

**EUROPEAN INTEGRATION THEORIES: THE CASE OF EEC  
MERGER POLICY**

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PhD

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## ABSTRACT

Political scientists have been searching for a comprehensive theoretical framework to explain the dynamics of European integration since the European Communities came into being in the early 1950s. European integration theory was dominated by neo-functionalism in the 1960s and by realism in the 1970s and early 1980s. In the late 1980s these two paradigms were finally confronted. As a result of this confrontation, there seems to be an emergence of a new approach based on the idea that neither neo-functionalism nor realism alone can explain European integration but that each perspective provides fundamental insights. Multi-level governance models and even state-centred models tend to recognise that both theoretical frameworks have something to offer.

Is it possible to view neo-functionalism and realism as complementary instead of competing theories of European integration? If both approaches contain some elements of truth but neither taken on its own is sufficient, insights from each may be needed to really understand the dynamics of integration. This piece of work tries to establish whether the idea that these two explanations need to be combined is worth considering at all. This hypothesis is tested in relation to European merger policy.

The European Economic Community's (EEC) Merger Regulation represents the single most important extension of Community competition law since its inception. Merger control was explicitly contemplated in the 1951 Treaty of Paris but the EEC was created in 1957 without any reference to these policy arrangements. For the first time in 1973, the Commission submitted to the Council a proposal for an EEC merger regulation. Yet it was only after five amendments and sixteen years that, in 1989, a merger control regulation was agreed upon. Why was an agreement on European merger regulation possible in 1989 rather than before? This research addresses this question using both neo-functionalism and realism as explanatory theories.

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**LIST OF ABBREVIATIONS**

DG IV	Directorate-General IV in charge of EC competition policies
EC	European Community
ECSC	European Coal and Steel Community
EEC	European Economic Community
EU	European Union
Euratom	European Atomic Energy Community
OECD	Organisation for Economic Co-operation and Development
SEA	Single European Act
UNICE	Union of Industrial and Employers' Confederations of Europe

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## PREFACE

The European Communities came into being with the Rome Treaties in 1957, establishing, in addition to the already existing European Coal and Steel Community (ECSC- Treaty of Paris 1951), a European Economic Community (EEC) and a European Atomic Energy Community (Euratom). In 1965 an agreement was reached to merge the institutions of the three Communities; this came into effect in 1967, and, although legally they were still separate entities, it became common to collectively refer to them as the 'European Community' (EC) (George, 1991). Lastly, in 1991, the Maastricht Treaty created the European Union (EU) establishing a three pillared structure, of which the EC is just one, albeit the most important, pillar. The two other pillars are: the Common Foreign and Security Policy and the Home Affairs and Justice Policy.

European integration, from the ECSC to the EU, has implied the development of a European legal framework, the creation of new European institutions such as the European Council (1974), the reinforcement and democratisation of others such as the European Parliament, the entrance of new members such as the United Kingdom or Spain, and new transfers of power and sovereignty to the European institutions through agreement on new common policies such as the 1989 EEC Merger Regulation. For Lintner and Mazey (1991: 1): 'The result has been a complex intermeshing of the Community's and the member-states' economic, legal, and political systems.' Today's EU has achieved a strong role both in the world as a whole and in the economic, social and political daily life of its member states. As Urwin (1991: 245) states: '...the EC has become a fact of life.'

This growing significance of the EU makes it essential to find a clear answer to questions such as the following: Which are the forces leading towards integration? Why is integration possible at one moment rather than at another? How do policy responsibilities of the European Communities develop? It is only by finding answers to such questions that the ability to understand recent Western European history becomes possible, and this in turn enables future predictions.

Political scientists have tried to answer these and other related questions by identifying constant backgrounds or conditions upon which European integration is contingent. European integration theory was dominated by neo-functionalism in the 1960s and by realism in the 1970s and early 1980s. In the late 1980s these two paradigms were finally confronted. As a result of this confrontation, there seems to be an emergence of a new approach based on the idea that neither neo-functionalism nor realism alone can explain European integration but that each perspective provides fundamental insights. Multi-level governance models and even state-centred models tend to recognise that both theoretical frameworks have something to offer.

Is it possible to view neo-functionalism and realism as complementary instead of competing theories of European integration? If both approaches contain some elements of truth but neither taken on its own is sufficient, insights from each may be needed to really understand the dynamics of integration. This dissertation tries to establish whether the idea that these two explanations need to be combined is worth considering at all. This hypothesis is tested in relation to European merger policy.

The EEC Merger Regulation represents the single most important extension of Community competition law since its inception. Merger control was explicitly contemplated in the 1951 Treaty of Paris but the EEC was created in 1957 without any reference to these policy arrangements. For the first time in 1973, the Commission submitted to the Council a proposal for an EEC merger regulation. Yet it was only after five amendments and sixteen years that, in 1989, a merger control regulation was agreed upon. Why was an agreement on European merger regulation possible in 1989 and not before? This research addresses this question using both neo-functionalism and realism as explanatory theories.

This work is presented in two parts. The first part is composed of three chapters throughout which European integration theory is reviewed, a tentative hypothesis shaped, the selection of case study justified and a methodology proposed. In the second part, another set of three chapters cover the description, analysis and interpretation of the results obtained from the operationalisation of the theoretical hypothesis in relation to the case study. Finally, the dissertation concludes with a

discussion about possible extrapolations and areas of future research.

It should be noted at this point that the terms EC and EEC will be used in preference to EU in this work because both the period under study and the agreement on the transfer of the policy examined here predate the creation of the EU. For the same reason, the Treaty of Rome numbering is employed in the text. However, where the Treaty of Maastricht has modified, removed or renumbered a Treaty provision mentioned in this research, the changes are indicated in the footnotes. As to the alterations the 1997 Treaty of Amsterdam will bring about when ratified, they are displayed in an appendix.

**PART I. THEORY, IMPORTANCE AND METHODOLOGY**

## **CHAPTER 1. EUROPEAN INTEGRATION THEORIES: SHAPING AN HYPOTHESIS**

Political scientists have been searching for a comprehensive theoretical framework to explain the dynamics of European integration ever since the European Communities came into being in the early 1950s. Two theories, neo-functionalism and realism, have been able to capture the complexity of the integration phenomenon to the point of becoming, in Kuhn's terms, 'paradigms' for this area of political science and hence 'the pivot on which the academic debate hinges' (Corbey, 1995: 253). Both theories have always been considered as competing perspectives to European integration. What is proposed here is to contemplate the possibility that they may actually be complementary approaches to integration. This chapter sets the theoretical framework of this research reviewing the neo-functionalist and realist postulates and recent developments in the theoretical debate.

### **1.1. THE NEO-FUNCTIONALIST THEORY**

After the Second World War, when the nation-state as a political unity was at a moment of weakness, different theories of integration were proposed, especially by American scholars. According to Milward and Sorensen (Milward *et al.*, 1993: 1), most of those theories were a direct response to the needs of the United States of America foreign policy towards Europe. In their words: 'Once the unity of Western Europe became a goal of US foreign policy, political theories which predicted the likelihood of that goal being achieved proliferated.' However, it is the opinion of others (e.g. Cram, 1996 or Muns, 1972) that the development of integration theories had to be attributed to the desire of political scientists, political leaders and intellectuals to create the conditions that would prevent another war, that is a community different from the nation-state system (Haines, 1957).

In any case, all scholars agree that among the post-war theories of integration, 'the explanatory theory that dominated studies of the EC in the 1950s and early 1960s was neo-functionalism' (George, 1991: 19). Indeed, whilst other approaches such as the federalist or the functionalist, were rapidly dismissed by the factual reality of the 1940s and 1950s, the neo-functionalist was able to capture a universal recognition as *the* theory of European integration.

The neo-functionalist theory was largely developed by Haas (1958; 1963; 1968) and Lindberg (1963) in the 1950s and 1960s. It was a theory of regional integration based upon a sympathetic revision of the functionalist's postulates for global integration developed by David Mitrany. As Hix (1994: 10) writes, functionalism 'was the starting point of modern integration theory in general, and of neo-functionalism in particular.' Although different, both theories have elements in common. The following table summarises both approaches.

#### **TABLE 1.1. NEO-FUNCTIONALISM VERSUS FUNCTIONALISM**

NEO-FUNCTIONALISM	FUNCTIONALISM
<u>- ACTORS IN THE PROCESS OF INTEGRATION</u>	
* ELITES	* CITIZENS
<u>- SOCIAL LIFE IS DOMINATED BY</u>	
* COMPETITION AMONG INTERESTS	* UNDERLYING SOCIAL CONSENSUS
<u>- INTERNATIONAL INTEGRATION NEEDS</u>	
* THE EFFICIENT MANAGEMENT OF CONFLICT	* CONSENSUS BUILDING
* CONVERGENCE OF SEPARATE PERCEPTION OF INTERESTS	* PERCEPTION OF A GENERAL GAIN OR COMMON GOOD: WELFARE NEEDS.
<u>- ESSENTIAL ELEMENTS IN THE INTEGRATION PROCESS</u>	
* THE CHANGING ATTITUDES OF KEY ACTORS	* THE CHANGING OF POPULAR ATTITUDES OR BEHAVIOUR
* THE FRAMEWORK OF EXISTING INSTITUTIONAL STRUCTURES	
<u>- A CONSENSUS IS REQUIRED</u>	
* A PROCEDURAL CONSENSUS (groups are persuaded to pursue their interests through an agreed framework)	* A CONSENSUS ON INTERESTS
<u>- THE END RESULT</u>	
* NEW POLITICAL COMMUNITY	* UNIVERSAL SOCIO-PSYCHOLOGICAL COMMUNITY

Neo-functionalism and functionalism were both process theories; 'they both contained a sophisticated view upon the causal links which were expected to lead from one level of integration to another' (Taylor, 1983: 7). However, as table 1.1 shows, the two theoretical frameworks attached significance to quite different aspects of the integration process. The neo-functionalists stressed the psychology of elites, whereas functionalism's emphasis was on a popular psychological community.

This is a consequence of different conceptions of society. For the neo-functionalists it is a pluralist community, 'a system of co-existing but different interests' (Taylor, 1983: 3). For the functionalists it is a 'community of beliefs,

values, attitudes and loyalties' (Taylor, 1983: 3). Accordingly, each theory saw the essence of stability in different elements. The older functionalists pointed to the element of agreement, consensus in society, that is, to an underlying homogeneity of society. The neo-functionalists, on the other hand, argued that social life was dominated by competition among interests. They recognised stability in the efficient management of conflict in a pluralist society.

In short, both theories were process theories. However, while functionalism was interested in changes in popular attitudes, neo-functionalism focused on changes in elite attitudes and expectations. As Lintner and Mazey (1991: 7) argue: 'This shift in emphasis marked an important theoretical development in that it introduced politics and political conflict as part of the integrative process.' In the words of Cram (1996: 45):

Haas did not share Mitrany's vision of politically neutral actors carrying out technical/functional tasks unaffected by political conflict. Less idealistic, Haas's pluralist-based neo-functionalism recognised the continuing importance of national political elites, and emphasised the key role played by interest-based politics, in driving the process of political integration.

Another important similarity and at the same time difference between both theories, which is not reflected in the table, refers to the inevitability of the integration process. Indeed, as Milward (1992; 1993) points out, both saw a linear continuum from the functional origins of the state to the point where the continued pursuit of its functions would necessarily lead to integration. However, for the functionalists the original purpose of creating international institutions was to achieve integration, yet the neo-functionalists moderated this view. They confined their argument to the premise that once such institutions were established they would increasingly tend to seek integrationist solutions even if integration had not been the original purpose in creating them.

As to the end result of integration, for both the inevitable process of integration was to lead, through a cumulative dynamic, to a form of community that would suppose the rejection, or at least transformation, of the nation-state system. As Evans and Newham (1998: 358) put it: 'Both theories assume that people's loyalties to their existing nation-states will be steadily eroded as they see that integration has

many positive benefits and that these can best be obtained and sustained, by the new nexus.' However, while functionalism 'directly opposed the recreation of territorially-based state structures at the European level except insofar as they represented unrelated responses to technical self-determination' (Cram, 1996: 43), in neo-functionalism 'states were simply to be supplemented/replaced by new territorially-based organisations at the European level' (Cram, 1996: 44). As noted in table 1.1, neo-functionalists believed the integration process was to bring on a new political community; for the functionalists it was to produce a socio-psychological community.

The neo-functionalists claimed that there was a linear continuum or progress leading from the nation-state system towards a terminal condition which they called *political community*. Haas (1958: 5) described political community as 'a condition in which specific groups and individuals show more loyalty to their central political institutions than to any other political authority, in a specific period of time and in a definable geographic space.' According to the author, a variety of constitutional and structural factors were compatible with this notion (Schmitter, 1996b; Pentland, 1973; Haas, 1963).

This condition was, for the neo-functionalists, the one towards which the process of *political integration* was supposed to lead to. Lindberg (1963: vii) defined political integration as 'the process whereby a number of nation-states come to construct a single political community.' Haas (1958: 16) specified it as:

...the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institutions possess or demand jurisdiction over the pre-existing national states.

The neo-functionalist way of describing the central dynamic of this process was through the concept of *spillover*. The 'logic of spillover' was 'the motor' of the integration process (Hix, 1994: 4). In Taylor's words (1983: 8), the term spillover summed up the 'subtle relationship between the functional areas within which an agreement had been struck and the changing attitudes of actors' that characterised the progress towards political community.

The concept of spillover had two aspects. 'Functional spillover' refers to the process whereby 'a given action, related to a specific goal, creates a situation in which the original goal can be assured only by taking further actions, which in turn create a further condition and a need for more action, and so forth' (Lindberg, 1963: 10); 'sector integration... begets its own impetus toward extension to the entire economy...' (Haas, 1958: 297). This aspect of the process was based on the neo-functionalists' belief that because modern industrial economies were made up of interdependent parts, it was impossible to isolate any particular policy sector; integration of one sector will succeed only if other contiguous areas were also integrated (Lintner and Mazey, 1991; George, 1991). Quoting Lindberg and Scheingold (1970: 7): 'Haas reasoned that economic problems were interconnected, so that the solution of one by joint action would lead naturally and necessarily to joint action on others.'

It is interesting to note that this version of spillover draws from Mitrany's doctrine of 'ramification' whereby the successful development of collaboration in one technical field would encourage comparable behaviour in other technical fields (Cram, 1996; Dougherty and Pfaltzgraff, 1990). However, Mitrany's rather organic process focused 'on the very separate demands of different functional tasks', whereas neo-functionalism focused 'on the potential linkages between sectors' (Cram, 1996: 47). Furthermore, alongside this technical version of spillover, neo-functionalists also identified 'political spillover', a concept that cannot be found in the non-political approach of the functionalists.

'Political spillover' involved the build-up of political pressures in favour of further integration within the states involved. Political actors would 'shift their attention and ultimately their loyalties' from the national to the supranational level (Lindberg and Scheingold, 1970: 7). In the words of Greenwood (1997: 244):

In the first instance, business interest groups, in particular, would come to see the value of European integration, perhaps from tangible benefits achieved in other sectors, and exert demands upon member states for integration at the supranational (European) level. As integration initiatives arose, so pressure would build up in favour of further integrative measures, and transnational groups would form to exert demands at the transnational level in tandem with those made at the national level, and to form a barrier against the possibility of any retreat in integration.

Once an area of the economy was integrated, the interest groups operating in that sector would have to exert pressure at the European level, that is, on the organisation charged with running their sector (George, 1991).

The concept of spillover was reinforced by the neo-functional assumption that 'integration is a *two-way process* in which the central institutions affect and are affected by the subject groups' (Haas, 1958: xii; my emphasis). Indeed, by this assumption neo-functionalists recognised that *supranational institutions* had a crucial role to play in the determination of common policies. They were to be, given the propensity of organisations to maximise their powers, 'agents of integration' (Haas, 1958: 29). In the case of European integration, the neo-functionalists concentrated upon relationships between national political actors and the Commission. They believed that the European Commission was in a unique position to manipulate the facts of domestic pluralism and international interdependence so as to push forward the process of European integration even against the resistance of national governments (George, 1991).

Haas (1963: 11) summarised the relationship between spillover and the central (European) institutions in the integration process, when he stated that 'many of the decisions are integrative in their immediate economic consequences [functional spillover] as well as in the new expectations and political processes which they imply [political spillover]. It is this indirect result which is maximised by the mixture of institutions [two-way process].' In other words, for the neo-functionalists, supranational institutions helped to maximise the spillover effects.

As to the role of the member states' governments in the process, Lindberg (1963: 11) stated: 'Spillover assumes the continued commitment of the Member States to the undertaking.' Member states must possess 'the will to proceed' if integration is to continue. Nevertheless, Lindberg (1963: 11) further wrote that: 'It seems likely, however, that with the operation of the other integrative factors, the alternatives open to any Member State will gradually be limited so as to reduce dependence upon this factor.' Member states or governments were expected to have a somewhat passive role in the integration process (Corbey, 1995). As Hoffmann

(1968: 199) put it:

According to [the logic of integration], the double pressure of necessity (the interdependence of the social fabric, which will oblige statesmen to integrate even sectors originally left uncoordinated) and of men (the action of the supranational agents) will gradually restrict the freedom of movement of the national governments by turning the national situations into one of total enmeshing. In such a milieu, nationalism will be a futile exercise of anachronism, and the national consciousness itself will, so to speak, be impregnated by an awareness of the higher interest in union.

On the whole, the theory had a strong predictive element: it not only promised an uncomplicated future for European integration but also gave precise policy prescriptions of how to bring about integration. Indeed, as may be inferred from what precedes, the neo-functionalist theory argued that integration was a cumulative and expansive two-way process or continuum represented by the ideas of functional spillover, political spillover as well as the Commission leadership, and leading from the nation-state system towards a new form of political community. This strong element of prediction and the fact that it was able to explain what was actually happening in Western Europe in the 1950s and early 1960s, made the theory very attractive not only to academics but also to European policy-makers.

Indeed, the 1950s' and early 1960s' factual reality seemed to match with the neo-functionalist's postulates developed by Haas and Lindberg. Haas (1958) had built up his theory upon the observed experience of the functioning of the ECSC and the integrative attempts that followed; and Lindberg's (1963) later analysis of the workings of the EEC appeared to confirm the validity of the neo-functionalist approach.

The EEC (and Euratom) appeared to have been the result of the ECSC success (a spillover example); and to have granted the supranational European institutions, especially the Commission, the potential to develop as political actors influencing the mode of accommodation of decision-making. Actually, as George (1991) points out, during the early years of the EEC, the supranational elements contained in its institutional structure gave the impression of being increasingly dominant in policy-making, as national governments followed a strong lead provided by the Hallstein Commission and surrendered their control over tariffs on industrial goods and over agricultural policy. Last but not least, the validity of the neo-functionalist theory

seemed to be reinforced by the constitution of several interest groups at the European level. According to Mazey and Richardson (1993: 5): 'By 1970 more than 300 Euro-groups existed...'

However, in the mid-1960s and 1970s, the theory came increasingly into conflict with observed developments. In January 1966, the Luxembourg Accords, which brought to an end the crisis in the Communities caused by the French withdrawal from participation in the major committees of the Communities in June 1965 ('empty chair' policy), confirmed that there would be no movement to majority voting in the Council of Ministers, as had been stipulated in the Treaty of Rome. This decision had the effect of hastening the development of intergovernmentalism in the Communities. In the words of Taylor (1983: 20): 'It meant that the style of decision-making came to focus upon building a consensus among governments rather than upon building an adequate majority in the Council.' Or as Wallace (1996: 46) states: '[this decision] began to undermine neofunctionalism and to make intergovernmentalism a more common descriptor of the Community's institutions.'

To make matters worse for the neo-functionalists, three institutional innovations in the late 1960s further reduced the Commission's room for manoeuvre. First, the member states developed the Committee of Permanent Representatives. Secondly, they created the management committee procedure. Lastly, in 1974, the European Council was established. All those institutional innovations were on the Council side of the Commission-Council axis, and tipped the balance further in that direction (George, 1991).

There is, therefore, evidence to show that neo-functionalists' emphasis on the role of the Commission in the integration process, did not coincide with the reality of the late 1960s and of the 1970s. Yet, this was not the only neo-functionalist parameter to be discredited by the reality of that period. The same can be said about the interest groups that were formed at European level and about the neo-functionalist belief in a linear process of integration.

Neo-functionalists expected European interest groups to develop 'a distinct

vested interest in increasing their attributes *vis-à-vis* the national constituent groups' as well as 'participation in them to represent a fundamental restructuring of expectations and tactics' (Lindberg, 1963: 99). In other words, they expected that there would be a steady consolidation of European interest groups at the European level and a decline in the position of national ones. The reality, however, was that 'much EC lobbying by national organizations or firms was conducted through national political and administrative structures' (Mazey and Richardson, 1993: 5);

...the Euro-groups were a forum for exchanging information and helped national groups to define the positions which they would follow in relation with their own governments in national capitals or with their governments' representatives in Brussels (Taylor, 1983: 42).

Furthermore, neo-functionalists also believed the process of integration to be a linear continuum leading from the nation-state system towards a new political community. Nevertheless, after the 1966 Luxembourg Accords, European integration was stopped in its tracks. Neo-functionalists' expectations of spillover did not take place, 'nothing like an incremental and self-sustaining momentum towards further integration could be claimed' (Greenwood, 1997: 246). All attempts to increase the scope and pace of European integration (e.g., Hague summit of 1969, the 1970 Werner Report on European Monetary Union, and the 1975 Tindemans Report on European Union) were halted by decision-making grid-locks and a dysfunctional institutional structure. Exceptions to this rule, though, were the rulings of the European Court of Justice, yet their impact on European integration received little attention from neo-functionalist writers (Leonardi, 1995; Weiler, 1993 and 1991; Stein, 1981).

As may be inferred from what precedes, the basic neo-functionalist theory components -the role of leadership of the Commission, the shift of loyalties and expectations of national groups upon the European institutions and the linear character of integration, were refuted by the 1960s and 1970s developments. Why did the theory fail to pass the test of history?

The main reason depends upon the neo-functionalist underestimation of the role of the state and in particular of its ability 'to stop or to slow down the building of a central political system' (Hoffmann as quoted in Pinder, 1986: 43). Neo-

functionalism predicted a gradual and inexorable erosion of the powers of the nation-state in favour of a new political community leading to the replacement of the former by the latter. The reality of this first period of integration was, however, a continuous increase of the role of the nation-state. Neo-functionalists were predicting the replacement of the nation-state at the exact time when European states were embarking on unprecedented programmes of intervention, achieving a degree of power stronger than in any previous period. As a consequence, they could not forecast the reinforcement of intergovernmentalism in EC decision-making, or the strength of interest groups' national loyalties.

This lack of correspondence between the neo-functionalist perspective and the reality of the period analysed led to reassessments of the approach by the neo-functionalists themselves, and eventually to their abandonment of the theory. In the 1970s, several publications by the main exponents of the approach reflected their internal debate. Namely, Haas' work *The Obsolescence of Regional Integration Theory* (1975) and Lindberg's and Scheingold's *Europe's would-be polity: patterns of change in the European Community* (1970). Lindberg (1994: 82) has recently summarised the conclusions of this internal debate:

We were incorporating elements of intergovernmentalism; we were rejecting the automaticity of integration in the early theories; we were talking about the symbiosis of supranationalism and intergovernmentalism. We had abandoned the idea of linear progression and indeed I had projected an extended period of stasis: a plateau of equilibrium.

In short, they were trying to incorporate the nation-state into their theoretical framework recognising that integration was not a linear continuum but maintaining the idea that spillover could occur and that supranational institutions played an active role in the process of integration.

This line of reassessment has been retaken by scholars in the late 1980s and 1990s when some of those reverses for supranationalism had themselves been up-ended.

## 1.2. THE REALIST THEORY

The factual reality of the 1960s and 1970s and the problems of the neo-functional theory to explain it, led to the application of realist perspectives to the European case. The 'logic of diversity' seemed stronger than the 'logic of integration' (Hoffmann, 1968: 199).

The realist approach to European integration is an umbrella term grouping together related interpretations of EC politics and policy-making (Hix, 1994). Realist theories may be broadly defined as those theories which stress relative power (i.e. resources, capability for unitary action) and national interests and for which the principal actors at the international level are the nation-states, while all the other realities are subordinated to them (Dougherty and Pfaltzgraff, 1990). In these theoretical frameworks, the Community is a gathering of sovereign states, 'an international rather than a supranational organization' (Cameron, 1992: 28). The EC is just seen as an instrument of the nation-states, created to assist their regeneration and adaptation to the demands of the modern world. Under this view, the EC would be 'a forum for facilitating agreements in areas where the interests of autonomous states overlap' (Sandholtz, 1996: 405); 'a passive structure providing a contractual environment conducive to efficient intergovernmental bargaining' (Moravcsik, 1993: 508).

Among the theories that can be included in this wide-ranging definition, it is worth mentioning two recent approaches, one with a historical tendency and the other with a political perspective, held respectively by Milward and Sorensen (1993) and by Moravcsik (1993).

The theory proposed by Milward and Sorensen argues that 'nation-states since the late 19th century have been increasingly held together not by traditional symbols of allegiance nor by repressive force but by national policies designed to secure material benefits for large social groups' (Milward *et al.*, 1993: 182). In other words, since the late 19th century, nation-state claims to legitimacy have only been sustained when they have been able to respond to a greater range of demands from

their citizens.

These scholars hypothesise that some of the policies selected by Western European nation-states in the immediate post-war period, to reassert themselves as the fundamental organisational unit of political life, could only be successfully advanced through the international framework. Consequently, they argue that:

Integration, the surrender of some limited measure of national sovereignty, is a new form of agreed international framework created by the nation-states to advance particular sets of national domestic policies which could not be pursued, or not be pursued so successfully, through the already existing international framework of co-operation between interdependent states, nor by renouncing international interdependence (Milward *et al.*, 1993: 182).

In their view, therefore, historical evidence suggests that the selection between interdependence and integration as international frameworks for developing national policy choices depends on the nature of these national policies. They conclude that integration will be preferred over interdependence when 'similar and reconcilable sets of policy choices will be made in sets of nation-states' (Milward *et al.*, 1993: 19).

**Moravcsik's Liberal Intergovernmentalist approach** builds on 'intergovernmental institutionalism'. In the opinion of Moravcsik, his approach refines former theories of interstate bargaining and institutional compliance, and adds an explicit theory of national preference formation grounded in liberal theories of international interdependence; hence integrating within a single framework two types of general international theory often seen as contradictory. In short, liberal intergovernmentalism is grounded in fundamental concepts of international political economy, negotiation analysis, and regime theory, having at its core three elements: the assumption of rational state behaviour, a liberal theory of national preference formation and an intergovernmental analysis of interstate negotiation.

Moravcsik (1993: 474) claims that 'the EC can be analysed as a successful intergovernmental regime designed to manage economic interdependence through negotiated policy co-ordination.' Namely,

The liberal intergovernmentalist view seeks to account for major decisions in the history of the EC by positing a two-stage approach. In the first stage, national preferences are primarily

determined by the constraints and opportunities imposed by economic interdependence. In the second stage, the outcomes of intergovernmental negotiations are determined by the relative bargaining power of governments and the functional incentives for institutionalization created by high transaction costs and the desire to control domestic agendas (Moravcsik, 1993: 517).

To sum up, it can be said that Moravcsik's approach is based on the idea that refinements and extensions of existing theories of foreign economic policy, intergovernmental negotiation, and international regimes provide a plausible and generalisable explanation of the EC's evolution. 'Although the EC is a unique institution, it does not require a *sui generis* theory' (Moravcsik, 1993: 474), European integration can be explained with reference to general theories of international relations.

Thus, these two approaches see the EC as the solution nation-states have found to carry on their national policies in a context of economic interdependence. European integration does not represent the end of the nation-state but helps the state survive. According to both, nation-states still are the exclusive actors both at the national and international level and integration will be determined, through bargaining in the European Council and the Council of Ministers, by their relative power and interests. Only in cases where policy preferences of the dominant, most powerful, states have converged will new steps towards integration be taken.

Proponents of realism consider this convergence of preferences may be the result of economic upswings or of the internationalisation of the economy (Corbey, 1995). But the role of supranational institutions and functional spillover as possible sources of convergence is dismissed (Sandholtz, 1996; Corbey, 1995). Also, though interest groups contribute to domestic preference formation among member states, the role of transnational-level aggregations of interests is under-emphasized (Greenwood, 1997). For the realists, the domestic and EU arenas 'are nested rather than interconnected' (Marks *et al.*, 1996: 345), governments are 'the sole mediators between non-state actors and EC policymaking' (Stone Sweet and Sandholtz, 1998: 18).

Just as neo-functionalism neglected the importance of the nation-state role, realist theories disregard the role the experience of integration and the presence of

European institutions can have on the integration process. In the words of Greenwood (1997: 253), realist accounts fail 'to adequately conceive of the autonomy of supranational institutions and the importance of their relationships with non-state actors for the development of integration.'

### 1.3. SHAPING A NEW HYPOTHESIS OF EUROPEAN INTEGRATION

The dramatic transformation of the political and economic climate in Western Europe during the 1980s led to a revival of theoretical debate on the 'whys' and 'hows' of European integration. Neo-functionalists and realists authors (such as Taylor, 1991; Tranholm-Mikkelsen, 1991; Moravcsik, 1991; Sandholtz and Zysman, 1993; Milward *et al.*, 1993) saw the integration dynamics as providing evidence of the validity of their own approach whilst revealing the challenging limits of the other (Cram, 1996; George, 1996).

Perhaps these scholars were both right and wrong. Right in finding evidence of neo-functionalism or realism, wrong in seeking to offer monocausal explanations. In fact, the idea that both theories have something to offer to the understanding of European integration has been taking force in the 1990s. The theoretical debate has experienced an evolution. From neo-functionalism versus realism, the debate has moved to state-centric versus multi-level government models (Sandholtz and Stone Sweet, 1998; Armstrong and Bulmer, 1998; Greenwood, 1997; Marks *et al.*, 1996a; Marks *et al.*, 1996b; George, 1996; Sandholtz, 1996; Moravcsik, 1993).<sup>1</sup>

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<sup>1</sup> It is worth noting that some of these new models do not try to analyse, as this research does, the dynamics of integration but the governance of the EU. There is growing literature examining the function of the EU as a polity:

Increasingly scholars assume that some institutional structure is in place and examine what goes on inside these structures. Politics and policy-making within institutions have assumed an analytic place alongside the politics of institutional change. (Caporaso and Keeler as quoted in Cram, 1996: 53)

When analysing the governance of the EU, scholars tend to draw on comparative politics approaches rather than on international relations theories such as the neo-functionalist or realist perspectives used in this research. In fact, the claim has been made that while 'the international relations approaches may be appropriate for the study of European *integration* ... , comparative politics approaches are more appropriate for the analysis of European Community *politics*' (Hix, 1994: 22-23; his emphasis).

'Multi-level government models posit that power has moved away from national executives and away from the Council as a plethora of actors mobilize and exert influence at various points in the decision-making process' (Golub, 1996: 330). In these models 'the state no longer monopolizes European level policy-making or the aggregation of domestic interests' but supranational institutions and subnational actors have a role (Marks *et al.*, 1996: 346). These are post-neo-functional approaches or, as Pollack (1996) called them, 'theoretical cousins' of neo-functionalism.

'State-centric models posit that the Council has retained a monopoly on real power and that other EC institutions play either a limited or subservient role in the policy-making process' (Golub, 1996: 330). Yet, although realist, 'the state-centric model does not maintain that policy-making is determined by state executives in every detail, only that the overall direction of policy-making is consistent with state control' (Marks *et al.*, 1996: 345).

This shift towards multi-level government versus state-centric models is significant. It can be seen as a convergence movement between the old approaches. Both types of models seem to recognise that the failure of integration theories may be attributed to one-sided attention to a single actor or group of actors. Indeed, post-neo-functional models do 'not reject the view that state executives and state arenas are important' (Marks *et al.*, 1996: 346); 'intergovernmental bargaining is an ubiquitous feature of supranational governance' (Stone Sweet and Sandholtz, 1998: 25). Also, state-centric models have incorporated societal influence into national preferences (Caporaso, 1998); some realists have even acknowledged the growing power of supranational European institutions (Pierson, 1998). Can this convergence be pushed to its logical conclusion? Can neo-functionalism and realism be understood as complementary instead of competing approaches to European integration?

Both realists and neo-functionalists accept economic interdependence is at the origin of integration. For the neo-functionalists, on the bases of a first intergovernmental grand bargain, economic interdependence feeds the internal dynamics of the process of integration creating functional and political spillovers

which are maximised by the supranational institutions. For the realists, integration is a possible policy response by nation-states to rising economic interdependence. Integration will serve the interests of member states, especially the most powerful ones, and will be controlled by them.

For integration to occur, therefore, the realists consider that such a solution should be in the national interest of the most powerful nation-states. They generally take the preferences of member states' governments as given and concentrate their analysis on how national executives seek to pursue those preferences. Behind this apparent openness, however, they stress the preoccupation of national governments with preserving sovereignty and their belief that previous integration does not determine national governments' preferences. On the other hand, neo-functionalists claim that the integration process provides for an internal dynamic based on spillover and supranational institution's autonomy. Agreement on an area will spill over on to other areas. According to them, member states' governments will be dragged along by the dynamics of the process. They will not be able to offer much resistance.

Following from this, it may be argued that each theoretical framework concentrates its analysis on different actors: realists on the governments of the member states and neo-functionalists on supranational and transnational actors. If all these actors have an autonomous role in the integration process, neither perspective is right. Although both approaches would contain some elements of truth, neither one on its own would be sufficient. Evoking the well-known story of the blind men and the elephant (Puchala, 1972), neo-functionalist and realist scholars would have each touched a different part of 'the elephant' and concluded that 'the large animal' had the appearance of the part touched. To understand the dynamics of integration, insights from both theories may be needed.

To see whether the hypothesis that the neo-functionalist and realist perspectives need to be combined to offer a more complete picture of the dynamics of European integration holds, I propose to go back to the basics. Namely, I intend to apply the two 'old' paradigms fundamental postulates to a case study. The aim will be to see which role was played by supranational institutions, functional spillover,

interest groups and member states' governments in a specific integration process and what were the relationships, if any, between these factors. On the basis of the results obtained, the theoretical implications will be discussed.

## CONCLUSIONS

The aim of this thesis is to contribute to the understanding of European integration by testing a new hypothesis. This new hypothesis considers that in order to understand the forces leading towards integration it is necessary to combine neo-functionalism and realist insights. It is based on the belief that both traditional approaches contain some elements of truth but that neither of them on its own provides a sufficient explanation of European integration dynamics.

As applying this hypothesis to all European policies is too broad a task, I will focus my analysis on one specific area: EEC merger policy. The empirical materials gathered will be used as a 'plausibility probe', that is, to establish whether the theoretical construct proposed is worth considering at all (Eckstein's terminology as quoted in Sandholtz, 1996: 405). Therefore, although I will only probe the validity of the complementarity hypothesis in relation to one case study, I hope it will be a step towards the consolidation of a new way of understanding and explaining the dynamics of European integration. Indeed, whatever the findings, I believe this effort will help inform, by introducing new facts and ideas, the actual search for a comprehensive theoretical framework. Nobody, as yet, has tried to apply any of these two theories to this particular case study.

Why have I chosen merger policy as my area of study? To answer this question it is necessary to explain what is merger policy, which is its role and to place this policy within the broader context of competition policy. This will be dealt with in the second chapter.

## CHAPTER 2. THE CASE STUDY: NATURE AND IMPORTANCE OF MERGER POLICY

EEC merger policy has been chosen as case study to test both the neo-functional and realist approaches to European integration. The purpose of this second chapter is to justify this selection. To this end, I have divided the chapter into three main sections. The first will be devoted to defining the nature of mergers. The second section will look into the nature of merger policy. Lastly, the third section will assess the importance of EEC merger policy for European integration. It will be shown that the significance of merger policy in EC development makes it a good case for examining the explanatory power of European integration theory.

### 2.1. THE NATURE OF MERGERS

A **merger** can be defined as a process of integration between two (or more) firms -a union of two (or more) formerly independent enterprises. In other words, a merger is like a 'marriage' between companies through which two (or more) formerly independent firms come under common control (Ballarín *et al.*, 1994; Hay and Morris, 1991; Scherer and Ross, 1990; Weinberg and Blank, 1979; Steiner, 1975; CEC, 1966a). However, it is common practice to use the word 'merger' to also include both take-overs and certain joint ventures.

Regarding the inclusion of take-overs, a distinction can be made between 'merger' and 'take-over', where 'merger' is used to describe the process of voluntary fusion between two (or more) companies, and 'take-over' means the acquisition of control through share purchase without the agreement of the directors of a company (Shepherd, 1990; OECD, 1974). However, it is generally agreed (see CEC, 1994c; Ballarín *et al.*, 1994; Chiplin and Wright, 1987; Weinberg and Blank, 1979) that a

clear distinction between a merger and a take-over is in practice impossible to establish because many borderline cases exist, for which, even *ex post*, it is not clear if a deal was a simple take-over or a true merger. It has been further argued that, from an economic point of view, the difference is of no importance as both types of deals have the same structural effects.

Concerning the inclusion of joint ventures, these operations are 'a strategic alternative to acquisition', 'a form of alliance between two (or more) firms for the purpose of entering a new market or a new business' (Pocket Strategy, 1994: 32 and 114). In other words, the term 'joint venture' refers to a variety of forms of interfirm relationships that, unlike a total merger, involve only a partial and often temporary integration of the parent companies' functions, leaving them free to continue as separate operational units. By and large, however, certain joint ventures are subject to merger legislation. (Jones and Gonzalez-Diaz, 1992; Brittan, 1991; Rosenthal, 1990; Shepherd, 1990; OECD, 1986a)

For the purpose of this study and in line with common practice, the term 'merger' will be used to describe both mergers and take-overs. In addition, this term will be applied to those joint ventures that are subject to the same legislation. In short, from now on, I will refer to mergers in a broad sense, embracing the wide variety of legal arrangements within and throughout the EC that are covered by merger control legislation, i.e. all external growth operations.

Two broad **motives** can be distinguished to explain why a company should wish to merge with, or to acquire control of another company. There can be profit motives<sup>2</sup>: a merger may serve the firm's objective to gain profits. Certainly, the firm that ensues from a merger may have more *market power* and, thus, can achieve higher profitability. A merger can also combine under-used resources in one company with complementary under-used resources in another, meeting the so-called '2+2=5' *synergy* criteria, i.e. the combined enterprise will produce greater or more certain earnings than the sum of earnings of the two companies. Two firms operating under

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<sup>2</sup> Traditional neo-classical profit maximising perspective or value-maximising approach.

capacity, for example, can share fixed costs and benefit from economies of scale. In addition, mergers may result in several kinds of *pecuniary economies*, i.e. economies that provide money benefits without improving the use of real resources. For instance, tax laws and accounting rules may raise the profitability of mergers.

But mergers not always flow from a rational assessment of the economic interest of the companies. They may be the product of managerial motives<sup>3</sup>, that is, of the 'acquisitive ego' of the management (as opposed to owners) of one or both the companies. For example, managers may decide to increase the sheer size of their firm through a merger in order to add to their sense of status and affluence, rather than to achieve more profits. Managers may also choose to acquire or merge with another company as it is much more exhilarating than organic growth, rather than to maximise returns. (*The Economist*, 9 Jan 1999; *The Economist*, 12 Aug 1995; Ballarín *et al.*, 1994; Bishop and Kay, 1993; Hay and Morris, 1991; Fernandez Sanchez, 1991; Sherer and Ross, 1990; Shepherd, 1990; Rosenthal, 1990; Chiplin and Wright, 1987; Williamson, 1987; Weinberg and Blank, 1979; Steiner, 1975; Scherer, 1974; Manne, 1965)

Whatever their motives, mergers may be generally classified as horizontal, vertical or conglomerate, although any particular merger may not be capable of strict categorisation. A horizontal merger is a marriage of rivals. It involves the joining together of two companies which are producing essentially the same products or services, or products or services which, before the merger, used to compete directly with one another. A vertical merger occurs where one of the two firms' involved is an actual or potential supplier of goods and services to the other, so that the two companies are both engaged in the manufacture or provision of the same goods or services but at different stages in the chain of production. Lastly, a conglomerate merger is one that brings together firms which do not produce similar products and where neither is an actual or potential supplier of the other, i.e. the businesses of the two companies are not related to each other either horizontally or vertically. In this case, a diversification of product lines occurs. (Whish, 1993; Rosenthal, 1990;

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<sup>3</sup> This relates to alternative theories of the firm that see the divorce between ownership and control as enabling the management to pursue their own personal objectives.

Shepherd, 1990; Asch, 1983; Weinberg and Blank, 1979; OECD; 1974)

All these transformations, through which two (or more) formerly independent firms come under common control, not only change the structure of the companies involved but also the market in which they operate. Mergers are particularly important **market structure-shaping forces** (Ballarín *et al.*, 1994; Scherer and Ross, 1990). Indeed, the structure of a market is defined by its degree of concentration, i.e. the extent to which the largest firms dominate an industry, a large sector or the whole of the economy (Hay and Morris, 1991; Admiraal, 1990; Shepherd, 1990; De Jong, 1988; OECD, 1979; OECD, 1974). Mergers have the capacity to alter the ways markets are organised, in that they increase industrial concentration by amassing resources, assets and economic power in fewer hands. This is why in EC legal terms, the word 'concentration' covers all arrangements whereby one undertaking (i.e. almost any independent entity engaged in activities of an economic or commercial nature) obtains control of another, including certain joint ventures (Brittan, 1991).

At any point in time, firms will be pursuing one or more (profit or managerial) objectives in the face of several constraints such as a given market structure and with it the shape and position of the demand curve or a set of cost conditions. Active behaviour involves the attempt over time to modify or remove constraints, thus permitting greater achievement of firm objectives. Merger's capacity to alter the structure of the market make them a form of active behaviour which can be undertaken in order to relax constraints (Hay and Morris, 1991). As Woolcock (1989: 1) states: 'Mergers are one of the instruments used by business to adapt rapidly to the changing competitive conditions.' In fact, mergers usually form part of the industry rationalisation processes (George and Jacquemin, 1992; Chiplin and Wright, 1987). They are one determinant of the changing industrial structure over time.

Merger activity in general tends to occur cyclically, that is in **merger waves**. However, this is not a continuous movement, but rather an irregular one (Ballarín *et al.*, 1994). In the last half-century, three merger waves can be distinguished in Western Europe, the last of which is still occurring.

The first European wave of mergers took place between 1958 and 1973, when trade barriers were lowered significantly following the establishment of the EEC. Indeed, although in Europe, the decade from 1958 to 1968 was dominated by United States-based corporations' direct investment, from the mid-1960s onwards European companies took the lead. Quoting the European Commission's *Second Annual Report on Competition Policy* (1973a: 10-11):

Available information shows that the general movement towards industrial combination is gathering strength in the Common Market. International concentration operations in the Common Market, which showed a marked increase from 1966 to 1970, were even more numerous in 1971. While participation of the undertakings of non-member countries in international operations remained substantial, it declined as a ratio of the number of concentration operations involving only Common Market undertakings.

However, it is necessary to specify that most of that period's restructuring and mergers were confined within national boundaries. This was, as Tsoukalis (1993: 102) points out, the period that saw 'the emergence of national champions.' In addition, this first European wave was characterised by both vertical and conglomerate mergers, though a few horizontal mergers did occur. In those years, therefore, firms largely merged to pursue product diversification within a limited geographical area. (Micossi, 1996; Ortega, 1996; CEC, 1994b; CEC, 1994c; Ballarín *et al.*, 1994; Sachwald, 1994; Jacquemin, 1993; Bishop and Kay, 1993; Staple, 1992; Tempini, 1991; Bernini, 1991; Jacquemin, 1990; Monopolkommission, 1989; De Jong, 1988; CEC, 1976; CEC, 1975; Mazzolini, 1975; Walsh and Paxton, 1975; CEC, 1974a; Scherer, 1974; CEC, 1973a; CEC, 1973e; *Financial Times*, 23 Jul 1973; *Financial Times*, 21 Jul 1973; CEC, 1972a; Cunning, 1972; OJ [1971] C 66/11; Rolfe, 1970; Stacey, 1970)

The second European wave of mergers took place between 1986 and 1992, when the single market programme was launched, and benefited from the higher capital mobility of the 1980s. This merger wave has been described with adjectives such as 'impressive' (Jacquemin, 1993: 93) or 'by any historical standard... enormous' (Bishop and Kay, 1993: 319). According to Commission data, published in its Annual Reports on Competition Policy and based on operations of the EC's top 1 000 firms, the total number of mergers rose from 303 in 1986-87 to 622 in 1989-90

and only began to decline after 1990.<sup>4</sup>

In contrast to the situation in 1987-88 and earlier, when national merger operations were nearly twice as frequent as international ones, in 1989-90 the greatest percentage rise was in relation to cross-border mergers among Community based companies, though international operations involving at least one non-EC undertaking were also a driving force of the wave. In other words, while, on the whole, the lion's share of merger activity in the late 1980s remained at national level, the ratio of cross-national mergers, particularly among EC companies, was substantially increased. Moreover, this wave was mainly horizontal, with firms looking to reinforce their specialisations and market position in the activities in which they performed best. Converse to the 1960s and early 1970s, the late 1980s wave of mergers was characterised by firms wanting to strengthen their positions in clearly defined core businesses and increase their geographical diversification. (Armstrong and Bulmer, 1998; Micossi, 1996; Barnes and Barnes, 1995; Ballarín *et al.*, 1994; CEC, 1994b; CEC, 1994c; Sachwald, 1994; Tsoukalis, 1993; Bishop and Kay, 1993; Jacquemin, 1993; Jacquemin and Wright, 1993; CEC, 1993b; Hodges *et al.*, 1992; Staple, 1992; OECD, 1992; Downes and Ellison, 1991; Jacobs and Stewart-Clark, 1990; Jacquemin, 1990; Montagnon, 1990; Jacobs and Stewart-Clark, 1990; CEC, 1990a; CEC, 1989a; Woolcock, 1989; CEC, 1988a; Woolcock, 1989)

Lastly, it may be argued that Europe is witnessing a third wave of mergers, which is primarily a cross-national wave. Though the number of national operations remains very high, the most dynamic component of this wave are cross-border mergers (CEC, 1998; CEC, 1997b; CEC, 1996b; CEC, 1995a). *The Economist* of 21 January 1995 evidences that in 1994, for the first time in three years, the number of cross-border deals in the EU grew: 'So buoyant has been the recent recovery in cross-border acquisitions in Europe, that 1994 had a whiff of the late 1980s about it. What is more, the frenzy seems to be a symptom of more than just the cyclical economic recovery.' In fact, Mr. Van Miert, Commissioner responsible for competition policy since 1993, let it be known that by the end of 1994, the number

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<sup>4</sup> These numbers include both pure mergers and take-overs but not joint ventures, which also experienced a similar trend.

of mergers with a Community dimension had practically doubled in that single year: 'The number of Community-scale mergers has risen sharply, with 66 notifications between 1 January and 31 August, as against 39 for the same period in 1993. Should this trend continue, some 100 mergers could be notified in 1994 (from an average of 50 in preceding years)' (*Agence Europe*, 13 Sep 1994).<sup>5</sup>

Since 1994, a growing number of mergers with a Community dimension have been notified each year to the Commission; namely, 110 in 1995, 131 in 1996, 172 in 1997 and 235 in 1998. These statistics show restructuring and mergers on the rise again in Europe. Indeed, the scope of Community control being limited to very large operations, these figures represent only a small proportion of the total number of mergers which take place in the Community. In any case, mergers, and in particular cross-border ones, seem to be taking place in areas where privatisation, the evolution of the Single Market and the arrival of the Single Currency are exposing firms to (prospects of) more competition; examples include the airlines, telecommunications, energy, pharmaceuticals and financial services. As in the late 1980s, they tend to be both horizontal and swept along by high stockmarket valuations. (*The Economist*, 9 Jan 1999; CEC, 1998; CEC, 1997b; CEC, 1997a; *The Economist*, 18 Oct 1997; *The Economist*, 28 Sep 1996; CEC, 1996b; CEC, 1996c; CEC, 1995a)

The reasons why these waves have occurred are not clear. Although there have been speculations, no study has yet been able to explain why mergers do come about in waves (*The Economist*, 16 Sep 1994). However, there is general consensus that both the lowering of trade barriers and the economic boom which accompanied it, have played an important role in inducing a restructuring of many markets by means of mergers in the three cases (*The Economist*, 21 Jan 1995; Barnes and Barnes, 1995; CEC, 1994b and 1994c, Ballarín *et al.*, 1994; Tsoukalis, 1993; Bishop

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<sup>5</sup> Under the 1989 EEC Merger Regulation (OJ [1989] L 395/1; corrigendum in OJ [1990] L 257), and until March 1998, when a reassessed EEC merger regulation entered into force (OJ [1997] L 180/1; corrigendum in OJ [1998] L 40/17), mergers had a Community dimension when the combined world-wide turnover of the parties exceeded 5 billion ECU; at least two of the parties had a Community-wide turnover of 250 million ECU or more; and each of the parties did not achieve more than two-thirds of its aggregate Community-wide turnover within one and the same member state. In short, the vast majority of cases with a Community dimension were cross-border deals and just a minority were large national operations with a clear impact in other Community markets.

and Kay, 1993; Staple, 1992; Jacobs and Steward-Clark, 1990). It is worth noting, that like the number of cases taking place across national frontiers between Community-based companies, the importance of mergers, in terms of the assets or employment involved, has tended to increase (CEC, 1997b; CEC, 1996b; CEC, 1995a; Barnes and Barnes, 1995; Monopolkommission, 1989; Cooke, 1988; Jacquemin, 1982). In other words, it seems that European firms have been changing their reference market from 'national' to 'European' and that, as De Jong (1988: 1) affirms, 'merger intensity rises with size-class firms.'

To summarise (see table 2.1), mergers are processes of integration between two (or more) firms that can take different forms and are the result of either economic based rationale or management ambitions. They usually come in waves and have the effect of changing the structure of the market by increasing its degree of concentration. Consequently, and as it will be shown in the next section, merger activity may affect competition within the market or industry in question.

**TABLE 2.1. THE NATURE OF MERGERS**

**DEFINITION :** A merger is as a process of integration between two (or more) formerly independent firms. For the purpose of this study, the term 'merger' will be used to describe mergers, take-overs and certain joint ventures, embracing the wide variety of legal arrangements within and throughout the EC that are covered by merger control legislation.

**MOTIVES :** Two broad kinds

- > Profit motives (rational economic assessment of the firms' interest)
- > Managerial motives (management ambitions)

**TYPES OF MERGER :** Three main categories

- > Horizontal mergers (between competitors)
- > Vertical mergers (between firms at different stages in the production chain)
- > Conglomerate mergers (joining together unrelated activities)

**MERGERS' EFFECTS :** Structure-shaping forces -they contribute to industrial concentration.

**EUROPEAN MERGER WAVES :** Mergers happen in waves.

In the last half-century, three European merger waves:

- in the 1960s (primarily within national boundaries)
- in the mid-late 1980s (both across and intra-borders)
- from the mid-1990s (chiefly across-frontiers).

## 2.2. THE NATURE OF MERGER POLICY

**Merger policy** may be defined as both a public and a competition policy that aims to prevent anti-competitive market structures (Scherer and Ross, 1990). In other words, a government's merger policy is intended to counter the risk of domestic competition restraint as a result of the modification of domestic market structures brought about by a merger. Indeed, like other competition policies, merger policy aims to adjust market processes to make producers' performance conform more closely to an ideal standard -competition- so as to secure economic and social goals. It is based on the 'presumption that competition is a good thing, and something to be encouraged' (Cini, 1993: 4).

To understand the particular **motives** for the existence of this public policy, therefore, it is necessary to first comprehend the underlying need for both competition and competition policy. Regarding the need for competition, a perfectly competitive market is considered to be an economic first best in Pareto terms. In a situation of perfect competition, firms have no power over market outcomes. It is a market condition in which a large number of independent buyers and sellers compete for homogeneous commodities, deal freely with each other, and retain the right of entry and exit from the market; so that no individual firm finds itself able to affect market prices by varying the quantity of output it sells (Cini and McGowan, 1998; McGowan, 1994; Neven *et al.*, 1993; Scherer and Ross, 1990). As Shepherd (1990: 16) writes: 'The essence of competition is the mutual exertion of pressure to perform well.' Standard welfare analysis has proved that perfect competition is Pareto optimal: '...a situation in which the well-being of one or more members of society can be improved only by harming the position of some other' (Asch, 1983: 18). In short, the case for competition lies in the argument that competitive markets are the most efficient form of industrial organisation, achieving both allocative and productive efficiency as well as consumer and society welfare.

Yet, the assumptions on which the optimality of competition is based are not always fulfilled in the real world. For example, it is known that the technology of some industries requires relatively large plants for efficient operation, i.e. a more

monopolistic (as opposed to competitive) market structure. Consequently, the utility of the perfect competition ideal has been questioned. In fact, the theory of second best states that if all conditions for Pareto optimality cannot be met, there may be no point in attempting to meet them whenever or wherever possible. Nevertheless, universal competition has been maintained as an ideal, though in more operational forms such as 'workable competition'<sup>6</sup> or 'contestable markets'<sup>7</sup>, on the grounds that some departures from the perfectly competitive norm are not as harmful from a longer-run perspective as was supposed. Quoting Goyder (1988: 8): 'In spite of the imperfections of the workings of competition in real markets, the presence of competition is normally considered by economists to confer real advantages.' As Cini and McGowan (1998: 2) state: 'The belief that economic competition is a good thing is something of an act of faith in countries where the economy operates on the basis of free market principles...[it is] arguably the most important organising principle in the capitalist world.' (*The Economist*, 2 May 1998; McGowan, 1994; Neven *et al.*, 1994; Whish, 1993; Hay and Morris, 1991; Scherer and Ross, 1990; Shepherd, 1990; Asch, 1983)

Concerning the need for competition policy in general, public control is considered necessary because the market fails to provide the degree of competition sought (e.g. 'workable competition'):

Ideally, good economic performance should flow automatically from proper market structure

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<sup>6</sup> This vaguer approach to competition, initiated by J.M. Clark in 1940, contends that both the competitive process and its results are important. In other words, rather than chasing perfection, the aim should be to seek the best competitive arrangement that is practically attainable, which is a market system that is workably competitive (e.g. the number of rivals in the market may be smaller than would be needed for perfect competition). Some observers stress workable market structures, whereas others place a higher priority on performance or conduct. Following Cini and McGowan (1998), Allen (1996), Whish (1993), Goyder (1988) and Lever and Lasok (1986), although there is little agreement about what 'workable competition' implies in concrete policy terms, the EC competition authorities have invoked this idea on various occasions.

<sup>7</sup> A contestable market is one where entry is completely free and exit is costless. According to the theory of 'contestable markets', in such a market firms will be forced to ensure an optimal allocation of resources. For Gilbert (1989: 107), this theory 'asserts that potential competition is as effective as actual competition in controlling market performance.' Entry from outside the market may be decisive, rendering irrelevant the market's internal structure. This theory is quite recent (1980s) and has mainly been developed and applied in the United States.

and the conduct to which it gives rise. But, for a variety of reasons, markets fail, yielding performance that falls below norms considered acceptable. Then government agencies may choose to intervene and attempt to improve performance by applying policy measures that affect either market structure or conduct. (Scherer and Ross, 1990: 7)

Competition policy, therefore, is important as a mechanism for correcting market distortions (from competition) and hence may contribute materially to the major goals of general economic policy (Cini and McGowan, 1998; Neven *et al.*, 1994; McGowan in El-Agraa, 1994; Whish, 1993; Scherer and Ross, 1990; Korah, 1990; OECD, 1974). This policy instrument, 'designed to promote the fair play of competitors on product and factor markets' (OECD, 1992b: 97), usually comprises two main components: one concerns the control of restrictive practices such as cartels and monopolies (policy measures that affect conduct), and the other deals with the control of mergers or concentrations (policy measures that affect market structure).

In summary, although it is accepted that perfect market competition is an unrealistic objective, the search for market competition is maintained as ideal. Accordingly, free-markets failing to provide (enough) competition, competition policy is deemed necessary to correct possible distortions. However, what are the specific motives for having merger policy? What market or competition distortions can mergers produce?

One important motive for merger control is *economic*: mergers can create conditions of dominance or monopoly due to their capacity to alter the structure of the market. As mergers contribute to augment concentration, and increased concentration may lead to anti-competitive market structures and thus to undesirable welfare consequences, some supervision of mergers may be necessary. Indeed, while the existence of a high degree of concentration in an industry does not necessarily ensure anti-competitive practices, it does bear the potential of certain types of conduct and performance which are not usually considered desirable. Monopolistic and oligopolistic practices are more likely and competitive behaviour less likely, where a few large firms account for the major share of an industry's output, compared to a situation where even the largest firms are relatively unimportant. Through mergers, then, firms can reach a market position where they can avoid the pressure of competition. In the words of Admiraal (1990: ix), for Jacquemin 'there is an implicit

danger that merger activity will restrict market competition by creating dominant positions for the combined firms.’ (Cini and McGowan, 1998; Whish, 1993; Cini, 1993; George and Jacquemin, 1992; OECD, 1992b; Hay and Morris, 1991; OECD, 1979; OECD, 1974)<sup>8</sup>

However, it is necessary to point out that mergers may also have positive effects in the economy or industry. Certainly, as noted above when discussing the motives for mergers, they can have a role in securing benefits of economies of scale and other economic efficiencies. This possible ‘efficiency-increased market concentration’ trade-off has led some theorists, such as the ones conforming to the Austrian and Chicago Schools, to argue that merger control is not necessary. For these scholars, the key indicator of market power is not the structure of the market, but rather the performance of firms. Accordingly, it is not the degree of concentration in a market that is important but the relative efficiency of firms. Concentration may be ‘a natural consequence of the process of competition which ensures that the most efficient producers survive’; mergers ‘are means to adjust to continuous changes in global markets’ (OECD, 1992b: 100-101). (*The Economist*, 2 May 1998; Sachwald, 1994; Neven *et al.*, 1993; Hay and Morris, 1991; Scherer and Ross, 1990; Shepherd, 1990; George, 1989; Gilbert, 1989; Hawk, 1989; Asch, 1983; Bailey, 1981)

Yet, the evidence of the contribution to social benefits from mergers is not greater and nor does the evidence of private benefits suggest that merger is in all cases the most efficient way of transferring resources from less to more profitable uses. Most empirical research shows that in fact mergers do not produce the advantages expected from them. Quoting *The Economist* of 9 January 1999: ‘Repeated analyses by business gurus, management consultants and investment bankers have all reached the same conclusion: in the medium term, fewer than half of all mergers add value.’ In the words of Scherer and Ross (1990: 174): ‘Evidence

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<sup>8</sup> Although horizontal and some vertical mergers increase industrial and overall concentration, conglomerate mergers only increase overall concentration. To put it plainly, the effect of mergers will vary depending on their type: horizontal and certain vertical mergers tend to be more anti-competitive than conglomerate mergers.

supporting the hypothesis that profitability and efficiency increase following mergers is at best weak.' (*The Economist*, 28 Nov 1998; *The Economist*, 10 Sep 1994a; Ballarín *et al.*, 1994; Whish, 1993; Kay, 1993; Hughes, 1993; OECD, 1992b; Admiraal, 1990; Jacquemin, 1990; Asch, 1983; Scherer, 1974)

In addition to this economic aspect, other motives for merger control may be *socio-political*. For instance, merger supervision may be needed to prevent excessive concentration of wealth. As Asch (1983: 1) stated: 'A free society tends to distrust concentrations of power, whether private or public.' For Whish (1993: 670): 'Mergers may be objected to on the ground that they lead to firms of such size and with such power as to be antithetical to a balanced distribution of wealth.'<sup>9</sup> Mergers may also be objected to in some sectors of the economy such as media, oil, banking and defence, because these are sectors especially sensitive to concentration for national security concerns. However, again, there are other socio-political motives in favour of allowing concentration. Mergers may have effects on the balance of payments, on industrial policy or on employment that are considered to be in the public interest (Cini and McGowan, 1998; Whish, 1993; Hay and Morris, 1991; Asch, 1983; OECD, 1974).

The rationale for merger policy is thus complex. On the one hand, merger control is deemed necessary for social and political as well as economic motives. On the other hand, both groups of motives have been challenged on the basis that mergers can also be beneficial to both the economy and the public interest. Although economic evidence against having merger control systems has been weak and most developed countries have them, this debate has underlined **four basic approaches to merger policy** as described by Chiplin and Wright (1987: 78). At one extreme, 'the pro-merger approach' considers mergers to be beneficial and hence governments do not need to control them but perhaps should encourage them by providing appropriate tax and other incentives as well as acting as a 'marriage broker' on occasion. At the other extreme, 'the anti-merger approach' is based on the idea that any merger involving companies above a certain size is detrimental to society and governments

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<sup>9</sup> This was certainly the case in the United States' competition legislation (Cini and McGowan, 1998; Whish, 1993; Scherer and Ross, 1990; Shepherd, 1990).

should ban them, unless substantial net social benefits can be demonstrated. The two other approaches fall between these extremes. 'The trade-off approach' favours a neutral stance; governments are to compare, case by case, the likely gains resulting from a given merger against the possible losses. Lastly, 'the competitive-structure approach' considers that competition has to be the only criteria when judging a merger case: all mergers having an adverse effect on the competitive structure should be prohibited irrespective of any possible efficiency or socio-political gains.<sup>10</sup> Although in the 1960s and 1970s 'the pro-merger approach' was followed by most European countries, since then almost all EC member states have shifted towards the intermediate approaches, i.e. most member countries now have merger control systems.

In setting their merger control systems -that is, the rules of the game under which mergers take place- governments apply a variety of policy instruments, the most important of which is **merger laws** (or regulations). The way in which these laws operate is mainly contingent on the criterion used in judging whether mergers are legally acceptable, the choice of criterion depending in turn on the approach to merger policy followed.<sup>11</sup> Hence, as may be inferred from above, EC member states' merger laws are either based purely on competition criteria, or also take into account other objectives. In the first case, the possible advantages of a merger cannot be pleaded to offset the disadvantages which could result from increased concentration ('the competitive-structure approach'). In the second case, the promotion of effective competition is one of a number of other desirable objectives such as economies of scale or a certain balance-of-payments ('the trade-off approach'). Nevertheless, this distinction is usually not so straightforward. Even the

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<sup>10</sup> One may argue that a third middle approach exists. Since the Reagan era, North-American competition authorities, while still following a pure competition approach, devote more attention to factors like threat of entry (Theory of contestable markets) or the possible increase in productive efficiency (Chicago School) in assessing merger activity. (I 23, 1995; OECD, 1992b; *Financial Times*, 20 Sep 1990; Scherer and Ross, 1990; Shepherd, 1990)

<sup>11</sup> Although the manner in which any system of merger control works depends above all on the criterion used in assessing mergers, in the case of EEC merger regulation two other issues become crucial: scope (which merger cases are covered by the regulation) and control (who decides on mergers within and outside the scope of the regulation). They must be defined to clarify national and Community jurisdictions in merger control.

European national merger law most strictly based on competition criteria, the German one, has a national interest provision which allows the government to overturn the 'independent' competition authorities. The British merger law, on the other hand, though providing for the flexible and discretionary use of the concept of public interest, has been pursued on competition grounds since 1984. (Cini and McGowan, 1998; McGowan, 1994; Sturm and Ortwein, 1993; Whish, 1993; Schwartz, 1993; Bos *et al.*, 1992; Hay and Morris, 1991; Hodges *et al.*, 1991; Dechery, 1990; Rosenthal, 1990; House of Lords, 1989; Hawk, 1989; Asch, 1983; OECD, 1974)

In any case, nowadays, most EU member states have merger laws. To be more specific, one can distinguish three groups of countries. First, there are four countries that have had a merger law since the 1960s-1970s. These are the United Kingdom (1965), the Federal Republic of Germany (1973), France (1977) and Ireland (1978). Secondly, there are eight countries that have only recently established a merger control system. These include Sweden (1982), Portugal (1988), Spain (1989), Italy (1990), Belgium (1991), Greece (1991), Austria (1993) and the Netherlands (1998). Lastly, Denmark, Finland and Luxembourg still do not have any merger control except for operations in some special sectors such as banking and other financial institutions.<sup>12</sup> In other words, currently, twelve out of the fifteen member countries have a merger law or regulation.<sup>13</sup> Moreover, after sixteen years of debate and negotiations, in 1989, an agreement on EEC merger regulation was finally reached, adding a supranational dimension to the increasing number of national merger legal provisions.<sup>14 15</sup>

To recapitulate (see table 2.2), merger policy is a competition policy that aims to prevent anti-competitive concentration levels in the market-place. The rationale for

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<sup>12</sup> The Finnish are in the process of adopting a merger control law.

<sup>13</sup> See Annex E.

<sup>14</sup> Although the Treaty of Paris explicitly included merger control in setting the competition rules for the ECSC, the Treaty of Rome did not refer to this area of competition policy.

<sup>15</sup> Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ [1989] L 395/1; corrigendum in OJ [1990] L 257). Amended in June 1997 by Council Regulation (EC) No 1310/97 (OJ [1997] L 180/1; corrigendum in OJ [1998] L 40/17).

this public policy is mixed. As a result, different approaches to merger policy and thus to merger law stand. Each government has its own approach to merger policy, and this approach may or not imply the existence of a specific merger law or regulation. Evidence shows that the role and enforcement of merger policy has varied over time in Western Europe. Nowadays, however, almost all member states have a merger law and an EEC merger regulation has been established. Bearing this in mind, why is it relevant to select merger policy as an appropriate case study when analysing the European integration process?

**TABLE 2.2. THE NATURE OF MERGER POLICY**

**DEFINITION:** Merger policy is a competition policy that aims to prevent anti-competitive market structures so as to make producers' performance conform more closely to some ideal standard - competition- and, by doing so, to secure economic and social goals.

**MOTIVES** for having a merger policy:

**GENERAL** -> **COMPETITION** is needed. The more competitive a market is, the more efficient it is in welfare analysis terms.

-> **COMPETITION POLICY** is needed because *laissez-faire* does not ensure competitive results.

**SPECIFIC** -> **ECONOMIC MOTIVE:** mergers may lead to anti-competitive market conditions such as oligopoly or monopoly.

HOWEVER mergers may also have positive economic effects.

-> **SOCIO-POLITICAL MOTIVES:** such as mergers may result in excessive concentration of wealth.

HOWEVER they may also accrue benefits for the public interest.

**==>> DIFFERENT APPROACHES** to merger policy:

- \* 'THE PRO-MERGER APPROACH': mergers are valuable. No need for merger control.
- \* 'THE TRADE-OFF APPROACH': need for a case by case analysis. Need merger control.
- \* 'THE COMPETITIVE-STRUCTURE APPROACH': only competition criteria analysis. Need merger control.
- \* 'THE ANTI-MERGER APPROACH': mergers tend to be harmful. Need merger control.

**EC MEMBER STATES' MERGER LAWS** are based either on:

- > **COMPETITION CRITERIA** or
- > **'PUBLIC INTEREST' CRITERIA**

**MERGER LAWS IN THE EU:** twelve out of the fifteen present member states have current merger control laws. Since 1989 there is also an EEC merger regulation.

### 2.3. THE IMPORTANCE OF MERGER POLICY AS A CASE STUDY

EEC merger policy has been chosen as case study to test whether the neo-functional and realist approaches may be considered complementary. Hence, to justify this selection, merger policy has to be a relevant policy in the context of European integration. This section will show the importance for European integration of competition policy in general and merger policy in particular.

**Competition policy** has always been an important part of the EEC edifice. Quoting Karel van Miert (1998: 1), Commissioner for competition since 1993, 'EC competition policy is one of the pillars of the economic constitution established by the EC Treaty...' In the words of the Monopolkommission (1989: 15): 'The establishment of the European Community in 1957 was at the same time a decision of general principle in favour of a competitive economic system.' The Treaty of Rome clearly reflects that fact through the wordings of Articles 2 and 3, referring respectively to the objectives of the Community and to the ways of achieving them. In particular, Article 3 (f)<sup>16</sup> states that the EEC shall include 'the institution of a system ensuring that competition in the common market is not distorted.' Public barriers to trade must not be replaced by private barriers.

EEC competition policy is thus an instrument to an end: to help construct and preserve the Common Market so as to reach the Community's objectives set out in Article 2 of the Rome Treaty. Quoting the Commission's *Twenty-Second Annual Report on Competition Policy* (1993a: 13):

Alongside the establishment of a common market, competition policy is one of the two great strategies by which the Treaty of Rome sets out to achieve the Community's fundamental objectives: the promotion of harmonious and balanced economic development throughout the Community, an improved standard of living, and closer relations between the member states.

In truth, as Downes and Ellison (1991: 1) note: 'Competition policy was one of the first areas of sustained legal and judicial activity in the European Communities.'

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<sup>16</sup> Renumbered as Article 3(g) by the Treaty on European Union.

Its relevance for European integration has been enhanced in the last decade both by the '1992 programme' and by the Commission's 1994 White Paper *Growth, Competitiveness, Employment: The Challenges and Way Forward into the Twenty-First Century*. The former intends to finish the construction of a unified European market by means of the process of competition. The latter, in setting up the EC economic strategy until the beginning of the next century, underlines the centrality of this policy in the process of European integration. It states that competition policy 'helps to ensure that the single market is a living reality' by 'creating as favourable an environment as possible for company competitiveness' (CEC, 1994a: 14). In short, EEC competition policy is seen as one of the main policy weapons needed to ensure the success of European economic integration and the improvement of European firms' competitiveness. In the words of Sir Leon Brittan, Commissioner for competition from 1989 to 1993: 'The continuing integration of the Community, and the ever-present need for the protection of the consumer from competitive abuses, ensures that competition policy will always play a vital role in Europe' (CEC, 1992b: 2). (Cini and McGowan, 1998; CEC, 1994a; Dinan, 1994; McGowan in El-Agraa, 1994; Van Miert, 1993; George and Jacquemin, 1992; Ehlermann, 1992; Martin, 1992; Korah, 1990; Jacobs and Steward-Clark, 1990; Montagnon, 1990; Monopolkommission, 1989; White, 1987; CEC's Annual Reports on Competition Policy)

Moreover, competition policy has from the earliest years of the EEC been an important manifestation of the supranational powers the European Commission aspires to in other areas. Indeed, the Council of Ministers is fairly marginalised when it comes to competition matters. The Commission decides on those competition cases that are considered to have Community effects, subject only to supervision by advisory committees, judicial review by the European Courts and political scrutiny by the European Parliament (Gerber, 1994; Hodges *et al.*, 1992; Brittan, 1991; Montagnon, 1990; Allen, 1983; Allen, 1977). As Cini and McGowan (1998: 180) state:

The Industry Council does have a role to play in authorising regulations, but with much of the legal framework already in place, and with competition decision-taking considered an executive rather than legislative function, the policy remains largely in the hands of the Commission and the Courts.

The importance of these powers is highlighted when one takes into account what exactly EEC competition policy embraces. Following Dinan (1994: 372), it 'comprises two main branches, one with regard to the activities of private enterprise [the so-called 'anti-trust' dimension in United States terms], the other with regard to the activities of member states and state-sponsored bodies.' In other words, EEC competition policy, contrary to national policies, includes not only Articles 85 and 86 of the Rome Treaty referring to restrictive practices and the recent European Merger Regulation, but also Articles 92 to 94 relating to state aids and even Article 90(2) concerning public undertakings or deregulation. (Sachwald, 1994; Korah, 1990; Rosenthal, 1990; Swann, 1983)

Competition policy, by its economic and political impact, is, thus, a key element in the European edifice. Accordingly, it is surprising, as Allen noticed both in 1977 and 1983 and McGowan in 1993, that whilst economists and lawyers interested in the EC have devoted considerable attention to competition policy, political scientists have, generally, preferred to make their observations and test their theories of integration in other policy areas such as agriculture or money. In contrast, this research will concentrate on using merger policy, one of competition policy's main aspects, as a case study for testing the neo-functionalist and realist approaches to European integration. Why choose merger policy as opposed to other competition policies?

**Merger policy** is one of EEC competition policy's central pillars. Quoting the European Commission's *Twenty-Second Annual Report on Competition Policy* (1993a: 22): 'Merger control occupies a central place in Community competition policy.' According to Ehlermann (1992: 268), former Director-General of the Commission's Directorate in charge of EC competition policies (DG IV): 'Merger control is one of the key priorities of DG IV.' Indeed, Montagnon (1990: 3) states that: 'Mergers and acquisitions is an area of competition policy that has become what might be termed "stress-points" for policy towards competition in Europe after 1992.' Gerber (1994: 135) explains that the EEC Merger Regulation 'immediately became the focus of DG IV's own attention, occupying an exceptionally large part of DG IV's time, resources, and interest and shifting attention away from the conventional areas of DG

IV's activities.' It is, as an interviewee put it, 'the jewel of the crown' (I 5, 1995). In other words, merger policy has been chosen from among other competition policies because of its actual relevance in this area.

Merger policy's special position in EEC competition policy in recent years is due to different factors. The most obvious is the fact that although merger control was explicitly contemplated by the Treaty of Paris for the ECSC, it was not until 1989, after several proposals by the European Commission, that a European merger regulation for the rest of the EC was agreed upon by the then twelve member countries. Both the newness of the EEC legal instrument and its difficult birth indicate that its implementation is observed with marked attention by both member states and European institutions. These two factors also reflect that 'mergers are a sensitive issue and not one over which member state governments are anxious to cede control' (Swann, 1983: 184). Mergers have side effects which go beyond the realm of competition policy, affecting policies such as industrial or social policy, and, as Gerber (1994: 135) notes, 'merger control tends to be the most visible as well as the most economically and politically significant part of competition law.' Therefore, transfer of part of merger control power to the EC has focused attention on this competition policy. It is the single most important addition to Community competition law since its inception.

A further reason why this policy is of particular interest is that it is at the centre of present and future developments in the EC. As the EC achieves a European single market, moves on towards some form of economic and monetary union and expands its membership, a new European industrial map is emerging designed by means of mergers. The waves of mergers depicted previously in this chapter, suggest that mergers are being utilised by firms as instruments of industrial reorganisation thereby becoming one of the most important channels of European economic integration. Indeed, cross-national merger activity has been employed as barometer of European economic integration. For the European Commission (1994b: 1): 'The development of cross-border mergers has become an important indicator of progress in Community-wide economic integration.' (Ballarín *et al.*, 1994; Dinan, 1994; Sachwald, 1994; CEC, 1994a, 1994b and 1994c; Jacquemin, 1993; George and

Jacquemin, 1992; Hodges *et al.*, 1991; Rosenthal, 1990; Sandholtz and Zysman, 1989; CEC's last Reports on Competition Policy)

To epitomise (see table 2.3), competition policy in general and merger policy in particular are of leading importance in the process of European integration. Competition policy is one of the columns upon which European integration is being built on. Without it a single market is not feasible and European economic integration will be at risk. Moreover, EEC competition policy is one of the few areas where the Commission may act without specific authorisation from member states. The supranational control of this policy may have explained the reluctance of member countries' governments to further shift the balance of power between the European Commission and the domestic competition authorities by adding EEC merger legal stipulations. Indeed, the European Merger Regulation is quite recent and is the result of sixteen years of negotiations. The newness of merger legal provisions at European level, their difficult birth, and the crucial role mergers and, thus, merger policy play in a period of intense industrial restructuring explain the choice of EEC merger policy as case study against other competition policies. The selection of a competition policy, before other possible policies which are also important for European integration, relies on the fact that it has been an area usually neglected by political scientists.

**TABLE 2.3. WHY CHOOSE EEC MERGER POLICY AS A CASE STUDY?**

**BECAUSE OF COMPETITION POLICY'S IMPORTANCE FOR EUROPEAN INTEGRATION**

-> **ECONOMIC REASON** = 'the competition process lies at the heart of the common market and is essential in securing all the benefits linked with the single market' (Martin, 1992: 7).

-> **POLITICAL REASON** = competition policy is an important manifestation of the supranational powers the Commission aspires to in other areas.

**BECAUSE MERGER POLICY IS NOWADAYS A CRUCIAL EEC COMPETITION POLICY**

-> **POLITICAL REASON** = newness and difficult birth of the EEC Merger Regulation.

-> **ECONOMIC REASON** = waves of mergers - restructuring of the European industrial map.

## CONCLUSIONS

This chapter has sought to justify the selection of merger policy as a case study for testing European integration theory. Towards this end, it has attempted to present a clear picture of the nature of mergers and merger policy both in general terms and within the EC in the first two sections, so to later show in the third section the importance of this competition policy for European integration.

Regarding the nature of both mergers and merger policy, merger activity has marked the relatively short existence of the EC: three waves of mergers, the last one continuing at the time of writing, have taken place since the 1950s. Mergers, the union into one of two (or more) formerly independent firms, have been defined, for the purpose of this work, in broad terms so as to include mergers *per se*, take-overs and certain joint ventures. These firms' strategies, which usually occur in waves, affect the structure of markets by increasing the degree of concentration. As a result, competition in these markets may be restricted though at the same time the efficiency of the firms involved may be increased. Governments approach to merger policy depends on the position they take on this trade-off efficiency-competitive structure: it may require a merger control system. Most EU member states have recently adopted merger legal controls and, since 1989, after sixteen years of negotiations, a merger regulation is also at work at the European level.

As to the importance of merger policy for European integration, the vital role that competition policy has always played in European integration both for economic and political reasons, coupled with the fact that it has generally been overlooked by political scientists, have been argued to support the choice made in researching this general area of policy. The case for merger policy has been defended on the grounds that this policy, due to its newness, its difficult birth at the European level and its crucial role in securing European economic integration, is, at the moment, the most interesting competition policy to be examined.

EEC merger policy may, therefore, be held to be an attractive case to study when trying out assumptions of European integration. Although I will only check the

neo-functionalist and realist hypotheses on this specific area of European integration, I believe it will provide new insights and actual knowledge on the evolution not only of this but of other policies as well. Moreover, the study of merger policy in the European context may serve to inform the present intense debate on how to ensure competition (rules) at the international level (Arhel, 1998; Cini and McGowan, 1998; CEC, 1998; Schaub, 1998; *The Economist*, 4 Jul 1998; *The Economist*, 16 May 1998; van Cauwelaert, 1997; OMC, 1997; Baches, 1996; Depypere *et al.*, 1996; van Miert, 1996; Miles, 1995a; Rakousky *et al.*, 1995; Whish and Wood, 1994; Iwaki, 1993). For Jacquemin (1993: 100): 'The European experience, with its increasing and expanding regional integration, and its transnational competition policy, could be of considerable relevance to this challenge facing the wider world.' Thus, to understand how and why, after sixteen years of debate, twelve sovereign countries decided to agree on the transfer of part of their merger control autonomy to the European institutions may provide this international debate with useful knowledge.

The following chapter will merge both the theoretical framework described in chapter one with the particularities of this case study. From this, a method to establish whether it is possible to dismiss the idea that the neo-functionalist and realist approaches are complementary, will be devised.

## CHAPTER 3. SPECIFIC PURPOSE OF RESEARCH AND METHODOLOGY

In chapter one, the theoretical framework of this research was set up. In chapter two, the relevance of European merger policy as case study was highlighted. This third chapter will attempt to merge theory and case study so as to determine both the specific aims of this research and the methodology to be applied. Accordingly, this chapter is divided into two sections. The first one specifies both the question or problem with which this research is concerned with and the hypothesis which is to be tested. The second section defines the research design that will be followed so to empirically test the hypothesis.

### 3.1. SPECIFIC PURPOSE OF RESEARCH

Merger law at European level is a recent development. As mentioned in chapter two, despite the fact that the control of mergers was explicitly contemplated in the Treaty of Paris of 1951 (Article 66), the EEC when created in 1957 made no reference to this competition policy. It was only in 1973 that the Commission put forward, for the first time, a proposal for an European merger regulation. Five amended drafts were to follow until, finally, in 1989, an EEC merger control law was agreed upon.<sup>17</sup> Therefore, covenant on an EEC merger regulation was only reached sixteen years after the Commission's first proposal. Yet, in the opinion of several academics and European officials, the 1973 proposal was quite similar to the 1988 proposal which finally led to the agreement (Sachwald, 1994; Woolcock, 1989). **Why was an agreement in the case of merger policy possible in 1989 rather than**

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<sup>17</sup> The first Commission proposal for a regulation of the Council of Ministers on the control of concentrations between undertakings was submitted to the Council by the Commission on 20 July 1973 (OJ [1973] C 92/1). The successive drafts were submitted respectively: on 16 December 1981 (OJ [1982] C 36/3); on 7 February 1984 (OJ [1984] C 51/8); on 2 December 1986 (OJ [1986] C 324/5); on 25 April 1988 (OJ [1988] C 130/4); and on 30 November 1988 (OJ [1989] C 22/14).

**before?**

Authors such as Woolcock (1989), Hölzler (1990) or Schwartz (1993) have written about the causes that led to the contents of the 1989 Accord. Furthermore, there is recent research by Bulmer (1994) and by Amstrong and Bulmer (1998) which focuses on the evolution of European merger control from the viewpoint of 'new institutionalism'. These studies can help to elucidate why an arrangement was possible in 1989, however, they do not offer a comprehensive explanation of why agreement on the EEC Merger Regulation could be reached in 1989 and not before. Which were the factors present in the late 1980s that were absent in earlier periods of negotiation? The solution to this question is the purpose of this research: to identify the forces that led to integration in the specific case of European merger policy in a systematic and analytical way.

The variable to be explained in this study is integration. By integration I understand it to be the process by which national states transfer parts of their autonomy to a common institutional framework in order to allow for common rules or policies (Corbey, 1995), i.e. the process by which part of the control over mergers in the Community was transferred to the European institutions. As seen in chapter one, political scientists have tried to identify a constant background or set of conditions upon which European integration is contingent, building up the neo-functional approach and the realist approach. This research intends to establish whether it is worth considering these two perspectives as complementary rather than as competitive.

Therefore, this work aims to test the **hypothesis** that although both the realist and neo-functional approaches to European integration contain some elements of truth, neither one taken on its own explains European merger policy pre-1990 evolution, that is, why an agreement on EEC merger regulation was possible in 1989 and not before. While both are necessary conditions for integration, neither each on its own is sufficient. It is only when they are jointly considered that they help provide a sufficient explanation. I will name these two conditions as the neo-functional condition and the realist condition.

Regarding the neo-functional condition, the neo-functional theory considers, as discussed in chapter one, that integration is the result of spillover and pressure from the European institutions. Accordingly, and as Lindberg illustrates in *The Political Dynamics of European Integration* (1963), this approach suggests that to understand the 1989 Agreement and the failure of previous negotiations, it is necessary to examine the following three factors:

First, *the position and role of the EC 'supranational' institutions*: the Commission, the European Parliament and the European Court of Justice. For the neo-functionalists, these institutions, and in particular the Commission, are in the best position to influence policy-making (Webb, 1983). Were they able to push integration despite national governments' resistance in this policy area? Did they press for an European merger regulation?

Secondly, *whether there has been political spillover*. Neo-functionalists understand political spillover to be the result of the pressure for integration exerted both at the national and European level by the interest groups operating in that sector. Did European industrialists lobby for an EEC merger regulation? Were European industrialists in favour of European merger control?

Lastly, it will be necessary to examine *whether there has been functional spillover* or a process by which 'a given action related to a specific goal creates a situation in which the original goal can be assured only by taking further actions...' (Lindberg, 1963: 10). Was an European merger regulation considered essential to ensure any other specific common goal?

Following the neo-functional logic, these three factors together constitute a necessary and sufficient condition for integration. An agreement on EEC merger regulation would have been possible in 1989 rather than before because it was only in the late 1980s that the three factors were simultaneously brought together. The working hypothesis for this dissertation is, however, that they constitute a necessary condition for integration but not a sufficient one. To understand the integration

process the realist condition must also be taken into account.

Concerning the realist condition, the realist approach states, as shown in chapter one, that integration is the result of interstate bargains which reflect national interests and relative power. Realists believe these interstate bargains are the only necessary and sufficient condition for integration. Following Bulmer (1994), for them, policy-making across the full range of EU activity is dominated by national governments through the intergovernmental institutions: the Council of Ministers and the European Council. Moreover, Moravcsik (1991) highlights, within these intergovernmental institutions, the three most powerful member states will be the ones that will determine the bargaining. Consequently, to understand the 1989 Agreement on EEC merger regulation and the failure of the previous attempts, the realist approach considers it necessary to look at a specific factor: at *the positions held on this issue by the United Kingdom's, Germany's and France's representatives in the EC intergovernmental institutions*. It would only be when at least two of these member states are willing to have an EEC merger regulation, that real negotiations will begin and an agreement would be possible.<sup>18</sup> Following from this, the Agreement on EEC merger regulation was only possible in 1989 rather than before because it was only at that moment in time that at least two of the three largest member states wanted such a regulation.

What is proposed here, therefore, is to operationalise both the neo-functional and the realist approaches in relation to one specific case study to see whether both perspectives may be jointly considered as necessary for integration or if any of the two explanations can be dismissed. The idea behind this analysis is to test whether it is reasonable to contemplate the need to combine the neo-functional and realist accounts to offer a clearer picture of the dynamics of European merger policy. For this hypothesis to be credible, an agreement on EEC merger policy should have been possible only when both the neo-functional and realist conditions were fulfilled. The 1989 Agreement on European merger regulation and the failure of previous attempts should be determined by the presence or absence of both neo-

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<sup>18</sup> See Moravcsik (1991; 1993) and his point on 'exclusion costs'.

functionalist and realist factors. It is only when all these factors occur simultaneously that an agreement should be possible.

I will **assume** that these two conditions, and hence the factors which compound them, were affected by the context in which negotiations took place: by both international (e.g., an international wave of mergers) and domestic (e.g., national approaches to merger policy) pressures. In other words, I will assume that, though the different contexts in which the EEC Merger Regulation was negotiated did not cause responses, they did pose challenges and opportunities. This is not a strong assumption, it has come to be commonly accepted by both neo-functionalist and realist scholars (e.g. George, 1996; Bulmer, 1994 and 1983; Moravcsik, 1991; Keohane and Hoffman, 1990; Sandholtz and Zysman, 1989).

To summarise (see table 3.1), this section has specified the question or problem with which this research is concerned with. It has also proposed a suitable explanation or hypothesis for the phenomena under study and defined the concepts and assumption thought to be useful in this explanation. In short, this section has set up the specific theoretical framework of this research. The next section will expose the empirical framework, that is, how this research's hypothesis will be empirically tested.

**TABLE 3.1. SPECIFIC PURPOSE OF RESEARCH**

<p><b>RESEARCH QUESTION</b> Why was an agreement on an EEC merger regulation possible in 1989 rather than before?</p> <p><b>HYPOTHESIS</b> Integration is caused by the presence of two different and, at the same time, related variables. These are necessary conditions which, in combination, become sufficient for integration. I will call these two conditions: the neo-functionalist condition and the realist condition.</p> <p><b>VARIABLE TO BE EXPLAINED</b> INTEGRATION is the process by which national states transfer parts of their autonomy to a common institutional framework in order to allow for common rules or policies, i.e. the process by which part of the control over mergers in the Community was transferred to the European institutions.</p> <p><b>EXPLANATORY VARIABLES</b> THE NEO-FUNCTIONALIST CONDITION assumes the existence of three factors: supranational institutions' pressure in favour of an EEC merger regulation, political spillover and functional spillover.</p> <p>THE REALIST CONDITION is based on the occurrence of one factor: at least two of the three most powerful member states are in favour of an EEC merger regulation.</p> <p><b>ASSUMPTION</b> I will assume that these two conditions and the factors which identify them are affected by both international and domestic pressures, i.e. by the context in which negotiations took place.</p>
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### **3.2. METHODOLOGY : HOW TO TEST THE HYPOTHESIS**

'Research design is a plan that shows how a researcher intends to fulfill the goals of a proposed study' (Johnson and Joslyn, 1991: 95). Accordingly, a research design indicates what data are to be collected and how; how the researcher is going to analyse them; how she/he will interpret them; and, last but not least, which is the domain of generalisability of the interpretations (Miles and Huberman, 1994; Wolcott, 1994; Johnson and Joslyn, 1991; Patton, 1990; Strauss, 1987). These are the aims of this section.

#### **General research design**

The goal of this research is to test a causal hypothesis, I am concerned with finding out what led to what. This means presenting evidence concerning three relationships (Johnson and Joslyn, 1991). First, that there is a connection between the variable to be explained (i.e. the 1989 Agreement on EEC merger regulation and the failure of previous attempts) and the explanatory variables selected (i.e. the two conditions). Secondly, that the cause preceded the effect in time. Lastly, that the effect was dependent upon or could not have occurred in the absence of the cause. As Miles and Huberman (1994: 147) state: 'It is necessary to understand the "plot" over time.'

This may be accomplished, in this case, by measuring the presence or absence, at different moments in time, of the factors which define each of the conditions I use to understand the phenomena, and then by comparing the results. In other words, I propose to test my causal hypothesis through studying whether the two necessary conditions, and hence the factors which compound them, were present at the time of the different European merger regulation negotiations.

With reference to this time-frame, however, instead of dividing my analysis into six periods of time corresponding to each of the Commission's EEC merger regulation proposals, I intend to consider three periods. This division is explained and supported by the analysis of data. Although the Commission submitted six proposals

to the Council from 1973 to 1989, it is possible to group some of these proposals as corresponding to a particular negotiation. In this way, the 1981 and 1984 proposals are part of the same negotiation, and the same can be said about the ones in 1986 and 1988. What emerges are three distinct periods of analysis: the 1970s, the early 1980s and the late 1980s.

To recapitulate, in order to test the accuracy and utility of my causal hypothesis I intend to see whether the factors which determine the neo-functional condition and the realist condition were present at each of these three periods and later to compare the results.

## Data Collection

To carry out the empirical observations with which to test the research hypothesis, two types of data have been collected: interview data (i.e. data derived from written or verbal questioning of selected respondents; primary sources of data) and documentary data (i.e. data that exists in records; secondary sources of data).

Regarding **interview data**, the aim of my study led me to ask questions on the 1989 EEC Merger Regulation's past. These questions limited my population to knowledgeable persons in the field, that is, to an elite population. Indeed, my population is composed of both people who participated in the European Merger Regulation negotiations and people who are experts in European merger policy.

Ideally, the inquiry would have targeted the entire elite population, however, practical limitations (i.e. time, access, resources, etc.) made this huge task impossible. Consequently, and in line with the nature of my population, I focused on in-depth, rather than width, and on relatively small purposefully selected samples. The logic and power of *purposeful sampling* lies in selecting information-rich cases to study in depth. Information-rich cases are those from which much can be learnt from about issues of central importance to the purpose of research. Therefore, the size of the sample as well as the specific cases under examination depend on the study purpose rather than on probability (SCPR course, 1994; Miles and Huberman,

1994; Johnson and Joslyn, 1991; Patton, 1990).

To establish whom to include in the sample, my strategy was to follow a process of continuing discovery or *snowball sampling*.<sup>19</sup> As Miles and Huberman (1994: 28) explain: 'Snowball or chain sampling identifies cases of interest from people who know people who know what cases are information rich.' The process begins by asking well-situated people to identify other persons who might qualify for inclusion in the sample. By asking a number of people who else to interview, the snowball gets bigger and bigger as one cumulates new information-rich cases. The chain of recommended informants will diverge initially as many possible sources are recommended, then it will converge as a few key names are continuously mentioned. (SCPR course, 1994; Patton, 1990; Dexter, 1970)

This sampling strategy has proven very useful. I added and then narrowed the sample as the fieldwork advanced. I conducted a total of twenty-three interviews with academic and experts in this field from different European countries as well as with European officials in Brussels who had direct knowledge. I also made approximately ten informal contacts with other informants.<sup>20</sup>

The elite nature of my sample or population also determined the type of questions I could ask. Indeed, elite interviewing usually precludes closed-ended questions and favours *open-ended questions*. This is because as Dexter (1970: 5-6) indicates:

...in the case of elites the investigator has to let the interviewee teach him what the problem, the question is. For one thing, a good many well-informed and influential people are unwilling to accept the assumptions with which the investigator starts; they insist on explaining to him how they see the situation, what the real problems are as they view the matter.

In other words, elite interviewees may resent being asked to respond to inflexible

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<sup>19</sup> Johnson and Joslyn (1991: 161) note that 'snowball sampling is particularly useful to study a relative select population.'

<sup>20</sup> I was surprised by the availability of the elites I contacted, only seven out of thirty were not able or refused to allow me to interview them. Nevertheless, contacting them was sometimes a time-consuming nightmare of phone-calls, double-checking and changes.

closed-ended questions. Open-ended questions allow respondents to state what they know and think, hence allowing them to tell the researcher what they mean, not vice-versa.

From the point of view of the researcher, open-ended questions also present advantages. As Johnson and Joslyn (1991: 193) point out: 'A researcher is usually especially interested in an elite interviewee's own interpretation of events or issues and does not want to lose valuable information that an elite "insider" may possess by constraining responses.' Moreover, these scholars also stress that 'the only way for researchers to learn about certain events is to interview participants or eyewitnesses directly' (Johnson and Joslyn, 1991: 193). This was indeed my case.

Last but not least, the nature of my sample or population also influenced the type of interview I chose to conduct: a *semi-structured interview*. As may be inferred from the previous point, elite respondents will usually prefer non-structured or semi-structured interviews as opposed to structured ones. As Dexter (1970) and Johnson and Joslyn (1991) remark, elite resent being encased in structured or standardised interviews which they usually detect. Moreover, I believe this type of interview brings in the strengths of both structured and non-structured interviews thereby limiting their weaknesses.

In a non-structured interview, topics and issues to be covered are specified in advance, in an outline form. The interviewer decides the sequence and wording of questions throughout the course of the interview. As a result, logical gaps in data can be anticipated and closed and interviews remain fairly conversational and situational. Yet this flexibility in sequencing and wording questions can also result in substantially different responses from different perspectives, thus reducing the comparability of responses. To make matters worse, important and salient topics may be inadvertently omitted.

In a structured interview, the exact wording and sequence of questions are determined in advance. Although each question can be worded in a completely open-ended format, all interviewees are asked the same basic questions in the same order.

As a consequence, respondents answer the same questions, thus enabling comparability of responses - data are completed for each person on the topics addressed in the interview - and so, facilitating the organisation and analysis of the data. Yet, the standardised wording of questions may constrain and limit naturalness and relevance of questions and answers, as well as involve little flexibility in relating the interview to particular individuals and circumstances.

Semi-structured interviews are a mixture of the above two types of interviews. Indeed, in a semi-structured interview, the exact wording and sequence of questions are pre-determined. All interviewees are asked the same questions in the same order. Also, questions are worded in a completely open-ended format. Yet, depending on the answers, the interviewer will decide which questions need to be further probed or developed.

As a result, semi-structured interviews provide for both the comparability of responses of structured interviews and the flexibility of non-structured interviews. In other words, I think this type of interview gathers the strengths of both structured and non-structured interviews while limiting their weaknesses (Miles and Huberman, 1994; Johnson and Joslyn, 1991; Patton, 1990; Gorden, 1975; Dexter, 1970; Richardson *et al.*, 1965).

Within this semi-structured mark, however, once the pilot interviews were carried out, my interviewing technique followed two stages. In the initial stage, my interviews were more structured and mainly based on tape-recording -even though a summary sheet was always filled in immediately after the interview.<sup>21</sup> In the second stage, my interviews became less structured, more conversational, and I started taking some basic notes in addition to tape-recording. This proved to be the best way to conduct the interview. I became more relaxed not having to keep everything in my mind and the interviewee became more responsive. Moreover, this basic note-taking technique allowed me to have a clearer idea of the data I had collected immediately after the interview was terminated and provided an extra-security against the

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<sup>21</sup> See the summary sheet format in Annex A.

possibility of bad tape-recording. Yet, this second stage in my interviewing manner was the result of previous experience and, therefore, of a learning curve. I do not think I would have been able to conduct my earlier interviews in this way; I needed practice, security and a clearer knowledge of my interviewing skills.

To summarise, this research's interview data has been mustered from a purposeful sample of elite population selected following the snowball sampling strategy. Due to the nature of the sample, my interviewing was semi-structured and all my questions open-ended.<sup>22</sup> I conducted twenty-three interviews with both academics and experts in the field and with European officials.<sup>23</sup> All my interviews were carried out face-to-face and were tape-recorded.

As regards to **documentary data**, these were gathered from existing public written documents (i.e. not produced in connection with my study but relevant to it) such as newspapers accounts, journals, magazines, books and European documents. I would have liked to have had access to the minutes of the negotiations which took place in the Council and in the Committee of Permanent Representatives, but these are not available to the public for security reasons.

To select the data, I carried out computer-assisted searches for the 1980s periods and 'manual' searches through printed indexes and bibliographies for most of the 1970s period so as to cover as much sources of information as possible.<sup>24</sup> All written documents directly or indirectly related to European merger policy were singled out. The assembling of these data was carried out in various libraries<sup>25</sup> and through some interviewees. Although I was not able to locate all the documents I looked for, I managed to find approximately eighty per cent of them: seventy-one

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<sup>22</sup> See the interview guide in Annex A.

<sup>23</sup> See the distribution of the interviews' data between the three periods under study in Annex C.

<sup>24</sup> See Annex B for an account of all CD-roms and on-line searches conducted as well as for a list of the major journals and newspapers consulted.

<sup>25</sup> These include the British Library of Political and Economic Science, other libraries of the University of London and the Commission's central library in Brussels.

official publications, one hundred and seventy-seven articles and books and one hundred and forty newspapers articles.<sup>26</sup>

The reason for using data derived from both interviews and written documents can be summarised in one word : **triangulation**. Indeed, one important way to strengthen a study design is through triangulation, or the combination of data sources (or methods, theories, researchers) in the study of the same phenomena. Triangulating data sources means comparing or cross-checking the consistency of information derived at different times and by different means.

Studies that use only one source of data are more vulnerable to errors linked to that particular data (e.g. loaded interview questions) than those that use multiple sources of data. In other words, triangulation is a powerful solution to the problem of relying too heavily on any single data source, thereby undermining the validity and credibility of findings because of the weaknesses of any single source. Furthermore, using triangulation is recognition that the researcher needs to be open to more than one way of examining issues. Triangulation of data sources seldom leads to a single, totally consistent picture. The point is to study and understand 'when' and 'why' there are differences. Different results may indicate that different types of data have captured different things.

To summarise, triangulation of data sources is a strategy for reducing systematic bias in the data and hence of increasing the consistency and validity of the findings. The strategy involves checking results derived from one source of data against those derived from another source of data. It has meant, in this case, validating the information obtained through written documents by checking interviews. (Miles and Huberman, 1994; Johnson and Joslyn, 1991; Patton, 1990; Gorden, 1975; Dexter, 1970)

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<sup>26</sup> See the distribution of the documentary data, by type of document, between the three periods under study in Annex C.

## Data analysis

To analyse the data, I coded both the documents and the interviews' transcripts so as to dissect their contents.<sup>27</sup> The aim was to take measurements of the factors of interest at several points in time so as to observe changes over time. Indeed, I looked for confirmation of the presence or absence, in each of the periods under analysis, of the factors which determine the two conditions employed in this research to understand why an agreement on EEC merger regulation could be reached in 1989 rather than before. In other words, I searched for testimony of:

### NEO-FUNCTIONALIST CONDITION:

- \* Did the EC supranational institutions press for an European merger regulation?
- \* Were European industrialists in favour of an European merger regulation?
- \* Was an European merger regulation considered essential to ensure any other specific common goal?

### REALIST CONDITION:

- \* Were at least two of the three most important member states in favour of an European merger regulation?

After some depuration and selection, I will display the findings in an organised and chronological way. To be more precise, I will show evidence of whether the factors which identify the conditions were present or not in each of the three negotiation periods: the 1970s, the early 1980s and the late 1980s. This will be carried out in chapter five after having exposed, in chapter four, the facts related to merger policy which characterised each period.

Therefore, the analysis of both the interview and documentary data collected will be carried out by means of a qualitative study of their contents. This analysis will be both retrospective and deductive in nature. I will see whether certain

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<sup>27</sup> See coding framework in Annex D.

antecedent events took place and had clear connections to later outcomes proceeding from theory to specific observations. Before such an analysis is attempted, however, it is sensible to contemplate the potential findings so as to increase this research design's credibility and validity.

### **Possible findings and interpretations**

For each of the three periods analysed I foresee three possible findings (see table 3.2): evidence of the occurrence of the two conditions at the same time; evidence that only one condition took place; and evidence that none of the conditions occurred. The first possible outcome would mean that all the factors which define the neo-functionalist condition and the realist condition were present in the negotiation period under consideration. The second, that either the realist factor or at least one of the factors which determine the neo-functionalist condition did not occur in the period analysed. Lastly, the third possible finding would indicate that the realist factor and at least one of the factors which conform to the neo-functionalist condition did not take place in that period.

**TABLE 3.2. POSSIBLE FINDINGS FOR EACH PERIOD**

<b>1970s</b>	<b>early 1980s</b>	<b>late 1980s</b>
<b>2 CONDITIONS</b>	<b>2 CONDITIONS</b>	<b>2 CONDITIONS</b>
<b>1 CONDITION</b>	<b>1 CONDITION</b>	<b>1 CONDITION</b>
<b>NONE</b>	<b>NONE</b>	<b>NONE</b>

Following from this and as displayed in table 3.3, sixty-four combinations are possible. Only one of these would be consistent with this research hypothesis: evidence that the two conditions only took place in the late 1980s. This result would mean that there is no clash between evidence and research hypothesis in the case of European merger policy. The success of the late 1980s negotiations would be explained by the simultaneous occurrence of the two necessary conditions, and

Table 3.3. POSSIBLE GENERAL OUTCOMES<sup>28</sup>

1970s	early 1980s	late 1980s
2 CONDITIONS	2 CONDITIONS	2 CONDITIONS
2 CONDITIONS	2 CONDITIONS	NONE
2 CONDITIONS	2 CONDITIONS	1 CONDITION
2 CONDITIONS	1 CONDITION	2 CONDITIONS
2 CONDITIONS	NONE	2 CONDITIONS
2 CONDITIONS	1 CONDITION	NONE
2 CONDITIONS	NONE	1 CONDITION
2 CONDITIONS	1 CONDITION	1 CONDITION
2 CONDITIONS	NONE	NONE
1 CONDITION	1 CONDITION	1 CONDITION
1 CONDITION	1 CONDITION	NONE
1 CONDITION	1 CONDITION	2 CONDITIONS
1 CONDITION	NONE	1 CONDITION
1 CONDITION	2 CONDITIONS	1 CONDITION
1 CONDITION	NONE	2 CONDITIONS
1 CONDITION	2 CONDITIONS	NONE
1 CONDITION	NONE	NONE
1 CONDITION	2 CONDITIONS	2 CONDITIONS
NONE	NONE	NONE
NONE	NONE	1 CONDITION
NONE	NONE	2 CONDITIONS
NONE	1 CONDITION	NONE
NONE	2 CONDITIONS	NONE
NONE	1 CONDITION	2 CONDITIONS
NONE	2 CONDITIONS	1 CONDITION
NONE	1 CONDITION	1 CONDITION
NONE	2 CONDITIONS	2 CONDITIONS

<sup>28</sup> Although twenty-seven combinations are shown in this table, it must be remembered that '1 CONDITION' stands for either the realist or the neo-functionalist condition. This adds thirty-seven new possible combinations.

the failure of the previous attempts would be the result of the non-fulfillment of these conditions at that time. This outcome would, moreover, indicate that there is a connection between the dependent variable and the two conditions, that the cause preceded the effect in time, and that the effect was dependent upon, or could not have occurred in the absence of the cause. In short, it would provide the evidence that the research hypothesis is a causal hypothesis.

From a theoretical point of view, the completion of this hypothesis would imply two things. First, in order to explain the 1989 Agreement and the failure of previous attempts, both a neo-functionalist and a realist account can be defended. Secondly, to unfold this particular process of integration, neither perspective can be rejected, as both are necessary. Consequently, the fulfillment of this hypothesis would indicate that the idea that these two approaches may be complementary cannot be dismissed. It would then be worth studying how these two conditions combine in the integration process so as to produce an integrative decision.

Any of the remainder sixty-three possible results, however, would mean that there is a clash between evidence and the research hypothesis. This would imply that the late 1980s European merger regulation Agreement and the failure of the previous attempts are not explained by the two conditions taken together. In this situation, the interpretative track would depend upon the outcome. In the event of finding any combination in which one condition occurring in the late 1980s did not occur before, the interpretative track would be to examine the case in terms of competing theories. The objective would then be to see how the evidence gathered helps to rule out one of the two conditions and, thus, to enhance the explanatory power of the other. In the extreme situations represented by the other possible results, an inductive interpretation would be attempted so as to establish which were the forces not contemplated by these conditions which led to integration.

To recapitulate, the qualitative analysis I intend to conduct may generate sixty-four possible outcomes. In the event of obtaining evidence that the two conditions tested only took place in the late 1980s, then my research hypothesis will be confirmed and I will proceed to see how these two conditions' factors interact. In the

case of any of the remaining sixty-three possible events, the hypothesis will be refuted, leading to new tracks of interpretation based on examining the results in terms of competing theories or looking for alternative conditions for integration. The interpretation of the findings will be carried out in chapter six.

### **Domain of generalisability of the interpretations**

Whatever the findings, the analysis of this case study will help to establish whether the idea that the neo-functionalist and realist approaches can be taken as complementary is worth considering at all. In the situation where empirical testimony cannot be found, the hypothesis will be dismissed. However, should evidence confirm the hypothesis, the analysis of a single case study will not allow for generalisations. Yet, it may provide useful extrapolations. As Patton (1990: 489) defines them: 'Extrapolations are modest speculations on the likely applicability of findings to other situations [or policies] under similar, but not identical, conditions.' This author further adds that researchers 'extrapolate from their findings in the sense of pointing out lessons learned and potential applications to future efforts.' This will be attempted in the concluding chapter.

### **Conclusion: a qualitative research design**

This section has exposed the research design I followed to test whether there is any evidence that this research causal hypothesis is confirmed in the case of European merger policy. The main features of this design have been summarised in table 3.4. The focus of analysis is to see whether the factors which determine the neo-functionalist condition and the realist condition, were present in three different negotiation periods: the 1970s, the early 1980s and the late 1980s; and to compare the results. The data used to make the empirical observations were gathered from two different sources -interviews and written documents- to increase the consistency of the research. The qualitative method of analysis chosen was both deductive and retrospective. There are sixty-four potential findings and, of these, only one confirms the hypothesis: evidence that the two conditions only took place in the late 1980s. Whatever the outcome, the interpretations will allow for extrapolations rather than

for generalisations.

**TABLE 3.4. RESEARCH DESIGN**

<p><b>GENERAL RESEARCH DESIGN</b></p> <p>To test the accuracy and utility of my causal hypothesis I intend to examine whether the factors which define the neo-functionalist condition and the realist condition, were present in three distinct periods of analysis: the 1970s, the early 1980s and the late 1980s; and to compare the results.</p> <p><b>DATA COLLECTION</b></p> <p>Two types of data have been collected to allow for triangulation of sources.</p> <p><b>Interview data:</b> twenty-three semi-structured interviews purposefully selected through snowball sampling from an elite population defined by the object of my research.</p> <p><b>Documentary data:</b> almost four hundred references singled out through both computerised searches and 'manual' searches. Collected from different libraries and from some interviewees.</p> <p><b>DATA ANALYSIS</b></p> <p>Restrospective and deductive qualitative analysis of both interview and documentary data.</p> <p><b>POSSIBLE FINDINGS AND INTERPRETATIONS</b></p> <ul style="list-style-type: none"> <li>- <u>In the event that the two conditions only took place in the late 1980s:</u> evidence confirms the research hypothesis, that is, the timing of the EEC Merger Regulation can be accounted for by both approaches at the same time. Neither perspective can be discarded as source of explanation. The idea that these approaches are complementary cannot be shelved ==&gt;&gt; see how these two necessary conditions combine in this particular integration process.</li> <li>- <u>In the case of any of the remaining sixty-three possible events:</u> evidence refutes the research hypothesis ==&gt;&gt; depending on the outcome, examine the findings in terms of competing theories or looking for alternative conditions for integration.</li> </ul> <p><b>GENERALISABILITY OF THE INTERPRETATIONS</b></p> <p>This single case study research does not allow for generalisations but rather for extrapolations.</p>
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## CONCLUSIONS

The specific purpose of this research is to explain why an agreement on an EEC merger regulation was possible in 1989 and not previously. My research hypothesis is that the timing of this complex phenomena, that is integration, cannot be explained by any of the existing main theories of European integration *per se*. On the contrary, what is attempted here is to test whether the neo-functionalist and realist approaches may be complementary rather than competing accounts of European integration, so that only together do they offer a comprehensive explanation of the course of events.

In order to test this causal hypothesis and to determine which were the forces that led to integration in the case of merger policy, I intend to measure whether the factors and hence conditions which compound the hypothesis were present at three distinct periods of negotiations: the 1970s, the early 1980s and the late 1980s. This will be carried out in the next two chapters, first by exposing and then by analysing the contents of the data collected in a retrospective and deductive way. Chapter six will subsequently compare the results and contrast evidence with theory so as to offer an interpretation of the results. Finally, this research will conclude with a discussion about possible extrapolations as well as pointing out areas for future investigation.

**PART II. WHY WAS AN AGREEMENT ON EEC MERGER REGULATION  
POSSIBLE IN 1989 RATHER THAN BEFORE?**

## CHAPTER 4. THE FACTS

This chapter intends to expose the facts related with European merger policy which characterised each of the three periods under analysis. For this purpose, the chapter has been divided into three, each part corresponding to one of the already identified following periods: the 1970s, the early 1980s and the late 1980s. Each of these three sections will answer the same descriptive question: 'what was going on in that period of negotiations?'. Using the data collected both from primary and secondary sources, a description of the events and context of each period will be provided so as to answer this question.

### 4.1. 1970s: THE FIRST ATTEMPT

As the Treaty of Paris to the High Authority, the Treaty of Rome gave the European Commission specific powers to ensure that competition was not distorted in the Community. However, contrary to the ECSC Treaty (Article 66), and despite the fact that the 1956 Spaak Report had discussed the need to monitor the formation of monopolies and dominant positions, the EEC founding Treaty did not contain any mention of merger control (Schwartz, 1993; Brittan, 1991; Dechery, 1990; Monopolkommission, 1989; Mestmäcker, 1973).

For most commentators, the failure to include specific merger control provisions in the EEC Treaty was due to the pro-merger thinking of that time (Bulmer, 1994; Schwartz, 1993; Bernini, 1991; Woolcock *et al.*, 1991; Le Bolzer, 1990; Woolcock, 1989; Brussels Law Offices, 1988; Lever and Lasok, 1986). In the 1950s, the priority was not the control or restriction of concentrations but quite the reverse. In the words of Banks (in Martin, 1992: 6):

...omission of a merger control provision from the Treaty is not surprising given the European

economic thinking at that time. One of the main objectives of the EEC was to bring about the economies of scale made possible by an enlarged European market. Mergers -and especially mergers across national boundaries- were seen as part of the process of European integration and as necessary in order to enable European industry to adapt to the new dimensions of the common market and to compete effectively against large foreign (notably American) enterprises...the member states clearly did not wish to include in the Treaty any provision which might inhibit such developments.

This EEC 'pro-merger approach' was shared by the six founding states of the Community. None of them had merger control laws. After the Second World War, the theory of economic growth developed by Keynesian advocates dominated the political arena of Western Europe providing an intellectual justification for state intervention. As a consequence of Keynes economic postulates and of the fact that Europe had been destroyed by the war, industrialisation and full employment became objectives of the Western European states leading to a continuous strengthening of the role of the state at both the micro- and macroeconomic levels. National reconstruction was aimed by building a greater and richer national economy, by industrialisation, by modernisation, and by the full utilisation of hitherto idle national resources. To this purpose, sets of policies referred to as the welfare state as well as industrial policies were established in the different Western European countries leading to incomes policies, to extensive nationalisation programmes, to the promotion of 'national champions' and even to the use, in certain cases, of the newly evolving domestic competition policies as a tool of industrial policy (Tsoukalis, 1993; Milward, 1992). 'These were the high days of optimism about the ability of political institutions to guide the "invisible hand"' (Tsoukalis, 1993: 30).

The industrial policies' goal was to allow war-ravaged and historically under-industrialised Europe to attain American levels of industrialisation by encouraging the formation of American-sized industrial giants. In a situation where low degrees of concentration were found in most economic sectors, increased concentration between undertakings was seen as a process that should be encouraged so to restructure the European economy and to produce large undertakings capable of competing in world markets (Cini and McGowan, 1998; I 12, 1995; Sachwald, 1994; Cini, 1993; De Jong, 1988; Lever and Lasok, 1986; Cunningham, 1973). Quoting Gardner (1990: 186): 'The pre-war belief that the concentration of firms into larger units would increase their efficiency continued to be held by many industrialists and politicians,

well into the 1960s.' The tendency at that time among national governments was to encourage rather than restrict concentration in European industry. Siekman (1972: 248) called it 'a fascination with giantism.'

The economic presumption behind this 'pro-concentration approach' was that most mergers were beneficial or, at least, neutral in their effects on competition and efficiency (I 20, 1995; Comanor *et al.*, 1990); 'Mergers were not seen as a threat to competition' (Cini and McGowan, 1998: 117). As Woolcock (1989: 2) states: 'If there was any predominant view of merger, it was that these were useful means of assisting in European industry's effort to recover international competitiveness.' In the words of Bernini (1991: 633): 'It was the time in which concentrations were blessed... the attitude was entirely pro-mergers.'

To recapitulate, there was in the 1950s a variety of economic and political motives for encouraging concentration instead of controlling it. Mergers were seen by member states as useful means to promote the formation of industrial giants large enough to compete with American firms, and by EEC authorities as a good way to achieve integration of the national economies and to promote economies of scale deemed necessary to build up the infrastructure of the Common Market. Moreover, mergers were thought to have no negative effects upon competition. In this pro-merger post-Second World War context what seems strange is not the lack of provisions for merger control in the EEC Treaty but rather the inclusion of such provisions in the ECSC Treaty.

The ECSC provisions on merger control were the result of the political background to the Treaty. Indeed, ECSC competition policy derived from political rather than economic motives. Immediately after the Second World War, there were fears among the Allied Nations of a resurrection of the German industrial power, more specifically that of its heavy industry, key element in warfare. Although separated by the Allied Nations after 1945, during the war, coal and, in particular, steel industries in Germany had been heavily concentrated. Consequently, the re-emergence of German coal and steel giants was feared because it 'could be a springboard to rearmament' (Hözlner, 1990: 9). Under strong pressure from the United

States, the ECSC Six decided to include stringent merger control rules in the Treaty of Paris to supersede the Allied deconcentration policy in Germany. (I 12, 1995; McGowan, 1994; Bulmer, 1994; Bos *et al.*, 1992; Brittan, 1991; Schmitt, 1982; Allen, 1977)

Therefore, the ECSC Treaty contains an explicit system of merger control while the EEC Treaty does not due to the different needs and objectives of the two treaties. The collective memory of the role of German concentrated heavy industry in World War Two along with American pressure created favourable conditions for introducing merger control for the coal and steel sectors. In other economic sectors, deprived of negative war connotations and where overall concentration was low, mergers were deemed necessary in order to foster a healthy economic structure and in order not to lose competitive advantage, especially with American industry. In the pro-merger context of the 1950s, what was peculiar was the inclusion of merger rules in the ECSC Treaty rather than the lack of such provisions in the EEC Treaty.

However, this pro-merger context started to change in the mid-1960s. The number of mergers in the Community had been increasing steadily since 1958 partly, but not exclusively, due to the 'pro-merger policy' actively pursued by most member states. A process of economic concentration in individual European countries was taking place, which saw the birth of many 'national champions' (Tsoukalis, 1993). This led the Commission to issue the first warning against the risks of excessive concentration in the Common Market, where, following Article 3(f) of the EEC Treaty, competition had to be ensured.

As early as 1963, the Commission asked two groups of independent legal experts to consider the possibility of using Articles 85 and 86 of the EEC Treaty to control mergers (Swann, 1992b; Brittan 1991). Article 85 prohibits agreements between undertakings 'which have as their object or effect the prevention, restriction or distortion of competition within the common market' (Art. 85(1)), unless the Commission exempts these transactions (Art. 85(3)). Article 86 prohibits 'any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it.' These articles apply only to conduct that may affect trade

between the member states.

On the basis of these groups of experts' findings, the Commission defined its point of view and, in 1966, issued a Memorandum on *Le Problème de la Concentration dans le Marché Commun* (CEC, 1966a) which was sent to the governments of the member states. In this Memorandum, the Commission recognised the unsuitability of both articles of the EEC Treaty to the task of controlling mergers but did not exclude the possibility of using Article 86 for this endeavour.

Concerning Article 85, although the legal experts consulted had reached the conclusion that this article of the EEC Treaty could be, at least in terms of principle, an adequate vehicle to control mergers resulting from agreements between enterprises, the Commission considered it not to be applicable (Bernini, 1991). For the Commission, cartels and mergers required separate policies because of their differences. Cartels were the result of agreements or concerted practices between undertakings which remained economically independent while mergers supposed lasting changes in market structure. Moreover, the application of Article 85 as a merger control instrument presented procedural difficulties. The strict criteria of Article 85(1) would preclude too many permissible mergers. On the other hand, the possible exemptions of Article 85(3) would be under-inclusive. Furthermore, the revocability of any exemption granted would upset vested property rights. Last but not least, Article 85 would not cover certain mergers capable of damaging competition, such as open market purchases of shares, where the difficulty would be in identifying an 'agreement' or a 'concerted practice'. (Schwartz, 1993; Bishop, 1993; Brittan, 1991; van Empel, 1990; Bellamy and Child, 1987; Barounos *et al.*, 1975; CEC, 1966a)

Regarding Article 86 of the EEC Treaty, both the Commission and the experts consulted agreed that this clause could be applied to certain mergers:

La fusion d'une entreprise en position dominante avec une autre entreprise, qui élimine la concurrence qui subsisterait encore dans le marché en cause en créant une situation de monopole, peut précisément avoir les mêmes effets nocifs qu'un comportement visé par

l'article 86. (CEC, 1966a: 26)<sup>29</sup>

The Commission was aware that Article 86 of the EEC Treaty was not the best possible instrument for merger control. In particular, it could be applied only when at least one of the undertakings involved in the merger already held a dominant position before the event. Moreover, it provided for intervention only after the merger had taken place. The Commission, therefore, could neither interfere on the grounds that two firms, when merged, would then acquire a dominant position, nor prevent an anti-competitive merger from taking place. As underlined in the Memorandum, this still left many instances of mergers outside the scope of Article 86. Nevertheless, the Commission considered that Article 86 did not suffer from the strong limitations of Article 85 as merger control instrument:

Contrairement à ce qui se passe pour l'article 85, peu importe, dans le cas de l'article 86, quels sont les moyens utilisés pour parvenir à la situation sanctionnée par l'interdiction. Pour l'application de l'article 86, il est donc indifférent qu'une concentration à laquelle participe une entreprise en position dominante résulte d'un accord entre entreprises ou de l'acquisition d'une entreprise concurrente par l'achat d'actions en bourse... Les critères et la technique juridique prévus à l'article 86 ne feraient pas obstacle à une application aux concentrations: il n'y a pas de distinction entre anciennes et nouvelles ententes ni de problèmes résultant du caractère révocable et temporaire de l'exemption. (CEC, 1966a: 22)<sup>30</sup>

By so arguing, the Commission opened in 1966 the door to the use of Article 86 of the EEC Treaty to control mergers in the Community. Article 86 could be applied if an undertaking in a dominant position eliminated competition by taking over another economically independent undertaking.<sup>31</sup> Indeed, the Commission's *First Annual Report on Competition Policy* (1972a: 78) noted: 'It has been common

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<sup>29</sup> The merger of an enterprise holding a dominant position with another enterprise so that a monopoly situation is brought about by the removal of any remaining competition on the market in question, may in itself constitute an abuse within the meaning of Article 86. (own translation)

<sup>30</sup> In contrast to Article 85, the means used to reach the situation sanctioned by the prohibition are of no importance under Article 86. Hence, to apply Article 86, it does not matter whether a concentration that involves an undertaking in a dominant position is the result of an agreement between enterprises or of the acquisition of a competitor through the purchase of shares in the stock market... Article 86's criteria and legal technique would not constitute a barrier to its application to concentrations: there is no distinction between old and new agreements nor problems resulting from the temporary and revocable character of the exemption. (own translation)

<sup>31</sup> Some authors did not share the Commission's and group of experts' view that Article 86 could be applied to certain mergers. For them, Article 86 does not proscribe a dominant position but rather attacks the abuse thereof. (Swann, 1992a; van Bael and Bellis, 1990; Whish, 1989; Swann, 1979)

knowledge since 1966 that the Commission understands Article 86 to apply to those cases of mergers and takeovers which constitute an abuse within the meaning of this provision.'

The second half of the 1960s did not bring to an end the increase in the degree of concentration observed since 1958 in the different industries of the Community. On the contrary, it was confirmed, as seen in chapter two, that Western Europe was experiencing its first wave of mergers of this century:

Between 1962 and 1970 the yearly number of concentrations in the Community of the Six - defined as financial participations of more than 50% - rose from 173 to 612. In comparison with 1962, the yearly number of concentrations had increased three and a half times by 1970. In comparison with 1962-66, the rate of increase in 1966-70 had almost doubled. (CEC, 1973c: 4-5)

Although most of the increase in the number of mergers was due to the creation of 'national champions', the overall effect was an increase in the degree of concentration in the Community as several studies by the Commission showed (CEC, 1972a; 1973a; 1974a). Moreover, this concentration process seemed unstoppable: 'If the trend continues -and it may not abate until all potential partners are wedded and bedded- the European industrial landscape will soon be dominated by a small number of very large companies, each with a near monopoly in its national market...' (Siekman 1972: 248).

In this context of rising degrees of concentration, the Commission continued looking, though without success, for possible ways to increase its merger armoury. For example, the Commission contemplated, at the time when the Treaties were fused, the possibility of amending the EEC Treaty so as to extend the ECSC merger powers to the Common Market as a whole (Allen, 1996; Allen, 1977; Swann and McLachlan, 1967). Following Van Graay (1977) and Mestmäcker (1973), the Commission also considered establishing a system of preliminary control of mergers in a sectorial way:

Some sectors were dominated by a small number of large enterprises, and therefore the Commission proposed, in 1968, a system of automatic pre-registration for new concentrations in the oil, gas and nuclear energy sector. Only a few months later the Commission proposed such a system for all branches of industry characterised by a high degree of concentration. (Van Graay, 1977: 468)

Last but not least, the Commission tried to put into practice its interpretation of Article 86 of the EEC Treaty as a merger control instrument. It considered a number of merger cases but, after investigation, came to the conclusion that there was no need to apply this Article (Cunningham, 1973; CEC, 1969).

Then, in 1969, the Council of Ministers pointed out, in the Second Programme for Medium-Term Economic Policy, that structural adaptation to common market's conditions of production and sale would be expressed by an acceleration of the process of concentration. The increase in the number of mergers was expected to last and even to accelerate. In the face of this, the Council stressed the urgency of defining clearly the policy to be followed in the field of mergers (Monopolkommission, 1989; van Graay, 1977; CEC, 1973c).

Yet, it was only in June 1971 that the European Parliament, in the shade of the integration momentum created by the 1969 Hague Summit and on the basis of its 1970 Berkhouwer Report on European competition policy, asked for the first time for EEC merger control provisions (Dechery, 1990; Monopolkommission, 1989; van Graay, 1977; OJ [1974] C 23/19; EP Document 263/73). In its *Resolution on the rules of competition and the position of European firms in the common market and in the world economy*, passed on 7 June 1971, the European Parliament stated its belief that it was necessary to eliminate fiscal and legal barriers to cross-border mergers, and, at the same time,

...il s'impose de prévoir une notification préalable pour les concentrations dont la réalisation permettrait de dépasser un certain taux de participation au marché ou un ordre de grandeur donné; ces concentrations ne devraient être considérées comme autorisées que si la Commission ne s'y est pas opposé dans un délai qui reste à déterminer;... (OJ [1971] C 66/12)<sup>32</sup>

Also in 1971 but in December, the Commission issued its famous decision on

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<sup>32</sup> '...for concentrations which exceed a certain share of the market or a certain size there should be prior notification; such concentrations should be regarded as authorized only if the Commission does not raise any objection within a time-limit yet to be fixed;...' (CEC, 1973c)

the Continental Can case.<sup>33</sup> In this decision, five years after its Memorandum on the problem of concentration, the Commission formally applied, for the first time, its interpretation on the use of Article 86 of the EEC Treaty to merger cases.<sup>34</sup> The Continental Can Company, an American packaging company, had acquired successively two of its main potential competitors, the German Schmalbach-Lubeca-Werke AG producer and the Dutch Thomasen & Drijver-Verblifa NV. Company, through its Belgian subsidiary, the Europemballage Corporation SA. In the opinion of the Commission, the second merger strengthened Continental Can Company's dominant position in such a manner as to practically eliminate any existing competition in the market for light metal containers in the north-west region of the Common Market. Accordingly, the operation constituted an abuse of a dominant position within the meaning of Article 86 (Zachman, 1994; Downes and Ellison, 1991; Cooke, 1986; Merkin and Williams, 1984; CEC, 1972a; Mestmäcker, 1972).

On 9 February 1972, both Europemballage Corporation SA. and Continental Can Co. Inc. appealed against the Commission's decision to the European Court of Justice, leaving the controversial question of the applicability of Article 86 of the EEC Treaty to merger control in the hands of the European judges. However, the Commission made clear its intention to continue applying Article 86 to mergers 'entered into by enterprises in a dominant position to the prejudice of consumers' until 'contrary interpretation of the provision by the Court of Justice' (CEC, 1972a: 16).

This disputed Commission's decision was followed by a Communiqué issued by the Heads of State and Government of the Six and of the three States about to join

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<sup>33</sup> Commission's decision of 9 December 1971, OJ [1972] L7/25.

<sup>34</sup> The Commission's Continental Can decision was its second decision under Article 86 of the EEC Treaty:

After a decade concentrating on the application of rules concerning agreements (Article 85), in 1971 Community's competition policy entered the phase of application of Article 86 of the Treaty. The Commission took its first two decisions in the Gema [Commission decision of 2 June 1971, OJ [1971] L 134/15] and Continental Can Co. cases. (CEC, 1972a: 74)

the Community, at their meeting in Paris on the 19 and 20 of October 1972.<sup>35</sup> The Paris Summit 'introduced an ambitious programme of substantive expansion of Community jurisdiction and a revival of the dream of European Union' (Weiler, 1991: 2449). In particular, having studied the problem of industrial concentration in the Community, the Conference, in its Final Communiqué (point 7), invited the Commission to submit proposals to the Council for controlling excessive concentrations making the broadest possible use of Article 235 of the EEC Treaty (CEC, 1974a; CEC, 1973a; CEC, 1973b; CEC, 1973c; CEC, 1972b).<sup>36</sup> A crucial step towards a systematic EEC merger control had been made.

Ten days after this political pronouncement, on 30 October 1972, the Commission informed the Council of its intention 'to submit, independently of the application of Article 86 to specific cases, proposals designed to introduce a more systematic control of mergers of a given scale' (CEC, 1973a: 11). The Council of Ministers took note of the Commission's intentions in its Resolution of 5 December 1972 on action to fight inflation (Dechery, 1990; Allen, 1977; CEC, 1973d).<sup>37</sup>

This movement towards the need to control mergers was also taking place, to a certain extent, at the national level. In 1972, the Federal Republic of Germany was working on its own merger control law and the only European country which already had such law, the United Kingdom, was about to enter into the Community. The 'pro-merger attitude' of the 1950s and 1960s seemed to be shifting towards more intermediate approaches, towards the need to have merger laws, both at the European and national level.<sup>38</sup>

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<sup>35</sup> As a result of the negative referendum of 26 September 1972 on its joining the Community, Norway did not attend the Summit Conference (CEC, 1972b).

<sup>36</sup> Article 235 of the EEC Treaty reads:

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 Assembly, take the appropriate measures.

<sup>37</sup> OJ [1972] C 133/14.

<sup>38</sup> See Annex E.

In the late 1960s-early 1970s, evidence was mounting that showed that mergers had not often yielded the expected efficiency gains. Moreover, as Swann and McLachlan (1967:5) note: 'It [was] recognized that really large enterprises [could] bring with them problems as well as opportunities ... the public might have to pay dearly for its industrial giants.' As a result, there was a change in the climate of opinion to a more critical analysis of the dangers inherent in an excessive legislative and judicial benevolence towards mergers (Bernini, 1991; Woolcock *et al.*, 1991; Gardner, 1990; Lever and Lasok, 1986; Scherer, 1974). For example, two early 1970s reports of the Organisation for Economic Co-operation and Development (OECD), a research body for the world's most industrialised countries, concluded that a combination of a structural approach and conduct control was needed and recommended the establishment of merger control systems (OECD 1970; OECD 1974). The time seemed ripe to complete EEC competition law.

Indeed, on 21 February 1973, the European Court of Justice's judgement in the Continental Can case confirmed the 1966 Commission's interpretation on the applicability of Article 86 of the EEC Treaty to the control of mergers (Schwartz, 1993; CEC, 1973a; CEC, 1974a).<sup>39</sup> To be more accurate, the Court ruled against the Commission decision on Continental Can on grounds of insufficient proof. It considered that the Commission had failed to adequately define the market concerned (Zachman, 1994; Downes and Ellison, 1991; van Bael and Bellis, 1990; CEC, 1973a; ECJ, 1973). Yet, at the same time, the European Court upheld the position that the Commission could intervene to prohibit mergers which resulted in an abuse of a dominant position under Article 86. A company with a dominant position could be regarded as abusing its position by acquiring control over a competitor where this would substantially obstruct competition (Bulmer, 1994; Brittan, 1991; Korah and Rothnie, 1990; Monopolkommission, 1989; Barounos *et al.*, 1975; ECJ, 1973). Merger control at European level was assured at least for those combinations effected within the Common Market by firms in a dominant position.

It was in this favourable context that the Commission's Directorate General

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<sup>39</sup> *Eupemballage Corporation and Continental Can Co. Inc. v. Commission* (Case 6/72) [1973] ECR 215; OJ [1973] C 68.

for Competition (DG IV), at that time in hands of Commissioner Borschette, prepared the text of the merger control regulation proposal. Before deciding on its proposal to the Council, the Commission consulted member states' authorities as well as several interest groups.<sup>40</sup> On 2 July 1973, the Commission convened the 24th Conference of Government Experts of member states on Restrictive Agreements and Dominant Positions in Brussels, and held a preliminary discussion with the relevant national authorities on the draft regulation. The same month, the Commission also sought the opinions of industrialists and of trade associations and unions represented at European level (Ffrench, 1986; van Graay, 1977; CEC, 1974a; *Financial Times*, 21 Jul 1973). After these preliminary consultations, 'the members of Mr. Borschette's competition team [were] under no illusions that their regulation will have an easy passage through the Council of Ministers' (*The Economist*, 4 Aug 1973). Nevertheless, the Commission put its first proposal for a merger control regulation before the Council the 20 July 1973,<sup>41</sup> initiating the consultation procedure to be followed in order to approve the text (CEC, 1974a).

The regulation proposed by the Commission was based on Articles 87 and 235 of the Treaty of Rome. It made provisions for the control of those concentrations, involving at least one undertaking with its seat in the Common Market, which were liable to affect trade between member states and which exceeded two quantitative thresholds: an aggregate turnover of 200 million units of account (later ECU) and a market share, in any one member country, of 25 per cent (Article 1). Furthermore, assessment of each merger case was to be based upon a pure competition criteria but allowing for exemptions on grounds of the common interest of the Community (Article 1). Lastly, it gave the Commission the exclusive competence to deal with merger cases within the scope of the regulation, subject to verification by the Court of Justice (Article 3). Co-operation between the Commission and the member states in the decision-making process was ensured through a simple advisory committee procedure.

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<sup>40</sup> As Cini (1996: 20) points out: 'Under the 1966 Luxembourg Compromise, the Commission has an obligation to consult member states as well as other interests before proposals are issued...'

<sup>41</sup> OJ [1973] C 92/1.

At a more technical level, the proposal called for a compulsory regime of prior notification for those concentrations whose aggregate turnover was not less than 1000 million units of account; fixed operational deadlines (i.e. a final decision was to be taken at the latest at the end of a period of twelve months); and a procedure similar to the one already applied for Articles 85 and 86 of the EEC Treaty under Council Regulation No 17 (of 1962).

These essential characteristics of the proposed regulation show that the Commission desired the absolute control of all merger cases falling within the scope of the regulation. Control that would be based on a 'trade-off approach' to merger policy. As noted by the Commission in its explanatory memorandum (CEC, 1973c), the draft neither put forward a system, like that of Article 66 of the ECSC, based on prior authorisation, nor of general prohibition. Instead it suggested a system where incompatibility with the Common Market was to be established case by case after assessment by the Commission on whether the power of a concentration hindered effective competition in the Common Market (Schwartz, 1993; Swann, 1992b; Reynolds, 1990; Hölzler, 1990; Monopolkommission, 1989; Swann, 1979; Barounos *et al.*, 1975; *The Economist*, 4 Aug 1973; *The Economist*, 14 Jul 1973; CEC, 1973b; CEC, 1973c; CEC, 1974a). As Woolcock (1989: 15) stated: 'The Commission [was] thus seeking not only exclusivity above a certain threshold, but also the discretion to use these powers in a flexible fashion.'

The first step of the consultation procedure to approve the regulation, was completed in February 1974. Having been consulted by the Council,<sup>42</sup> both the European Parliament and the Economic and Social Committee endorsed the Commission's proposal by large majorities on votes taken respectively on 12 February<sup>43</sup> and 28 February 1974<sup>44</sup>. Nevertheless, in the course of the discussions

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<sup>42</sup> Both Articles 87 and 235 of the EEC Treaty made consultation of the European Parliament compulsory and, on 20 September 1973, the Council decided to exercise its option [Article 198 EEC Treaty] of consulting the Economic and Social Committee (OJ [1974] C 88/19). From then on, the Council consulted the Economic and Social Committee each time the Commission presented a new amended proposal on EEC merger regulation, that is, each time the European Parliament was formally consulted.

<sup>43</sup> OJ [1974] C 23/19.

<sup>44</sup> OJ [1974] C 88/19.

preceding the two votes, both institutions raised specific amendments to the proposal. In its *Fourth Report of Competition Policy* (1975) the Commission stated its intention to accept three of these amendments:

1. the inclusion of a provision whereby the competent authority would have to take into account of competition on the world market when reviewing concentration cases (Article 1(1));
2. the inclusion under the provisions for compulsory notification of cases of the formation of joint subsidiaries by independent undertakings or groups of undertakings which would otherwise have fallen within the exemption in Article 4(2);
3. the replacement of 1000 million units by 1250 million as the threshold turnover above which mergers of undertakings in the distribution sector were to be subject to compulsory notification (Article 5(2)). (CEC, 1975: 19)

In any case, it was a proposal backed as a whole by the 'supranational institutions', that was presented to the Council of Ministers in 1974 for its revision and approval by unanimity. (CEC, 1977a; CEC, 1975; CEC, 1974a; CEC, 1973a)

Ensuing a 1973 Council declaration, the Community was to have a merger regulation by January 1975. At its meeting of 17 and 18 December 1973, the Council of Ministers set a timetable for the first stage of the action programme on industrial policy called for by the Paris Conference's Final Communiqué. One of the items in the timetable read: 'The Council shall by January 1975 act on the proposal for a regulation on the control of concentrations' (CEC, 1974a: 37). In other words, in December 1973, the Council intended to speedily decide on the merger proposal.

However, the European context in 1974 was not the same as in 1973. The oil shock of 1973 had led to an acute economic crisis in Europe. The unprecedented economic growth of the 1950s, 1960s and early 1970s was substituted by a recession which was to persist throughout the 1970s:

The formation of the OPEC oil cartel and the concomitant quadrupling of the price of oil shifted massive economic resources from Europe and the US to the Middle East, jarring European economies into a recession that was followed by periods of stagflation that would persist for more than a decade. (Gerber, 1994: 114)

As described by the Commission in its *Fourth Report on Competition Policy* for 1974 (1975: 9): '...for some months the Community has been faced with the most serious economic and structural problems since its foundation.'

The response of the EC member states' governments towards this crisis was purely national, as opposed to concerted, strengthening the interventionist character of their policies and erecting non-tariff barriers not only against third-countries but also against each other (Armstrong and Bulmer, 1998; Allen, 1996; I 17, 1995; Tsoukalis, 1993; Cameron, 1992). Quoting Grahl and Teague (1990: 147):

In the 1970s industrial crises in all member states led to an explosion of interventionism at national level: national governments responded to rising unemployment and widespread excess capacity with a series of state-sponsored measures designed to give assistance and protection for the afflicted sectors... The political colour of governments made little difference to the patterns of intervention: in Britain, a Conservative government nationalised the Rolls-Royce aero-engine company and refinanced British Leyland, while Labour nationalised shipbuilding; in Italy, the state-owned industrial holding companies pursued an anarchic expansion through the takeover of unprofitable private businesses; Germany reinforced support for its steel and shipbuilding companies; similar rescues in France took the form of industrial 'plans', rapidly formulated for the most precarious sectors.

The reinforcement of national interventionism and protectionism was picked up by a worried Commission in its annual reports on competition policy throughout the 1970s. For example, in its *Fifth Report on Competition Policy* for 1975 (1976: 7) the Commission wrote: 'The Commission considers that the proliferation of State Aids as a means of mitigating economic difficulties and their social consequences carries with it the risk of preserving industrial structures that have failed to adapt to the circumstances...' Another example can be taken from its *Sixth Report on Competition Policy* for 1976 (1977a: 9): 'The illusion that economic and social problems can be solved either by Community or national protectionism, jeopardizing the unity of the common market, cannot be maintained.' These were years, however, in which the Commission, pressured by governments and industry, adopted a more pragmatic interpretation of competition policy -exemplified by the approval or tolerance of 'crisis cartels' and of state aids to industries in trouble (Cini and McGowan, 1998; Allen, 1996; Gerber, 1994; Cini, 1993; Wilks, 1992).

Regarding merger policies, throughout the 1970s each national government in Europe sought more than ever to build up domestic firms capable of competing with the American giants. The state encouraged or engineered mergers and provided research and development subsidies. In other words, state procurement heavily favoured the domestic firms (Sandholz and Zysman, 1989; Walsh and Paxton, 1975). In the words of Hermann at the *Financial Times* (11 May 1977):

Competition is fast being replaced by regulation by which the bureaucracies of government, big companies and trade unions seek to avoid the consequences of the recession ... These demands are reflected in a tolerant attitude towards mergers and a tendency to protect and fortify industry against overseas competition by nationalisation or regulation of some sort ... The concept of regulation, or dirigisme, with which France entered the Community, seems to be getting the upper hand over the essentially American concept of enforced competition on which Germany banked when taking part in the European venture.

Nevertheless, the data series showed a relative stability throughout the 1970s of the number of large mergers. This stability was the result of divergent trends: the United Kingdom and France rate of the hundred largest firms hardly rose, but overall concentration in Germany and in the Benelux countries did not come to a standstill until the late 1970s (De Jong, 1988; Fishwick, 1982). The continuous process of concentration of the 1960s and early 1970s slowed down some time after 1975 (CEC, 1978) and was marked by stagnation round about 1980 (CEC, 1982a).

It was in these years that two new member states adopted their own merger control laws: France in 1977 and Ireland in 1978; and that two other member states discussed the possibility of adopting one: the Netherlands and Belgium. Therefore, despite the change of context and the re-inforcement of 'national champions' policies, or perhaps because of them, the move previously observed from a 'pro-merger approach' towards a more stringent one continued to take place at national level. As the Commission commented in its *Sixth Annual Report on Competition Policy* for 1976 (1977: 43):

There are substantial differences in the legal treatment of competition policies resulting from differences in legal traditions and degrees of industrialization and concentration, and from the competing priorities of competition, industrial and structural policies. However,...., despite differences of degree, there is a general tendency for all member states to strengthen their competition policy to safeguard active competition. For instance, the principle of abuse is being dropped in favour of the principle of prohibition, resale price maintenance is being banned and merger control is becoming more stringent...member states are improving their own merger control machinery...

It is worth noting, however, that the two new merger laws, similar to the one already established in Britain (since 1965), were based on a 'trade-off approach'. In other words, public interest was to be taken into account by the competition authorities when deciding on a merger case. The other pre-existing merger law, the German one (since 1973), was more 'competition oriented' but also accepted the need

for public interest considerations in certain cases. Enacted domestic law thus allowed, if 'necessary', for a sympathetic and flexible approach to mergers though public interest considerations varied from one country to the other.

On the whole, the result of these interventionist and protectionist national measures was a widening of economic divergence among national economies - reversing the trend of the 1960s when there had been a progressive narrowing of the economic gap- as well as a fragmented and incomplete Common Market and an increasing 'Euro-pessimism' (Tsoukalis, 1993; Cameron, 1992). As the early 1970s context had seemed to offer an opportunity to achieve an agreement on merger control regulation, the context of the second half of the 1970s challenged such an accord.

Notwithstanding the change of context, discussions on the text of the proposal among the Nine started as soon as the Council received the Opinions of the European Parliament and the Economic and Social Committee (OJ [1975] C 233/12). To be more precise, negotiations started with the Council Working Party on Economic Questions at its meetings held on 14 June and 25 July 1974 (CEC, 1975). Consideration of the proposed regulation continued to take place at this level in 1975: meetings on 18 February, 25 June, 23 September and 10 and 11 November. This first stage of the work was, as the Commission (1976: 15) indicates, 'devoted to discussion of general aspects' and 'to some extent held back until the outcome of the June referendum in the UK was known.'

In July 1975, not satisfied with the progress of the negotiations on the proposed merger control regulation, the Commission 'made a formal approach requesting the Council to speed up work' (Reynolds, 1983: 420). It 'criticized some governments for dragging out the discussions at the expert level by continually asking for supplementary studies and analyses ...[so as] to avoid decision' (Allen, 1977: 107). It asked the Council 'to intensify its work' and 'to give the proposal priority' (CEC, 1976: 9 and 15). Several other Commission's complaints followed (CEC, 1978; CEC, 1977a) but, as shown below, without much success.

In 1976, the Council Working Party on Economic Questions held only one meeting, on 23 March, to consider the merger proposal. After this meeting, it submitted an interim report to the Permanent Representatives Committee calling for political guidelines on five main problems which it had been incapable of resolving: the legal basis of the proposed regulation, the scope or field of application of the regulation, the possibility of derogations, the notification of planned mergers and the decision-making procedure (Reynolds, 1983; CEC, 1981a; CEC, 1981c; CEC, 1978; CEC, 1977a).

The Committee of Permanent Representatives was unable to come to any decision on these five questions in 1976. It was not until 1977 that some progress was made: 'At meetings held on 17 March, 11 May, 19 October and 25 November 1977, the Committee noted a growing convergence of views on the power to grant derogations and on the question of notification' (CEC, 1978). However, at the end of 1977, all five items were still in the Committee's agenda. It was at this point in the negotiations that the proposal was to all effects shelved in 1978 (Gourvish, 1996; Merkin and Williams, 1984; Allen, 1983; *The Economist*, 12 Dec 1981; CEC, 1982a; CEC, 1981a; CEC, 1980; CEC, 1979). The first attempt to achieve an agreement on European merger regulation had failed.

To summarise this descriptive section, four stages in the 1970s negotiations on European merger regulation can be distinguished (see table 4.1). These stages followed the consultation procedure needed to approve the Commission proposal, as established by Article 235 of the EEC Treaty, but they did not all occur within the same political and economic context.

The first three stages took place within a favourable context to enable an agreement on European merger regulation. Indeed, the 1960s and early 1970s were characterised by an unprecedented economic growth, Euro-optimism, a European wave of mergers and a move from 'pro-merger approaches' towards more stringent ones at the European level and, to a certain extent, also at the national level. The first stage covered the background of the legislative proposal, i.e. the events which led to the proposal. It began as early as 1957, with the absence of a specific merger control

measure in the EEC Treaty and finished as late as February 1973 with the European Court of Justice ruling on Continental Can. The second stage was devoted to the preparation of the text of the proposal and coincided with the first semester of 1973. The third stage was the consultation period which is the time needed by the European Parliament and the Economic and Social Committee to evaluate and vote on the proposal.

The fourth and last stage, corresponding to the Council discussions on the text of the proposal, happened in a totally different context, i.e. a challenging one. The 1974-78 context was marked by an economic crisis, Euro-pessimism, protectionist national measures and yet there was a reinforcement of the shift from 'pro-merger approaches' towards more intermediate ones at the national level. By 1978 the Council discussions arrived at a stalemate.

TABLE 4.1. THE 1970s PERIOD

**CONSULTATION PROCEDURE (ART 235 EEC Treaty)****CONTEXT 1957-73**

- \* Economic boom.
- \* European merger wave.
- \* Euro-optimism.
- \* Move from a 'pro-merger approach' to a more stringent one at the European level and, to a certain extent, also at the national level.

**BACKGROUND OF THE LEGISLATIVE PROPOSAL**

- \* 1957, No provisions for merger control in the Treaty of Rome (different from the 1951 Treaty of Paris, Art. 66)
- \* 1966, Commission's Memorandum on the control of mergers.
- \* 1969, Council's statement on the need to define an approach to business concentrations.
- \* June 1971, European Parliament's call for systematic European merger control.
- \* December 1971, Commission's decision on Continental Can.
- \* 20 October 1972, Heads of State and Government's Communiqué calling for an EEC merger regulation (EMR).
- \* 30 October 1972, Commission's decision to submit proposals for a more systematic control of mergers.
- \* February 1973, European Court of Justice's ruling on Continental Can.

**PREPARATION OF THE TEXT**

- \* July 1973, Commission's consultations: interest groups and member states' relevant authorities.
- \* 20 July 1973, Commission's first proposal on EMR.
- \* December 1973, Council's declaration: intention to have acted on the EMR by January 1975.

**OPINIONS OF THE EUROPEAN PARLIAMENT AND THE ECONOMIC AND SOCIAL COMMITTEE**

- \* 12 February 1974, European Parliament's favourable Opinion.
- \* 28 February 1974, Economic and Social Committee's favourable Opinion.

**CONTEXT 1974-78**

- \* Economic crisis.
- \* Reinforcement of national interventionism and fragmentation of the European market.
- \* Euro-pessimism.
- \* Move from 'pro-merger approaches' to more stringent ones continued at the national level.

**DISCUSSIONS IN THE COUNCIL**

- \* 1974-75, Different meetings of the Working Party on Economic Questions.
- \* July 1975, The Commission asked the Council to give priority to the proposal.
- \* 1976-77, Different meetings of the Committee of Permanent Representatives.

=> THE PROPOSAL WAS TO ALL EFFECTS SHELVED IN 1978.

#### 4.2. EARLY 1980s: THE SECOND ATTEMPT

The beginning of the 1980s found Western Europe in the midst of a deep economic malaise. Stagnating output, high inflation, rapidly rising unemployment, and declining export shares of world markets formed the main elements of a dismal economic picture in the aftermath of the second oil shock. Moreover, these were times of the third industrial revolution based on sectors such as electrical and electronic equipment, office machinery, and information technology. It represented a time of major technological advances and rapid industrial restructuring at the global level; and Europeans increasingly felt that they were losing out in the international race for the industries of the future. In fact, there was a gradual loss of market shares within the Common Market as well as in the world market to the United States and Japan in high technology products (Tsoukalis, 1993; Pinder, 1993; Cameron, 1992; Holmes, 1992; Sandholtz and Zysman, 1989; Fishwick, 1982; OJ [1981] c 144/19).

Confronted with the fading competitiveness of the EC *vis-à-vis* the United States and Japan, 'market operators pressed for the retention of traditional structures, an unrealistic improvement of living standards and reliance on State financial intervention and protectionist measures' (CEC, 1981a: 9). And obtained a response: 'There [was] a growing tendency in the various member states for the public authorities, under considerable pressure, to make use of aid to protect their industries' and even 'to extend public ownership' (CEC, 1982a: 12 and 13). A clear example of this tendency could be found in France. As Grahl and Teague (1990: 151) confirm: '...it was [in France] that industrial strategy had gone furthest in the direction of state-led reconstruction on the national basis.' Indeed, the industrial strategy of the left-wing government elected in France in 1981 was a rapid implementation of a vast nationalisation programme of French industrial companies. But even in Mrs Thatcher's conservative Britain, the government handed out cash to keep tottering firms in business (*The Economist*, 25 Apr 1981).

In those years when member states often stepped in to support or rescue both private and public undertakings, the move previously noted from a 'pro-merger approach' towards a more stringent one did not take place at the national level. Both

Belgium and the Netherlands dropped their discussions on the possibility of adopting merger control laws and Greece, incorporated into the EC in 1981, did not have such a law. As a result, in these early years of the decade, only four of the then ten member states had their own merger control laws: the United Kingdom, the Federal Republic of Germany, France and Ireland.<sup>45</sup>

Regarding European integration, although the EC had survived its first major enlargement in 1973, as well as the dramatic deterioration of the international macroeconomic environment, it was considerably weaker. The efforts to extend integration to new areas of activity had largely failed and intra-EC trade had stagnated as a result of both the non-tariff barriers erected by the member countries and the policy of 'national champions' pursued by most governments. The entrance of Greece in 1981 did not change the situation. Quoting Holmes (1992: 65): 'The EC had never been less unified than it was in the early 1980s.' These were years of 'Euro-pessimism' and 'Euro-sclerosis', terms which became popular in the European and foreign media (Tsoukalis, 1993).

It is within this challenging context that both the Commission and the European Parliament insisted once again on the need to have an EEC merger regulation, pressing the Council to resume its work on the proposal. The Commission 'remain[ed] convinced that it [was] essential to introduce an instrument for a more systematic control of large-scale mergers at Community level...' (CEC, 1981a: 29). It continued to control mergers through Article 86 of the EEC Treaty profiting both from the extension of the concepts of abuse and dominance brought about by European Court of Justice's rulings throughout the 1970s and from the possibility of using interim measures established by the Court in the *Camera Care* case<sup>46</sup> in 1980 (CEC, 1985; CEC, 1984a; Reynolds, 1983; CEC, 1983a; CEC, 1982a; CEC, 1981a; CEC, 1980). As for the European Parliament, it 'deplore[d] the fact that the Council ha[d] still not adopted the merger control regulation' (OJ [1981] C 144/19).

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<sup>45</sup> See Annex E.

<sup>46</sup> *Camera Care Ltd v. Commission* (Case 792/79 R) [1980] ECR 119.

Both the Commission and the European Parliament were worried about the negative effects high degrees of concentration in the Common Market could have on competition (CEC, 1986a; CEC, 1985; CEC, 1982a; OJ [1981] C 144/23). Though there were no signs of a new wave of mergers, various Commission's studies showed that oligopolies were increasing their hold on markets. Community industry was becoming increasingly concentrated (CEC, 1983a; CEC, 1982a). Quoting the Commission's *Eleventh Report on Competition Policy* (1982a: 15) there was a 'combination of persistent crisis and tendency towards oligopolistic structures.'

Then, in 1981, the Commission took again the initiative. The new DG IV Commissioner, Mr. Andriessen, pursuant of Article 149 (2) of the EEC Treaty,<sup>47</sup> put before the Council an amended European merger regulation proposal on 16 December 1981.<sup>48</sup> Although aware that political circumstances were not very favourable, Andriessen considered 'the Commission [could] not remain inactive with regard to the Council' (CEC, 1981c: 1).

The main purpose of the 1981 amended proposal was twofold. First, it aimed to clarify that, as was the intention with the original Commission's proposal, the regulation should be applied first and foremost to mergers of an European scale. The scope of the regulation was to be determined by one (i.e. aggregate turnover) instead of the two quantitative criteria originally proposed (i.e. aggregate turnover and market share). The regulation was not to cover those concentrations which did not meet an increased aggregate turnover criterion: 500 million ECU as opposed to 200 million ECU (Article 1). As to the market share criterion, it was to be used as an assessment criterion and no longer as a means of indicating the limits below which the regulation would not apply (Article 1). Nevertheless, the widening of the market share criterion, from 25 per cent in any one member state to 20 per cent of the total Common Market, further indicated the Commission's intention that there should only be Community involvement in the largest and most anti-competitive mergers.

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<sup>47</sup> Article 149 (2) of the Treaty of Rome read: 'As long as the Council has not acted [on a proposal from the Commission], the Commission may alter its original proposal, in particular where the Assembly has been consulted on that proposal'. Article 149 was removed by the Treaty on the European Union.

<sup>48</sup> OJ [1982] C 36/3.

Secondly, the new proposal intended to involve member states more closely in the decision-making process. Although Article 3, which established the exclusive competence of the Commission to deal with merger cases falling within the scope of the regulation subject to verification by the Court of Justice, was not changed; Article 19 introduced the possibility for the Council to have a say in the decision-making process. Under the amended proposal, if a majority of the Advisory Committee opposed any draft decision on the incompatibility of a merger with the Common Market, the Commission could not adopt a final decision until a cooling-off period of twenty days had elapsed. Within that period, a member state could raise the matter in the Council if it considered that an objective having priority in the common interest of the Community justified derogation from the rules concerning incompatibility. At the end of the day, nevertheless, the Commission would only be obliged to 'take account of the policy guidelines which emerged in the course of the Council's deliberations.'

In short, member states were to be more closely associated in the Commission's decision-making process without, however, casting doubt on the Commission's final power of decision. They would have had more power than under a pure advisory committee procedure but less than under a pure management or regulatory committee procedure. As Wish (1985: 530) ascertained, under this proposal, 'national governments [would have retained] some influence over the Commission's merger policy.'

Besides these two main changes in scope and control, the amended proposal also introduced, in response to a request made by the European Parliament in 1974, a new assessment criterion: the international situation criterion. Using this, the Commission, in making its case by case assessment, would have taken into account the competitive situation and the development of trade at the international level, that is, 'the effects of international competition' (Article 1).

To sum up, the system of merger control put forward in 1981 was similar to that proposed in the 1970s: the Commission would continue to have the last word in merger cases within the scope of the regulation and to follow a 'trade-off approach'

to merger policy. The Commission would first determine whether a merger acquired or enhanced the power to hinder effective competition in the Common Market, and then decide whether or not the merger should nonetheless be authorised on certain common interest grounds (Article 1). Nevertheless, the 1981 amendments increased the quantitative threshold which defined mergers with a Community dimension reducing the scope of application of the regulation. The modification also attempted to involve the member states more closely in the decision-making process and introduced the international situation criterion. In short, the Commission was trying to offer a solution to two of the previous negotiations' key political problems and to answer some of the 1974 European Parliament's requests, without drastically changing the general lines of its proposal. (Reynolds, 1990; Brussels Law Offices, 1988; Elland, 1987; Merkin and Williams, 1984; Reynolds, 1983; CEC, 1982a; CEC, 1981b; CEC, 1981c)

Following the consultation procedure to approve the regulation, both the Economic and Social Committee and the European Parliament were consulted by the Council on the new proposal. The Economic and Social Committee endorsed the amended proposal in an Opinion adopted at its plenary session of 30 June and 1 July 1982.<sup>49</sup> It welcomed most of the amendments made by the Commission on the 1973 proposal but stressed that 'the Commission must continue to hold absolute responsibility for deciding whether a merger is incompatible or not with the common market' (CEC, 1983a: 34). The European Parliament also supported the 1981 Commission proposal in its Resolution of 25 October 1983<sup>50</sup> and suggested some amendments. These mainly concerned Article 1 and included both raising the aggregate turnover threshold from 500 to 750 million ECU and adding a new quantitative threshold whereby any merger which gave the firms concerned, irrespective of their turnover in the market as a whole, a market share in a substantial part of the Common Market over 50 per cent could be declared incompatible with the maintenance of effective competition in the Common Market. Moreover, despite its general backing to the proposal, the European Parliament, as the Economic and

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<sup>49</sup> OJ [1982] C 252.

<sup>50</sup> OJ [1983] C 322/26.

Social Committee had done, rejected the part of the amended proposal dealing with co-operation between the Commission and the competent national authorities, i.e. Article 19(7) and (8) (CEC, 1984a).

The Commission accepted the majority of the changes suggested by the European Parliament yet persisted in its argument for greater co-operation with the member states (CEC, 1984a). Indeed, on 7 February 1984, the Commission formally introduced the European Parliament's comments into the text of the proposal but did not modify Article 19.<sup>51</sup> The reluctance of the Commission to alter Article 19 may well have been due to the views expressed in a meeting of the Advisory Committee on Restrictive Practices and Dominant Positions held late in 1983 to discuss the 1981 amendments (Merkin and Williams, 1984).

In any case, the 1984 amendments only concerned Articles 1, 4 and 6 as well as introduced a new Article 22a. They provided for: an increase in the aggregate turnover threshold from 500 to 750 million ECU (Article 1); the adding of the market share criterion of 50 per cent (Article 1); minor changes in both Articles 4 (prior-notification) and 6 (commencement of proceedings); and a new provision (Article 22a) explicitly stating that the Commission could publish guidelines indicating the circumstances in which examination would take place (CEC, 1986a; CEC, 1985; CEC, 1984c). The 1981 approach was thus substantially unchanged.

Finally, it was in February 1984 that a revised proposal, backed as a whole by the supranational institutions, was submitted to the Council of Ministers for its approval. It is important to note that the 1984-86 context, in which the Council negotiations were to take place, was unlike that experienced in the 1981-83 period. Things had been slowly changing in Western Europe leading to a remarkable transformation of the economic and political climate. The first step towards this change was the establishment of a link between the loss of competitiveness of European firms and the fragmentation of the European market. The second step was the perception of the existence of a further link between both and the interventionist

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<sup>51</sup> OJ [1984] C 51/8.

role of the State in Western Europe.

In relation to the first link, Tsoukalis (1993: 49) considers that 'a consensus view about its existence gradually developed in the 1980s among key policy-makers and industrialists'; and that 'the Commission was highly instrumental in this respect.' The emphasis was on high technology sectors where economies of scale and gains associated with learning curves were perceived to be particularly important. Accordingly, the priority was on sectors where the advantages from the creation of a real Common Market should have been the greatest. As Woolcock *et al.* (1991: 3) described:

The progressive globalization of business [made] it impossible for companies heavily dependent on national markets to remain internationally competitive -largely because increased technological sophistication mean[t] that the economies of scale needed to fund product development [could] no longer be achieved in purely national markets.

Therefore, non-tariff barriers erected by national governments to protect old established sectors such as textiles that were hard hit by the stagflation of the 1970s, were not only fragmenting the European market but also blocking technological progress and thus negatively affecting European firms' competitiveness. European companies could only compete on an increasingly interdependent and global world economy if their home market became united rather than fragmented (I 8, 1995; Dinan, 1994; Sachwald, 1994; Tsoukalis, 1993; Pinder, 1993; Cameron, 1992; Hodges *et al.*, 1992; Keohane and Hoffman, 1994; Grahl and Teague, 1990).

Concerning the second link, as traditional policy instruments produced unexpected and often adverse results such as the above mentioned blockage of technological progress, and as unemployment increased, the post-war interventionist model was being challenged from within. Quoting Holmes (1992: 65):

...by the early 1980s severe disillusionment had set in with the meagre results and even more meagre prospects for national champions policies in an increasingly globalised world market economy, in which the micro- and macro-roles of national government spending were less and less important.

The failure of interventionist policies to deal with the economic recession and the lack of competitiveness of European firms in front of foreign competitors, served to

focus political attention on the rigidities and barriers created by systems such as state management of industry, and their allegedly harmful impact on industrial efficiency and technological development (I 17, 1995; Dinan, 1994; Milward *et al.*, 1993; Cameron, 1992; Grahl and Teague, 1990; Sandholtz and Zysman, 1989). In short, attention was focused on the inability of the state in controlling particular policy areas and processes. These were no longer 'the high days of optimism about the ability of political institutions to guide the "invisible hand"'.

As a consequence of these relationships, it may be said that a new diagnosis of the European situation emerged that pointed to the excessive presence of the nation-state in every sphere of life as the main cause for both the lack of competitiveness of European firms in relation to foreign competitors and the European market fragmentation. The change in the economic conditions within which Europe was operating in the 1980s required a change in the entire conception of the conditions necessary to enable European companies to compete in the international arena. This new diagnosis was echoed by developments both at the national and European level.

At the national level, a gradual redefinition of the role of the nation-state took place. The interventionist state was exposed to a wider-ranging critique pushing in favour of supply-side measures. The period's relatively lower rates of national income growth as compared to that in the first three post-war decades seemed to justify many of these critiques and paved the way for a gradual coalescence of national politics around a neo-conservative call for privatisation, deregulation and a reinforcement of competition controls.

However, the final catalyst for the shift from a state-managed to a more market-oriented industrial policy was made possible by two key developments internal to the nation-state. First, supply-side programmes and economic deregulation mainly imported from the United States under President Reagan, were pursued by Prime Minister Margaret Thatcher in the United Kingdom and later projected towards Europe as a means of conquering new markets for British industry and financial corporations. Secondly, France's President Mitterrand's choice in 1983 to change his

1981 policy of nationalisation and stimulation of internal demand seemed to mark the final abandonment of the belief that the post-war model of the Western European state could be made to generate the same results as it had done in previous years (I 17, 1995; Tsoukalis, 1993; Cameron, 1992; Grahl and Teague, 1990; Sandholtz and Zysman, 1989; McLennan, Held and Hall, 1984).

This shift towards supply-side measures, strongly supported by the EC Commission in its annual economic reports, was reflected in a general move to the political right in terms of economic policies, evident in most countries of Western Europe during the first half of the 1980s irrespective of the colour of the political parties in power (Tsoukalis, 1993; Cameron, 1992; Sandholtz and Zysman, 1989). In the words of Wilks (1992: 9):

Whether one calls it neo-liberalism or Thatcherism the move towards deregulation, privatisation and the withdrawal of the state has been of almost revolutionary proportions in the UK, it was always congenial to the Germans and has become influential in France and many of the smaller European countries.

Thus, it can be said that in the first half of the 1980s there was a shift, although taking place at different speeds in the different member states, from a Keynesian economic doctrine to a neo-liberal intellectual justification (Cini and McGowan, 1998; I 19, 1995; I 17, 1995). As Allen (1996: 159) points out: 'The transformation came in the 1980s, with the swing away from Keynesian policies towards a new enthusiasm for the workings of the market.' According to Hall (1984: 13), this change 'represented a move to restore the ideal of the classical liberal state, but under advanced 20th century capitalist conditions: therefore, the Neo-liberal state.'

To recapitulate, in the early mid-1980s the tendency manifested during the course of the first thirty years of the post-Second World War, in which the nation-state accumulated tasks and functions, was reversed. This supposed a gradual withdrawal of the nation-state from the governing of economic markets and thereby the beginning of a shift of attention from the public sector to the private sector. Quoting Sandholtz and Zysman (1989: 110): 'The political basis, in attitude and party coalition, for a more-market-oriented approach was being put in place.'

At the European level, the need of European companies to operate in an unhindered fashion throughout the Community rather than in small, national markets in order to be competitive, together with the growing popularity of supply-side measures and economic deregulation, motivated the programme of 'completing' the Internal Market. The European Court of Justice's 1970s and 1980s rulings made the practical achievement of such a programme more plausible. In particular, its famous Cassis-de-Dijon decision (1979) allowed the move from a policy of detailed harmonisation of standards to one of minimal harmonisation together with 'mutual recognition', i.e. 'where a product has been lawfully produced and marketed in one member state, it must be allowed to be traded freely throughout the Community' (Slynn, 1992: 47). For Keohane and Hoffmann (1994: 253): 'Reliance on "mutual recognition" rather than harmonization reflected the decision to focus Community attention on removal of barriers rather than on means of economic intervention.' (Allen, 1996; Sachwald, 1994; Tsoukalis, 1993; Cameron, 1992; George, 1991; Sandholtz and Zysman, 1989; Woolcock, 1989)

Signed in February 1986, the Single European Act (SEA)<sup>52</sup> created a timetable for the implementation of the Internal or Single Market by 1992.<sup>53</sup> It effectively transferred to the European level new policy areas that had for years remained under the exclusive control of national governments and authorised a revived Commission to assume the responsibility of achieving compliance with the Treaty provisions (Cini, 1996; Tsoukalis, 1993; Cameron, 1992; Weiler, 1991; Sandholtz and Zysman, 1989; MacLachlan and MacKesy, 1989).

The negotiations and the signing of the SEA (1984-86) coincided with a steady improvement of the economic environment. The political readiness to go ahead with what was perceived as a supply-side programme contributed to a further improvement of it. With the Internal Market, the Community had, as in the 1950s and 1960s, found a *force motrice* for further integration. However, contrary to experiences

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<sup>52</sup> Single European Act of 7 February 1986, OJ [1987] L 169/7. (effective since 1 July 1987).

<sup>53</sup> The Internal Market is defined, in a new Article 8(a) added by the SEA to the Treaty of Rome, as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.'

during those decades, this time the objective was accompanied by changes in the decision-making process which were meant to facilitate the implementation of the programme, such as majority voting in the Council of Ministers. On this occasion, therefore, an effective link was established between the change in the structure of the European market and European political institutions. Moreover, for the first time, a programme of full integration of the private market was made possible by the shift from state-managed to more market-oriented national industrial policies. (Tsoukalis, 1993; Cameron, 1992)

The negotiations and signing of the SEA were also concurrent with the beginning of a new trend of merger activity in the Community (Woolcock, 1989; CEC, 1986a). As the Commission concluded from its annual study on concentration for 1986 (CEC, 1987a: 216): '...there was a sharp rise in the number of acquisition of minority holdings. As the acquisition of a minority stake in a company can be a prelude to a takeover, this finding could signal a future wave of merger activity.' According to De Jong (1988: 4), the merger movement had started earlier: 'Since 1983, merger and takeover activity in all European countries is again on the increase.'

Thus, it is in a totally different context that the Council negotiations on the new merger control regulation proposal started. A transition was taking place from a Western Europe based on Keynesian policies in which the nation-state accumulated tasks and functions despite being involved in a process of integration, to a Western Europe based on neo-liberal policies in which there was a move of activities from the nation-state both to the private sector and to the European level as well as a new trend of merger activity. In short, as the 1981-83 context challenged an agreement on merger control regulation, the 1984-86 period seemed to offer an opportunity to achieve such an accord.

Indeed, in this new atmosphere, 'competition policy was seen as an essential adjunct to the market' (Allen, 1996: 159) or even as 'the keystone' of this new market approach (Cini and McGowan, 1998: 31). In the merger area, a new OECD report published in 1984 argued once again in favour of prior control of mergers,

especially of larger ones (Lyons, 1987; OECD, 1984). Yet, neither the Commission's White Paper on the creation of an internal market nor the SEA did include any reference to the need of EEC merger control (Cini and McGowan, 1998; Dechery, 1990). As Rosenthal (1990: 303) put it: '...merger control was no part of the 1992 program.' For some authors, this was a reflection of the difficulties the 1984 amended proposal was experiencing in the Council (Woolcock, 1989).

The Council's Working Party on Economic Questions initiated its discussions on the Commission's amended proposal for a merger regulation on 10 July 1984, after seven years of interruption (Dechery, 1990). Though the working group's meetings in 1984 and 1985 indicated that a majority of member states agreed with the principle of establishing a Community instrument for merger control, disagreement persisted both on points of detail and on certain essential issues. Four key issues remained unsolved: the scope of application (Article 1(1) and (2)), derogations (Article 1(3)), prior notification (Article 4) and the control procedure (Article 19) (CEC, 1986a; CEC, 1985). A political decision by the Council to serve as guidance for future debates seemed necessary. Yet, 'there was no meeting in the Council to discuss these matters' (CEC, 1987a: 49), 'the Council remain[ed] unwilling to enter into a constructive discussion of the Commission's proposals' (CEC, 1987a: 16). As a result, in the course of 1986, the Council's Working Party and the Committee of Permanent Representatives did not succeed in making any progress on these four outstanding issues. Negotiations on the merger regulation proposal had reached a new stalemate.

This new impasse arrived despite the efforts and threats of Mr. Peter Sutherland, head of DG IV since 1985 and, for some commentators, 'the most vigorous and committed Commissioner Europe ha[d] ever had' (Tempini, 1991: 141). Like his predecessor, Sutherland had made merger control one of his priorities (I 8, 1995; Lever and Lasok, 1986). Shortly after taking office, he threatened to develop EC merger policy by other means if the Council did not endorse the merger control regulation proposal. First, he indicated that he was prepared to apply not only Article 86 but also Articles 85 and 90 of the EEC Treaty to mergers (Bernini, 1991; Tempini, 1991; Brussels Law Offices, 1988; Elland, 1987; Korah, 1987; Reynolds,

1987; Lever and Lasok, 1986). For example, in a speech to the Association des Juristes d'Entreprises Européens of 18 April 1985, he stated:

As I have already indicated on other occasions if the proposal for merger control which has been pending now before the Council for 12 years is not enacted, the Commission will be forced to examine the direct applicability of Articles 85, 86 and 90 to mergers. In that event, I could propose to the Commission to adopt appropriate guidelines before applying this policy in individual cases. (Brussels Law Offices, 1988: 285)<sup>54</sup>

Then, in November 1985, Sutherland hinted, for the first time, at the possibility of extending the Commission's existing powers under Article 86 of the EEC Treaty by exploiting the concept of 'collective dominance' or 'shared monopoly'. Such a development would have placed mergers involving members of so-called 'tight' oligopolies and mergers between one oligopolist and a smaller undertaking within the scope of Article 86 (Reynolds, 1987; Lever and Lasok, 1986). In a speech delivered at the Eighth Annual Competition Law Conference, organised in Brussels by European Study Conferences,

Mr. Sutherland stated that the Commission was going to pay close attention to the type of case expressly mentioned in Article 86 namely the abuse of one or more undertakings of a dominant position. In other words the Commission would seek to rely on the concept of abuse of a collective dominant position where it could not identify one dominant company, for example to prevent further concentration in a market that is already oligopolistic...Mr. Sutherland stated that a report had been commissioned and that the Commission was examining a number of cases. (Brussels Law Offices, 1988: 287)

Sutherland reiterated in other speeches his intention both of using Articles 85 and 90 of the EEC Treaty as merger instruments and to apply Article 86 to cases involving undertakings which were jointly in a dominant position, if there was no progress in the Council on the proposed merger regulation. For instance, in his September 1986 conference at the International Bar Association meeting in New York (Brussels Law Offices, 1988; Elland, 1987; Reynolds, 1987; Lever and Lasok,

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<sup>54</sup> Article 85 possible application to mergers was discussed by several legal experts in those years as this article of the EEC Treaty had been brought in a number of joint venture cases into close contact with issues most usually connected with mergers (Brittan, 1992; Lever and Lasok, 1986; Merkin and Williams, 1984). Sutherland usually mentioned this possibility in a context of a special implementing regulation based on Articles 85 and 87 of the EEC Treaty, which would presumably contain thresholds to avoid the flood of notifications that would otherwise result as well as introduce strict procedural time-limits (Brussels Law Offices, 1988; Reynolds, 1987). Such a regulation would not need unanimity but a qualified majority in the Council to be adopted.

Regarding Article 90 of the EEC Treaty, its application to mergers would have been aimed at operations involving large public undertakings and would have particularly affected Italian public conglomerates (Korah, 1987; Reynolds, 1987).

1986). Yet, as noted before, Sutherland's threats were unsuccessful.

Given this situation, in 1986, the European Parliament, in its Resolution on the *Fifteenth Annual Report on Competition Policy*, invited the Commission to withdraw the proposal and to start anew:

[The European Parliament] considers that the Commission should end the 13 year-old deadlock in Council on its proposal on amalgamation and merger controls by withdrawing [its proposals] forthwith, in order that a fresh start can be made on filling this important gap in the Community's competition policy. (CEC, 1987a: 245)

This advice highlighted the fact that the early 1980s attempt to get an EEC merger regulation had failed and marked the beginning of a new period of negotiations.

To outline this descriptive section, four stages can again be singled out in the early 1980s negotiations of the EEC Merger Regulation (see table 4.2). These four stages followed the consultation procedure needed to approve the Commission's proposal. Yet, while a common factor of this period of negotiations was the absence of the 1970s move from a 'pro-merger approach' towards a more stringent one at the national level, the four stages did not all occur within the same context.

The first three stages took place within a challenging context characterised by a deep economic crisis, 'national champions' policies and Euro-pessimism. The first stage covered the years 1978 to 1980 and accounted for the events which led to the 1973 proposal's amendments. The second stage corresponded to 1981, a year dedicated to the preparation of the text changes and by the end of which the Commission submitted to the Council its revised proposal. In the subsequent third stage, both the European Parliament and the Economic and Social Committee approved the 1981 draft though subject to some modifications. In February 1984, most of their amendments were formally introduced by the Commission into the merger regulation proposal.

The fourth stage, that ran from 1984 to 1986, enjoyed a more favourable context. The political and economic climate both at the national and the European level was undergoing a transformation. However, at this stage, the Council's

Working Party on Economic Questions and the Committee of Permanent Representatives discussed the revised text without reaching an agreement. The early 1980s negotiation period ended with an apparent new deadlock situation and the recommendation of the European Parliament to start afresh. The latter closed a period of negotiations and announced the start of another.

**TABLE 4.2. THE EARLY 1980s PERIOD****CONSULTATION PROCEDURE (ART 235 EEC Treaty)*****CONTEXT 1978-83***

- \* Deep economic malaise.
- \* Interventionist policies at national level.
- \* The move from a 'pro-merger approach' towards a more stringent one at the national level did not take place.
- \* Euro-pessimism.
- \* Increasing number of oligopolies.

**BACKGROUND OF THE LEGISLATIVE PROPOSAL AMENDMENT**

- \* 1978, Lack of agreement on the 1973 EEC merger regulation (EMR) proposal.
- \* 1980, The Commission and the European Parliament pressed the Council to resume its work.

**PREPARATION OF THE TEXT**

- \* 16 December 1981, Commission's amended proposal on EMR.

**OPINIONS OF THE EUROPEAN PARLIAMENT AND THE ECONOMIC AND SOCIAL COMMITTEE**

- \* 30 June/ 1 July 1982, Economic and Social Committee's favourable Opinion.
- \* 25 October 1983, European Parliament's favourable Resolution.

= > 7 February 1984, Commission's new amended EMR proposal based on European Parliament's comments.

***CONTEXT 1984-86***

- \* Transformation of the economic and political climate both at the national and European level towards neo-liberal policies and Euro-optimism.
- \* Beginning of a new merger wave.

**DISCUSSIONS IN THE COUNCIL**

- \* 1984-86, Different meetings of the Working Party on Economic Questions and of the Committee of Permanent Representatives.
- \* 1985-86, Sutherland's threats.
- \* 1986, European Parliament's advice to withdraw the EMR proposal and to start afresh.

= > **THE AMENDED PROPOSALS DID NOT LEAD TO AN AGREEMENT.**

### 4.3. LATE 1980s: THE THIRD ATTEMPT

In December 1986, the Commission, under Article 149 of the EEC Treaty, modified again its merger control regulation proposal.<sup>55</sup> It amended only one article but by doing so its early 1980s approach on the control issue was reversed. The Commission delated from Article 19 the possibility of a Council involvement in the decision-making process going back to its initial proposal of a simple advisory committee procedure (CEC, 1986b). As explained in its *Sixteenth Report on Competition Policy* for 1986 (1987a: 49): '[The Commission] now proposes to organize cooperation between the Commission and the member states in the decision-making process through the establishment of a traditional advisory committee similar to that provided for in cartel cases.' In short, all decision-making power was again left in the hands of the Commission.

But the Commission changes to Article 19 did not stop there. By amending Article 19(5), the Commission was expressly preventing the Advisory Committee from voting on the outcome of its deliberations. Also by amending Article 19(6), the Commission obtained the power to set a time limit within which the Committee could deliver its opinion upon the draft decision. The Commission's modifications to Article 19, therefore, did not only remove the decision-making influence granted to member states' representatives in the 1981 and 1984 proposals, but also limited the advisory power of the Committee (Elland, 1987).

These amendments were made in accordance with the September 1985 Luxembourg's Intergovernmental Conference's call to the Community institutions to establish principles and rules for the exercise of executive powers conferred to the Commission. Under the strong leadership of Jacques Delors as its president (Cini, 1996) and of Peter Sutherland as head of DG IV, the Commission took the opportunity to reinstate its total jurisdiction over mergers with a Community dimension (CEC, 1986b). These changes reflected a more confident Commission. For Elland (1987: 165), they even 'tend to indicate that the Commission's patience with

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<sup>55</sup> OJ [1986] C 324/5.

the Council [was] running out.' In any case, they were the breaking point between the early and late 1980s negotiations.

The late 1980s were years of sustained economic growth, there was 'an economic boom' (I 14, 1995). According to the Commission, this favourable economic climate owed much, where the Community was concerned, 'to the opportunities for expansion created by the gradual completion of the internal market' (CEC, 1989a: 13).

Certainly, these were years of substantial transformation in the nature of Western Europe's industrial configuration. Business reacted to the Single Market and to globalisation, and the return of high growth in the late 1980s went hand in hand with a major re-organisation of industry (Gerber, 1994; OECD, 1992; George and Jacquemin, 1992; Maclachlan and Mackesy, 1989; House of Lords, 1989; Gray, 1988; Cooke, 1988). Unlike earlier periods, and as seen in chapter two, this restructuring was no longer confined within national boundaries, an increasing number of mergers and acquisitions across national frontiers took place in those years. With respect to this, the Commission's *Nineteenth Annual Report on Competition Policy* for 1989 (1990a: 241) reads:

The favourable short-term economic situation has led economic operators to incorporate increasingly in their planning the need to adapt to the new market conditions expected for 1993. The strategic planning implemented by firms leads them to overcome the Community's internal economic barriers by conducting a variety of transnational operations.

There was a growing 'Europeanness' or Europeanisation of the perceptions and strategies adopted by European firms. European companies were changing their reference market from national to European (I 13, 1995; Sandholtz and Zysman, 1989), increasing industrial concentration both in national and European markets (Gerber, 1994; Monopolkommission, 1989).

The late 1980s were also years of consolidation, although at different speeds in the different member countries, of the shift from interventionist towards neo-liberal policies initiated in the early 1980s. Even in the two new member countries of the Community: Spain and Portugal, it was increasingly accepted that subsidised jobs

were unstable jobs and that successful firms had to find incentives for growth within themselves and in the market place (CEC, 1988a). Quoting the Commission *Seventeenth Annual Report on Competition Policy* (1988a: 13):

As the completion of the internal market by 1992 gathers pace, competition policy is coming more to the fore. This fact is widely reflected in the economic and industrial policies of the member states and in the new emphasis on competition policy even in member states which hitherto did not have well developed legislative and policy framework in the field of competition.

Just as the 1970s was the decade of industrial policy, the late 1980s represented the increasing importance of competition policy. The need of competition and hence of competition law became much more acceptable than in the past (I 19, 1995; I 16, 1995; I 10, 1995; Wilks, 1992; Brittan, 1991; Howe, 1987). As Goyder (1988: 4) noted:

Whereas thirty years ago when the Treaty of Rome was first signed, there was no member state which had a competition law of a comprehensive nature and proven effectiveness, today, rare is the member state without its own competition law and in many, though not all, cases an increasing determination in its enforcement.

Indeed, as regards to merger policy, the two new entrants, Portugal and Spain, enacted their own merger laws in 1988 and 1989 respectively; draft laws were being considered in three other member states, Italy, Greece and Belgium (they were passed in the early 1990s); and France, the Federal Republic of Germany and the United Kingdom were making their merger controls more stringent (CEC, 1990a; CEC, 1989a; CEC, 1988a). The gradual move from a 'pro-merger approach' towards a more severe one enunciated in the 1970s, re-started in the late 1980s. By 1989, six of the then twelve member states had their own merger control laws, three were discussing draft laws, and only three -The Netherlands, Denmark and Luxembourg- neither had nor were in the process of enacting such a law. In the late 1980s, therefore, although only the United Kingdom, Germany and France had fully developed and regularly applied law and policies in the merger field, other member states had incipient merger legislations or were in the process of adopting them (Brittan, 1991; Woolcock, 1989).<sup>56</sup>

Within this favourable context, Commissioner Sutherland, with the explicit

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<sup>56</sup> See Annex E.

support of the European Parliament, continued to make merger control one of the priorities of his DG in 1987. The Commission felt, as well as the European Parliament, that although progress had been made in most areas of competition policy, there still remained a number of gaps, even in areas that were essential to the smooth running of the Community's economy. They believed that these gaps should be filled before 1992 (CEC, 1988a). Prior-control of mergers was among those areas: 'This matter is crucial to the preservation of competition structures, since it is inconceivable, from the standpoint of the completion of the internal market, that Community-scale mergers should not be evaluated from a Community standpoint' (CEC, 1988a: 15). Accordingly, throughout 1987 the Commission met with several experts, such as the members of the Competition and Intellectual Property Special Committee of the Consultative Committee of the Bars and Law Societies in October or a delegation from the Conseil National du Patronat Français in July, and one of the principal topics discussed was merger control (CEC, 1988a).

In July 1987, however, at the Competition Law Inquiry in London and in a speech to national Directors-General of competition in Brussels, Sutherland had to express again his frustration at the lack of progress in the adoption of the regulation (Brussels Law Offices, 1988; Reynolds, 1987). Yet, instead of dropping the issue, he decided to force it. The Commission asked the Council 'to adopt a political position that would allow work on the Commission's proposal to be pursued actively and constructively' (CEC, 1988a: 51). To this end aim, in the autumn of 1987, the Commission tabled its opinion that the future regulation should be based upon four essential points before the Council. These points were the following:

- (a) The regime to be set up should be applicable to major mergers which have a truly European dimension. The aim should be to prevent both the creation, and the enlargement, of dominant market positions.
- (b) The regime should, furthermore, provide legal certainty for firms subject to the controls. This will require a system of prior notification and the taking of decisions within tight deadlines.
- (c) The future regulation should also provide for authorization in derogation from the prohibition; this provision would be guided by the principles of Article 85(3) of the EEC Treaty, ...
- (d) Lastly, the regulation should ensure adequate participation of the member states in the decision-making process, and close cooperation within the Advisory Committee. (CEC, 1988a: 51-52)

If a political commitment on the principle of Community-wide merger control

was not achieved, the Commission intended to control large-scale mergers without the EEC regulation by making full use of its powers under Articles 85 and 86 of the EEC Treaty (van Empel, 1990; House of Lords, 1989; *Europolitique*, 5 Mar 1988; *Financial Times*, 3 Jul 1987). In July 1987, presenting the Commission's *Sixteenth Annual Report on Competition Policy*, Sutherland told member states that if they could not agree by the end of the year, at least in principle, to the necessity for an EEC merger control regulation, he would use the full force of Articles 85 and 86 to try to fill the gap (Owen and Dynes, 1989). In October 1987, he declared to the European Parliament that:

If our efforts in the Council do not achieve the desired results, I intend to propose my colleagues in accordance with the suggestion contained in the Parliament's Resolution on the Fifteenth Competition Report that the Commission withdraw the proposal and in that event we will have to apply ourselves to the innovative task of applying Articles 85 and 86 directly to mergers. (Venit, 1990: 13)

At the beginning of November, following the Commission's opinion and threats and before the Council meeting scheduled to discuss the matter, the Union of Industrial and Employers' Confederations of Europe (UNICE) emitted a declaration in favour of the adoption of a Council regulation. UNICE's members wanted 'Community-level control over European-scale company mergers, including joint ventures of a concentrative character.' Their declaration asked for a merger control 'exercised on the basis of pre-defined, objective and transparent, economic and legal criteria', which should be such as to 'favour cross-border mergers within the framework of the EEC Treaty' and 'to enable industry to strengthen its competitive position on European and world markets.' It also suggested that companies should be able to choose between prior and subsequent control and that short decisional deadlines were necessary. (CEC, 1988a; UNICE, 10 Nov 1987)

Also before the Council could give its opinion on the Commission's approach, the European Court of Justice, in its ruling on the BAT-Reynolds case<sup>57</sup> (also known

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<sup>57</sup> *British American Tobacco Company Ltd. and Reynolds Industries Inc v. Commission of the European Communities* (Joined Cases 142 and 156/84) [1987] ECR 4487.

as Philip Morris case)<sup>58</sup> of 17 November 1987, widened Community's armoury to control mergers. The Court ruled, for the first time, that Article 85 of the EEC Treaty could, in certain circumstances, be applied to acquisitions of financial holdings between two competing firms. Though the judgement was ambiguous on the crucial question of whether Article 85 only applied to the acquisition of a minority shareholding in a competitor or also to acquisitions of majority or total shareholdings, the Commission considered that 'the line taken by the Court suggest[ed] that the prohibition on cartels contained in Article 85 could possibly be applied to certain mergers, both by the Commission and by a national court' (CEC, 1988a: 17). Indeed, on 29 November 1987, the Commission derived support from the Court's ruling to threaten again with developing EEC merger control on the basis of Articles 85 and 86 of the EEC Treaty (Dechery, 1990; House of Lords, 1989). Also, during the two years of negotiations that followed, it did not hesitate to put its interpretation of the judgement into effect. It not only applied with greater vigour Article 86 of the EEC Treaty to mergers but also started to use Article 85 to this endeavour, building up a dual track negotiating stance with the Council (Venit, 1990).

It was after these events that, on 30 November 1987, the Council met to discuss the Commission's opinion. Although an agreement on the need for an EEC merger regulation could not be reached due to refusal of the British and French delegations to take a position at that stage, the Council 'adopted a generally positive attitude on the main lines of the Commission's approach' (CEC, 1988a: 52; CEC, 1987c: 31). In fact, the Germans declared their intention to give priority to this question in their then forthcoming Presidency (CEC, 1988a) and the Council opened the door for the Commission to present a new proposal: 'Should the Commission be

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<sup>58</sup> British American Tobacco Company Ltd and R.J. Reynolds Industries Inc. had brought actions before the European Court of Justice in 1984 for the annulment of a Commission decision of the same year declaring that certain agreements concluded between Philip Morris Incorporated and Rembrandt Group Limited did not infringe Articles 85 and 86 of the EEC Treaty. In April 1981, the Rembrandt Group, a South African based company, had sold to Philip Morris, the largest American exporter of cigarettes, 50 per cent of the equity in Rothmans Tobacco Holdings (RTH). Because RTH had a controlling interest in Rothmans International (RI), the Rembrandt Group and Philip Morris had agreed that the activities of RI should be managed on a joint basis. After the objection of the Commission to this agreement, the parties decided that Philip Morris would abandon its 50 per cent interest in RTH in exchange for a direct shareholding in RI. Philip Morris would have a 30.8 per cent stake in RI but would hold only 24.9 per cent of the votes. The Commission found no objection to the new share deal. (Downes and Ellison, 1991; Le Bolzer, 1990; Brussels Law Offices, 1988; ECR, 1987; Fine, 1987; Lever and Lasok, 1986)

required to amend its proposal; it will once again formally consult the European Parliament and the Economic and Social Committee' (CEC, 1988a: 52). At the end of 1987, therefore, the Council had agreed, at the Commission's request, to recommence work on a revised draft regulation (CEC, 1989a; Carr, 1988). This favourable disposal led the Commission to express its optimism: 'It should be possible for the Council to adopt the Regulation before the end of 1988' (CEC, 1988a: 52).

The European Commission's expectations seemed to be well founded. In the first half of 1988, the German Presidency placed, as promised, the work of establishing Community merger control high on its list of priorities (Dechery, 1990; CEC, 1988c; Carr, 1988; *The Times*, 7 Jun 1988). It was the first Presidency to do so and the ensuing ones followed its example (Zachman, 1994; Dechery, 1990). In any case, the Germans wanted to get the Council to adopt a merger control regulation during 1988 (CEC, 1988c). The merger issue had been included in the Council's agenda.

On 25 April 1988, the Commission adopted an amended proposal for EEC merger regulation containing the main points it had earlier submitted to the Council.<sup>59</sup> To mark that it was to signify a new start, the proposal included a new preamble and fully stated all the articles. It provided for changes in three areas: thresholds, the authorisation criteria and procedural rules. As to thresholds, the scope of the regulation (Article 1) was to be determined by three quantitative thresholds based on two criteria, a turnover criterion and a new geographical criterion. Namely, the regulation was not to be applied to those concentrations: which had an aggregate worldwide turnover of less than 1000 million ECU; or where the aggregate worldwide turnover of the undertaking to be acquired was less than 50 million ECU; or where all the undertakings effecting the concentration achieved more than three-quarters of their aggregate Community-wide turnover within one and the same member state. The idea was again that European merger control should apply only to large-scale mergers of Community-wide importance, with the national authorities

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<sup>59</sup> OJ [1988] C 130/4.

continuing to exercise control in cases having essentially a national impact.

Concerning the authorisation criteria, Article 2 of the new proposal was based on principles analogous to those contained in Article 85(3) of the EEC Treaty, limiting the possibility of exemptions. It still contained important industrial caveats but these would be considered only insofar as the merger did not block competition. Specifically, Article 2(4) stated:

The Commission shall authorize concentrations as compatible with the common market where they contribute to the attainment of the basic objectives of the Treaty, in particular to improving production and distribution, to promoting technical or economic progress or to improving the competitive structure within the common market, taking due account of the competitiveness of the undertakings concerned with regard to international competition and of the interests of consumers, provided that they do not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the achievement of the concentration;
- (b) do not afford the undertaking concerned the possibility of eliminating competition in respect of a substantial part of the goods or services concerned.

Lastly, regarding the procedural rules, the main changes proposed made time-limits for Commission decisions on merger cases tougher and widened the prior-notification regime. In relation to the latter, the proposal called for a regime of prior-notification of all mergers within the scope of the regulation, and not only of those whose aggregate turnover was not less than 1000 million units of account (Article 4). As Korah and Lasok (1988: 361) stated: 'The definitions of mergers that [were] subject to control and those which [were] required to be notified to the Commission [were made] identical.' Respecting procedural time-limits, Article 6(3) established that only two months, instead of three, could elapse from notification to the commencement of proceedings. Once the procedure had been initiated, new Article 19(1) stated that a decision should be taken within four months instead of nine, unless the parties concerned agreed on an extension. In other words, a final decision should be taken, at the latest, at the end of a period of six months instead of twelve. The operational deadlines had been halved.

To sum up, in April 1988 the Commission was still seeking exclusive control of all merger cases above certain thresholds and to follow a 'trade-off approach' to merger policy. Any merger that created or reinforced a dominant position would be banned except when subject to exemption. However, this proposal, by limiting the

possibility of exemptions, implied a tendency towards a more 'competitive-structure approach' (i.e. competition as the only criteria to judge a merger case), and, by introducing new turnover and geographical criteria, offered a new definition of the scope of the regulation, reducing it. (Monopolkommission, 1989; Woolcock, 1989; Schwartz, 1993; Reynolds, 1990; CEC, 1989a; CEC, 1988c)

The Council immediately commenced deliberating on the proposal at working party level. The German Presidency intended 'to report to the Council on 22 June 1988 of the results of the discussions to be held in its relevant working party on the [...] amended proposal for a regulation' (CEC, 1988c: 8).

Meanwhile, both the European Parliament and the Economic and Social Committee were formally consulted on the new proposal. On the 2 June 1988, the Economic and Social Committee endorsed the proposal stressing the need for concentrations with a Community dimension to be appraised solely by the Community authority, for the whole of the Common Market, thus ruling out the applicability of national legislation in such cases. The Opinion also pointed out that it was essential that undertakings were not controlled at both the Community and national level, and that the administrative procedures should be as short as possible. Lastly, the Committee asked that account be taken of the need to inform and consult the workers affected by a concentration (CEC, 1989a).<sup>60</sup>

The Economic and Social Committee's Opinion was followed the 22 of June by a favourable assessment of the Council of Ministers on the proposal: '...the Council noted that considerable progress had been made in drafting the Regulation' (CEC, 1989a: 51). At that meeting, the Council also reached general agreement on the need of ensuring a one-stop-shop system, prior-notification and the assessment of mergers on the basis of effective competition. Namely, it agreed on the following points:

- (i) decisions taken by the Community authorities should as far as possible prevail over national decisions;
- (ii) concentrations with a Community dimension should be notified prior to implementation;

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<sup>60</sup> OJ [1988] C 208/11.

(iii) the decisive criterion for prohibiting a concentration should be the creation of a position impeding effective competition in the common market. (CEC, 1989a: 51)

Last but not least, that Council meeting was important in that the French representatives accepted in principle that mergers with a Community dimension should generally be subject to EEC control, leaving the British alone in maintaining a general reserve upon the regulation. (Tempini, 1991; Dechery, 1990; Monopolkommission, 1989; Owen and Dynes, 1989; *The Times*, 19 Dec 1988; *Europolitique*, 10 Sep 1988; *The Times*, 23 Jun 1988)

On 26 October 1988, the European Parliament also welcomed the Commission's proposal in its Resolution, emphasising that the Community should have exclusive competence for concentrations covered by the regulation. National competition law should not apply to such concentrations. Besides some technical amendments, the Parliament requested that the Commission make provision for, on the one hand, the immediate publication of notifications' main points in order to inform all the economic and social actors concerned and, on the other hand, the right of the undertakings supervisory bodies and of the legitimate representatives of their employees to be heard by the Commission (CEC, 1989a).<sup>61</sup>

The Commission approved on the spot most of the European Parliament's amendments to the draft regulation. Yet, before it could take any formal action, the Council, at its meeting of 18 November 1988 and on the basis of its group of experts work, further discussed two of the three problems which had emerged during the preparatory work: the question of exclusive competence and the question of the assessment criteria. On the former, in accordance with the general agreement reached in June, the ministers decided that in principle 'the appraisal of concentrations with a Community dimension should be carried out by a single authority on the basis of the Regulation and that national legislation should not in principle be applicable' (CEC, 1989a: 53). On the latter, 'the Council agreed to continue its work on the basis of the principle of neutrality...the general approach to concentrations should be open and free from the outset of any bias' (CEC, 1988a: 53). The Commission

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<sup>61</sup> OJ [1988] C 309/49.

should not presume the compatibility or incompatibility of a merger with the Common Market before investigation (Dechery, 1990).

On 30 November 1988, the Commission modified its proposal of 25 April 1988 taking into consideration most of the amendments adopted by the European Parliament and including some innovations. The latter were mostly based on a Commission's internal working paper completed in July 1988 and set out to take into account the ideas formulated by the Council. The proposal was published in the Official Journal on 28 January 1989.<sup>62</sup> The most important changes and innovations concerned the scope of the regulation and the relationship between Community law and national laws.

On the latter, the amended proposal envisaged two situations in which national laws could be applied to mergers within the scope of the regulation. Article 8(2) established that, in cases where a concentration is compatible with the Common Market, each member state directly concerned by the concentration would be empowered to apply its national legislation on competition, in order to ensure conditions of effective competition in local markets. Moreover, Article 20(3) allowed member states to 'take appropriate measures where necessary to protect legitimate interests other than those pursued by the Regulation, provided that the interests are sufficiently defined and protected in domestic law and that the measures are compatible with other provisions of Community law.' In other words, although the Commission should still have sole competence for concentrations with a Community dimension and the decision-making would remain under the simple advisory committee procedure (Art. 20(1)), the field of national laws and interests was to be extended by other means. These articles granted member states broad powers to block or permit a merger at national level, regardless of what the Commission decided.

As to the changes on the scope of the regulation (Art.1), one of the quantitative thresholds was substantially increased diminishing the number of mergers considered to have a Community dimension: '... the requirement that the firm being

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<sup>62</sup> OJ [1989] C 22/14.

acquired should have a minimum worldwide turnover of ECU 50 million was replaced by a turnover threshold of ECU 100 million, to be achieved in the Community by at least two of the firms involved in the operation' (CEC, 1988a: 52).

Besides these two main amendments, it should be noted that the procedural time-limits were again reduced. Though the Commission continued to have four months for the full investigation, the preliminary inquiry period was reduced. The Commission would just have one month, instead of two, to decide whether to start proceedings against a merger (Art. 6(3)). Under these new arrangements, therefore, where the Commission judged a merger deserved full investigation, the whole inquiry would have had to be completed and a ruling given within five months instead of the previous six. The time-limits could, however, still be extended by agreement or for other reasons, including the provision of incomplete information by the parties.

With these modifications, on the whole, the 1988 proposals had redefined some of the most controversial issues of the regulation. They had certainly limited the scope of the regulation and, although confirmed the sole competence of the Commission to take the decisions, provided for some sharing of control with the member states. Moreover, procedural rules had been clarified and tougher time-limits for decision established. However, whilst the 1988 amendments had advanced towards a competition based authorisation criteria, by and large, the approach to merger policy was still the same as in the 1970s, a 'trade-off approach'. A merger authorisation could still be granted if the contribution of the merger towards improving the competitive structure within the Common Market outweighed the damage to competition. (Woolcock, 1989; Monopolkommission, 1989; House of Lords, 1989; CEC, 1988a; *The Guardian*, 10 Nov 1988; *The Economist*, 5 Nov 1988)

It is worth adding to this picture of the 1988's events, that throughout the year the Commission maintained several contacts with interested parties. As the Commission stated in its *Eighteenth Report on Competition Policy* for 1988 (1989a: 27): 'The Commission also received a wide range of observations from interested parties in the course of its work on the proposal for a Council regulation on the

control of concentrations.’ Among those interested parties, the Commission was particularly in touch with UNICE:

The Union of Industrial and Employers’ Confederations of Europe continued closely to follow developments in connection with the Commission’s proposals for a regulation on the control of concentrations. Commission officials attended two meetings with Unice in which this matter was discussed in depth. Unice also submitted a number of written observations during the year, both on the modified concentration control proposals and on the two proposals for block exemption regulations... (CEC, 1989a: 26)

Thus, the preparation of the 1988 proposals was a joint job between all Community’s institutions and interested parties.

When an agreement on the Commission’s final proposal on European merger regulation was not reached by the Council at the end of 1988, this communication with interested groups, and especially with UNICE, was not lost. In 1989, while the Council discussions continued, ’a meeting was held with representatives of businesses at the European level (UNICE) to discuss merger control, and there were a number of bilateral exchanges with national employers’ organizations’ (CEC, 1990a: 24).

At the critical Council of Ministers meeting of 21 December 1988, an agreement could still not be reached despite a last concession made by Sutherland to raise the combined worldwide turnover threshold from 1 to 2 billion ECU (Elland, 1991; *Financial Times*, 9 Feb 1989; *The Times*, 6 Jan 1989). It was on the grounds of this last offer that Leon Brittan, in charge of DG IV since January 1989, and who had also made merger control a priority, continued the negotiations for an EEC merger regulation endlessly proposing further amendments (Jacobs and Stewart-Clark, 1990; Brittan, 1989; *The Economist*, 7 Oct 1989; *The Times*, 31 Jan 1989; *The Times*, 28 Jan 1989; *Financial Times*, 28 Jan 1989). Most of these revisions were the result of an increased number of bilateral and multilateral contacts between the Commission and the member states’ delegations, as well as between the member states’ delegations themselves, held in parallel to the official negotiations (I 14, 1995; Dechery, 1990; van Empel, 1990; *Financial Times*, 19 Sep 1989). As van Empel (1990: 12) described: ’...the drafts followed each other in quick succession, so that even those closely involved had some difficulty in keeping track.’

To give an example, in March 1989, with hindsight of the 13 April Council meeting, the Commission proposed further upward revisions of the quantitative jurisdictional thresholds. Brittan announced that the Commission would be prepared to consider a global turnover figure of 5 instead of 2 billion ECU, but only until the end of 1992. The threshold would fall to 2 billion ECU the first of January 1993. Moreover, merger entities that would generate at least two-thirds of their EC-wide revenue in a single state would be exempt, a reduction from prior drafts' three-quarters hurdle. The Commission estimated that the new proposals, if adopted, would limit its competence to 30 or 40 transactions per year in the first few years and to around 80 once the threshold drop to its permanent level, as opposed to the estimated 150 transactions under previous versions. (Schwartz, 1993; Dechery, 1990; Fine, 1989; Whish, 1989; Woolcock, 1989; Lee and Robin, 1989; *Europolitique*, 15 Apr 1989; *Financial Times*, 1 Apr 1989; *The Times*, 1 Apr 1989)

Lastly, it was on 21 December 1989, under the French Presidency, that the Council arrived at an agreement on EEC merger regulation after two years of very complex and hard negotiations (I 12, 1995; I 6, 1995; Brittan, 1992; van Empel, 1990; Reynolds, 1990; Dechery, 1990).<sup>63</sup> As in the Commission's proposals, the Regulation established a distinction between mergers having a Community dimension, for which the Commission would be responsible, and those whose main impact was at national level, which would be accountable to the national authorities. Three increased cumulative quantitative thresholds were agreed upon to achieve this aim. A merger had a Community dimension when the combined aggregate worldwide turnover of all the undertakings concerned was more than 5 billion ECU; the aggregate Community-wide turnover of each of at least two of the undertakings concerned was more than 250 million ECU; and each of the undertakings concerned did not achieve more than two-thirds of its aggregate Community-wide turnover within one and the same member state (Article 1). Concentrations with a Community dimension had to be notified to the Commission and certain waiting periods observed before they could be put into effect.

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<sup>63</sup> Council Regulation (EEC) No 4064/89 of 21 December 1989 (OJ [1989] L 395/1; corrigendum in OJ[1990] L 257).

Nevertheless and in line with the Commission's 1988 proposals, the Regulation also provided for two derogations to the principle of exclusive Community responsibility for mergers which fell under its scope. Article 9, the so-called 'German clause', enabled national authorities, subject to the Commission's permission, to intervene where a problem involving a dominant position arose in a 'distinct local market'. Also, Article 21, the so-called 'British clause', gave member states the right to ensure the protection of 'legitimate interests' other than those protected by the Regulation such as public security, plurality of media and prudential rules. In both cases, member states could only be more severe than the Commission in judging the merger.

In addition, and as a counterweight, the Regulation introduced exceptions to the principle of national responsibility for mergers below the thresholds. The most obvious was the one granted by Article 22(3), the so-called 'Dutch clause', that gave the Commission the power to intervene at the request of one of the member states concerned. But the Regulation also allowed for a limited use of Articles 85 and 86 of the EEC Treaty in those merger cases. Indeed, though expressly excluding the application of these two articles of the Rome Treaty to mergers with a Community dimension (Article 22), the Regulation was silent on their application to mergers below the thresholds. These mergers could, therefore, be subject to the use of Article 86 by the national courts at the request of third parties, and, should the Commission seek to act on its own initiative or in response to a request from a third party, to the application of both Articles 85 and 86 pursuant to Article 89 of the EEC Treaty. The Commission in fact indicated that it intended to reserve the right to apply those articles of the EEC Treaty to mergers below the Regulation's thresholds where the aggregate worldwide turnover of the parties was 2 or more billion ECU and the Community-wide turnover of each of at least two of the parties was 100 or more million ECU, on grounds that above such levels a merger could significantly affect trade between member states.<sup>64</sup>

These derogations were seen by some commentators as undermining the

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<sup>64</sup> Accompanying statements by the Council and the Commission on the EEC Merger Regulation ([1990] 4 CMLR 314).

principle of 'one-stop shop' that the Regulation was supposed to establish (Bernini, 1991; Woolcock *et al.*, 1991; Korah, 1990; Venit, 1990; *Financial Times*, 21 Sep 1990b). Yet, for others, these exceptions were necessary when two levels of authority and jurisdiction coexist and, anyhow, were too narrowly circumscribed to endanger the 'one-stop shop' goal. The largest transactions, with significant cross-border effects, were to be principally the concern of the European Commission while smaller transactions, with mainly national impact, were to be primarily the concern of national authorities (I 12, 1995; I 11, 1995; Dechery, 1990; Brittan, 1990). Despite its possible imperfections, this delineation of responsibility between the Commission and national authorities was seen by some authors, including the Commission, as the first formal manifestation of the principle of subsidiarity in Community competition law (CEC, 1995; I 11, 1995; Bright, 1991). Quoting the Commission (1996a: 10):

The allocation of cases between the Community and the Member States in the area of merger control was...inspired by the same principles that underpin the notion of subsidiarity. According to this notion, action should be taken at the most appropriate level of jurisdiction, in view of the objectives to be attained and the means available to the Community and the Member States.

Regarding the approach to merger control, the Regulation, in contrast with previous drafts and proposals, did not contain an exemption provision allowing the Commission to authorise or exempt a merger on the ground that the benefits of the concentration outweigh the adverse effect on competition in the Community (Article 2). Thus, it could be considered to follow a pure competition approach. However, the reference to economic and social cohesion in Recital 13 and the criteria of the 'structure of all markets concerned' and 'technical and economic progress' found in Article 2(1), indicated a tendency towards inclusion of non-competition-oriented factors in the evaluating process. For some legal experts, these factors were included only in a subservient fashion. Mergers resulting in the establishment or strengthening of a dominant position which significantly impeded effective competition, in the Common Market or in a substantial part of it, would not be allowed (I 22, 1995; I 19, 1995; I 12, 1995; I 7, 1995; Bulmer, 1994; Bos *et al.*, 1992; Brittan, 1991; Cook and Kerse, 1991; Woolcock *et al.*, 1991; Brittan, 1990; van Empel, 1990; Jacquemin, 1990). Still, for others, they left a door open to the Commission to follow a 'trade-off approach' (I 9, 1995; Sachwald, 1994; Whish, 1993; Schwartz, 1993; Swann, 1992b; Martin, 1992; Keppenne, 1991; Hölzler, 1990; *Financial Times*, 18

Oct 1990; *Financial Times*, 21 Sep 1990a; *The Economist*, 22 Sep 1990; *Financial Times*, 26 Mar 1990; *The Independent*, 12 Jan 1990). In any case, the Commission had a time limit of five months to make the final decision.

As may be inferred from what precedes, the 1989 Regulation followed the 'competitive-structure approach' to merger control but included references to non-competition-related criteria. It established a 'one-stop shop' system of merger control in the Community but included derogations and high thresholds which limited the Commission's jurisdiction. Thus, the Regulation was ambiguous and a watered-down version of the Commission's original proposals. Yet, it was not a closed text. The Regulation provided for the revision to take place before 1994, on the basis either of unanimity or of a qualified majority, of its provisions on scope and control.

To recapitulate, the events described in this section may be clustered into four stages (see table 4.3). These stages, as in the 1970s and the early 1980s periods of negotiation, coincided with the consultation procedure needed to approve the Commission's proposal. They all took place in a favourable context characterised by sustained economic growth, increased 'Europeanness' of firms' strategies and perceptions, and by the consolidation of the move towards neo-liberal policies started in the early 1980s and reflected, in particular, in the development of national merger laws.

The first stage of the late 1980s negotiations started with a new change in the merger regulation proposal made by a more confident Commission in December 1986. The events included in that stage allowed a fresh opening of negotiations in 1988. The second stage was then dedicated to the delineation of a new proposal which was issued by the Commission on 25 April 1988. In the third stage, the April draft was analysed by all Community institutions as well as by interested parties. The result was a new amended proposal submitted by the Commission to the Council on 30 November 1988. Lastly, and for one year, different modifications to the November design were discussed within the Council. This fourth stage culminated with an agreement on 21 December 1989.

The Regulation entered into force nine months later, on 21 September 1990, to allow firms to familiarise themselves with it and to allow the Commission to draw up its implementing rules.<sup>65</sup> The third attempt to derive an accord on EEC merger regulation had proven successful.

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<sup>65</sup> The Commission adopted an Implementing Regulation (OJ [1990] L 219/5) as well as published two Notices containing guidelines on certain technical and legal aspects of the EEC Merger Regulation (OJ [1990] C 203/5; OJ [1990] C 203/10).

TABLE 4.3. THE LATE 1980s PERIOD

**CONSULTATION PROCEDURE (ART 235 EEC Treaty)****CONTEXT**

- \* Sustained economic growth.
- \* Transformation of Europe's industrial structure (wave of mergers).
- \* Consolidation of the trend towards neo-liberal policies both at the national and European level.
- \* Move from a 'pro-merger approach' towards a more severe one re-started at the national level.

**BACKGROUND OF THE LEGISLATIVE PROPOSAL AMENDMENT**

- \* 1986, Lack of agreement on the 1984 proposal.
- \* 2 December 1986, Commission's new confidence -> amendment of Article 19 of the EEC merger regulation (EMR) draft.
- \* 1987, SEA entry into force.
- \* 1987, Merger control continued to be a priority of DG IV; contacts with experts.
- \* Autumn 1987, The Commission asked and obtained permission from the Council for a new EMR proposal as well as political support.
- \* November 1987, UNICE's declaration in favour of a Council merger regulation.
- \* 17 November 1987, Ruling of the European Court of Justice on *BAT-Reynolds v. the Commission*.

**PREPARATION OF THE TEXT**

- \* 1988, Consultation of different interest groups such as UNICE.
- \* 1988, The Federal Republic of Germany made EMR a priority of its Presidency. The ensuing Presidencies followed its example.
- \* 25 April 1988, The Commission issued a new EMR proposal.

**OPINIONS OF THE EUROPEAN PARLIAMENT AND THE ECONOMIC AND SOCIAL COMMITTEE**

- \* May 1988, Deliberations on the proposal in the Council started at working party level.
- \* 2 June 1988, Economic and Social Committee's favourable Opinion.
- \* 22 June 1988, Ministerial agreement on some general points of the proposal.
- \* 26 October 1988, European Parliament's favourable Resolution.
- \* 18 November 1988, The Council discussed two problems.

=> 30 November 1988, Commission's new amended proposal based on European Parliament's and Council's comments.

**DISCUSSIONS IN THE COUNCIL**

- \* 21 December 1988, Council meeting but final agreement not possible.
- \* 1989, Council discussions, several Commission's informal amendments to the draft proposal, contacts with interest groups continued.

=> THE LATE 1980s PROPOSALS LEAD TO AN AGREEMENT IN DECEMBER 1989.

## **CONCLUSIONS**

This chapter has exposed, from a descriptive perspective, the events related to merger policy which took place in the 1970s, early 1980s and late 1980s. It has shown that each period of negotiations can be divided into four stages corresponding to the consultation procedure necessary to approve the merger regulation under Article 235 of the EEC Treaty. It has also highlighted that these stages befell in different contexts, some more challenging than others, for passing such regulation.

Chapter five will analyse these events so as to establish whether the factors and hence conditions which compound this research's hypothesis were present in any of the three periods.

## CHAPTER 5. ANALYSIS

The purpose of this chapter is to give an analytical perspective of the events exposed in chapter four. It aims to ascertain whether the factors which determine the two conditions of this research's hypothesis took place in any of the three periods under analysis. Again, the chapter has been divided into three parts, each one corresponding to one of the periods. Each of the three sections will answer the following analytical question: 'what is the evidence on the presence or absence of the neo-functionalist and realist factors?'. This will be done, as explained in chapter three, by analysing the contents of the data collected in a restrospective and deductive way.

### 5.1. 1970s: THE FIRST ATTEMPT

This section intends to certify whether the factors which shape the neo-functionalist condition and the realist condition occurred in the 1970s.

#### A. The neo-functionalist condition

The neo-functionalist condition for integration is defined by three factors: the position and role of the EC supranational institutions, whether there was political spillover and the existence of functional spillover.

Concerning the **first factor**, the question to be asked is: **did EC supranational institutions press for an EEC merger regulation in the 1970s?** The answer is yes, all three of them did.

*The European Commission* did press for an EEC merger regulation in the

1970s. Its 1966 Memorandum on the use of Article 86 of the EEC Treaty to control mergers, its late 1960s search for pre-notification procedures, its 1971 Continental Can decision, its quick response to the 1972 Paris Conference in delivering a merger control regulation proposal in 1973 or its different complaints to the Council on the slow progress of the discussions on the proposal, all denote that the Commission, throughout the 1960s and 1970s, both vindicated the need for the EEC to have merger control measures and tried to find a legal basis for such provisions. Yet, on top of that, one can find not so obvious evidence of the Commission's involvement.

With its 1966 Memorandum, the Commission had been able to open the door to much more than the possible use of Article 86 as a source of control over those mergers which created a monopoly. By overcoming the fact that the Treaty of Rome did not contain merger provisions and instead emphasising the Treaty's objective of ensuring competition in the Common Market (Art. 3(f)), it had opened the door for a gradual expansion of EEC merger control. Indeed, as Schwartz (1993: 616) argues, with its Memorandum, the Commission 'shifted discussion of the jurisdiction accorded to the Community by the Treaty of Rome from the realm of historic evidence regarding the intent of the signatories' so as to 'dissipate strict limits on Treaty interpretation.' By doing so,

The memo helped convert the Treaty from a text that granted limited authority based on literal readings and original intent, into one that, through expansive reading, could be interpreted as granting broad-based, discretionary authority to govern, to make decisions, and to interpret the Treaty of Rome for the good of the EC as a whole. (Schwartz, 1993: 616)

In short, the Commission had interpreted teleologically the Treaty of Rome so as to give EEC merger control a legal basis. This line of interpretation of the EEC Treaty did not convince all legal commentators (Monopolkommission, 1989; Goyder, 1988; Mestmäcker, 1973) but, seven years later, the European Court of Justice adopted it.

This teleological interpretation of the Treaty was made at the time of the 1966 Luxembourg Accords which closed the 1965 'empty chair' crisis brought about by France. Clearly this was not the best moment for the Commission to discover new powers for itself in the Treaty of Rome. This indicates that the Commission wanted EEC merger control powers badly enough to propose the use of at least Article 86

of the Treaty to this task at a time that was politically challenging.

The Commission considered that mergers, and in particular cross-border ones, helped the formation of the Common Market by creating firms large enough to profit from economies of scale. In this sense, the Commission wanted to eliminate fiscal and legal barriers to cross-border mergers - 'les obstacles artificiels aux concentrations européennes d'entreprises' (Cini and McGowan, 1998; Ortega, 1997; McGowan, 1994; *The Economist*, 31 Aug 1974; Alexander, 1973; Mestmäcker, 1972; CEC, 1966a; CEC, 1966b). It tried, for example, to introduce a European company statute for companies operating in several member countries.<sup>66</sup> Yet, the Commission also believed mergers had to be controlled so as to prevent the costs of excessive concentration. In its 1966 Memorandum the Commission summarised its position as follows:

Le marché commun exige des entreprises de taille européenne, afin que les avantages de la production en masse et de la recherche scientifique et techniques profitent, sans restrictions, à 180 millions de consommateurs ...une attitude positive vis-à-vis des concentrations s'impose [donc] dans la période actuelle d'intégration européenne...d'autre part, des fusions d'entreprises peuvent empêcher la concurrence de fonctionner ou limiter outre mesure la liberté de choix et d'activité des consommateurs, des fournisseurs et des acheteurs. Enfin, la concentration des entreprises affecte les conditions d'existence de nombreuses petites et moyennes entreprises. (CEC, 1966a: 5-8)<sup>67</sup>

As a result of this apparent conflict between the desire to develop large enterprises and the desire to maintain undistorted competition in the Common Market, the Commission's 1973 proposal was for a 'trade-off approach' on EEC merger control. 'Mergers which might benefit other EEC policies, such as regional development, preserving employment in particular sectors of industry, guaranteeing energy supplies or boosting vulnerable or advanced EEC industries on the world market, are given a global let-out clause in the draft regulation' (*The Economist*, 4

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<sup>66</sup> Proposal for a regulation on the Statute of the European Company, OJ [1970] C 124/1.

<sup>67</sup> The common market requires undertakings with a European dimension in order to pass on the benefits of mass production and of scientific and technical research without limitation to 180 million consumers...a positive attitude must thus be taken regarding concentrations at the present period of European integration...on the other hand, however, mergers between undertakings may prohibit competition or restrict, outside any proportion, the freedom of choice and action of consumers, suppliers and purchasers. Lastly, concentration of undertakings influence the very existence of many small and medium size undertakings. (own translation)

Aug 1973).

Moreover, for some authors such as Bernini (1991) and Le Bos *et al.* (1992), the Commission's dismissal of Article 85 of the EEC Treaty as a merger control instrument in 1966 was also a reflection of this apparent conflict of interests. According to these authors, the Commission's rejection was made on grounds of legal technicalities instead of convincing legal evidence. The reason behind this was political. The Commission did not want to subject mergers to automatic prohibition but rather to advantageous treatment to allow for the development of more efficient industrial structures and to foster the achievement of European integration. Article 86 of the Rome Treaty offered the Commission the opportunity to prohibit dangerous concentrations while otherwise subjecting mergers to a more favourable legal evaluation than would have been possible on the basis of the automatic cartel prohibition. In other words, the Commission did not want to take an 'anti-merger approach' but rather a 'trade-off approach' and only Article 86 permitted such an approximation.<sup>68</sup>

In any case, the Commission believed systematic merger control was necessary to achieve an effective Community competition policy and to ensure the objectives of the Treaty, particularly the one established by Article 3(f), within a context of increasing degrees of concentration in the Community. For the Commission, 'the growth in the number of concentrations and the acceleration in the rhythm of their development' made 'necessary to put into operation more precise and modern legislation on this subject' (CEC, 1973e: 15); indeed 'the trend towards mergers would, if it were to continue unchecked, constitute a threat to the maintenance of undistorted competition within the common market' (CEC, 1973b: 153). This opinion was clearly stated in the Preamble of the Commission's proposal:

Whereas, for the achievement of the objectives of the Treaty establishing the European Economic Community, Article 3 (f) requires the Community to institute 'a system ensuring that competition in the common market is not distorted';  
Whereas analysis of market structures in the Community shows that the concentration process

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<sup>68</sup> Other authors see the Commission's decision to reject Article 85 of the EEC Treaty as merger control instrument as pragmatic: 'Article 86 was the provision most amenable to an interpretation which would enable the Commission to exert merger control' (Downes and Ellison, 1991: 3).

is becoming faster and that the degree of concentration is growing in such manner that the preservation of effective competition in the common market and the objective set out in Article 3(f) could be jeopardized;  
Whereas concentration must therefore be made subject to a systematic control arrangement;... (OJ [1973] C 92/1)

To ensure this necessary systematic control of mergers, the Commission considered Article 86 of the EEC Treaty was unsatisfactory (Cini and McGowan, 1998; I 20, 1995; Cini, 1993; Brittan, 1991; Korah and Rothnie, 1990; Owen and Dynes, 1989; van Empel, 1990; Whish, 1985; Merkin and Williams, 1984; Allen, 1977; van Graay, 1977; *The Economist*, 18 May 1974; *The Economist*, 14 Jul 1973; CEC, 1973e). The Commission was 'conscious of the limitations of concentration control on the basis of Article 86' (Bos *et al.*, 1992: 113). For the Commission (1976: 14): 'An effective Community competition policy aiming to prevent harmful structural changes is out of the question unless systematic merger control is introduced along the lines proposed by the Commission to the Council, making it possible to prohibit the creation of a dominant position [rather than its abuse].'

In fact, one of the reasons given by the Commission for its merger regulation proposal was the inadequacy of Article 86 in dealing with the entire concentration phenomenon at Community level. Quoting the Recitals of its 1973 proposal:

Whereas Article 86 applies to concentrations affected by undertakings holding a dominant position in the common market or in a substantial part of it which strengthen such position to such extent that the resulting degree of dominance would substantially restrict competition; Whereas the power of action aforesaid extends only to such concentrations, as would result in only undertakings remaining in the market whose conduct depended on the undertakings which had effected the concentration; whereas it does not extend to the prevention of such concentration;  
Whereas additional powers of action must be provided for to make it possible to act against other concentrations which may distort competition in the common market and to establish arrangements for controlling them before they are effected;... (OJ [1973] C 92/1)

This belief was further manifested by the insistence of the Commission to base its proposal not only on Article 87 of the EEC Treaty but also on Article 235. Article 87 implied that the merger regulation was 'to give effect to the principles set out in Articles 85 and 86.' Therefore, the sole use of this Article as legal basis for the merger regulation would have meant that either Article 85 or Article 86 were good instruments of merger control. The inclusion of Article 235 indicated that the Commission wanted to go further than Article 86 or 85 permitted in merger control

(Bulmer, 1993; Bernini, 1991; van Empel, 1990; Hornsby, 1988; Barounos *et al.* 1975; Comité de Redaction, 1973; Mestmäcker, 1973). Certainly, it was the first time the Commission utilised Article 235 as legal basis for a proposal (*The Economist*, 19 Jan 1974) and this article signified that additional powers of action were necessary to achieve a specific Community objective within the sphere of the Common Market. In the words of Bos *et al.* (1992: 22): 'Since the implications of the regulation on competition policy were more far reaching than allowed by Articles 85 and 86, the Commission was not able to rely on Article 87 alone, but was forced to rely on Article 235 as well.'

Yet, despite being aware of its limitations, the Commission, supported by the European Court of Justice's ruling in the Continental Can case, continued to use Article 86 to control mergers after issuing its proposal in July 1973. From 1973 to 1979, the Commission assessed ten merger cases pursuant to Article 86 of the EEC Treaty (van Bael and Bellis, 1990; Monopolkommission, 1989; CEC, 1980; CEC, 1978; CEC, 1977a; CEC, 1976; CEC, 1975; CEC, 1974a). As the Commission declared in its *Third Annual Report on Competition Policy* (1974a: 9): 'The Commission will remain as active as ever in applying Article 86 to mergers which constitute abuses of dominant positions.' Indeed its *Sixth Annual Report on Competition Policy* for 1976 (1977a: 103) reads:

In the absence of more suitable merger control arrangements for EEC industries, the Commission continues to exercise Community surveillance of mergers after they have taken place to ensure that they are not contrary to the prohibition on abuse of dominant positions in Article 86 of the EEC Treaty.

To put it simply, by making teleological interpretations of the EEC Treaty and by applying Article 86 of the EEC Treaty to mergers, notwithstanding its flaws as merger control instrument, the Commission was sending a double message to the member states' governments. Message one: systematic merger control was really necessary. Message two: if an EEC merger control regulation was not agreed upon, the Commission would nevertheless be prepared to develop a less appropriate merger control measure through Article 86. It was a subtler form of pressure...

*The European Parliament* also pressed for an EEC merger regulation in this

first period. It was the first institution to present to the Commission specific considerations on EEC merger control measures in 1971. Just like the Commission, the European Parliament wanted both the elimination of legal and fiscal barriers to cross-border mergers and the control at European level of large mergers. After its 1971 Resolution, it 'repeatedly asked for the introduction of prior control of concentrations' (EP Document 362/73: 11).

The Parliament's suggestions, to a certain extent, influenced the Commission's decision to issue a merger regulation proposal in 1973 (Allen, 1977). The Commission's *Second Annual Report on Competition Policy* (1973a: 28) noted that: 'The Treaty could well be used as the basis for proposals based on the same considerations as those incorporated by the European Parliament in its Resolution on the rules of competition of 7 June 1971.' The 1974 *Bulletin of the European Communities* added that:

The Economic and Monetary Affairs Committee [of the European Parliament] had for a considerable time been discussing with the Commission the whole of the competition policy and the allied need for the control of concentrations. This represented an example of how Parliament and the Commission could work together on technical matters and influence the formulation of proposals to the Council. (CEC, 1974b: 71) (see also van Graay, 1977)

Moreover, the European Parliament made clear its support for such a regulation in 1974, when it approved the Commission's proposal by a large majority (Hözlner, 1990; Allen, 1977). The few amendments it presented requested technical rather than fundamental changes. Even the Conservative group in the Parliament, the most critical during the debate, 'accepted the philosophy behind the proposals of the Commission' (*The Economist*, 19 Jan 1974; see also CEC 1974b; CEC, 1974c; EP Document 362/73; EP Document 263/73). As Reynolds (1983: 420) stated: 'In February 1974 the Commission secured the support of the European Parliament.'

The European Parliament, therefore, believed EEC merger regulation was necessary and was actively involved in the preparation and promotion of the 1973 proposal. In fact, it continued to press for an EEC merger regulation after its Resolution on the Commission's proposal. For example, in 1977 the Socialist group urged for prompt approval of the regulation warning that any further delay would increase the possibility of oligopolies or monopolies dominating the market (CEC,

1977b; see also OJ [1979] C 282/5).

Lastly, as with the other two EC supranational institutions, *the European Court of Justice* embraced the EEC merger regulation cause in the 1970s. In its Continental Can case ruling, the Court accepted the Commission's decision, referring to the applicability of Article 86 of the EEC Treaty to the control of concentrations, through a teleological interpretation of the Treaty (Allen, 1996; Schwartz, 1993; Bos *et al.*, 1992; Merkin and Williams, 1984; van Graay, 1977; Allen, 1977; Barounos *et al.*, 1975; *The Economist*, 28 Apr 1973). According to Gerber (1994: 116), with this ruling the Court 'sanctioned the apotheosis of the teleological method.'

The Court could have carried out a strict reading of the text of the EEC Treaty and rejected the suitability of using Article 86 to control mergers. Indeed, Advocate General Roemer and several legal commentators argued against the Commission authority to police mergers on the basis that the Treaty of Rome did not explicitly place merger control under Community purview (Gerber, 1994; Schwartz, 1993; Dechery, 1990; Goyder, 1988; Swann, 1983; Mazzolini, 1973; ECJ, 1973). However, the Court disregarded this method of analysis in favour of the teleological mode.

The teleological grounds of the European Court interpretation are clearly stated in points 7 to 13 of its judgement (ECJ, 1973). In particular, point 10 reads: 'The spirit, general scheme and wording of Article 86 as well as the system and objectives of the Treaty must all be taken into account. Problems of this kind cannot be solved by comparing this Article with certain provisions of the European Coal and Steel Treaty.' The Commission's *Third Report on Competition Policy* (1974: 15) further confirms the teleological nature of the Court's interpretation:

Apart from the effect of the ruling in relation to mergers, its importance lies in the demonstration by the Court of its practice of interpreting the Treaty. The Court declined to confine its construction to a narrow reading of the text of one Article in isolation from other Treaty provisions, since this could have negated the clearly expressed aims of the Treaty as a whole.

The European Court considered that to achieve the objectives of the Treaty some kind of merger control was necessary. For the Court, the rules on competition

of the EEC Treaty aimed at the same goal of maintaining effective competition in the Common Market. The pursuance of this aim, closely defined in Article 3 (f), was, as the Court of Justice also stressed, 'indispensable for the achievement of the Community's tasks.' Any differing legal treatment of cartels and mergers would therefore have '[made] a breach in Community legislation on competition which could [have] jeopardiz[ed] the orderly functioning of the Common Market' (ECJ, 1973: 216-217).

In other words, for the European Court of Justice, Article 86 should be seen as applicable to mergers because merger control was essential to ensure other common goals: Article 3 (f) of the EEC Treaty and the functioning of the Common Market. With this 'maverick' judgement on Continental Can (*Financial Times*, 7 Dec 1987), the European Court of Justice upheld, seven years later, the teleological line of interpretation used by the Commission in its 1966 Memorandum (Swann, 1992a; Comanor *et al.*, 1990; van Empel, 1990).<sup>69</sup> Quoting Allen (1977: 104): 'The Court's judgment on Continental Can supported the Commission's view that effective competition within the framework of the Treaties required the control of concentration and hence mergers.'

In addition to this teleological ruling, the Court of Justice helped to expand the use of Article 86 of the EEC Treaty to control concentrations in subsequent judgements throughout the 1970s, on cases that did not involve mergers but anti-competitive behaviour (Gerber, 1994; Schwartz, 1993; Bishop, 1993; Brittan, 1991; Winckler and Gerondeau, 1990; Korah, 1987; Lever and Lasok, 1986).<sup>70</sup> As Reynolds (1983: 407) notes: '...the European Court of Justice increased the ability

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<sup>69</sup> For some authors, such as Gerber (1994), the European Court of Justice's 1973 ruling was just one example of a broader judicial policy in favour of a European competition law doctrine which increased the powers of the Commission. The Commission was often the source of new ideas and these were given authoritative force by the Court through inclusion in its judgements. The justification behind it was that competition law was an important vehicle for integration.

<sup>70</sup> Cases such as: *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corp. v. Commission* (Cases 6 and 72/73) [1974] ECR 223; *Suiker Unie and others v. Commission* (Sugar Cartel Case) (Cases 40-48, 50, 54-56, 111, 113 and 114/73) [1975] ECR 1663; *BRT v. SABAM* (Case 127/73) [1974] ECR 313; *Sacchi* (Case 155/73) [1974] ECR 409; *United Brands Co. and United Brands Continental B.V. v. Commission* (Case 27/76) [1978] ECR 207; *Hoffmann-La Roche v. Commission* (Case 85/76) [1979] ECR 462; *Hugin v. Commission* (Case 22/78) [1979] ECR 1869.

of the Commission to control mergers under Art 86 by lowering the threshold of dominance and extending the concept of abuse through its rulings in a number of subsequent cases.' Indeed, in its *Eight Report on Competition Policy* (1979: 12), the Commission recognised that 'recent judgements of the Court of Justice ha[d] given it valuable support in this area.'<sup>71</sup>

Therefore, like the other two supranational institutions, the European Court of Justice can be said to have pressed for an EEC merger regulation in the 1970s by using all its weapons. The first neo-functionalist factor was present in this first period of negotiations.

Regarding the **second neo-functionalist factor, whether there was political spillover**, the answer is no. Most European industrialists were not in favour of an EEC merger regulation. Although some managers favoured the transfer of merger control powers to the European Commission,<sup>72</sup> European industrialists' position towards the proposed EEC merger regulation was, in general, one of opposition or indifference (Jacobs and Stewart-Clark, 1990; Woolcock, 1989; Martin and Rider, 1988; *Financial Times*, 11 Dec 1981; Allen, 1977; *Financial Times*, 17 Jul 1973). As *The Economist* (14 Jul 1973) described: 'Although [the Commission proposal] is assured of support from the European Parliament as well as from the European trade unions, it draws the instinctive hostility of European big business.'

Different national confederations of industry or employers' expressed their opposition, the French being the most negative (*The Economist*, 31 Aug 1974; *The Economist*, 4 Aug 1973; *Financial Times*, 17 Jul 1973). This rejection was voiced at the European level by UNICE (I 21, 1995), an encompassing organisation

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<sup>71</sup> According to Schwartz (1993), other European Court of Justice's rulings -establishing the supremacy of EC competition law over domestic competition law and giving EC law 'direct effect'- also helped both to clarify the Commission's authority over competition and to enhance the Commission's potential power to police mergers through Article 86.

<sup>72</sup> Mazzolini (1973), on the bases of a series of interviews of the top managers of 154 major European companies, reported that some German and British managers favoured the delegation of all merger control power to the EEC Commission. For those managers a total transfer of powers was necessary to avoid multiple control, to provide a viable alter ego to the United States' Antitrust Authorities and to ensure a control based on European competition objectives instead of short-sighted domestic competition terms.

representing much of the constituency of business interests described by some as 'the peak association of business' (Greenwood, 1997: 103). They all argued that such a regulation would be an unnecessary encumbrance to the rationalisation and restructuring of European industry at a time the Common Market was still a relatively long-term objective, cross-border mergers were the exception and only Germany and the United Kingdom had merger control laws of their own (I 21, 1995).

Most European industrialists, therefore, preferred an EEC merger control based on Article 86 of the EEC Treaty to specific merger control measures. In truth, although the possible application of Article 86 created some uncertainty due to its weaknesses as a merger control instrument, businessmen were not really concerned about it in the 1970s. Various attitudes were adopted with some believing that the Commission was going to apply Article 86 to operations involving large foreign undertakings and others that Article 86 was very difficult to implement to mergers (I 14, 1995; Mazzolini, 1973).

So, albeit with some exceptions, the European business community did not want an EEC merger regulation. Industrialist pressure was, in general, against the approval of the Commission's 1973 merger control regulation proposal. The second neo-functional factor was not present in the 1970s.

With respect to the **third** and last neo-functional factor referring to **whether an European merger regulation was considered essential to ensure any other specific goal**, the answer is mixed. The merger regulation was only considered essential by some of the actors involved. The Commission, the European Court of Justice, the European Parliament and, at least in 1972, the Heads of State or of Government of the enlarged Community believed such a regulation was indispensable to guarantee that competition in the Common Market was not twisted by the increasing number of mergers taking place in the Community and the lack of an appropriate instrument to control them. For these actors, the lack of a systematic merger regulation at European level could jeopardise the goal set out in Article 3(f) of the EEC Treaty, that requires the Community to institute 'a system ensuring that competition in the common market is not distorted', and thus imperil the Common

Market. Yet, for most European industrialists and member states' governments, an EEC merger regulation was not necessary.

To sum up, only one of the three neo-functionalists' factors -the pressure of supranational institutions- was fully present in the 1970s. European industrialists were against the merger regulation and only some of the actors involved considered the regulation to be necessary to ensure another specific common goal. The neo-functional condition for integration was not fulfilled in this first period of negotiations.

### **B. The realist condition**

The realist condition for integration is determined by one factor: the three most powerful member states' position on the issue in the EC intergovernmental institutions. **Were at least two of the three most important member states in favour of an European merger regulation?** The answer is no. Although all member states' governments seemed to accept the need for EEC merger control in 1972, negotiations in the Council at both working group and Committee of Permanent Representatives level evidenced that, at least since 1974, two of the three biggest member states were not in favour of such a regulation.<sup>73</sup>

In 1969, the Council urged that a clear policy should be followed in the field of mergers. Then, the Paris Summit Conference of 19 to 21 October 1972 raised the problem of business concentration and, in its Final Declaration, called both for 'the elimination, especially in the field of taxation and law, of obstacles hindering alignment and concentration among undertakings' and 'the preparation of provisions to guarantee that concentrations, affecting undertakings established in the Community, are compatible with the Community's socio-economic goals and fair competition under the Treaty provisions both within the Common Market and on the

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<sup>73</sup> One of my interviewees (I 19, 1995) talked about the possibility that the Heads of State or Government of the Nine had not really agreed to the need of EEC merger control in 1972. For the interviewee, member states' governments were not worried about the control of mergers at that time. It is possible that their declaration of principle on the need of such a control 'se soit glissée'. According to him, this has happened in other cases.

outside markets' (CEC, 1972b: 19). The Heads of State or of Government further believed that, in order to accomplish these tasks, it was desirable to make the widest possible use of all the dispositions of the Treaties, including Art 235 of the EEC Treaty (CEC, 1972b).

In other words, the Heads of State or Government of the enlarged Community clearly backed, in October 1972, the Commission's approach to mergers. While demanding the elimination of barriers to cross-border mergers, they agreed on the necessity of specific EEC merger control rules to ensure the rules and aims laid down by the Rome Treaty. Moreover, through Article 235, the Heads of State or Government gave the Commission the legal basis to make a proposal (Weiler, 1991; Jenny, 1990; Comanor *et al.*, 1990; Fine, 1989; Monopolkommission, 1989; Merkin and Williams, 1984; Reynolds, 1983; Barounos *et al.*, 1975). By doing so, they were encouraging the Commission to take action (Dechery, 1990; Allen, 1977; CEC, 1973d). As Reynolds (1990: 33) observed: '...it was the member states themselves who in 1972 invited the Commission to draw up a proposal to regulate mergers at the European level.'

The initial unanimity of member governments as expressed in the Declaration seemed to continue in 1973. Indeed, as mentioned in chapter four, the Council declared in December 1973 its intention to act on the merger proposal by 1 January 1975. This led some commentators to conclude that the regulation was going to be adopted 'in the reasonably near future' (Barounos *et al.*, 1975: 200). However, the Council's Working Party on Economic Questions was unable to reach an agreement on several key issues in neither 1974 nor 1975. Neither was the Committee of Permanent Representatives, when presented with the problem in 1976, capable of reaching any decision on these issues. Negotiations reached a deadlock in 1978 despite the complaints of the Commission, the European Parliament and the Economic and Social Committee, and the Commission's proposal was, to all effects, shelved.

This lack of progress in the negotiations reflects that member states' delegations were not really interested in reaching an agreement. The atmosphere was

'not so much of hostility on the part of governments as of relative indifference' and no member state took an 'enthusiastic sponsorship' role in this realm (Allen, 1977: 101). According to most commentators, there were no real negotiations in the 1970s, 'aucun débat de fond' (I 18, 1995; I 16, 1995; I 12, 1995; I 11, 1995; I 8, 1995; van Empel, 1990). 'At that time, the Council did not give serious consideration to the draft regulation' (CEC, 1990a: 33). As Bulmer (1994: 429) stated: '...the Council of Ministers showed little real interest in developing EEC powers in this area; the member states simply did not see the need for supranational regulation.' Most member states' governments wanted to retain absolute control over merger policy in order to further their own national industrial policy objectives (Cini and McGowan, 1998; Gourvish, 1996; I 18, 1995; I 12, 1995; Kovar, 1991; van Empel, 1990; Hölzler, 1990; Woolcock, 1989; Reynolds, 1983).

The French, British and Italian delegations were the most hostile to the idea of the regulation. In the words of Woolcock (1989: 3): 'The initial proposals of the European Commission in 1973 failed to gain the support of Italy, Britain and France...' Other authors highlight that the 1981 Commission amendments 'were designed to dilute opposition from member states' governments, in particular the UK, France and Italy' (Brussels Law Offices, 1988: 282; Reynolds, 1983: 419). Indeed, Italy and France objected strenuously to the idea of EEC merger control (I 18, 1995; Dechery, 1990; Woolcock, 1989; Allen, 1977; *The Economist*, 18 May 1974; *Financial Times*, 21 Jul 1973). The British opposition, however, was not so clear cut. For Allen (1977: 107): 'The evidence of the British position suggest[ed] that the UK delegation ha[d] not finalized their position.'

The British delegation entered general reservations against the proposal as a whole in 1973 but relaxed, in principle, its opposition in 1975, after the June referendum on its membership in the Community. On November 1975, the British government announced that it was prepared to withdraw its general reservation and to accept the principle of Community control over mergers within limits and conditions to be defined (Reynolds, 1983; van Graay, 1977). Nevertheless, the British position was still one of hostility (I 18, 1995). *The Economist* of 31 August 1975 reports that 'Britain was cool under the Heath government, cooler still under

Labour.’ According to this well-known journal, Britain was just using a different strategy: ‘Britain has not mounted a frontal assault but has engaged in spoiling tactics...’ For example, *The Economist* accused Britain of having exaggerated, together with France and Italy, ‘the Commission’s potential for mischief in an effort to preserve national sovereignty over corporations.’

Of the three largest member states, therefore, the only that did not oppose the regulation was the Federal Republic of Germany (McGowan, 1993; Allen, 1977; *The Economist*, 31 Aug 1974). The German delegation made clear that they would endorse an EEC merger regulation if it was based on pure competition criteria (Woolcock *et al.*, 1991). Yet, the German delegation did not ‘sponsor’ the regulation. The Germans were not ready to fight for the regulation. For some interviewees, the Germans did not really want an EEC merger regulation in the 1970s because they had just introduced their own national merger control (I 18, 1995; I 12, 1995).

Thus, it can be concluded that the governments of two of the three biggest member countries, that is of France and of the United Kingdom, were not interested in reaching an agreement during the 1974-77 negotiations. One may even question the support the third most powerful member state, Germany, was prepared to give to the regulation. In any case, the realist factor was not present in the 1970s. The realist condition for integration was not completed in this period.

### **C. Conclusion**

As evidenced from what precedes and summarised in table 5.1, none of the two conditions which conform this research’s hypothesis were complied with in this first period of negotiations on EEC merger regulation. As shown in table 5.2, only some of the factors which determine the neo-functionalist and realist conditions for integration did occur in the 1970s.

Table 5.1. FIRST PERIOD FINDINGS

CONDITIONS FOR INTEGRATION	PRESENT
NEO-FUNCTIONALIST	NO
REALIST	NO

TABLE 5.2. FACTORS OCCURRING IN THE 1970s

CONDITIONS' FACTORS	PRESENT	EVIDENCE
<b>NEO-FUNCTIONALIST</b>		
<u>* Pressure supranational institutions:</u>		
- Commission	YES	1966 Memorandum (teleological interpretation), arguments for an EEC merger regulation (EMR), late 1960s proposals, 1971 Continental Can decision, 1973 EMR proposal, 1974-78 complaints, use Article 86 EEC Treaty.
- European Parliament	YES	1971 Resolution, 1974 support, 1974-79 complaints.
- European Court of Justice	YES	Teleological approach, help to expand use Art.86 EEC Treaty to control mergers.
<u>* European Industrialists in favour?</u>	NO	EMR was cumbersome and unnecessary.
<u>* Functional spillover</u>	YES/NO	To ensure Art.3(F) EEC Treaty and Common Market (Commission, ECJ, EP and, in 1972, Heads of State or Government)
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<b>REALIST</b>		
<u>* At least two of the three largest member states in favour?:</u>	NO	France and United Kingdom against. Germany did not oppose it. Lack of real negotiations.

## 5.2. EARLY 1980s: THE SECOND ATTEMPT

This part aims to verify whether the factors which compound the neo-functional condition and the realist condition took place in the early 1980s.

### A. The neo-functional condition

The three factors that shape the neo-functional condition for integration are: the position and role of the EC supranational institutions, whether there was political spillover and the existence of functional spillover.

With respect to the **first factor**, the three **EC supranational institutions pressed for an EEC merger regulation in the early 1980s.**

*The European Commission*, despite the lack of success of its first proposal, persevered in its attempts to achieve an agreement on EEC merger regulation in the early 1980s. The most obvious evidence of this is its proposal of an amended merger regulation in 1981 and the 1984 revision. Despite the challenging context of those first years of the decade, the dynamic new DG IV Commissioner, Mr. Andriessen, 'attempted to breathe new life into the Commission's controversial merger control proposal...' (Reynolds, 1983: 419; I 8, 1995; I 17, 1995) and gave 'high priority' to this project (van Bael and Maier-Reimer, 1983: 29). Furthermore, his successor in 1985, Peter Sutherland, made clear that he was prepared to resort to all the Commission's available powers under the Treaty to establish a comprehensive EEC merger control.

Just as in the 1970s, the Commission considered cross-border mergers as desirable and tried to encourage them (Sachwald, 1994; Tsoukalis, 1993; van Bael and Maier-Reimer, 1983). Certainly, as Martin and Rider (1988: 20) observed, Lord Cockfield's 1985 White Paper argued that:

Community action must go further and create an environment or conditions likely to favour the development of co-operation between undertakings. Such co-operation will strengthen the industrial and commercial fabric of the internal market (paragraph 133)...In spite of the progress made in creating such an environment, co-operation between undertakings of

different member states is still hampered by excessive legal, fiscal and administrative problems...

Nevertheless, the Commission also continued to think that an EEC merger control regulation was necessary to preserve competitive structures within the Common Market (CEC, 1986a; CEC, 1981c; CEC, 1980).<sup>74</sup> Convinced of the unsuitability of Article 86 of the EEC Treaty to control mergers in an efficient manner, the Commission held that only with a more systematic control of large-scale mergers at the Community level, would it be able to ensure 'that those industries which [were] already highly oligopolistic [did] not veer towards anti-competitive structures' (CEC, 1982a: 14). For the Commission: '...the increasingly oligopolistic structure of many sectors of industry [made] merger control more necessary ... than ever' (CEC, 1985: 46). In fact, the Commission believed that, by preserving competition in the Common Market, an EEC merger regulation could be regarded as important to ensure the triumph over the early 1980s economic crisis. As it stated in the Preamble of its 1981 revised proposal: 'A policy designed to strengthen effective competition plays a significant role in achieving more flexible structural adjustment and maintaining the competitiveness of our industries and, in so doing, also contributes to overcoming the current crisis.'

With the 1981 and 1984 amendments, the Commission intended to allow the Council to resume the work suspended since 1978: 'The modifications introduced by the Commission on the proposed merger regulation [1981 and 1984 proposals] were aimed at eliminating the main stumbling blocks at the Council level' (CEC, 1985: 24; see also CEC, 1982a). And to do so speedily:

...following the Parliament's adoption in October 1983 of a Resolution broadly endorsing the Commission's amended proposal, as the Economic and Social Committee had done the year before, the way is now clear for the Commission to submit a suitably revised text to the Council which it will commend to the Council's urgent consideration...[the Commission] will take the opportunity of urging the Council to resume its consideration of the merger control proposals without delay. (CEC, 1984a: 15 and 49)

The Commission was being flexible in wanting to alter the text proposed in 1973,

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<sup>74</sup> The result of this apparent conflict between the desire to develop large European enterprises and the desire to maintain undistorted competition was the maintenance in both the 1981 and the 1984 amended proposals of the previous 1973 'trade-off approach' on EEC merger control.

showing its will to facilitate an agreement (see Nugent, 1994). A clear example of this flexibility was the Commission's changes in Article 19 of the 1973 proposal enabling member states' representatives to have more influence in the decisions. As Bulmer (1993: 9) noted, such involvement of the Council in EEC merger control 'would have been outside the approach used in competition policy more generally.'

The Commission disposition to provide all the necessary steps to obtain the regulation was further evidenced at the end of this period of negotiations. By 1986 it was becoming clear that despite all the efforts made by the Commission and the change of context which was taking place in Europe, the Council was reluctant to enter into a constructive discussion of the Commission's proposals (CEC, 1987a; CEC, 1986a; CEC, 1985). Despite the Council's attitude, the Commission did not wish to forgo the issue but was willing to consider alternatives: to follow the European Parliament's advice to withdraw its proposal and start afresh, or to further develop its powers of *ex-post* vetting of certain types of mergers (CEC, 1987a). In any case, the Commission would continue to persist in its demands for an European merger regulation.

Indeed, a further and subtler evidence of the Commission's pressure to the Council on this issue, was the persisting use of Article 86 of the EEC Treaty against mergers during the early 1980s. Although Continental Can remained the Commission's only formal merger decision under Article 86, most commentators agree that this was not due to voluntary restraint or inaction from the part of the Commission. On the contrary, the lack of formal decisions is usually explained by the limitations of Article 86 as a merger control instrument and by the fact that 'where the Commission ha[d] investigated mergers and found evidence of dominance or abuse, the parties ha[d] withdrawn voluntarily or adjusted the proposal' (Gourvish, 1996: 16). (McGowan, 1994; Bulmer, 1994; Bishop, 1993; Swann, 1992a; Le Bolzer, 1990; Korah and Rothnie, 1990; Comanor *et al.*, 1990; van Bael and Bellis, 1990; Korah, 1990; Hölzler, 1989; Brussels Law Offices, 1988; Reynolds, 1987; Fine, 1987; Elland, 1987; Merkin and Williams, 1984; Raybould, 1984). Quoting Downes and Ellison (1991: 12):

The true extent of the Commission's merger control activity under Article 86 is revealed by examination of its informal practice...the Commission considered numerous proposed mergers in the light of the Article 86 criteria established in [Continental Can]; at times causing a change of conduct by the firms concerned; at other times seeing fit to take no action.

As the Commission stated in its *Tenth Annual Report on Competition Policy* (1981a: 104):

Experience in recent cases has confirmed that, even if Article 86 is difficult to apply on account of the conditions of its application, it still enables the Commission to monitor to a certain extent large-scale mergers and, if necessary, to prevent them being carried through or to have changes made which are desirable from the point of view of competition.

The Commission used the threat of an Article 86 action to win changes to mergers in at least ten cases from 1980 to 1986 (Bos *et al.*, 1992; Venit, 1990; Monopolkommission, 1989; CEC, 1985; CEC, 1984a; CEC, 1983a; CEC, 1982a; CEC, 1981a). The exact number of cases is difficult to estimate. After 1984 there are few references to the Commission's informal settlement practice in relation to mergers in the *Annual Reports on Competition Policy*. However, press reports evidence that such actions continued (van Bael and Bellis, 1990; Monopolkommission, 1989). Moreover, as Whish (1989: 738) argued: 'What one cannot know is how many mergers [were] not contemplated at all because of the possibility that they might [have] infringe[d] Article 86.'

Anyhow, there is evidence that the Commission informally intervened in a number of merger cases in the early 1980s. The unsuitability of Article 86 of the EEC Treaty to control mergers had thus not prevented the Commission, on its own initiative or at the request of the parties contemplating a merger or of complainants, to use its only weapon against anti-competitive mergers until a better armoury was given to it.

In fact, the Commission had been prepared to profit from European Court of Justice's judgements on Article 86 cases not involving mergers, that had expanded the concepts of both dominance and abuse, so as to control other merger cases (Bos *et al.*, 1992; Elland, 1991; Cook and Kerse, 1991; Downes and Ellison, 1991; Comanor *et al.*, 1990; Brussels Law Offices, 1988; CEC, 1985; CEC, 1984a; Merkin and Williams, 1984; Reynolds, 1983; CEC, 1983a; CEC, 1982a; CEC,

1981a; CEC, 1980). Quoting the Commission *Tenth Report on Competition Policy* for 1980 (1981a: 30 and 103):

Developments in the Commission decision-making and in the case-law of the Court with regard to the abusive conduct of dominant undertakings provide an indication of the scope for merger control afforded by the *Continental Can* doctrine, when re-examined in the light of more recent judgements (*Sugar, United Brands, Hugin/Liptons and Hoffmann-La Roche*)...In assessing conditions for applying Article 86 to mergers, particularly as regards the concepts of dominant position and abuse, the Commission also based its action on the line taken in later judgements in the *United Brands* and *Hoffman-La Roche* cases.

Also, regarding procedure, the Commission had been prepared to use its power to order interim measures in competition cases, as established by the Court ruling in the *Camera Care* case in 1980,<sup>75</sup> so as to enable intervention before mergers were completed (Comanor *et al.*, 1990; Brussels Law Offices, 1988; Reynolds, 1987; van Bael and Maier-Reimer, 1983; CEC, 1982a). Although it never actually took interim measures against any merger, the Commission menaced some mergers with them. In *Amicon/Fortia* (CEC, 1982a), the threat brought merger talks to an immediate end; in *Pilkington/BSN* (CEC, 1981a), the Commission obtained major modifications to the merger proposal.

So, in this period of negotiations, the Commission combined flexibility in the contents of the merger regulation proposal with action, indicating that it intended to develop European merger policy with or without the regulation. This threat was actually made explicit several times in 1985 and 1986 by Commissioner Peter Sutherland. He pointed out that if the regulation was not enacted by the Council, merger control would be developed at an European level not only by extending the Commission's powers under Article 86 of the EEC Treaty but also by applying Article 85 and 90 of the EEC Treaty to mergers.

*The European Parliament* also pressed for an EEC merger regulation in this second period. As with the Commission, it considered that 'the constant evolution of the market towards a generalized oligopolistic structure ... [could] seriously threaten

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<sup>75</sup> *Camera Care Ltd v. Commission* (Case 792/79 R) [1980] ECR 119. Interim measures are to be used in case of urgency and are designed to avoid irreparable damage being caused to a complainant or to the public interest when preliminary investigations are being undertaken (Comanor *et al.*, 1990; Downes and Ellison, 1991).

competition' and therefore that the Commission had to 'reshape its competition policy with a view to preventing any irreversible evolution of the market by controlling concentrations...' (OJ [1981] C 144/23; see also CEC, 1986a). Accordingly, it repeatedly deplored the fact that the Council had still not adopted the merger control regulation and expressed its support for the creation of effective means of controlling trans-frontier mergers (I 8, 1995; Brussels Law Offices, 1988; CEC, 1984a; CEC, 1982a; OJ [1981] C 144/19; CEC, 1980). As a matter of fact, the European Parliament, though suggesting some amendments, broadly backed the 1981 EEC merger regulation proposal in October 1983 and, in 1986, advanced a breakthrough of the 13 year-old deadlock situation on EEC merger control: by withdrawing the proposal and making a new start in filling this lacuna in the Commission's competition policy.

As to the third supranational institution, *the European Court of Justice's* position in that period is more difficult to ascertain. In the early 1980s there was no case like the *Continental Can*. In principle, the Court could thus not express whether it supported the Commission's efforts to establish EEC merger control. Nevertheless, the Commission intended to use several 1970s Court's rulings on Article 86 cases which were not concerned with acquisitive behaviour, but which lowered the thresholds for proving dominance and abuse, to broaden the scope of that Article of the EEC Treaty in the merger area. As Reynolds (1983: 409) comments: 'It is now apparent that although [those judgements] did not involve mergers but anti-competitive behaviour, the Commission's policy is to apply the concepts of both dominance and abuse as developed in these cases also to mergers.' According to some legal experts, it is by no means clear that the Court's rulings were intended for this aim. For them, this interpretation of the judgements was just another attempt by the Commission to expand its merger powers (Elland, 1991; Brussels Law Offices, 1988; Merkin and Williams, 1984). Regarding this, Cook and Kerse (1991: 2) wrote: '...although no subsequent judgments of the Court have applied Article 86 to takeovers or acquisitions the Commission *itself* has, since 1973, sought to broaden the scope of application of that Article in this area by reference to later Article 86 cases not concerning acquisitive behaviour' (my emphasis).

However, by establishing the Continental Can doctrine that Article 86 of the EEC Treaty could be applied to mergers, any subsequent ruling concerning this article was liable to have an impact on the Commission's powers to control mergers. Was this not to have been the case, the European Court should have specifically said so in the ruling. This was not the case. Therefore, it can be interpreted, as most commentators do, that, through these rulings, the European Court Justice had continued to press for EEC merger control (Gerber, 1994; Bishop, 1993; Brittan, 1991; Winckler and Gerondeau, 1990; Korah, 1987; Lever and Lasok, 1986; Reynolds, 1983). As Schwartz (1993: 619-620) stated:

On merger control in particular, Continental Can was one of a number of decisions that, taken cumulatively, created the potential for increased Commission authority. ... Some experts on EC jurisprudence believe that Hoffman-La Roche continued a trend whereby the Court slowly lowered the Continental Can hurdle, which had required a "substantial" effect on competition for Article 86 to apply.

The European Court of Justice had used its common tactic to gradually introduce a new doctrine. In the first case which came before it, the Court established the doctrine as a general principle but suggested that it was subject to various qualifications or just covered some extreme cases. Certainly, the test for intervention on merger cases under Article 86 of the EEC Treaty, enacted by the Continental Can ruling, was stringent. A corporate acquisition had to be carried out by a dominant undertaking and was only unlawful under Article 86 if it had 'substantial fettering' effects on competition. The principle, however, had been established. Not receiving too many protests, it was re-affirmed in later cases indirectly related with the new doctrine. Qualifications were then taken away -by lowering the thresholds of what can be understood by dominance and abuse- and the full extent of the doctrine revealed (Lasok and Bridge, 1991; Mancini, 1991; Colchester and Buchan, 1990; Dehousse and Weiler, 1990; Hartley, 1981). This tactic was a subtle way of pressing for the introduction of a new doctrine: in this case for the expansion of Community control over mergers through Article 86 of the EEC Treaty.

By the early 1980s, therefore, the European Court of Justice had given the Commission the possibility to use Article 86 of the EEC Treaty in more merger cases. Although there was no other cases like that of Continental Can, it was in this period of negotiations that the full extent of the doctrine, established in that case and

further expanded in subsequent judgements throughout the 1970s, was revealed. As in the 1970s, the three supranational institutions pressed for an EEC merger regulation in the early 1980s. The first neo-functionalist factor was present in this second period of negotiations.

Regarding the **second neo-functionalist factor: were European industrialists in favour of an European merger regulation?** European industrialists' position towards the proposed regulation continued to be, in general, one of opposition or indifference (I 21, 1995; Woolcock, 1989).<sup>76</sup> The business community considered that the 1981 and 1984 amendments had not modified the 1973 approach to merger control. The changes were merely 'cosmetic'. Moreover, for them, the early 1980s, with the rampant economic crisis, was not a suitable time to add such an instrument (I 21, 1995). In this sense, the *Financial Times*' issue of 2 February 1981 recorded that the Confederation of British Industry, in a report on the impact of EEC legislation on British business, had made 'a sharp attack on the European Community for trying to impose too many unnecessary laws and regulations on companies...' The report specifically stated that there was 'little appetite for new initiatives except in the Commission.' According to the *Financial Times*' article, the Confederation of British Industry's ideas 'gained support from other employer groups in the EEC, particularly the French, Italians and West Germans.' Although some companies were dissatisfied with the pervasive uncertainty of how the Commission would treat any proposed merger under Article 86 of the EEC Treaty (Bishop, 1993; van Empel, 1990; Brussels Law Offices, 1988), European businessmen generally did not believe that an EEC merger regulation was mandatory. Just as in the 1970s, there was no political spillover witnessed in the early 1980s.

Lastly, with respect to the **third neo-functionalist factor: was an EEC merger regulation considered essential to ensure any other specific goal?** Just as in the 1970s, the answer remains mixed. The Commission and the European Parliament considered such a regulation as indispensable to preserve competitive

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<sup>76</sup> Most interviewees and secondary information consulted, do not distinguish between a 1970s and early 1980s business community position on EEC merger regulation. According to them, businessmen only changed their position from one of opposition or indifference to one of support in the late 1980s.

structures within the Common Market, that is, the goal established in Article 3(f) of the EEC Treaty. Indeed, for them, the limitations of Article 86 of the EEC Treaty as a merger control instrument and the increasingly oligopolistic structure found in many sectors of industry, made an EEC merger regulation much more necessary than ever. Moreover, the Commission believed such a regulation, to ensuring competition in the Common Market, would help to overcome the early 1980s economic crisis. An European merger regulation was, thus, deemed essential to ensure an specific Community goal - the preservation of competition in the Common Market- and was expected to help contribute to the defeat of the economic crisis.

But the regulation was regarded as vital only by the Commission and by the European Parliament, the business community and member states' governments did not seem to share this belief. As for the European Court of Justice, it did not have the opportunity in that period to clearly express its opinion. Its reasoning in *Continental Can* and its gradual extension, through other rulings, of the legal doctrine established in that case, indicate, nevertheless, that it probably agreed with the other supranational institutions. In any case, an EEC merger regulation was not held to be essential to ensure another specific goal by all the actors involved.

To recapitulate, as in the 1970s, only one of the three neo-functionalists' factors -the pressure of supranational institutions- was fully present in the early 1980s. Most European industrialists opposed the regulation and, like the member states' governments, did not believe there was functional spillover. The neo-functional condition for integration was not fulfilled in this second period of negotiations.

### **B. The realist condition**

The factor that defines the realist condition for integration is the position of the three most powerful member states on the issue in the EC intergovernmental institutions. **Were at least two of the three most important member states in favour of an European merger regulation?** Just as in the 1970s, the answer remains no.

The representatives of member states' governments in the Council of Ministers did not show any willingness to enter into constructive discussion of the Commission's proposal (I 18, 1995; I 12, 1995; Bulmer, 1993; CEC, 1985; CEC, 1987a). Quoting the Commission's *Sixteenth Report on Competition Policy* for 1986 (1987a: 16): '...the Council has still not made a serious attempt to discuss and adopt the Commission's proposals.' Despite the need for political decision to pursue the debates at both the Working Party and Committee of Permanent Representatives level, no meetings were held at the ministerial level to discuss these matters.

The lack of real negotiations in the Council reflected the fact that, although by 1984 a majority of member states agreed with the principle of giving the Commission pre-merger control powers (CEC, 1986a; CEC, 1985), at least two of the three largest member states opposed it.

Regarding France, at the end of 1983, just before assuming the Presidency of the Council, the French government issued a memorandum which seemed to indicate that it was going to support an EEC merger regulation. The memorandum read: 'La législation de chaque État membre devrait reconnaître explicitement que le risque de concentration excessive doit être apprécié au regard de l'espace économique que constitue la Communauté et non dans le cadre de chaque État' (Dechery, 1990: 309).<sup>77</sup> This statement was interpreted by the Commission as encouraging. However, the French delegation's next move was to propose two alternatives to an EEC merger control regulation. Namely, the harmonisation of national merger laws and to concede the Commission the right to express its opinion on merger cases examined by national authorities (Dechery, 1990). The French opposition to the regulation was further revealed in subsequent meetings (I 8, 1995; Bos *et al.*, 1992; Dechery, 1990). As in the 1970s, the French delegation maintained a formal reservation during that period of negotiations (I 18, 1995; Woolcock *et al.*, 1991; Woolcock, 1989).

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<sup>77</sup> Each member state legislation should explicitly recognise that the risk of excessive concentration must be appraised taking into account the economic area the Community constitutes rather than just the domestic market. (own translation)

As to the other two largest member states, the British delegation continued to oppose the regulation (I 18, 1995; I 8, 1995; Dechery, 1990; Brussels Law Offices, 1988) and the German delegation to support EEC merger control only if based on pure competition criteria (Woolcock, 1989). However, the Germans were still not enthusiastic about the regulation (Tsoukalis, 1993; Dechery, 1990). According to some interviewees, the Germans did not really want an EEC merger regulation in the early 1980s because they considered their Federal Cartel Office, the *Bundeskartellamt*, to be better in controlling mergers than the Commission could ever be (I 18, 1995; I 8, 1995).

In short, as in the 1970s, the governments of France and Great Britain opposed the idea of EEC merger control and the support of the German government to the regulation was, at best, conditional. Hence, the realist factor was not present in the early 1980s. The realist condition for integration was not completed in this period.

### **C. Conclusion**

As displayed in table 5.3, none of the two conditions that conform with this research's hypothesis were found within this second period of negotiations of the European Merger Regulation. Indeed, as table 5.4 outlines, only some of the factors which determine the neo-functionalist and realist conditions for integration occurred in the early 1980s.

**Table 5.3. SECOND PERIOD FINDINGS**

<b>CONDITIONS FOR INTEGRATION</b>	<b>PRESENT</b>
NEO-FUNCTIONALIST	NO
REALIST	NO

TABLE 5.4. FACTORS OCCURRING IN THE EARLY 1980s.

CONDITIONS' FACTORS	PRESENT	EVIDENCE
<b>NEO-FUNCTIONALIST</b>		
<b>* <u>Pressure supranational institutions:</u></b>		
- Commission	YES	Arguments for an EEC merger regulation, 1981 and 1984 amendments and 1986 options, use Article 86 EEC Treaty, use ECJ rulings, Sutherland's threats.
- European Parliament	YES	Complaints, 1983 Resolution, 1986 suggestion.
- European Court of Justice	YES	Full extent of doctrine revealed.
<b>* <u>European Industrialists in favour?</u></b>	NO	Cumbersome and unnecessary.
<b>* <u>Functional spillover</u></b>	YES/NO	To ensure Art.3(F) EEC Treaty and Common Market and hence help to overcome the economic crisis (Commission and EP; possibly the ECJ)
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<b>REALIST</b>		
<b>* <u>At least two of the three largest member states in favour?:</u></b>	NO	France and United Kingdom against. Germany did not oppose it. Lack of real negotiations.

### 5.3. LATE 1980s: THE THIRD ATTEMPT

This part proposes to ascertain whether the factors which determine the neo-functional condition and the realist condition were present in the late 1980s.

#### A. The neo-functional condition

The three neo-functional factors are: the position and role of the EC supranational institutions, whether there was political spillover and the existence of functional spillover.

Concerning the **first factor: did EC supranational institutions press for an European merger regulation in the early 1980s?** In this period, it can be seen that such pressure was provided by all three of the supranational institutions.

*The European Commission* did press for an European merger regulation in the late 1980s. A more confident Commission, under the strong leadership of President Delors and DG IV Commissioner Sutherland (and later on of DG IV Commissioner Brittan), reinstated its sole competence in merger cases decisions by amending Article 19 of the draft regulation in 1986 and made again merger control one of its priorities.

The increased confidence of the Commission, in general, and of DG IV, in particular, during this period of negotiations, derived both from the personality of the Commissioners in charge and from the importance competition policy acquired. Regarding leadership, as Rosenthal (1990: 299) argued: 'DG-4 can be constrained by a passive commissioner for competition ..., but, conversely, strong leadership in those positions strengthens its hands.' Most commentators agree that both Sutherland and Brittan were forceful competition Commissioners. For Wilks (1992: 10): '...the significance of leadership from the Commissioner was established by Peter Sutherland whose success was built upon by Leon Brittan.' Both were relatively young, tough and ambitious and proved to be sophisticated and able operators on the Brussels scene (Cini and McGowan, 1998; I 22, 1995; I 17, 1995; I 7, 1995; I 2, 1994; Cini, 1993; Wilks, 1992; Rosenthal, 1990; Winckler and Gerondeau, 1990; Owen and Dynes,

1989; *Financial Times*, 5 Sep 1988; Carr, 1988).

As to the importance of competition policy, the revival of EC dynamism in the form of the single-market programme led to a renewed enthusiasm for all aspects of competition policy and hence enhanced the DG IV's status by giving it legitimacy (Cini and McGowan, 1998; Allen, 1996). As Wilks (1992: 9) stated:

To a large degree market integration has always been the prime objective of DG IV. To have it elevated to the main Commission objective is good for morale, raises the salience of competition issues and means that DG IV is taken more seriously by other Commission agencies...

This self-assured Commission continued to hold mergers, and especially cross-border mergers, as necessary for building a real European market. For the Commission, cross-border mergers were 'a means of realizing the objective of the Single European market and improving international competitiveness' (Tsoukalis, 1993: 112; see also Rosenthal, 1990; CEC, 1988c and the Preambles of the 1988 proposals). The potential gains from completing the Internal Market, identified by the 1987 Cecchini Report on the cost of non-Europe, relied, in part, on the reallocation of resources between enterprises and activities which would be achieved through such mergers (Jacquemin and Wright, 1993). Accordingly, the Commission tried to encourage cross-border mergers and alliances through its various projects in the high technology field, its internal market programme and its persistent attempts to harmonise company legislation and to offer European companies a common framework for conducting their operations (Tsoukalis, 1993; MacLachlan and MacKesy, 1989; Ownes and Dynes, 1989; Brittan, 1989; *The Economist*, 7 Oct 1989; *Financial Times*, 18 Jul 1989).

At the same time, however, the Commission persisted in its demands for an EEC merger regulation. The potential gains of the completion of the Internal Market were also expected to depend upon reduction in monopoly power. In this sense, the Commission believed systematic merger control was not only necessary but indispensable and urgent.<sup>78</sup> The unsuitability of EEC existing competition powers

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<sup>78</sup> The result of this apparent conflict between the desire to develop large European enterprises and the desire to maintain undistorted competition was the maintenance in the 1986 and 1988 amended proposals of a 'trade-off approach' on EEC merger control.

to deal efficiently with mergers, the wave of mergers which was taking place in the Community, the disparity and limited scope of national merger control laws, and the need to ensure the objectives of the Treaty and the completion of the Internal Market were all arguments asserted by the Commission in this respect. This was reflected, for instance, in its different Annual Competition Reports and in the Recitals to its draft proposals.

To be more specific, according to the Commission, an EEC merger regulation was crucial to achieve the aims of the Treaty of Rome as established in Article 3(f) - to institute 'a system ensuring that competition in the common market is not distorted' - and, by doing so, to ensure that the full benefits of the Internal Market could be realised. By maintaining a competitive structure for European industry, and thus the unity of the Internal Market, systematic EEC merger control would lead to an optimal allocation of resources and create the best possible climate for fostering innovation and technical progress (Sachwald, 1993; CEC, 1991c; CEC, 1990a; CEC, 1989b; CEC, 1988f; CEC, 1988a).

Such a merger control was all the more imperative when the single market project had given rise to a process of restructuring of European industry and hence to a wave of mergers (CEC, 1987a; CEC, 1989a). Wave of mergers characterised not only by an increasing number of large domestic mergers but also, for the first time, by an increasing number of cross-border mergers. For the Commission (1990a: 33): 'Although many such mergers [had] not posed any problems from the competition point of view, it [had to] be ensured that they [did] not in the long run jeopardize the competition process which lies at the heart of the common market.' In the words of Dinan (1994: 375): 'The number, size, and speed of 1992-induced mergers gave Competition Commissioner Peter Sutherland a legitimate pretext upon which to press national governments to cede more regulatory authority to Brussels.' Indeed, as the *Financial Times* of 3 June 1988 reported, Sutherland 'appealed for progress towards a Community-wide merger regime' on the basis that 'new Commission figures showed that Europe [had] seen a steep rise in large mergers.' Without an EEC merger control regulation, there was an implicit danger that merger activity would restrict market competition by creating dominant positions for the

combined firms.

Article 85 and 86 of the EEC Treaty did not provide the Commission the tools 'to cover all operations which [could] prove to be incompatible with the system of undistorted competition envisaged in the Treaty' (Preambles 1988 proposals; see also Martin, 1992). As Kovar (1991:72) noted, the need to continue basing the EEC regulation upon Article 235 of the EEC Treaty '[arose] out of the need to remedy the deficiencies of Articles 85 and 86 which [did] not guarantee effective intervention in all cases of concentration.' Both articles offered limited scope of application and neither of them provided for prior notification of a proposed merger, or for formal grant of approval (Tempini, 1991; Elland, 1990; Sutherland, 1989; Monopolkommission, 1989; Brussels Law Offices, 1988). In the words of Brittan (1991: 31): 'Articles 85 and 86 do some of the job, but they are very limited and technically inadequate (for example, if there is no agreement or no pre-existing dominant position, they may not apply).' Accordingly, and as John Temple Lang, then head of DG IV, told the International Bar Association conference in Strasbourg in October 1989: '...the Commission wished to see the merger regulation adopted because of several aspects of the law contained in Articles 85 and 86 which were unclear or otherwise unsatisfactory' (*Financial Times*, 6 Oct 1989).

Moreover, the Commission considered that national laws could not guarantee an efficient control of large mergers. National rules were restricted to the respective territories of the member states concerned, and therefore, could not deal adequately with large-scale mergers where the reference market was the Community as a whole or a large part of it (CEC, 1990a; CEC, 1990b; CEC, 1988c). Furthermore, national authorities could favour certain mergers for nationalistic reasons. In the Explanatory Memorandum attached to the April 1988 draft proposal, the Commission stated that national instruments of merger control could 'be a damaging risk to the internal market if they were used to favour "national champions" rather than the interests of the Community as a whole' (CEC, 1988c: 4). Nevertheless, the reason the Commission most emphasised to establish the unsuitability of domestic control over large mergers was the possibility of 'multiple jeopardy' in cross-border cases.

Major mergers extending beyond national frontiers in a single market '[needed] to be appraised on the basis of uniform and non-discriminatory rules' (CEC, 1989a: 50). In such a market, therefore, major mergers '[could not] be adequately assessed under such national laws as [existed], which [were] in any case not homogeneous' (CEC, 1988a: 51). The lack of Community control was 'damaging to the interest of firms that [were] seeking to develop their presence in the integrated Community market' (CEC, 1987a: 16). Cross-border mergers were at the mercy of differing national rules on merger control authorisation and could be faced with higher legal risks and transaction costs due to the possibility of parallel procedures from different national authorities. At a conference in Paris in March 1988 Sutherland asked:

Is it really acceptable that the same mergers between different companies in different member states should be subject to differing national laws, with the distinct possibility that conflicting decisions will be reached resulting from the fact that member states could apply different criteria? (Owen and Dynes, 1989: 129)

The very creation of a Community-wide merger control could be seen as the elimination of a technical barrier to integration (CEC, 1994c).

In short, for the Commission, the existing Treaty provisions and domestic laws could not provide an efficient system of control for all mergers. In a context of industrial restructuring and increasing number of large mergers, an EEC merger regulation was indispensable to ensure competition in the Single Market and hence its completion. For Sutherland: '...a Community-wide merger regulation [was] a vital instrument in achieving the single integrated market by 1992' (Brussels Law Offices, 1988: 289). Leon Brittan hailed the 1989 Agreement on EEC merger regulation as a 'historic breakthrough in the creation of a single European market' (*Financial Times*, 22 Dec 1989).

But the Commission not only pressed the Council with 'common sense' arguments. It also threatened once again to develop merger control at the European level with or without an agreement on EEC merger regulation, despite the unsatisfactory system provided by the EEC Treaty (I 15, 1995; I 12, 1995; I 2, 1994; Jacobs and Stewart-Clark, 1990; van Empel, 1990; Le Bolzer, 1990; Fine, 1989;

MacLachlan and MacKesy, 1989; *Financial Times*, 24 Nov 1987). As the Commission (1988c: 4) stated: '...it is possible to envisage an approach whereby the Community's existing competition rules might be applied systematically to certain mergers that significantly affect competitive structures within the common market...' Undeterred by the alleged defects of Articles 85 and 86 of the EEC Treaty as merger control instruments, the Commission was prepared to turn to case-law to develop EEC merger policy if the Council did not adopt a regulation (Schwartz, 1993). In the words of Sutherland: 'The issue [was] not whether Europe ha[d] a merger policy but what type it ha[d]' (*The Economist*, 5 Nov 1988).

The Commission in fact proceeded to carry out its threats after the BAT-Reynolds ruling of the European Court of Justice in November 1987. In 1988, besides continuously applying Article 86 of the EEC Treaty to mergers, the Commission started to utilise Article 85 of the EEC Treaty to this endeavour (CEC, 1990a; CEC, 1989a). The Commission considered the European Court of Justice's controversial decision in BAT-Reynolds established this possibility, substantially increasing the number of mergers it could control (Zachman, 1994; CEC, 1988a; Korah, 1987). For some commentators, this interpretation of the Court ruling was 'undoubtedly inspired by the political goal of seeing the Council adopt a concentration control regulation' (Bos *et al.*, 1992: 90; see also Cook and Kerse, 1991; van Empel, 1990; *Financial Times*, 24 Nov 1987). According to others, the Commission's interpretation was accurate.

In any case, the Commission applied both articles in several share acquisitions of competitors, mergers and hostile takeovers (Allen, 1996; Bulmer, 1994; Bellamy and Child, 1991; Venit, 1990; CEC, 1990a; CEC, 1989a; Owens and Dynes, 1989; Fine, 1989; Whish, 1989; Forrester, 1989; CEC, 1988a). Two cases in particular 'made the Commission's name' (*The Economist*, 5 Nov 1988). In March 1988, it used Article 86 to force British Airways to accept abandoning some of its routes to its competitors after it had taken over British Caledonian (CEC, 1989a), and, in July 1988, it used Article 85 to block the GC and C Brands proposed takeover of Irish Distillers (CEC, 1989a). Most commentators agree that, though few cases were mentioned in the Annual Reports, the Commission was fairly active in monitoring

mergers under those articles of the EEC Treaty subsequent to BAT-Reynolds (Van Bael and Bellis, 1990; Whish, 1989). *The Economist* (7 Oct 1989) reported that, by 1989, the Commission was examining about fifty deals a year.

These interventions did not usually result in formal decisions but made the Commission's determination to keep on developing its merger control armoury more credible than ever (Carr, 1988; Gray, 1988; Reynolds, 1987). Sutherland had 'proved that Brussels could interfere under the Treaty of Rome with or without an agreed prior-vetting policy' (*The Times*, 2 Feb 1989). As the European Communities sub-committee of the British House of Lords concluded (1989: 5): 'Such interventions [draw] attention to the powers relied on by the Commission to control mergers under the EEC Treaty and to its efforts to secure more comprehensive powers by means of the proposed Regulation.' Quoting the *Financial Times* of 9 February 1989: 'The genie [was] out of the bottle; and there [was] no way to put it back...' The Commission was pressing for an EEC merger regulation not only with words but also with actions. And these actions had high associated costs for companies wanting to merge.

In increasing the use of Articles 85 and 86 of the EEC Treaty to attempt to control mergers without clear and predictable technical and assessing rules, the Commission was provoking a lot of second-guessing and legal uncertainty (Davison and Fitzpatrick, 1995; Institute of Directors, 1989; Blumberg and Schödermeier, 1988; *Financial Times*, 24 Nov 1987). Many mergers, such as the 1989 Metal Box/Carnaud (CEC, 1990a), were voluntarily brought to the attention of the Commission on the grounds that 'it [was] preferable to have a green light from the Commission in advance than to discover that it intend[ed] to open proceedings in respect of a completed merger, with the possibility that it might order divestiture' (Whish, 1989: 751). These were major mergers 'which previously would not have dreamed of calling upon Brussels' to seek the Commission's prior opinion (Swann, 1992b: 71).

Moreover, the development by the Commission of EEC merger policy on a case by case bases implied the creation of a twofold system of merger control in the

Community. A system based, on the one hand, on Articles 85 and 86 of the EEC Treaty, which could be applied directly by the national authorities, and, on the other hand, on national merger laws. This resulted in many mergers being investigated both by domestic competition authorities and by the Commission. For example, the British Airways takeover of British Caledonian was investigated in the United Kingdom and by the Commission. The joint bid by GEC and Siemens for Plessey had to be notified to the Commission and to the British, French, Italian and German national competition authorities (not to mention further notifications in other non-EC countries, mainly because of defence interests). And Ashland Oil/Cabot was monitored at both EEC level and by the French Commission de la Concurrence. (Woolcock *et al.*, 1991; CEC, 1990a; CEC, 1989a; Whish, 1989; Owen and Dynes, 1989; Woolcock, 1989)

This multiple control system was very costly to European firms (Zachman, 1994; Woolcock *et al.*, 1991; Brittan, 1990; Whish, 1989; *Financial Times*, 9 Feb 1989). It meant that the already confused legal environment surrounding large mergers was becoming even more complicated in a moment of active industrial restructuring. The Commission was not only aggravating the problem of parallel control from different national authorities on cross-border mergers but also extending it to large national mergers. As a result, companies faced considerable uncertainty about whether a potential large merger would be investigated by national or European merger regulators or both. Furthermore, the Commission and member states' competition authorities could reach conflicting positions on the desirability of proposed mergers. For example, in the British Airways/British Caledonian case, the conditions demanded by the Commission for approval were more stringent than those asked for by the British Monopolies and Mergers Commission.

With relation to this problem of corporate uncertainty, the Commission argued again that only a 'one-stop shop' system, a single Community control for large-scale mergers, could avoid the risk of differences of assessment and establish clear legal jurisdictions and procedures (CEC, 1990a; Pathak, 1990; *Financial Times*, 18 Oct 1990; *The Times*, 28 Jan 1989; *The Times*, 23 Jun 1988). The only way to eliminate this uncertainty was with the approval of a comprehensive approach to merger

control. As Sutherland argued: '...it [was] better to have a clear procedure than the risk of the retrospective application of Articles 85 and 86' (Carr, 1988: 7).

The Commission was, thus, offering EEC merger regulation as the alternative to a situation of legal uncertainty that it had greatly help to create. An EEC merger regulation was required not only to control anti-competitive mergers which could jeopardise the Single Market but also to help competitive mergers to take place by clarifying the rules. It '[could] be seen as a means of facilitating European mergers, by reducing as much as possible the area in which national and Community competences overlapped' (Tsoukalis, 1993: 112). Sutherland claimed that an EEC merger regulation was 'not designed as an impediment' but as 'a reorganisation that [would] remove one layer and replace it with one decision-making body' (Carr, 1988: 7). In an interview for *The Independent* (31 Jul 1989), Sir Leon Brittan affirmed that 'one-stop control [was to] be to the benefit of industry.' The need to establish a 'one-stop shop' system became a 'cornerstone' of the Commission's arguments for an EEC merger regulation (I 15, 1995; Brittan, 1989; Sutherland, 1989; *The Times*, 28 Jan 1989).

As may be deduced from what precedes, the Commission increasing use of Articles 85 and 86 of the EEC Treaty can be seen 'as a political move by Brussels to strengthen its hand in winning member states agreement to a EC-wide merger control regulation' (*Financial Times*, 5 Sep 1988), that is, as a means of persuasion. As Forrester (1989: 98) described, the Commission's 'unusually frequent involvement in merger cases over the past months has been part of its campaign to be granted clear power to review major mergers.' The Commission was hoping member states would view a merger control regulation with less alarm than the prospect of an increasing use of these articles of the EEC Treaty to attack mergers (*Financial Times*, 24 Nov 1987). Indeed, in 1988 and 1989, the Commission insisted on the risks the use of Articles 85 and 86 of the EEC Treaty as merger control instruments implied yet, at the same time, threatened member states not only to persist in their application until adoption by the Council of an EEC merger regulation, but to do it to a greater extent (Monopolkommission, 1989; Woolcock, 1989; Forrester, 1989; *Financial Times*, 6 Oct 1989; CEC, 1988f). According to *The Economist* (5 Nov 1988) the

right word to describe the Commission's intentions was 'blackmail'.

Last but not least, the Commission resolve to get a specific merger control instrument especially adopted to deal with Community-scale mergers, was displayed by three further facts. First, by its willingness to work with interested groups, the European Parliament, the Economic and Social Committee and the Council in the preparation of its merger regulation proposals (I 18, 1995; Dechery, 1990; CEC, 1990a; CEC, 1989a; CEC, 1988a; CEC, 1987a). Secondly, by its flexibility in amending its proposal twice in 1988 and several times in 1989 as the final text of the regulation showed (CEC, 1989a). As one interviewee involved in the late 1980s negotiations stated, the Commission was 'practical and sensible' (I 14, 1995). And thirdly, by the fact that the Commission's delegation to the negotiations, the so-called 'merger team', was headed, and this is exceptional, sometimes by the director general of DG IV, sometimes by the deputy director general, or sometimes by a member of the Commissioner's cabinet (I 18, 1995; I 12, 1995).

Briefly, in the late 1980s a more assured Commission fought with all its weapons for an agreement on European merger regulation. It offered 'common sense' arguments for an EEC merger regulation, increasingly applied Articles 85 and 86 of the EEC Treaty to mergers, despite (or because of) their limitations and thus associated costs, and was prepared to be flexible on the contents of the regulation. The energy shown by the Commission in attempting to get Council agreement on the subject of EEC merger control was indeed highlighted and welcomed by the European Parliament in several occasions. For instance, in its voluntary Resolution on mergers of October 1987,<sup>79</sup> in its *Resolution on the Seventeenth Report on Competition Policy* (CEC, 1989a) and in its *Resolution on the Eighteenth Report on Competition Policy* (CEC, 1990a).

*The European Parliament* also pressed for an EEC merger regulation in this third period. Just as with the Commission, it considered such a regulation more necessary than ever due to the unsuitability of EEC existing competition powers to

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<sup>79</sup> OJ [1987] C 318/120.

deal efficiently with mergers, the wave of mergers which was taking place in the Community, the 1992 target of a true internal market and the need to avoid multiple control on mergers (CEC, 1992a; CEC, 1991c; CEC, 1990a; CEC, 1989a; CEC, 1988a).

For this reason, besides voting in favour of the Commission's 1988 April amended proposal and greeting the Commission's efforts to get an agreement, the European Parliament directly appealed to the Council for the regulation. It 'urged the Council to implement [the regulation] as soon as possible' (CEC, 1989a: 259). As expressed in its voluntary Resolution on mergers of October 1987, the Parliament 'deplor[ed] the many years of deadlock on the Council's Economic Questions Working Party and the Committee of Permanent Representatives on the proposal' and 'call[ed] upon the Council to recognize that, by its failure to act so far, it [was] both seriously jeopardizing competition in the Community and denying companies the certainty and assurance to which they [were] entitled' (OJ [1987] C 318/120).

However, the European Parliament's main line of action was to exhort the Commission to take all the necessary steps to get a Council agreement on this issue. On the one hand, in its *Resolution on the Sixteenth Report on Competition Policy* (CEC, 1988a), it stated its belief 'that a firm decision [had to] be taken by the Commission as to how it [intended] to proceed with regard to its proposals on merger controls, which [were] still deadlocked in the Council.' On the other hand, it encouraged the Commission to use Articles 85 and 86 of the EEC Treaty as instruments of merger control if the Council did not reach an agreement:

[the European Parliament] Notes that the European Court of Justice in the Philip Morris case suggested that the prohibition on cartels contained in Article 85 could possibly be applied to certain mergers as well; considers, therefore, that the Commission should fully use its powers under both Articles 85 and 86 of the Treaty if the proposal for a regulation on merger control is not accepted by the Council. (CEC, 1989a: 259)

Indeed, Brittan (1991: 31-32) commented that during the negotiations, the Parliament 'did not miss an opportunity to urge [the Commission] to withdraw the regulation proposal from the Council table and instead get on applying the Treaty rules audaciously.'

Moreover, the European Parliament actively participated in the late 1980s discussions on European merger regulation. As the Commission noted in its *Nineteenth Report on Competition Policy* (1990a: 22): 'The Parliament played a constructive role in the process leading to the adoption of the text. Its opinions and criticisms were taken into account by the Commission.'

Hence, when in December 1989 an agreement was eventually reached on the regulation, the European Parliament was the first to applaud the success in its *Resolution on the Nineteenth Report on Competition Policy*: '[The European Parliament] Welcom[ed] the fact that the Council [had] finally [taken] the decision to adopt a Regulation on merger control in December 1989 after so many years of stalemate' (CEC, 1991c: 252).

Lastly, just like the Commission and the European Parliament, *the European Court of Justice* pressed for an European merger regulation in the late 1980s. In November 1987, it issued a disputed ruling in the BAT-Reynolds case. In this ruling, the Court rejected BAT and Reynolds specific complaint but held that, in principle, the acquisition of a minority shareholding can amount to a restrictive agreement under Article 85 of the EEC Treaty irrespective of whether those transactions constitute an abuse of dominance under Article 86 of the EEC Treaty (George and Jacquemin, 1990; Hölzler, 1990). The Court argued that:

It should be recalled that the agreements prohibited by Article 85 are those which have as their object or effect the prevention, restriction or distortion of competition within the common market.

Although the acquisition by one company of an equity interest in a competitor does not itself constitute conduct restricting competition, such an acquisition may nevertheless serve as an instrument for influencing the commercial conduct of the companies in question so as to restrict or distort competition on the market on which they carry on business. (ECR, 1987: 4576-4577, parag 36 and 37)

Commentators agreed the Court unequivocally ruled that Article 85 of the EEC Treaty could be applied to the acquisition of a minority shareholding in a competitor. Notwithstanding, they had different opinions on the crucial question of whether the judgement had established that Article 85 could also apply to acquisitions of majority or total shareholdings.

According to the Commission, the European Parliament and some legal experts, the Court had significantly widened EC merger powers of intervention. For them, the Court's judgement 'radically revised the application of Article 85 to mergers' undermining the restraint imposed by the 1966 Memorandum (Schwartz, 1993: 642). It implied that Article 85 of the EEC Treaty could be applied in instances of majority share acquisitions and even to full mergers if they lead to control of the commercial conduct of the acquired company (I 12, 1995; Bishop, 1993; Bos *et al.*, 1992; Hodges *et al.*, 1992; Kovar, 1991; Woolcock *et al.*, 1991; Downes and Ellison, 1991; Le Bolzer, 1990; George and Jacquemin, 1990; Whish, 1989; *Financial Times*, 9 Feb 1989; Forrester, 1989; CEC, 1989a; Blumberg and Schödermeier, 1988; Brussels Law Offices, 1988; CEC, 1988a; CEC, 1988c; CEC, 1987c; Fine, 1987; Reynolds 1987).

These commentators based their assessment on the fact that the Court included amongst agreements 'prohibited by Article 85' instances 'where, by the acquisition of a shareholding or through subsidiarity clauses in the agreement, the investing company obtains legal or de facto control of the commercial conduct of other company...' (ECR, 1987: 4576-4577, parag 36-38) and any agreement that 'gives the investing company the possibility of reinforcing its position at a later stage and taking effective control of the other company...' (ECR, 1987: 4577, parag 39). They argued that the Court was not required to include such broad statements of principle in the assessment of this case. It could have as well avoided the question of the applicability of Article 85 to mergers as the Commission had done in 1984.

For other legal specialists, nevertheless, the Court's ruling had not broken new ground. It was 'far less revolutionary than some may pretend' (Van Bael and Bellis, 1990: 303). The judgement related only to minority share acquisitions and thus had just confirmed that Article 85 of the EEC Treaty could be applied, not only to specific restrictive clauses in agreements on the formation of joint ventures, but to the formation of a joint venture itself where it provides a framework for co-operation between the parents that is likely to restrict competition, backing the Commission policy in this area (Bos *et al.*, 1992; Kovar, 1991; Bellamy and Child, 1991; van Bael and Bellis, 1990; van Empel, 1990; Forrester, 1989;

Monopolkommission, 1989; Whish, 1989; *Financial Times*, 24 Nov 1987).

These legal experts pointed out many uncertainties and practical objections militating against a broad interpretation of Article 85 as well as paragraphs 30 and 31 of the European Court's ruling. In these paragraphs, the Court characterised the issue before it as

...whether and in what circumstances the acquisition of a minority shareholding in a competing company may constitute an infringement of Articles 85 and 86 of the Treaty. Since the acquisition of shares in Rothmans International was the subject-matter of agreements entered into by companies which have remained independent after the entry into force of the agreements, the issue must be examined first of all from the point of view of Article 85. (ECR, 1987: 4575)

This passage suggests that Article 85 of the EEC Treaty is applicable only where an undertaking acquires a minority shareholding in a competitor and the agreement is entered into by companies which have remained independent. If one of the parties to the agreement were to lose its independence -in other words, if a true merger or acquisition were to occur -Article 85 might not apply. Finally, the mention of 'competing companies' suggests that even if horizontal mergers could be brought under Article 85, the holding might not reach vertical and conglomerate mergers. According to these legal experts, if the Court had wanted to allow for expansive reading of Article 85, it 'could have categorized the transaction as one that gave one company control of another, thus clearly enabling it to extend its analysis to concentrations' (Schwartz, 1993: 641).

The European Court of Justice ruling was thus unclear (I 2, 1994; Whish, 1989; Korah, 1987). It 'was written ambiguously enough to support either a restrictive or an expansive reading of Article 85 of the EEC Treaty' (Schwartz, 1993: 641). On the one hand, the Court made the application of Article 85 of the EEC Treaty contingent upon the fact that the undertakings concerned also remained independent following the conclusion of an agreement, but, on the other hand, deemed Article 85 to be applicable if the acquirer obtained the legal or factual control of the business activities of the other undertakings (Brittan, 1991; Monopolkommission, 1989; Lever and Lasok, 1988). The judgement had left unexplained the scope of application of Article 85 of the EEC Treaty to mergers and

thus, as Swann (1992b: 71) argued, had 'threw up a host of unresolved procedural issues' (Bernini, 1991; Venit, 1990; Hölzler, 1990; Whish, 1989). In the words of Montagnon (1990: 103), this decision 'raise[d] more questions than [it] answer[ed].'

In any case, however, 'the judgement [had] raised some possible doubts whether, after all, Article 85(1) might be made applicable to merger' (Forrester, 1989: 98). Despite the lack of clarity concerning the powers of the Commission *vis-à-vis* undertakings, the ruling had actually opened up the possibility to broaden the use of Article 85 of the EEC Treaty to merger cases. As a result, it helped to increase the credibility of the Commission's threats to develop European merger control with or without an specific merger regulation (I 7, 1995; Owen and Dynes, 1989; CEC, 1988c). Quoting Korah and Rothnie (1990: 212): '...the judgement in BAT and Reynolds was widely interpreted as an indication to the Council of Ministers that it should adopt the regulation or suffer the consequences of a wide interpretation of the precedent.'

Certainly, by giving the Commission the chance to have considerable discretionary power to control acquisitions, the ambiguous ruling provided for the creation of a twofold system which would be very costly to European firms (I 7, 1995). In the words of Hodges *et al.* (1992: 31): 'This decision opened up the real prospect that European industry would be subject to double-jeopardy on mergers - with both Commission and national governments ruling according to different criteria-...' In fact, as Downes and Ellison (1991: 25) noted, the Court's decision 'led immediately to a number of informal investigations which were settled after negotiation with the Commission.' An ambiguous judgement was all that was needed to encourage the Commission to claim the power to investigate mergers on the basis of Article 85 and to confer new impetus to its efforts to introduce a Council regulation on mergers (Swann, 1992b; Cook and Kerse, 1991; Brittan, 1991; Bellamy and Child, 1991; Whish, 1991; Downes and Ellison, 1991; van Bael and Bellis, 1990; Hölzler, 1990; Brussels Law Offices, 1988).

Therefore, despite or because of its ambiguity, the European Court of Justice's ruling in the BAT-Reynolds case gave the Commission a useful new weapon

with which to control mergers and to urge the Council for an EEC merger regulation. With its decision, the Court assisted the Commission in its efforts to get an EEC merger regulation and, by doing so, pressed, at least indirectly, for it. For some authors, the judgement was indeed an important catalyst in the evolution of Community merger control; it helped create a new momentum (Allen, 1996; Bulmer, 1994; Swann, 1992b; Hodges *et al.*, 1992; Woolcock *et al.*, 1991; Downes and Ellison, 1991). According to Lord Slynn (1992), former judge of the European Court, the Court laid the foundations of the EEC Merger Regulation.

Yet, whereas the effects of the ruling are straightforward, what is not so clear is whether they were intentional. At first sight, the Court of Justice was not seeking to help the Commission. Unlike in the Continental Can case in the early 1970s, the Commission's decision on the Philip Morris case in 1984 did not try to establish the principle that Article 85 could be applied to mergers (Schwartz, 1993). Contrary to the Continental Can case, therefore, the Court could not be presumed to have followed the Commission's interpretation in this case. Perhaps, the judgement's ambiguity was just the result of the Court's internal proceedings. As Nugent (1994: 231-232) notes:

...the use of majority voting, coupled with the lack of opportunity for dissenting opinions, has encouraged a tendency, which perhaps is inevitable given the different legal backgrounds of the judges, for judgements sometimes to be less than concise; occasionally even to be fudged.

On the other hand, however, Sutherland had threatened the Council with using this article of the EEC Treaty to control mergers since 1985 and especially before the crucial Council meeting of 30 November 1987. The Court issued the controversial ruling some days before that meeting. Perfect timing or coincidence? As Downes and Ellison (1991:20) stated: 'The Court of Justice was clearly sensitive to the fact that these proceedings were regarded by many interested observers as a test case of the Court's attitude to the application of Article 85 to agreements which had an element of concentration or merger in them.' Despite this, the Court issued an ambiguous ruling. Perhaps, as some authors have argued:

...the Court's vagueness suggests uncertainty as to how institutional and political actors would receive the Court's interpretation. Thus the Court included clauses in the opinion to 'allow future limitation' in case expansive reading of the decision proved 'unworkable'. (Schwartz, 1993: 641)

It is difficult to believe that the Court did not have in mind the political implications of its decision (I 2, 1994). It is said that a member of Sutherland's cabinet 'was frequently on the telephone to the Court' (I 2, 1994). The likelihood of some political influence cannot be excluded. Blumberg and Schödermeier (1988: 35) noted that 'in combining the antitrust investigation with the transfer of control, the Court [had] come very close to the Commission's view expressed in Article 2 of the Draft Merger Regulation.'

The possibility that in the BAT-Reynolds ruling the Court had tried, just as with the Continental Can decision, to interpret the Treaty in a light most favourable to the expansion of the Commission's powers over mergers cannot be dismissed. Whether or not the Court intended the scope of its judgement to extend so far, the fact is that it gave the Commission an opportunity to reinforce its position. Like in the previous two periods of negotiations, the first neo-functionalist factor was present in the late 1980s.

**Regarding the second neo-functionalist factor: were European industrialists in favour of an European merger regulation?** Yes, the European business community was, in general, in favour of an EEC merger regulation in the late 1980s (Armstrong and Bulmer, 1998; I 19, 1995; I 18, 1995; I 17, 1995; I 7, 1995; Bulmer, 1994; Brittan, 1991; Hölzler, 1990; Korah, 1990; van Empel, 1990; Brittan, 1989; Woolcock, 1989; Sutherland, 1989; *The Times*, 28 Jan 1989; *The Guardian*, 10 Nov 1988; *The Economist*, 5 Nov 1988; *Financial Times* 5 Sep 1988). At the beginning of November 1987, European industrial and employers' confederations issued a declaration, through UNICE, making plain their support for EEC merger control (I 21, 1995; CEC, 1988a; UNICE, 10 Nov 1987)<sup>80</sup> and, in 1988, major European industrial leaders in the Round Table organisation gave the regulation general backing (*The Guardian*, 21 Jun 1988).

Industrialists argued that the logic of the Single Market necessitated a single

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<sup>80</sup> In a footnote to the official UNICE opinion, the Federation of Danish Industries clearly stated that, contrary to the rest of national industrial or employers' organisations, it did not see the need for the regulation. However, in UNICE's official opinion of 4 November 1988, this footnote had disappeared.

EC merger policy. As UNICE, the European grouping of national industry confederations, pointed out in its declaration of 10 November 1987, 'the completion of the internal market by 1992 and the exigencies of international competition' were surmised to 'give rise to a major restructuring in the EC.' Competition was expected to take place more and more on the European level. Accordingly, the application of national policies to large mergers was not only inappropriate but could also jeopardise the completion of the Single Market: 'National controls on company restructuring, being based on different national criteria, are incompatible with the existence of a really integrated market and the increasing geographical extension of a large number of markets' (UNICE, 10 Nov 1987). As the EEC Treaty did not contain 'any suitable provisions concerning the control of company mergers from the competition policy point of view', an EEC merger regulation was, therefore, required to reflect the nature of competition in the European market and also avoid multiple national control and unequal treatment (UNICE, 10 Nov 1987). (I 21, 1995; I 17, 1995; I 13, 1995; Woolcock, 1989)

After the November 1987 European Court of Justice's BAT-Reynolds ruling and the Commission's informal involvement in several cases, industry requests for clarification of the Commission's and member states' jurisdictions and the substantive standards each would apply to future merger control were fuelled (I 21, 1995; Bulmer, 1994; Hodges *et al.*, 1992; Bernini, 1991; Schwartz, 1993; Hölzler, 1990; UNICE, 14 Dec 1989; *The Independent*, 31 Jul 1989a; *Financial Times*, 5 Sep 1988; UNICE, 17 Nov 1989; UNICE, 4 Nov 1988). After these events, large European companies were faced with the possible consolidation of a multiple merger control system in the Community based not only on different national merger laws but also on Articles 85 and 86 of the EEC Treaty. Such a system meant more delay, expense, uncertainty and the increasing possibility of divergent decisions at precisely the time when more companies were considering mergers (I 21, 1995; I 19, 1995; Zachman, 1994; Bulmer, 1994; Woolcock *et al.*, 1991; Brittan, 1991; Dechery, 1990; van Empel, 1990; Korah, 1990; Hölzler, 1990; Fine, 1989; Woolcock, 1989; House of Lords, 1989; Sutherland, 1989; *The Times*, 28 Jan 1989; *The Economist*, 5 Nov 1988). When, in December 1989, UNICE welcomed the Agreement on EEC merger regulation, it was 'for ending the haphazard system under which the Commission

[had] power to overrule the decisions of national authorities, but only when the merger [had] taken place' (*Financial Times*, 22 Dec 1989).

Most European industrialists, therefore, regarded an EEC merger regulation as mandatory to avoid the costs of multiple control and hence to allow European industry to restructure and the completion of the Internal Market. Accordingly, the associations representing 'big business' formed a coalition with the Commission in favour of replacing the possibility of multiple control by one single 'one-stop' exercise in Brussels and pressed both at the European and national level for an EEC merger regulation (I 21, 1995; Bulmer, 1994; van Empel, 1990; Woolcock, 1989).

At the European level, UNICE tried, through its usual means, to influence the Council's discussions. It submitted a number of formal position papers and had several informal contacts with Commission officials and government representatives (CEC, 1990a; CEC, 1989a; UNICE, 14 Dec 1989; UNICE, 17 Nov 1989; UNICE, 14 Dec 1988; UNICE, 4 Nov 1988; UNICE, 4 May 1988; UNICE, 10 Nov 1987). By doing so, some commentators argue, 'UNICE helped to get the regulation through the Council' (Collie, 1993: 218; I 21, 1995). An interviewee added that the help was provided not only by UNICE but also by other professional and industrial organisations (I 18, 1995).

At the national level, employers' and industry confederations undertook lobbying campaigns directed at their governments (I 21, 1995). In the United Kingdom, the most reluctant member state to an EEC merger regulation, the campaign was particularly tough. To give an example, in July 1988, John Banham, then Director General of the Confederation of British Industry, asked narrow, nationalistic competition policies to be set aside in favour of the European Commission becoming the key arbiter for international company mergers. His defending arguments were similar to those used by UNICE at the European level: an EEC merger regulation was needed to ensure fair play in a free market and to allow British industries to link up sufficiently in preparation for 1992. This statement was in direct conflict with the British government policy at the time (Owen and Dynes, 1989; *Financial Times*, 14 Jul 1988b; *Financial Times*, 8 Jul 1988; *The Times*, 8 Jul

1988; see also House of Lords, 1989).

To sum up, in contrast to earlier periods, in the late 1980s the European business community held the view that an EEC merger control regulation was necessary and was prepared to fight for it, lobbying the Council both directly and indirectly. Political spillover was finally present in that period of negotiations.

The same can be said of the **third** and last neo-functionalist factor. **An European merger regulation was also considered for the first time essential to ensure another specific goal** by all the actors involved. Contrary to the 1970s and early 1980s, in the late 1980s, the need for merger control at the European level was accepted not only by the three supranational institutions but also by member states' governments and the business community. An EEC merger regulation was thought indispensable to achieve the aims of the Treaty (Article 3(f)) and to complete the Internal Market because of the unsuitability of EEC existing competition policy to deal efficiently with mergers, the wave of mergers which was taking place in the Community and the disparity of national merger control laws.

To summarise, the three neo-functionalist's factors were present in the late 1980s. This time, European industrialists, and not only the supranational institutions, pressed for the regulation and all actors involved believed the regulation was required to achieve the Single Market. The neo-functionalist condition for integration was fulfilled in this third period of negotiations.

### **B. The realist condition**

The position held by the three most powerful member states on the issue in the EC intergovernmental institutions determines the realist condition. **Were at least two of the three most important member states in favour of an European merger regulation?** Contrary to earlier periods of negotiation, the answer is yes.

The representatives of all member states' governments in the Council of

Ministers showed willingness to enter into constructive discussion of the Commission's proposals in the late 1980s. As the Economic and Social Committee stated: 'On 30 November 1987 the Council of Ministers responsible for the internal market finally gave up its obstructive attitude' (OJ [1988] C 208/11). The Council did not wait for the European Parliament or the Economic and Social Committee before proceeding with the Commission's April 1988 proposal. Informal discussions and deliberations did even take place within the Council prior to the formal referral of the proposal from the Commission. Moreover, deliberations not only occurred at the Working Party or Committee of Permanent Representatives' level, but ministers were, for the first time, involved in the debate from the outset. Last but not least, the Council's change of attitude on EEC merger regulation negotiations was further reflected by the fact that the four countries holding the Presidency from 1988 to 1989 -the Federal Republic of Germany, Greece, Spain and France- made the work of establishing Community-level merger control one of their priorities.

As a result, and contrary to the 1970s and early 1980s, in the late 1980s real negotiations on EEC merger regulation took place. In the words of van Empel (1990: 5): 'It could be said that negotiations only began in earnest from the moment when the then-responsible Commissioner, Mr. Peter Sutherland wrested a "political commitment" to the concept of a Community-wide merger control from the Council in November 1987.' 'The proposals were given serious consideration by the Council' (Bellamy and Child, 1993: 306) and, as the Commission itself recognised, this intergovernmental institution 'pressed ahead vigorously with its work on approving new legislation on merger control' (CEC, 1989a: 16). Complex and hard formal and informal bargaining, between the Commission and the member states' representatives and between the member states' representatives amongst themselves, took place during the two years it took the Council to agree on the final text of the Regulation; particularly on the provisions relating to scope, control and criteria (I 17, 1995; Bulmer, 1994; Tsoukalis, 1993; Hodges *et al.*, 1991; Kovar, 1991; van Empel, 1990; Hölzler, 1990; House of Lords, 1989).

Member states' governments seemed to accept the functional spillover arguments for an EEC merger control regulation held by the EC supranational

institutions and by European industrialists. Indeed, Recitals one to six of the final Regulation read:

...Whereas, for the achievement of the aims of the Treaty establishing the European Economic Community, Art 3(f) gives the Community the objective of instituting 'a system ensuring that competition in the common market is not distorted';  
 Whereas this system is essential for the achievement of the internal market by 1992 and its further development;  
 Whereas the dismantling of internal frontiers is resulting and will continue to result in major corporate re-organizations in the Community, particularly in the form of concentrations;  
 Whereas such a development must be welcomed as being in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community;  
 Whereas, however, it must be ensured that the process of re-organization does not result in lasting damage to competition; whereas Community law must therefore include provisions governing those concentrations which may significantly impede effective competition in the common market or in a substantial part of it;  
 Whereas Articles 85 and 86, while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not, however, sufficient to cover all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty;  
 Whereas a new legal instrument should therefore be created in the form of a Regulation to permit effective monitoring of all concentrations from the point of view of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations;... (OJ [1989] L 395/1)

By endorsing those Recitals, the Council of Ministers indicated that it was adopting the EEC Merger Regulation to answer the needs created by the single market project. Effective competition was considered essential to the completion of the Internal Market and, in a context of industrial restructuring, the available Community merger control instruments were not sufficient to ensure competition was not distorted in the European market. The Regulation should establish an effective system of control for Community-wide mergers (I 11, 1995; I 7, 1995; Zachman, 1994; Swann, 1992a; *The Times*, 27 Nov 1989). Indeed, it had to be effective enough to ensure competition and, at the same time, to eliminate the possibility of double and multiple control so as to help the process of corporate re-organisation that the Single Market implied. As Recital seven stated, the new Merger Control Regulation should be 'the *only instrument applicable* to such concentrations' (my emphasis). In the words of Brittan (1991: 51): 'The member states, all of them, were fully committed to the one-stop shop idea.'

Not all member states' governments, however, were in favour of an EEC merger regulation in 1987. Only ten of the twelve member states' ministers accepted

in principle the need for such a regulation at the November Council meeting. The French and British governments did not want to grant their approval in principle on the introduction of such a regulation at that meeting. Both had political and technical reservations about the transfer of sovereignty such a Community control represented. Both countries' governments also coincided in their worry about the political consequences of giving new powers to the Commission in an area greatly related with national and industrial interests. Yet, neither of them explicitly opposed EEC merger control. They just reserved their positions in principle. (Zachman, 1994; Schwartz, 1993; Tempini, 1991; Dechery, 1990; van Empel, 1990; Owen and Dynes, 1989; *Financial Times*, 3 Jun 1988; *Europolitique*, 5 Mar 1988; Korah, 1987)

Of the three largest member states, therefore, only Germany was in favour of having an EEC merger control regulation from the outset of the late 1980s negotiations. The West German government was the first to put the establishment of such a regulation high on its list of priorities during its Presidency of the Council in the first half of 1988. Though, as in the 1970s and early 1980s, the Germans were only prepared to accept an EEC merger control regulation if based on pure competition criteria alone, this time they were ready to 'sponsor' the regulation. Indeed, as the *Guardian* (3 June 1988) reported, Chancellor Kohl made specific appeals to the United Kingdom to agree to the principles of the proposed EEC merger control regulation during his chairmanship of the European Council. For example, he wrote to Mrs. Thatcher in advance of the June 1988 Hannover European summit, suggesting that merger control was a 'vital element' in the approach to 1992. (Zachman, 1994; Woolcock *et al.*, 1991; Dechery, 1990; Woolcock, 1989; *Financial Times*, 9 Oct 1989; *The Guardian*, 21 Jun 1988)

After the Council's meeting of June 1988, nevertheless, Germany was no longer the only large member state in favour of an EEC merger regulation. At that meeting, the French delegation formally endorsed, in principle, the need for such a regulation. As written in *The Times* (23 Jun 1988): 'The meeting ended with Britain isolated over its refusal to accept "in principle"...that an EEC merger control regulation was "indispensable" for the completion of the European internal market by 1992.' Thereafter, France played an important part in the adoption of the

Regulation, particularly during the second half of 1989, when this country's government took the Presidency of the Council and made agreement on EEC merger control regulation one of its main goals (I 22, 1995; I 18, 1995; I 15, 1995; I 7, 1995; Schwartz, 1993; *The Independent*, 21 Dec 1989).

As soon as it took the Presidency in July, the French government, under the leadership of its forceful minister of European Affairs Edith Cresson, set a target date of the end of 1989 for the adoption of the draft regulation and established a special committee of national officials to work on resolving the problems still impeding the unanimous agreement needed (Reynolds, 1990; *Financial Times*, 18 Jul 1989). For Brittan, the French led negotiations in a 'businesslike' fashion (*The Independent*, 21 Jul 1989). Reynolds (1990: 34) comments that under the direction of the French government, 'both the Commission and the Council expressed new enthusiasm to adopt the Merger Regulation before the end of the year.' Lastly, it was on the basis of a proposal that the French Presidency submitted to the Council in September 1989 that the last horse-tradings between member states were organized (Dechery, 1990; Zachman, 1994).

As to the United Kingdom, it proved to be the most reluctant member state to the idea of an EEC merger regulation. In the words of Schwartz (1993: 626): 'Great Britain became the last member to lift its basic reservations to the idea of merger control.' Despite pressures from the Commission, the Confederation of British Industry and the different countries holding the Presidency in 1988 and 1989, the British government refused to express formal support, even in principle, for such a regulation until the last moment (Winckler and Gerondeau, 1990; Woolcock, 1989; *The Independent*, 4 May 1989). Though Lord Young, the then British Secretary of State for Trade and Industry, unofficially accepted the need for such a regulation in January 1989, it was just an informal endorsement (*Europolitique*, 8 Feb 1989; *The Independent*, 31 Jan 1989; *The Times*, 31 Jan 1989). The British government's position remained formally unchanged until the last Council meeting on the issue, the 21 December 1989 (*The Times*, 22 Dec 1989b).

In January 1989, after talks in Brussels with key members of the new

Commission, including Sir Leon Brittan, Lord Young said that 'while Britain retained reservations about the proposed merger control regulation, it accepted the necessity of avoiding the problem of "double jeopardy", where mergers had to be approved by both national and Community authorities' (Owen and Dynes, 1989: 139). In other words, he seemed to indicate that the British government considered such a regulation desirable. But, at the same time, Lord Young said that the British position was formally unchanged. If there were any doubts, Lord Young further stated in February that 'it was not a question of whether there should or should not be Community controls but a matter of deciding the basis on which these should operate.' Until all key questions were answered, Britain would not decide whether it was for or against an EC-wide merger regulation (*Financial Times*, 17 Feb 1989).

Nevertheless, despite this reluctance to accept the need for an EEC merger regulation, Britain never opposed or blocked the negotiations (Dechery, 1990). On the contrary, it fully and actively participated in them to the point of putting forward proposals designed to bridge gaps between member states (I 7, 1995; Jacobs and Stewart-Clark, 1990; House of Lords, 1989; *Financial Times*, 11 Oct 1989; *Europolitique*, 10 Sep 1988). Quoting Woolcock *et al.* (1991: 17): 'Although the British government took no formal position until well into 1989, it was actively involved in negotiations with the Germans and the French on the shape of the proposal.' Mrs. Margaret Thatcher, the then British Prime Minister, wrote in a letter to Chancellor Helmut Kohl in 1988 that: '...while Britain "will contribute constructively to the detailed negotiations," it will only take a formal position in the light of those talks' (*Financial Times*, 3 June 1988; *The Guardian*, 3 Jun 1988). Sutherland recognised in June 1988 that British officials had taken full part in working groups examining the proposal (*The Guardian*, 3 Jun 1988).

Therefore, and in line with its approach to many other European issues, the British government followed a 'wait and see' strategy (I 12, 1995; Woolcock, 1989; House of Lords, 1989). The British position was clearly stated by the then British Junior Trade Minister, Francis Maude, when he said: 'We are not prepared to say yes to the principle before we know the final form of the proposal' (*The Times*, 19 Dec 1988; *The Times*, 23 June 1988). As written in *The Independent* (31 Jan 1989),

in the late 1980s, the British government maintained a 'negotiating reserve' on the issue.

It is worth noting that though Britain was isolated in its refusal to accept until the last moment, even in principle, the need for an EEC merger regulation, all member states expressed grave reservations about the details of the Regulation (Owen and Dynes, 1989; Whish, 1989; *Financial Times*, 5 Sep 1988). Member states' delegations held different positions on the three key issues of the Regulation, that is, control, scope and criteria. Positions which were the result, at least in the case of the three largest member states, of contradictory demands from competing domestic interest groups (Armstrong and Bulmer, 1998; Bulmer, 1994; Schwartz, 1993; Woolcock *et al.*, 1991; Woolcock, 1989).

While the Germans and British wanted a regulation based on a pure-competition criteria, most of the other delegations, including the French, demanded a 'trade-off approach'. While the representatives of the three largest countries and Spain called for very high thresholds, smaller countries preferred to give the regulation much more scope. Last but not least, while the Germans wished to enable national competition authorities to intervene in certain merger cases with a Community dimension and the British to have the possibility to secure the protection of 'legitimate national interests', the other member states' governments asked for a purer 'one-stop shop' system (Armstrong and Bulmer, 1998; I 22, 1995; I 19, 1995; I 18, 1995; I 14, 1995; I 12, 1995; I 7, 1995; I 6, 1995; Bulmer, 1994; Schwartz, 1993; Tsoukalis, 1993; Bernini, 1991; Bos *et al.*, 1992; Woolcock *et al.*, 1991; Brittan, 1991; Dechery, 1990; Jacobs and Stewart-Clark, 1990; Hölzler, 1990; Woolcock, 1989; Monopolkommission, 1989; Owen and Dynes, 1989; *Europolitique*, 1989; *Financial Times*, 1989; *The Economist*, 7 Oct 1989). In other words, there were strong disagreements not only between the largest member states' delegations and the representatives of the other member countries, but also among the former. Though the British, French and German governments shared a common interest in high thresholds, their positions differed when it came to the crucial criteria and control issues.

The resulting text was a compromise between the different approaches (Armstrong and Bulmer, 1998; Allen, 1996; I 7, 1995; I 6, 1995; I 12, 1995; Bulmer, 1994; Bernini *et al.*, 1991; Venit, 1990; Dechery, 1990; Elland, 1990; Hölzler, 1990; van Empel, 1990). As Bos *et al.* (1992: 122) stated, the Regulation was 'broadly based on compromise incorporating specific demands of individual member states.' Indeed, this is illustrated by a number of examples which show exception to the general rule, i.e. 'the so-called compromises' (I 12, 1995). These articles and Recitals have even come to be named after their main protagonists (Cook and Kerse, 1991). The different derogations to the general principle of 'one-stop shop' were the so-called 'German clause' (Art. 9), 'British clause' (Art. 21) and 'Dutch clause' (Art. 22(3)). Article 24, which refers to the relations with non-member countries, was called the 'French clause' and there were the 'Luxembourg clauses' regarding financial companies in Article 3(5) and Article 5. Recital 12 was the 'Italian clause' and Recital 13 the 'Spanish clause' (I 22, 1995; I 18, 1995; I 12, 1995; *Financial Times*, 21 Sep 1990b).

Last but not least, the lack of consensus on the contents of the Regulation was reflected in two further facts. First, an agreement could only be reached after two years of hard bargaining between member states' delegations and the Commission, and between the member states amongst themselves. The debates 'were heated and often acrimonious' (Cini and McGowan, 1998: 33). Secondly, the text's main provisions were to be reviewed before the end of the fourth year. Member states 'had postponed the most critical issues yet again' (Schwartz, 1993: 661).

In any case, the realist factor was present in the late 1980s. Germany accepted in principle the need for an EEC merger control regulation in November 1987, France in June 1988 and though Britain held formal reservations until December 1989, it never officially opposed such a regulation and fully participated in the negotiations. The realist condition for integration was completed in this period.

**C. Conclusion**

As condensed in table 5.5, the two conditions which conform with this research's hypothesis were complied within this third period of negotiations on European merger regulation. As table 5.6 summarises, all the factors which determine the neo-functionalism and realist conditions for integration did occur in the late 1980s.

**Table 5.5. THIRD PERIOD FINDINGS**

<b>CONDITIONS FOR INTEGRATION</b>	<b>PRESENT</b>
NEO-FUNCTIONALIST	YES
REALIST	YES

TABLE 5.6. FACTORS OCCURRING IN THE LATE 1980s

CONDITIONS' FACTORS	PRESENT	EVIDENCE
<b>NEO-FUNCTIONALIST</b>		
<u>* Pressure supranational institutions:</u>		
- Commission	YES	Arguments for an EEC merger regulation (EMR), new confidence, use Articles 85 and 86 EEC Treaty, flexibility during negotiations, 'merger team' composition.
- European Parliament	YES	Arguments for EMR, 1988 Resolution, complaints to the Council, encouragements to the Commission, active participation in the process.
- European Court of Justice	YES	1987 BAT-Reynolds ambiguous ruling.
<u>* European Industrialists in favour?</u>	YES	Arguments for EMR, direct and indirect lobby.
<u>* Functional spillover</u>	YES	To ensure Art.3(f) EEC Treaty and Single Market (all actors involved)
-----		
<b>REALIST</b>		
<u>* At least two of the three largest member states in favour?:</u>	YES	Germany and France in favour. United Kingdom did not oppose it. Real negotiations, arguments for EMR.

## CONCLUSIONS

This chapter has evidenced, as exposed in table 5.8, that the factors which determine each of the two conditions for integration established in this research's theoretical hypothesis were not present in each of the three periods of negotiations. Accordingly, the neo-functional and realist conditions were not fulfilled in all the periods. As recapitulated in table 5.7, this qualitative analysis has indicated that the two conditions for integration only took place in the late 1980s.

**Table 5.7. ALL PERIODS FINDINGS**

CONDITIONS FOR INTEGRATION	PRESENT 1970s	PRESENT EARLY 1980s	PRESENT LATE 1980s
NEO-FUNCTIONALIST	NO	NO	YES
REALIST	NO	NO	YES

What does it all mean? What is to be made of it all? Chapter six will compare the three periods' analytical results and offer a theoretical interpretation of the evidence.

TABLE 5.8. FACTORS OCCURRING IN THE THREE PERIODS

CONDITIONS' FACTORS	PRESENT 1970s	PRESENT EARLY 1980s	PRESENT LATE 1980s
<b>NEO-FUNCTIONALIST</b>			
* <u>Pressure supranational institutions:</u>			
- Commission	YES	YES	YES
- European Parliament	YES	YES	YES
- European Court of Justice	YES	YES	YES
* <u>European Industrialists in favour?</u>	NO	NO	YES
* <u>Functional spillover</u>	YES/NO	YES/NO	YES
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<b>REALIST</b>			
* <u>At least two of the three largest member states in favour?:</u>	NO	NO	YES

## **CHAPTER 6. INTERPRETATION OF THE RESULTS**

This research's hypothesis is not disconfirmed by the analysis of the facts: the two conditions were only fulfilled in the late 1980s. Neither the neo-functionalism nor the realist approach can be discarded as source of explanation of why an agreement on EEC merger regulation was possible in 1989 and not before. The idea that these two approaches may be complementary cannot be rejected. This chapter will attempt to give an interpretation of this analytical result. It will compare the three periods findings so as to appraise the role played by each factor in this case study and see what links between the two conditions for integration can be established.

### **6.1. COMPARING THE RESULTS: THE ROLE PLAYED BY EACH FACTOR**

Only one factor has been present in the three periods: the pressure of supranational institutions. Industrialists and the governments of at least two of the three major member states were only in favour of an EEC merger regulation in the late 1980s and it was then that they accepted the supranational institutions' constant claim that functional spillover arguments for an EEC merger regulation existed. Two of the three neo-functionalism's factors and the realist one only took place in the last period of negotiations. How can one interpret the fact that just one factor was always present whilst the others only occurred in the late 1980s?

The supranational institutions factor was never absent because of its role in the integration process. These institutions had to convince the governments of at least two of the largest member states and European industrialists of the need for an EEC merger regulation. For all factors to be present, the Council of Ministers and the business community had to admit functional spillover existed and thus be interested in EEC merger regulation. This situation only occurred in the late 1980s.

The Commission was the initiator and engine of the process in the three

periods. In each period, the Commission, with more or less success, devised an strategy of pressure to be placed upon industrialists and member states' governments. By and large, the general lines of each period manoeuvring were the same. First, the Commission always defended the case for an EEC merger regulation alleging functional spillover arguments related with each period context. In the 1970s, a merger regulation was needed to ensure the objective of Article 3(f) of the EEC Treaty and thus enable the Common Market to function successfully in front of the increasing concentration of EC industrial sectors and in the face of the weaknesses of Article 86 of the EEC Treaty as a merger control instrument. In the early 1980s, it was also the way out of the crisis which staggered Europe. In the late 1980s, Article 3(f) of the EEC Treaty and hence the completion of the Single Market were endangered by a new European merger wave and the lack of appropriate merger control instruments, both at the national and European level, to assess large and, especially, cross-border mergers.

Another line of pressure that the Commission used in the three periods was a combination of threats and flexibility. In each of the periods, the Commission showed or expressed its willingness to modify the contents of its merger control regulation proposal. Yet, at the same time, it also threatened, with more or less success, member states' governments and industrialists with developing alternative ways of merger control if an EEC merger regulation was not agreed upon. These alternative ways were based on instruments less suited for merger control than the proposed regulation and the Commission did not need the Council's approval to use them. In the 1970s, the Commission threatened to use Article 86 of the EEC Treaty to control mergers. In the late early 1980s, Sutherland added the possibility of applying both Articles 85 and 90 of the EEC Treaty to this endeavour. In the late 1980s, the Commission threatened to extend the use of Articles 86 and 85 of the EEC Treaty against mergers. In the three periods, the Commission, to different extents, actually put these warnings into practice achieving a measure of merger control under Articles 85 and 86 of the EEC Treaty.

The idea behind these threats and actions was the same in each period (although not the results): to maximise functional spillover so as to persuade

industrialists and, indirectly, member states' governments that the costs of not having an European merger regulation were greater than the costs of having one. Articles 85, 86 and 90 of the EEC Treaty are not good instruments of merger control. As a result their use to this task implied uncertainty costs for companies wanting to merge. Once convinced of the benefits that an EEC merger regulation would have for them, the Commission expected businessmen to lobby for it at both the Council, through UNICE and other transnational business associations, and each national government, through domestic interest groups. Nevertheless, European industrialists only became such an indirect source of pressure upon member states' governments in the late 1980s. In the 1970s and early 1980s, the European business community opposed an EEC merger regulation. Without industrialist support there was no chance of agreement; their support was necessary to the success of the Commission's strategy.

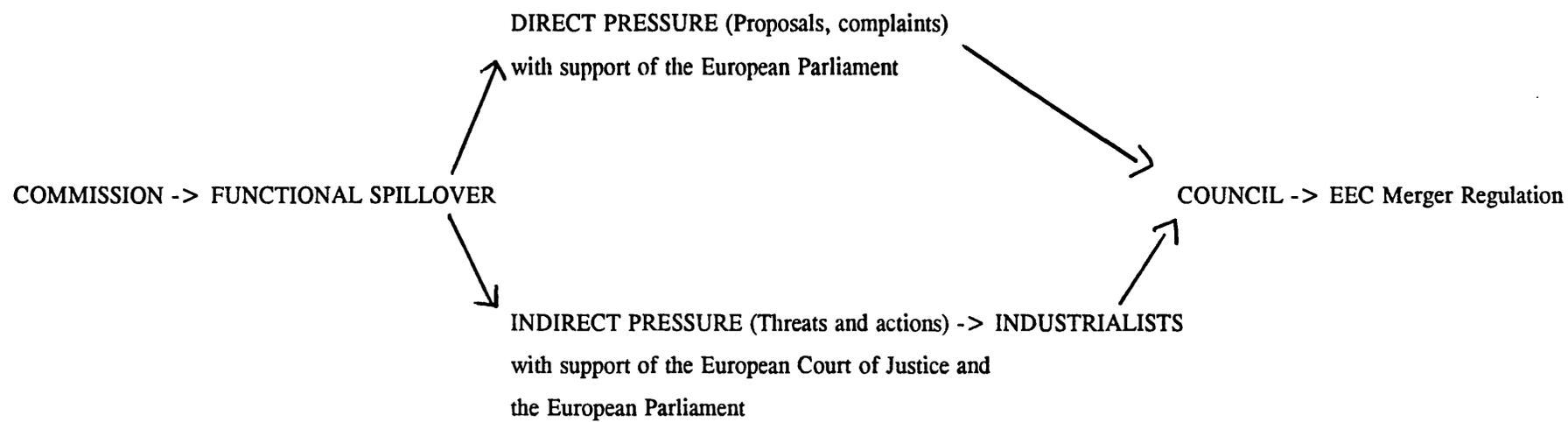
The other two supranational institutions gave, in each period, political and judicial support to the Commission's arguments, threats and actions. The European Parliament always backed the Commission, vindicating the same functional spillover reasons and providing some useful and constructive ideas and criticism. It even encouraged the Commission to threaten the Council with alternative ways of control. As to the European Court of Justice, its rulings either sustained the Commission's threats and actions or allowed them. Just like the Commission, it considered an expansive reading of the competition provisions of the EEC Treaty as critical to its role in moving the Community towards integration. The Commission would not have been able to carry out its threats without the Court's judicial endorsement of its interpretations and applications of the Treaty. Judicial support would have been of no use had the Commission not exploited the resultant uncertainty it created. In each period, the Commission utilised both the European Parliament's encouragements and the European Court of Justice's rulings to reinforce its pressure.

In other words, each factor played a role in the integration process. The Commission was the initiator and the director of the orchestration of pressures to be placed upon the Council to prove the need for an EEC merger regulation to governments. The existence of functional spillover was the Commission's argument for justifying its demands, threats and actions. The European Parliament encouraged

the Commission's manoeuvrings and the European Court of Justice crucially authorised them. Business groups also vitally assisted the Commission in urging the Council but only when satisfied of the cost of not doing so. Finally, member states' governments, given the different pressures, decided whether or not to sponsor the regulation. Only when the governments of two of the three biggest member states resolved in favour of an EEC merger regulation did real negotiations start and an agreement was eventually reached.

These relationships between the factors are in line with my theoretical hypothesis: although both the neo-functionalism and realist approaches contain some elements of truth, neither one on its own is sufficient. Neo-functionalism is concerned with explaining how previous integration (that is, the existence of supranational institutions and of common policies, perceived as successful by different interest groups, which need further common policies) helps to achieve further integration. Realism believes member states are the only actors who can decide whether or not there is going to be further integration. In this case study, the role of neo-functionalism's factors is to persuade member states' governments of the need of an EEC merger regulation while member states are the actors who have the power to make further integration a reality. To understand the whole process, it is necessary to look at both groups of factors.

The network of relationships between factors has been schematised in figure 1. The Commission, with the support of the European Parliament and the European Court of Justice, tried to set both direct and indirect pressure upon the Council in the three periods to convince member states' governments of the existence of functional spillover. Yet, only in the late 1980s were supranational institutions able to satisfy either industrialists or the Council of the need to have an EEC merger regulation. Why was the always present neo-functionalism factor able to convince European industrialists and member states' governments of the existence of functional spillover in the late 1980s and not before?

**FIGURE 6.1. FACTORS' ROLES**

## 6.2. COMPARING THE RESULTS: FACTOR INTENSITY

Supranational institutions were only able to persuade the business community and the governments of at least two of the three largest member states that an EEC merger regulation was necessary in the late 1980s. To explain this fact, it is necessary to look at the degree of influence supranational institutions were able to use before European industrialists and member states' representatives in each period. As it will be shown, although each factor played the same role in each period, the intensity or credibility of supranational pressure was different. The degree of influence the Commission was able to exert, with the support of both the European Parliament and the European Court of Justice, was contingent on its status or self-confidence and on the importance given by industrialists and member states' governments to the common market project.

The Commission, initiator and motor of pressure, was viewed differently in each period. In the 1970s, the 'empty chair crisis' had shifted the balance towards intergovernmentalism and produced a more cautious Commission. Moreover, DG IV was still building up its credibility as a competition authority. By 1980, after several years of Euro-sclerosis, the Commission's aplomb was in general low and, after several years under irresolute commissioners with a weak hand in controlling member states' subsidies and 'cartel crisis', DG IV's reputation was not at its best. The situation started to change for DG IV in the early 1980s under a more determined Commissioner, Mr. Andriessen. But it was not until the mid-1980s that the Commission and DG IV entered a period of strong self-confidence with Jacques Delors as President of the European institution and Peter Sutherland as Commissioner in charge of competition policy. Sutherland's forceful leadership in DG IV was sustained by Sir Leon Brittan after 1988, giving this directorate-general considerable prestige. Therefore, the Commission and, in particular, DG IV had more status and respect in the late 1980s than in the 1970s or early 1980s. In the late 1980s, the Commission was seen in a far better position to assume an efficient role as merger control body and as more capable to put its threats into practice.

The importance given by the business community and by member states'

governments of the end goal to be achieved through an EEC merger regulation was also stronger in the late 1980s than before. The will to establish a real Common Market based on the rule of competition was stronger in the late 1980s than in the earlier periods. In the 1960s and early 1970s, although legally committed to the establishment of a common market, member states' governments, with the support of most European industrialists, promoted the creation of 'national champions' in order to achieve the efficiencies then associated to sheer bigness. Mergers were basically taking place within national borders. State-oriented policies were reinforced by the 1970s economic crisis, leaving the common market goal far behind in national governments' scale of priorities. Interventionist and neo-protectionist measures dominated the economic policies of member states' governments in the 1970s and most part of the early 1980s, and this was encouraged by industrialists. There was little progress in completing the Common Market in those years or in promoting competition; in fact, fragmentation was becoming more pronounced.

It was not until the mid-1980s that a momentum built up in favour of liberalisation and competition. Industrialists and member states' governments started to see the establishment of a real common market as the only remedy for the lack of competitiveness of European industry. Both formal and informal attitudes and values began to change in most of the Community, although at different speeds in the different member states. It was the outset of a convergence of views towards the benefits of free-market, deregulation and competition policy which continued to take place in the late 1980s, and this produced a much more positive attitude towards competition-based economic integration. In fact, it was only in the late 1980s, that a merger wave characterised not only by national mergers but also by an increasing number of cross-border mergers took place in the EEC.

Industrialists and member states' governments, therefore, attached a new significance to the common market objective in the late 1980s. This meant, on the one hand, that rules of fair play became more important both at the national and European level. The need to prevent mergers from erecting barriers to trade by distorting competition and hence placing the common market goal in jeopardy, was stronger in the late 1980s than before. On the other hand, it indicated that the need

to avoid corporate legal uncertainties was also very compelling. Mergers, in particular cross-national, were vital for the preparation of the Single Market, and for globalisation in general. Accordingly, the European Commission's functional spillover arguments were more credible and its threats more dangerous. The late 1980s context offered the Commission's strategy more opportunities of success than in the 1970s or early 1980s.

Stronger leadership together with a more favourable context combined with the 1987 European Court of Justice's BAT-Reynolds ruling to give the Commission the chance to make its determination to develop EEC merger control, irrespective of a Council's regulation, more credible than in the two previous periods. In the 1970s and early 1980s, industrialists and member states' governments considered the danger of a mild Commission using a limited instrument for merger control (i.e. Article 86 of the EEC Treaty) on the few large mergers which could result in an impact on intra-Community trade, less costly than granting new competition powers to the Community. In the late 1980s, the situation had changed.

As early as 1985, Sutherland threatened the possibility of withdrawing the European merger regulation proposal. As other DG IV's Commissioners before him, Sutherland proposed to develop an alternative merger control policy at the EC level through the Treaty of Rome's available instruments if member states' governments continued to refuse to start real negotiations on an EEC merger regulation. On this occasion the threat was made explicit and included not just Article 86 of the EEC Treaty but also Articles 85 and 90. The former would allow the control of mergers between companies which are not in a dominant position. The latter would allow the Commission to control mergers between public enterprises. This possibility, within a context of preparation for the Single European Market and of an international process of globalisation, gave an unprecedented picture of uncertainty for European industry. It meant that large mergers and, in particular, cross-border operations that were taking place in increasing numbers, would have then faced different layers of control both at the national and the Community level. In short, multiple jeopardy and thus high costs.

It is worth noting that this uncertainty would have mostly affected British, French and German companies. First, because long standing merger control laws with an impact on the market place could only be found in their countries. Secondly, as France, Germany and the United Kingdom were the biggest economies of the EC, they had a higher number of large firms and, as noted in chapter two, merger intensity rises with the size-class of firms. The prospect of multiple control was thus greater for these companies than for other member countries' firms.

The European Court of Justice's 1987 ruling on the BAT-Reynold case added to this climate of uncertainty ambiguously allowing the Commission to use the competition tools granted by the EEC Treaty to control mergers. The Commission took the opportunity and rushed through the opening judicial door. Its application, a while after the ruling, of Article 86 of the EEC Treaty to merger cases such as British Airways-British Caledonian, and of Article 85 to merger cases such as Irish Distillers, did not help to calm European industrialists and member states' governments. The Commission's threats were at last credible and the legal uncertainty surrounding mergers unacceptable. A 'one-stop shop' system of merger control was needed to reduce corporate confusion and establish clear limits to the Commission's powers of intervention.

In the late 1980s, and for the first time, business groups actively pressed their governments for an EEC merger regulation and real negotiations took place among member states' representatives in the EC. Truly, business groups lobbied both at the national and at the European level for the regulation and, instead of indifference and scattered meetings at Working Party or Committee of Permanent Representatives level, the European merger regulation discussion was brought to ministerial level and placed high in the list of priorities of the successive Presidencies.

As may be inferred from what precedes, supranational institutions were able to persuade both business interest groups and the governments of at least two of the largest member states for the need of an European merger regulation only in the late 1980s because the degree of credibility of the Commission's determination, of its

functional spillover arguments and threats, was greater than in the 1970s and early 1980s. Stronger leadership, the context of industrial restructuring brought about by the development of a market philosophy among large companies and national governments, as well as the European Court of Justice's ruling at a critical moment, helped the Commission to have greater power of conviction. The costs of not having an EEC merger regulation had become superior to the costs of having one. A purpose-built regulation, with strict-limits on the powers it conferred, was preferable to the prospect of an interventionist Commission enhancing corporate uncertainty and its powers of control. Germany and, a while after, France, led the negotiations to a successful ending.

### **6.3. LINKS BETWEEN THE NEO-FUNCTIONALIST AND REALIST CONDITIONS**

This case study shows that an agreement on an EEC merger regulation was possible in 1989 rather than before because, as realism predicts, it was only at that moment that the governments of at least two of the three most powerful states were in favour of such a regulation. Although a majority of member states' governments accepted the need for an EEC merger regulation in the early 1980s, the governments of at least two of the major member states only admitted in the late 1980s that their national laws did not provide for an efficient system of control in all merger cases. Such a system of control was necessary for the adaptation of their firms to the European market, and so the partial transfer of merger control powers to the Community was to come 'to the rescue' of the states, to help them 'survive' in the modern world. Why did national interests become similar more or less simultaneously in the late 1980s rather than before? Why was an EEC merger regulation needed to 'rescue' the largest states in the late 1980s rather than before?

At first sight, this convergence of national interests could be explained by the shift towards market-oriented policies that had started in the mid-1980s in the different member states, particularly in the United Kingdom and France, and that had enhanced the importance that national governments gave to competition. But

agreement on an EEC merger regulation in 1989 was not the result of consensus on neutral economic policy norms or ideology. In fact, the changes in values and attitudes were taking place at different speeds in the different member countries, national merger laws were not homogeneous, and there were strong disagreements among all member states' representatives as to the type of regulation they wanted. Moreover, this pro-competition domestic context did not produce spontaneous demands for an EEC merger regulation. The Regulation was not the result of autonomous action by national governments. The initiative came from outside the domestic settings; it came from the Commission.

To understand why the governments of at least two of the three largest member states wanted an EEC merger regulation in the late 1980s but not before, it is necessary to include in the analysis the neo-functionalists factors. In this case study, following neo-functionalist predictions, it was only in the late 1980s that pressure from supranational institutions highlighted that the costs to the EC member states' governments of not having an EEC merger regulation were greater than the costs of having it. Only then did the costs of the Commission's strategy of developing an alternative system of merger control become credible and tangible. It was only in the late 1980s that the European Court of Justice's decisions, backed by the Commission's commitments and actions, triggered significant corporate reactions. In a context of increasing numbers of large and cross-border mergers brought about both by the Single Market prospect and by globalisation, the possibility of a more self-confident Commission developing, along with the support of the European Court of Justice, a new layer of merger control, created enough legal uncertainty for European industrialists to prefer a clear merger regulation. As neo-functionalism predicts, therefore, a coalition built up between the supranational institutions and industrialists in favour of an EEC merger regulation. There is evidence of political spillover with business groups mobilising at the transnational level in favour of an EEC merger regulation, and exerting influence on both the Council and the member states' governments.

The pressure on member states' governments to approve an EEC merger regulation came thus from within the European-level itself, the Commission playing

a crucial role in maximising the spillover effects, with the help of the European Parliament and, especially, of the European Court of Justice. The EEC Merger Regulation would not have been accepted in the absence of this supranational pressure, at least at that moment. Recalcitrant member states' governments were brought about largely by the focusing of attention on the need both for 'one-stop shop' and to set clear limits to the Commission's powers of intervention. State governments wanted to restore at least part of the national sovereignty they were losing as a result of the Commission's increasing activism and to provide their large firms with clear merger control rules. The Commission's case for a clear and comprehensive legal and procedural framework had become a strong one.

Nevertheless, the fact that both supranational institutions and business interests were able to exert influence upon the position of member states' governments, does not imply that the latter fell victim of their pressure in the late 1980s. Though the initiatives came from the Commission, governments negotiated the details of the EEC Merger Regulation and approved it. Moreover, supranational pressure took root because the nature of the domestic political context had changed. The success of the Commission's strategy was helped by member states' governments philosophical endorsement of the market during the late 1980s. State governments were more willing to accept the need for undistorted competition and for clear rules, or, perhaps more realistically, their opposition was harder to justify than in the 1970s or early 1980s. The ambitions of national policies were closer to the single market goal and to the EEC Treaty's objective set out in Article 3(f). In another context the Commission's threats and actions and industrialists pressure would not have been as effective.

It may even be argued that without this change in the formal and informal values and attitudes of member states' governments, industrialists' pressure would not have taken place. Indeed, governments endorsement of the market helped trigger the late 1980s wave of mergers that led industrialists to react against the legal uncertainty that surrounded large and, in particular, cross-border operations. The increasing number of cross-border mergers was not only the result of European industrialists' new perception of what was needed to be competitive in a globalised

economy but also of their belief their governments shared their diagnosis of the situation: the Single Market was to become a reality. There had been a neo-liberal turn towards the market among member governments. In other words, governments interpretation of what was in the national interest affected industrialists' strategies.

To recapitulate, realists and neo-functionalists factors have each played their key role in the process that led to agreement on an EEC merger regulation and their presence or absence was inter-related. Without the gradual change in the economic philosophy of member states' governments and large companies, the neo-functionalist condition would have not been fulfilled. Without supranational pressure, the realist condition would have not occurred, at least not at that moment in time. Without the German and French sponsorship of the EEC Merger Regulation, real negotiations would have not taken place and an agreement would have not been reached. The interconnections and interactions among these conditions indicate that both are necessary to explain the late 1980s negotiations success and the failure of the previous attempts.

## CONCLUSIONS

It is only when they are jointly considered that the factors and hence conditions examined in this research help provide a sufficient explanation of why an agreement on EEC merger regulation was possible in 1989 and not before. Comparison of the three periods' results shows that the three neo-functionalist factors -the pressure of supranational institutions and the two spillovers- were able to influence the formation of national preferences within the late 1980s favourable context provided by national governments philosophical endorsement of market-oriented economic policies. It also reveals that the three largest member states' positions determined the outcome. In this case study, there was a 'supranational supply' of policy ideas and different intergovernmental reactions to these ideas which, in turn, were followed by further supranational pressure.

Both integrationist and intergovernmental forces had a role in the pre-1990 development of EEC merger policy. Member states' governments, interest groups

and supranational institutions were all key actors in this particular process of integration. Neither the realist emphasis upon the role of states nor the neo-functional emphasis upon 'supranational institutionalist dynamics' (Greenwood, 1997: 242) provides, on its own, an adequate explanation of why integration was possible in 1989 and not before. The idea that these two perspectives need to be combined cannot be dismissed. In short, what this research shows is that it is necessary to continue crossing the pre-established boundaries between the two theoretical frameworks and explore in depth their possible connections.

**CONCLUSIONS: TOWARDS AN EXTRAPOLATION  
OF FINDINGS**

The main theoretical divide in the study of European integration has been between realism and neo-functionalism. Most theorising on integration endorses one approach or the other. This research, however, has examined whether the neo-functionalism and realist accounts can be taken as complementary contributions to the understanding of the dynamics of European integration. Complementarity implies here that neither approach is right. While both theories contain elements of truth neither one on its own is sufficient. To capture the complexity of the integration phenomenon, insights from both perspectives are needed.

This hypothesis was only tested in relation to a particular case study. Nevertheless, by its time-span and differentiated periods of analysis, the EEC merger policy case study has enabled a comparison of the results and has shown that the idea that the two dominant paradigms need to be combined cannot be dismissed since 'an apparent empirical instance of it can be found' (Eckstein as quoted in Sandholtz, 1996: 405). The agreement on an EEC merger regulation in December 1989 and the failure of previous attempts cannot be completely understood without both neo-functionalism or realist factors. Both realism and neo-functionalism are necessary for an understanding of this policy evolution before 1990.

The validity of these findings is reinforced by the fact that they point to many of the same conclusions as other recent scholars of European integration. These research findings indicate that realism, on its own, fails to capture the integration dynamics. If the supranational institutions behaviour could be explained in terms of satisfying the collective position of member governments in EEC merger policy, there would have been no need for procedures that bypassed the Council. In this particular case study, supranational institutions always tried to maximise spillovers

so as to increase both their own competences and more generally the competences of 'Europe'. In this endeavour, they employed all the weapons they had, including creative interpretations of existing rules.

The supranational institutions were essentially able to develop a measure of merger control utilising both Articles 85 and 86 of the EEC Treaty and, by doing so, to maximise both the functional and political spillover effects. Cross-border mergers were not only impaired by separate national legal regimes but also conditioned by supranational institutions creative use of existing common rules. Industrialists had an incentive to lobby for integration and to seek not only transnational contacts but also the help of supranational institutions. Member states' governments, besides their domestic interest groups pressure, had an additional reason to espouse an integrative solution: to regain control. National executives wanted to establish clear limits to the power of supranational institutions in this area.

Recent realist perspectives tend to recognise that interest groups have a role to play in the integration process. Scholars such as Moravcsik (1993) and Milward and Sorensen (1993), while still holding on states as central and sovereign actors, are turning towards 'liberal' theories of preference formation to incorporate societal influence into national preferences or arguing that nation-states' legitimacy is dependent upon their ability to promote the interests/prosperity of their peoples. Moravcsik (1993) has even acknowledged the growing power of the European Court of Justice. Nevertheless, these state-centric approaches still under-emphasize or disregard both the role of supranational institutions and the importance of their relationships with non-state actors. This research indicates that both these factors need to be taken into account.

These findings are consistent with many of the conclusions of leading contemporary scholars of European integration such as Mark Pollack, Paul Pierson and Gary Marks. These three argue that supranational institutions have a capacity for autonomous action that realism fails to take into consideration; the institutional development in the EC cannot only be understood in functional terms. Pollack's (1998: 247-248) research indicates that the Commission 'does have independent

preferences' and that it is 'a competence maximizer' that exercises 'considerable autonomy and influence.' Pierson (1998: 29) argues that although member states' governments 'retain the legal authority to rein in their "agents"', over time, institutional effects, such as path-dependence and lock-in, constrain their capacities to control the course of integration. In his opinion, this is due in part to the fact that governments tend to be more interested in the short-term consequences of their actions; the long-range consequences of delegating authority to EC organisations are often heavily discounted. In his words:

...what one makes of the EC depends on whether one examines a photograph or a moving picture. Just as a film often reveals meanings that cannot be discerned from a single photograph, a view of Europe's development over time give us a richer sense of the nature of the merging polity. At any given time, the diplomatic maneuvering among national governments looms large, and an intergovernmentalist perspective makes considerable sense. Seen as a historical process, however, the authority of national governments appears far more circumscribed, and both the interventions of other actors and the cumulative constraints of rule-based governance more considerable. (Pierson, 1998: 30-31)

Last but not least, Marks (1996a; 1996b) adds that as 'control has slipped away from them to supranational institutions' (Marks *et al.*, 1996a: 342), 'European states are losing their grip on the mediation of domestic interest representation in international relations' (Marks *et al.*, 1996a: 341). To explain European policy-making, it is important to analyse the independent role of both European and subnational level actors. According to this scholar, the domestic and European arenas are interconnected rather than nested.

Yet, noticing supranational institutions and non-state actors does not entail that neo-functionalism can explain how integration proceeds. This research provides evidence that neo-functionalism, on its own, also fails to capture the dynamics of integration. If the supranational institutions room for independent action had been enough, they would have not sought a Council merger regulation or would have had no problems in obtaining one. In the case of the EEC Merger Regulation, member states were always reluctant to transfer merger control powers to the Community; they wanted to preserve national sovereignty in merger policy. In this case study, moreover, national governments tended to yield greater influence upon the outcome the greater the power they commanded; the largest member states determined the outcome. Finally, member states' governments always pursued their own interests,

which they expressed as being the national interest. Agreement among the main governments on an EEC merger regulation was only possible when the common end-goal, to be achieved through the Regulation, was perceived to be in the national interest in the largest member states.

In the 1970s and during most of the early 1980s, the common market goal was not the priority of national executives. Despite the legal commitment to establish a common market enshrined in the Treaty of Rome, the economic policies of member governments were interventionist. In the late 1980s, however, the Single Market was the solution to the economic ills of Europe. There was a general convergence of attitudes and values towards economic liberalism at a domestic level throughout the 1980s which helped see the completion of the Common Market as being in the interest of the governments of the largest member states. This acceptance of the common market goal at national level led member states' executives to be more sensitive to the problems and demands of the industrialists involved in transnational mergers. Moreover, it also helped trigger the late 1980s wave of mergers that fuelled industrialists pressure for a merger regulation.

According to these findings, although supranational institutions and interest groups have more room of manoeuvre than realist scholars are so far willing to accept, their actions are still constrained by member states' government preferences. Classical neo-functionalism needs to take account of the fact that governments are always reluctant to delegate new powers to the European level, and that integration can only proceed if there is preference convergence among the main member states' governments.

This need to take into consideration member governments' preferences had already been recognised by the fathers of neo-functionalism in the 1970s. As mentioned in chapter one, the lack of correlation between their perspective and the reality of the 1960s and 1970s led these scholars to reassess their theoretical framework. They essentially tried to incorporate elements of intergovernmentalism into it.

Most of the leading contemporary scholars of European integration have reached similar conclusions. Pollack (1998) considers that the Commission's ability to act on its own preferences, and to press for 'more Europe', should not be overstated. According to this scholar, this ability of the Commission

...varies widely across issue-areas and over time as a function of the preferences of the member states, the rules governing the sanctioning or overruling of the Commission, the information available to both the Commission and the member governments, and the Commission's ability to strike up alliances with important transnational actors. (Pollack, 1998: 248)

Both Pierson (1998) and Marks (1996a; 1996b) accept that member states' governments play a central part in policy development within the European Union. For them, there is little doubt that member states' governments remain the most powerful decision-makers and that they are capable of constraining the actions of supranational and transnational actors.

Perhaps more revealingly, Stone Sweet and Sandholtz (1998: 25), in what may be considered the most comprehensive example of post-neofunctionalism, the transaction-based theory of integration, recognise that 'intergovernmental bargaining is an ubiquitous feature of supranational governance.' They also accept that 'in the bargaining process, executives from the larger states command greater resources and tend to wield greater influence on EC policy outcomes than those from the smaller states' (Stone Sweet and Sandholtz, 1998: 25).

The idea that both neo-functionalism and realism contain elements of truth but that neither taken on its own is sufficient to explain the dynamics of European integration, cannot be dismissed. The theoretical debate of the 1990s, where the lines between classical neo-functionalism and realism tend to be blurred, must be brought to its logical conclusion. Further research should focus on building up a comprehensive theory of European integration that is neither realist nor neo-functional but includes insights from both these perspectives.

Complementarity is expected to help explain the evolution of areas of policy, such as the EEC telecommunications policy or the post-1990 EEC merger policy, that present similar but not identical characteristics to the case study used in this research. In fact, in the telecommunications case (Sandholtz, 1998), the Commission

only began to find a receptive audience for its industrial policy proposals in the mid-1980s when it was becoming clear that the 'national champions' strategies to promote high-tech industries had failed and that businesses from a multitude of sectors needed pan-European telecommunications for their increasingly transnational activities. In this favourable context, the Commission was able to exploit the legal opening offered by key decisions of the European Court of Justice, issuing, under Article 90 of the EEC Treaty, a series of directives that did not require Council assent. Integration became the only plausible solution.

As to the post-1990 EEC merger policy evolution, the EEC Merger Regulation provided for the re-examination of some of its key provisions before the end of 1994, namely, those relating to scope (Article 1) and control (Articles 9 and 22). In 1993, nevertheless, despite the fact that Community merger control was widely regarded as a success, most member states' governments (notably the British, French and German) were reluctant to accept an increase of the scope of the Regulation, that is, to a new transfer of merger control powers to the European level. In the difficult post-1991 economic and political climate marked by a general economic downturn, the dying out of the late 1980s merger wave, the collapse of the European Monetary System's exchange-rate mechanism and the ratification problems of the Treaty on the European Union; European Parliament's and Commission's demands for threshold reduction could only rely on a qualified support from the business community. After consulting national authorities, companies and industry associations, the Commission proposed, in July 1993, to defer any formal proposal to revise the 1989 Regulation until, at the latest, the end of 1996. The Council endorsed the postponement in September 1993 and the Commission merely introduced, in 1994, some improvements not requiring a change in the Regulation.<sup>81</sup> (Cini and McGowan, 1998; CEC, 1996a; Allen, 1996; I 4, 1995; I 5, 1995; I 7, 1995; I 9, 1995; I 10, 1995; I 11, 1995; I 12, 1995; I 13, 1995; I 14, 1995; I 15, 1995; I 16, 1995; I 17, 1995; I 18, 1995; I 19, 1995; I 20, 1995; I 21, 1995; I 22, 1994; I 23, 1995; I 2, 1994; CEC, 1994e; Bulmer, 1994;

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<sup>81</sup> The Commission introduced some procedural innovations (OJ [1994] L 377/1) as well as issued guidance statements on certain technical and legal aspects of the EEC Merger Regulation (OJ [1994] C 385).

CEC, 1993b; Whish, 1993)

In the mid-late 1990s, economic recuperation was underway, a new merger wave was gathering strength, and the Economic and Monetary Union was again a priority of member states' governments. Against this background, most industrialists and member states' governments accepted a review of the 1989 EEC Merger Regulation was necessary to avoid the costs of multiple notification and hence to ensure a more effective 'one-stop shop' system of merger control in the Community. On 12 September 1996, after seeking the views of all parties concerned, the Commission submitted to the Council a formal proposal for amendment (CEC, 1998; CEC, 1997a; CEC, 1996a; CEC, 1996c; CEC, 1996d; Cuziat, 1996a; Cuziat, 1996b).<sup>82</sup> Nine months later, on 30 June 1997, the Council adopted Regulation No 1310/97 amending the 1989 Regulation on the control of concentrations between undertakings.<sup>83</sup> The reassessed Merger Regulation entered into force on 1 March 1998 placing more merger cases under Community control but, at the same time, simplifying the conditions for a referral to the competition authorities of the member states under Article 9 (CEC, 1998; Aribaud, 1997). These new arrangements were accompanied both by a new procedural regulation<sup>84</sup> and by a set of new explanatory notices<sup>85</sup> adopted by the Commission, and are to be reconsidered before the 1 July 2000. Further adjustments in the national-European division of merger control powers are to be surmised until the European business community is satisfied with the level of 'one-stop shop' achieved.<sup>86</sup>

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<sup>82</sup> OJ [1996] C 376/8.

<sup>83</sup> OJ [1997] L 180/1; corrigendum in OJ [1998] L 40/17.

<sup>84</sup> OJ [1998] L 61.

<sup>85</sup> OJ [1998] C 66.

<sup>86</sup> It should be mentioned, nonetheless, that future debate on EEC merger policy may not be focused so much on issues of jurisdiction but on the merger policy approach to be followed. Discussion on the criteria that should be used in assessing EEC competition policy cases has been revived in the 1990s. While some member states would like the Commission to take more into account social, local, regional and environmental considerations; Germany, with some support from the United Kingdom, considers that Commissioners are too often open to political persuasion jeopardising a pure-competition appraisal of mergers, restrictive practices and dominant positions. The Germans are pressing for the creation at European level of an agency above political influence that would emulate their Federal Cartel Office, that is, for an independent European Cartel Office. (Cini and McGowan, 1998; European Voice, 5 Jun 1997;

The complementarity hypothesis is, therefore, expected to apply to areas of policy that are under the first pillar and are cases of 'low' or borderline 'high' politics. These are areas of policy that are more prone to be affected by cross-border exchanges and by functional spillover than areas of 'high' politics such as foreign policy or defence. Areas of policy, also, where the supranational institutions enjoy supranational powers, contrary to what happens in the second and third pillars.<sup>87</sup> This does not mean, however, that the complementarity idea cannot be of assistance in understanding the evolution of areas of policy with different characteristics. The supranational institutions lack of powers in the second and third pillars and the fact that no single interest has monopolistic access to issues at the centre of such areas of policy (almost entire populations are affected) may help to explain the slow pace of integration in foreign policy and defence as well as in justice and home affairs.

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Allen, 1996; I 5, 1995; I 9, 1995; I 10, 1995; I 11, 1995; I 14, 1995; I 17, 1995; I 18, 1995; I 20, 1995; I 23, 1995; Bishop, 1993; McGowan, 1993; Neven et al, 1993; Ehlermann, 1992; Hölzler, 1990)

<sup>87</sup> It must be noted that the decision-making procedure is not believed to affect the validity of this hypothesis in 'low' areas of politics. Although the use of qualified-majority voting or of co-decision procedures within the first pillar may help the Commission and the European Parliament in their pro-integrative endeavour, the preferences of member states' governments and interest groups are still presumed to constrain their actions. Moreover, though the erosion of opportunities for unilateral vetos together with a relative decline in their voting power across successive enlargements may be unsettling for the larger member states, smaller member states do not actually outvote them in any systematic way (Wallace and Hayes-Renshaw, 1997).

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<b>ANNEX A: INTERVIEW DATA</b>
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### INTERVIEW GUIDE (1 hour)<sup>88</sup>

(SCPR course, 1994; Johnson and Joslyn, 1991; Patton, 1990; Dexter, 1970; Richardson *et al.*, 1965)

Thank you very much for seeing me. As you know my name is Patricia Garcia-Duran and I am doing research at the London School of Economics on European merger policy. The purpose of this interview is to gain information and advice that will help me in my research. Basically, the interview is about your opinions on the past, present and future evolution of European merger policy.

Everything you say will be confidential and will be used only for the purpose of my research. Nothing you say will ever be identified with you personally.

I hope you do not mind if I use a tape recorder...it will allow me to concentrate on what you are saying without having to take notes... as you have noticed my English is not Shakespearian... Thank you.

Any questions before we begin? As we go through the interview, please feel free to ask whatever question you would like to.

The purpose of this interview is to get your opinions about the evolution of European merger policy.

Let me first ask you some general background questions such as Which is your actual job? Is it in any way related with merger policy at national or European level?

#### *PRESENT AND FUTURE*

What do you think of the European Merger Regulation?

What would you change in the Regulation?

What impact (if any) has the existence of this Regulation had on the member states' approaches to merger policy?

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<sup>88</sup> Some questions on the present and future of the European Merger Regulation were included in the interview, following textbooks general recommendation and to enable me to complete my research. However, in the interview itself, the emphasis was given to the 'past' questions. Some of the interview questions have been added or are the result of modifications done throughout the fieldwork period when information emerged that indicated the value of change.

In your opinion, how is it that the Commission decided to delay the Merger Regulation revision from 1993 to 1996?

PROBE Survey Commission (Multilateral contacts June-July 1993)  
 Could you say some more about that  
 Different member states positions

Which are the more disputed issues to be revised?

PROBE Control, criteria, thresholds  
 Member states positions

In your opinion what would be the result of the upcoming revision of the Regulation that will take place in the mid-1990s?

PROBE More debated issues: control, criteria, thresholds

Why do you think so?

In your opinion what will be the member states' positions in the revision?

PROBE On the three key issues: control, criteria, thresholds

How will the result of this revision be affected by the fact that, instead of unanimity, the Commission proposal will just need a qualified majority to be accepted?

Why do you think so?

What do you think could be the impact on the revision results of the recent entry of Finland, Austria and Sweden?

Why do you think so?

I think a lot of really important things are coming out of what you are saying. If I have understood well you consider that ...(summary) Would you like to add anything else before we talk about another aspect of European merger policy?

### *EVOLUTION*

So far we have been talking about the present and future of the European Merger Regulation. Let me ask you now about the past of this Regulation.

What do you think of the late 1980s negotiations that led to the actual European Merger Regulation?

Which were the more controversial issues under discussion?

PROBE Control, criteria, thresholds

What were the member states' positions on each of these issues?

PROBE On control, criteria and thresholds

In your opinion what allowed the member states to reach agreement on these negotiations?

In your opinion how is it that an agreement was not possible in any of the previous four negotiations on a European merger regulation; the negotiations that followed the four precedent Commission proposals in 1973, 1982, 1984 and 1986?

Which were the more controversial issues under discussion in those negotiations?

PROBE Control, criteria and thresholds

Do you think there was an evolution of member states' positions on these issues?

PROBE Control, Criteria and thresholds  
Entry new member states effects

What sort of evolution? How would you describe this evolution?

How would you explain the evolution of member states' positions from one negotiation to the other?

How would you describe the process leading towards the agreement on a merger policy?

So, If I have understood well, in your opinion what we can call conjunctural or circumstantial causes.../structural...explain why the European Merger Regulation was agreed in 1989 and not before.(Probe)

#### *ADVICE*

You have been very helpful. Thank you. Before finishing, however, I would like to seek your opinion on a last issue. Who else would you recommend that I talk to? Who knows a lot about this topic? (Get full names, addresses, phone numbers, faxes, etc. All possible information)

Is there any document or specific bibliography you believe can be of interest for my research?

Thank you very much, you have been very helpful. Do you want to add anything or ask any questions?

**SUMMARY SHEET<sup>89</sup>**

CONTACT SUMMARY SHEET

INTERVIEW No

NAME:

JOB:

DATE:

LOCATION:

Q1-WHAT WERE THE MAIN THEMES OR ISSUES IN THE CONTACT?

Q2-WHICH RESEARCH QUESTIONS AND WHICH VARIABLES IN THE INITIAL FRAMEWORK DID THE CONTACT BEAR ON MOST CENTRALLY?

Q3-WHAT NEW HYPOTHESES, SPECULATIONS, OR HUNCHES ABOUT THE FIELD SITUATION WERE SUGGESTED BY THE CONTACT?

Q4- WHERE SHOULD I PLACE MOST ENERGY DURING THE NEXT CONTACT, AND WHAT KIND OF INFORMATION SHOULD I SOUGHT?

GENERAL COMMENTS:

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<sup>89</sup> Immediately after each interview this summary sheet was filled in so as to have both a clear idea of the data collected and a first evaluation of the interview. It has proven very useful.

**ANNEX B: DOCUMENTARY DATA****ELECTRONIC INFORMATION SOURCES CONSULTED**

**ABI/INFORM:** Business, industry and management database. Includes commercial law, economics, finance, public administration, health, etc. Gives bibliographical citations and abstracts from journal articles. It covers around 400 core journals, fully indexed, and 400 part indexed for business interest. (1971 to present day)

**CELEX:** Legal database of the European Union. Broadly corresponds to the L series of the Official Journal. Contains primary and secondary legislation, preparatory acts, reports of cases before the European Court of Justice, national legislative measures implementing EC directives, and European Parliamentary questions. (1960s to present day)

**ECLAS:** Bibliographic database comprising all EU publications and other holdings of the Commission's central library in Brussels. (mid-1970s to present day)

**ECONLIT:** Corresponds to the printed title *Journal of Economic Literature* and has good coverage of EU economic issues. (1980s to present day)

**EPOQUE:** References to all documents produced by or discussed by the European Parliament. (mid-1970s to present day)

**EURHISTAR:** Catalogue of the European Community archives deposited at the European University Institute in Florence. Includes archives of the European Community institutions in Brussels and Luxembourg; private papers of politicians deposited at the University Institute; and grey literature of the EC. (1960s to present day)

**FT-PROFILE:** Full text news database giving up to date coverage of EU affairs. Includes the European Information Service's bulletin *European Report*. (1980s to present day)

**PAIS:** Bibliographic database covering the fields of international relations and government. Good coverage of EU issues. (mid-1970s to present day)

**RAPID:** Press database. Contains the full text of all press release material from the Spokesman's Service of the Commission, texts of speeches by members of the Commission, and other important documents such as European Council conclusions. (1985 to present day)

**REUTERS BUSINESS BRIEFING:** Covers general, economic and political news stories. Articles are sourced not only from Reuter's own reports, but also from over 700 leading newspapers, journals, and news services throughout the world. (1990 to present day)

**SCAD:** Bibliographic database. Includes references to major EU publications and policy documents, plus journal articles on EU matters from 1,200 journals. Also includes the Spicers database which contains abstracts of items published in the Official Journal. (1985 to present day)

**UKOP:** Catalogue of all United Kingdom government publications, both HMSO and departmental publications. Also lists all EU publications, because HMSO acts as the sales agency for EU publications in the United Kingdom. (1980s to present day)

I have also conducted **Libertas** searches at the British Library of Political and Economic Science and other libraries of the University of London.

### 'MANUAL' SEARCHES

I have browsed earlier issues of several journals and newspapers including<sup>90 91</sup>:

- The Bulletin of the European Union
- The Economist
- The European Competition Law Review
- European Economy
- The European Law Review
- The Financial Times
- The Journal of Common Market Studies
- La Revue du Marché Commun

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<sup>90</sup> I do not include in this list other journals or publications which were consulted and proved unsuccessful such as the press releases of the Council of the European Union.

<sup>91</sup> Most of these journals and newspapers were recommended by the interviewees as relevant sources of information.

<b>ANNEX C: DATA DISTRIBUTION</b>
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**EVIDENCE GATHERED FOR EACH PERIOD<sup>92</sup>**

<b>DATA</b>	<b>1970s</b>	<b>E1980s</b>	<b>L1980s</b>	<b>1970s-E1980s</b>	<b>E1980s-L1980s</b>	<b>3 PERIODS</b>	<b>TOTAL</b>
<b>OFFICIAL PUBLICATIONS (OJ AND CEC)</b>	25	25	21	-	-	-	71
<b>ARTICLES AND BOOKS</b>	32	3	51	8	7	70	171
<b>NEWSPAPER ARTICLES</b>	13	5	122	-	-	-	140
<b>INTERVIEWS</b>	-	-	10	-	-	13 <sup>93</sup>	23

<sup>92</sup> As explained in chapter three, the data gathering process was all-encompassing. I tried to find all data available in each period related to the EEC Merger Regulation negotiations. These results, therefore, reflect the importance given by the press and by experts of the topic in each of the different periods.

<sup>93</sup> Almost all of the 13 interviewees concentrated in the periods of the 1970s and late 1980s negotiations and on the corresponding facts because they considered that the early-1980s period was not as important, if at all.

**AMOUNT OF EVIDENCE GATHERED FOR EACH CODE**

FILES	1970s		EARLY 1980s		LATE 1980s	
	PAGES	BYTES	PAGES	BYTES	PAGES	BYTES
<b>CONTEXT</b>	64	193.097	25	80.924	18	55.551
<b>NEO-FUNCTIONALIST</b>						
Commission	83	239.409	40	119.801	122	347.330
European Parliament	12	29.722	7	19.401	7	19.718
European Court of Justice	22	62.595	7	22.230	27	79.936
European Business	10	29.903	4	13.217	39	112.085
Functional Spillover	11	29.722	4	11.332	22	62.128
<b>REALIST</b>						
Member states' positions	53	151.211	15	44.641	101	315.134

**ANNEX D: CODING FRAMEWORK****CODES' LABELS****1. FIRST PERIOD: 1970s****1.1. CONTEXT****1.1.A. Context 1950s (CONT50S)**

- 1.1.A.1. European Coal and Steel Community (CONT50S-ECSC)
- 1.1.A.2. Treaty of Rome (CONT50S-TofR)
- 1.1.A.3. Economic thinking (CONT50S-ET)
- 1.1.A.4. Merger approach (CONT50S-MERGA)
- 1.1.A.5. Degree of concentration (CONT50S-CONCENT)
- 1.1.A.6. Member states merger laws (CONT50S-MSL)

**1.1.B. Context 1960s (CONT60S)**

- 1.1.B.1. Economic thinking (CONT60S-ET)
- 1.1.B.2. Merger Approach (CONT60S-MERGA)
- 1.1.B.3. Degree of concentration-merger wave (CONT60S-CONCENT)
- 1.1.B.4. Member states merger laws (CONT60S-MSL)

**1.1.C. Context 1970s (CONT70S)**

- 1.1.C.1. Economic crisis (CONT70S-ECONOCRISIS)
- 1.1.C.2. Economic thinking (CONT70S-ET)
- 1.1.C.3. Merger Approach (CONT70S-MERGA)
- 1.1.C.4. Degree of concentration-merger wave (CONT70S-CONCENT)
- 1.1.C.5. Member states merger laws (CONT70S-MSL)

## **1.2. NEO-FUNCTIONALIST CONDITION**

### **1.2.1. EC 'supranational' institutions**

#### **1.2.1.A. Commission (COMM70S)**

- 1.2.1.A.1. Need European mergers (COMM70S-NEEDMERG)
- 1.2.1.A.2. Need EEC merger regulation (EMR) (COMM70S-NEEDEMUR)
- 1.2.1.A.3. 1966 Memorandum (COMM70S-66MEMO)
  - a. Article 85 (COMM70S-66MEMOART85)
  - b. Article 86 (COMM70S-66MEMOART86)
  - c. Reactions (COMM70S-R66MEMO)
- 1.2.1.A.4. Attempts to overcome limitations Article 86 (COMM70S-ATTEMPTS)
- 1.2.1.A.5. Use Article 86 (COMM70S-USEART86)
  - a. Continental Can (COMMCC)
- 1.2.1.A.6. 1973 Proposal (COMM70S-73PROP)
- 1.2.1.A.7. Commission's expectations (COMM70S-EXPECT)
- 1.2.1.A.8. Commission pressure during negotiations (COMM70S-PRESSNEGOT)

#### **1.2.1.B. European Parliament (EP70S)**

- 1.2.1.B.1. Need EMR (EP70S-NEEDEMUR)
- 1.2.1.B.2. Berckhouwer Report - 1971 Resolution (EP70S-BR)
- 1.2.1.B.2. Other demands for prior-control (EP70S-OTHERD)
- 1.2.1.B.4. Resolution on 1973 proposal (EP70S-RES73PROP)
- 1.2.1.B.5. Post-Resolution pressure (EP70S-POSTRESPRESS)
- (1.2.1.B.6. ESC Opinion on 1973 proposal)

#### **1.2.1.C. European Court of Justice (ECJ70S)**

- 1.2.1.C.1. Pro-integration strategy (ECJ70S-PROINT)
- 1.2.1.C.2. Continental Can ruling (ECJ70S-CCR)
  - a. Teleological (ECJ70S-CCR-TELEO)
  - b. Against Advocate General (ECJ70S-CCR-ADVGRAL)
  - c. In favour 66 Memo (ECJ70S-CCR-66MEMO)
- 1.2.1.C.3. Rulings on Article 86 after Continental Can (ECJ70S-ACC)
- 1.2.1.C.4. Other ECJ rulings (ECJ70S-OTHERRUL)

**1.2.2. Industrialists (IND70S)****1.2.2.A. Against EMR (IND70S-AGAINSTEMR)**

a. UNICE (IND70S-UNICE)

b. Exceptions (IND70S-FAVOUREMR)

**1.2.2.B. Article 86 not a problem (IND70S-ART86)****1.2.3. Functional spillover (FUNCTSPILL70S)****1.2.3.A. Commission arguments for EMR (FUNCTSPILL70S-COMM)****1.2.3.B. European Court of Justice arguments for EMR  
(FUNCTSPILL70S-ECJ)****1.2.3.C. European Parliament arguments for EMR  
(FUNCTSPILL70S-EP)****1.2.3.D. European Council arguments for EMR  
(FUNCTSPILL70S-EURCOUNC)****1.3. REALIST CONDITION****1.3.1. 1972 European Summit (EURCOUNC70S)****1.3.2. Council of Ministers (COUNC70S)**

a. Working Party meetings (COUNC70S-WP)

b. Coreper meetings (COUNC70S-COREPER)

c. Key issues (COUNC70S-KEYISSUES)

**1.3.3. United Kingdom position on need EMR (UK70S-NEEDEMUR)****1.3.4. Germany position on need EMR (GER70S-NEEDEMUR)****1.3.5. France position on need EMR (FR70S-NEEDEMUR)****1.3.6. Other member states positions on need EMR  
(MSS70S-NEEDEMUR)****2. SECOND PERIOD: EARLY 1980s****2.1. CONTEXT EARLY 1980s (CONTE80S)****2.1.1. Economic context (CONTE80S-ECONO)**

a. Before 1984 (CONTE80S-ECONO-BEF84)

b. After 1984 (CONTE80S-ECONO-AFTER84)

**2.1.2. Economic thinking (CONTE80S-ET)**

a. Before 1984 (CONTE80S-ET-BEF84)

b. After 1984 (CONTE80S-ET-AFTER84)

c. SEA (SEA)

**2.1.3. Merger approach (CONTE80S-MERGA)**

a. Before 1984 (CONTE80S-MERGA-BEF84)

b. After 1984 (CONTE80S-MERGA-AFTER84)

**2.1.4. Degree of concentration (CONTE80S-CONCENT)**

a. Before 1984 (CONTE80S-CONCENT-BEF84)

b. After 1984 (CONTE80S-CONCENT-AFTER84)

**2.1.5. Member states merger laws (CONTE80S-MSL)**

## **2.2. NEO-FUNCTIONALIST CONDITION**

### **2.2.1. EC 'supranational' institutions**

#### **2.2.1.A. Commission (COMME80S)**

- 2.2.1.A.1. Need European mergers  
(COMME80S-NEEDMERG)
- 2.2.1.A.2. Need EMR (COMME80S-NEEDEMUR)
- 2.2.1.A.3. Use Article 86 (COMME80S-USEART86)
- 2.2.1.A.4. 1981 Amended Proposal (COMME80S-81PROP)
- 2.2.1.A.5. 1984 Amended Proposal (COMME80S-84PROP)
- 2.2.1.A.6. Commission's expectations (COMME80S-EXPECT)
- 2.2.1.A.7. Commission pressure during negotiations  
(COMME80S-PRESSNEGOT)

#### **2.2.1.B. European Parliament (EPE80S)**

- 2.2.1.B.1. Need EMR (EPE80S-NEEDEMUR)
- 2.2.1.B.2. Demands for EEC merger regulation  
(EPE80S-EMR)
- 2.2.1.B.3. Resolution on 1981 proposal (EPE80S-RES81PROP)
- 2.2.1.B.4. The 1986 advice to the Commission  
(EPE80S-1986ADVICE)
- (2.2.1.B.5. ESC Opinion on 1981 proposal)

#### **2.2.1.C. European Court of Justice (ECJE80S)**

- 2.2.1.C.1. Intentionality of ECJ's rulings on Article 86 after  
Continental Can (ECJE80S-ACC-INTENTIONALITY)
- 2.2.1.C.2. Other ECJ rulings (ECJE80S-OTHERRUL)

### **2.2.2. Industrialists (INDE80S)**

- 2.2.2.A. Against EMR (INDE80S-AGAINSTEMR)
  - a. UNICE (INDE80S-UNICE)
  - b. Exceptions (INDE80S-FAVOUREMR)
- 2.2.2.B. Article 86 creates certain legal uncertainty (INDE80S-ART86)

### **2.2.3. Functional spillover (FUNCTSPILLE80S)**

- 2.2.3.A. Commission arguments for EMR  
(FUNCTSPILLE80S-COMM)
- 2.2.3.B. European Parliament arguments for EMR  
(FUNCTSPILLE80S-EP)

## 2.3. REALIST CONDITION

- 2.3.1. Council of Ministers (COUNCE80S)
  - a. Working Party meetings (COUNCE80S-WP)
  - b. Coreper meetings (COUNCE80S-COREPER)
  - c. Key issues (COUNCE80S-KEYISSUES)
- 1.3.3. United Kingdom position on need EMR (UKE80S-NEEDEMR)
- 1.3.4. Germany position on need EMR (GERE80S-NEEDEMR)
- 1.3.5. France position on need EMR (FRE80S-NEEDEMR)
- 1.3.6. Other member states positions on need EMR  
(MSSE80S-NEEDEMR)

## 3. THIRD PERIOD: LATE 1980s

### 3.1. CONTEXT LATE 1980s (CONTL80S)

- 3.1.1. Economic context (CONTL80S-ECONO)
- 3.1.2. Economic thinking (CONTL80S-ET)
- 3.1.3. Merger approach (CONTL80S-MERGA)
- 3.1.4. Degree of concentration-merger wave (CONTL80S-CONCENT)
- 3.1.5. Member states merger laws (CONTL80S-MSL)

### 3.2. NEO-FUNCTIONALIST CONDITION

#### 3.2.1. EC 'supranational' institutions

##### 3.2.1.A. Commission (COMML80S)

- 3.2.1.A.1. Need European mergers  
(COMML80S-NEEDMERG)
- 3.2.1.A.2. Need EMR (COMML80S-NEEDEMR)
- 3.2.1.A.3. Use Articles 86 and 85  
(COMML80S-USEART86-85)
- 3.2.1.A.4. 1986 Amended Proposal (COMML80S-86PROP)
- 3.2.1.A.5. April 1988 Amended Proposal  
(COMML80S-APR88PROP)
- 3.2.1.A.6. November 1988 Amended Proposal (COMML80S-  
NOV88PROP)
- 3.2.1.A.7. 1989 proposed amendments  
(COMML80S-1989AMEND)
- 3.2.1.A.8. Commission's expectations (COMML80S-EXPECT)
- 3.2.1.A.9. Commission pressure during negotiations  
(COMML80S-PRESSNEGOT)
- 3.2.1.A.10. Confident Commission  
(COMML80S-CONFIDENCE)

**3.2.1.B. European Parliament (EPL80S)**

- 3.2.1.B.1. Need EMR (EPL80S-NEEDEMR)
- 3.2.1.B.2. Demands for EEC merger regulation  
(EPL80S-EMR)
- 3.2.1.B.3. Resolution on April 1988 proposal  
(EPL80S-RES88PROP)
- 3.2.1.B.4. Pressure upon the Commission  
(EPL80S-PRESSCOMM)
- (3.2.1.B.5. ESC Opinion on April 1988 proposal)

**3.2.1.C. European Court of Justice (ECJL80S)**

- 3.2.1.C.1. BAT-Reynolds ruling (ECJL80S-BAT)
- 3.2.1.C.2. Interpretation ruling (ECJL80S-BATINT)
  - a. Wide interpretation  
(ECJL80S-BATINT-WIDE)
  - b. Narrow interpretation  
(ECJL80S-BATINT-NARROW)
- 3.2.1.C.3. Effect ruling (ECJL80S-BAT-EFFECT)
- 3.2.1.C.4. Intentionality ruling  
(ECJL80S-BAT-INTENTIONALITY)

**3.2.2. Industrialists (INDL80S)**

- 3.2.2.A. In favour EMR (INDL80S-INFAVOUREMR)
  - a. UNICE (INDL80S-UNICE)
  - b. Others (INDL80S-OTHERS)
- 3.2.2.B. Lobbying for EMR (INDL80S-LOBBY)
  - a. At national level (INDL80S-LOBBY-NAT)
  - b. At European level (INDL80S-LOBBY-EUR)

**3.2.3. Functional spillover (FUNCTSPILLL80S)**

- 3.2.3.A. Commission arguments for EMR  
(FUNCTSPILLL80S-COMM)
- 3.2.3.B. European Court of Justice arguments for EMR  
(FUNCTSPILLL80S-ECJ)
- 3.2.3.C. European Parliament arguments for EMR  
(FUNCTSPILLL80S-EP)
- 3.2.3.D. Industrialists arguments for EMR (FUNCTSPILLL80S-IND)
- 3.2.3.E. Governments arguments for EMR  
(FUNCTIONALSPILLL80S-GOV)

### **3.3. REALIST CONDITION**

- 3.3.1. Council of Ministers (COUNCL80S)
  - a. Working Party meetings (COUNCL80S-WP)
  - b. Coreper meetings (COUNCL80S-COREPER)
  - c. Key issues (COUNCL80S-KEYISSUES)
- 3.3.3. United Kingdom position on need EMR (UKL80S-NEEDEM)
- 3.3.4. Germany position on need EMR (GERL80S-NEEDEM)
- 3.3.5. France position on need EMR (FRL80S-NEEDEM)
- 3.3.6. Other member states positions on need EMR  
(MSSL80S-NEEDEM)

<b>ANNEX E. NATIONAL MERGER LAWS<sup>94</sup></b>
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**MERGER CONTROL SYSTEMS AT NATIONAL LEVEL IN THE 1970s**

<b>COUNTRIES WHERE MERGERS ARE NOT CONTROLLED AT ALL AND CARTEL AND MONOPOLIES ARE ONLY MARGINALLY CONTROLLED BY NATIONAL LEGISLATION ON COMPETITION</b>	<b>COUNTRIES WHERE MERGERS ARE NOT CONTROLLED AT ALL YET CARTEL AND MONOPOLIES ARE CONTROLLED BY NATIONAL LEGISLATION ON COMPETITION</b>	<b>COUNTRIES WHERE MERGERS AND CARTEL AND MONOPOLIES ARE CONTROLLED BY NATIONAL LEGISLATION ON COMPETITION</b>
BELGIUM, DENMARK, ITALY AND LUXEMBOURG	THE NETHERLANDS [Greece, Portugal and Spain]	GERMANY (1973), BRITAIN (1965), FRANCE (1977) AND in terms of its basic aspects, IRELAND (1978).
= PRO-MERGER APPROACH.	= PRO-MERGER APPROACH.	= INTERMEDIUM APPROACHES -> BETWEEN TRADE-OFF AND PURE-COMPETITION.

<sup>94</sup> Own elaboration based on the following sources: CEC (1976, 1977a, 1978, 1979, 1980, 1981a, 1982a, 1983a, 1984a, 1985, 1986a, 1987a, 1988a, 1989a, 1990a, 1996a); Brussels Law Offices (1988); Monopolkommission (1989); Boner and Krueger (1991); Cromie (1991); OECD (1983-1992); Neven et al. (1993); Verloop (1993); Whish and Wood (1994); McGowan (1994); Laudati (1995).

**MERGER CONTROL SYSTEMS AT NATIONAL LEVEL IN THE EARLY 1980s**

<p><b>COUNTRIES WHERE MERGERS ARE NOT CONTROLLED AT ALL AND CARTEL AND MONOPOLIES ARE ONLY MARGINALLY CONTROLLED BY NATIONAL LEGISLATION ON COMPETITION</b></p>	<p><b>COUNTRIES WHERE MERGERS ARE NOT CONTROLLED AT ALL YET CARTEL AND MONOPOLIES ARE CONTROLLED BY NATIONAL LEGISLATION ON COMPETITION</b></p>	<p><b>COUNTRIES WHERE MERGERS AND CARTEL AND MONOPOLIES ARE CONTROLLED BY NATIONAL LEGISLATION ON COMPETITION</b></p>
<p><b>BELGIUM, DENMARK, ITALY AND LUXEMBOURG</b></p>	<p><b>GREECE AND THE NETHERLANDS [Portugal and Spain]</b></p>	<p><b>GERMANY, BRITAIN, FRANCE AND, in terms of its basic aspects, IRELAND.</b></p>
<p><b>= PRO-MERGER APPROACH.</b></p>	<p><b>= PRO-MERGER APPROACH.</b></p>	<p><b>= INTERMEDIUM APPROACHES -&gt; BETWEEN TRADE-OFF AND PURE-COMPETITION.</b></p>

**MERGER CONTROL SYSTEMS AT NATIONAL LEVEL IN THE LATE 1980s<sup>95</sup>**

<b>COUNTRIES WHERE MERGERS ARE NOT CONTROLLED AT ALL AND CARTEL AND MONOPOLIES ARE ONLY marginally CONTROLLED BY NATIONAL LEGISLATION ON COMPETITION</b>	<b>COUNTRIES WHERE MERGERS ARE NOT CONTROLLED AT ALL YET CARTEL AND MONOPOLIES ARE CONTROLLED BY NATIONAL LEGISLATION ON COMPETITION</b>	<b>COUNTRIES WHERE MERGERS AND CARTEL AND MONOPOLIES ARE CONTROLLED BY NATIONAL LEGISLATION ON COMPETITION</b>
BELGIUM, DENMARK, ITALY AND LUXEMBOURG	GREECE AND THE NETHERLANDS.	GERMANY, BRITAIN, FRANCE AND, in terms of its basic aspects, IRELAND. And PORTUGAL (1988) and SPAIN (1989).
<b>= PRO-MERGER APPROACH.</b>	<b>= PRO-MERGER APPROACH.</b>	<b>= INTERMEDIUM APPROACHES -&gt; BETWEEN TRADE-OFF AND PURE-COMPETITION.</b>

<sup>95</sup> The introduction of merger control and the reinforcement of their general competition policy was in preparation in Italy (1990), Belgium (1991) and Greece (1991).

MERGER CONTROL SYSTEMS AT NATIONAL LEVEL AFTER 1989<sup>96</sup>

COUNTRIES WHERE MERGERS ARE NOT CONTROLLED AT ALL AND CARTEL AND MONOPOLIES ARE ONLY marginally CONTROLLED BY NATIONAL LEGISLATION ON COMPETITION	COUNTRIES WHERE MERGERS ARE NOT CONTROLLED AT ALL YET CARTEL AND MONOPOLIES ARE CONTROLLED BY NATIONAL LEGISLATION ON COMPETITION	COUNTRIES WHERE MERGERS AND CARTEL AND MONOPOLIES ARE CONTROLLED BY NATIONAL LEGISLATION ON COMPETITION
DENMARK AND LUXEMBOURG	none	GERMANY, FRANCE, BRITAIN, PORTUGAL, SPAIN AND, in terms of its basic aspects, IRELAND. And ITALY (1990), BELGIUM (1991) GREECE (1991) and THE NETHERLANDS (1998).
= PRO-MERGER APPROACH.	= PRO-MERGER APPROACH.	= INTERMEDIUM APPROACHES -> BETWEEN TRADE-OFF AND PURE-COMPETITION.

<sup>96</sup> Of the three new member states, both Austria (1993) and Sweden (1982) have merger control laws and the introduction of such a law is in preparation in Finland.

**APPENDIX. TREATY OF AMSTERDAM RENUMBERING**

<b>EEC TREATY</b>	<b>TREATY OF AMSTERDAM</b>
Art. 85	Art. 81
Art. 86	Art. 82
Art. 87	Art. 83
Art. 89	Art. 85
Art. 90	Art. 86
Art. 92	Art. 87
Art. 93	Art. 88
Art. 94	Art. 89
Art. 235	Art. 308