Commission, Delors strongly supported the regulation and lent his weight to it. But the essential work was done by the two Commissioners for Competition, Sutherland and then Brittan, and their staff (Faull, Interview). When Brittan replaced Sutherland in early 1989 a great deal of the basic negotiations had been done. But Faull recalls that

‘a number of the very big issues were left. Where were the thresholds? What would the final test be? Would it simply be a dominant position test or would there be some inclusion of criteria relating to the employment, social and other consequences of a merger? Would there be any exceptions to the exclusive jurisdiction above and below the thresholds?’ (Faull, Interview)

Hence, at this late stage it was anything but a foregone conclusion that the governments would be able to reach agreement. However, Brittan made the adoption of the regulation his top priority (Brittan, Interview<sup>78</sup>) and believed from the outset that a solution could be reached. He later recalled that

‘I was not as pessimistic as you might have expected from the long history of failure to reach agreement. And the reason why I was not so pessimistic was that I knew



from what I was hearing in Britain – which is of course one of the Eurosceptic countries least enthusiastic about handing competencies to the European Commission – that in fact there was strong desire on part of the business community that this regulation should be agreed. And the fundamental reason was that they were getting fed up with going around to several jurisdictions when they had a merger case. They wanted a one-stop-shop. And that view I picked up myself because before coming to the Commission I was approached by almost every business interest that you could ever imagine that had anything to do with the European level. So I knew what their concerns were’ (Brittan, Interview)

Within twelve months of his tenure as Commissioner, Brittan achieved his goal: on 21 December 1989, under the Presidency of the French government, the Council reached agreement on Regulation 4064/89.

Let us begin with the criteria of merger regulation. Here the MCR states in Article 2(3) that ‘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’. The concept of “concentration” refers not only to standard mergers, but also to joint ventures, acquisition of a majority stake and take over bids. Although it is not clarified how the Commission defines such “dominant positions”, the MCR ‘does fairly clearly limit the relevant criteria to ones relating to competition’ (Neven *et al.*, 1993: 5). Indeed, it is noteworthy that there is no mention of the Commission being allowed to pursue industrial policy goals. Instead Article 2(1) now reads that the Commission among other things shall take into account ‘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*’ (emphasis added).

This is interesting given the long history of disagreements over the content of this article. Indeed, whereas his predecessor had, in what one might see as an uncharacteristically diplomatic act, retained the language of industrial policy in Article 2(3) in a failed attempt to please in particular the French government, Brittan had no such intentions. As he later wrote

‘I was determined that the Merger Regulation should not be used as a way of imposing an industrial policy on Europe, although there were quite a number of participants in the debate who wanted to do just that. Whether it was because they wished 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 mergers in the relevant market' (Brittan, 2000: 3).

Brittan himself was of course 'solely in favour of a pure competition regulation' (Brittan, Interview). Consequently, in an amended proposal for a merger regulation of March 1989 Brittan and the Commission made sure to leave out the provisions that would have allowed the Commission to regulate mergers on the basis of industrial and social policy criteria (Brittan, Interview). This was definitely not only a question of Brittan's personal ideological preferences, but in large part also a necessity if member states like Germany and now also the UK were to accept the regulation (Faull, Interview). In other words, in a move that was only logical given the broader ideational developments, the Commission moved from the Euro-mercantilist "EC industrial policy" camp to the "pure competition test" neoliberal camp. Even Delors supported a "pure competition" regulation 'because he was persuaded that that was the only thing that was going to be adopted. But he was concerned to ensure that there was enough language in the text to allow for other considerations to come into play, possibly' (Faull, Interview).

Yet the problem remained that the French government, now backed up by Italy, Spain and Portugal, had now come to defend the position that the Commission should be given some discretionary powers so that it could be flexible in its assessment of mergers. In this way it was hoped that the merger regulation would not prevent the establishment of "European champions" that could compete internationally. That fundamental disagreement regarding the criteria of merger regulation thus continued to exist was confirmed on a number of informal meetings between France, UK and Germany in the beginnings of 1989 (Woolcock, 1991: 19). It is thus interesting to note that ultimately the neoliberal "competition only" USDR prevailed. That is, although 'the development of technical and economic progress' is mentioned in Article 2(1) of the MCR as something that can be taken into consideration, it is also made clear that the preservation competition is the name of the game. As Woolcock *et al.*, (1991: 20) noted, 'it seems unlikely that the narrowly defined criteria contained in the regulation will ever be used to pursue EC industrial policy objectives'. Or as Brittan (2000: 3) himself expressed it: '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'.

The big question is why in particular the French government accepted to be "beaten back". The main reason seems to have been that French capital actors wanted the regulation and that there was

no way Germany and the UK would have accepted a regulation based on the Euro-mercantilist USDR. As Faull puts it, 'I think they [the French government, HB] felt at that stage that France had more to gain by stopping protectionist merger decisions in other countries than it had to lose by having a regulation based on a pure competition test. So the French joined in' (Faull, Interview). In addition to this, it was probably of some importance that France had the Presidency in the second half of 1989. The prestige involved in reaching agreement in this area after 16 years of failure gave the French government an extra incentive to let the negotiations come to a conclusion.

If the French government had to make significant concessions in relation to the question of criteria, it was more successful with respect to the question of *jurisdiction* (the scope of EC merger control). Here it reads in Article 1(2) of the MCR that a merger has "Community dimension" when '(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'. Mergers of this magnitude fall under the Commission's jurisdiction and must be pre-notified to the Competition DG, whereas all other mergers fall under member state jurisdiction. However, for instance it appears from Article 9 that member states are, under certain conditions, able to request the Commission that they conduct a national investigation of a merger that is considered to affect 'competition in a distinct market within its territory that does not form a substantial part of the common market' (Art. 9(3)) and which would thus have been approved by the Commission. In addition to this Article 22(3) of the MCR also allows member states to request that the Commission reviews mergers even if they do not have a Community dimension.

So how can this outcome be explained? On one hand, countries like Germany and the UK preferred a high threshold (ECU 10 billion) so that the Commission's jurisdiction would be relatively limited. On the other hand, the Commission, Italy and a number of smaller countries such as the Benelux countries and Denmark preferred a low threshold (around ECU 1 billion) that would make the Commission's field of activity significant. Towards the end of 1989 the ERT, which had so far not made its precise position with respect to this question clear, also came out in favour of a low threshold. In a position paper from December 1989 it was declared that the 'ERT would support the lowest feasible threshold level, especially having regard to the anticipated period of heightened merger activity before 1993. Accordingly, the target threshold should not exceed two thousand

million ECU' (ERT, 1989a). That the ERT members would prefer a low threshold is understandable; insofar as the regulation would establish a one-stop-shop for mergers with a Community dimension (something most or all mergers involving transnational capital actors would probably have if the threshold level was set at a low level), transnational companies could avoid national control altogether. Finally, the French government took a middle position and suggested thresholds around ECU 5 billion.

In its amended March 1989 proposal, the Commission proposed that a merger should fall under its jurisdiction if the aggregate global turnover of the merging parties exceeded 5 billion ECUs (as opposed to the ECU 1 billion proposed by the Sutherland-Commission in its' December 1988 proposal) *or* if the EC level turnover exceeded ECU 100 million *unless* each of the two companies had more than 66 % of their aggregate turnover in one member state. These threshold levels would then after a transition period of four years be subject to revision in the Council. Even though the German government insisted on the ECU 10 billion threshold until May 1989, and even though also the British government opposed a threshold at this low level until the end, this was the compromise that formed the basis for the final agreement. However, in the MCR the EC level turnover threshold was raised from the ECU 100 million suggested by the Commission to ECU 250 million<sup>79</sup>. It is worth noting that the thresholds were hereby set at a level twenty-five (!) times higher than the threshold originally proposed by the Commission in 1973. Hereby the scope for EC merger regulation was obviously made much more limited than the Commission had initially envisaged.

However, the adopted MCR did not entail quite as clear a division of competencies between the Commission and national authorities, as some had hoped for. In particular the business community strongly disliked Article 9(3), an article the inclusion of which was insisted upon by the German negotiators and which, consequently, became known as the "German clause". With the inclusion of the "German clause" the German government ensured that the national authorities would continue to be able to regulate mergers of great significance to the German home market and the clause can thus be seen as a compensation for threshold values that were set at a much lower level than the Germans would have preferred. As UNICE put it in one of its position papers, 'the "German Clause" ... is unacceptable to industry because its effects come close to constituting a double barrier' (UNICE, 1989a). Indeed, this article did weaken the one-stop-shop regime wanted by industry. But the German government insisted – under the influence from BKartA – that it was included in the merger regulation and threatened to veto the whole regulation if such a clause was

not included (Woolcock *et al.*, 1991: 18). As regards Article 22(3) of the MCR (which allows member states to request that the Commission reviews mergers even if they do not have a Community dimension) this was included in the regulation as compensation to those member states that wanted lower thresholds than those ultimately agreed upon. Among these states were the Netherlands and the article is thus known as the “Dutch clause”.

Finally it should be mentioned that the MCR sets out a timetable for decisions. The assessment of mergers with Community dimension can fall into two stages. There is a one-month screening stage where mergers that do not raise concerns (in relation to the abovementioned criteria) are approved (possibly with certain conditions) (Article 10(1)). Mergers that do raise concerns proceed to a second stage where a more detailed investigation is performed. Within four months the Commission has to decide whether the merger can be permitted (possibly with certain conditions) or not – and the opinion of an Advisory Committee consisting of Member State representatives has to be taken into account in reaching this decision (Articles 10(3) and 18). Yet the power of this Committee was limited; as stated in Article 21 ‘the Commission shall have sole competence to take the decisions provided for in this Regulation’, only ‘[s]ubject to review by the Court of Justice’.

To recapitulate, the form and content of the merger sub-unit of regulation established with the MCR was modelled on neoliberal ideas of regulation. That is, ultimately the (democratically accountable) member state governments were not enabled to overrule the (not so democratically accountable) Commission’s decisions in certain merger cases, reflecting the neoliberal commitment to the separation of key institutions from democratic accountability. And ultimately, the MCR leaves little or no room for regulation of mergers that takes into account non-competition considerations, just like the neoliberal USDR prescribes. With the neoliberal USDR prevailing it seems fair to categorise its two most important advocates, namely the governments of Germany and the UK as the primary programmers when looking at the outcome of the negotiations. The Competition DG and its pro-active Commissioners also deserve this label. The other governments participating in the negotiations can cautiously be categorised as secondary programmers. Although being direct programmers (and thus by no means insignificant) these governments had to accept the neoliberal USDR but made an impact at the level of CIR, especially regarding the threshold level and the clauses defining the division of labour between the Competition DG and NCAs. A number of other external, but indirect, programmers can also be placed in this category: namely transnationally oriented capital actors, NCAs (in particular the OFT and the BKartA) and the Court. Centre-left,

National-mercantilist and Euro-mercantilist ideas of regulation were not reflected in the text of the MCR and such we can say that they were marginalised. This also goes for the programmers supporting the centre-left USDR, including unions and the centre-left parties in the Parliament.

**Table 6.3: The 1989 MCR – programmers and ideas**

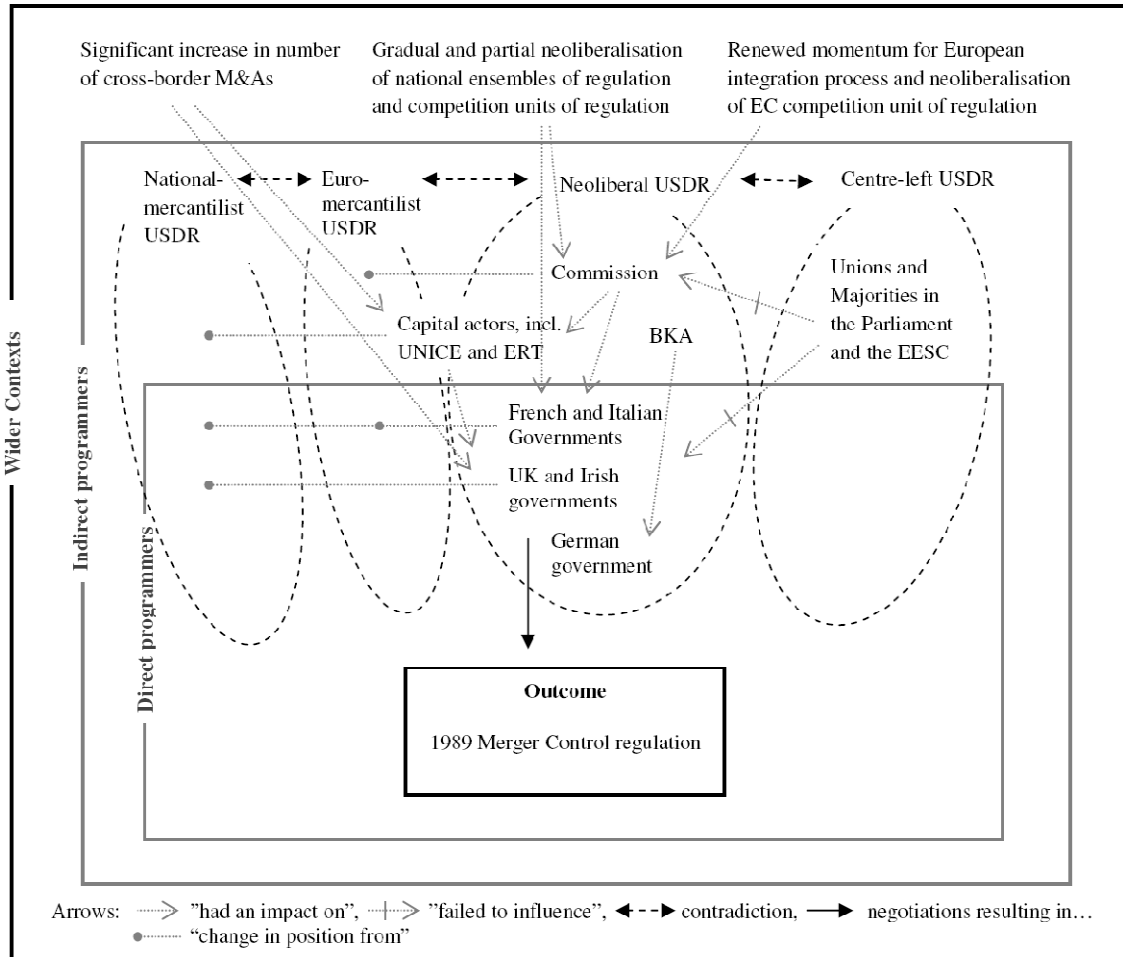
	<i>Programmers</i>	<i>Ideas</i>
<i>Primary</i>	The governments of Germany and Britain. The Competition DG (including Sutherland and Brittan)	Neoliberal USDR
<i>Secondary</i>	France and other member state governments, transnationally oriented capital actors, national competition authorities (OFT, BKartA) and the Court.	
<i>Marginalised</i>	Unions and centre-left parties in the Parliament	Centre-left and mercantilist ideas of regulation

## 6.8. In conclusion

The main purpose of this chapter was to explain the continued failure to reach agreement on an EC MCR throughout most of the 1980s and the adoption of the MCR in 1989. We are now in a position to answer the second and third sub-questions. First, why did the Commission’s proposals for a MCR fail to gain support from the member states in the 1970s and most of the 1980s? The short answer is that the various programmers (direct and indirect, internal and external) advocated positions grounded in incompatible USDRs, making it impossible to reach agreement on the content and form of the MCR. The slightly more elaborate answer is that a number of “contextual factors” resulted in the reluctant or hostile attitude of both governments and capital actors. In the previous chapter we saw that these included a limited number of cross-border M&As; an economic crisis that member states chose to deal with through national initiatives such as state aids for declining industries; and a resulting stagnation of the European integration process and the EC competition unit of regulation. In this situation neither member states nor important capital actors generally saw any need for an EC merger subunit of regulation. This was also the situation in the early part of the 1980s, rendering it impossible to reach agreement on the revised proposals for a MCR. Second, why was it eventually possible to adopt a MCR and why was designed the way it was? The answer is that the wider settings within which the negotiations over the MCR took place changed significantly

in the course of the 1980s, contributing to a gradual change in the position of key programmers. Figure 6.1 is an attempt to illustrate this.

**Figure 6.1: Explaining the 1989 MCR**



After the mid-1980s the broader rise of neoliberal ideas impacted on Europe’s competition units of regulation, where it was translated into a vision of competition policy as an instrument of regional market making which would have as its sole objective the preservation/creation of competition and which would be enforced with no or very limited political involvement. A gradual and partial neoliberal turn took place not only in the British, French and German competition units and the wider ensembles of regulation of which they formed part, but also in the EC competition unit of regulation which experienced a revitalisation in the course of the decade. This was related not only to the rise of neoliberalism but also to the re-launch of the European integration process, which was to no small extent caused by the efforts of the capital actors in the ERT. Partly as a result of neoliberal policies and initiatives an explosion in the number of cross-border M&As took place the

mid-1980s, reflecting an increased transnationalisation of capitalism. In these changed settings a number of programmers shifted position. Among the direct programmers, the German government, under influence from the BKartA, remained a strong advocate of a position grounded in the neoliberal USDR. The French and Italian governments moved from a national-mercantilist to a Euro-mercantilist position and finally accepted EC merger regulation based on the neoliberal USDR. In the course of the 1980s the Irish and UK governments also endorsed the neoliberal USDR as did the Commission. Crucially, indirect programmers in the form of capital actors such as ERT and UNICE also moved away from the national-mercantilist position and now favoured an EC merger subunit of regulation based on either the neoliberal or the Euro-mercantilist USDR. Other indirect programmers, namely unions and majorities in the EESC and the Parliament, continued to advocate a position grounded in the centre-left USDR. Ultimately, these ideas/programmers were however marginalised as the 1989 MCR ended up as a neoliberal text, which did not really allow for non-competition factors to be taken into consideration in the regulation of mergers and which did not allow for “political discretion”.



## **7. The 1990s and onwards: merger control in the era of neoliberal hegemony**

After our long journey through the 1950s, 1960s, 1970s and 1980s we have now arrived at the final stop: the period stretching from the early 1990s to 2007. The main phenomena to be explored are EC merger regulation in the 1990s onwards and especially the 2003 revision of the MCR. In other words, the chapter should enable us to answer the fourth and last sub-question posed in section 1.1, namely ‘how has the MCR been implemented by the Commission and how can the revision of it in 2003 be explained?’ In what follows we first focus on neoliberal hegemony and the transnationalisation of capitalism (section 7.1) and the main developments in the European integration process (section 7.2). Against this background we briefly look at the “neoliberalisation” of the different subunits making up the EC competition unit of regulation and the internationalisation of competition regulation (section 7.3). We then explore the nature of the comprehensive “modernisation” of Regulation 17 (section 7.4) before considering the “Europeanisation” of the national merger subunits of regulation in Germany, France and the UK (section 7.5). Having outlined these various “contexts”, section 7.6 analyses how the Competition DG has implemented the MCR in the 1990s onwards and section 7.7 investigates the processes leading up to the adoption of a revised MCR. After a brief conclusion summarising the answer to the above-mentioned sub-question, a postscript to the chapter takes a look at the challenges to the hegemonic neoliberal type of competition regulation (section 7.9).

### **7.1. Neoliberalism and the transnationalisation of capital**

The 1980s were the decade when the neoliberal GDR gradually became hegemonic. At first it served as the basis for what van Apeldoorn *et al.* (2003: 38; see also Overbeek, 2000: 248-249) refer to as a “deconstructive project” that provided ‘the most convincing analytical and prescriptive framework of the crisis of Keynesianism’ and which thus provided intellectual ammunition for the disruption of the post-war social orders of embedded liberalism/social democracy. In its second phase, neoliberalism, or more precisely various neoliberal USDRs, gave rise to a series of strategies

aimed at liberalising, deregulating, privatising and internationalising the existing socioeconomic order (2003: 38; Jessop 2006: 8). At this stage the proponents of neoliberalism sought to discredit all alternative visions and elevate neoliberal ideas to the only credible and legitimate perspective around. In its third phase, which is the one stretching from the early 1990s to the present (the period covered in this chapter), neoliberalism had become the hegemonic GDR in most parts of the capitalist world. This state of affairs was clearly related to, but not explained away by, a change in the underlying balance of power between capital and labour, which had now shifted decisively in favour of especially transnationally oriented capital.

To say that the neoliberal GDR has become hegemonic is not, of course, to say that all (or any) contemporary Western societies are accurately modelled on the neoliberal vision of society. This is clearly not the case: the extent to which the neoliberal GDR has served as the basis for the programming of important legal-regulatory institutions differs from society to society. As such important differences between the various models of capitalism in Europe endure. Nor is it to deny that neoliberal policies/strategies are frequently criticised and opposed by various social groups. The point is rather that when looking at the broader development in the European societies, these are in no uncertain manner moving in a neoliberal *direction* and have been doing so since the 1980s. The most important reason for this is that the neoliberal discourse is now, implicitly or explicitly, endorsed by a large majority of those who occupy positions of power in many both national and supranational institutions. As Harvey explains,

‘the advocates of the neoliberal way now occupy positions of considerable influence in education (the universities and many “think tanks”), in the media, in corporate boardrooms and financial institutions (treasury departments, the central banks), and also in those international institutions such as the International Monetary Fund (IMF), the World Bank, and the World Trade Organisation (WTO) that regulate global finance and trade. Neoliberalism has, in short, become hegemonic as a mode of discourse’ (2005: 3)

The members of this transnational elite, which also includes political decision-makers belonging to both the political right and to “third way” social democratic parties, have to a considerable extent succeeded in institutionalising neoliberalism as ‘an uncontested and incontestable dogma’ (Swyngedouw, 2004: 29). The neoliberal GDR provides the political and economic elites with a common language and now constitutes the framework through which most of them understand social reality. These elites are backed up by an obliging army of neoclassical economists who are

only happy to confirm that competition and the marketisation of the public sphere are blessings. Despite their well-documented failure to predict anything at all such economists do not hesitate to make precise predictions about what will happen in some distant future and, on this basis, prescribe far-reaching (neoliberal) reforms of existing societies that need to be urgently implemented if not an irreparable loss of competitiveness and other catastrophes are to be the outcome. Hereby the political ideology of neoliberalism is elevated to a scientific truth, and real political debate is effectively undermined (see Nielsen, 2006: 36-39 for a brilliant discussion of this). As this indicates, all alternative visions and projects are on the defensive in the era of neoliberal hegemony:

‘The discourse of neoliberal internationalism has become ... a hegemonic, incontestable and virtually naturalised and self-evident set of arguments and beliefs. This hermetic field of vision defies critique and dissidence, such that alternative visions or voices are marginalised and silenced, or meet with formidable resistance. This monolithic imagination, in turn, flattens the political spectrum and renders the political articulation of alternative positions difficult, if not impossible’ (Swyngedouw, 2004: 28).

Consequently, political disagreements tend to be less fundamental than they were in previous eras; that is, they are often not rooted in diverging USDRs, but concern instead various CIRs that are all broadly compatible with neoliberalism. So for instance, it is not considered necessary to debate whether competition is *only* a good thing, nor does the question of whether competition regulation should also take into account, say, employment considerations become a real issue. Mainstream politics, then, in large parts consist of a dialogue between agents who find themselves in broad agreement with the neoliberal GDR and the various USDRs – and any challenge to this discourse is perceived of as naïve or unrealistic and illegitimate. In this sense, the current era is one of neoliberal hegemony.

This hegemony, like other historical hegemonies, is sustained by particular practices and social structures. As briefly mentioned above it is premised upon, and contribute to reinforce, the weakened position of the working classes vis-à-vis capital. But it must also be seen as the outcome of a struggle within the capitalist class, where its transnationally oriented fractions increasingly transcended or prevailed over those organised at and oriented towards the domestic level. As such, the hegemony of neoliberalism has to be seen in the context of increased integration at the transnational level of productive and financial capital (what is often referred to as economic globalisation). Finance capital is almost by definition international in its orientation, but after the

breakdown of the Bretton Woods System in the early 1970s, its international integration intensified significantly, especially from the 1980s and onwards. This was in no small part due to the new system that replaced the old: ‘Domestic governments retracted exchange controls, dissolved former price and interest rate cartels, lowered access barriers for foreigners to banking activities and stock exchange membership and allowed trading in new financial instruments’ (Lütz, 2006: 30). In the EC the introduction of the SEM (see Chapter 6) and the Economic and Monetary Union (see below) further contributed to facilitate the transnational integration of finance. This integration reached far beyond the borders of the EU. As one scholar observes: ‘By the late 1990s international financial activities were so intertwined with domestic financial markets that for all intents and purposes there was one global financial system that included all the developed countries and many developing and formerly Communist countries’ (Frieden, 2006: 385). To mention but one statistic, world foreign exchange trading trebled from 1989 to 2004 where it reached a level of \$1,900 billion per day (Glyn, 2006: 66; see also Toporowski, 2005).

Yet what sets the current epoch truly apart from previous ones is not so much the transnationalisation of finance as the transnationalisation of production. This phenomenon is closely related to the increase in number and size of TNCs. According to data from UNCTAD, reproduced in Robinson (2004: 55-56), their number increased from 7,000 in 1970 to 37,000 in 1993 and 53,000 in 1998. In 2000 their number exceeded 60,000, accounting for approximately two-thirds of world trade. The global value of TNC sales went from \$ 2.5 trillion in 1982 to \$ 5.4 trillion in 1990 and reached \$15.7 trillion in 2000. As Robinson points out, such figures cannot be taken as direct indicators of the degree to which companies are transnational. Instead he refers to UNCTAD’s “transnationality” index of 2001, according to which the largest 25 TNCs are in fact genuinely transnational, in the sense that, on average, 59.9 per cent of their assets, sales and employment are foreign (2004: 56). The increasing importance of TNCs is also reflected in the rise in foreign direct investment (FDI) – that is, investments that are made to acquire interests in companies operating outside of the economy of the investor. Bieler & Morton (2001b: 4), referring to UNCTAD data, report that outflows of world FDI rose from \$ 88 billion in 1986 to \$ 225 billion in 1990, which is equivalent to an average annual increase of 26 per cent. After a downturn in FDI levels in the early 1990s it rose again from 1993 onwards, reaching \$ 424 billion in 1997. The extent to which the Western European economies were integrated towards the end of the 1990s, is also reflected in the fact that FDI flows were significantly higher here than anywhere else in the world in the period from 1998 to 2003 (see Glyn, 2006: 100-01; also Robinson, 2004: 22-27).

Now, FDI is closely related to, and in many cases identical to, the phenomenon of cross-border M&As. That is, FDI often takes the form of acquisitions of foreign companies or parts of them. For instance, Robinson (2004: 59) notes that ‘just over four-fifths of FDI was in M&As in 1997, with the remainder going to new or start-up investments’. Consequently, it is not terribly surprising that the 1990s witnessed a massive increase in the number of cross-border M&As. As we have seen in Chapter 6, a merger wave had already swept across the EC from around 1987 and to the end of the decade where it reached its peak in 1990. Here we can add that it formed part of a somewhat broader merger wave in the developed world, which was led by American and British firms, with some French firms also joining in towards the end of the boom (Evenett, 2003: 8). The value of all the cross-border M&As taking place during this wave rose from \$ 74.5 billion in 1987 to \$ 135 billion in 1990 (Evenett, 2003: 26). In the early 1990s, the number and magnitude of cross-border M&As seems to have declined. The value of cross-border M&As taking place in 1991 and 1992 was merely \$ 69.9 billion and \$ 66.9 billion (which is not surprising given the downturn in FDI in this period). It was only from the mid 1990s and especially from 1995 onwards that a new merger wave was set in motion, the magnitude of which was without historical precedent. In the EU, mergers were increasingly used to gain a strong position in the internal market. This was for instance documented in a 1995 survey from the accountancy company Price Waterhouse, which found that 45 % of Europe’s top 500 companies were intending to grow by acquisition over the next year (*European Voice*, 1996c).

Once this new wave reached its peak in 2000 its value was \$ 823.4 billion – or more than five times as much as the peak of the previous wave (Evenett, 2003: 8, 26; see also Schmidt, 2002: 18). The size of many of the firms involved in mergers this time around was massive. One indicator of this is the number of so-called “mega deals”, a concept denoting transactions with a value exceeding \$ 1 billion: the number of such M&As rose from 45 in 1996, to 58 in 1997, 89 in 1998, 109 in 1999 and then reached 175 in 2000 (Evenett, 2003: 31). In comparison with the merger wave of the late 1980s, this new wave was not primarily an Anglo-American phenomenon as it also involved a much larger number of German, French, Spanish and Nordic firms than previously (Evenett, 2003: 9, 30; Gaughan, 2000: 3). Many of the M&A deals in this wave ‘left a hangover of bad debt and broken companies’ (*International Herald Tribune*, 2007) resulting in a slowdown in merger activity for a couple of years (when seen in a global perspective). However, in 2006 the number and magnitude of M&As surpassed all records, with a global \$3.79 trillion worth of deals, which was an

increase of 38 percent from 2005 (*International Herald Tribune*, 2007). Indeed, an article brought in the financial press on 22 November 2006 could report that ‘[o]f the top 10 biggest deals ever, eight have been announced since the beginning of this year’ (*International Business Times*, 2006).

In 2007 the global M&A activity continued to reach new heights. A Bain & Company newsletter reported several remarkable findings for the first half of the year: the global M&A value reached \$2.7 trillion, an increase of 62% when compared to the same period of 2006; the value of cross-border M&As set new records, their share of the total number totalling 48 %; the number of hostile bids quadrupled to a number of 407, as compared to the 108 such bids in the first half of 2006; the average deal size went up 50 % from \$132 million to \$198 million; 5 of the top ten global deals involved bids from US-based companies whereas 4 involved European acquirers; European M&As set new records, reaching a new high value of \$1.1 trillion, representing a 80 % increase over the first half of 2006; the number of European deals rose 9% in the period, reaching 6,349; cross-border M&As in Europe reached a record value of \$582 billion (Bain & Company, 2007: 1-4). Despite a significant fall in the volume and number of M&As in the second half of the year, the total value of such deals in 2007 reached an astonishing \$4.74 trillion, hereby surpassing all previous records (*Financial Times*, 2007g). As we shall see later (in section 7.6 below) this explosion in big mergers in recent years has been reflected in the number of notifications received by the Competition DG.

## **7.2. European integration in the 1990s onwards**

In the 1990s onwards, the European integration process was intensified and broadened to the extent that Frieden (2006: 383) can note (like others have noted before him), that the EU now has ‘all the economic hallmarks of a country: a single market, a single currency and central bank, a common trade policy, and common economic regulations on such matters as antitrust and the environment. For all economic intents, Western Europe [is] one economic unit – indeed, by most measures, the largest economic unit in the world’. With the adoption of the “Maastricht Treaty” (hereafter: EU Treaty) in February 1992, the EC Treaty was revised in important respects. The EU was born, based on three pillars, namely the existing EC (pillar 1), the Common Foreign and Security Policy (pillar 2) and Justice and Home Affairs (pillar 3). Institutionally speaking, the Parliament was given more powers (under the so-called co-decision procedure), the use of qualified majority (as opposed to unanimity) voting in the Council was extended somewhat and the Court was given powers to

impose fines on member states in case these did not comply with its rulings or failed to implement EC laws. Whereas the SEA had clarified the EC's powers in areas such as environmental and social cohesion policies, the EU Treaty not only strengthened these but also extended the Community's powers into new areas such as consumer protection and education. However, it seems fair to say that the most remarkable feature of the EU Treaty was that it set out a timetable for the completion of the Economic and Monetary Union (EMU) (which would have to be established no later than 1 January 1999) as well as stringent criteria that were to ensure the convergence of the Member State economies prior their participation in the EMU. These included that member states were not allowed to run budget deficits of more than 3 per cent of GDP; that their public debt would have to be no more than 60 per cent of GDP; and that the level of inflation was not to be higher than 1.5 percentage points above the average level existing in the three EMU member countries with the lowest level of inflation.

The convergence these criteria were meant to bring about was of course a particular type of convergence, namely one modelled on a neoliberal USDR known as "monetarism" (see section 6.2). That is, the criteria would hinder effective Keynesian counter-cyclical demand management policies and moreover put the national welfare states under pressure. Another "neoliberal feature" of the EMU was that the European Central Bank, which would be in charge of conducting the monetary policy of the Euro-zone, was programmed to not only be politically independent (or to put it differently, it would not be subject to democratic pressures); it would also, above all, have as its task to ensure low inflation (also at the cost of high unemployment) (see e.g. Gill, 2001 and Jespersen, 2000 for insightful discussions of the EMU). As such, the EMU 'can be interpreted in the spirit of Margaret Thatcher's vision of destroying the post-war corporatist consensus between capital, the state and labour and replacing it with monetarist stabilisation and supply-side flexibility' (Young, 2000: 80)<sup>80</sup>.

The ERT which had played a decisive role in the European integration process in the 1980s (see section 6.3) continued to do so in 1990s<sup>81</sup>. From the beginning of the decade, the ERT's orientation became increasingly neoliberal. According to van Apeldoorn (2002: 132) this was related to the rise of the globalist fraction 'within the ranks of the ERT and the European transnational class more widely'. This was reflected in a changed composition of members (especially after the merger with *Groupe des Présidents*, see section 6.3) with the Europeanist fraction now becoming a minority (and its "protectionist" inclinations becoming a minority view). The Roundtable's increasingly

neoliberal orientation is reflected in its publications, where it, for instance, calls for “flexible” labour markets and limited social and environmental policies, while strongly supporting the EMU. Of particular interest in the present context is what van Apeldoorn refers to as the ERT’s neoliberal “competitiveness discourse”. On this view the competitiveness of European business is ensured by exposing it to global competition, rather than protecting it from it: ‘Now competitiveness is about survival of the fittest in a fully open environment of a global free market’ (van Apeldoorn, 2002: 172). In order for business to be able to compete, of course the societies in which business operates have to adapt: in fact the societies now enter a competition of who is capable of providing the best business environment (as defined along neoliberal lines). According to this discourse, then, the goal of ensuring the competitiveness of business always comes first when designing new policies or transforming old ones – and this applies to all policies, including social, environmental and educational policies.

The Roundtable not only identifies competitiveness as the root of all good; from the early 1990s it also pointed out an instrument that can be used to bring competitiveness about, namely benchmarking (ERT, 1996 contains the most detailed discussion of this). To put it briefly, the idea behind benchmarking is to measure your own performance against the performance of the best, on this basis setting up targets or benchmarks that you have to reach. So, for instance companies can be measured on their ability to accumulate as much profit as their competitors, whereas countries can be measured on their ability to attract investments. If one does not rank among the best (and not everyone can do that all the time!), clearly action needs to be taken. Companies have to lower their costs of production, for instance by sacking employees or by merging, whereas countries have to lower taxes, cut social welfare transfers, relax their environmental policies etc. Bench-marking, then, is an instrument that can be used to put countries under permanent pressure to adjust. There is no question that the ERT has been successful in selling its message to the EU-system: from the mid 1990s “competitiveness” and “benchmarking” became focal points in many EU, and in particular Commission, publications. This was not a coincidence but the result of a number of seminars, where ERT member invited governments and EU officials to discuss benchmarking and competitiveness. On the ERT’s initiative the Competitiveness Advisory Group was formed by the Commission in 1995 (Davignon, Interview). The group, which primarily consisted of prominent business leaders but also, *inter alia* of representatives from the trade unions, had as its purpose to ensure that competitiveness remained on top of the EU agenda when policies were being designed. When the group delivered its biannual reports to the heads of state and government in the European Council



the message was identical to the one they could (and can) hear from the ERT: competitiveness, competitiveness, competitiveness!

In March 2000 the European Council adopted the so-called Lisbon Strategy, which has as its declared purpose to ‘make Europe, by 2010, the most competitive and the most dynamic knowledge-based economy in the world’ (European Council, 2000)<sup>82</sup>. For instance, this is to be brought about through investment in research and development and through reforms of social security systems and labour market policies. Mostly these reforms are to be implemented by means of... benchmarking. Although social cohesion and a good environment are also mentioned as goals, there is a clear hierarchy between the various elements in the strategy in the sense that other goals are to be achieved through competitiveness. That the Lisbon strategy in many respects sounds like an echo of the ideas promoted by the ERT throughout the 1990s is, again, not a coincidence. As Baron Daniel Janssen of Solvay, chairman of ERT’s Competitiveness Working Group, explained in a speech delivered to the annual meeting of the Trilateral Commission in 2000, ‘The European Round Table of Industrialists and our Competitiveness Working Group were very much involved in the preparation of the [Lisbon, HB] Summit’ (Janssen, 2000)<sup>83</sup>. It is thus not terribly surprising that the ERT members, together with UNICE and other business groups, have been strong supporters of the Lisbon Strategy. Hence, they have also frequently voiced their dissatisfaction with the ability or will of the member states to implement it sufficiently<sup>84</sup>.

The point is of course not to suggest that the European Union’s policies are or have in every detail been designed by the ERT. Clearly this is not the case: both EU institutions and member state governments by definition enjoy a substantial degree of operational autonomy from the ERT and other members of the transnational capitalist class. The point is that the ERT and other capital actors have played an important role in establishing the neoliberal GDR (or “competitiveness discourse”) as the dominant horizon which shapes the *overall direction* of European integration and governance through the various USDRs it is translated into. But over time the EU bureaucracy has gradually become a powerhouse that disseminates this discourse: ‘the ruling social, economic and political forces in Europe have channelled the process of European integration into an apparatus ensuring and reproducing the hegemony of neoliberal policies and ideas in European countries’ (Milios, 2005: 208).

In addition to the developments described above, a few others also deserve mentioning. Delors was succeeded as Commission President by Jacques Santer (Luxembourg) who served from 1995 to 1999 and Romano Prodi (Italy) who served until October 2004 where he was replaced with the current President, José Manuel Barroso (Portugal). The EU-12 was enlarged with new member states. First with Austria, Finland and Sweden in 1995, then with ten Eastern/Central European countries in 2004, and finally with Bulgaria and Romania in 2007. Partly with a view to ensure the smooth functioning of the EU after the enlargements, the EU treaty was amended on more than one occasion. First with the 1997 Amsterdam Treaty, which for instance introduced the notion of “flexible integration” and increased the use of qualified majority voting in the Council while enhancing the role of the Parliament somewhat; then with the 2003 Nice Treaty which e.g. introduced a new voting procedure (“double majority voting”), further extended the use of QMV and refined the concept of “flexible integration”. In October 2004 representatives of the EU member states signed the “Treaty establishing a Constitution for Europe”, widely known as the European Constitution, which inter alia aimed at streamlining the decision-making procedures in the “EU-27”. However, when the French and Dutch voters rejected the constitution in referenda in 2005 the ratification of the treaty had to be given up (see e.g. Johnson & Turner, 2006: 36-44 for a brief overview of the content of the various treaties). In December 2007 the constitution’s successor, the “Reform Treaty”, was signed in Lisbon by representatives of the 27 member states.

### **7.3. EC competition regulation in neoliberal times**

The neoliberal shift was also reflected in the EC competition unit of regulation. This shift had already been initiated in the 1980s and was manifested in the 1989 MCR regulation. However, from the early 1990s onwards, the neoliberal GDR became increasingly reflected in the Commission’s rhetoric and practice. Indeed, ‘EU competition policy has gradually been transformed into a tool to serve the interests of all those economic, financial, social and political forces which depend on free competition, market liberalisation and state deregulation’ (Petrella, 1998: 293). As Hooghe & Marks (1999: 84) explain, ‘[t]he neoliberal agenda, or parts of it, has gained support in several directorate-generals of the Commission (DGs), particularly those implementing the internal market such as the powerful directorate-general for competition (DG IV). The market liberal activism of DG IV has several sources, but a major factor was the recruitment of enthusiastic market supporters during the 1980s’. Another, and related, “source” is the ideological inclinations of the Competition

Commissioners that have served from the 1990s onwards (see also Appendix II for a historical overview of the Commissioners serving in this area).

We have already noted in the previous chapter how Leon Brittan, who served as competition commissioner until 1993 was a hardcore neoliberalist. Karel van Miert (Belgium) who took over after Brittan was initially expected by many to be ‘too ready to take a non-competition line when issuing competition decisions’ but ended up carrying ‘the label of *liberal* within the ranks of the College of Commissioner’ (Cini & McGowan, 1998: 43). Like van Miert, Mario Monti (Italy) who became the new Commissioner of competition in 1999 was not a vociferous neoliberalist. He liked to keep a low political profile, as when he stated in an interview that ‘[o]n some occasions you are criticised by the left and on the other by the right, but at least you feel that you do not belong to either’ (cited in Willmes & Duursma, 2005: 8). However, one should be in no doubt that Monti was a strong advocate of neoliberal policies. Indeed, *BusinessWeek online* (2002) reports that Monti ‘has been championing free markets longer than almost anyone in Europe’ and adds that he, in his previous position as a professor of economics at Bocconi University, ‘spoke out frequently in favour of deregulation, liberalization, and competition’. Neelie Kroes (Netherlands), who replaced Monti in 2004, and who ‘has plenty of experience of commercial reality, having been a director of many large European and American companies’ (*Sunday Business*, 2004), has made no secret of her neoliberal inclinations. On several occasions she has emphasised the virtues of competition and made no secret of her contempt for protectionism (see section 7.9 below).

Neoliberal ideas have been and are reflected in all the various subunits of the EC competition unit of regulation (of which we will deal with merger control in some detail in section 7.6). It is not so much that the fundamental rules have been changed: indeed, the competition provisions of the EU Treaty remain virtually unaltered, although they were renumbered with the Amsterdam Treaty, to the effect that Articles 85, 86 and 92 have become Articles 81, 82 and 87. The neoliberal shift is rather reflected not only in the way the Commission interprets the rules and in the meticulousness and eagerness with which it enforces them, but also in the instruments it has devised in order to make the rules effective.

As McGowan (2007b: 5) points out, EC **cartel policy** ‘provides an apt illustration of an increasingly pro-active and aggressive Commission’. Whereas, the Commission had previously (in the era of embedded liberalism) allowed for certain cartels, this changed in the neoliberal epoch.

The drastic increase in the size of the fines levied on the parties involved in cartels can be seen to reflect the Commission's changed attitude from the mid 1980s. McGowan notes that '[b]y today's standards the initial fines seem ridiculously light as a deterrent' (2007b: 6). He contrasts a 1969 ECU 500,000 fine and a 1983 fine of ECU 1,250,000 with a 1986 fine of ECU 58 million and writes that even the latter 'pale into insignificance in the light of developments in the 1990s when the DG COMP intensified its campaign' (2007b: 6). As part of this campaign the Commission issued a Leniency Notice in 1996 (later to be revised in 2002 and 2006), which seeks to give firms involved in cartels an incentive to report the cartel to the Competition DG, by offering them full immunity or at least a reduction in the fine that would otherwise have been imposed on them. Considering the magnitude of the fines the Commission has been imposing on such companies in the 1990s onwards, and in particular in the past few years (see below), this might in fact constitute a strong incentive

No fine has probably attracted as much attention as the one imposed by the Commission on Microsoft in 2004 (a decision that was upheld by the CFI in 2007). The record fine of 497 million Euros was levied on Microsoft because the Commission found that the company had abused its **dominant position** under Article 82 (previously Article 86) of the EC Treaty. More concretely it was held that Microsoft had abused its position by not only refusing to provide suppliers of server operating systems with interoperability information needed by these firms to be able to compete effectively against Microsoft's own supply of server operating systems, but also by tying its Media Player with its Windows operating system. Although 497 million Euros sounds like an astronomical figure, several commentators have raised doubts as to whether it will have any impact on a company like Microsoft that has over 50 billion Euros in cash reserves (see e.g. Johnson & Turner, 2006: 119). Nevertheless, the case underlines the Commission's increased willingness to apply the competition provisions, even in a case that was always destined to cause a lot of controversy.

From the 1990s and onwards the Commission has also begun pushing for **liberalisation** of key utility and infrastructure sectors (such as energy, post and transport) where state owned companies enjoyed monopoly status. Such companies had previously (in the era of embedded liberalism) often been exempted from competition regulation since the public services they performed were regarded to be in the public interest (Wilks, 2005a: 125-126; see also Bannerman, 2002: 33). This tougher approach was only possible because of the broader turn towards neoliberalism (see also Smith, 2005: 317).

In the **state aid** subunit of regulation, the Commission has also become increasingly aggressive from the mid 1980s onwards (see also section 6.4). The “State Aid Scoreboard” was launched by the Commission in 2001 as the benchmarking instrument by which it would measure progress towards the goals of the Lisbon agenda. As Monti put it, ‘This Scoreboard will ... reinforce the process of peer pressure. I hope that the Scoreboard will lead to a vigorous debate on State aid in Member States and stricter respect of the existing rules by all concerned, in particular the Member States themselves’ (Commission, 2001a). The current Competition Commissioner, Neelie Kroes, made clear from the outset of her tenure, that she would make state aid control a top priority. In 2005 a reform of the subunit was initiated with the so-called State Aid Action Plan, which was presented by the Commission as policy to ‘promote growth, jobs and cohesion’ (Commission, 2005). In line with this plan, the Commission has ‘stepped up efforts to accelerate the execution of recovery decisions’ (decisions whereby the Commission oblige member states to recover illegal aid from the beneficiaries) with the result that by the end of 2006 71 per cent or ‘some €6 billion of illegal and incompatible aid had been effectively recovered’, which constituted ‘a significant improvement compared with the situation in December 2004 when only 25% had been repaid’ (Commission, 2007a). It appears from the Spring 2007 “Scoreboard” that the Commission took 608 decisions on unlawful aid in the 2000-2006 period. Germany was the country involved in most cases (148), followed by Italy (105), Spain (70) and France (63) (Commission, 2007b: 12-13). If measured by subsidy level per capita ‘Germany emerges as one of the worst culprits and the neoliberal UK one of the most reluctant to award subsidies’ (Wilks, 2005a: 125). This clearly suggests that the Commission’s aggressive management of the state aid subunit is particularly difficult to cope with for (and perhaps poses a threat to) the continental models of capitalism.

Unsurprisingly, the neoliberalisation of EC competition regulation has been supported and promoted by the ERT and other European level capital actors. In the previous chapter it was described how the ERT enjoyed easy access to Commissioners such as Peter Sutherland (who became a member of the ERT in 1997 as Chairman of BP) and Leon Brittan. There are no reasons to assume that this changed under later Competition Commissioners. For instance, Baron Daniel Janssen of the ERT noted in 2000 that

‘The Commission plays the lead role in many areas of economic importance and it is extremely open to the business community, so that when businessmen like me face an issue that needs political input we have access to excellent Commissioners such

as Monti for competition, Lamy for world trade, and Liikanen for electronic-commerce and industry. This is in addition to our normal and regular contacts with national ministers...’ (Janssen, 2000)

The Roundtable’s neoliberal profile shines clearly through in the various publications where competition policy is mentioned. In its 1992 action plan for Europe, *Rebuilding Confidence*, it appears that

‘Competition Policy ... must adapt to the new economic realities of world-wide competition. Industry needs the freedom to restructure its operations at European level, where strong competitors can grow and flourish. It is then the market’s job to decide which companies live and die. Authorities are there to ensure that market works fairly. It is industry’s job to rebuild competitiveness. The Community’s competition policy should now be reviewed in the light of the single market and the needs of global competitiveness’ (ERT, 1992: 9; see also ERT, 1991: 43)

That the globalist (and neoliberally inclined) fraction had prevailed within the ERT also appears from the 1993 *Beating the Crisis* report where it is proclaimed that

‘Competition should be judged against a global perspective and the needs of competing on *world markets*. Competition in the Single Market is the best way to develop world players. Government should not try to create “European Champions” but nor should it try to block their development. There should be a bias towards the freedom of action’ (ERT 1993: 25)

The Roundtable’s most elaborate discussion of the EC’s competition policy can be found in the 1994 memorandum *Freedom to compete: Competition policy issues for European business* which was prepared by a working group led by Floris Maljers of Unilever and Etienne Davignon. Here the Roundtable expressed its support for the policy, stating that ‘ERT members believe that the EC Competition Policy has in general served European business well and much has been achieved by the Commission’ (ERT, 1994: 1). The latter was given credit for its awareness of ‘the advantages of speedy decisions in merger control cases’, although the Competition DG’s role as ‘policeman, prosecutor and judge’ was criticised (1994: 3-4). Moreover, the ERT-members had become so fond of the one-stop-shop regime that they suggested to extend it significantly:

‘The emergence of the single market suggests to Business that the ultimate objective should be a single authority. This may be controversial, but certainly the near term objective should be to achieve a “one-stop shop”, where any transaction is reviewed at one level only’ (1994: 5)

In a 1995 discussion paper, UNICE also expressed its support for ‘an effective competition policy which promotes the dynamism of European business and enhances its competitiveness on world markets’ (UNICE, 1995: 4). However, the paper contains a call for a far-reaching reform of EC competition policy, in particular with respect to the administration and scope of Article 85. For instance, UNICE argued in favour of a more ‘flexible interpretation of article 85(1)’ and for a simplification of the procedural rules (1995: 9, 12).

In December 2000, in the wake of the Lisbon Strategy, the ERT also called for a reform of EC competition policy, stating that the strategy ‘cannot be pursued, let alone realised, unless competition has space to flourish’ (2000: 1). In particular the Roundtable called for less strict “market definitions” by the Commission in the light of the changed economic environment (globalisation). More precisely it was argued that globalisation ‘creates larger markets with much greater market volumes → larger markets increase the “optimum size” of companies → larger optimum sizes mean that EU companies have to grow in size if they are to reap the benefits of scale economies in global markets’. As globalisation at the same time intensifies competition in all regional markets, scale ‘is the key for many EU companies to maintain global competitiveness’ and hence it (globalisation) ‘forces EU companies to grow in size both organically and through acquisitions/mergers in order to achieve new efficiencies’ (ERT, 2000: 1-2). In other words, the transnational capital actors attempted to use the Lisbon Strategy and “globalisation” as a lever to obtain a competition policy that would not prevent them from growing even bigger.

Indeed, the type of competition unit of regulation called for by the ERT and other transnational capital actors is one which entails as little involvement by NCAs as possible; which allows them to “concentrate” almost as much as they like, so that they can absorb other companies through M&As; *and* which prevents uncompetitive companies from engaging in cartels and other protectionist agreements that can shield them from the forces of competition. Keeping this latter standpoint in mind it is interesting to take a look at Table 7.1 which lists the ten largest fines ever imposed by the Commission on companies.

**Table 7.1: Ten highest cartel fines per undertaking (since 1969) as of 28 November 2007**

Year	Undertaking **	Case	Amount in €*
2007	ThyssenKrupp	elevators and escalators	479,669,850
2001	F. Hoffmann-La Roche	AG vitamins	462,000,000
2007	Siemens AG	gas insulated switchgear	396,562,500
2006	Eni SpA	synthetic rubber	272,250,000
2002	Lafarge SA	plasterboard	249,600,000
2001	BASF AG	vitamins	236,845,000
2007	Otis	elevators and escalators	224,932,950
2007	Heineken NV	Dutch beer market	219,275,000
2006	Arkema SA	methacrylates	219,131,250
2006	Solvay SA / NV	hydrogen peroxide	167,062,000

Source: reproduced from <http://ec.europa.eu/comm/competition/cartels/statistics/statistics.pdf>, accessed on 8 January 2008

\* Amounts corrected for changes following judgments of the CFI and Court.

\*\* If more than one legal entity of the same group were subject to the decision, they are counted as one undertaking for the purpose of this table.

Not only does it appear from the table that all these fines were imposed after 2000 and that seven of them dated from either 2006 or 2007, with the Euro 480 million fine levied on ThyssenKrupp in 2007 topping the list. It is even more remarkable, well in fact quite astonishing, that the five largest fines were all imposed on companies that were represented in the ERT. Solvay (number ten on the list) was also an “ERT company” at the time of the fine, whereas two other companies, namely BASF and Heineken, have also been represented in the ERT (albeit not at the time of the fine). If it can be assumed that these companies were not subject to miscarriages of justice, one could be excused for wondering whether there is not a good deal of hypocrisy involved in the TNC’s consistent calls for open competition. At least it seems that certain companies find it difficult to practice as they preach.

In the 1990s onwards the first steps toward the internationalisation or globalisation of competition regulation have also been taken. The Commission and the US antitrust authorities have been in the forefront pushing for coordination (as opposed to harmonisation) of competition law enforcement, hereby attempting to meet the challenges that an increasingly global market place poses to this unit of regulation. The EU and the US authorities have concluded *bilateral agreements* with each other and with e.g. Canada and Japan, hereby allowing the authorities in these jurisdictions to share information and coordinate activities. The US-EU cooperation agreement, which entered into force after the mid-1990s, has for instance resulted in close cooperation in a number of merger cases, including the GE/Honeywell case to which we will come back in section 7.6 below.



This process has been actively promoted by the Transatlantic Business Dialogue (TABD), a private elite network that brings together Chairmen/CEOs from leading US and European companies. According to its webpage, the goal of TABD ‘is to help establish a Barrier-Free Transatlantic Market which will serve as a catalyst for global trade liberalisation and prosperity’<sup>85</sup>. The initiative for the network, which was formed in the mid 1990s, was initially taken by the US Secretary of Commerce Ron Brown and Martin Bangemann and Leon Brittan of the Commission. Hence, the network has close contacts with the US administration, to the most important European governments and to the Commission and has on a number of occasions successfully advanced transatlantic trade liberalisation (see e.g. van Apeldoorn, 2002: 111<sup>86</sup>). Many of the current European participants in TABD are or have been members of the ERT, in their capacity as Chairmen/CEOs of companies such as BASF, BAT, Lafarge, Philips, Shell, Siemens and Unilever. The EU Chairman of TABD is currently Martin Broughton, the chairman of British Airways, who is also an ERT member<sup>87</sup>.

Since the network’s beginning, the TABD has pushed for convergence of EU and US competition policies, for instance arguing in its first report that ‘The EU and US should develop convergent procedures to vet mergers’ and that ‘The US and the EU should agree to make worldwide “market access” for all companies, foreign and domestic, a priority objective’ (TABD, 1995: 8). More recently, the TABD has urged ‘continued vigilance against any policies that promote national champions or use the cloak of patriotism or national security to prevent overseas investment’. In this context it argued in favour of the removal of ‘any artificial national or state constraints on mergers or acquisitions while retaining robust competition policy to guard against the abuse of dominant market positions’ adding that the governments ‘should also work together with business to remove barriers to cross-border banking mergers and acquisitions both within the EU and across the Atlantic’ (TABD, 2007: 11).

But the internationalisation of the competition units of regulation has extended well beyond bilateral agreements. EU and US competition authorities have pushed for *multilateral agreements*, consisting of ‘a common set of rules and mechanisms for dispute settlement’ applying to large groups of countries (Johnson & Turner, 2006: 115-116). The EU, and more precisely the Commission, has been the strongest supporter of the adoption of common rules at WTO (see e.g. Van Miert, 1998: 11). One reason for this support has to some extent been the stated goal of

becoming able to fight hardcore international cartels and to avoid the burden placed on merging companies having to deal with several competition authorities. However, another and certainly not a less important reason is that the EU and the US seek to use competition policy as an instrument to consolidate the neoliberal social order on a global scale. By linking it to international trade agreements, ‘competition policy could potentially become yet another tool for prying open markets – whether the markets of developing countries, activities provided by the public sector or state enterprises, or specific industries given special treatment for public policy reasons’ (Lee & Morand, 2003: 3). Indeed, as Hoekman & Holmes (1999: 9) point out, ‘efforts to put competition-related issues on the WTO agenda are largely driven by classic producer interests in major OECD countries’. That is,

‘The main interest of the EU and US is to use competition policy disciplines as an export-promoting device and to reduce the scope for conflict in the approval of mergers between large firms; they are less interested in subjecting the behavior of their firms in foreign markets to international disciplines that will benefit foreign consumers’ (Hoekman & Holmes, 1999: 5)

Unsurprisingly, such efforts have been supported from the outset by the transnational business community, not least the International Chamber of Commerce (ICC, 2003)<sup>88</sup>. Notwithstanding this, it has not been able to reach any agreement on competition issues within the WTO (mainly due to resistance from developing countries) and hence the negotiations are currently suspended. Meanwhile, ‘the EU has placed itself among a network of interlinking organisations seeking to develop a multilateral framework for competition’ (Johnson & Turner, 2006: 116). Besides the WTO, this network comprises the OECD’s *Global Forum on Competition*, which brings together high-level competition officials from around the world and the UNCTAD *Intergovernmental Group of Experts on Competition Law and Policy*, which promotes the “culture of competition” in developing countries.

The most important forum for the coordination of the various competition units of regulation is the International Competition Network (ICN) which was established in 2001. Initially created by 16 competition authorities, including those of the EU, US, Japan and Canada, it now includes 100 agencies from 88 jurisdictions in both developed and developing countries. The ICN is a “virtual” forum that ‘cooperates closely with and seeks input from existing international organizations ... such as the OECD, WTO and UNCTAD’ (ICN, 2005: 2). Acknowledging that ‘[a]ntitrust enforcement at times may impose unnecessary costs and uncertainty on the business community

and marketplace’, the ICN ‘works to promote sound and principled procedural and substantive standards that help minimize such burdens and leave pro-competitive, efficiency enhancing conduct free to flourish’ (ICN, 2005: 1). It does not itself have legislative powers or any competition rules to enforce, but seeks to exert an influence through softer instruments such as “best practice guidelines”. The work of the ICN takes place in a number of working groups that, for instance, deal with issues related to mergers and cartels (see Budzinski, 2004 for more details on the ICN). In its 2007-2008 Work Plan, the ICN Merger Working Group states that its mission ‘is to promote the adoption of best practices in the design and operation of merger review regimes’. Besides representatives from various competition policy authorities, this ‘working group also includes representatives from the OECD and from the legal, economic, academic and business communities’ (ICN, 2007). Indeed, the work of the ICN is strongly supported by business groups. For instance, the ICC has established a “Taskforce on the International Competition Network”. It appears from a 2002 speech given by the chair of this taskforce, Klaus F. Becher, that ‘private sector groups such as the ICC, the OECD’s Business and Industry Advisory Committee (BIAC) and the International Bar Association have formally supported the work of the ICN’ (ICC, 2002b). Becker also made clear that ‘business is working with increasing commitment for a global antitrust convergence and to assist competition agencies in their efforts to make these regimes hopefully harmonious, at least transparent, nondiscriminatory and simpler’.

#### **7.4. The “modernisation” of Regulation 17**

Although the possibility and desirability of a comprehensive reform of EC competition policy was seriously discussed from the early 1990s, it was only towards the end of the decade that a reform process was officially set in motion by the Commission. In April 1999, while Karel van Miert was still Competition Commissioner, the Commission published a *White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty*. The *White Paper* proposed that the existing EC competition unit of regulation which was based on pre-notification and centralised authorisation in the sub-units of cartels and abuses of dominant positions, was replaced with a system that was based on *ex post* regulation and a more decentralised application of the competition provisions in these subunits. A former Director General of the Competition DG, Claus-Dieter Ehlermann, has suggested that

‘The White Paper [...] is the most important policy paper the Commission has ever published in more than 40 years of EC competition policy. It suggests a legal and cultural revolution in proposing the fundamental reorganization of the existing responsibilities between the Commission, national antitrust authorities and national courts’ (Ehlermann, 2000: 537)

Nonetheless, the *White Paper* was accepted ‘virtually in its entirety’ (Wilks, 2005a: 435) by the member states, and hence its content was to no small extent reflected in the proposal for a regulation that was submitted to the Council by the Commission in September 2000 and subsequently adopted in December 2002. The new Regulation 1/2003 (hereafter: Regulation 1), which entered into force in 1 May 2004 (the very same day the EU was enlarged with ten new member states), replaced Regulation 17. As a number of scholars have observed, the implications of this reform (which also extends into the merger area, as we shall see below) are far-reaching. McGowan (2005: 987) suggests that ‘[t]he momentous changes contained within the reforms represent nothing less than a real revolution in the way competition policy will now be enforced and implemented’. And according to Wigger & Nölke (2007: 487) the 2004 reform ‘is the most important change in the history of EU competition policy’.

In particular, three changes introduced with Regulation 1 deserve mentioning. *First*, the reform grants additional investigative powers to the Commission, allowing it, for instance to conduct interviews with individuals from a company and to search domestic premises of such individuals (see e.g. McGowan, 2005: 994; Monti, 2007: 410). *Second*, the enforcement of EC competition regulation is “decentralised”. This means that NCAs are going to be involved in the enforcement of EC competition rules, for instance enabling them to approve agreements with reference to Article 81(3) (formerly Article 85(3)) without the Commission’s acceptance. Whereas the EC competition unit of regulation was previously managed by the Competition DG, parts of it are now also to be managed by 27 NCAs. In order to allocate cases among the NCAs and to ensure a coherent application of rules, the European Competition Network (ECN) was formed in 2002 (the year Regulation 1 was agreed). The stated purpose of this “decentralisation” is to provide a speedier and more uniform handling of cases and to allow the Commission to refocus its resources (Johnson & Turner 2006: 107-108). However, some scholars have suggested that the real purpose is to *centralise* even more power in the Commission. Indeed, the ECN is not a network of equal partners; on the contrary, it is a hierarchical network where the NCAs are not allowed to reach decisions that contradict the Commission’s decisions *and* where the NCAs have to send a draft to the Commission before adopting a decision, hereby enabling the Commission not only to comment on the decision

but also to actually remove the case from the NCA and take it on itself (McGowan, 2005: 993; Monti, 2007: 517). In other words, the Commission is not the architect of a “revolution” that undermines its own power and central position as a competition policy enforcer; on the contrary it ‘has engineered an audacious coup that has extended its powers, marginalised national competition laws, and corralled the national competition authorities’ (Wilks, 2005b: 438; see also Riley, 2003).

*Third*, the old notification system is abolished. Regulation 17 entailed a system where companies with a “community dimension” could notify all sorts of commercial agreements (with the exception of mergers) to the Commission, which would then either prohibit the agreement or grant exemption with reference to Article 85(3). As Wigger & Nölke (2007: 496) explain, ‘[t]he logic of this system was that everything not permitted was forbidden. Once the Commission gave its approval or exemption decision, the deal was automatically immune from legal prosecution’. Under Regulation 1 all ‘agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which do not satisfy the conditions of Article 81(3) of the Treaty shall be prohibited, no prior decision to that effect being necessary’ (Regulation 1: Art. 1). This means that the old *ex ante* notification system is replaced with an *ex post* system, where it is very much up to companies themselves to figure out if an agreement constitutes a breach of Article 81(1) or whether it meets the criteria to be exempted under Article 81(3). This, however, does not only involve self-assessment: the new system gives companies a strong incentive to “look after” their competitors and take them to court if they have reason to believe that their agreements should be prohibited under Article 81(1). In other words, the new system involves a significant “privatisation” of EC competition law, where capital actors are to play a much more active role than they have previously done. This change has not been without effects. According to data presented by Wigger & Nölke (2007: 497) only 5 per cent of competition cases in the EU-25 were brought to national courts by private parties prior to the enactment of Regulation 1; in the two years following its enactment 51 per cent of the competition cases resulting in national court judgements had been initiated by various private actors.

The stated purpose of this “privatisation” of competition policy enforcement is to benefit both companies and the Commission. The former are freed from the burden of notification and the latter is now able to concentrate its efforts on those cases that involve serious distortions of competition. However, again one might well question whether this was also the real motive behind the change. For one thing the old notification system, while not being perfect, provided businesses with a certain degree of legal certainty. This was widely appreciated in the business community and, even

though the Commission was also criticised for being too slow and inefficient, the system itself enjoyed support not only from business but also from some member states (see e.g. FRG, 1999). Despite the stated goal of Regulation 1 to increase certainty for business, the “privatisation” has the exact opposite effect. This can come as no surprise to the Commission, which is indeed ‘aware that firms find it next to impossible to understand what constitutes an anticompetitive agreement under Article 81(1)’ (Monti, 2007: 411). Hence, large parts of the European business community are not particularly pleased with the new system which they fear will lead to ‘a situation of increased legal insecurity and significant transaction costs’, and UNICE and other business groups ‘therefore strongly counterbalance efforts for further legal modifications that enhance the possibilities of litigation’ (Wigger & Nölke, 2007: 500, 501; see also Martin, 2007). The consequence of “privatisation” is that businesses ‘will require ever increasing legal and economic advice before implementing agreements, and this favours larger firms with greater economic resources’ (Monti, 2007: 411-412). Yet it certainly also favours the legal profession serving the business community, and indeed much seems to suggest that, although business groups such as ERT, UNICE and AmCham-EU were involved in the reform processes (McGowan, 2005: 987)<sup>89</sup>, it was to no small extent a coalition consisting of law companies, legal experts and the Commission that pushed for changes in this field (Wigger & Nölke, 2007: 504; Wilks, 2005b: 447).

In the processes leading up to the reform, the Commission did much to portray itself as an institution that was heavily burdened by the notification system. This system was said to have forced the Commission into a reactive mode where too many resources were wasted on the notification of harmless agreements, while too little effort was made to fight more serious breaches of EC competition law. For instance, it appears from the Commission’s *Twenty-sixth Report on Competition Policy* that in the period from 1989 to 1996, only in 13 percent of its cases had the Commission become involved on its own initiative, in the rest it was involved due to complaints or notifications (Commission, 1997: 341-342). Moreover, the Commission had only prohibited nine notified agreements between 1962 and 1999 (where the *White Paper* was published). Although this number does not take conditional exemptions into account, it still clearly indicates that the notified agreements were generally not those involving serious breaches of the rules (Monti, 2007: 397). As mentioned above this system was rightly criticised for being inefficient – and as the Commission was keen to point out the 2004 enlargement would only aggravate this situation as one could expect the Competition DG to be almost drowned in new notifications. This was one of the problems that privatisation and “decentralisation” was hoped to solve.

However, some scholars have questioned whether the old system was indeed functioning as badly as claimed by the Commission (e.g. Riley, 2003; Wilks, 2005b: 438). For one thing it is doubtful whether the Competition DG was overburdened by notifications. Whereas it had received over 200 notifications a year in the 1989-1998 period, the number fell drastically between 1999, where a new block exemption system was introduced, and 2004 where the new system entered into force:

**Table 7.2 Number of notifications received by the Competition DG 1999-2004**

1999	2000	2001	2002	2003	2004
162	101	94	101	71	21

*Source: Data from the Commission as cited in Monti (2007: 400)*

Moreover, the Competition DG had been able to reduce the backlog of cases: whereas more than 3000 notified agreements had been pending in 1980, this number had been reduced to 473 in 2004 (Monti, 2007: 400). This seems to suggest that the Commission might have exaggerated the extent to which it was overburdened – and the extent to which the EU enlargement would paralyse it. Indeed, a number of commentators have pointed out that there is no guarantee that the new system is going to be more efficient than the system it replaces. For instance, the new NCAs of the accession countries have little experience with the enforcement of competition policy and are perhaps also less persuaded about the need for this type of regulation (see e.g. Monti, 2007: 414-423 for a discussion of some possible flaws of the new system).

This suggests that the “modernisation” of the EC competition unit of regulation is not merely some practical or bureaucratic arrangement that is meant to ensure its smooth operation “post-enlargement”: it should certainly also in no small part be seen as an attempt to consolidate the prevailing neoliberal USDR. Indeed, far from constituting an attempt to genuinely “re-nationalise” competition law, ‘policy makers in the Commission were seeking commitment to a neoliberal European economy, to the privileging of competition as against employment or social welfare, and to a pan-European integrated market that may imply major shifts in the location of economic activity’ (Wilks, 2005a: 437). Wigger & Nölke point out that the reforms constitutes ‘a substantial shift from the Rheinisch to the Anglo-Saxon variety of capitalism’ with the result that ‘[s]hort-term efficiency considerations are likely to take precedence over wider socio-economic concerns, such as the protection of SMEs or technology transfer through inter-firm collaboration’ (2007: 505). Indeed, it seems correct to say that the reforms contribute to consolidate the hegemony of the neoliberal

USDR by ensuring that this discourse will serve as the basis for competition regulation not only at the EU level but also at the national level throughout the EU-27. As such the reforms also constitute a further break with the post-war compromise of embedded liberalism and the prevailing form of competition regulation in the era of the KNWS (where the “wider socio-economic concerns” mentioned above by Wilks and Wigger & Nölke were often taken into consideration).

### **7.5. The “Europeanisation” of national merger control**

It should be clear from what has been said in the previous sections that a fundamental transformation of the EC competition unit of regulation has taken place over time. In the course of this process, the Competition DG has become increasingly powerful and self-confident, and EC competition policy has come to overshadow national competition law. In this section we once again turn our attention to national merger control/competition regulation in the UK, Germany and France and briefly look at how the national subunits of regulation have gradually and partially been “Europeanised” in order to make them more compatible with EC merger control.

*Britain.* As we saw in the previous chapter, a rather radical neoliberal shift took place in the UK in the 1980s. In the monetary area this entailed a commitment to monetarist principles; in the industrial policy area it involved much less state intervention in the market; and in the social policy area it was reflected in cuts in unemployment benefits, social assistance and housing allowances for single mothers, unemployed and youth (Schmidt, 2002: 76). Notwithstanding the socially imbalanced nature of these policies, they contributed to lower unemployment and brought down the social security deficits (2002: 78) and were by and large continued under the Conservative, John Major government (1990-1997). In 1997 the Labour Party, now renamed “New Labour”, came to power. The new Tony Blair government, with its so-called “Third Way” policies, did not in most respects break with the neoliberal path followed since the late 1970s. Although committed to an increase in social equality, ‘the three successive Labour Governments under Blair’s continuing authoritarian plebiscitary tutelage have deliberately, persistently, and wilfully driven forward the neo-liberal transformation of Britain rather than halting or reversing it’ (Jessop, 2006: 9). That is, New Labour ‘has willingly committed itself to further liberalization and de-regulation in many areas, old and new; to the privatization or, at least, corporatization, of most of what remains of the state-owned sector; [and] to reliance on expensive ‘private-finance initiatives’ as a way of raising



funds for public investment whilst keeping such borrowing off the government's balance sheet' (2006: 11; see also Coates, 1999).

As mentioned in Chapter 6, the British competition unit of regulation was not formally reprogrammed in the 1980s, albeit a more implicit neoliberal shift took place also in this area, especially in the wake of the Tebbit guidelines. Despite proposals for reforms British capital actors managed to block major changes in this area in the 1980s and most of the 1990s<sup>90</sup>. This stalemate came to an end when the New Labour government came into power. In its election manifesto it had promised a reform of the existing competition unit of regulation and after a round of consultations (and some delay due to Conservative opposition) the *Competition Act* was adopted in the Parliament in 1998. The Act, which came into force in 2000, 'marks a fundamental shift in the core characteristics of the traditional UK policy' (Eyre & Lodge, 2000: 69). As a number of scholars have pointed out, the Act involves a significant "Europeanisation" of the British regime (e.g. Eyre & Lodge, 2000: 69-71; Suzuki, 2000; Utton, 2000: 281). Articles 81 and 82 of the EU Treaty were incorporated into the Act (Eyre & Lodge, 2000: 69)<sup>91</sup>; UK authorities were given investigative powers similar to those held by the Commission; the MMC was renamed the "Competition Commission" (CC); and an Appeals Tribunal was established (Cini, 2006; Kryda, 2002: 256).

The Act changed nothing in the field of merger control which had been excluded from the reforms, but it had barely been implemented before, in October 2000, Trade and Industry Secretary, Stephen Byers, announced that a major reform of the merger control regime was going to take place (DTI, 2000). The essence of the reform, which was reiterated in a 2001 DTI White Paper, *A World Class Competition Regime* (a title very much in the spirit of the neoliberal era of benchmarking), was to limit the involvement of political decision-makers in merger decisions and to make competition the all-important criterion of merger regulation (DTI, 2001). With the new merger system, which formed part of the 2002 *Enterprise Act* and came into force in 2003, the Trade and Industry Secretary is no longer to take part in the process of merger regulation, except in exceptional cases (e.g. related to national security), meaning that politically independent competition authorities, rather than democratically accountable ministers take the final decision (Scott *et al.*, 2006: 8). In other words, the new British regime is modelled on a neoliberal type of merger regulation, not unlike the one that was introduced at the EC level in 1989 (see section 6.7). Moreover, a new "substantial lessening of competition" (or SLC) test was introduced, meaning that the CC now decides whether or not a merger can be approved solely on the basis of whether it has resulted (or

can be expected to result) in a SLC. It is worth noting that this test is different from the “dominance” test used by the EC, although the both concern a merger’s effect on competition in a given market. Yet the SLC test is associated with the US antitrust regime, which since the 1914 Clayton Antitrust Act has prohibited mergers that “substantially lessen competition” (see section 4.1). As Vickers (2004: 456) points out, competition had already for a long time been the criterion used in British merger regulation and as such ‘the reform crystallised in law how practice had developed’. Yet ‘the sole emphasis on competition rather than public interest is a tell-tale sign of a change in outlook’ (Arestis & Sawyer, 2005: 204) and that this competition-only vision was institutionalised while a Labour government was in power is a testimony to the extent to which the neoliberal USDR has become hegemonic.

*Germany.* Whereas a shift towards neoliberalism had already taken place in the monetary unit of regulation in the mid 1970s (in the form of monetarism, see section 6.2), steps towards a “neoliberalisation” of other areas of the “social market economy” were not taken before the 1990s. At this juncture, the now unified Germany suffered from high unemployment (11 percent by the mid 1990s) with a resulting increase in welfare expenditure (29.6 percent of GDP in 1995), that put the social security system under great pressure (Schmidt, 2002: 73). However, political realities made it impossible for the Kohl government to implement more than minimal cuts in the social security system. Only under the government led by Gerhard Schröder of the SPD (1998 -2005) did more neoliberally inspired reforms take place, not least in the pension system where a freeze on increases was adopted and a partial privatisation took place (2002: 73-74). In the 1990s, the Kohl government did however respond to the (perceived) declining competitiveness of German business in both capital and product markets by initiating a process of privatisation and deregulation: ‘[i]n addition to the massive privatization programme in East Germany, major monopolistic public service providers in telecommunications and air and rail transport were privatized while highly regulated markets such as stock markets, electricity, and road haulage were deregulated’ (Schmidt, 2002: 72; see also Ryner, 2003 for a discussion of Germany’s political economy in the neoliberal era). This process did in no small part take place due to pressure from the Commission and the Competition DG which, as we saw in section 7.3 above, turned its attention to the public sectors and government intervention in the market in the 1990s (see also Quack & Djelic, 2005: 271).<sup>92</sup>

With the increased prominence of EC competition policy in the 1990s onwards, the relationship between German competition authorities (primarily the BKartA) and the Competition DG has also

changed dramatically. Following Quack & Djelic (2005: 276-277) one might distinguish between three phases in this relationship: from the mid-1950s to the mid-1970s the German competition authorities were influential in shaping European level competition policy; from the mid-1970s to the mid-1980s the interconnections between the BKartA and the Competition DG were rather limited; and since the mid-1980s the interactions between the two have become much stronger but now with influence mainly going from the Competition DG towards the German competition regime. Indeed, the BKartA has increasingly been ‘relegated to a subordinate position’, also because it has ‘manoeuvred itself into inward looking isolation with an exaggerated self-belief in its mission and an over-legalistic and case-oriented approach towards competition policy’ (Lodge, 2003: 236; see also Wilks & Bartle, 2002). Unsurprisingly, this subordination to the Competition DG has not been welcomed by the BKartA, and hence the 1990s were to some extent characterised by increased “system friction” or “ideational mismatch” between BKartA and the Competition DG and indeed also hostility between the German governments and the Commission (Lodge, 2003: 236, 248). For instance, the BKartA time and again criticised EC competition policy, not least EC merger control, arguing that the creation of a politically independent “European cartel office” would be desirable (see e.g. McGowan & Cini, 1999; Pollack, 1998: 235). An important reason for the lack of German enthusiasm with respect to the reforms of Regulation 17 and, as we shall see below, the MCR was that these ‘[a]lterations to the EC competition law approach represented not just challenges to the philosophy underlying German competition law. They also exposed the German inability to veto such change in the absence of potential coalition partners in the Council and the inability to generate an alternative to a *status quo* that was widely regarded as untenable’ (Lodge, 2003: 248). In particular, the abolition of the *ex ante* notification system, which was a German device, was a pill that was hard to swallow.

However, in the wake of the economic problems in the unified Germany, a debate over the German competition law, the GWB, took place in the mid 1990s and a reform process was initiated. In particular German industry, as represented by the BDI, ‘argued that German competitiveness could be enhanced by reducing the burden on national business by harmonizing the domestic with European competition law’ (Eyre & Lodge, 2000: 72). That is, the BDI called for a Europeanisation of German competition law – and the government responded with a draft proposal that would have entailed full harmonisation (Quack & Djelic, 2005: 274). This was openly opposed by the BKartA and the Monopoly Commission, with the former accusing the BDI of attempting to undermine the German competition unit of regulation. After four years of controversy, the GWB was reformed in

1999. The new law did not go as far in the direction of Europeanisation as the BDI had wished for (Eyre & Lodge, 2000: 72). Nevertheless, various adaptations to EC competition law were effected. In particular, ‘§1 and §19 GWB represented Europeanized provisions by adopting the prohibition approach of Article 81 and Article 82, respectively’, and moreover ‘the existing split between *ex ante* and *ex post* controls was replaced by a pure *ex ante* approach for mergers above DM 1bn’, hereby creating a system that was similar to the European one (Lodge, 2003: 238, 239).

In 2005 yet another reform of the GWB entered into force, this time in response to the adoption of Regulation 1 (see the previous section). This law involved ‘further substantial adaptations of German law’ to EC law including ‘the abolition of the obligation to notify and seek approval of agreements between undertakings and the adjustment to European provisions of substantive exemption requirements for horizontal and vertical agreements’ (BKartA, 2005; see also Wise, 2005a for a detailed discussion of the modernised German competition law). The new law also facilitates private antitrust litigation in order to compensate for this loss of regulatory control, hereby allowing private parties to sue infringers for damages under Articles 81 and 82. Although it is too early to say what the outcome of this change will be, it could potentially constitute a radical break with German competition law traditions (Rinne & Walz, 2007: 126; Wurmnest, 2005). Should private antitrust litigations become the order of the day in Germany, it could possibly undermine some of the foundations of the German model of capitalism. Indeed, as Wigger & Nölke (2007: 500) point out, ‘[t]he volatility induced by private enforcement makes strategic long-term investments or commercial collaborations more risky’ hereby tending ‘to erode the Rhenish comparative advantages in high skill and high technology products, which *inter alia* are based on incremental innovation sustained by long-term investment’ (see also Buxbaum, 2005).

*France.* Since the 1980s France’s state-led model of capitalism has been transformed in some important respects. As mentioned in the previous chapter, it was the socialist Mitterrand government that abandoned Keynesian economic policies, opting instead for monetarism as well as for somewhat less interventionist industrial policies and privatisation. As such a process towards a more market-based model was initiated and this process has been followed under subsequent governments. The result is, as Prasad (2005: 358) explains, that ‘the French state is no longer as interventionist as it was during most of the postwar period: price controls have been abolished, many industries have been privatized, labor and financial markets have been deregulated, and increasing integration with Europe has forced adherence to a more liberal monetary and exchange

rate policy'. However, it would be mistaken to present this as a full-blown shift away from the French model of capitalism: 'it is privatization that has been the most noticeable feature of French neoliberalism, while taxation and social costs remain undiminished' (2005: 358). Indeed, in the 1980s, French governments actively expanded the social security and public service systems, and the attempt to cut down such expenses in the 1990s onwards has met with great resistance (Schmidt, 2002: 84-87; see also Clift, 2001 for a more detailed discussion of France's contemporary political economy). Although France has thus moved towards a more market-based form of capitalism in the last two decades, neoliberalism is neither embraced wholeheartedly by the political elite nor by a majority of the population. Indeed, there is a real fear that France will end up as a loser in the competition game if neoliberalism is taken too far. Since the beginning of the decade this has resulted in a protectionist or "national mercantilist" backlash in both political rhetoric and practice, to which we will come back in section 7.9 below.

Both French and EC competition policies have played and play an important role in the neoliberalisation of the French economy. According to the Chair of the *Conseil de la Concurrence*, Marie-Dominique Hagelsteen, French competition law 'is part and parcel' of 'the reforms undertaken over the past 20 years to move towards a profound liberalisation of the economy and disengagement of the State', adding that 'this move is *irreversible*' (quoted from Annex to Wise, 2005b: 78). The pressure to liberalise the French economy has to a large extent come from the EU. However, as Schmidt (2002: 83) points out, 'EU deregulatory policies promoting competition and the opening of the market in sectors such as telecommunications, electricity and transport have been particularly difficult for France to absorb, since they undermined the central role of national champions in infrastructural services...'. Notwithstanding this, a number of public companies have been privatised. For instance, *Électricité de France* and *Gaz de France*, the state-owned power and gas companies, have been functioning on private sector lines (that is, without state guarantees) since 2005 (EIU Viewswire, 2007: 1).

The 1986 ordinance which laid the foundations of modern competition law in France (see section 6.2) has been used to create the conditions for a much more competition-oriented regulation of the French economy than previously. For instance, the *Conseil* fined France Telecom, *Électricité de France* and *Gaz de France* for unfair competitive practices. On more than one occasion, French competition authorities have been re-programmed in order to align them with EC competition policy: in 1992 the *Conseil* was empowered to apply the EC Treaty's Articles 85 and 86; in 2001 a

comprehensive modernisation of the competition law, for instance introduced a clemency procedure and enabled the Conseil to levy more severe fines on companies, hereby reflecting similar development at the EC level; and in 2002 new merger control rules came into force, hereby introducing a pre-notification system for mergers falling above certain thresholds (and below the EC thresholds), not unlike system under the MCR (Wise, 2005b; LeBoeuf *et al.*, 2002). However, both the content and form of French merger control continues to fall short of neoliberal ideals (and thus also of a complete Europeanisation). Mergers are regulated on the basis of more than just a competition criterion: both economic and social progress are factors that can be taken into consideration, with the result that ‘companies stand a better chance of obtaining clearance if they can show that their merger will create or save jobs’ (EIU Viewswire, 2007: 4). And moreover, the Minister of Economy continues to be centrally involved in the process (LeBoeuf *et al.*, 2002), hereby leaving room for political involvement in merger control.

To recapitulate, the merger subunits of regulation in the UK, Germany and France have gradually been “Europeanised” (and hence also neoliberalised) in order to integrate them with the EC merger subunit. However, the stakes involved in neoliberalising/Europeanising competition regulation differ from one country to the next. The stakes are relatively low in the UK as neoliberal competition regulation “fits” the Anglo-Saxon model of capitalism well, whereas they are higher in Germany and France where this type of regulation does not necessarily sit easily with the models of capitalism found here. To a large extent this accounts for the remarkable reversal in attitudes: whereas the UK government was for many years one of the main critics of EC competition policy and very reluctant to cede any powers to Brussels in this area, it is now one of the strongest national proponents of the Competition DG’s tough policies against various forms of protectionism. And whereas Germany was previously a leader in the competition policy area, ‘the “former best pupil” has turned today into a rather reluctant adapter’ (Quack & Djelic, 2005: 273) with the BKartA on a number of occasions making no secret of its distrust of the Commission. It should also be mentioned that the Europeanisation of competition law is not limited to the countries discussed above. A major reform of the Spanish competition unit of regulation is in progress, in large part due to the changes introduced at EU level in 2004 (see Callol, 2007 for details). In other countries such as Italy and the Netherlands EU type competition regulation were adopted in the late 1980s and early 1990s and according to McGowan (2005: 988) eight of the then fifteen NCAs were in a position to apply Article 81 directly by the end of 1998.

## **7.6. EC merger regulation in the 1990s onwards**

The MCR entered into force on 21 September 1990. A separate department within the Competition DG, the so-called Merger Task Force (MTF), was programmed to deal with all merger cases with a “Community dimension” as defined in the MCR (Lyons, 2004: 247). As briefly mentioned in section 6.7 the review of mergers is divided into two phases. Phase 1 is a one month screening stage which begins the moment the Competition DG receives notification of a merger. Provided that the notified merger does in fact have a community dimension the outcome of the screening process is that the merger is either approved (with or without conditions attached) or that proceedings are initiated in cases where the merger gives rise to serious doubts about its effects on competition. The outcome of such Phase 2 investigations, which are to last no longer than four months, is that a merger is either prohibited, allowed unconditionally or allowed subject to various remedies that are decided through negotiations with the involved companies. In this process the opinion of the Advisory Committee, consisting of Member State representatives, has to be taken into account. Importantly, it is not up to the MTF or the Competition DG to take the final decision: formally the Competition DG makes a recommendation to the College of Commissioners (consisting of the full group of Commissioners) which takes the final decision. This decision can be appealed to the CFI. However, this is generally speaking a lengthy process ‘and business realities mean that it is extremely difficult to resurrect a merger prohibition that has been overthrown on appeal’ (Lyons, 2004: 248). In effect, then, the Commission is investigator, prosecutor and judge in the regulation of mergers.

Under the 1989 MCR the MTF’s assessment of mergers is based on the “market dominance” (MD) test. Art 2(3) of the MCR states that

‘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’

In other words, the MD test consists of two steps: first it is assessed whether a given merger is likely to create or strengthen a dominant position; if this is the case, then the question becomes whether competition is going to be “significantly impeded”. In other words, mergers involving a significant impediment of competition (second step) can only be blocked in so far as it can be

rendered probable that they also involve market dominance (first step) (Weitbrecht, 2005: 67-68). One of the most crucial yet delicate aspects of the first step is the definition of markets: ‘This can be extremely difficult and controversial, as market definition is often the deciding factor in the approval of a merger, and firms and the Commission often disagree on this point’ (Cini, 2002: 242). That is, the narrower the definition of the market, the greater the likelihood that a merger will lead to or strengthen dominance. In defining markets, both product markets and geographical markets are taken into account and although “market dominance” is not reduced to a question of market share, it has been suggested that ‘a finding of dominance is more likely as market shares increase above 40% and it may be very difficult to refute when the share goes over 60%’ (Morgan, 2001: 460). In the second step, a number of aspects are considered in order to establish whether “dominance” will also result in a “significant impediment to competition”. At this stage, it will often be considered whether the merged entity’s current competitors have the strength to make it unattractive for it to raise prices; whether entry into the market by new competitors is likely and sufficient to prevent anti-competitive effects; whether the merged entity is likely to behave in such a way as to raise its rivals costs and/or erect new market barriers to potential entrants; and whether buyers and suppliers will be able to obtain the goods/services produced by the merged entity elsewhere (see Cini, 2002: 243; Monti, 2007: 250-256)<sup>93</sup>.

Whereas the MD test was a suitable instrument in situations where a single firm’s dominance was created/strengthened through a merger, the Competition DG was from an early stage well aware that mergers in oligopoly markets that would distort competition without creating a dominant position, would escape control. Consequently, ‘it waited for a strong case to establish a legal basis for finding that mergers increasing concentration in oligopoly markets could be blocked’ (Monti, 2007: 311). In 1992 the Competition DG challenged the merger between Swiss food group Nestlé and French mineral water supplier Perrier on grounds of “collective dominance” (a merger that was subsequently cleared subject to certain conditions, see Dinan, 1999: 348). To simplify somewhat, this concept was used to denote a situation where two or more companies tacitly (as opposed to explicitly) coordinate their behaviour and come to act as one company in an oligopoly market. This initiated the development of a new doctrine in the 1990s that allowed the Commission to control certain mergers in oligopoly markets, a power that was subsequently confirmed by the Court (see Monti, 2007: 311-316; Morgan, 2001: 461; Weitbrecht, 2005: 67).



From the early 1990s the Competition DG came under attack from the BKartA and the German government. Most importantly it was claimed that ‘the Commission’s enforcement of the Merger Regulation is excessively lax and “politicized”, with the Commission approving mergers which should have been blocked, and improperly applying social and industrial policy criteria to merger decisions’ (Pollack, 1998: 235). As regards accusation of “laxness”, at least one commentator has suggested that a number of mergers in oligopoly markets escaped the MCR’s net in the early 1990s and that it was partly due to pressure from the BKartA that the Commission devised the notion of collective dominance in order to remedy this gap (see Ridyard, 1992). The charge of “politicization” is mainly related to the involvement of the College of Commissioners in merger decisions, which e.g. entails a risk that Member State governments are able to persuade “their” Commissioner to defend various national special interests (see below). Although there have on some occasions been heated discussions in the College (see below), it is difficult to assess the extent to which its involvement has actually affected the outcome of merger decisions. As regards the question of the criteria of merger regulation, it has already been indicated above that competition is the name of the game (see also section 6.7). Levy (2003: 196) notes that ‘[t]he Commission has consistently rejected suggestions that its appraisal take account of industrial, social, or employment considerations’ and other analyses of the subject confirms that indeed it hasn’t (see Banks, 1997; Monti, 2007: 291-300).

**Table 7.3: Notifications and decisions under the MCR, 1990-2007 \***

	Cases notified	Cases withdrawn (Phase 1 or 2)	Approved (Phase 1 or 2)	Approved with conditions (Phase 1 or 2)	Prohibited
1990	11	0	5	0	0
1991	64	0	48	6	1
1992	59	3	44	7	0
1993	59	2	50	2	0
1994	95	6	80	4	1
1995	110	4	92	6	2
1996	131	6	110	3	3
1997	168	9	119	9	1
1998	224	9	199	16	2
1999	276	12	225	23	1
2000	330	13	281	38	2
2001	335	12	304	20	5
2002	277	4	240	15	0
2003	211	0	205	17	0
2004	247	5	222	16	1
2005	313	9	278	18	0
2006	356	9	327	19	0
2007	402	7	373	22	1
<b>Total</b>	<b>3668</b>	<b>90</b>	<b>3202</b>	<b>241</b>	<b>20</b>

Source: calculated on the basis of statistics downloaded from the Competition DG website: <http://ec.europa.eu/comm/competition/mergers/statistics>, accessed on 8 January 2008.

\* As decisions are not always reached in the same year a notification is made and as not all forms of decisions have been included here, the figures do not tally.

Table 7.3 shows the number of notifications received by the Commission under the MCR and its subsequent decisions from the enactment of the regulation in 1990 to the end of 2007. For one thing, one can notice that the annual number of notifications shows a very clear upward tendency, rising every year from 1993 to 2001 and again from 2003 to 2007, where it reached its peak at the level of 402. Commissioner Kroes has pointed out that this increase in notifications reflects that ‘[t]he proportion of cross-border (as opposed to domestic) mergers has grown considerably’ and that this “merger tsunami” shows ‘that the market itself is adapting to change, and that European companies are adapting to global competition’ (Kroes, 2007). Yet this rise in notifications has inevitably increased the Competition DG’s workload, especially as ‘[i]t is not unknown for companies to submit over a million pages of documentation in support of a proposed deal’ (Bannerman, 2002: 10). The next thing to notice is that the vast majority of the notified mergers, namely 87.3 %, were approved unconditionally in either Phase 1 or 2. Here it can be added that the bulk of these unconditional approvals were given in Phase 1. In other words, in almost all cases EC merger regulation has not served to impede or prevent mergers with a “community dimension” from taking place; on the contrary it has served to ease their completion in those situations where multiple NCAs would otherwise have been involved.

It also appears from the table that in 241 cases the Commission has utilised its right (under Articles 6.2 and 8.2 in the MCR) to approve proposed mergers subject to various conditions. That is, if the Competition DG finds that a given merger would distort competition, it can make a deal with the involved parties in which the latter commit themselves to, for instance, sell off part of the merged company or license technology to one of its competitors with a view to eliminate the distorting effects. Finally, it follows as a logical consequence from what was said above that the number of mergers that were prohibited under the MCR has remained at a very low level. Indeed, it appears from the table that only 20 out of the 3668 notified mergers, or 0.55 %, were blocked by the Commission. However, in addition to this 90 cases were withdrawn, ‘often because the modifications needed to satisfy the Commission were unacceptable and because of prohibition fears’ (Morgan, 2001: 459).

It almost goes without saying that it is only possible to provide a snapshot view of some of the most interesting and important cases here. Fortunately, readers interested in detailed accounts of particular cases or in comprehensive overviews will have no difficulties in finding this in the copious literature on competition law written by legal scholars (see e.g. Faull & Nikpay, 2007 or Monti, 2007).

*Alcatel/Telettra.* On 10 December 1990 the Commission received notification of a proposed acquisition by French company Alcatel of 69.2 % of the shares of Telettra, the telecommunication subsidiary of Italian Fiat. This operation, which would make Alcatel the leading telecommunication equipment provider in the world and which also involved Spanish telecommunication company Telefonica, was viewed with concern in the Competition DG, not least by Commissioner Brittan (Ross, 1995: 132). Yet other Commissioners (in particular Martin Bangemann, the Industry Commissioner) saw the merger as an opportunity to create a “European champion” and President Delors was aware of Alcatel’s ‘close ties to the French government’ and ‘the likely effect of a negative decision in France, should DGIV succeed in block it’ (Cini & McGowan, 1998: 128). It was thus anything but a foregone conclusion that the Competition DG would be able to get the approval of the College of Commissioners to block the merger. Instead a deal was made between the Commission and the involved parties where Telefonica agreed to sell its shareholdings of Alcatel and Telettra. This was the first time a merger was conditionally approved under the MCR (Cini & McGowan, 1998: 128). Some commentators see this as an early and rare example of a

merger that was cleared due to industrial policy considerations (Monti, 2007: 299), although no such considerations are mentioned in the Commission's decision (see Commission, 1991).

*ART/De Havilland.* On 13 May 1991 Aérospatiale and Alenia, the French and Italian state owned aircraft manufacturers, notified the Commission of their intention to take over Canadian company de Havilland, a subsidiary of Boeing. The Competition DG believed that 'ATR-de Havilland together would be strong enough to wipe out British Aerospace and Fokker, ATR's major EC competitors who, not coincidentally, were major corporate objectors to the merger' (Ross, 1995: 177). As this would give it a dominant position and distort competition, Commissioner Brittan decided that this was to be the first concentration to be prohibited under the MCR. However, both the French and the Italian governments put pressure on "their" Commissioner to allow the deal, and Commissioner Bangemann (Germany) once again played the "Euro-champion card", arguing 'that the industrial advantages of the merger exceeded the drawbacks' and 'rejecting DGIV's neoliberal approach and their market analysis in this case' (Cini & McGowan, 1998: 129). President Delors was also in favour of the merger and it was only due to Brittan's ability to persuade a small majority of his colleague Commissioners that he got his way in the end: with nine votes to seven, the takeover was prohibited (Ross, 1995: 178). This decision was announced in October 1991 and provoked bursts of anger from in particular the French and the Italian governments and 'became a big, major public affair' (Faull, Interview; see also *European Voice*, 1996c; McGowan, 2000: 138). If there had been any doubt before, it had been clarified now: the MCR was 'Not an Industrial Policy Instrument' (Hawkes, 1992).

*MSG Media.* During Karel van Miert's tenure as Commissioner nine mergers were prohibited. The first of these (and the second to be blocked under the MCR) was the proposed joint venture between two German media companies, namely Bertelsmann and Kirch Group, and the state owned Deutsche Telekom. According to the Competition DG, the joint venture, known as MSG Media, would have led to the creation/strengthening of a dominant position and distortion of competition in three markets, including those for Pay-TV. Hence the merger was blocked in November 1994, despite opposition from the DGs for industry and telecommunications (Cini & McGowan, 1998: 129; Dinan, 1999: 384; *European Voice*, 1996c). A few years later, in 1998, the Commission blocked another planned venture in the Pay-TV market involving Bertelsmann and Kirch Group. According to Dinan (1999: 384), 'Bertelsmann's refusal to make more concessions allowed the Commission to claim that its decision was unanimous, whereas the Commission was divided on the

issue, not least because of intensive lobbying from the media giants involved and from German politicians' (see also Morgan, 2001). Monti (2007: 142) cites this as a prime example of a decision that relies on an "unconvincingly narrow" market definition, because the Commission defined Pay-TV as a separate market hereby facilitating the easy identification of dominance.

*Boeing/McDonnell Douglas.* On 18 February 1997 the Commission received notification that the two US-based aerospace giants Boeing and McDonnell Douglas intended to merge in a \$13.3 billion transaction. The new company, still named Boeing, would be the largest aerospace company in the world and the second largest defence supplier (McGowan & Cini, 1999: 191; Morgan, 2001: 463). The US Department of Justice cleared the merger and concluded that no remedies were necessary, while the Competition DG was concerned about the strengthening of Boeing's market position and the reduction in the number of global producers in the sector (Levy, 2003: 206). The case quickly became highly politicised, with US president Bill Clinton making 'a series of direct telephone calls ... to a number of prime ministers and presidents of major European governments' (Moravcsik, 1998b: 2). The Commission's College was divided over the issue of whether the merger was to be prohibited, and according to Bannerman (2002: 43), Commissioner van Miert 'threatened to resign before the deal was eventually allowed through with additional commitments from the companies'. This was the first time the Competition DG and US competition authorities reached different conclusions and it had as a consequence that a lot of effort was put into the enhancement of EU-US cooperation and coordination in the field of competition regulation (Levy, 2003: 206-207; see also Morgan & McGuire, 2004: 40 and section 7.3).

*Mannesmann/Vodafone.* Another interesting case that deserves mentioning was UK-based mobile telecommunication corporation Vodafone's DM 200 billion bid for the giant German telecommunications and engineering group Mannesmann AG which was announced on 13 November 1999. The bid was rejected by Mannesmann's executive board, in turn prompting Vodafone to appeal directly to the Mannesmann shareholders, offering them to exchange their shares to the ratio of 53.7 Vodafone shares for one Mannesmann share. This was a historic move that not only constituted 'the world's biggest hostile takeover bid' but also 'the first ever major cross-border raid on Germany AG' (Garrett, 2001: 84). Indeed, the bid was widely interpreted as an attack on the corporate culture in the social market economy (where hostile takeovers were rare) and it was met with strong opposition from prominent politicians, including Chancellor Schröder, and from the main union representative on the Mannesmann board, IG Metal. However, the

Manningsmann CEO, Klaus Esser, did not want to prevent the takeover by involving politicians in the case or by using other tricks. According to Garrett (2001: 89), Esser, like the CEOs of companies such as Daimler-Chrysler and Allianz, represented 'Germany's new international managerial class' who 'sought to assure their firm's survival through major purchases beyond German borders'. Previously Manningsmann had acquired UK mobile operator Orange Plc and a crucial element in Manningsmann's defence against the hostile bid was to make an alliance with the giant French media company, Vivendi SA, an alliance which would make Manningsmann too expensive for Vodafone to purchase. However, Vodafone responded to this threat by allying itself with Vivendi in the beginning of 2000, hereby crushing Manningsmann's defence. If many of the shareholders had previously been hesitant, this move persuaded many of them to sell and on 3 February 2000 the takeover was announced by the CEOs of the two companies (Garrett, 2001: 94; see also Morgan, 2001). Later, in April 2000, the Commission, where Monti had been the Commissioner in charge of competition since 1999, cleared the merger subject to certain remedies, most notably that 'Orange Plc including all its subsidiaries will be de-merged as a stand-alone business' (Commission, 2000a; see also Monti, 2007: 253-254).

In the first decade of merger regulation under the MCR (1990-2000) 13 mergers had been prohibited. However, in 2000 and 2001 'an increasingly forceful, confident, and creative approach to its application' could be witnessed (Levy, 2005: 104). For instance, mergers were now assessed on the basis of a broader range of economic theories, and the Commission not only sought to broaden the notion of "collective dominance", but also to identify single-firm dominance in situations where a merger would have led to market shares below 40 per cent. In part as a result of this, a rather high number of mergers, namely five, were prohibited in 2001 – presumably with the result that a number of other mergers were dropped in advance with a view to avoid prohibition (2005: 104-105; Commission, 2002a: 236-240 contains an account of its decisions in these cases).

*GE/Honeywell.* The most remarkable prohibition case in 2001 was American industrial conglomerate General Electric's proposed purchase of aerospace and electronics company Honeywell. The case was interesting not only because it was the first time the Commission banned a merger between two US based TNCs, but also because the merger had been cleared by the US Department of Justice subject to certain remedies (for instance that Honeywell's helicopter unit was sold off) (Weitbrecht, 2002: 407). But the Commission feared that the merged company would "bundle" its services with a view to keep out competitors, hereby enabling it to impose higher

prices on consumers (Commission, 2002a: 237). Consequently, it did not consider the remedies imposed on the companies by the US Department of Justice to be sufficient, and despite further proposals put forward by GE in order to save the deal, the merger was formally blocked on 3 July 2001 (Morgan & McGuire, 2004: 41). The different decisions adopted by the EU and US authorities did not stem from a lack of communication between the two (an ongoing dialogue was taking place) but rather from the use of different competition theories and diverging ways to interpret evidence (Bannerman, 2002: 11, 49; Morgan & McGuire, 2004: 50). After its decision the Commission came under attack from both sides of the Atlantic. A cheering section of economists, lawyers, US antitrust officials and commentators in the financial press pointed to economic and procedural weaknesses in the foundations of EC merger regulation. The Commission was e.g. criticised for relying on speculation about future behaviour rather than on sound economics in the assessment of the merger and for wearing too many hats (Levy, 2005: 106). As the Chairman of GE, Jack Welch, put it, ‘it’s very difficult to be in a process where the prosecutor is also the judge’ (*Time*, 2001).

In Chapter 6, it was mentioned that the companies of ERT members were involved in quite a few mergers in the 1980s (prior to the adoption of the MCR) (see section 6.6). After 1990 several companies that, at some stage, have been represented by the CEO/Chairman in the ERT have been involved in mergers with a “Community dimension”. Some of these companies have already been mentioned above, namely Nestlé (ERT from 1983 onwards), Alcatel (ERT from 1990-1997), Bertelsmann (ERT from 1994-2002) and Vodafone (ERT from 2002-2003). Although the number of mergers that were prohibited by the Commission from 1990 to August 2007 has been rather small, namely 20, five of these cases involved companies that at some stage have been represented in the ERT. Apart from the two abovementioned proposed mergers involving Bertelsmann, this applies to a 1997 proposed merger involving Deutsche Telekom (ERT from 1999-2007), a 1999 proposed takeover involving Volvo (ERT from 1983-1994 and 2002 onwards) and a 2004 operation involving ENI (ERT from 2005 onwards). In these cases, as in the vast majority of cases involving ERT member companies more generally, it was the “member company” that tried to acquire another company, not the other way around. In some other cases, a notification involved two ERT companies. This was for instance the case when a subsidiary of German energy company E.ON (ERT from 1994 onward) notified its intention to overtake two subsidiaries of Hungarian oil and gas group MOL (2002 onwards) in 2005, an operation that was subsequently approved by the Commission subject to certain remedies.

To give an indication of the extent to which “ERT companies” have been involved in mergers in period covered in this chapter, table 7.4 shows the number of notifications under the MCR from 1990 to August 2007 involving companies that were represented by their CEO/Chairman in ERT in 2007. Certainly, far from all of these companies were represented in the ERT in the whole period, and other companies that were represented in the Roundtable prior to 2007 have been involved in numerous mergers from 1990 onwards.

**Table 7.4: Notifications to the Commission under the MCR by companies “represented” in the ERT in August 2007, 1990-August 2007**

<i>Company name*</i>	<i>Notifications**</i>	<i>Company name*</i>	<i>Notifications**</i>
AB Volvo (Volvo)	13	Nokia	4
Air Liquide	4	Norsk Hydro	9
Akzo Nobel	5	OMV	5
AstraZeneca	2	Renault	4
BASF	14	Repsol YPF	2
Bayer	10	Rio Tinto	1
BP	15	Rolls-Royce	2
British Airways	6	Royal Dutch/Shell (Shell)	18
British American Tobacco (BAT)	4	Royal Philips Electronics (Philips)	23
BT	21	Saint-Gobain	2
Carlsberg	4	SAP	5
CIR	1	Siemens	46
Eczacıbaşı Group	0	Smurfit Kappa Group	0
Endesa	8	Solvay	11
Eni	10	SONAE, SGPS (SONAE)	4
E.ON	14	STMicroelectronics	3
F. Hoffmann-La Roche (Roche)	3	Suez	2
Fiat	3	Telefónica	10
Heineken	5	ThyssenKrupp	9
Investor AB (Investor)	2	TOTAL	6
KONE Corporation (KONE)	1	Umicore	5
Lafarge	8	Unilever	5
MOL	1	Vivartia	0
Nestlé	17	Total	347

Sources: information on ERT members at the time of writing stems from [http://www.ert.be/members\\_a\\_to\\_z.aspx](http://www.ert.be/members_a_to_z.aspx) Information on notifications involving these companies stems from the Commission data base: <http://ec.europa.eu/comm/competition/mergers/cases/>

\*In order to ensure consistency and avoid too much trouble, mergers involving subsidiary companies or subdivisions of “ERT companies” are left out. As such the table provides a cautious or conservative picture of the amount of mergers involving these companies. In those instances where the Commission has shortened the company name in its registration of the case, the shortening appears in brackets.

\*\* Include mergers, joint ventures, acquisitions of a majority stake and take-over bids.

As it appears from the table almost all of the companies were involved in mergers with a “Community dimension” in the period in question. In the 17 year period the companies were, on



average, involved in approximately 7.5 notifications. Siemens, Philips, BT, Shell, Nestlé and BP were the most active companies in this regard. It is perhaps worth noting that three of these companies, namely Shell, BP and Nestlé were ranked in the top ten in the 2007 FT500, in which the *Financial Times* lists the 500 largest companies in Europe, measured by their market value. The top ten also includes two other ERT companies, namely Total and Roche. The remaining five companies on the 2007 FT500 (Gazprom, HSBC, GlaxoSmithKline, EDF and Novartis), which although not represented in the ERT are clearly giant European TNCs, have also all been involved in “Community dimension” mergers, the total number of which is 25 (*Financial Times*, 2007f)<sup>94</sup>. This confirms that M&As are an important mechanism through which the concentration of capital takes place, and gives us some idea of why EC merger regulation is an area of significant importance and interest to TNCs.

Three main conclusions can be drawn on the basis of this analysis of the Competition DG’s regulation of mergers in the 1990-2007 period. First, it has been precisely as “neoliberal” as the formulations used in the MCR would lead one to expect. That is, it seems that industrial and/or social policy considerations have not entered the regulation of mergers, nor have effects on national models of capitalism. Merger control is thus based on an approach that only looks at the effects on competition. Second, the attempts to influence the Competition DG’s decisions in merger cases have apparently proved unfruitful. Although some cases have resulted in controversies in the College of Commissioners, the latter has always followed the Competition DG’s recommendation. In short, the operational autonomy of the DG in merger cases has been substantial: it seems that it has neither given in to pressure from governments nor from capital actors (whether European or American). Despite the close relationship between the Commission and the ERT, and despite the vital role played by the latter in pushing for the adoption EC merger rules in the late 1980s, it does not seem that ERT companies have been given preferential treatment by the Competition DG. Third, the EC merger subunit of regulation has primarily served to facilitate cross-border M&As and only prevented a very limited number of them to go through.

### **7.7. Reforming the EC merger subunit of regulation**

The increase in the number of notifications accounted for above was not only due to an increase in large mergers. For one thing the scope of the thresholds defining whether a merger has a

“Community dimension” has been eroded over time as a result of inflation. According to Morgan (2001: 456-457) ‘the original ECU 5 billion worldwide threshold was equivalent to some £3.7 billion when the MCR was adopted but worth only £2.6 billion by September 2000’. Moreover, the thresholds have been supplemented with a new threshold. It appears from the MCR that in 1993, the Commission is bound to review how the regulation works, in particular with respect to the thresholds. Already from the early 1990s the Commission was in favour of a lowering of both thresholds (worldwide and Community) but van Miert and the Competition DG realised that this was unlikely to happen given the political climate at this stage. Hence, in 1993 the Commission announced its decision to postpone the review of the thresholds until 1996. On the basis of consultation with member states, industry, the law community and others, a *Green Paper on the Review of the Merger Regulation* was published in 1996 in which it was suggested that the turnover thresholds were lowered to ECU 2 billion and ECU 100 million, respectively (see Commission, 1996: 2). According to the estimates of the Commission this would bring an additional 65 to 80 cases a year within its jurisdiction (*European Voice*, 1996b; see also Davison & Fitzpatrick, 1996 on the review). Capital actors were divided over the issue, with some arguing in favour of a reduction and others, including UNICE and ICC, had mixed views due to the diverging positions of their members (Commission, 1996: 16). At the political level the proposal was supported by Italy and the smaller member states. However, it came up against strong opposition from especially the German government which received support from the French, British and five other governments in the Council (Cini & McGowan, 1998: 132; *European Voice*, 1996a). Hence, it was not possible for the Commission to get the qualified majority it needed for its proposal. Instead a second set of lower turnover thresholds was introduced (the so-called secondary or supplementary thresholds), designed to address the problem of multiple filings to NCAs. Those changes came into effect in March 1998 and did, according to Morgan (2001: 457), result in approximately 25 extra notifications per year.

However, it was only in the context of the broader reform of the EC competition unit of regulation accounted for in section 7.4 above that significant changes were introduced in the merger subunit. The processes leading up to the adoption of a revised MCR in 2003 were initiated by the Commission in the summer of 2000. It had become apparent to the Commission that, despite the introduction of the supplementary thresholds, there were still a lot of cases falling beneath the thresholds that had to be notified in a variety of member states. Initially this was the problem that the review of the MCR was mainly intended to address (Competition DG Senior Official, Interview<sup>95</sup>; see also Commission, 2000b). As John Vickers, the Chairman of the OFT, explains, the

initial '[s]timulus for reform on jurisdictional issues came from a desire shared by competition authorities and the legal and business communities for a better way to ensure that multi-jurisdictional mergers are reviewed by the authority or authorities best placed to address them, and to avoid undue duplication and regulatory burden' (Vickers, 2004: 457). However, events in 2001 and 2002 triggered a broader review of the MCR.

In December 2001 the Commission adopted a *Green Paper on the Review of the Regulation 4069/89* (Commission, 2001b). The *Green Paper* does not describe the Commission's position but outlines possible ways in which the MCR could be reformed, addressing a number of issues related to jurisdiction, substance and procedure. It will suffice to mention a few of the most important/controversial suggestions here. As a solution to the problem of multiple filings a so-called 3+ system was proposed. This would entail that 'concentrations which do not meet the thresholds laid down in Article 1(2) have, nevertheless, a Community interest when it comes within the jurisdiction of three Member States' (2001b: 18). It also pointed to the need to find a mechanism that could facilitate easier referral of cases between NCAs and the Commission. Moreover, the Commission expressed its willingness to hear the views of employees and in particular consumers 'in the context of ongoing merger control procedures' and asked for suggestions as to how this could be facilitated (2001a: 55). Finally, a debate on the strengths and weaknesses of the MD test used in the Commission's assessment of mergers (see section 7.6 above) as opposed to the strengths and weaknesses of the SLC test was launched. This latter test was used the US, Canada and Australia but had also been introduced in national competition law in the UK (see section 7.5) and Ireland. Here it was concluded that 'experience in applying the dominance test has not revealed major loopholes in the scope of the test. Nor has it frequently led to different results from SLC-test approaches in other jurisdictions' (2001b: 40).

Interested parties were invited to comment on the *Green Paper*, and when the deadline was reached towards the end of March 2002, the Commission had received 114 written comments. Around half of these came from capital actors, a quarter came from law firms and the rest came from trade unions, consumer organisations and academics. Whereas the Commission's intentions to find a way to deal with the problem of multiple findings and to ease the referral of cases between national and EC level was generally welcomed by the respondents, opinions differed as to whether the Commission's concrete proposals were in fact useful (see Commission, 2002b: 2-15; Monti, 2002b). As regarded the question as to how the views of consumers and employees could be heard

in merger regulation processes, the position of most capital actors was clear: merger decisions should be taken independently of such views (on the basis of a competition-based test). It is ‘unnecessary to change those rules as this could *risk undermining the competition focus of the Commission’s analysis and cause uncertainty and delay*’, as it reads in UNICE’s position paper (UNICE, 2002: 8, emphasis added). The ERT agreed:

‘The ERT Competition Policy Task Force doubts the advisability or utility of expanding the role of consumer organisations in the European Commission’s decision-making process regarding merger control. It believes the same is true for employees ... Greater involvement of such groups *risks diverting attention from the competition focus of the Commission’s analysis and increasing both uncertainty and delay*’ (ERT, 2002: 4, emphasis added)

The similarity in the formulation used here and elsewhere in the ERT and UNICE position papers, but also the almost identical positions of many of the business groups and law firms responding to the *Green Paper*, was by no means a coincidence. UNICE’s position paper was drafted in the organisation’s Competition Working Group, which was chaired by Peter Plompen of Philips (a company that has been “represented” in the ERT from the outset). As a Senior Staff Member of UNICE explains:

‘What we always try to do with respect to our position papers is to have other business organisations saying the same thing. And there are a lot of organisations in Brussels: You have all the different sectorial organisations representing for instance the chemical industry and pharmaceuticals; there is the ICC which has a lot of law firms and American companies as its members, and we don’t; and you have the ERT. And we always try to give the same message. We don’t want to create an opportunity for the Commission to play us off against each other. So we are usually closely involved with each other with respect to our drafting process: they know what we’re drafting and the other way around. Also, a lot of members of our working group are also involved in the ICC and people from CEFIC are involved in our working group. So there is quite a lot of coordination and people basically know what the others are doing. You also see that the ERT would always make sure that they say the same thing as we do, and we would not say things that they don’t say. There’s a lot of coordination. It’s a conscious policy to try to make a big front of business organisations saying the same thing’ (UNICE Senior Staff Member, Interview<sup>96</sup>).

Somewhat unexpected the question regarding MD versus SLC test became the perhaps biggest issue in the responses to the *Green Paper* and in the subsequent negotiations between the member states. As a Senior Official at the Competition DG who was involved in the process recalls, ‘when it was put in, in the first place it was not regarded by us as being a really central concern; it was a concern

that we had heard marginally over the years. But it became a much bigger discussion during the course of the consultations on the Green Paper and we were a bit surprised by the extent to which there were people who felt that there was a defect in the existent test' (Competition DG Senior Official, Interview). In particular, the Irish and British governments and competition authorities expressed strong support for the SLC test in their responses to the Green Paper. As the DTI put it,

'We see SLC as a test that is fundamentally better adapted to merger control, primarily because it is directly grounded in economic analysis and the impact of a merger on competition in a way that the concept of dominance is not. It is also a more flexible test than dominance, making it particularly well suited to tackling oligopolistic markets' (DTI, 2002: para 34; see also Irish Delegation, 2002).

This position which was also supported by many economists (Competition DG Senior Official, Interview), was based on a critique of the MD test. The latter was claimed to create a serious "gap" in the EC regulation of mergers in oligopoly markets, the very same gap that the Competition DG had attempted to close in the 1990s with the notion of collective dominance (see section 7.6 above). As the DTI noted in its position paper the Competition DG's use of this notion had proven problematic and given rise to a number of appeals to the CFI (at this stage these appeals were still pending).

The BKartA submitted a detailed response to the Green Paper in which it concluded that '[t]here are no convincing reasons to convert the criterion for prohibition from a dominance test to the SLC' (BKartA, 2002: 30). Of course the MD test was not only used by the BKartA in its own assessment of mergers, but it had also been embedded in the 1989 MCR due to German pressure (see section 6.7). In a joint article, the BKartA President and its Head of Unit of German and European Merger Control argued that there was no evidence 'for the assertion that the MD test fails to catch merger projects raising competition concerns or that they can be evaluated more comprehensively by means of the SLC test' (Böge & Müller, 2002: 498; see also BKartA, 2001). Pointing out that the BKartA had 'always been able to make a decision in the interest of competition' in the 'more than 30,000 merger projects examined since 1973' they concluded that

'it is more than questionable whether the disadvantages [of introducing a new test] – legal insecurity, lack of decision-making practice by the courts and new divergence of provisions within the European Union – should be accepted. It cannot be objectively justifiable to replace well-proven standards without good cause' (2002: 498).

It is perhaps worth noting that the DTI position paper states that the introduction of the SLC test at the national level in the UK enjoys ‘strong support from the competition law community’ while remaining silent on the position of capital actors (DTI, 2002: para 34). This was perhaps no coincidence because business groups such as CBI, BDI, ERT, the ICC, UNICE and many others did all strongly oppose the introduction of the SLC test at the EC level. The main stated reasons for this opposition was that a new test ‘would result in a great deal of legal uncertainty’ (BDI, 2002: 11), that it ‘would increase legal uncertainty’ (CBI, 2002:2) and that it ‘could produce a substantial period of uncertainty’ (UNICE, 2002: 4) or in fact ‘lead to even more uncertainty’ (ERT, 2002:2). It was also frequently pointed out that the MD test was the one used in the majority of national regimes (see e.g. ICC, 2002a). Individual companies such as British Telecom, Shell and Vodafone also expressed their preference for the MD test (see BT, 2002; Shell, 2002; Vodafone, 2002). However, those respondents representing US transnational capital were somewhat less dismissive towards the introduction of the SLC test. AmCham-EU encouraged ‘a thorough examination of the implications of the alternative tests’ before a new test was introduced (AmCham-EU, 2002), whereas the Boeing Company, referring to the above-mentioned *Boeing/McDonnell-Douglas* case, pointed out that the MD test ‘causes difficulties for United States companies such as Boeing not only because it is a different basic standard than that applicable under United States antitrust law but also because this different standard has been interpreted in ways that have led to actual and serious conflict between the two jurisdictions’ (Boeing, 2002: 3-4). The American Bar Association also expressed its support for the SLC test (ABA, 2002), whereas many international law firms such as Baker & McKenzie, Freshfields Bruckhaus Deringer, Landwell, Slaughter & May and White & Case argued against it for reasons similar to those given by the BKartA and the majority of capital actors (see e.g. Baker & McKenzie, 2002).

It is interesting to note that the *Green Paper* itself and the vast majority of responses to it, concern concrete ideas of regulation (CIR), not more fundamental questions related to diverging USDRs. That is, the *Green Paper* and almost all respondents took for granted that mergers should be regulated on the basis of a competition criterion alone, whereas social and/or industrial policy goals should not be taken into consideration. Hence, the main focus is on the more harmless questions regarding MD versus SLC test and details regarding the coordination of tasks between the Competition DG and NCAs. However, some trade unions, most notably the ETUC, did challenge the neoliberal “competition only” view, arguing that ‘employment considerations have to be

integrated into the merger control regulation’ and suggesting that ‘[t]he Commission should not approve a merger if the Company has not evaluated the consequences of the merger for employment and location, nor unless it has made plans on how to tackle negative consequences for employment’ (ETUC 2002: 2-3). Yet this was most certainly a minority view which did not resonate well with the view of the Commission (see below).

After the consultation period had ended and before the Commissions presented its ‘Proposal for a Council Regulation on the control of concentrations between undertakings’ in December 2002, some important developments took place. Prior to this juncture only one of the Commission’s merger decisions had been overruled by the Courts (Maudhuit & Soames 2005a: 57). But between June and October 2002 the CFI annulled three of the Commission’s high-profile decisions, namely its prohibitions of the proposed *Airtours/First Choice*, *Schneider/Legrand* and *Tetra Lavel/Sidel* mergers. In these rulings the CFI attacked the economic analyses underpinning the Commission’s decisions. The proposed *Airtours* merger was banned on the basis of an analysis that pointed to the likelihood of “collective dominance” if it was allowed to go through. Yet in its ruling the CFI concluded that the Commission had failed to prove that such a situation was going to arise post-merger and it was pointed out that the prohibition was based on ‘errors, omissions and inconsistencies of utmost gravity’ (Para. 404). The ruling moreover clarified what the standards for identifying collective dominance should be and also raised the standards of proof that the Commission would have to meet if it was to prove its case (see Dethmers, 2005 for more details). In a similar vein the CFI identified serious flaws in the *Schneider/Legrand* and *Tetra Lavel/Sidel* cases, e.g. concluding that the Commission’s decision in the latter was ‘vitiated by manifest errors of assessment’ (cited in Morgan & McGuire, 2004: 45; see also Lyons, 2004: 248-249).

It is not only interesting to note that in these decisions, ‘the CFI at times acts as an economic expert, implicitly claiming for itself a superior expertise in economic analysis’ (Gerber, 2004: 493). It is also worth remembering how, in the past, the Commission and the Court had worked closely together to expand the EC’s powers in the field competition of regulation (see section 6.4), a partnership which has proved instrumental in transforming the Commission into a powerful and self-willed regulator. One might speculate whether the three 2002 CFI rulings indicate that the lower court desired a new division of labour in the EC’s control of mergers. That is, perhaps a motive behind the rulings was to set in motion a process that could ultimately bring about a new system in which the Courts would have a much more prominent role in the control of mergers. An

interview with the President of the CFI, Judge Bo Vesterdorf, which was published in September 2002, seems to support such speculation. Here he suggested that '[t]he Commission might consider whether the sole responsibility to prohibit mergers should remain with the Commission, or whether one should change the system into something like the U.S. system' (*Reuters News Service*, 2002). As Vesterdorf did not forget to point out in the interview, in the US it is up to courts to decide whether a merger is to be prohibited.

Needless to say, the three CFI judgments constituted a major blow to the Commission, not least the Competition DG's MTF, and provided additional fuel to the critique of the Commission's economic analyses in merger cases. As Commissioner Monti acknowledged, 'our record in the merger area is less glorious after these Court rulings' (*Independent*, 2002). One of his officials put it in less diplomatic terms, 'We have been wiped off the table ... The Court's message is simple and strong: there is something rotten within our system' (*Financial Times*, 2002a). A reform process had certainly already been initiated prior to the judgments, and as such they cannot be seen to have caused this process. But they probably contributed to make the changes in this field somewhat more far-reaching than they would otherwise have been (see also Christensen *et al.*, 2007: 425; Lyons, 2004: 249).

On 11 December 2002, the Commission announced that it had 'decided the most far-reaching reform of its merger control regime since the entry into force of the EU Merger Regulation in 1990' (Commission, 2002c). And the Commissioner emphasised 'the proposal's business friendly character. After all merger control is not about blocking mergers. It's about ensuring consumers continue to benefit from sufficient innovation, choice and competitive prices' (*Financial Times*, 2002b). Concretely, the Commission had adopted a reform package consisting of three elements:

(1) Draft guidelines for horizontal mergers. The purpose of these guidelines, on which the Commission invited comments from interested parties, was 'to make the theoretical framework underlying our economic assessment of mergers clear and transparent and thus as predictable as possible', as the Director of the MTF, Götz Drauz, explained (Drauz, 2002: 392).

(2) A series of non-legislative measures aimed at improving the decision-making process. These *inter alia* included the appointment of peer review panels composed of experienced officials that would scrutinise merger decisions and the creation of a post of Chief Competition Economist in the Competition DG. The role of the Chief Economist would be to provide guidance, both on the



general use of economics and econometrics in the application of EU competition rules and in individual competition cases. Hereby the Commission hoped to enhance its economic capabilities<sup>97</sup>. Later, in April 2003, it was also announced that the MTF would be disbanded. Instead a merger unit would be created within each of the five sector specific departments of the Competition DG.

(3) A proposal for a revision of the MCR (Commission, 2002d).

After the consultation period and the three CFI rulings it had become apparent within the Competition DG that it would be necessary to come up with some solution to the question of substantive test in the proposal for a revised MCR (Competition DG Senior Official, Interview). On one hand, the CFI rulings had created uncertainty regarding the “collective dominance” concept, but on the other hand, a number of respondents had clearly expressed their support for the existing MD test, afraid that a new test would create legal uncertainty. The Commission decided against proposing the SLC test (see also Maudhuit & Soames, 2005b: 76), but did as Drauz puts it find ‘that it was important to remove this uncertainty pro-actively rather than to wait for an opportunity to obtain legal clarification through court rulings. For this reason it is proposed to clarify that the Dominance test covers all cases where the harm to consumers arises...’ (Drauz, 2002: 392). That is, in the Commission proposed to insert a clarification in the explanatory memorandum for the MCR that

‘the notion of dominance within the meaning of this Regulation should ... encompass situations in which, because of the oligopolistic structure of the relevant market and the resulting interdependence of the various undertakings active on that market, one or more undertakings would hold the economic power to influence appreciably and sustainably the parameters of competition ... even without coordination by the members of the oligopoly (Commission, 2002d: p. 21)

It also appears from the draft proposal that the Commission, in the light of the responses received during the consultation period, had abandoned its idea to introduce the 3+ system. Instead some alternative measures designed to ‘ensure, consistent with the principle of subsidiarity, that the best-placed authority should examine a particular transaction, while at the same time seeking to reduce the incidence of “multiple filing”’ (Commission, 2002c). No new mechanism that could be used to give more weight to the views of consumers and employees was proposed. However, in recital 32 it reads that the regulation ‘should be interpreted and applied with respect to’ the ‘fundamental rights and ... the principles recognised in particular by the Charter of Fundamental Rights of the European Union’. And in recital 42 it was stated that ‘[t]his Regulation in no way detracts from the collective

rights of employees, as recognised in the undertakings concerned’ (Commission, 2002d: recitals 32 and 42). Importantly, however, these airy formulations were not translated into the actual articles in the operative part of the draft regulation.

From the outset of 2003 diplomats from the various member states, many of whom were associated with the different NCAs, met in a Council working group where they negotiated on the basis of the Commission’s proposal. From the outset it was clear that it would be necessary to reach agreement not much later than November that year, if the new rules were to come into force before the enlargement of the Union on 1 May 2004. Not only would it be inexpedient for the new countries if they would have to implement the old competition rules knowing that they would soon be replaced; the member states were also acutely aware that ten new participants would complicate the negotiations significantly (Diplomat A, Interview<sup>98</sup>, Diplomat C, Interview<sup>99</sup>). The meetings in the working group were chaired by the Commission and diplomats from the forthcoming member states participated as observers who were allowed to express their views. During 2003 the diplomats met approximately twenty times, often over two days, in negotiations that were, according to one of them, ‘extremely intense’ (Diplomat A, Interview).

The two main bones of contention in these negotiations were the questions of substantive test and how the allocation of cases between the Commission and the NCAs could be optimised (Diplomat A, Interview; Diplomat C, Interview). Many models regarding how this latter issue could be solved were discussed. During these discussions the Italian negotiators proposed that one could take a look at the turnover thresholds. As we saw in Chapter 6, these thresholds had been a matter of great controversy in the debates in the 1980s and this was not a dispute that the Commission would like to see re-opened. In the Annex to the 2001 *Green Paper* it had concluded that the thresholds levels were appropriate and in a skilful manner it avoided this becoming an issue again. One of the diplomats involved in these negotiations recalls how this was done:

‘When the Commission makes a proposal for revision of a regulation, then in order to ensure its readability they send out the whole regulation and then all the motions for amendment are marked with grey and everything not up for amendment is outside the proposal [and marked with white, HB], in other words it’s not up for discussion ... That’s the Commission’s argument. That’s because the Commission will say that it has the right of initiative in the EU – we [the member states, HB] do not have the right of initiative, so we cannot make proposals for amendments different from those set out by the Commission. That was the Commission’s argument all the time. And the articles dealing with threshold values were not

marked with grey, meaning that they were outside the area of discussion' (Diplomat A, Interview)

Another involved diplomat adds that 'we were some countries that were flabbergasted that we could not discuss anything in the white area if it was related to the grey. Normally a regulation is a consistent whole ... and if you change one element this might effect other elements ... the Commission believed that we should only look at the grey tools, even though some of us believed that some of them could have effects in the white area' (Diplomat B, Interview<sup>100</sup>). In this manner the Commission attempted to take, and was successful in taking, charge of the negotiations and hereby to a significant degree affect their outcome. In the end, the negotiators settled on a model that would allow companies to request the Commission to review transactions that do not have a "Community dimension", but which may be reviewed by at least three NCAs. Provided that none of the NCAs in question object to this the Commission is given exclusive competence to review the merger (Article 4(5)).

As has already been hinted at above, the question of whether the existing MD test should be replaced with the SLC test or alternatively merely be "clarified" (as proposed by the Commission), became the most contentious issue in the negotiations. Here, the British diplomats appeared as the strongest and most clamorous advocate of the introduction of the new test (Diplomat A, Interview). In November 2003, the Minister for Employment Relations, Competition and Consumers, Gerry Sutcliffe described the position of the UK government in terms very similar to those used in the DTI's response to the 2001 *Green Paper*. He maintained that the SLC test 'is fundamentally better adapted to merger control than dominance' because 'it is more directly grounded in economic principles' and provides 'greater flexibility to deal with all forms of anti-competitive mergers'. He added to this that 'our principal concern is to plug the potential gap in the existing dominance test, which might mean that the regulation cannot deal with non-collusive oligopolies. It is important to do this in as straightforward a way as possible, minimising the risk of any anti-competitive mergers slipping through the Commission's net' (House of Lords, 2003).

In the opposite corner stood the German diplomats, insisting that the MD test should be preserved and threatening to veto any other outcome. In the words of one of the diplomats involved in these negotiations, the Germans were defending and holding on to a 'rather inflexible position' (Diplomat B, Interview). Initially Germany enjoyed support from the Netherlands and Italy but these countries gradually withdrew this support, with the result that the Germans ended up being more or less

isolated in the negotiations (Diplomat A, Interview; Diplomat B, Interview). Whereas the British and German negotiators had strong and unambiguous preferences in relation to the “test issue”, the stance taken by the negotiators from most other countries was more pragmatic. In particular, it seems that the main preoccupation of the negotiators from many of the smaller member states was that the test should be clear and usable (Diplomat A, Interview).

Since the publication of the proposal for a revised MCR, capital actors such as UNICE and ERT had been extremely worried that the Commission was indeed trying to introduce a new test. As a UNICE Senior Staff member puts it, ‘[i]t was only when the proposal came out that we saw that they wanted to go ahead with the SLC test. At the time of the Green Paper that didn’t seem like a risk’ (Interview). Once it became apparent towards the end of 2003 that the introduction of a new test was indeed not an unlikely outcome of the negotiations in the Council’s working group, the working groups dealing with competition policy matters in both UNICE and the ERT started a carefully coordinated campaign in order to stop this from happening. In a letter to the member federations dated 6 October, the UNICE working group on competition wrote that the new test ‘would widen the scope of the present merger control system to an unacceptable extent’. Members were thus ‘urged to communicate UNICE’s concerns regarding discussions in the Council working party to their national representatives’ and they were moreover urged ‘not to agree to any major changes to the current merger control system’ (UNICE, 2003). On 21 November 2003, the CEO of Air Liquide, Alain Joly and Wolfgang Kopf, the convenor of ERT’s competition policy working group, wrote a letter to Commissioner Monti in which they made clear that they were ‘greatly concerned at the Commission’s proposal contained in the draft revised Merger Regulation to move away from the dominance test towards a “substantial lessening of competition” test’. In their view, ‘the dominance test is entirely compatible with modern economic theory’ and a move to the SLC test

‘could lead to additional costs for European business by lowering predictability, not only in the short to medium term through the switch from one paradigm to another, but also permanently through increasing the Commission’s scope for discretionary intervention’

It furthermore appears from the letter that ‘extensive discussions’ between the ERT and the Commission’s MTF ‘have not allayed our concerns’ (ERT, 2003). A UNICE Senior Staff Member

describes the campaign against the new test as “intense”: ‘certainly with respect to the lobbying it was very intense ... we really tried to do our best at a very high level to influence this’ (Interview).

One might speculate whether, in addition to the concerns related to the predictability of the system, a reason for ERT companies’ opposition to a new test stems from a fear that a new test would possibly make it easier for the Commission to block the type of transactions that such companies are typically involved in, namely mergers in markets where a significant concentration of capital has already taken place prior to the merger (oligopoly markets). As mentioned above, the old test made it difficult to block such mergers if a situation of market dominance was not likely to result. The applicability of the “collective dominance” concept (which had been invented by the Commission in order to cope with this very problem) had been significantly weakened and arguably undermined by the *Airtours* judgment. The fact that the Commission did not prohibit any mergers between 2002 and May 2004 when the new MCR came into force, can be seen to indicate that its eagerness to attack mergers under the old MCR and the MD test had been hamstrung somewhat. Levy (2005: 110) cites a number of transactions in 2003 and 2004 ‘that many expected to be challenged’ but which were approved by the Commission. These included the Carnival/P&O, Sony/BMG and Oracle/PeopleSoft mergers. In the latter case the Commission ‘had been making threatening noises about blocking Oracle’s attempted takeover of PeopleSoft’ but then ‘appeared to relent in the face of a U.S. court decision allowing it’ (*Wall Street Journal*, 2004). Transnational capital actors may well have considered this status quo to be a desirable state of affairs, providing them with a degree of freedom they had not previously enjoyed.

The ink had barely dried on Joly and Kopf’s letter to Monti before it was announced on 27 November 2003 that the Council had reached agreement on a revised MCR, and that it would be formally adopted at one of its forthcoming meetings. A compromise with respect to the test question had been reached: the Spanish and French diplomats had proposed a solution which took into account both the desire not to undermine the case law that had been established under the MD test and the perceived need to introduce a test that could for sure be used to control mergers in monopoly markets. The result was the so-called “significant impediment to effective competition” (SIEC) test. In Art 2(3) of the new MCR it thus reads that

‘A concentration which would significantly impede effective competition, in the common market or a substantial part of it, in particular by the creation or

strengthening of a dominant position, shall be declared incompatible with the common market'

One could be excused for thinking that this formulation is very similar, almost identical, to the one contained in the old MCR (see section 7.6). Yet in fact this is 'a remarkable and elegant exercise in semantics' (Weitbrecht, 2005: 68) that makes it unnecessary for the regulator to identify "dominance" before a merger that results in a "significant impediment" to competition can be blocked. In the working group the German diplomats were not pleased with this solution, which was not considered to constitute an improvement on the MD test. Accordingly, they came up with various alternative formulations, but the negotiators from the other member states preferred the French-Spanish compromise. Until the end it seemed like a genuine possibility that Germany would veto the agreement, and indeed they threatened to do so two days before the Council meeting in November. But as one of the diplomats involved in the negotiations recalls, this did not give the Germans a strong position at this rather late stage in the negotiations:

'The Commission succeeded in isolating the Germans, so the only ones not completely satisfied with the outcome were the Germans. If the proposal was vetoed there would be one villain. So you can say, on one hand they were in a strong position, but on the other hand they had to be prepared to be the scapegoat if no regulation was adopted' (Diplomat B, Interview).

The prospect of being responsible for the failure of the Union to get a new merger regulation probably prompted the Germans to accept the new test in the end (Diplomat A, Interview). However, there is no doubt that neither the Germans nor important European capital actors were particularly pleased with the introduction of the new test. On the German view, which was expressed by the President of the BKartA, Ulf Böge, the introduction of the SIEC test 'resulted in the EU now having three "tests" which increased legal insecurity for companies. There had been no practical need for this amendment' (BKartA, 2003). A similar opinion was expressed by the Secretary-General of UNICE, Philippe de Buck. In his 2004 essay 'Modernising European Merger Policy: A Business View', he wrote that the introduction of a new test was 'unnecessary and disproportionate' and that '[t]he Commission should not underplay the uncertainty which is created but take it extremely seriously'. Indeed, '[t]he wide discretion which the Regulation grants to the Commission should be exercised with great care and reserve' (De Buck, 2004).

In the working group negotiations over the revision of the MCR, it was never discussed to take into account social and industrial policy considerations in the regulation of mergers. However, the EECS was consulted by the Council and in its Opinion, which was adopted with 102 votes to 27 (16 abstentions) at its plenary session of 24 September 2003, a number of amendments were proposed. One of these was that the Commission should take into account ‘employment trends in the economic sector and in the areas in which the merging companies’ productive facilities are located’, in addition to the things it already considers. The EESC also suggested that the following passage was added to the operative part of the regulation (in Article 4(2)): ‘Simultaneously with, or immediately following, notification of the Commission, the notifying persons or enterprises shall also notify representatives of the employees of the enterprises involved in the concentration’ (EESC, 2003).

In the Parliament, which was also consulted, the question of employment considerations was raised in a debate that took place on 8 October 2003. Here Ieke van den Burg of the Socialist Group argued that the Competition DG, in the regulation of mergers ‘should consider aspects other than competition in the narrow sense of the word’. More precisely, the socialists called for a wider definition that would make it possible to take into consideration ‘the contribution that concentrations can make to improved production and marketing systems, to international competitiveness, to consumer interests and to the creation of jobs and the employment situation in general’. And in line with previous proposals from the ETUC and the EECS, the socialists called for a ‘serious and fully-fledged consultation of employee representatives within the procedures’ (Parliament, 2003a). Commissioner Monti, who was present in the Parliament during the debate, responded to these requests by pointing out that the regulation of mergers should not ‘be cluttered with measures to stimulate or safeguard employment: there are other instruments for that’ and that enough was already done to get the ‘input that workers’ representatives can provide in the procedure’ (Parliament, 2003a). If majorities in the Parliament had subscribed to a position grounded in the centre-left USDR in this field in the 1970s and 1980s, this was no longer the case: In its legislative resolution of 9 October in which it approved the Commission’s proposal and proposed various amendments, there was no mentioning of the social and industrial policy dimension (see Parliament, 2003b). Now the centre-left USDR was a minority view that only a few Parties in the Parliament adhered to.

In any case, it will not come as a big surprise that this USDR, in the form of the above-mentioned proposals made by the ETUC and the EESC, was not reflected in the text that the member states finally agreed upon. Once again, centre-left ideas and their advocates were marginalised. Indeed, the philosophy that had hitherto been underpinning the Competition DG’s regulation of mergers was never questioned in the negotiations. All direct programmers (member states) and most indirect programmers (in particular capital actors, law firms and officials from the Commission) subscribed to a neoliberal USDR regarding how competition, in this case mergers, are to be regulated, namely on the basis of a competition test alone. Due to this fundamental agreement on the basic ideas, it is difficult to categorise these programmers in terms of “primary” and “secondary”. Arguably, the Competition DG, which was the main driving force in the processes leading up to the revision, and the UK government (which was much more pro-active than it had previously been) were the primary programmers, whereas the rest of the governments, capital actors and law firms were all secondary. In any case, with no Member State government and no important EU institution challenging the neoliberal USDR, it was all too easy to ignore those who advocated a different view – and indeed that was what happened. It is rather ironic that the new MCR entered into force on 1 May 2004, a date also known as International Workers’ Day.

**Table 7.5: Revising the MCR – programmers and ideas**

	<i>Programmers</i>	<i>Ideas</i>
<i>Primary</i>	The Competition DG and arguably also the UK government	Neoliberal USDR
<i>Secondary</i>	The other member state governments, transnationally oriented capital actors, law firms.	
<i>Marginalised</i>	Unions and centre-left parties in the Parliament	Centre-left USDR

## 7.8. In conclusion

The main purpose of this chapter was to find out how the MCR has been implemented by the Commission and to explain the revision of the MCR in 2003. If we begin with the implementation, it seems safe to conclude that it has fully reflected the neoliberal USDR underpinning the formulations in the 1989 MCR. That is, the Competition DG has not been taking into account industrial and/or social policy considerations in its regulation of mergers, but only looked at effects on competition. Moreover, those governments and capital actors who have attempted to influence



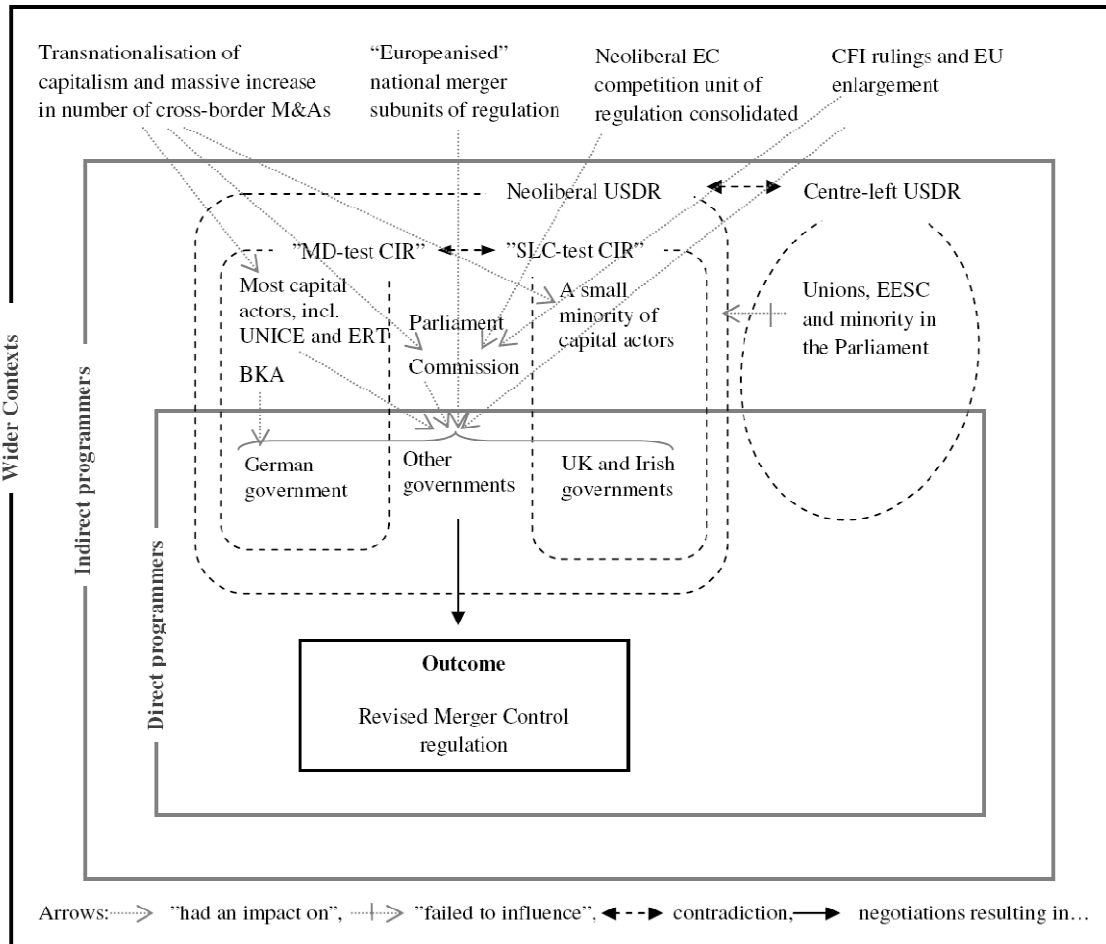
the Competition DG's decisions in merger cases have been unsuccessful. In its regulatory practice the DG seems to have been able to detach or liberate itself from outside influences (the CFI being the main exception), with the result that it enjoys a substantial degree of operational autonomy. It has not, however, used this autonomy to prohibit a large number of M&As: to the contrary only a small proportion of the notified mergers have been banned, and hence it seems fair to say that the main function of the EC merger subunit of regulation has been to ease or facilitate mergers with "Community dimension".

Turning to the revision of the MCR in 2003 (see also Figure 7.1), the perhaps most noteworthy aspect of the negotiation processes was that all the direct programmers as well as almost all the indirect programmers advocated positions based on the neoliberal USDR. Indeed, at this juncture only some unions (including the ETUC), a majority in the EESC and a minority in the Parliament advocated a centre-left position. Consequently, alternatives to merger control based on a neoliberal USDR were hardly discussed in the processes leading up to the adoption of the revised MCR, which consequently ended up as a purely neoliberal document. That this was the case was not surprising: all the subunits making up the EC competition unit of regulation are based on a neoliberal vision of competition regulation – as are the increasingly "Europeanised" national merger subunits of regulation in the UK, Germany and (to a smaller extent) France. Moreover, the wider ensemble of regulation of which the competition unit forms part has generally (but of course not exclusively) been grounded in neoliberal USDRs from the mid 1980s onwards.

The outcome of the negotiations were also influenced by the intensified transnationalisation of capitalism throughout the period, which resulted in an increased number of cross-border M&As and thus also an increase in the number of notifications received by the Competition DG. This made it relevant to review the allocation of cases between the DG and NCAs. Moreover, the CFI rulings overturning three of the Competition DG's merger decisions prompted the programmers to look at the test used by the Commission when assessing mergers. Indeed, this turned out to be the most "controversial" part of the negotiations. The German negotiators backed up by not only the BKartA but also an overwhelming majority of European capital actors argued strongly for the preservation of the MD-test. The UK and Irish negotiators backed up by a few capital actors and the British law community argued that this test was outdated and that the SLC-test would be more appropriate. In the end a compromise was reached with the so-called SIEC-test. To explain the timing in the agreement one needs to see the negotiations over the MCR revision in the context of the wider

reform of EC competition policy, the timing of which was related to the enlargement of the EU with ten new countries on 1 May 2004. That is, the direct programmers were well aware that with ten more countries involved in the negotiations it would be even harder to agree on a text and hence they did their utmost to come to an agreement before the end of 2003.

**Figure 7.1: Explaining the revision of the MCR**



### 7.9. Postscript: challenges to neoliberal competition regulation

‘Competition as an ideology, as a dogma, what has it done for Europe? Fewer and fewer people who vote in European elections and fewer and fewer people who believe in Europe’ (French President Sarkozy, quoted in *Financial Times*, 2007a).

Even though the neoliberal “competition only” discourse of regulation has been hegemonic for some time, this does not mean that alternative discourses are completely absent. It was already

noted in the above discussion of the processes leading up to the revision of the MCR that proponents of the centre-left USDR made themselves heard. However, such ideas constitute a minority view that is not taken seriously by those with genuine decision-making powers. The Euro-mercantilist perspective also seems to have few proponents nowadays, even in the Commission's DG for Industry which was traditionally a committed supporter of a strong European industrial policy. Since the end of the 1980s, this DG has adhered 'to a new style industrial policy approach which sees competition as the basis of competitiveness. It has practically divorced itself from earlier promotions of Euro-champions and come to accept that competitiveness on world markets can only be realized if there is genuine competition within the European market' (McGowan & Cini, 1999: 189). To put it differently, 'in the realms of European discourse and institutions alike, competition has been elevated to an exalted status, a "highest good" that brings all other virtues, including international economic competitiveness' (Smith, 2005: 316). This means that the emergence of a strong, interventionist EC industrial policy is very unlikely indeed. However, there have been calls for a different type of EC competition and industrial policy from in particular Germany and France. In April 2002, the *Financial Times* published a letter written by the German chancellor Gerhard Schröder, in which he argued that '[a] competitiveness-orientated industrial policy must ... form part of the EU's Lisbon strategy'. Such a policy would 'not forget the need for social solidarity and employee participation in decision-making' and would differentiate between sectors according to their position in global markets (*Financial Times*, 2002c). Although the letter was formulated in a rather diplomatic language, its content clearly went against the neoliberal "competitiveness through competition" view, which leaves no room for differentiation and solidarity and which seeks to avoid employee participation. As such it 'reflected a fundamental challenge to the EU approach to industrial policy' (Smith, 2005: 315).

French governments have also challenged the Commission's neoliberal competition policy. Arguably, the current French President Nicolas Sarkozy is the leader of the "mercantilist" counter-movement. As Minister of Finance, Sarkozy argued that 'neither France nor Europe can become industrial deserts... It is not a right for the state to help industry. It is a duty' (quoted in Murray, 2004: 8). These were not merely empty words: on a number of occasions he (and the French government) has pursued interventionist policies in order to save large French companies. This was the case in September 2003 when Alstom, a leading French engineering company which is e.g. known for its production of cruise ships and high-speed trains, almost went bankrupt. Only because of an emergency 1.2 billion Euro loan from the government did the company manage to survive.

The Commission, which was upset that the government had not asked for its permission to grant the loan, was not too keen to approve the rescue plan. But the government, and Sarkozy in particular, put pressure on the Commission by arguing that it would bear the sole responsibility for the loss of up to 70,000 jobs should it decide not to accept the subsidy. The outcome was a complex deal between the French government and the Commission, where the latter only approved the subsidy subject to certain remedies, including that Alstom has to sell some of its subsidiaries whereas the French government has to sell its stake in the company (Murray, 2004: 14-15). Sarkozy celebrated this agreement as a triumph on ‘a victory tour of Alstom’s factories in Belfort and La Rochelle, which helped boost his poll ratings’ (Murray, 2004: 15).

In August 2004 French President Jacques Chirac called on the EU to ‘strongly support the creation of European industrial champions’ and spoke in favour of ‘a European competition policy that truly takes into account the realities of international competition’ (*EU Observer*, 2004). Prior to this, in June 2004, Schröder and Chirac had issued a joint statement in which they made clear the need for government intervention in order to create ‘the industrial champions that Europe needs’ in order to be competitive in world markets (*International Herald Tribune*, 2004). In this context the two political leaders had also agreed to set up a joint industry forum comprised of business leaders in a bid to boost industrial cooperation. Unsurprisingly, this announcement was not met with enthusiasm from the Commission. In particular, internal market Commissioner Fritz Bolkestein made no secret of his feelings. In a letter to the *Financial Times* entitled ‘Let the market choose Europe’s champions’, Bolkestein wrote that ‘I cannot help feeling that I am in a time warp. I have to pinch myself to make sure that I am not back in the 1960s, 1970s or 1980s. Or even under the mercantilist regime of Jean Baptiste Colbert in King Louis XIV’s France’. His argument against interventionist industrial policies was the familiar one that governments and bureaucrats are unable to ‘second-guess the market’ and ‘tend to pick losers, not winners’. The neoliberal “competitiveness through competition” mantra was also repeated: ‘The key to prosperity is ensuring the right conditions for business investment, in particular in innovative sectors. An essential condition is strong competition. When companies are faced with stiff competition or the threat of takeover, they are forced to innovate and come up with better-quality products at lower prices’ (*Financial Times*, 2004).

If the challenge to the neoliberal type of competition regulation has very often been Euro-mercantilist at the level of discourse, it has been purely national-mercantilist in practice. That is,

with little or no prospect of a different kind of industrial policy at the European level, the challenge to the Commission has instead taken the form of national protectionism. So why is there a national-mercantilist backlash? In effect European companies are being exposed to increasingly tough competition on an increasingly international scale. The Commission's neoliberal type of competition regulation serves only to intensify this competition and companies react by engaging in cross-border M&As in order to remain or become competitive in world markets. However, many governments do not like to lose control of national industries in key sectors. Indeed, there is a genuine fear in such countries that they will not be net beneficiaries of economic globalisation, the result *inter alia* being a loss of jobs and other negative social effects. In March 2006, the *Financial Times* reported how 'Italy is almost literally cracking up under exposure to competition from Eurozone partners and from China in textiles and shoes' and that 'Paris is reacting with even more fury than Rome at finding that the EU is proving as much a transmission belt bringing the forces of globalisation in as a bulwark keeping them out' (*Financial Times*, 2006e). This is the background against which protectionism, or "economic patriotism" as French Prime Minister Dominique de Villepin characterised the phenomenon, should be seen.

Indeed, in recent years a number of conflicts between member state governments and the Commission have surfaced. Although governments cannot as such stop cross-border mergers and takeovers that fall under the Commission's jurisdiction, they can still frustrate bids in various ways. Suffice it to give a few examples of this. The attempt by Italian company Enel to take over Franco-Belgian Suez Group was hindered by the French government's opposition: in order to prevent the deal, the government managed to force through a merger between the Suez Group and Gaz de France (*Financial Times*, 2007b). This merger was later conditionally approved by the Commission. The Italian government has gone to great lengths in order to prevent a foreign takeover of Telecom Italia and in December 2006 it managed to derail the bid for Autostrade, the country's main motorway operator, from Spain's Abertis (*Financial Times*, 2007c). This latter merger had already been cleared by the Commission. The Spanish government attempted to hinder the takeover of power company Endesa by German Eon. The *Financial Times* (2006c) quoted a Spanish official saying that 'Spain is merely following Italy, France and Germany which have all taken steps to protect their energy sectors'. The Polish government has attempted to prevent Italian UniCredit from merging its Polish subsidiary Pekao with a subsidiary of German HVB, fearing that the merged entity would constitute a threat to state-owned PKO Bank Polski (*Financial Times*, 2006f).

The German government struggled hard to preserve a law that protects Volkswagen from being taken over by foreign companies (*Economist*, 2006), and the French government has also introduced various measures to prevent hostile foreign takeovers of French companies and declared 11 sectors off-limits to foreign investment (*Financial Times*, 2006d). When India's Mittal Steel announced its hostile takeover bid for Luxembourg based steel company Arcelor it came up against tough opposition from, in particular the French, Belgian and Spanish governments. However, the takeover, which was discussed at a meeting between President Chirac and Indian Prime Minister Manmohan Singh (*Financial Times*, 2006b), was allowed to go through in June 2006, hereby creating the world's largest steel company. Of course, not all member states are unhappy with the neoliberal policies of the Commission. For instance the UK, a country with an Anglo-Saxon model of capitalism, has openly supported the fight against protectionism. For instance, in the context of the Mittal-Arcelor case Alan Johnson, the UK Secretary of Trade and Industry, echoed the Commission's oft-repeated point of view when he said that '[m]easures to protect key industries from foreign takeovers where there are no state security issues are futile and self-defeating. The paradox of protectionism is that it destroys what it seeks to protect' (*Financial Times*, 2006a).

It is not only in the merger area that the Commission has been challenged. In the state aid area, member state governments, not least the French and German, have arguably become more willing than previously to challenge the Commission's decisions. This is for instance possible under Article 88 of the Treaty which empowers the Council, acting unanimously, to overturn state aid decisions "under exceptional circumstances" (see Cini, 2007 for examples of Article 88 and other challenges in the state aid area).

Many of the abovementioned cases have led to proceedings under Article 226 of the EC treaty, many of which are still ongoing (see also Galloway, 2007). Meanwhile, the national-mercantilist countermovement has been strengthened by the election of Nicolas Sarkozy as French President. We saw above how Sarkozy, as Minister of Finance, became associated with protectionist policies. And from the outset of his tenure as President, Sarkozy has openly challenged the neoliberal competition ideology at the European level. The European Constitution, which had been signed by member states representatives in 2004, gave more prominence to competition than it had previously enjoyed: that is, whereas the EC Treaty had mentioned "undistorted competition" as something that had to be ensured in order to attain the objectives of the Community (Article 3), the Constitutional Treaty elevated competition to an *objective* in itself, stating that the EU 'an internal market where

competition is free and undistorted’ (Constitutional Treaty, Art 1-3(2)). As mentioned in section 7.2, the Constitutional Treaty was rejected in the 2005 referenda in France and the Netherlands, prompting the political leaders of the EU to come up with a new treaty, the Reform Treaty. What is particularly interesting about the Reform Treaty in this context is that the commitment to free and undistorted competition was dropped from the “objectives” section. This was due to the efforts by Sarkozy. At the June 2007 EU summit in Germany he made his intentions to break with the neoliberal competition ideology clear, making provocative statements such as the one quoted in the beginning of this section. Informing his colleagues that competition is ‘not the meaning of life’ and that ‘[t]he word “protection” is no longer taboo’ he insisted on the removal of the “free competition” formulation from the EU’s objectives and got his way (*Financial Times*, 2007e).

The reactions to this move were quite predictable. Capital actors expressed their concern: the ERT’s secretary general, Win Philippa, commented that it ‘would be food for people arguing in favour of economic nationalism’, adding that ‘[t]his could have a very negative effect. We are worried’. And BusinessEurope’s director for legal affairs said that ‘We would be worried if this had an effect on EU competition policy’ (*Financial Times*, 2007a). Some commentators in the financial press were outraged; not least Wolfgang Munchau of the *Financial Times* who talked about ‘the madness of Europe’s drift to mercantilism’, characterising the move as “insane” and informing his admiring readers that ‘Europe’s future does not lie in ideas of the pre-enlightenment era’ (*Financial Times*, 2007d). Some EU experts also jumped on the bandwagon, describing the move as ‘an important and decisive step’ that would remove competition as the foundation stone of the EU (see *Politiken*, 2007)<sup>101</sup>. As one scholar put it, ‘the evil of protectionism is now, more than ever, alive and kicking’ (Bavaso, 2007: 3). Despite such (over)reactions, the fact remains that the move was a symbolic act as opposed to a legally significant change. As mentioned above, the attainment of free and undistorted competition was not an “objective” in the EC treaty, only in the Constitution where it for obvious reasons had no legal effect whatsoever. Hence, the consequence of not including the reference to free and undistorted competition in the “objectives” section would, legally speaking, merely seem to be to preserve the status quo, not to initiate some radical shift towards protectionism/mercantilism.

As this section opened with a statement made by one of the “protectionists” it seems appropriate to let one of the neoliberals, namely Commissioner Kroes, have the last word. The following extract

from a 2007 speech confirms that the Commission continues to be tireless in its efforts to combat all forms of protectionism and illustrates that its rhetoric is more aggressive than ever before:

‘Politicians have a duty to accompany people and companies through change. It is not good politics to play King Canute and try to hold back the tide. Yet that is exactly what we are seeing when some European governments try to advocate “matching aid” to prop up failing companies, or when they put unjustified obstacles in the way of cross-border mergers. I’m not at all convinced their protectionist sandcastles will fare any better than Canute did with the oncoming tide. Wouldn't it make more sense to give people the tools they need to build seagoing crafts and ride the waves?’ (Kroes, 2007)



## 8. Conclusions

This concluding chapter is divided into four main sections. In the first two sections the substantive argument advanced in the previous chapters is summarised and a number of themes related to the way the history of European level merger control has been explained in this thesis are reflected upon. This also entails some considerations as to how the critical political economy perspective on regulation could be further developed. The third section contains a review of the way the existing literature has theorised the history of EC competition policy or parts of it. Finally, the fourth section explicates the alternative agenda for the study of EC competition policy, of which the current work can be seen to form part.

### 8.1. The history of European level merger control: summarising the argument

The main purpose of this thesis has been to shed light on the overall history of European level merger control. The research question guiding the analyses was ‘what were the main causes of the major developments in the history of European level merger control?’ To answer this question four sub-questions, each concerning major developments in the merger area, were formulated. The purpose of this section is to gather up the threads, summarising how these sub-questions were answered in the previous four chapters.

*Sub-question 1: Why were merger rules not included in the EC Treaty when such provisions were contained in the ECSC Treaty?*

To answer this question Chapter 4 looked into the processes leading up to the adoption of the two Treaties and related the diverging outcomes with respect to merger rules to broader contextual developments. In the processes leading up to both treaties two major USDRs on the basis of which the various programmers articulated their respective positions were identified. These were a “pro-concentration USDR” according to which mergers (and cartels) should not be hindered by the new supranational institutions and a “pro-competition USDR” (which drew on ideas from the US antitrust tradition and German ordoliberalism) according to which the preservation of competition through the establishment of a well-functioning European level competition unit of regulation was

desirable. Due to some important developments in the broader contexts within which the negotiations over the two Treaties took place, the constellations of programmers subscribing to positions grounded in these USDRs changed over the course of the 1950s – and this does much to explain why merger rules were included in one treaty but not the other.

In the processes leading up to the adoption of the ECSC Treaty, the proponents of the pro-concentration USDR were important capital actors and a number of political parties in Germany, France, Italy and Belgium. Although these programmers were not a unified group, they generally believed that their national heavy industries needed to “concentrate” and hence they saw no need for a supranational bureaucracy that would hinder this process. The proponents of the pro-competition USDR were the primary direct programmers, namely the governments of France, Germany and the US. The programming outcome reflected that the latter, which was an occupying power in Germany at the time, pushed strongly for competition provisions in order to avoid that the ECSC itself became a “gigantic cartel”. In a situation where the prospective ECSC member countries had no or very little experience with competition regulation and were dependent on US aid for the reconstruction of their economies it became possible to reach agreement on the provisions despite the strong opposition they were up against. This was especially the case because US antitrust ideas resonated quite well with the ordoliberal ideas to which leading members of Germany’s political elite subscribed and because the French government, and Monnet who negotiated for France, saw the merger provisions as a way to prevent German re-concentration.

Whereas the ECSC Treaty was negotiated against the background of economic crisis and with the Second World War still fresh in the collective memory, the situation was completely different in 1957 when the EC Treaty was adopted: the threat of war seemed less imminent; the European economies were booming; and the US no longer had as decisive an impact on politics in Europe. This had consequences for the competition rules that were included in the Treaty. With the Americans not taking part in the negotiations and the French government not being particularly keen on establishing a general European level competition unit of regulation, the most important direct programmers in favour of such rules were those leading members of the German government who were influenced by ordoliberal thinking. Whereas the constellation of programmers advocating the pro-competition USDR had hereby been weakened significantly, the pro-concentration USDR was to some extent strengthened as the French government now advocated a position grounded in this discourse. However, at the same time various capital actors did not take much interest in the

proposed competition rules of the EC Treaty, not least because they did not (and didn't have any reason to) expect that competition regulation would become a prominent feature of the EC. The outcome of the negotiations reflected these significant changes in the constellations of programmers subscribing to the two discourses. On one hand, the inclusion of competition rules in the EC Treaty, which established a competition unit of regulation consisting of four subunits, was a victory for the German negotiators and the ordoliberalists (supported by the Dutch government). On the other hand, it was not the case that the provisions reflected a wholehearted commitment to ordoliberalism, as the conventional wisdom would have us to believe. Indeed, the pro-concentration USDR is strongly reflected in the provisions in the sense that the latter allowed for significant concentrations of capital, for instance by not mentioning mergers with as much as a word.

*Sub-question 2: Why did the Commission's proposals for a MCR fail to gain support from the member states in the 1970s and most of the 1980s?*

To answer this question Chapter 5 and 6 identified four USDRs (each constituting a distinct perspective on the desired content, form and scope of merger control), to which various constellations of programmers subscribed: a *national-mercantilist USDR* the main proponents of which were the governments of France, Italy, and (in the 1970s) the UK, as well as most capital actors and some parties in the Parliament; a *Euro-mercantilist USDR* which gave rise to the position advocated by the Commission; a position grounded in a *neoliberal USDR* which was (at least in principle) favoured by the German and Danish governments; and a *centre-left USDR* which gave rise to a position subscribed to by majorities in the Parliament and the EESC, and probably also most trade unions. The outcome of the negotiations, namely that no agreement could be reached, reflected that the national-mercantilist position prevailed. The proponents of this position were oriented towards national industrial policy and the creation of "national champions", and not particularly keen on European level merger rules that could potentially interfere with national policies.

To understand why such ideas prevailed one needs to look at the wider settings in which the negotiations took place in the 1970s and most of the 1980s. That is, it should be seen in the context of the social order "embedded liberalism", with its combination of KWNSs and a predominantly nationally oriented (Fordist) type of capital accumulation. With the regulation of capitalism being primarily national in scope and with a low number of cross-border M&As taking place in the

Common Market few programmers located outside the European institutions saw the need for European level merger control. The Commission had made its 1973 proposal for a MCR during a brief moment of Euro-enthusiasm among member states and in the immediate aftermath of the Court's ruling in the Continental Can case. But especially after 1973, when the Golden Age came to an end and a long and deep economic crisis began, did member states respond to the American challenge by opting for national, rather than European, initiatives. That is, national industrial policies, often entailing various forms of state aid for declining industries and other forms of protection of national firms against outside competition, became an increasingly popular instrument in most or all member state. In this period of "economic nationalism", the European integration process stagnated as did the EC competition unit of regulation.

A major reason why no agreement on an EC merger regulation could be reached was fears among member state governments that such rules could serve as an instrument to undermine or hinder national industrial policies related to M&As. The merger subunits of regulation that came into being in the course of the 1970s were thus established at the national as opposed to the European level. Indeed, it is interesting (but perhaps not surprising) that although the merger subunits that took shape in Germany, France and the UK in this era differed in some respects, they were designed in ways that made them compatible with the way capital accumulation was facilitated in the broader ensembles of regulation of which they formed part. In particular M&As were regulated on the basis of various "public interest" criteria, meaning that a broad range of objectives (including employment and industrial policy considerations) could be taken into account *and* political decision-makers were allowed to overrule the decisions made by competition authorities. Hereby it was ensured that the emergence of big (Fordist) enterprises could be allowed even in situations where they would undermine competition and the full employment commitment underlying the KNWSs could also be taken into account in this subunit.

*Sub-question 3: Why was it eventually possible to adopt a MCR and why was designed the way it was?*

To answer this question the changes in the constellation of programmers subscribing to the four USDRs were explored and these changes were linked to some significant developments in the wider contexts. During the course of the 1980s a major shift took place, not only in the competition units of regulation but also in the wider ensembles of regulation of which they form part. In many

member states and at the EC level neoliberal ideas of regulation gradually became influential, first by providing intellectual ammunition against the KNWS, later by serving as the ideational basis for reforms of the existing ensembles of regulation. This disruption of the compromise of embedded liberalism was clearly related to, but not explained away by, a change in the underlying balance of power between capital and labour, which had now shifted decisively in favour of capital. But it was also related to a transformation of the European business community itself, the prevailing fractions of which had now become those orienting themselves beyond the national level and who thus perceived of free markets on a regional or even global scale as attractive. The neoliberal GDR gave rise to a USDR which prescribed a type of merger control that had as its sole declared objective the preservation/creation of competition and which was to be enforced with no or very limited political involvement. This was related to the way competition is perceived: whereas it was previously widely understood to be a phenomenon with both positive and negative effects, it was now elevated to a blessing. The neoliberal discourse underpinned a partial re-programming of national competition units in the 1980s and 1990s, although it did not take place synchronously or to the same extent in the various EC countries. For instance it was much more pronounced in the UK than in France or Germany, hereby reflecting developments in the wider ensembles of regulation.

At the EC level important developments took place as well. The integration process gained momentum in the mid 1980s with the SEA and the “1992 programme”. Capital actors, more precisely the members of the ERT, were a main driving force behind the latter initiative, arguing that Europe needed a genuine internal market if the economic crisis was to be overcome. As mentioned, the EC competition unit of regulation had stagnated throughout the 1970s and in the early 1980s. The Competition DG had been forced to temporarily re-programme itself, turning the blind eye to serious violations of EC competition law and in some cases even promoting “crisis cartels”. Although the SEA did not as such introduce any significant changes in the competition area, the broader momentum of the integration process enabled strong Commissioners such as Sutherland and Brittan, backed up by the Court, to play a much more pro-active role than their predecessors of the 1970s had done. The outcome was a revitalisation of the EC competition unit of regulation which paved the way for the establishment of a European level merger sub-unit in the late 1980s.

From the early to the mid 1980s, the support for the national-mercantilist discourse crumbled. The UK joined the neoliberal camp and capital actors now increasingly oriented themselves towards the

international level. Towards the end of the 1980s, the ERT became a strong supporter of EC merger regulation, perceiving of it as an instrument that could be used to ease cross-border restructuring. Indeed the number of cross-border M&As exploded after the mid 1980s, in response to the 1992 programme and deregulation and liberalisation more generally, and this “merger madness” was a process that a number of ERT companies were very actively involved in. However, it was only after a number of meetings between Commissioner Sutherland and ERT members that the latter became persuaded that an EC regulation would constitute an attractive alternative to the several national jurisdictions. The Commissioner and his staff also met with representatives from UNICE several times, and the latter now joined the ERT, AmCham, CEFIC and other representatives of transnational capital in their promotion of clear, and preferably neoliberal, supranational rules in the merger area. Meanwhile the Commission also joined the neoliberal camp, whereas the French and Italian governments became supporters of the Euro-mercantilist position before finally giving in to the neoliberal majority. As regarded the centre-left position, it continued to enjoy support from unions and majorities in the EESC and the Parliament. But as the latter institutions do not have any real powers in this field, and as the heyday of the trade union movement was long gone at this point, this position was easily marginalised. Consequently, the MCR that was eventually adopted was very much a neoliberal text. That is, member states were not empowered to overrule the Commission’s decisions in merger cases (whereby the room for “political discretion” was limited significantly) and mergers were to be regulated on the basis of a pure competition test (employment considerations etc. were thus not to be taken into account).

*Sub-question 4: How has the MCR been implemented by the Commission and how can the revision of it in 2003 be explained?*

In Chapter 7 the way the MCR has been implemented in the 1990s onwards by the Commission was investigated, looking both at a number of interesting “cases” and at some quantitative data. On the basis of this it can be concluded that the MCR has been implemented in the spirit intended by those who programmed the Competition DG. That is, the enforcement of the rules has served to facilitate large M&As and has taken place on the basis of the neoliberal ideas embedded in the MCR. As regards the latter, there is no evidence to suggest that the Competition DG has regulated mergers on the basis of industrial and/or social policy considerations. To the contrary, regulation is based on a test that concerns the effects on competition (“market dominance” and later “significant impediment to effective competition”). This is clearly in line with the neoliberal USDR. So is the fact that

neither political decision-makers nor capital actors have been successful in influencing the regulatory practice of the Competition DG. Indeed the latter seems to enjoy a very significant degree of operational autonomy from outside influences, which is precisely what this USDR prescribes. Finally, the EC merger subunit has not first and foremost served to prohibit M&As: of the 3668 mergers that were notified to the Competition DG between 1990 and the end of 2007, only 20 were prohibited and 3202 were approved unconditionally. This clearly suggests that the subunit has done what in particular transnationally oriented capital actors want it to do: making it easier for large companies to merge across borders.

To understand the neoliberal type of EC merger control and the way the MCR was revised in 2003 one needs to see the subunit as forming part of a bigger picture. From the 1990s onwards, neoliberal ideas of regulation had become hegemonic, not least in the various EU institutions and in the EC competition unit of regulation as a whole. Moreover, the neoliberal vision of competition regulation is reflected in increasingly “Europeanised” merger subunits of regulation in the UK, Germany and (to a smaller extent) France. The hegemony of neoliberal ideas in both the wider GDR and the competition USDR is promoted not only by the Commission and other supranational institutions; transnational capital actors (including the ERT, the ICC and the TABD) remain among the most committed supporters of such ideas and hence also, of ever more vigorously enforced competition regulation, preferably at the global level.

Unsurprisingly, then, the processes leading up to the revision of the MCR in 2003 above all became a testimony to the hegemony of the neoliberal USDR. All the direct programmers as well as the vast majority of indirect programmers advocated positions based on this USDR. The only “rival” at this juncture was the centre-left position which was promoted by some unions (including the ETUC), a majority in the EESC and a minority in the Parliament. This alternative was thus easily marginalised (and hardly discussed) in the processes leading up to the adoption of the revised MCR, which consequently ended up as a purely neoliberal document. The most contentious issue in the negotiations was the question of what “competition only” test should be applied by the Competition DG in its regulation of mergers (a topic that had become relevant after the CFI rulings overturning three of the Competition DG’s merger decisions). The German negotiators backed up by the BKartA and an overwhelming majority of European capital actors wanted to retain the MD-test, whereas the UK and British negotiators backed up by a few capital actors and the British law community argued in favour of the SLC-test. In the end a compromise was reached with the so-

called SIEC-test. The outcome of the negotiations were also influenced by the intensified transnationalisation of capitalism throughout the period, resulting in an increase in cross-border M&As and thus also in notifications received by the Competition DG. This made it relevant to review the allocation of cases between the DG and NCAs. To explain the timing in the agreement one needs to see it in relation to the enlargement of the EU with ten new countries on 1 May 2004. To avoid the inclusion of ten more countries in the negotiations, the direct programmers did what they could to come to an agreement before the end of 2003 – and succeeded in doing so.

## **8.2. Reflections on the history of European level merger control**

It has been argued throughout the thesis that “context matters”: that the history of European level merger control has to be understood in the light of the development of the broader whole of which it forms part. If one adopts a longitudinal perspective it becomes clear that the settings in which merger control takes place have changed dramatically. In particular two major shifts can be observed. First, an ideological shift from “left” to “right” has taken place, manifested in the move from embedded liberalism towards neoliberalism. Second, the prevailing orientation of capitalist production and accumulation has shifted from national towards international markets, a process that has been accompanied by (and reinforced through) the internationalisation of regulation. An underlying theme in this thesis, which is worth spelling out here, has been how these two shifts have been translated into a profound transformation in the way competition is regulated in Europe. As also suggested elsewhere (see Buch-Hansen & Wigger, 2008), this transformation relates both to the content, form and scope of competition policy (including merger control). *Content*: whereas competition was regulated on the basis of various “public interest” criteria (including effects on employment) in the era of embedded liberalism, its content has by and large been limited to a “competition only” focus in the neoliberal era. *Form*: whereas political (democratically accountable) decision-makers were involved in different ways in competition regulation in the era of embedded liberalism, their influence on the regulatory practices of competition authorities has been reduced in the era of neoliberalism. Now competition regulation is to take place on the basis of sophisticated and presumably objective economic analyses rather than on the basis of “political discretion”. *Scope*: whereas the NCAs arguably enjoyed a certain primacy over the Competition DG in the era of embedded liberalism, they have come to play second fiddle in the era of neoliberalism,



where an increased internationalisation and even globalisation of competition regulation can be witnessed.

However, ascribing so much importance to various contexts gives rise to certain difficulties. For one thing, the dynamic contexts identified as important in the previous chapters are not clearly demarcated independent variables. To the contrary they are often closely related to each other, making it difficult to establish their relative significance. Perhaps more importantly the actual links between contextual shifts such as those described in the previous paragraph and developments in the merger control area are not always some that can be shown to exist by means of empirical data. One cannot go to, say, the Commission's archives in Brussels and find some old document that explicitly establishes a connection between embedded liberalism and a particular type of competition regulation. The alternative we can opt for is to show how specific contextual developments actually make sense of specific developments in the merger area, hereby justifying the assumption that there is an actual link. So, on the basis of knowledge about the nature of the "embedded liberalism compromise" and of competition units of regulation in this era, we can make the case that the latter's concern with employment effects were in all likelihood related to the full employment commitment underlying the former. The merit of looking at the comprehensive picture is that it allows us to take a historically specified perspective on the history of merger control (and competition regulation more generally). Of course the far more convenient (and in my view inadequate) approach is to simply focus on the developments in the EC merger control area. This is the approach the vast majority of scholars in this field have chosen (see also section 8.3 below).

Another theme worth reflecting on is how much various capital actors have been able to influence the regulation of mergers in the EC. In section 3.3 the importance of capital actors was emphasized whereas it was suggested in section 3.6 that regulatory institutions by definition possess a degree of "operational autonomy". In the previous chapters we have tracked the evolution of the institution responsible for the enforcement of the EC competition rules, namely the Competition DG and seen how, in particular from the mid 1980s onwards, capital actors have taken a keen interest in EC merger control. Now, if one analysed the evolution of the EC merger subunit of regulation from a "traditional" neogramscian perspective one would expect the influence of capital actors (class fractions) on the design of the rules to be of a direct and tangible nature, and hence the operational autonomy of competition authorities and governments to be rather confined. Indeed this was pretty much what I expected to find when I embarked on this PhD project some years ago. Yet the

analyses presented in the previous two chapters show that it is rather difficult (or at least not plausible) to uphold this perspective on EC merger control.

On one hand the support from ERT and the UNICE members proved to be crucial in relation to the adoption of the 1989 MCR and capital actors more or less got the “one stop shop” they wanted. On the other hand, it seems clear that capital actors had no or very little impact on the concrete design of the MCR and that their intensive campaign to preserve the MD test in the process leading up to the revision of the MCR in 2003 failed completely. This suggests that the operational autonomy of the Competition DG is significant, as does the fact that neither capital actors nor governments have apparently managed to influence its decisions in merger cases. To describe the nature of the influence capital actors have had on the way the Competition DG is programmed to regulate mergers perhaps the distinction introduced in the theory chapter between USDRs and CIRs comes in handy. That is, we can say that whereas capital actors have had little or no say on the concrete design of the merger control rules (CIR) in 1989 and 2003, their support for the broader discourse on the basis of which mergers are regulated (USDR) is of vital importance. We can take this point further and suggest that as long as this USDR is hegemonic and the Commission acts on the basis of it, it is unlikely to come up against opposition from capital actors and member states that it will not be able to overcome.

So how can we account for the fact that the Competition DG has become so powerful? Part of the explanation is that this, seen from the perspective of the majority of those member states that programmed it in the first place, is an unexpected and indeed unintended consequence. That is, they did not expect EC competition regulation to be a particularly salient area and hence gave the DG the sole responsibility (together with the Court) for the implementation of the rules with the adoption of Regulation 17 (see section 4.6). This allowed the DG to develop its powers incrementally over the years, not least through its partnership with the Court. Seen from this perspective, the powerfulness of the DG is almost an accident. Another part of the explanation relates to the agency of those positioned in the DG. In particular it will be recalled how the revitalisation of the EC competition unit of regulation in the 1980s was led by energetic, charismatic and ambitious Commissioners such as Sutherland and Brittan, who had a leadership style that differed greatly from that of their predecessors. However, the revitalisation was not reducible to their agency: it was conditioned by the broader neoliberal turn, the renewed momentum of the integration process and the transnationalisation of capitalism.

In Chapter 2 the philosophical foundations of the thesis (a version of critical realism) were explicated. It will perhaps be recalled that it was stated here that I, abstractly speaking, consider it to be the primary purpose of my social scientific practice to explore the structurally conditioned and ideationally mediated interplays between agents and the outcomes of such interplays (section 2.4). In this context a distinction was made between agential, ideational and material mechanisms and it was suggested that all three types of mechanisms are by definition involved in causing or blocking any given social events and phenomena. As it was made clear in section 2.5 these concepts were not used directly in the empirical analyses but were instead translated into theoretical concepts and ideas that were used in the analyses of the history of European level merger control. But the question remains whether it is fruitful to distinguish between these types of mechanisms. Based on the empirical analyses I believe the question can cautiously be answered in the affirmative. That is, in each of the previous four chapters important developments in the history of merger control were explained with reference to agential mechanisms (various types of programmers), ideational mechanisms (various ideas of regulation) and material mechanisms (such as the transnationalisation of capitalism and the increase in cross-border M&As). Consequently, I would argue that an account of the development in this area that fails to take into account all three kinds of mechanisms would be incomplete (see also section 8.3 below).

This said, a reason for being somewhat sceptical is that the distinction may give the impression that the three types of mechanisms are more separable than is actually the case. Arguably the distinction is too rigid since one type of mechanism always presupposes the other two if it is to make a difference. So for instance a phenomenon such as competition confronts companies and societies as a pre-existing objective structure existing independently of how they choose to interpret it. As such competition is a material mechanism. But it only exists and makes a difference because it is reproduced or transformed through actions based on ideas. Likewise the empirical analyses show that a USDR only become significant if agents occupying important structural positions accept and advocate them (which is why the centre-left USDR was not reflected in the 1989 MCR let alone in the revised 2003 version). And agents are of course never acting in a structural or ideational vacuum. In other words, the different types of mechanisms form part of a whole and should not be analysed in isolation from each other. To be sure, there is no denial of this inseparability in this thesis, but I keep an open mind as to whether there are better ways to conceptualise mechanisms.

There are important themes that have been touched upon in the previous chapters which it has not been possible to give the kind of attention they deserve within the confines of this thesis. What I particularly have in mind here are the effects of the neoliberal type of competition and merger regulation on the broader society. That is, the analyses have focused much on the impact of the whole on the part but could have done much more to illuminate the impact of the part on the whole. Indeed, competition regulation is one element in a wider ensemble of regulation and it thus has effects that go far beyond its concrete objects of regulation, be they mergers, state aid, cartels, market dominance or liberalisation. There is much more at stake here than it might appear at prima facie: besides the obvious effects on price levels, there are effects on employment and the allocation of resources in society. Moreover, the Commission's aggressive enforcement of neoliberal competition policies may resonate well with the UK's model of capitalism, but threaten to undermine parts of the German and French models (see also Wigger & Nölke 2007). This is certainly a theme that ought to be central in future research on EC competition policy (see also section 8.4 below).

The critical political economy perspective outlined in Chapter 3 has, in my view, been helpful in the analyses of the history of European level merger control. Its merits include that it conceptualises competition and mergers as capitalist phenomena and sees competition regulation as one unit in the wider ensemble of regulation that stabilises capitalism in a given social space; that it highlights the contingent and political nature of competition regulation; and that it operates with different types or levels of ideas, hereby linking broader discursive developments to developments in the competition policy area. This said, the perspective could certainly also be further refined, both through a "dialogue" with more or better data and through engagements with theoretical literatures that it has not been possible to draw inspiration from here (either because of time restraints or because the author is not yet familiar with them).

One strand of theory which it could be particularly interesting and fruitful to engage with is that of Norman Fairclough's critical discourse analysis (CDA) (see e.g. Chouliaraki & Fairclough, 1999). For one thing, CDA is committed to a critical social science along the same lines as the theoretical perspective advocated in this thesis. That is, 'CDA has emancipatory objectives, and is focussed upon the problems confronting what we can loosely refer to as the "losers" within particular forms of social life – the poor, the socially excluded, those subject to oppressive gender or race relations, and so forth' (Fairclough, 2001b: 125). Moreover, CDA is explicitly grounded in critical realism

(see e.g. Fairclough *et al.*, 2004) and is thus directly ontologically compatible with the theory advocated here. The commitment to critical realism is *inter alia* reflected in the fact that CDA, unlike certain postmodernist forms of discourse analysis (e.g. Laclau & Mouffe, 1985), does not reduce everything to discourse nor does it *only* concern itself with language or text. Rather, it is argued that social reality consists of both discursive and non-discursive elements, and discourses are seen as ‘diverse representations of social life which are inherently positioned – differently positioned social actors “see” and represent social life in different ways, as different discourses’ (Fairclough, 2001a: 7). This means that one can only understand the significance of a particular discourse by seeing it in the context of the wider economic and political context of which it forms part – which is of course precisely what I have attempted to do in this thesis (see also Buch-Hansen & Nielsen, 2005: 87-88).

However, elements from CDA could help to bring the analysis of the discursive dimension of European (competition) regulation forward. In the theory/analyses presented in this thesis “discourse”, in the form of GDRs and USDRs, has been used to denote sets of ideas about regulation. Although this has proved to be a fruitful way to conceptualise discourse, it could (and should) be emphasised that such discourses not only describe reality, or a part of it, and prescribe particular (regulatory) practices; they also serve to *legitimise* certain social structures and particular practices (in section 8.4 we will come back to how the neoliberal competition policy discourse is legitimised). And just as discourses can provide misleading descriptions of reality, so the practices they serve to legitimise can have effects that differ quite a bit from those postulated by the (proponents of a) discourse. The possible “gap” between discourse and reality in the field of EU competition policy is something it would be interesting to explore in greater detail (see also section 8.3 below). Here CDA might come in handy as it ‘is concerned with *the truth, truthfulness and appropriateness* of texts, their production, and their interpretation. That is, it is concerned with the relationship between semiosis and the material and social world; persons and their intentions, beliefs, desires etc; and social relations’ (Fairclough *et al.*, 2004: 32).

CDA can also be used to make us more aware of how the hegemonic neoliberal discourse functions. Of particular interest here is the concept of “order of discourse”, which denotes ‘a social structuring of semiotic difference – a particular social ordering of relationships amongst different ways of making meaning’ (Fairclough, 2001b: 124). In an order of discourse ‘some ways of making

meaning are dominant and mainstream...; others are marginal, or oppositional, or “alternative” (2001b: 124). So, as Fairclough (2001b: 129) explains:

‘Global capitalism in its neoliberal form is pervasively constructed as external, unchangeable, and unquestionable – the simple “fact of life” which we must respond to. The social problem here is that feasible alternative ways of organizing international economic relations which might not have the detrimental effects of the current way (for instance, in increasing the gap between rich and poor within and between states) are excluded from the political agenda by these representations’

Looking at the EC competition unit of regulation, it would be relevant to produce systematic textual analyses of the way the Commission and the other advocates of the neoliberal USDR have been and are constructing an order of discourse which marginalises alternative types of competition regulation – such as the type prevailing in the epoch of embedded liberalism.

It would also be interesting and important to investigate how, in the process of “hegemonising” neoliberalism, elements associated with the previous discourse are incorporated into the neoliberal USDR where they are gradually given a different meaning. What I have in mind here is the concept of “public interest”. In the era of embedded liberalism, a competition unit of regulation based on public interest criteria was one that took into account a broad range of objectives, such as employment, consumer protection and industrial policy goals. Although this is still how the concept is widely understood, one can also witness how representatives from the Commission now use this “signifier” to refer to a different, or at least more delimited, “referent”. For instance, former Competition Commissioner Monti gave a speech at the 2000 UNICE Conference on Competition Policy Reform, where he noted that ‘[u]nlike competition authorities, who act in the public interest, the central function of courts is to safeguard the rights of private individuals’ (Monti, 2000). Unremarkable as this observation might seem, it is still worth noticing that, noted in passing in an interposed sentence, it is apparently suggested that competition authorities *by definition* act in the public interest – even if they (like the Commission) have adopted a “competition only” approach. More recently, Director General of the Competition DG, Philip Lowe gave a speech where he noted that ‘[a]s we all know, competition is not an end in itself, but an instrument for achieving public interest objectives, notably consumer welfare’ (Lowe, 2006: 2). Here public interest objectives are more or less reduced to consumer welfare – at least no other objectives are mentioned. And as it happens, consumer welfare is, in the neoliberal view, brought about by ensuring competition in the

market, and is therefore not something that requires the Commission to deviate from its current path in the slightest.

### **8.3. Theorising the evolution of EC competition policy: the existing literature**

The reason why it was considered necessary to construct the critical political economy perspective on regulation outlined in Chapter 3 was that the existing attempts by political scientists to theorise the history of European level merger control (and competition regulation more generally) suffer from some important shortcomings<sup>102</sup>. This is not to say that other theories are without merits (they are certainly not!); only that they, in my view, are missing out on significant aspects in their explanations of developments in the competition regulation area<sup>103</sup>. In this section we will review the theoretical perspectives that have been applied to analyses of the history of EC merger competition policy (or parts of it), dealing in turn with intergovernmentalism, neofunctionalism, sociological institutionalism, principal-agent theory and the varieties of capitalism perspective. Arguably it is a bit unconventional to discuss the theories applied in the existing literature this late in a thesis. But my reason for doing so is to be able to do it on the basis of (some of) the knowledge presented in the previous four chapters.

Schwartz (1993) approaches the area from a traditional *intergovernmentalist perspective*, arguing that ‘the evolution of Community merger control supports the thesis that the Community’s member states, rather than the Community’s institutions, remain the ultimate charters of the Community’s future. Interstate bargaining driven by national interest [...] continues to characterise the Community’s development’ (1993: 610). Although Schwartz is correct to emphasise the important role played by member states (in effect Germany, France and the UK) at certain junctures in the development of EC merger control, it is quite misleading to suggest that the *evolution* of this policy-area can be adequately explained in terms of interstate bargaining. For one thing this is to seriously underestimate the well-documented importance of supranational institutions in this area, not least in the long periods between bargains between member states. Moreover, it is probably due to the intergovernmentalist perspective that Schwartz overlooks (or has nothing to say about) the crucial involvement of transnational capital actors such as the ERT and UNICE. This perspective is also blind to the fact that the content and form of the MCR was strongly shaped by neoliberal ideas and that this was due to the broader discursive shift which was taking place from the mid 1980s

onwards. Finally it should also be mentioned that Schwartz makes an overly pessimistic assessment of the MCR, suggesting that ‘the efforts to draft a unified system to control European mergers ended poorly’ (1993: 661) because the final text ‘failed to resolve key disputes which had plagued the decades of negotiations, such as the demarcation of Community and national jurisdiction, the criteria for evaluating mergers, and the procedures the Commission was to follow in undertaking evaluation’ (1993: 609). As we saw in section 6.7 these issues were in fact by and large resolved with the MCR, which would indeed hardly have been adopted had this not been the case. It is tempting to speculate as to whether Schwartz’s failure to acknowledge this is related to the intergovernmentalist perspective and its focus on conflicting national interests.

Büthe (2007; see also Büthe & Swank, 2006) and McGowan (2007a) both suggest that *neofunctionalism* constitutes a convincing theoretical perspective which can be used to explain the broader developments in the EC competition policy area. As Büthe explains, this perspective emphasizes the importance of “subnational actors”, in particular business groups, and “supranational actors”, such as the Commission, and expect them to ‘act in concert’ in order to realise common goals. In particular subnational actors are expected to ‘push for a shift of authority from the national to the supranational level if such a shift allows them to achieve their goals more efficiently’ (2007: 180, emphasis removed). Clearly neofunctionalists are correct to identify business groups as important actors, also in the context of EC competition policy where, as McGowan (2007a: 11) correctly points out, the 1989 MCR was only adopted due to pressure from groups such as the ERT and UNICE<sup>104</sup>. However, it is also a problematic perspective in certain respects.

First, why was the Competition DG given far-reaching powers with the EC Treaty and Regulation 17? Not because of pressure from subnational actors – to the contrary most business groups would certainly have opposed it, had they considered competition policy an important area. Second, why did a shift in the attitude of (some) subnational actors actually take place in the 1980s? It would seem that neofunctionalism lacks an answer, which is related to the fact that it has little or nothing to say about the nature of the various objects of regulation. That is, it lacks a theory of capitalism, let alone of phenomena such as mergers and competition. These phenomena merely have the status of exogenous variables that only become significant through the “always already formed” preferences of subnational actors. That such actors have themselves undergone a major transformation which is related to the broader transformation of capitalism is thus also something



neofunctionalism neglects. Third and related to this, neofunctionalism lacks a notion of what has been referred to as “discourses of regulation” in this thesis. McGowan is clearly aware of the importance of such discourses, noting that the Competition DG ‘came of age in the 1980s on the back of a neo-liberal agenda to secure greater European competitiveness’ (2007a: 9). This would seem to suggest the need for a theoretical perspective that takes competing ideas or discourses into account. At the end of the day, there are thus good reasons to dispute Büthe’s claim that neofunctionalism is ‘most promising as a theory of institutional change in the EU’ and ‘yields ... a superior explanation of the politics of competition in the EU over the last fifty years’ (2007: 193).

Bulmer (1994; see also Armstrong & Bulmer, 1998) analyses the evolution of merger control from a *historical/sociological institutionalist* perspective á la March & Olsen (1989) and argues that ‘the major changes reflected how the EC institutions have mediated various pressures at critical stages in the integration process’ (Bulmer, 1994: 426). Although Bulmer provides one of the most well-researched and convincing accounts of the processes leading up to the adoption of the 1989 MCR, it would seem that the chosen theoretical perspective can only be used to throw light on the institutional dimension rather than on the “various pressures” (discussions of the latter only appear in the empirical analyses). As such, competing ideas/discourses, mergers, competition, political struggles and the nature of capitalism are all phenomena that this theoretical perspective says nothing about. And indeed, it offers no guidelines that can be used to explain *how* institutions mediate “various pressures”. Accordingly, as Bulmer concedes with admirable honesty, it ‘cannot offer a comprehensive explanation of why the MCR could be agreed in 1989, and not sixteen years earlier’ (1994: 442). That is not to say that this theoretical perspective is without merits: to the contrary, it serves to highlight the importance of supranational institutions, governance structures and norms of governance (see Armstrong & Bulmer, 1998: 107).

In an in many respects brilliant analysis of the 2003-2004 “modernisation reforms” of EC competition, Wilks (2005b) makes use of insights from both *principal-agent theory* and sociological institutionalist theory<sup>105</sup>. Seen through the prism of the former theory, the Competition DG can be conceptualised as an agent to whom a number of principals, namely member states or NCAs, have delegated power, for instance with a view to enhance the efficiency of rule enforcement (2005b: 436). Wilks suggests that the modernisation with its so-called “decentralisation” of power to NCAs (see section 7.4) can be interpreted in two ways from this perspective. From one reading, it can be interpreted ‘as a renegotiation of delegated powers in

which the principals have chosen to take back a greater degree of authority' (2005b: 337). However, Wilks finds more evidence in support of a second reading. According to this the modernisation was 'an imperialist move by the Commission to centralize competition enforcement and to consolidate its control over an increasingly assertive group of NCAs' (2005b: 446). Although Wilks refers to the principal-agent theory as a 'powerful framework' that 'offers compelling insights' (2005b: 433), it is not quite clear that the theory as such contributes that much to his empirical analyses (which, on the contrary, *do* offer "compelling insights"). It can be used to turn attention to the division of labour between the Competition DG and the NCAs/member states, but does not really contribute to the explanation of why the latter accepted the Competition DG's 'extraordinary coup', as Wilks calls it (2005b: 437). In fact, this theory says nothing whatsoever about the context in which the institutions in question are located, nor does it say anything about the ideological dimension of competition regulation.

This latter problem is recognised by Wilks, who concedes that principal-agent theory 'conceals the political goals behind the delegation' (2005b: 437). This is the reason why he brings in the sociological institutionalist perspective, which 'suggests relocating the decision to delegate in a wider political context' and which is 'critical of the supposedly apolitical nostrum of ... competition agency independence' (2005b: 437). Although Wilks should be commended for suggesting a more contextualising and critical perspective, he fails to show that sociological institutionalism helps him to do so. This is not terribly surprising as this perspective, just like the principal-agent theory, has little to say about the context in which institutions are located (at least the part of the context which does not consist of other institutions) and as it is not exactly known for its ability to serve as the basis for critical social science. To sum up, Wilks fails to demonstrate that the combination of principal-agent theory and sociological institutionalism provides a sufficient theoretical framework.

Wigger & Nölke (2007) provide an innovative and insightful analysis of the 2003-2004 EC competition policy reforms from a "*varieties of capitalism*" (VoC) perspective. A main strength of this contribution is that it constitutes an attempt to link competition policy to wider models of capitalism, arguing that the reform 'can be understood as a substantial shift from the Rhenish to the Anglo-Saxon variety of capitalism' (2007: 505). Another merit of this contribution is that it supplements this more structural perspective with an actor-oriented account, identifying some of the various groups that have pushed for this shift (2007: 489). Although Wigger & Nölke's article is an exciting contribution to the literature in this field, and constitutes perhaps the first attempt to

investigate the broader effects of the developments in the EC competition policy area, their theoretical perspective can be criticized in certain respects. For one thing, the VoC perspective is too simplistic in its distinction between only two forms of capitalism, as if all of continental Europe had just one and the same model of (coordinated) capitalism (a tendency that can also be witnessed in Hall & Soskice 2001). As we have seen in this thesis, both the models of capitalism and the competition policies that developed in Germany and France after the war were different in important respects. In other respects they had much in common – also with the competition policies of the “Anglo-Saxon” UK. As such, variety is one important thing the VoC perspective lacks.

Moreover, and related to this, this theoretical perspective can be criticized for being too static. That is, not only does its focus on institutional diversity within the two types of capitalism mean that it deals inadequately with the profound transformation of capitalism that has taken place over time; it is also much more convincing as a perspective on institutional continuity within “a variety of capitalism” than on fundamental institutional changes<sup>106</sup>. This is problematic as it means that the varieties of capitalism approach ends up as an insufficient appendage to Wigger & Nölke’s account of the significant transformation of EC competition policy that has taken place over time. Finally, it could also be pointed out that the VoC perspective offers little in terms of a discussion of concepts that are important to any account of developments in the EC competition field. That is, concepts such as competition, competition policy, mergers and merger control. In sum, Wigger & Nölke deserve much credit for moving the discussion of EC competition policy in a new and interesting direction, but could be criticized for not aligning themselves with a better “theoretical partner” than the US centric VoC approach<sup>107</sup>.

#### **8.4. Competition and competition policy: an alternative agenda**

‘[W]hat has become of the freedom presented to us sixty years ago? Is it now no more than a stock market profit? Our highest constitutional value no longer protects civil rights as a priority, and has rather been wasted at cut prices, so that it now only serves the so-called free-market economy in line with the neoliberal Zeitgeist. Yet this concept, which has become a fetish, barely conceals the asocial conduct of the banks, industrial associations and market speculators. We all are witnesses to the fact that production is being destroyed worldwide, that so-called hostile and friendly takeovers are destroying thousands of jobs, that the mere announcement of rationalisation measures, such as the dismissal of workers and employees, makes

share prices rise, and this is regarded unthinkingly as the price to be paid for “living in freedom” (Günter Grass, 2005).

As we saw in the previous section, political scientists have analysed competition policy in Europe from a number of different theoretical perspectives. The resulting contributions have certainly done much to illuminate various aspects of the competition policy area and consequently neither the theoretical perspective nor the empirical analyses presented in this thesis have been designed to be diametrically opposed to such work. This said, I do see my work as forming part of an emerging alternative research agenda that seeks to break with a number of *tendencies* in the prevailing discourse on EC competition policy<sup>108</sup>. What distinguishes this agenda is that: (1) it tells a story not only of continuity but also of deep transformations; (2) it seeks to analyse the evolution of EC competition policy in the light of developments in the broader ideational and material context; and (3) it highlights the profoundly political nature of competition policy and takes a more balanced perspective on the nature of competition<sup>109</sup>.

Whereas it should already be clear what the first two mentioned features entail, the latter has yet to be unfolded. In section 3.1 a distinction was made between conservative and critical theoretical perspectives in the field of EUS. While the former takes the desirability of the current social order (and thus its ensemble of regulation) for granted, the latter asks how it (or a part of it) came into being and considers its negative effects. The literature on competition policy is exemplary in this respect: here it is almost never questioned whether competition is actually *only* a wonderful thing that *always* has the postulated positive effects. This is, of course, the case in the works of mainstream economists. Typical of the prevailing view in this literature is the suggestion by Eekhoft & Moch (2004: 1) that ‘competition benefits almost everyone’ and is ‘the permanent driving force behind individuals, as it rewards successful activities and penalises laziness and failure’. But it is also a view one can find reproduced in the political science literature dealing with this topic, as when Tim Büthe opens a chapter on competition policy in the EU with the following statement: ‘Competition causes suppliers of goods and services to lower prices, raise quality, and innovate. It is crucial for maximizing social welfare in a market economy’ (Büthe, 2007: 175).

Likewise, competition policy is often conceptualised in a strangely “neutral” way – as something that merely aims, in various ways, at protecting competition but which does not really have any negative effects at the societal level. For instance, Motta (2004: 30) defines competition policy as ‘a set of policies and laws ensuring that competition in the marketplace is not restricted in such a way

as to reduce economic welfare’. This certainly resonates very well with the prevailing neoliberal discourse which, as we have seen, entails a completely one-dimensional perspective on competition and competition policy: the former is great and the latter should only serve to preserve/bring about the former. By elevating this political view to an unquestioned premise, much research on competition/competition policy ends up being inherently conservative, hereby serving to reproduce or even reinforce the hegemonic ideas of regulation.

So what does a more critical perspective involve? First of all it is clear that it can entail different things and in this context one should not confuse the critical perspective advocated here with what could perhaps be described as ultra-liberal perspectives. Ultra-liberalists agree with neoliberalists that competition is a blessing. But they refuse to acknowledge that the invisible hand of the market cannot do the job of safeguarding competition and insist that competition policies by definition have some highly undesirable effects. This is, for instance, the view of the most well-known exponent of the so-called Chicago School in economics, Nobel Prize winner, Milton Friedman:

‘My own views about the antitrust laws have changed greatly over time. When I started in this business, as a believer in competition, I was a great supporter of antitrust laws; I thought enforcing them was one of the few desirable things that the government could do to promote more competition. But as I watched what actually happened, I saw that, instead of promoting competition, antitrust laws tended to do exactly the opposite, because they tended, like so many government activities, to be taken over by the people they were supposed to regulate and control. And so over time I have gradually come to the conclusion that antitrust laws do far more harm than good and that we would be better off if we didn’t have them at all, if we could get rid of them. But we do have them’ (Friedman, 1999)

At times, EC competition policy has also been criticised from this “competition good, competition policy bad” perspective. Here the (ultra-)liberal think tank called Centre for the New Europe has been at the forefront, for instance arguing in its 2004 report *From Antitrust to Disaster: An Overview of European Union Competition Policy* that ‘[b]ecause of the competition policy actually adopted by the European Union, around 780,000 may presently be unemployed who would otherwise have jobs’ (Gabb *et al.*, 2004: 4). Although the authors of the report later acknowledge that this figure is “questionable” (2004: 22), they are convinced that EC competition policy does not only drive away business from Europe; it also deters those remaining from investing in research and development (2004: 16-19). But then of course competition policy is not the only problem – indeed,

any '[a]ttempts to regulate enterprise by government officials must be counterproductive to the progress of humanity' (2004: 20).

Unlike this ultra-liberal perspective, the perspective advocated here seeks to adopt a more balanced understanding of the phenomenon of competition and is not against competition regulation *per se*. Let us begin with competition. On one hand, it is undeniable that some degree of competition is a good thing in a market: certainly it provides companies with an incentive to keep down prices and innovate and as such it can and often does have some positive effects. On the other hand, many politicians and academics would do well to not only see the phenomenon of competition through rose-coloured spectacles. There is also a dark side to competition which is completely neglected in the neoliberal discourse. For one thing it is obvious that the owners of uncompetitive companies often pay a high price if the latter are exposed to strong competition, as do the people employed in such companies (ultimately, in the form of unemployment) and possibly also the communities in which such companies are located. Indeed, in the global economy there is no guarantee whatsoever that competition always has positive effects at the societal level in a given society. As mentioned in Section 3.2 companies may react to competition by engaging in M&As. These do not necessarily have negative employment effects, but often they do. This is not surprising when it is taken into consideration that M&As are often 'motivated by the desire to exploit synergies between the operations of the acquirer and the target with a view to reducing costs and improving efficiency' (Chapman, 2003: 325). Hence, there are numerous examples of mergers that have resulted in job losses. For instance, it appears from a 2001 report from the International Labour Organisation that 'almost 130,000 net jobs were eliminated as a result of M&As in the European financial services during the 1990s' (ILO 2001: 64). Notwithstanding this, only very limited systematic research into the effects of mergers on employment, exist. This may in part be due to methodological problems related to counter-factual analyses, where one tries 'to assess what would have happened to employment levels in the acquired firm if it had remained an independent enterprise' (Chapman 2003: 326). Yet one may also suspect that, had this not been considered an irrelevant question seen from the perspective of the prevailing neoliberal discourse, more resources would have been invested in research that could provide well-founded answers.

It is also absolutely crucial to keep in mind that competition is not just something that involves companies: in the era of neoliberal globalisation regions, states and cities compete against each other with a view to attract business investments, just like universities, hospitals and other public

and semi-public institutions have been subjected to the logic of competition. This is of course wonderful, if one sees the world through the prism of neoliberalism: here strong competition in all corners of society is seen as a precondition for competitiveness. However, as the so-called Group of Lisbon pointed out in their 1995 book *Limits to Competition*, it is also problematic in several respects. First, the desire to win the war of competition may involve ‘sacrificing the interests of the most vulnerable people’ in European societies (Group of Lisbon, 1995: 97). This will ultimately be the result if such societies are further reformed in a direction where values such as tolerance and solidarity are eclipsed by neoliberal values such as egoism and self-sufficiency. Whereas such societies are generally considered desirable by the owners and managers of transnational capital, they may contribute to worsen the lives of the vast majority of citizens. Second, the idea that everyone can be more competitive is absurd: not everyone can be the best student in class. The proponents of the competitiveness discourse forget to mention that it ‘contributes to the development of social exclusion: the noncompetitive people, firms, cities, and nations are left behind. They are no longer the subject of history’ (1995: 98). Third, the neoliberal competitiveness discourse is problematic because it is misleading:

‘It sees only one dimension of human and social history, that is, the spirit of competition. The spirit of competition and aggression is a powerful engine for action, motivation, and innovation. It does not, however, act in isolation nor is it disconnected from other engines such as the spirit of cooperation and solidarity. Cooperation is also a fundamental phenomenon in human history, produced and determined by society. ... The ideology of competitiveness either ignores or devalues cooperation, or it instrumentalizes it to its own logic...’ (Group of Lisbon, 1995: 98)

For these and other reasons it is plausible to break with the one-dimensional perspective on competition and instead recognise that it is a phenomenon that has both pros and cons. This, to be sure, is not a particularly new or original discovery: indeed, it is probably correct to say that this was the prevailing view in the era of “embedded liberalism” and it remains the view of those who subscribe to centre-left, national-mercantilist and Euro-mercantilist ideas of regulation (see Chapters 4 and 5).

The “alternative agenda” also entails a perspective on competition policy that seeks to highlight the latter’s political nature. Hence, rather than putting forward a narrow definition of competition policy, it was suggested in section 3.4 that it can in principle serve a number of different objectives in a given social space, an important one of which is to remedy some of capitalism’s inbuilt

contradictions. Indeed, as mentioned in section 8.2 over time the content and form of European competition policy has been transformed profoundly. That is, whereas it used to be a unit of regulation that sought to facilitate Fordist growth while taking into account the full employment commitment underlying the KNWS it is now based on a neoliberal “competition only” USDR which favours Europe’s competitive companies; and whereas political (democratically accountable) decision-makers used to be involved in the management of many of Europe’s competition policies, the latter are now managed by authorities that are independent from the political system (and thus not particularly democratically accountable themselves).

Taking into consideration the important impact EC competition policy has on the various member states and their citizens, it is not surprising that this unit of regulation has to be legitimised somehow. This is where “the consumer” enters the picture: time and again it is repeated in speeches and documents from the Competition DG that the main purpose of the whole thing is to protect the interest of the European consumers. So for instance, in the foreword to the Commission’s pamphlet on *EU competition policy and the consumer*, Director-General Philip Lowe, explains that the promotion of competition is important because ‘[i]t helps to lower prices and increase choice for European consumers’ (Commission, 2004). In a similar vein Jonathan Todd, the Commission’s competition spokesperson, is quoted on the Competition DG’s webpage saying that ‘Competition Policy is basically applying rules to make sure that companies compete with each other and, in order to sell their products, innovate and offer good prices to consumers’<sup>110</sup>.

For one thing it is quite symptomatic of the neoliberal discourse that it is the citizens in their capacity as consumers that competition policies are said to protect. There is of course no mentioning of the fact that such consumers are not just consumers. That is, often the same “consumers” will be employees in companies where they are permanently forced to do wonders if they want to keep their job. However, when they get home from work late in the day or when they lose their job because their employer engages in a merger (or simply goes under in the war of competition), they can take delight in the fact that their mobile phone bill will, on average, be somewhat smaller than it would have been had not the Commission ‘opened the telecommunications sector completely to competition on 1 January 1998’ (Commission, 2004: 13). Moreover, it will be cheaper for them to use air transport due to the liberalisation of this sector, whereas ‘prices have remained unchanged or have even increased’ (!) in the other markets that have been liberalised, including ‘electricity, gas, rail transport and postal services’ (Commission, 2004:



13; see also Hvelplund & Meyer, 2007). Whether a majority of the European citizens are actually in favour of exposing previously state-owned companies to market forces is of course besides the point here: they were never asked for their opinion.

This brings us neatly to the next point, namely that the neoliberal type of competition policy in Europe *does not* primarily serve to safeguard the consumers: above all, it serves to further the interests of Europe's large, competitive companies. Carchedi (2001: 126) puts it well:

‘In reality ... the aim of antitrust legislation has very little to do with consumers. The protection of the interest of consumers (if this is the case) is a by-product (in spite of claims to the contrary) rather than being the primary purpose of this legislation. The protection of the interest of the tiny majority of the powerful is smuggled into the collective consciousness as being the protection of the overwhelming majority of the society’

This is particularly clear in the area which we have paid particular attention to in this thesis, namely the regulation of mergers. As it will be recalled from section 7.6 only 20 out of the 3668 M&As that were notified to the Competition DG from 1990 to the end of 2007, were prohibited. This confirms what the Commission has also openly acknowledged: namely that the main purpose of this subunit of regulation is not to prevent cross-border mergers but to facilitate them. It is thus not surprising that TNCs, such as those represented in the ERT, are among the strongest supporters of EC competition policy. This brings us to a paradox at the heart of the neoliberal type of competition regulation. On one hand the Commission and the TNCs praise the virtues of competition. On the other hand the Commission is extremely reluctant to prevent massive concentrations of capital from taking place. And a number of ERT-companies have themselves taken part in illegal cartels, hereby in effect contributing to undermine competition. Indeed, of the ten largest fines that the Commission has ever imposed on companies involved in cartels (as of November 2007), eight involved TNCs that were or had been members of the ERT (see section 7.3)! Against this background one could be excused for wondering whether certain proponents of the neoliberal “competition only” discourse really do believe in strong competition – or if their main concerns are to ensure that weaker competitors are exposed to competition and that social and industrial policy considerations are eschewed from the regulatory practices.

Now, it is a well-established fact that the EU system suffers from a massive democratic deficit (see e.g. Andersen & Burns, 1996). From the outset the EC was an elite-driven project and the political

leaders of the member states know all too well that large segments of Europe's citizens are anything but pleased with the current type of EU governance. Indeed, this is one important reason why most populations in Europe have not been asked for their opinion when new treaties were adopted – and why majorities of those populations that were asked often rejected the steps towards further integration (of the neoliberal sort) they were meant to approve of. In 2005, the Constitutional Treaty was rejected in referenda in France and the Netherlands to the chagrin of the political and economic elites. Commenting on the outcome of the referenda in France and the Netherlands, Slovenian philosopher Slavoj Žižek made the following observation:

‘When commentators described the no as a message of befuddled fear, they were wrong. The real fear we are dealing with is the fear that the no itself provoked within the new European political elite. It was the fear that people would no longer be so easily convinced by their “post-political” vision.’ (Žižek, 2005)

For this very reason, the same political elite has decided not to ask the European citizens for their approval of the Constitutional Treaty's successor, the so-called Reform Treaty – despite the fact that the two are by and large identical<sup>111</sup>. Only in Ireland did a referendum take place in 2008, the outcome of which was a clear rejection of the Reform Treaty.

The research agenda suggested here does not involve being critical of competition policy *per se*. Indeed, competition policies are considered necessary elements in the broader ensemble of regulation in a capitalist social space. But the existing EC competition unit of regulation is very much part and parcel of the democratic deficit in the wider ensemble of which it forms part. Indeed, Europe's populations have no chance whatsoever to influence developments in this field through conventional democratic channels – and as such they can only await the next steps in the Commission's seemingly never-ending quest to further neoliberalise the European societies. One does not have to be a radical socialist (as is the author of this thesis indeed not) to think that the current type of neoliberal regulation, both in the competition field and elsewhere, is a disgrace to Europe and the principles of democracy that, paradoxically, Europe's political leaders and representatives of the various EU institutions never waste an opportunity to praise. Academics and other citizens who are unhappy with this state of affairs have an obligation to make their voice heard and to call for a different type of EC competition regulation, namely one that is based on a democratic mandate and which serves the interests of the large majority of the Europeans (and not only in their capacity as consumers) rather than merely the large competitive companies. It is hoped

that the current thesis has contributed to illuminate the nature of the neoliberal type of merger and competition regulation in Europe and that it can hereby serve to provide some of the intellectual ammunition needed to challenge the hegemonic discourse in this field.

## 9. References

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## 10. Appendixes

### Appendix I: Abbreviations and Acronyms

<b>AmChamEU</b>	EU Committee of the American Chamber of Commerce	<b>FDP</b>	Free Democratic Party (G)
<b>BDI</b>	<i>Bundesverband der Deutschen Industrie</i> (G)	<b>GDR</b>	General discourses of regulation
<b>BKartA</b>	<i>Bundeskartellamt</i> (G)	<b>GWB</b>	<i>Gesetz gegen Wettbewerbsbeschränkungen</i> (G)
<b>CAP</b>	Common Agricultural Policy (EU)	<b>IoD</b>	Institute of Directors (UK)
<b>CBI</b>	Confederation of British Industry	<b>ICC</b>	International Chamber of Commerce
<b>CC</b>	Competition Commission (UK)	<b>ICN</b>	International Competition Network
<b>CDU</b>	Christian-Democratic Union (G)	<b>KNWS</b>	Keynesian National Welfare State
<b>CEFIC</b>	European Council of Chemical Industry Federation	<b>M&amp;As</b>	Mergers and acquisitions
<b>CFI</b>	Court of First Instance (EU)	<b>MCR</b>	Merger Control Regulation (EU)
<b>CIR</b>	Concrete ideas of regulation <i>Conseil National du Patronat Français</i> (FR)	<b>MD test</b>	“Market dominance” test
<b>CNPF</b>		<b>MMC</b>	Monopolies and Mergers Commission (UK)
<b>CSU</b>	Christian-Social Union (G)	<b>MTF</b>	Merger Task Force (EU)
<b>DG</b>	Directorate General (EU)	<b>NCA</b>	National Competition Authority
<b>DTI</b>	Department of Trade and Industry (UK)	<b>OFT</b>	Office of Fair Trading (UK)
<b>EC</b>	European Community	<b>RCT</b>	Rational Choice Theory
<b>ECN</b>	European Competition Network	<b>SEA</b>	Single European Act
<b>ECSC</b>	European Coal and Steel Community	<b>SEM</b>	Single European Market
<b>EESC</b>	European Economic and Social Committee	<b>SLC test</b>	“Significant Lessening of Competition” test
<b>EMU</b>	The Economic and Monetary Union	<b>SPD</b>	Social Democratic Party (G)
<b>ERT</b>	European Roundtable of Industrialists	<b>TABD</b>	TransAtlantic Business Dialogue
<b>ETUC</b>	European Trade Union Confederation	<b>TNC</b>	Transnational corporation
<b>EU</b>	European Union	<b>TUC</b>	Trade Union Congress (UK)
<b>FDI</b>	Foreign direct investment	<b>UNICE</b>	Union of Industrial and Employers' Confederations of Europe
		<b>USDR</b>	Unit-specific discourses of regulation
		<b>WTO</b>	World Trade Organisation

## Appendix II: Commissioners of Competition 1958-2008

**Hans Von der Groeben**  
(1958-1966)



**Emanuel Sassen**  
(1966-70)



**Albert Borschette**  
(1970-76)



**Raymond Vouel**  
(1977-80)



**Frans Andriessen**  
(1980-84)



**Peter Sutherland**  
(1985-89)



**Leon Brittan**  
(1989-93)



**Karel van Miert**  
(1993-99)



**Mario Monti**  
(1999-2004)



**Neelie Kroes**  
(2004-?)



## Notes

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<sup>1</sup> Strictly speaking it would be more correct to refer to this treaty, which is also known as the Treaty of Rome, as the EEC Treaty. With the so-called Merger Treaty in 1967 the institutions of the ECSC, the European Atomic Energy Community (Euratom) and the EEC were merged after which it became normal practice to refer to the “merged entity” as the “EC”. In the present context, there is little point in retaining a distinction between the EEC and EC and henceforth only the latter designation is therefore used.

<sup>2</sup> There are, however, examples of legal scholars who apply a “law in context” perspective on EC competition law. See Gerber (1998) and Monti (2007).

<sup>3</sup> In section 8.3 the theoretical perspectives applied to EC competition policy by political scientists are discussed in greater detail.

<sup>4</sup> In order to ensure the anonymity of some of the interviewees it will not appear from quotes whether they have been translated or not.

<sup>5</sup> I use the terms “philosophy” and “philosophy of science” interchangeably in this thesis.

<sup>6</sup> It is well known that the term “paradigm” is associated with Thomas S. Kuhn’s position in the philosophy of science – a position outlined in his classic *The Structure of Scientific Revolutions* (1996). However, as Kuhn used the term in a rather erratic manner in this book (see Masterman, 1970) it was less than clear exactly what a paradigm is. In order to avoid this type of confusion we can say that two theories or approaches belong to the same paradigm if they share a number of ontological assumptions, are based on a shared general conception of how (social) science is carried out and what the purpose of theory is, use the same sort of language and in addition to this deal with similar questions.

<sup>7</sup> The formulations used in this paragraph are similar to those of Buch-Hansen & Nielsen (2005: 11), some of which I may not have been the originator of.

<sup>8</sup> It is perhaps worth noting that some EU scholars use the concept of “social ontology” in a manner that differs from the way it is used here. According to Christiansen *et al.* (2001: 3) social ontology includes ‘intersubjective meanings, norms, rules, institutions, routinized practices, discourse, constitutive and/or deliberative processes, symbolic politics, imagined and/or epistemic communities, communicative action, collective identity formation, and cultures of national security’. Apparently, this list is not even exhaustive as Christiansen *et al.* (somewhat confusingly) also include “human consciousness and ideational factors” (2001: 3) and later “identity, community and collective intentionality” (2001: 6) in their concept of social ontology. In any case, the problem with this is that “social ontology” is here used to refer to a number of social phenomena in the real world, rather than to *conceptualisations* of such phenomena.

<sup>9</sup> Likewise, Dessler states that ‘the richer and more comprehensive the underlying ontology, the better the theory’ (1989: 446). To be sure, not all scholars agree that ontologies should be as “rich” as possible. Hollis & Smith have thus argued that ontologies should be as simple as possible. However, this has to be understood in relation to their – in my view rather absurd – argument that we can only choose between “understanding” (a hermeneutic approach to social science) and “explaining” (a positivist approach) and that elements from the two can never be consistently combined (see Hollis & Smith, 1990).

<sup>10</sup> Here I am not going to explain how this synthesis was possible. For a detailed explanation cf. Ole Wæver’s (1996: 161-164; 1997: 15-19) brilliant account for what he calls the “neo-neo synthesis” in IR theory.

<sup>11</sup> The term *neo-positivism* is used here because not all rationalists happily accept to be called positivists (see e.g. Schneider & Aspinwall, 2001: 181-182) and because positivism is an anything but unambiguous label (for instance, Halfpenny (1982) identifies no less than 12 varieties of positivism). Accordingly, it is necessary to emphasise that what we are dealing with here is a rather moderate version of positivism that has little in common with, for instance, the type of (logical) positivism associated with the Vienna Circle. See e.g. Benton (1977) or Manicas (1987) for excellent discussions of the different types of positivism.

<sup>12</sup> Or, as two rationalist scholars put it, ‘[r]uthless egoism does the trick by itself’ (Burley & Mattli, 1993: 54).

<sup>13</sup> To be fair, it should be mentioned that it can be debated whether neofunctionalism should be counted as a rationalist theory. A number of scholars – including Ernst Haas, the “father” of neofunctionalism (see Haas, 1958) – claim that neofunctionalism (NF) is compatible with a moderate constructivist position (cf. Haas, 2001; Ruggie, 1998: 11; Wendt, 1999: 3), whereas others suggest that it is ‘firmly established within the rationalist camp’ (Jachtenfuchs, 2002: 652). I would consider neofunctionalists to belong to the rationalist camp as they accept ‘soft rational choice ontology which puts them closer to utilitarianism than most constructivists consider acceptable’ (Haas, 2001: 22). In his 2001 piece on constructivism and NF, the late Haas briefly reflected on the agency-structure problem and claimed that ‘my NF has no concern with structures at all’ (2001: 29). As I have argued at some length elsewhere (Buch-Hansen, 2003) Haas hereby radically misrepresented at least the early version of NF. The following quote from the “early” Haas, in which he describes his own NF, will suffice to drive home this point: ‘the superiority of step-by-step economic decisions over crucial political choices is assumed as permanent; *the determinism implicit in the picture of European social and economic structure is almost absolute*. Given all these conditions ... the progression from a politically inspired common

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market to an economic union, and finally to a political union among states, is automatic. The inherent logic of the functional process, in a setting such as Western Europe, can push no other way' (Haas, 1967: 327, emphasis added).

<sup>14</sup> Morse makes a similar point when she writes that 'The economist's view of the person, as it now stands, is that the person is a pure stimulus-response machine. The preferences are given; the relative prices are given. The person is completely reactive. We might say that the person's behaviour is perfectly predetermined, or predestined, once the utility function has been formed. There presently is no scope within economics for the genuinely creative act, for the uniquely personal contribution' (1997: 182).

<sup>15</sup> Smith (1997) describes reflectivism as a position that also covers feminist theory, normative theory, critical theory and historical sociology. What matters in the present context is the epistemological disagreements between positivists/rationalists and postmodernists/poststructuralists.

<sup>16</sup> It is probably correct to say that in EU studies constructivism represents an "imaginary middle position" between rationalism and reflectivism— because fact it that reflectivism has never really been an influential position in this field. To my knowledge, only a very limited number of studies of European integration based on reflectivism has been produced. The discourse analyses of Diez, (2001a; 2001b), Larsen (1997) and Wæver (2000) could be candidates – but whether they are actually grounded in genuinely reflectivist epistemologies is an open question. More obvious candidates are Smith (2000; 2001) and I.Ward (1995).

<sup>17</sup> Examples of studies of European integration that explicitly draws on March & Olsen are Armstrong & Bulmer (1998), Bulmer (1994), From (2002), Sweet & Sandholtz (1997) and Wind (1997; 2001). In addition to this, it would seem that a number of constructivists subscribe to positions that are more or less compatible with sociological institutionalism. See also Wiener (2005) for a good discussion of constructivism and sociological institutionalism in EUS.

<sup>18</sup> In addition to the kind of constructivist agency-structure approaches discussed here, some constructivists in IR have advanced an agent-centred approach that 'tends to take transnational actors as autonomous entities rather than as embedded in, and indeed constituted by, transnational structures' (Van Apeldoorn, 2004: 148, emphasis removed).

<sup>19</sup> As Joseph (2007: 353) observes: 'Wendt and other constructivists are so keen to emphasise the ideational that they often turn a two-way relationship into a one-way one'.

<sup>20</sup> I owe this point and formulation to Peter Nielsen.

<sup>21</sup> In the *Possibility of Naturalism* Bhaskar argues in favour of position called "critical naturalism". On one hand this position entails a commitment to naturalism – viz. 'the thesis that there is (or can be) an essential unity of method between the natural and the social sciences' (1979: 3). Yet on the other hand it is also argued that there are a number of ontological, epistemological and relational differences between the objects of study in the natural and the social sciences and that this places a number of limits on the possibility of naturalism (1979: 56-69). In the present context the question of naturalism is not a matter of concern.

<sup>22</sup> To be sure, some rather formal schemes have been developed that at an abstract level propose steps in scientific practice grounded in critical realism. Bhaskar has outlined two schemes called, respectively, the RRRE model and the DREI model (see e.g. Bhaskar, 1975: 125; 1989: 91; 1991: 160), whereas Danermark *et al.* (2002: 108-112) propose a scheme which is claimed to bring together the most important elements from Bhaskar's two models. Now, my suspicion is that such schemes have generally not been very helpful (among other things because they say little or nothing about the function of theory). This is also reflected in the fact that they are rarely followed by those critical realists who do empirical work (see also Buch-Hansen & Nielsen, 2005: 64).

<sup>23</sup> See Benton & Craib (2001: 1-3) on the concept of underlabouring. For a classic critique of the "underlabourer conception", see Winch (1958: 3-24).

<sup>24</sup> Examples *par excellence* of such theoretical straitjackets would be neorealist IR theory à la Waltz (1979) and, in the context of EUS, Moravcsik's liberal intergovernmentalism (see section 2.2).

<sup>25</sup> As Smith (2000: 31) has perceptively pointed out, 'rationalist theory, far from being the explanatory theory it claims to be, instead provides a political and normative account of European integration whereby (positivist) notions of how to explain a given "reality" in fact constitute the reality of European integration' (Smith, 2000: 31).

<sup>26</sup> This is also related to what is sometimes referred to as "the hermeneutic circle", namely that 'we cannot know the part without understanding the whole of which it forms part, and at the same time we cannot understand the whole without understanding the parts that make it up' (Benton & Craib, 2001: 104).

<sup>27</sup> To be sure, this type of research is rarely mentioned in mainstream textbook introductions to EUS. For partial exceptions, however, see Bache & George (2006) and Rosamond (2000). Manners (2006) contains an interesting overview of the various strands of critical research in EUS, that looks not only at historical materialisms but also at e.g. feminist and postmodernist positions.

<sup>28</sup> Among these were also a number of Soviet studies of the "capitalist integration" of Western Europe countries. See in particular Kniazhinsky (1984) and Maximova (1973).

<sup>29</sup> See also Nielsen (2004: 193) on the wider tendency of classical Marxism to end up as a rather self-contained yet fractioned intellectual phenomenon.

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<sup>30</sup> The most developed neogramscian perspective is often referred to as the “Amsterdam Perspective” (see e.g. Holman, 2004; Overbeek, 1990; van Apeldoorn, 2002; van der Pijl, 1984 for brilliant works made by the key “members” of this “school”). The theory presented here has not been constructed in opposition to this perspective; to the contrary it draws inspiration from it. But at the same time it also diverges from it in many respects and as such it does deserve its own label, the “Copenhagen Perspective” being one option.

<sup>31</sup> In fairness it should be noted that Bourdieu is making this statement in a discussion of “status competition”, not economic competition.

<sup>32</sup> Marx refers to this latter phenomenon (which includes mergers) as “centralisation”. But as the phenomenon is now generally referred to as “concentration”, also in the literature referred to in subsequent chapters, I find it practical to do this as well in order to avoid conceptual confusion.

<sup>33</sup> To say this is not to advance a teleological or deterministic argument, thereby contradicting the agency-structure model outlined in section 2.4. Because as Collier (2004: 144) points out, ‘the concentration of capital can happen only if people perform acts of working, investing, undercutting competitors in the market, buying up other firms, and so on. The point is that we can predict, with some degree of certainty, that people will do this. But no one is saying that the predicted outcome will occur whatever people do’.

<sup>34</sup> Robinson (2004: 69) makes a similar point when he remarks that ‘the structures of the global economy came about as the unplanned outcome of strategic decisions taken by thousands of firms (i.e., by individuals who make decisions within firms), but these structures then present themselves to capitalists and other social agents as a reality conducive to further actions toward transnationalization’.

<sup>35</sup> A distinguishing feature of capitalism is that the process of exploitation manifests itself as a purely economic process. Whereas, say, the feudal lord often had to use coercive power in order to exploit his workers, this is not the case under capitalism. Here the exploitation simply appears as an exchange of commodities (labour power in exchange for a wage), thereby making it appear simply as an economic matter. In one important sense, then, capitalism involves a formal separation of the political/legal and economic spheres so that ‘the social functions of production and distribution, surplus extraction and appropriation, and the allocation of social labour are, so to speak, privatised and they are achieved by non-authoritative, non-political means’ (Wood, 1995: 29, see also 2003: 10-14). But this formal separation should not disguise that the economic sphere is in the most fundamental sense embedded in other spheres and depends on other spheres if the expanded reproduction of capital is to be secured (see also Rupert, 1993: 73 and section 3.4). Referring to the extraction of surplus value as “exploitation” might sound a bit dramatic or as a political value-judgement, but as Collier points out, the term ‘acquires its negative value-judgement, not in addition to what it means, but because of what it means’ (2004: 82).

<sup>36</sup> See also Adkins (1993) for a discussion of class analyses and critical realism.

<sup>37</sup> Recent class-based analyses of European integration include Chari & Kritzing (2006), Holman & van der Pijl (1996), Taylor & Mathers (2002), and van Apeldoorn (2002). See e.g. Robinson (2004), Sklair (2001) and van der Pijl (2006) for studies that focus on the formation of a transnational capitalist class and Bottomore & Brym (1989) for some studies that focus on the national level. On the continued relevance of class analysis see also Sørensen (2002).

<sup>38</sup> It should also be added that fractioning also takes place within the working class. As one scholar notes, ‘A white-collar worker in the service industry is clearly in a different fraction of labour than a blue-collar worker at the assembly line of a car manufacturer. Workers they are, however, in that they are forced to sell their labour power, used by capital for the extraction of surplus value and the accumulation of profit’ (Bieler, 2003: 1-2).

<sup>39</sup> As Monéger (2006: 275) explains, ‘[r]egulation, in British and American English, means, not only *regulation* as a legal system of rules, but *regulation* as an action, a procedure of control, either *ex ante* or *ex post* ... [i]t is an intriguing word, in which can be mixed politics, economics, philosophy and law’.

<sup>40</sup> An ensemble of regulation is not a new word for what Parisian regulation theorists refer to as “modes of regulation”. As already described the concept of regulation is used in its narrow sense in the present thesis, whereas regulation theorists use it in a more inclusive sense. Consequently, a mode of regulation denotes ‘an emergent ensemble of rules, norms, patterns of conduct, social networks, organisational forms and institutions’ which can stabilise a particular economic system (Jessop, 1997: 291; see also Lipietz, 1987: 14-15).

<sup>41</sup> A “unit of regulation” refers both to the institution(s) enforcing the rules in a particular area and to the regulation of this area itself. As such it differs from the IPE literature’s concept of “regimes”, which denotes ‘sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of International Relations’ (Krasner, 1983: 2).

<sup>42</sup> “Object of regulation” is a concept borrowed from Jessop (see Jessop & Sum, 2006a: 44, 84).

<sup>43</sup> I owe this idea to Angela Wigger (conversation).

<sup>44</sup> ‘Competition occupies so important a position in economics that it is difficult to imagine economics as a social discipline without it. Stripped of competition, economics would consist largely of the maximizing calculus of an isolated Robinson Crusoe economy. Few economists complete a major work without referring to competition’ (Demsetz, 1982: 1).

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<sup>45</sup> This has resulted in (apparently justified) accusations that the Chicago School is inconsistent (see e.g. McChesney, 1991): on one hand its proponents argue that political interventions are an evil, on the other they nevertheless argue in favour of some degree of political regulation when making policy recommendations.

<sup>46</sup> In these regards the neogramscian perspective is similar to that advocated by prominent Marxist state theorist, Nicos Poulantzas (on the latter's view of this, see Ougaard, 2004: 63). It is also possible to point to other similarities between the two perspectives. Neogramscian scholars would follow Poulantzas in his rejection of instrumentalist theories of the state and agree that 'the contemporary state is not a simple tool or instrument that can be freely manipulated by a single coherent "will"...' (1975: 158). Moreover some of these scholars agree with Poulantzas (1975: 158-161) that the state enjoys a certain degree of "relative autonomy" in relation to the prevailing class fractions. For instance, neogramscian scholar Otto Holman (2001: 168-69) writes that '...the state has to organise and safeguard the interests and hegemony of the bourgeoisie as a whole. The state can accomplish this only when it can take a stand as an autonomous subject *vis-à-vis* the separate fractions of the bourgeoisie' (see also e.g. Cox, 1987: 19; 1996: 479, Gill & Law, 1993: 113). In doing this, the state is said to play a decisive role in securing the coherence of capitalist societies.

<sup>47</sup> For instance, Cox (1996: 149) suggests that it can mean everything 'from marriage and the nuclear family, through the state, diplomacy and the rules of international law, to formal organizations like the United Nations and the International Monetary Fund' (see also e.g. the various conceptions to be found in Aspinwall & Schneider, 2001; Jessop, 2001; Torfing, 2001).

<sup>48</sup> See Jessop (2003a and 2003b) and Joseph (2002) for interesting discussions of the notion of "hegemony" from a critical realist perspective.

<sup>49</sup> No co-ordinated plan for carrying out the de-concentration of the German economy was prepared and consequently the Allies' were left to carry out the process individually in their respective occupation zones. See e.g. Lovett (1996) and Djelic (1998: 79-81) on the resulting dissimilar legislation and enforcement practices.

<sup>50</sup> In 1958 when two large German steel companies, the above-mentioned ATH and Phoenix-Rheinrohr, attempted to merge, hereby creating by far the largest company in the community, it became known that the High Authority intended to use its powers and would impose certain conditions on the companies. The application for authorisation of the merger was then withdrawn, something that brought about a burst of anger in Germany. According to McLachlan & Swann (1967b: 45) this case forced the High Authority to 're-examine its previous thinking on the question of size' with the result that, since 1958, 'not only has this particular merger been subsequently approved, but the High Authority has also become one of the strongest advocates of larger groupings in the European steel industry – provided that the danger of monopoly is kept at bay' (see McLachlan & Swann, 1967a: 197-218 for a more detailed discussion of the ECSC in this area).

<sup>51</sup> This seems to lend some support to the Mandel's thesis that 'the movement towards Western European economic integration *via* the Common Market is a product of capitalist concentration on an international scale: an attempt by capitalism to reconcile the level of development of the productive forces and the degree of monopolistic concentration with the survival of the national state' (1975: 143)

<sup>52</sup> Until 1999 this directorate was known as "DG IV", but was then renamed DG Competition. In this thesis the DG is simply referred to as the Competition DG.

<sup>53</sup> The ECSC Treaty expired on 23 July 2002, after which all agreements previously authorised under the Treaty now have to be reviewed under the rules of the EC Treaty.

<sup>54</sup> A report of the Netherlands' State Secretary for Economic Affairs showed that of the 258 mergers and other forms of amalgamations involving Dutch industry in the period from 1958 to mid-1965 only 8 involved enterprises from another EEC country. 175 involved other Dutch enterprises, 42 US and Canadian enterprises and 26 UK enterprises (McLachlan & Swann, 1967b: 38; see also Canellos & Silber, 1970 on concentration in the EEC in the 1960s).

<sup>55</sup> Another "bureaucratic" obstacle to cross-border mergers arose from the relationships between public and private administrations in countries like France and Italy. In France, with its system of extensive governmental economic planning, the relationships between business and public authorities were particularly close, and it was not going to be easy for foreign companies to establish similar relationships. And in Italy, with its economy which was permeated by corruption, the foreign businessman 'must learn how to bribe. A misplaced bribe can have catastrophic consequences for him personally as well as for his company' (Mazzolini, 1975: 44).

<sup>56</sup> Some "members" of Europe's financial capital fraction did in fact prepare for involvement in cross-border mergers in order to meet the American challenge. As Ross (1998: 355) explains, 'European banks felt themselves to have been left behind by the Americans; they were short of the skills, the time and the resources required to challenge the competitive advantage which the Americans were exploiting'. In the 1960s and 1970s, they thus formed a number of "banking clubs" with participation from many of the big European banks. To give but one example, by 1974 the club called *European Banks International Company* brought together *Deutsche Bank* (Frankfurt), *Société Générale* (Paris), *Midland Bank* (London), *Banca Commerciale Italiana* (Milan), *Amsterdam Rotterdam Bank* (Amsterdam), *Société Générale de Banque* (Brussels) and *Creditanstalt Bankverein* (Vienna). In some cases the banking clubs were understood by their participants as a preparatory step before an eventual merger that could not yet be realised 'given the

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regulatory, tax and legal differences among European banking markets' (Ross, 1998: 356). Many of the banking clubs were therefore formed with the purpose of promoting European economic integration, especially in the monetary area, but also as a means of sharing information. However, the political influence of the banking clubs appears to have been rather limited. And as the European integration process slowed down significantly in the 1960s and 1970s, the lacking prospect of real cross-border mergers between the European banks meant that the clubs were gradually closed down in the course of the 1970s.

<sup>57</sup> To be sure, one should not exaggerate the extent to which de Gaulle undermined the European integration process (see e.g. Dinan, 1999: 40-41). In particular, the General saw the Common Agricultural Policy (CAP) as a potentially highly attractive feature of the EC as it would guarantee French producers high agricultural prices and subsidise exports of EC agricultural products to the world market. Only due to the CAP was de Gaulle willing to reluctantly embrace the Common Market.

<sup>58</sup> According to figures referred to in Overbeek (1990: 100-102), the share of UK exports to the Common Market went from 13.9 % in 1958 to 21.0 % in 1963 and in the same period the share of British direct investment in the EC went from 5.5 % to 16.9 %.

<sup>59</sup> In particular two of doctrines established by these rulings deserve mentioning. The 1963 *Van Gend en Loos* ruling established that certain provisions of the EC Treaty have direct effect, meaning that the Treaty gives individuals and companies certain rights *independently* of national law (see e.g. Johnson & Turner, 2006: 53; Weiler, 1999: 19-20). And in the 1964 *Costa v. ENEL* case it was ruled that Community law would also supersede national law. Hereby the doctrine of supremacy was established with the result that, as the Court put it in a later ruling, 'every national court must ... apply Community law in its entirety ... and must accordingly set aside any provisions of national law which may conflict with it' (quoted in Dinan, 1999: 304). Such landmark decisions constituted significant steps in the direction of increased European integration, even if this only gradually became apparent to policy-makers, scholars and others.

<sup>60</sup> Industrial policy, like competition policy, is a term that can have different referents. Here we will understand it broadly as policies that seek to aid particular industries or companies, for instance in order to enable them to compete internationally. A European level industrial policy had also been an important element in the European response to the American challenge envisaged by Servan-Schreiber. The national scale would be too narrow to generate '50 or 100 firms which, once they are large enough, would be the most likely to become world leaders of modern technology in their fields' (Servan-Schreiber, 1968: 117). His idea was thus to transfer the interventionist industrial policies of France (see section 5.3 below) to the European level in order to promote the emergence of a number of flagship companies that were competitive vis-à-vis their US counterparts.

<sup>61</sup> The economy remained on an upward growth trajectory from 1950 to 1973, with an annual growth rate (measured in real GDP) that averaged 2.8% in 1950-1960 and 3.1 % in 1960-1973. However, this should be seen in relation to average annual growth rates elsewhere in this period. For instance, the German average growth rate was 8.2 % in 1950-1960 and 4.4 % in the 1960-1973 period (Coates, 2000: 5; see also Dormois, 2004: 12 on GNP developments). Indeed, with growth rates only approximately half of the OECD average, Britannia was not ruling the waves in the "Golden Age". The relative British decline that had begun in the 1890s thus continued in the *Pax Americana* era where British industry gradually lost ground to its European competitors (see Coates, 2000: 43-52 for more details and an interesting discussion of the reasons for this decline). In the 1950s and 1960s, Britain was lagging well behind the EC countries and the US in industrial investments and industrial productivity with the outcome that her share of world industrial production fell from 8.6 % in 1950 to 5.4 % in 1970 (Overbeek, 1990: 123).

<sup>62</sup> Fishwick (1982: 10) points to a paradox in the UK system: 'in the UK in the 1960s one government organisation (the Industrial Reconstruction Corporation) was trying to organise industry into larger units, while another government institution, (the Monopolies and Mergers Commission), was delaying and in some cases, preventing moves to increase concentration because of possible market implications'.

<sup>63</sup> Indeed, in the 1960s 'neither the British nor the Germans felt a strong need to challenge the hold of enterprises that had managed to achieve a dominant position in their national markets. A tolerance for concentration was exhibited in many ways' including that 'neither country was prepared to control mergers or to limit the activities of dominant firms' (Vernon, 1974: 6). The same held true for many of the other European countries, including France and Italy.

<sup>64</sup> In 1964 only 78 officials were employed in the Competition DG (Wilks & McGowan, 1996: 231). Today, the number is approximately 600 (see Wilks 2007: 445).

<sup>65</sup> According to Fishwick (1993: 115), the Court's ruling left a rather odd paradox in EC law: 'a merger involving at least one firm in a dominant position might be prohibited under article 86 ... ; a merger between a small number of equal size firms would contravene no law even if it created a 100 per cent impregnable monopoly'.

<sup>66</sup> It is interesting to note, that these USDRs bore some resemblance to the three "political projects" identified by van Apeldoorn (2001: 74-76; 2002: 78-82) in his seminal study of the re-launch of European integration in the 1980s and 1990s: Here a distinction is made between (1) a "neoliberal project" according to which European integration should primarily be about deregulation and liberalisation of markets; (2) a "neomercantilist project" according to which

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European integration should be about the creation of a strong European “home market” that is defended against competition from non-European companies (by means of tariff walls etc.) and; (3) a “social democratic project” according to which European integration should be about protecting the European type of welfare state against neoliberalism and economic globalisation). Each of these “projects” can be seen to embody a particular GDR – that is, an overall perspective on how the economy in a given socio-economic formation ought to be regulated.

<sup>67</sup> Italy was the country that was most critical towards the Commission’s 1973 proposal. It not only opposed that mergers should be regulated before they had taken place; it was also opposed to the fact that the regulation would also apply to public companies. In addition it also questioned the legal basis on which the Commission had based its proposal, as it believed that it would in fact require a fundamental amendment of the Treaty.

<sup>68</sup> However, that one case turned out to be the perhaps most controversial case in the history of the German merger control system (Wilks & McGowan, 1995: 55). The case arose in 1987 when the liberal Minister of Economics, Martin Bangemann, proposed a merger between Daimler Benz and MBB in order to help Airbus, an airline consortium that received significant state aid from the German governments and which was partly owned by MBB (see Schwartz, 1993: 630). The outcome of the merger would be a huge conglomerate that would employ 380,000 people and account for 5 per cent of Germany’s GDP. The BKA banned the merger as it would give the conglomerate a dominant position in the airline and defence markets, but was then in 1989 overruled by the new Minister of Economics, Helmut Haussman, who allowed the merger to go through (Wilks & McGowan, 1995: 55).

<sup>69</sup> The remaining part of this section draws on, and reproduces a number of (translated) formulations used in, Buch-Hansen (2006).

<sup>70</sup> Interview with Etienne Davignon in Brussels on 1 June 2006. Davignon was the Commissioner responsible for industrial affairs between 1981 and 1985, where he was also vice-president of the Commission. From 1986 to 2001 he was a member of the ERT in his capacity as chairman of the Belgian bank Société Générale de Belgique.

<sup>71</sup> The EC Presidency rotates every half year.

<sup>72</sup> Ortoli also became a member of the ERT (from 1988 to 1990) as director of French oil company Total.

<sup>73</sup> Interview with Jonathan Faull in Brussels on 24 March 2006. Faull was an important member of Leon Brittan’s cabinet and directly involved in the processes leading up to the adoption of the MCR in 1989. He is currently Director General of the European Commission’s Justice, Freedom and Security DG.

<sup>74</sup> Moreover, The Italian government still wanted public firms to be exempted from regulation whereas Luxembourg now wanted purely fiscal holding companies to be completely exempted.

<sup>75</sup> Telephone interview with Peter Sutherland on 26 April 2006. Sutherland was Competition Commissioner from 1985-1989. He is now chairman of BP and of Goldman Sachs International and a member of ERT, the Trilateral Commission, the Bilderberg Group and the Foundation Board of the World Economic Forum.

<sup>76</sup> The ERT’s interest in the merger area is also underlined by the fact that the theme of its seventh “Youth Conference” was cross-border mergers in Europe (see ERT, 1989b). These conferences brought together young managers from of ERT member’s companies in order to involve them in various issues related to European integration and the challenges faced by business. One might see these conferences as a platform for the creation of a common worldview among the upcoming managers of transnational capital.

<sup>77</sup> Schwartz (1993: 648-649) provides an interesting account of how these conflicting views over the desirable French negotiation position was rooted in three ministries; namely the Ministry of Industry, the Ministry of Economics and Finance and the Ministry of Foreign Affairs. The Ministry of Industry was generally associated with the by now well-known French view that an EC merger regulation would not be in the interest of French industry, as it would prevent it from restructuring and moreover hinder national industrial policies. For a long time it was thus opposed to the adoption of a regulation and argued that, insofar as the Commission was granted powers in this area, its decisions (or at least the most important ones) ought to be subject to national review. The prevailing view in the Ministry of Economics and Finance was that an EC regulation was desirable, although it was agreed that national review of Commission decisions would be required. In the Ministry of Foreign Affairs it was the generally accepted view that an EC regulation would be in the French interest, not least as it would be good for France’s image. From around mid-1988 the position of the two first mentioned ministries changed: the Ministry of Industry now began to wholeheartedly support a regulation that would establish a clear division of labour between the national and the supranational level (and which would thus not entail a national review of the Commission’s decisions), whereas the Ministry of Economics and Finance now vehemently opposed the EC regulation, arguing for instance that the proposed thresholds were too low and that vital French state interests would be in danger if the regulation was adopted. In other words, it ‘urged that industry’s wish for judicial clarity take a back seat to the French public interest and the need to maintain antitrust hurdles to foreign acquirers’ (Schwartz, 1993: 649).

<sup>78</sup> Telephone interview with Lord Leon Brittan on 6 February 2006. Brittan was Competition Commissioner from 1989 to 1993. He is now a legal consultant at Herbert Smith.



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<sup>79</sup> Some business groups had also argued in favour of a higher EC level threshold than the one initially proposed by the Commission. In a position paper dated 6 July 1989 AmCham for instance argued that the 100 million ECUs threshold should be increased to at least ECUs 200 million (see AmChamEU, 1989).

<sup>80</sup> This is not, of course, to say that the EMU was Thatcher's idea. Indeed, the UK decided not to join the EMU – as did Denmark after the EU Treaty had been turned down in the 1992 referendum. It is not possible to go into a discussion of the complex processes leading up to the introduction of the EMU and the Euro here. The reader will have no difficulties in finding such discussions, as there are probably few dimensions of European integration/governance that have attracted more attention from academics than the EMU (see Dyson & Featherstone 1999 for the perhaps most detailed and well researched account). It should be mentioned, however, that it was strongly supported by important segments of transnational capital. The promotion of the EMU did not take place through the ERT as its members were at this stage (in the late 1980s) divided over the issue. An example of an early member who was not in favour of the EMU was Maersk Mc Kinney Møller (A.P. Møller), who left the ERT in 1992 in response to the Roundtable's increasingly neoliberal profile. Instead a number of ERT members from companies such as Philips, Fiat, Solvay and Total formed the *Association for a Monetary Union of Europe* in 1987, an organisation that had Etienne Davignon, the former EC Commissioner of Industry, as its president. Although the precise impact of the organisation's extensive lobbying activities at both national and European has not yet been sufficiently documented, it seems relatively safe to assume that it had been difficult if not impossible to introduce the EMU had it not enjoyed support from (or even been opposed by) important capital actors (see also van Apeldoorn, 2002: 155-156).

<sup>81</sup> This and the following three paragraphs draws on, and reproduces a number of (translated) formulations used in, Buch-Hansen (2006).

<sup>82</sup> This entails, among other things, that the EU countries should, by 2010, have annual growth rates of 3 per cent and employment rates close to 70 per cent.

<sup>83</sup> The ERT had been invited by Antonio Guterres, Prime Minister of Portugal and the President of the European Council to contribute to the preparations for the Lisbon European Council.

<sup>84</sup> This and the previous section draws directly on Buch-Hansen (2006: 118-119) and indirectly on van Apeldoorn (2002: 158-189).

<sup>85</sup> <http://www.tabd.com/about>, accessed on 19 September 2007.

<sup>86</sup> See also <http://www.tabd.com/about>, accessed on 19 September 2007.

<sup>87</sup> American members include well-known companies such as The Coca-Cola Company, Ernst & Young, General Electric and Microsoft.

<sup>88</sup> On its webpage the ICC describes itself as 'the voice of world business championing the global economy as a force for economic growth, job creation and prosperity'. Its members are thousands of companies from over 130 countries. See <http://www.iccwbo.org/id93/index.html>, accessed on 22 September 2007.

<sup>89</sup> We have already seen above how the ERT had called for a reform from the mid 1990s onwards. UNICE had also argued in favour of a reform in 1995: 'This was one of the first times that we really asked for a more economic approach' (UNICE Senior Official, Interview).

<sup>90</sup> In the mid-1980s the DTI actively began exploring whether a major reform of the regime would be desirable, reaching the conclusion in a 1988 Green Paper that indeed a reform seemed necessary. Despite the publication of a 1989 White Paper which recommended a far-reaching reform of the "restrictive practices" policy which was modelled on the EC system, the conservative government did, 'for reasons which have never been fully explained' (Robertson, 1996: 211), not translate it into legislation that could be adopted by the British Parliament. However, according to one scholar, big business was opposed to 'the introduction of EU-based monopolies control in which market dominance was prohibited in principle' (Suzuki, 2000: 4). Despite new DTI Green Papers in 1992 and 1996 which confirmed the need for reform and suggested a system which in some respects were modelled on the EC model (see e.g. Cini, 2006; Eyre & Lodge, 2000: 68-69), little actual progress was made. Again, one reason for this might have been that the CBI did not favour a change of the existing system – at least not in the early 1990s, where it was argued that a tougher form of competition regulation would undermine the competitiveness of British business. According to Suzuki, the CBI-staff working on competition policy issues were 'in-house lawyers of big companies' which 'may explain why the CBI's representative opinion was more sceptical about the regulation over industrial concentration than any other issue' (2000: 11; see Zahariadis, 2004 for more details on the positions of the various involved programmers).

<sup>91</sup> One article in the Act explicitly reads that 'The purpose of this section is to ensure that so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising under this Part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community' (Competition Act, article 60).

<sup>92</sup> For instance, '[i]n air transport ... ECJ decisions, followed by Commission action, ultimately forced deregulation on a number of reluctant governments ... while the mere threat of ECJ action in the telecommunications and electricity sectors helped bring all parties to the table' (Schmidt, 2002: 55). One of those "reluctant governments" was Germany's

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(see Schmidt, 1998 for more details). Another area where EC competition policy has contributed to neoliberalise the German model is that of finance. An important feature of the social market economy is the existence of public/non-commercial savings banks, including the Länder banks that have certain industrial policy commitments and are subsidised by municipal and Länder governments (Lütz, 2006: 27). However, since the 1990s, ‘German private banks have used the “opportunity structure” of European competition policy to question the status of their competitors in the public banking system’ (Lütz, 2006: 29). In 1994 an alliance of German, French and British banks filed a complaint to the Commission, arguing that the government of North Rhine-Westphalia had illegally subsidised the Westdeutsche Landesbank. In 2002 the Commission opened proceedings against five other Länder banks on similar grounds and in 2004 a compromise was reached with the involved parties, namely that the six Landesbanken would have to repay 4.3 billion Euros to their Länder governments (Lütz, 2006: 29). In another case, the European Banking Federation, which represents private banks in Europe, complained to the Commission about the state liability guarantees for the Landesbanken, on the grounds that these guarantees put public banks at an unfair advantage vis-à-vis their private counterparts. In 2005 the various involved parties ‘reached the historic compromise to remove public guarantees from state banks by July 2005’ with the result that although ‘infusions of public capital are still possible ... they have to be accepted in Brussels’ (Lütz, 2006: 29). There is thus no question that EC competition policy has played and plays an important role in the neoliberalisation of Germany’s social market economy – which is obviously not to say that it has been the only important mechanism in this context.

<sup>93</sup> Horizontal mergers have accounted for the vast majority of notified transactions, although the Commission has also dealt with vertical and conglomerate mergers (Levy 2003: 198).

<sup>94</sup> That the 46 ERT companies are among Europe’s largest (measured in terms of market value) is confirmed by the FT500: More than half of them (namely 25) were in the top 100, and the top 200 comprised 36 of these companies. One can also note that the four ERT companies that are not even included in the FT500 list, namely CIR, Eczacıbaşı Group the Smurfit Kappa Group and SONAE have been involved in a very limited number of mergers with “Community dimension”. Such companies are probably represented in the ERT for other reasons than their size in terms of market value, such as their geographical location or sectorial belonging.

<sup>95</sup> Interview with Senior Official of the Competition DG in Brussels on 7 March 2006. This Senior Official was centrally involved in the processes leading up to the revision of the MCR.

<sup>96</sup> Interview with a UNICE Senior Staff Member of in Brussels on 7 March, 2006. This Senior Staff Member was centrally involved in UNICE’s working group on competition policy.

<sup>97</sup> In July 2003 Lars-Hendrik Röller was appointed Chief Competition Economist. In July 2006 he was replaced by Damien Neven. See also Wigger (2008a: 306-309) for an interesting analysis of the “microeconomisation” of EC competition regulation.

<sup>98</sup> Interview with diplomat involved in the negotiations over the revision of the MCR, February 2006.

<sup>99</sup> Interview with diplomat involved in the negotiations over the revision of the MCR, February 2006.

<sup>100</sup> Interview with diplomat involved in the negotiations over the revision of the MCR, June 2006.

<sup>101</sup> My translation from Danish

<sup>102</sup> It should not come as a surprise that this thesis has analysed the transformation of EC competition policy from a (critical) political economy perspective, rather than from a pure political science perspective. However, in the absence of theoretically informed political economy analyses of this topic (the main exception being Wigger & Nölke, 2007), the various political science analyses are the most relevant to discuss here. That is, they clearly have much more in common with the present work than do the contributions produced by economists and legal scholars.

<sup>103</sup> One major problem is that all the theories applied in the existing literature are conservative – that is, they take more or less for granted that competition is by definition a good thing and do not really seek to fundamentally challenge the prevailing neoliberal type of competition regulation. This issue will be dealt with in section 8.3.

<sup>104</sup> It is surprising, however, that Büthe (2007) and Büthe & Swank (2006) say nothing about the role played by the ERT in their empirical analyses.

<sup>105</sup> Wilks & Bartle (2002) also apply principle-agent theory to an analysis of EC competition policy.

<sup>106</sup> I have borrowed this argument from the discussion of the varieties of capitalism approach found in Kang (2006).

<sup>107</sup> In addition to these shortcomings in the “varieties of capitalism” approach itself, I would also dispute two aspects of the empirical analyses contained in Wigger & Nölke’s article. First, their account of developments in the EC competition field is overly “German-centric”. That is, it reproduces a tendency in the literature to exaggerate the extent to which EC competition policy has been shaped by German ordoliberalism (see especially Gerber, 1998). It follows from the arguments made in Chapter 4 and 5 that other ideas and agents (such as “anti-competition” ideas and the French government) were influential from the outset, with the result that the EC competition unit of regulation was far less ordoliberal than it is often assumed. Second, whereas the strong link the two authors make between ordoliberalism and Germany’s social market economy is convincing, it is less clear that the Anglo-Saxon model of capitalism necessarily goes together with a “Chicago School” perspective on competition policy. Certainly this School has had a strong impact on US antitrust in the last few decades. But it seems more problematic to argue, as do Wigger & Nölke, that the 2004

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EC competition policy reform marks a shift ‘from ordo-liberalism to the Chicago School’ (2007: 498). In this context it is, for instance, suggested that the re-wording of the MD test (into a SIEC test) constitutes a move towards a Chicago School model and ‘radically breaks with the European tradition of pursuing broader goals in competition law enforcement’ (2007: 499). However, if the argument advanced in Chapter 7 is correct, then this would seem to exaggerate the importance of a minor (and quite unexciting) technical change, and arguably to overlook that, in EC merger control, the MD test was never applied with a view to pursue “broader goals”.

<sup>108</sup> Contributions forming part of this emerging research agenda include Buch-Hansen (2007), Buch-Hansen & Wigger (2008), Chari & Kritzing (2006), Wigger (2007, 2008) and Wigger & Nölke (2007). Although taking a theoretical perspective that differs much from the one taken in these contributions, Wilks (2005b and 2007) also contain elements of a critical analysis of recent developments in EC competition policy.

<sup>109</sup> It must be stressed that I am talking about tendencies here: I do not mean to suggest that the current thesis differs from each and every work on EC competition policy in all three respects.

<sup>110</sup> [http://ec.europa.eu/comm/competition/consumers/index\\_en.html](http://ec.europa.eu/comm/competition/consumers/index_en.html), accessed on 5 December 2007.

<sup>111</sup> According to Open Europe, an independent think tank, 96 % of the articles in the Reform Treaty are copied directly from the Constitutional Treaty. See <http://www.openeurope.org.uk/media-centre/pressrelease.aspx?pressreleaseid=51>, accessed on 5 December 2007.