COMPETITION FOR COMPETITIVENESS:

The Politics of the Transformation of the EU Competition Regime

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COMPETITION FOR COMPETITIVENESS:
The Politics of the Transformation of the EU Competition Regime

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door

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geboren te Luzern, Zwitserland

promotoren: prof.dr. H.W. Overbeek
prof.dr. A. Nölke

To my partents Martin and Elisabeth Wigger,

who have always encouraged and supported me in my academic endeavours.

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AAA	Administrative Arrangements on Attendance
ABA	American Bar Association
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
ASU	Arbeitsgemeinschaft selbständiger Unternehmer (Germany)
BASF	Badische Anilin- und Sodafabriken
BDI	Bundesverband der Deutschen Industrie (Germany)
BEUC	Bureau Européen des Unions de Consommateurs
CAG	Competitiveness Advisory Group
CBI	Confederation of British Industry (UK)
CCBE	Consultative Committee of the Bars and Law Societies
CDU	Christlich Demokratische Union (Germany)
CEECs	Central and Eastern European Countries
CET	Common External Tariff
CFI	Court of First Instance
CFP	Common Foreign Policy
CFSP	Common Foreign and Security Policy
CNPF	Conseil National du Patronat Français
COPA	Committee of Professional Agricultural Organisations in the European Union
CSU	Christlich Soziale Union (Germany)
DG	Directorates-General of the European Commission
DG IV	Directorate General IV of the European Commission
DG COMP	Directorate General of Competition of the European Commission
DIAC	Draft International Antitrust Code
DoJ	Department of Justice (US)
ECB	European Central Bank
ECN	European Competition Network (EU)
ECJ	European Court of Justice (EU)
ECSC	European Coal and Steel Community
EEA	European Economic Area
EEC	European Economic Community

EFTA	European Free Trade Area
JHA	Justice and Home Affairs
EMU	Economic and Monetary Union
EP	European Parliament
ERP	European Recovery Programme
ERT	European Round Table of Industrialists
ESA	European Space Agency
ESCB	European System of Central Banks
ETUC	European Trade Union Confederation
EVV	Europees Verbond van Vakverenigingen
FDI	Foreign Direct Investment
FTC	Federal Trade Commission (USA)
FDP	Freie Demokratische Partei (Germany)
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GDP	Gross Domestic Product
HSR	Hart-Scott Rodino Act (USA)
IAA	International Antitrust Authority
IAEAA	International Antitrust Enforcement Act
IAR	International Authority for the Ruhr
IBA	International Bar Association
ICC	International Chamber of Commerce
ICI	Imperial Chemical Industries
ICN	International Competition Network
ICPAC	International Competition Policy Advisory Committee
ICT	Information and Communication Technology
IMF	International Monetary Fund
ITO	International Trade Organisation
JHA	Justice and Home Affairs
LDC	Least Developed Countries
M&As	Mergers and Acquisitions
MEP	Member of the European Parliament
MFN	Most-Favoured-Nation Treatment
MIT	Massachusetts Institute of Technology

MNCs	Multinational Corporations
MRA	Mutual Recognition Agreements
NAFTA	North American Free Trade Agreement
NCAs	National competition authorities
NIEO	New International Economic Order
NIS	Newly Independent States
NTA	New Transatlantic Agenda
NTBs	Non-Tariff Trade Barriers
OECD	Organisation for Economic Cooperation and Development
OFT	Office of Fair Trading (UK)
OPEC	Organisation of Petroleum Exporting Countries
PCA	Positive Comity Agreement
PJCC	Police and Judicial Cooperation in Criminal Matters
QMV	Qualified Majority Voting
R&D	Research and Development
SMEs	Small and Medium-Sized Enterprises
SLC	Substantive Lessening of Competition
TABD	Transatlantic Business Dialogue
TACD	Transatlantic Consumer Dialogue
TAED	Transatlantic Environmental Dialogue
TAFTA	Transatlantic Free Trade Agreement
TEC	Treaty Establishing the European Community
TEU	Treaty of the European Union
TNCs	Transnational Companies
ToA	Treaty of Amsterdam
TRIMs	Trade Related Investment Measures
TRIPs	Trade Related Aspects of Intellectual Property Rights
UEAPME	European Association of Craft Small and Medium-Sized Enterprises
UCLA	University of California Los Angeles
UNCTAD	United Nations Conference on Trade and Development
UNICE	Union of Industrial and Employers' Confederation of Europe
WTO	World Trade Organisation
WGTCP	Working Group on the Interaction of Trade and Competition Policy
VAT	Value Added Tax

Acknowledgements

As it is often the case, the impetus for writing a Ph.D. thesis can be traced back to a Master thesis, leaving still too many questions without a conclusive answer. Once I had finished my thesis on '*The Vertical and Horizontal Dimensions of Multi-Level Governance in European Competition Policy: The Role of Policy Networks in Competition Governance'* in 2003, I was offered the opportunity to embark on a Ph.D. project at the *Vrije Universiteit* in Amsterdam, and to make competition policy the central focus of my research. The field has occupied my attention ever since, and is likely to continue to do so for another while. Retrospectively, however, my very first encounter with competition policy was anything but love at first sight. I could not be enkindled when I read my first chapter on competition policy in a textbook on EU politics and governance. Even though I was genuinely interested in political economy themes, the field of competition policy and the many tedious technical details that come with it seemed utterly boring to me. It should therefore not surprise that I initially hesitated when Henk Overbeek, then my Master thesis supervisor, suggested investigating the recent developments in the field of EU competition policy as a possible research topic. Having no alternatives ready at hand, I completed my first share of reading with moderate interest. This changed when I realised that the formulation of competition policy constitutes a profoundly political process, involving many underlying conflicting stakes of societal groups. The fact that competition, and rules controlling competition pertain on important questions regarding the distribution and concentration of economic wealth, not only in domestic market settings, but also on a global scale, awoke my interest. My affinity and fascination with competition laws and the policy of enforcement have since then only been growing.

This dissertation could not have been written without the support of a number of people. I would like to mention the most important ones. To begin with, I would like to thank my two supervisors Henk Overbeek and Andreas Nölke. Henk, you have drawn my attention to the topic of competition policy when I was still a graduate student. Without this stimulus and your conviction that this was indeed a highly interesting research topic, this dissertation would never have been written. Andreas, you were enthusiastic about this topic from the very beginning when you embarked on the role of a supervisor at a later stage. Writing a co-authored article together with you was a very enjoyable experience, which

also greatly motivated me in conducting my dissertation project. Andreas and Henk, I am deeply grateful to both of you for having continuously challenged me by raising important questions along the way that I seemed to neglect. Your input allowed me to refine my analysis and critically reflect upon my argument. Moreover, you both have tought me to explore new avenues of understanding the crucial political issues at stake. After all these years, I can conclude that despite (or, maybe, right because of?) the academic freedom I enjoyed in choosing my own perspective, you both have shaped me in most profound ways, and inspired me more than that I have ever admitted to you in the course of writing the dissertation. Your guidance and assistance has made me grow intellectually, and, I dare say also see the world differently. For the latter, I am particularly greateful. I feel very privileged to have had you as my supervisors. Thank you for everthing!

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In reality […] the aim of antitrust legislation has very little to do with consumers. The protection of the interest of consumers (if this is the case) is a by-product (in spite of claims to the contrary) rather than being the primary purpose of this legislation. The protection of the interest of the tiny majority of the powerful is smuggled into the collective consciousness as being the protection of the overwhelming majority of the society.

Guglielmo Carchedi (2001: 136)

An open, competitive Single Market is Europe's biggest asset, unique in the world. Competition policy and effective enforcement will secure a level playing field – so all operators in the Single Market compete and win on merit alone. This is what generates investment, efficiency, and innovation.

Neelie Kroes, EU Competition Commissioner (2006a)

Introduction

Competition policy constitutes one of the core policy areas of the European Union (EU). In the Treaty of Rome of 1957, establishing the European Economic Community (EEC), competition laws received a strong constitutional status, laying the legal basis for 'a system ensuring that competition in the internal market is not distorted' (Article 3(f)). The actual competition provisions were included and stipulated in a section entitled 'Rules of Competition', in the Articles 85-90. After the renumbering through the Treaty of Amsterdam (ToA), they became Articles 81, 82 and 86 to 89, comprising four components dealing with cartels and restrictive business practices (Article 85), abuse of dominant position (86), public undertakings (90), and state aid (92). In the view of the Treaty drafters, the inclusion of this market regulatory field to the supranational level served the purpose of setting in motion the dynamics of the European economic integration project, or, what in EU jargon was coined at a later stage as the creation of 'a level playing field'. Shortly after its inauguration, the European Commission's Directorate General (DG) Competition (formerly DG IV) was entrusted with far-reaching investigatory and decisional powers in the enforcement of competition laws. To date, there is no comparable Community pillar policy, in which the Commission enjoys similar wide-ranging competences, and in which the Council of the European Union and the European Parliament have so little to say. The centralisation of competition control at supranational Community level – that is the enforcement of EC competition laws – was pivotal to the creation of market capitalism in the region, and paramount to the persistent continuity in which the economic integration project advanced. By being genuinely focused on market making, EC competition laws aimed at opening up Member States' markets to foreign competition, and removing obstacles to cross-border economic transactions imposed by private market actors, as well as Member State governments. The right to compete in the common market granted companies the right to freely access the domestic markets of other Member States.

The Focus of the Research

Looking back at the EU's fifty-year history reveals that the substance of EC competition laws remained largely unaltered during the first four decades of the European integration project, except for the introduction of the EC Merger Regulation in 1989, and a range of regulations specifying the enforcement of EC competition laws. From its inauguration until the mid-1980s, competition policy was characterised by a flexible, administrative, and multigoal orientated enforcement approach, informed by a broader macroeconomic welfare vision. It exemplified strong neomercantilist and protectionists traits, and in some cases even allowed for significant 'distortions' of competition, whenever justified for general reasons of industrial and/or social policy. Competition laws were enforced largely in line with what in the objectives of the non-consolidated version of the Rome Treaty was spelled out as 'balanced trade' and 'fair competition'. Alongside the accelerated pace of the single market creation in the mid-1980s, the prevalent accent of the enforcement practices underwent a major transformation. EC competition policy acquired heightened agenda status, and increasingly came to be recognised as 'the most important organising principle in the capitalist world' (Cini and McGowan, 1998: 2). Gradually, a 'competition only' vision came to dominate. This was also reflected in the consolidated text of the Treaty of the European Union (TEU), where the notion of 'fair' competition was replaced by 'free' competition. Together with the free movement of goods, people, capital, and services, and a whole string of other market making measures in the 1990s, such as monetary stability, privatisation, and linked processes of deregulation and re-regulation, a more stringent enforcement of competition laws was adopted. As outlined above by Competition Commissioner Kroes, effective enforcement was considered to form the backbone of economic growth. Defined in the terms of a 'competition for competitiveness strategy', competition policy was subordinated to the goal of making the single market more efficient and effective. This 'competition for competitiveness' spirit was further reinforced with the reinvigorated discourse of EU's Lisbon agenda set at the Lisbon Council Summit in 2000, aiming at making the EU the most competitive and knowledge-based economy of the world by 2010. Against this background, and in parallel to the welcoming of ten new Member States in 2004, the EC competition regime underwent a far-reaching reform, which was officially titled 'the Modernisation'. The reform fundamentally touched upon the substance of competition laws, the enforcement procedures, and the central principles guiding the enforcement. Reforms constitute important signposts for analysing the *Zeitgeist* in a policy area. In marked contrast to the existing literature analysing single competition policy reforms in isolation, that is without considering the broader socioeconomic historical timeframe, this dissertation argues that the competition policy reforms of the early 21st century constitute a point of culmination of a much broader transformation of EU policy making. It seeks to contribute to a comprehensive understanding of the political processes underlying the transformation of what is identified here as the EC model of competition law and practices. How can we explain the transformation of EU competition law and enforcement? What is the direction of change? Who has driven the transformation, and most notably, why? Furthermore, *cui bono:* who gains and who loses from this transformation?

The dissertation employs a ‘critical political economy’ perspective, with which it seeks to grasp the transformation of EU competition laws and enforcement practices by relating it to broader socioeconomic material and ideational changes. It departs from the notion that law is frozen politics, and that the policy choices regarding the enforcement of laws are driven by a complex interplay between influential sociopolitical forces, located in particular macroeconomic realities, and adhering to particular ideas on how to organize the market place. Reforms usually mark the end of certain ideological beliefs, and the consolidation of new ideas that evolved in the time before the finalisation of the reform. Competition policy is a genuinely multidisciplinary policy field, in which political, economic, and legal thinking cannot be viewed independently from each other. Nor can competition policy be viewed independently from economic realities. Although dominant ideas (knowledge, norms, and convictions) are not always reducible to material factors, the dissertation argues that the ascendancy of new ideas in EU competition policy needs to be understood in the context of capitalist restructuring in Europe, unleashed by the process of economic and political integration of markets in Europe, as well as increasingly on a global scale. Based on a longitudinal analysis, the dissertation links the evolution of EC competition policy in the late 1950s, and the subsequent development of the enforcement practices in the 1960s, 1970s, and early 1980s to a structural shift of corporate orientation from competition in national markets to competition in the single European market. In this period, competition policy formed part of the institutional nexus of the post-War order of ‘embedded liberalism’. The subsequent transformation starting in the mid-1980s, found its origins in the disruption of the post-war social order, and the rise of neoliberalism. It was accompanied by a shift in corporate orientation from competition in the common European market to competition in the global market place. The dissertation argues that the direction of the changes were shaped by a public-private alliance of the European Commission's DG Competition, and a selective group of leading business representatives, controlling large, transnationally operating corporations, headquartered predominantly in the EU and the US, and organised in exclusive clubs, such as the *European Round Table of Industrialists (ERT)* and the *Transatlantic Business Dialogue (TABD)*. This public-private alliance enjoyed the support of other business organisations, such as the *Union of Industrial and Employers' Confederations of Europe (UNICE)*, today called *BusinessEurope*, the *American Chamber of Commerce to the European Union (AmCham EU)*, and the *International Chamber of Commerce (ICC)*. Together with the Commission, these business organisations shared the conviction to consolidate the creation of a borderless market in which the free flow of market forces and free competition were to prevail. The centralisation of competition policy at EU level offered business representatives, and their corporate lawyers, a platform to express their interests, and to become a pivotal political force in EU economic policy making.

The emergence of transnational corporations is inherently linked to the structural changes in the world economy that catalyzed from the late 1970s onwards. The rapid pace of technological innovation and the ICT revolution, the facilitation and cost reduction in transportation, as well as the regulatory ramifications of ongoing liberalisation of trade and capital flows on a world-encompassing scale, provided corporations with an accumulation regime unprecedented in history. The phenomenon, generally captured as economic globalisation, made it possible for corporations to engage in cross-border transactions more easily, and to compete in the global economy. The emphasis on *unfettered* competition as a market structuring device strengthened the power of transnationally operating corporations. The transformed regime, consequently, was designed for the winners of the competitive process, i.e. those able to compete. It consolidated a more market-based, neoliberal order, in which private rather than public actors prevail, and which seeks to create an ever-bigger 'level playing field' of free market play not only in the realm of the common market, but also on a global scale. As Commissioner Kroes (2007a) has repeatedly stated, 'markets rather than politicians are best placed to allocate resources efficiently, to identify the companies and technologies of the future, and to generate the wealth needed to maintain our way of life, based on our shared social and environmental values'. As part of this strategy, the number of mergers and acquisitions, as well as other corporate alliances increased considerably, resulting in a massive concentration of economic power. The dissertation argues, moreover, that the transformation of the EU competition regime needs to be placed in the context of underlying competitive tensions between the US as the EU as major trading partners. This is particularly reflected in the transatlantic 'cohabitation' in setting the parameters of how cross-border competition questions should be addressed. What initially had the shape of a friendly rivalry between EU and US competition authorities, increasingly appeared as an organic unity. This is due to the fact that the past competition reforms constitute considerable steps of convergence towards the US competition regime, both in terms of content and in procedural enforcement rules.

Structure and Main Arguments of the Dissertation

The dissertation is built up as follows: Chapter 1 offers a theoretical account of the nature of competition and competition policy in capitalist markets, and identifies the main stakeholders and their interests in competition policy. It argues that competition policy is profoundly political in character, and that laws protecting free competition support the accumulation of capital into ever-fewer hands, and in its extreme form, the oligopolisation, or monopolisation of product markets. This inherently secures the continuous reproduction of capitalist socioeconomic power relations, in terms of the relation between large transnational corporations (TNCs) vis-à-vis small and medium-sized enterprises (SMEs), the developed and developing world, as well in terms of the power relations between capital and labour. Chapter 2 introduces and clarifies the central concepts of the competition terminology and discusses the peculiarities of two competition law enforcement models, including two schools of economic thought. The first part presents the European *ex ante* administrative public control, or what here is also called the EC competition model that remained in force until the 2004 reform. It introduces the institutional design, and the enforcement mechanisms, as well as the competences attributed to the European Commission. In a second part, the *ex post* court model of the US Federal competition authorities is presented. The emphasis is on describing the central features of these two models, and on establishing a general understanding of the conceptual, legal, and institutional elements that underpin these models, which will be referred to in the remainder of the dissertation.

Chapter 3 traces the historical evolution of the European competition model in the period stretching from the early post-war years to the creation of the competition laws in

Germany, the inclusion of competition laws in the European Coal and Steel Community (ECSC), and the EEC. It establishes the historical and political context in which laws on competition were formulated and equipped with enforcement mechanisms, and explores how the interplay of treaty drafters and the political opposition has given shape to the particular outlook of EC competition model. Chapter 4 analyses and explains how EC competition law enforcement has taken shape against the background of the broader 'embedded liberalism' bargain at Member State level in the period from 1958, the EC's birth year, until 1985, the year in which the Single European Act (SEA) was adopted. It argues that the Commission in its role of a supranational competition authority balanced its decision-making against the broader macroeconomic goal of economic integration. EC competition laws were enforced to pursue multiple goals, often in line with broader industrial policy objectives, and occasionally social policy objectives, in order to cope with the overall commitment to economic openness, both regionally and globally. Even though competition policy was genuinely market opening, and thus, market making, it was also rather 'defensive' in character, displaying traces of a protectionist and neomercantilist ideology that aimed at sheltering certain industries and companies from fierce outside competitive pressures. In line with the progressive creation of a larger integrated regional market that allowed companies to reap the benefits of economies of scale production, competition laws were enforced as a means to foster the competitive strength of European companies vis-à-vis the technologically more advanced and larger companies originating from the US, and later from Japan. Enabling European competitors to compete was given priority above the protection of the competitive process, which comprised a rather tolerant stance towards mergers and acquisitions (M&As), and (cross-border) intercompany agreements designed to pool R&D investments, and various forms of production, distribution, or marketing joint ventures. Without loosing sight of the common market project, Community level competition control sought to adjust the diminished capacity of national governments to employ traditional protectionist measures. The dissertation argues that the Commission's flexible market interventionist strategies were made possible by the strong administrative nature of EC competition law enforcement of the *ex ante* public control model.

Chapter 5, 6, and 7 address the developments in EC competition law enforcement in the time covering the time period of 1985 until the end of the century. Chapter 5 explores the gradual changes of EC competition law enforcement that took shape with the advent and the ascendancy of neoliberalism as a counter project to embedded liberalism in Europe. As part of a larger transformation of capitalist organisation in Europe since the mid-1980s, more narrow definitions of competition were employed, and the enforcement of EC competition law became more stringent. Neoliberal conceptions of corporate efficiency and consumer welfare amounted to the sole decisional criteria, and the use of microeconomic reasoning in the assessment of anticompetitive conduct has become the standard. Efficiency is generally understood as the lowest possible price, combined with the highest quality of the goods and services for consumers. This fundamentally broke with the broadly defined macroeconomic and flexible market interventionist orientation that dominated the enforcement practices in the era of embedded liberalism. The accelerated pace of the common market project, enacted by the Single European Act (SEA) in 1987 and the creation of the European Union in the early 1990s, was constitutive for corporations to grow in size, to mobilise capital more easily, and henceforth to invest in new spheres of production on a global scale. The subsequent privatisation of state-run industries, and processes of deregulation, as well as re-regulation at supranational level, offered new prospects for transnational corporations to adapt to the challenges posed by economic globalisation. This brought about a considerable increase in crossborder business transactions in the 1990s, such as mergers and acquisitions (M&As), strategic alliances, and other forms of commercial intercompany agreements.

As outlined in Chapter 6, a vast share of these transactions had a transatlantic dimension, which brought different procedural rules, time schedules, and information requirements, and henceforth, different rulings of the competition authorities to the fore. What is commonly termed ‘multijurisdictional overlap’, i.e. the necessity to comply with multiple regulatory regimes, here, competition regimes, concomitantly raised concerns among executive boards of transnational corporations about increased risks of judicial conflicts, and hence additional transaction costs. This was particularly the case when the European Commission started to apply its competition laws on an extraterritorial basis. It did so in cohabitation with the Federal competition authorities of the US, composed of the Federal Trade Commission (FTC) and the Antitrust Division of the US Department of Justice (US DoJ), who used to be a hegemonic player in combating anticompetitive conduct on a global scale. These interagency tensions between the EU and US Federal competition authorities augmented after a range of conflicting decisions in high-level merger cases in the 1990s, such as the *McDonnell-Douglas* merger, the *GE-Honeywell* merger, or more recently, *Microsoft*'s abuse of its dominant market position. In reaction to the enhanced exposure to multiple competition regimes, the executive branch of a selective group of leading US and EU transnational corporations joined forces in their lobbying activities before the EU institutions. Driven by the motive to expand the logic of the common market to the transatlantic realm, they urged the EU and US competition authorities to streamline their procedural approaches in competition law enforcement, and to harmonise their interpretations of anticompetitive conduct in order to make competition rules more coherent and predictable at both sides of the Atlantic. Chapter 6 examines the conclusion of various bilateral cooperation agreements on competition matters between the EC/EU and the US authorities, and links them to the broader neoliberal agenda. These bilateral agreements were meant to facilitate commercial crossborder transactions. They sought to establish an integrated transatlantic marketplace, undisturbed by regulatory and administrative obstacles, and marked by a high degree of transparency.

The phenomenon of multijurisdictional overlap further intensified with the proliferation of newly emerging competition regimes around the world throughout the 1990s, amounting to nearly 100 competition regimes today. Apart from the burdensome regulatory compliance requirements, this fuelled corporate concerns that national competition authorities would interpret competition rules in a protectionist manner, biased against foreign competitors. In response, transnational business networks actively encouraged the EU and US competition authorities to establish global competition rules removing private, non-tariff barriers to goods, services, and capital on a global scale. Chapter 7 explains why the European Commission's DG Competition evolved as a vanguard in attempting to orchestrate a multilateral agreement on global competition rules in the regulatory realm of the World Trade Organisation (WTO) during the 1990s, and why the multilateral trajectory eventually failed and why an alternative route has been chosen. It argues that, corresponding with corporate interests, the goal to establish competition rules at WTO level served the purpose to open up national markets and to ensure free access to foreign competitors to new product, labour, public procurement, and investment markets. The EU-US leadership in setting WTO competition rules, as envisaged by the transnational business elite, did not achieve political momentum. Despite the fact that both the US and the EU competition authorities shared a common interest in the creation of global free markets, US authorities opposed the idea of binding competition rules, which amongst other reasons contributed to the historical downfall of the Cancun Ministerial WTO meeting in 2003. Besides the deep-rooted US reluctance of having their powers further constrained by a multilateral trading regime, the downfall of the multilateral trajectory finds its origins also in the differences between the EU and US competition regimes. The US authorities distrusted competition authorities of other WTO Members, including the European Commission, to enforce competition laws in line with the free-market ideology. As an alternative, the US authorities proclaimed the road of voluntary convergence as key to streamline the application of competition laws on a global scale. Upon the initiatives of US authorities and business interests, the International Competition Network (ICN) was established as the central mechanism to proclaim convergence in competition matters around the world. As a voluntary and informal forum, the US authorities occupy the driver's seat, in tandem with the European Commission and transnational business interests.

Chapter 8 focuses on the past competition policy reforms of the early 21st century, and explains why the 'EU competition model' has been so fundamentally transformed. It argues that transnational business elites in the course of the 1990s identified the regime most favourable to their interests. A range of features of the US competition regime was considered more business-friendly, and eventually came to be preferred above that of the EU. Regular public-private interactions on a case-by-case basis, and workshops, conferences, position papers, as well as joint tripartite meetings involving also the US competition authorities, resulted in what former Competition Commissioner Mario Monti called 'a silent process of convergence towards US competition law and practices that went on for a number of years and that recently intensified' (Monti, 2001a). In addition to the series of transatlantic bilateral cooperation agreements, the US and EU competition authorities intensively cooperated in a joint EU-US Merger Working Group. Enforcement procedures were streamlined and substantive issues in the review of mergers and acquisitions were addressed. Subsequently, also the analysis of cartels and other restrictive business practices moved to the centre of attention. The transatlantic 'cohabitation' in competition matters, backed up by a strategic elite alliance of representatives of large transnational corporations, has given shape to what became labelled 'the modernisation', a major step of convergence to the more marked-based, free competition orientated competition regime of the US. By introducing a similar test to judge acts of economic concentration like the US, the legal basis for inhibiting large transnational mergers was removed, and efficiency arguments have become institutionally anchored. With the abolition of the administrative *ex ante* public control model for judging commercial intercompany agreements, similar to the US model, a private enforcement regime has come in place, which based on a decentralisation mechanism reinforces private enforcement also at national level. A more marketbased competition regime was established: one that panders to the free flow of market forces in the allocation of resources, and significantly reduces the protectionist scope for shielding corporations, or economic sectors, from outside competition.

The conclusion summarises the substantive argument advanced in Chapters 3 to 8, and reflects upon the wider impacts of the transformation of the EU competition regime.

Contribution to the Existing Literature

Situated at the interface of International Political Economy and European Union Studies, the dissertation seeks to contribute to the literature on EU competition policy from a critical political economy perspective that anchors the evolution, the development, and the subsequent transformation in socioeconomic historical processes. The bulk of the contributions to the field is dominated by legal scholars and economists, who have in common that they adopt what Cox (1981) coined 'a problem-solving attitude', serving the purpose of finding solutions to problems that emerge from present competition law enforcement problems without further questioning 'the existing order of things'. A vast range of the literature of legal scholars, foremost in the specialised journal article sector, tends to be preoccupied with complex legal technicalities.[1] Voluminous commentaries address questions of interpretations of existing competition laws and case law, legal consistency, and procedural equity, as well as predictability, and transparency – concerns shared by the wider business community who is subject to competition laws (Dörn and Wilks, 1996: 3). Similarly, economists tend to be concerned with sophisticated

[1] A range of journals dedicated to competition law offer a platform for debate and the evolution of new ideas. Noteworthy in this regard are the *Journal of Competition Law and Economics,* the *Journal of Industry, Competition and Trade,* the *OECD Journal of Competition Law and Policy, World Competition, Antitrust Bulletin* and the *Journal of Economic Perspectives*. In addition, the textbook literature is copious and was particularly on the increase in the 1990s. Worth mentioning on EU competition laws are the works of Sauter (1998) *Competition Law and Industrial Policy in the EU* and Korah (1994) *An Introductory Guide to EC Competition Law and Practice*, and Goyder (1998) *EC Competition Law* made it into the standard literature on EU competition policy. Seminal is the book *Law and Competition in Twentieth Century Europe: Protecting Prometheus* by David Gerber (1998) tracing the ordoliberal origins of EU competition policy and comparing the competition regimes of EU Member States. Currently topping the list of bestsellers among the audience of academics and practitioners in the field is *Competition Policy: Theory and Practice* by Motta (2004), an economic account on game-theoretic modelling as it is applied in contemporary practice at both sides of the Atlantic.

econometric tools for analysing markets, market shares, market efficiencies, consumer welfare assessments, and distorting anticompetitive conduct. The branch of legal scholars and economists drive the academic debate by inaugurating new legal questions, or responding to judicial problems encountered in everyday competition law practice and changing market situations. Their contributions often ‘provide the intellectual context of new ideas’ in competition matters (ibid). Legal and economic expert accounts, however, tend to obscure, or downplay, the profoundly political nature of competition policy through seemingly apolitical and static conceptualisations, and a preoccupation with complex legal technicalities. Competition policy, however, is not a politically neutral regulatory field, and political authorities do not naturally perceive problems and solutions in similar ways, and subsequently arrive at the ‘best’ and most effective institutional and regulatory solution to a defined problem. Behind seemingly detailed judicial and technocratic issues of competition laws and their enforcement lurk important political questions regarding the distribution and concentration of economic power and wealth, not only in domestic market situations, but also in an ever-more globalised world. Competition policy benefits some groups and segments in society more than others, and different actors have different interests in this policy area. Conceptions of competition policy denying or neglecting this are political themselves, as they disguise the underlying conflicting interests regarding content, form, and scope of public intervention in competition matters.

Compared to the abundance of literature in other fields of socioeconomic regulation, competition policy suffers from a chronic shortage of contributions from political scientists. As Cini and McGowan (1998: 1) point out, EC competition policy ‘is one of the least understood of all the European Union’s policies’. Apart from occasional high-profile cartel prosecutions, or disputed mergers, competition laws and their enforcement generally do not attract the attention of the wider community of political scientists. This is mostly due to the technicalities of competition policy that may seem unexciting and trivial at first glance. Notable exceptions in the field are the volume edited by Dörn and Wilks (1996), titled *Comparative Competition Policy National Institutions in a Global Market* comprising a range of essays addressing competition issues from a comparative vantage point in six different competition regimes, and Cini and McGowan (1998), who contributed to the field with an accessible account on the *Competition Policy in the European Union* rich in empirical detail, and, although outdated, still an indispensable source of information. In addition, a range of studies provided astute insights into the institutional and regulatory dimensions of this policy area (cf. Bulmer, 1994; Damro, 2002, 2006a, 2006b; Wilks, 2005; McGowan and Cini, 1999; McGowan, 2007a, 2007b; Büthe and Swank, 2005; Büthe, 2007). Nonetheless, the overwhelming majority of existing political science studies on EC competition policy fails to relate the developments in the field to broader transformations in the way in which capitalism is regulated in Europe. EC competition policy is often analysed as an isolated policy area. Such studies largely remain at the descriptive surface of political processes, and predominantly pay attention to producing knowledge on intra-institutional and judicial features, without further contextualising this knowledge against broader socioeconomic and ideational changes (see also Buch-Hansen and Wigger, 2007).

The dissertation links the transformation of EU competition policy to the emergence of transnational corporations and their specific interests. In the literature on the EU, it is widely acknowledged that transnational corporations on an individual basis, or by elite lobbying networks, constitute influential forces in the shaping of European economic integration. The particular political interest constellation of the transnational corporate elite, and the European Commission, however, tends to be overlooked in most of the existing studies. Competition policy is generally portrayed as one of the major strongholds in which a public authority – the European Commission – fights the power of corporate market actors, and sanctions their abuses of market power, cartels, and other forms of restrictive business practices. Moreover, the central focus of attention is often directed towards the Commission as an institutional actor driven by institutional interests of prestige seeking. In marked contrast to this literature, the dissertation seeks to highlight the profoundly political nature of competition policy, and argues that the recent developments in EU competition policy are inherently driven by those able to compete.

Method and Approach

The dissertation builds on the triangulation of different research methods of empirical data gathering. This implies that different techniques, using both primary and secondary sources, were applied in an auxiliary manner to confirm the collected information, and to increase the validity and the robustness of the results. An intensive literature study served to historicise the genesis and evolution of EC competition policy in the socioeconomic European context. The resulting explanatory narrative, concentrating on how political processes unfolded over time, is complemented by an empirical analysis of qualitative data collected from official and publicly accessible documents, such as treaties and agreements, reports of the EU institutions, archival material of the European Commission, speeches, position papers of several interest groups, press accounts, and a range of semi-structured expert interviews. The reconstruction of the dominant norms, institutions, and practices of EU competition law enforcement over time draws on data collected from official records. The Commission's Annual Reports on Competition Policy that were issued from 1972 onwards in order to provide the European Parliament with greater transparency of the decisions taken in the competition division of the European Commission were particularly pertinent in this regard. In addition, the Official Journal of the European Communities, European Court Reports on landmark cases, as well as speeches held by key figures, and secondary literature comprising commented materials and enforcement records by lawyers and economists, served as a valuable source of information.[2]

The numerous position papers issued by the different stakeholders of EU competition policy served to identify the interest constellations and map the political contestation of the chosen policy course, as well as to trace the dynamics of process of policy making. In addition, the conduction of semi-structured expert interviews (cf. Bogner *et al.*, 2005) helped to complement the information gathered, and to identify further political struggles. Among the interviewed were: Frans Andriessen, former Competition Commissioner; Pérvenche Béres, chairwoman of the European Parliament's Committee on Economic and Monetary Affairs; Erik Berggren, Senior Adviser of the Union of Industrial and Employers' Confederations of Europe (UNICE), now called BusinessEurope; Denis Waelbroeck, Business Law Lawyer, specialised in EU competition law and involved in high-level cartel and merger cases at the Brussels based law company Ashurst; Fevzi Toksoy and Ali Ilicak, economists and business consultants specialised in competition law at the law company Asland Camicla Toksoy; as well as a Commission official at the DG Competition, who whished to remain anonymous. The structure of the interviews comprised both a questionnaire with descriptive and evaluative elements, as well as a range of open questions. This allowed for flexible and individual in-depth questioning on the positions of the actors involved. Moreover, the participation at numerous expert meetings, workshops, and conferences, congregating competition law practioners, i.e. lawyers,

[2] The Annual Competition Reports from 1995 onwards can be accessed at the Commission's webpage at: http://europa.eu.int/comm/competition/annual_reports/. Earlier Annual Competition Reports, speeches by Commissioners and high-ranking officials, as well as other documents by the Commission before 1995 are accessible at the Historical Archives of the Commission in Brussels.

economists, and public officials, and business representatives, as well as the Annual Competition Day organised jointly by the European Parliament and the European Commission, provided a good opportunity to corroborate background knowledge about ongoing policy discussions in the field.

Doing research on competition policy, nonetheless, entails a range of limitations. Most notably, case material falls under rules of confidentiality, and meetings of Commission officials with executive boards generally take place behind closed doors. Furthermore, as Gerber (1998: xii) has pointed out, the different agendas of the actors involved ‘are often not announced, nor do they come perceptible only by looking at the decisions that are actually taken’. Representatives of business associations, private practitioners from law companies, or former Members of the European Commission can be reluctant to give detailed accounts on the decision making process. Moreover, lobbying is not always a unidirectional process. The European Commission repeatedly and actively encouraged the involvement of the transnational business elite to formulate policy solutions in competition matters.

Chapter 1

On the Nature of Competition and Competition Laws in Capitalist Markets

The function of competition policy is to promote the interest of big capital rather than those of labour or those of small or medium-sized capital.

Guglielmo Carchedi (2001: 125)

Introduction

Competition policy constitutes one of the most characteristic policy fields in the organisation of modern capitalist economies. It comprises a regulatory area in which politics, law, and economics intertwine in complex ways. Competition laws and their enforcement typically pertain to the structure of market power and market integration. They set the conditions of market concentration and market access and define the scope of commercial freedom to conclude cooperative ventures for companies. Moreover, they mark the distinction between the public and the private realm. Situated at the nexus of trade, financial investment, industrial policy, contract law, and corporate governance regulation, competition laws are genuinely public market interventionists. The terms competition policy, competition law, and their enforcement are commonly used without further delineating, in terms of scope and content, what is actually meant. In practice, much of the terminology used in this field can give rise to confusion. In the US, the term ‘antitrust policy’ is used specifically to indicate the prohibition of cartels and other restrictive business practices. In Europe and other parts in the world, the more generic analogue ‘competition policy’ is more common. The boundaries with other economic policy fields are often blurred. The particular nomenclature and technical jargon of umpteen experts and practitioners that dominate the literature in the field make it not an easily accessible field to study. Moreover, apart from occasional high-profile cartel prosecutions or disputed mergers, competition laws and their enforcement generally do not attract broad political attention. This is mostly because the technicalities of competition policy may seem unexciting and trivial at first glance. However, behind seemingly detailed judicial and technocratic issues of laws and practices lurk important political questions regarding the distribution and concentration of economic power, wealth, and social justice, not only in domestic market situations, but also in an ever-more globalised world.

Competition policy can come in different shapes and sizes serve a broad range of conflicting interests. It is generally anchored in a polity, the competition authority, which forms part of the institutional architecture of the state. Depending on the degree of institutional independence from government steering, the competition authority can be equipped with more or less discretionary competences. Competition policy, in its broadest sense, can strive to make entire economies more competitive, or focus on competition between single enterprises. It can enable and constrain private market power, be more or less market-interventionist, more or less business-friendly, or more or less free-market orientated. The ambiguity of the nature of competition control – constraining and enabling market freedom at the same time – makes competition authorities a lobbying target of rival interests. On theoretical grounds, one can assume that a competition authority, similar to other government bodies, is receptive to the lobbying activities. Different constituencies have different stakes with regard to competition laws and their enforcement. Not all constituencies are always aware of their stakes and hold explicit political positions. Neither are all stakeholders mobilised and organised in the same degree.

This chapter argues that competition law enforcement needs to be understood as 'a product of the prevailing economic and political thinking of the times' (Gavil *et al.* 2002: 69), that is both constituted by and constitutive to the structural power relations in a political economy. In other words, it is a product of specific discursive and material practices. The prevalent political and ideological discourses, enforcement philosophies, established practices and procedural rules, and most notably, the political weight of certain social forces seeking to influence the competition law enforcers, constitute elements that interact in complex ways in a given market structure. The ideological outlook of these social forces is not a priori fixed, but partly contingent upon their position and the position of others in a given historical market structure. Dominant political discourses shape the broader political climate and the wider socioeconomic governance regime, and affect social identities. The social forces, which are directly involved and addressed in the governance of the competitive process, i.e. the representatives of companies with operations in the common market, can be expected to articulate their stakes in the most pronounced way.

The chapter starts with a few basic theoretical lines of thought with regard to the dynamics of competition on the one hand, and the general nature of competition laws in capitalist market economies on the other hand. It defines the parameters, adopted in this research, of the concepts of competition and competition laws. Moreover, the chapter unveils, on theoretical grounds, the interlinkages of ideological and interest-driven objectives of the different constituencies. It embeds these actors and their interests within broader historical macroeconomic structures and segues into theoretical questions with regard to how the process of competition affects political, social, and economic life in the contemporary context of globalisation.

> *There is probably no concept in all of economics that is at once more fundamental and pervasive, yet less satisfactorily developed, than the concept of competition.*
>
> Paul McNulty (1968: 632)

1.1 On the Dynamics of Competition in Capitalist Market Economies

Essential for understanding the nature of competition policy is the concept of competition and the particular dynamics that follow from the competitive process. Competition constitutes one of the most central concepts in most economic theories, yet it remains notoriously nondescript and vague. Intangible as it is, it is prone to different interpretations in different circumstances. In different cultural settings, competition can evoke different pictures and emotions. As Gerber pointed out: "One can 'see' something called 'competition' only where one's language, training and experience give that concept meaning." (Gerber, 1998: 10, emphasis in the original) Most dictionaries refer to competition as a force or process that gives rise to a relationship of contention and rivalry and in which at least two parties strive for supremacy, reward, or another form of gain. In a marketplace, those parties are usually corporations, striving for market supremacy.[3] In order to imagine competition one is inclined to conceive of corporations as unitary actors. In economic reality, however, corporations are also subject to internal divisions and power struggles, such as conflicts between company boards, shareholders, and labour, as well as external power struggles, which also involve the wider society as a stakeholder. Nonetheless, corporations generally display 'a pattern of coordinated collective action based on internal processes of control, monitoring, and discipline' (Morgan, 2005: 5), which justifies the perception of corporations as more or less discrete units in the competitive process. In order to grasp the dynamic nature of competition more aptly, the

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[3] Throughout this research, the terms enterprise, company, corporations, undertaking, or firm are interchangeably applied.

following section elaborates on the range of contrasting understandings of competition in a marketplace.

In general, if any branch of trade, or any division of labour, be advantageous to the public, the freer and more general the competition, it will always be the more so.

Adam Smith (1776: 420)

1.1.1 Competition as the Invisible Hand Increasing Wealth

Classical and neoclassical economic theories tend to associate competitive 'rivalry' in a market situation with economic progress and innovation, the creation of wealth, and the reduction of poverty. Yet, classical and neoclassical theorists hold fundamentally different conceptions of what competition is. The classical thinkers depart from a behavioural understanding, according to which competition is a guiding force in the process of economic exchanges. According to McNulty (1968: 634), competition in the classical sense is understood as analogous to the force of gravitation in physical science: through competition, resources 'gravitate' towards their most productive uses and, competition prices are 'forced' to the lowest sustainable level. In contrast, neoclassical theorists adopt a structural point of view, according to which competition refers to a particular imaginary state of affairs. The difference can be further outlined as follows:

From the camp of classical economic thinkers, Adam Smith probably represents the most prominent of all. He did not invent the concept of competition – other economists discussed competition in the economic literature well before him (cf. Rothbard, 1995; McNulty, 1968). His work, however, attached considerable intellectual and ideological significance to it. In the *Wealth of Nations* (1776), he generalised competition as a force that drives the aggregate interaction of self-interested market players to higher standards of wealth, a conception he captured with the renowned notion of the 'invisible hand':

He [the individual] generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. […] (H)ẹ intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. (Smith, 1776: 572)

Although Smith mentioned the invisible hand only once throughout his work, it became one of the central predications for his theories. Yet, as he did not offer a clear definition of competition, academic disputes on whether competition indeed constituted the much-discussed invisible hand are ongoing. Rather than engaging with this discussion, it is merely important here to illustrate how most of the dominant contemporary economic theories depart from Smith's positive sum idea of competition, which assumes that free competition 'is advantageous to the great body of the people' (ibid: 623). According to Smith, the rivalrous nature of free competition obliges 'every man to endeavour to execute his work with a certain degree of exactness' and 'animates the exertion of a few men of extraordinary spirit and ambition' (ibid: 963).

Contemporary neoclassical economic theories often build on the premise that the aggregate endeavour in long-term survival and prosperity of individual corporations moves 'the economy to higher levels of productive efficiency and technological innovations, and increasing the power and capabilities of an economy' (Gilpin, 2003: 18). Yet, they deviate in their definition of what competition is. In the mindset of neoclassical economists, the process of sorting out the efficient and the innovative from the inefficient and the unprofitable results in 'perfect competition', a concept coined by Antoine A. Cournot (1801-1877). Perfect competition refers to a theoretical, imaginary state of affairs that is also sometimes referred to as *pareto equilibrium.* It embodies the result of a process after which a plethora of discrete individual buyers and sellers has striven to maximise their profits and utilities. This state of affairs entails the efficient allocation of resources, and the efficient production and distribution of products benefiting the ultimate buyer, i.e. the consumer. Perfect competition builds on the assumption that no buyer or seller has had the power to influence the market conditions to his/her own benefit. Moreover, all buyers and sellers have been in the fortunate position of having perfect information about the costs and demand situation, and all have been free to enter and leave the marketplace. The concept of perfect competition is generally juxtaposed with a monopoly situation in which no competitors are left to compete, while the degree of competition is assumed to oscillate between these opposing ends. Yet, as McNulty (1968: 642) rightly noticed, the utopian situation of perfect competition actually refers to 'the *absence* of competition in quite as complete a sense as does pure monopoly where no further competition within the industry is possible'. This is because perfect competition implies a situation in which no further welfare increases are possible, neither for buyers of resources, sellers, nor the final consumers.

(Neo-) classical economic theory essentially configured the concept of competition. As the following section illustrates, competition was also central in Karl Marx's work. However, he held quite different assumptions on the creation and distribution of wealth resulting from the competitive process.

> *Free competition brings out the inherent laws of capitalist production, in the shape of external coercive laws having power over every individual capitalist.*
>
> Karl Marx (1906, Part III, Chapter 10, Section 5)

1.1.2 Competition and the Extraction of Surplus

Although Karl Marx does not offer a clear definition of what competition is, nevertheless, his views were, as the above quote illustrates, that the very process of competition brings the inherent systemic contradictions of capitalism to the fore. He portrays competition as a force that exerts coercive pressure on 'every individual capitalist', irrespective of his 'good or ill will' (Marx, 1906, Part III, Chapter 10, Section 5). In his theory, the 'feverish agitation' of price and product rivalry expands to the markets of the whole world and forces capital owners to reduce the costs of production in order to increase the overall extracted surplus. Thus, from a Marxist understanding, the wish for enhanced surplus creation and securing profits in a competitive environment constitutes one of the key reasons that encourage capital owners to expand in both size and scope into (geographically) new markets for resources and labour. To illustrate this in more detail: a competitive position can be achieved by improving the quality of the products in order to sell more than competitors, and thus drive them out of the market. Another way is to lower prices and reduce profit margins in the hope of compensating initial profit losses by higher sales levels. According to this latter option, competition becomes a force 'robbing capital of the golden fruits of its power' (Marx, 1847). Lower prices can also be realised by increasing economies of scale, i.e. by improving technological innovation and implementing more rationalised production processes, which replace labour-intensive and therefore, costly forms of production. Marx forecasted that the more competition intensified, the more capital owners would seek to beat down the price of labour, and/or the more they would seek to improve the efficiency of the production process through labour-saving innovations. Eventually, the command over abnormal quantities of unpaid labour becomes a source of competitive strength (Marx, 1906, Part VI, Chapter 20). Competition, thereby, is in essence about the extraction of surplus and the accumulation of capital.

Competition does not only take place *in* markets, but also *for* markets, thus prompting a process of commodification. Commodification indicates the subjugation of ever-more segments of human existence and human interaction to the logics of the market and the mechanism of price as a means of exchange. This ongoing process of commodification is the direct result of the coercive nature exerted by competition. In order to expand market shares and to be able to invest in more efficient production technologies, capital accumulation becomes a necessity. Consequently, the competitive process leads to the accumulation of capital into ever-fewer hands, and in its extreme form the oligopolisation or monopolisation of product markets. To put it metaphorically, competition forces market players to swim or to sink, and competition takes place only between the swimmers. Smaller, weaker, or simply less successful competitors lose, and competition eventually minimises. Monopolies – the ultimate form of economic power concentration with no competitors left – concomitantly reveal the inherent contradictions of capitalist systems. They constitute part of the reason why Marx prophesied that capitalism as an economic system was destined to fail. However, Marxist theory did not take into account the development of state-imposed competition laws in modern capitalist economies, which seek to stabilise the competitive process and to combat monopolies. Thus, in a wider sense competition laws secure the continuous reproduction of capitalist socioeconomic power relations. They obviate what Marx expressed with the much-cited phrase 'capitalism contains the seeds of its own destruction'.

Marx' notion with regard to the inborn contradictions of capitalist markets offers a good starting point to add a critical note to the concepts of competition, and competition policy. Contrary to the Adam Smith type (neo-) classical allusions that competition instigates wealth, it is important to realise that, in reality, competition does not only produce winners. According to Thurman Arnold, a US antitrust official in the 1940s, 'the economic philosophy behind antitrust laws is a tough philosophy as competition means that someone may go bankrupt. Competition laws do not contemplate a game in which everyone who plays can win' (in Kolasky, 2002b). Even though this is not to deny that competition may indeed lead to increased levels of wealth, it is important to realise that not everybody can profit equally from competition. The important question therefore is for whom wealth increases: *cui bono?* As Sklar (1988: 88) pointed out, there is no such thing as a politically innocent capitalist market. Competition touches upon important political questions of income distribution. It erects a hierarchy of socioeconomic relations marked by inequalities in wealth and power, which extend from the individual, groups or classes, to geographical regions in the world. Moreover, competition constitutes a practice that is inherent to capitalist free markets. It takes place among the owners of capital and labour alike. In modern capitalist economies, competition has permeated various social spheres. According to Bourdieu (1998), the logic of competition has extended to individuals themselves. The individualisation of the wage relationship, individual performance evaluations by means of salary increases and bonuses, and individual career paths are examples thereof. As Bourdieu put it, 'individual wage labourers are held responsible for their sales, their products, their branch, and their store as though they were independent contractors' (ibid).

Laws protecting competition keep capitalism alive by removing restraints that inhibit competitors from competing. Consequently, competition law is both *constitutive to* and *constituted by* capitalist market regimes. To use a metaphor again: if the process of competition is the engine of capitalism, competition laws are the lubricating oil that assures the functioning of the engine. The mere existence of laws that protect competition entail a disclaimer with respect to the workings of unrestricted free-market logics. The rule of law is constitutive to a capitalist system. Capitalist markets do not originate in law, however. Once established 'the rise, the development, and the stability of the capitalist order, be it *laissez*-faire capitalism or regulated capitalism, go hand in hand with the rise of a legal order' (Sklar, 1988: 87). The overarching purpose of competition laws is therefore to ensure the endurance and stability of the capitalist mode of production by forcing market actors to engage in a constant situation of rivalry. The next section further elucidates the political nature of competition laws and their enforcement.

Antitrust will always be a product of the prevailing economic and political thinking of the times. The ubiquitous influence of political and economic thought throughout antitrust's history, combined with the longevity of some antitrust precedent, as well as the conflicting ideologies […] guarantees that antitrust will continue to provide an arena for the clash of contemporary ideas on governments and markets.

Gavil et al. (2002: 69)

Every cultural mode of thought has its own concepts of market, competition, economy in general, property, collectivity of goods, trust and decency. Unless we understand, and respect, these other modes of thought, we are not entitled to superimpose our concepts of market and competition, and our understanding of economy, belonging and efficient behaviour upon other, non-Western cultures. […] There are economic meta-concepts, and meta-values, to be drawn from comparison, but they are not necessarily ours.

Fikentscher (2002: 14)

1.2 On the Political Nature of Competition Laws and Practices

Legal and economic commentators, as well as practitioners working in the field of competition law often neglect or underrate the political core of competition policy. The view that competition policy constitutes a regulatory field with clear-cut laws and practices is predominant. In line with the tradition of neoclassical liberalism, contemporary authors of competition law textbooks offer definitions of competition policy in terms of expected beneficial outcomes for a smooth and effective running of the market. In the absence of competition policy, markets are considered to be performing at a suboptimal level. One example of this is Motta (2004), who defines competition policy as 'a set of policies and laws ensuring that competition in the marketplace is not restricted in such a way as to reduce economic welfare' (Motta, 2004: 30). Similarly, Baker (2003: 6) defines antitrust law as being concerned 'with the loss of competition on quality and innovation as well as on output and price'. Efficiency-based definitions are also common among political scientists. As Damro (2006b: 867) notes, competition policy is 'designed to ensure and manage competition, which helps to determine opportunities and incentives for consumers and producers' and without which markets become staid and resources inefficiently allocated. Underpinning these definitions is a conviction that competition laws are instrumental to the efficient allocation of scarce resources, and that there is one common purpose underlying all kinds of competition control, namely to increase 'economic welfare'. This is problematic insofar that the benefits of competition law enforcement are neither directly observable nor quantifiable, nor can everyone equally profit from the alleged increase of economic welfare. One can only guess the overall impact of competition policy based on counterfactual reasoning.

Similarly, those enforcing competition laws also tend to downplay the political nature of competition laws by positing a ‘taken-for-granted’ problem-solving understanding, mostly to avoid the involvement of (other) government actors and uncalled-for stakeholders. Former EU Competition Commissioner Mario Monti, for example, emphasised that competition policy was ‘a matter of law and economics, not politics’ and that unwarranted political pressure weakened its effectiveness and undermined public confidence in the combat of ‘objectively harmful practices’ (European Union, 2001). Yet, competition policy is not a politically neutral regulatory field in which political authorities naturally perceive problems and solutions in similar ways, and crystallise the ‘best’ and most effective institutional and regulatory solution to a problem. The often-made trilogy of ‘politics, policy, and polity’ in the English language is also confusing as it separates ‘policy’ from ‘politics’, and thereby gives the impression that a policy is no longer politics. In the French and German language, the political nature comes to the fore more clearly: competition policy is steadfastly expressed in terms of *‘la politique de la concurrence’,* or, *Wettbewerbspolitik*, respectively. Conceptions of competition policy denying its inherent political character are political themselves, as they disguise the underlying conflicting interests regarding the scope and content of public intervention in competition matters. As competition laws are located at the boundaries of the private and the public domain, they represent the visible hand of the state. They determine the extent to which the organisation of the economy is subject to state command and free-market processes. At the same time, they protect market actors from unrestricted state power and arbitrary public market intervention.

In order to analyse the political nature of competition policy, one needs to distinguish between competition laws as they are designed, and as they are enforced. This dissertation builds on the premise that law is frozen politics, and that competition law represents the outcome of a political struggle. It touches upon the questions Lasswell (1956) posed as ‘who gets what, where, how, and when’. There is no such a thing as the one and only competition policy. The substantive content of competition laws either explicitly or implicitly integrates political perceptions and values with regard to the organisation of the marketplace. It generally anticipates certain consequences regarding the distribution of wealth in society and forms part of a broader vision of state-market relations. Each vision on how to organise the market domain inevitably contains political considerations. In state-controlled markets, governments or state institutions determine the conditions of economic exchange, either by fullscale centralised, top-down state planning, or by price regulations, or by intervening in the interplay of supply and, demand, or combinations of all of these. In contrast, in (more or less) free markets, the state guarantees private ownership over the means of production and the distribution of goods, while trade is the prerequisite of the self-organisation of private actors. In between, varying degrees of state-market intervention are possible, which in the literature are distinguished as types or variants of capitalism. They range from 'embedded' versus 'disembedded' market economies (Polanyi, 1944), to coordinated versus uncoordinated liberal market capitalism (Rhodes and Apeldoorn, 1998), Anglo-Saxon and Rhenish capitalism as the regional variants (cf. Albert, 1993; Hall and Soskice, 2001; Crouch and Streeck, 1997), as well as state-led, *dirigiste*, or governed capitalism, corporatism, or negotiated economy (Streeck and Schmitter, 1985; Molina and Rhodes, 2002). Each of these variants is accompanied by different perceptions on competition laws and enforcement practices. The interpretation and enforcement of competition laws can problematise or protect economic power (concentration), be more or less pro-market orientated, enhance or restrict competition among market players, or take the interests of labour and other groups into account. For example, competition authorities may deliberately choose to police private market conduct that is considered anticompetitive, or leave things as they are and refrain from an interventionist strategy. Consequently, the social purpose of competition law enforcement differs throughout time and from place to place. It is never static, but cumulatively builds up through the production of case law, which makes it an area with a strong evolutionary character. The next section identifies the stakeholders of competition laws and links their interests to the wider macroeconomic market structure.

1.3 Identifying the Main Stakeholders of Competition Policy

The formulation of competition laws and their actual enforcement is always the result of a combination of factors. Groups of stakeholders can seek to exert influence on the formulation of competition laws, the overall development of a policy on how competition authorities should enforce these laws, as well as on the decision making on a case-by-case basis. In addition, dominant discourses that have established common sense understandings, customary enforcement practices, and procedural rules in a given legal tradition, as well as influential theoretical schools of economics and law have important repercussions on the policy objectives and conceptions of competition officials on how to interpret and enforce competition law. The stakeholders, in theory, are manifold, and their interactions complex, rendering competition control a sensitive area where a great variety of interests clash. This provokes interesting questions with regard to which group of stakeholders has what kind of interest and why. There is no elegant and succinct theory that captures and explains the peculiarities of the politics involved in competition control. The addressees of competition law, i.e. (private) enterprises, have an ambiguous and even paradoxical relationship with competition laws and their enforcement. This is because competition laws are located at the interface of both enabling and constraining private market power. Moreover, enterprises have contradictory needs. Depending on the competitive strength and the wider macroeconomic situation, large, small, or medium-sized enterprises (SMEs), transnationally operating corporations (TNCs), corporations with an import- or export-competing focus, or corporations with a domestic market orientation, may stand poles apart in their preferences with regard to competition control. In addition to the stakes of corporate enterprises, one can distinguish between the Commission and the European Courts, the wider community of public and private competition practitioners, labour interests, and consumer rights organisations that may seek to influence the agenda setting and shape the interpretations and enforcement of competition laws. The following sections disentangle these different stakeholders and theoretically explain their main interest in competition laws and their enforcement.

Even if oligopolies are not always and not necessarily the most efficient enterprises, the most efficient enterprises are usually oligopolies. […] Owing to their economic power, oligopolies have their ways and means to get their interest defined by international institutions as well. This process of representation is almost never immediate and transparent. […] Yet, it is the oligopolistic sector that, directly or indirectly, dictates the rules of the game.

Guglielmo Carchedi (2001: 121)

Business can and does contribute to shaping competition policy. Any major policy initiative is preceded by consultation.

Neelie Kroes, EU Competition Commissioner (2006c)

1.3.1 Theorising Corporate Stakes in Competition Policy

There are no universal corporate preferences with regard to competition laws and their enforcement. In principle, every law or regulatory rule imposes constraints on corporate economic freedom. The effort to comply with a law always causes transaction costs. In the field of competition laws, the situation is much more complex than this. Neoclassical theories on competition policy build on the assumption that a market is composed of a number of discrete corporate units that are equally free to compete. However, even though a company may be formally free to enter competition, competition does not take place among equals. Competition erects market hierarchies of unequal economic power. The balance of power is by definition skewed and competition with equally matched companies is a chimera. In the vicious struggle to secure profits and economic survival, companies seek to evade the vicissitudes of the competitive process or even completely eliminate competitive pressures. In order to gain competitive strength and to avoid being outcompeted by competitors, they may feel inclined to engage in collusive agreements with one another. Besides cartel agreements and other restrictive business practices, attempts to monopolise the market through mergers and acquisitions can form a corporate strategy to secure a competitive position. Competition and the attempt to monopolise the market are irreversibly coupled, or as McNulty (1968: 642) wrote, ‘how may a business firm be expected to compete without monopolising?’

Large and small enterprises alike can adopt anticompetitive practices. Nonetheless, companies have contradictory stakes with regard to the desirability of competition laws. In essence, ‘a policy of free competition fosters objectively the powerful economic units, that is, the oligopolies’ (Carchedi, 2001: 126). The preservation of free competition is in the interest of those determining the standards of competition for (usually) smaller, less competitive companies, be it in terms of price, product innovation, advertising expenses, or be it in terms of organisational or distributional logistics. Outcompeting weaker companies works systematically to the advantage of economic survivors. The situation is more delicate for corporations that have to face dominant corporations. The pace of competition set by those able to compete may thwart their existence. Comparatively weaker enterprises may use market-sharing or price-fixing cartel agreements and other collusive practices to combine forces against dominant competitors. More competitive or oligopolistic companies have a stake in the prohibition of these practices in order to maintain their status quo. At the same time, the latter may also abuse a dominant position and adopt anticompetitive practices to secure their position. Weaker companies then have a stake in the protection from the anarchy of free-market play. It follows that competition laws are zero-sum in nature: for some companies competition laws can function as a constructive force, while imposing constraints on the economic freedom of others. Alternatively, what constitutes a reduction of market freedom for one market player may benefit another. The companies on the winning side, however, are those setting the pace of competition for others, i.e. the dominant and mostly large companies. Concomitantly, these companies are genuinely interested in the right to compete freely, undisturbed by state interferences and privately erected market barriers by competitors, such as cartels. In this vein, there is a conflict of interests between corporations from different sectors.

These interests are generally contingent upon a range of different factors, including the degree of market openness and the broader macroeconomic market structure, the integration of companies and/or business sectors in the world economy, and their trade orientation. Companies with a strong focus on national market economies, mostly small and medium-sized enterprises (SME), or companies that have to compete with cheaper imports, i.e. import-competing enterprises and or sectors, are vulnerable to the exposure of fierce outside competition (see also Van Apeldoorn, 2002). In addition to import-quota or other measures, they are more likely to seek protectionist competition policies, rather than competition policies that promote free competition and open economic borders (for trade policies, see also Milner, 1988). A protectionist orientation in competition law enforcement can take different forms. It can imply a less stringent interpretation of competition laws by tolerating cartels and other restrictive business practices that lead to reduced corporate rivalry, and hence a reduced need to compete with other (national) competitors. It can also mean a discriminatory enforcement strategy, i.e. a beneficial approach towards domestic corporations at the expense of foreign competitors, or towards certain domestic economic sectors by granting state aid, tax reductions, or guaranteed procurement. Whether or not import-competing companies voice their preferences with regard to a protectionist competition policy depends on the degree of market openness and their exposure to outside competition. Small and medium sized corporations with a domestic focus constitute the most vulnerable of all. In contrast, companies focusing on exporting their products to other markets seek free(r) competition, and hence more stringent competition law enforcement. Although corporations with an export-orientation may still prefer domestic barriers for foreign competitors as a way to secure their competitive strength, they seek open markets abroad. Laws protecting free competition, preferably at the multilateral stage, are in their interests as they inherently protect the right to enter (geographically) new markets and to expand in scale and scope. It follows that the more corporations are engaged in transnational transactions, the more likely it is that they share a common interest in competition laws protecting the right to compete, regardless of where they are headquartered and the sectors in which they operate. Free competition offers a way to expand market shares and take advantage of the opportunities offered by economic globalisation.

The term transnational corporation (TNC) juxtaposes the terms multinational corporation (MNC) and international corporation. In the literature, the terms transnational, multinational or international corporation are sometimes used interchangeably. While international usually refers to relations between states, the term multinational corporation (MNC) is often misleading, as it implies a corporation with multiple nationalities and strong attachments to national economies. The term transnational, in contrast, specifies actors, networks of actors, processes, and institutions established beyond national boundaries. Those controlling transnational corporations are such actors. They act as if national boundaries do not matter, or as Sklair (2001: 2) wrote, they do not derive their power and authority from the state. Therefore, the term transnational corporations more aptly captures that those representing these corporations are 'not dominated by nation states economically, politically, or in terms of culture and ideology', regardless of the fact these corporations as legal entities may have several nationalities and be composed of subsidiaries which focus on national economies (ibid: 48).

The emergence of transnational corporations (TNCs) goes together with the phenomenon of enhanced economic globalisation. Economic globalisation can best be conceptualised as the dialectical dynamics between the 'expansion of market relations and the freedom of capital to maximise its accumulation potential' and the structural transformation of the world economy by the pursuit of economic liberalism (Overbeek, 2002). The nature of economic transactions was changed significantly by the steady course of worldwide trade and capital liberalisation that accompanied the development of new technologies and communication possibilities, as well as the improvement of transport. These changes implied that vertical trade increasingly replaced traditional horizontal trade in finished products. The different stages in the production and distribution chain were completed by companies and subsidiaries located in different regions of the world. TNCs embrace these structural transformations of the world economy. Despite the global scope and impact of their activities, most of the large TNCs find their origin in a few advanced industrial countries of the OECD, most notably the US, UK, Germany France and Japan, where they also tend to have their headquarters (Goddard, 2003: 440).

TNCs are not only a product of economic globalisation, but also one of its driving forces. They have a genuine interest in the right to free trade and access to new (cheap) labour markets, markets for natural resources, as well as new product markets. The hierarchical network organisation of affiliated companies allows TNCs exerting controlling power over a national economy, and to exploit their bargaining leverage versus states, workers, local competitors, and network affiliates (cf. Jones, 2000). It allows TNCs to reduce transactions costs and to focus on high value-added activities, while passing on riskier or non-essential activities, to subcontractors, who often fully depend on them. The vertical integration of foreign affiliates into the hierarchical network structure allows TNCs to exploit transferpricing opportunities at the expense of a host country's tax revenue, as well as competition. The broader ideology of neoliberalism suits the interests of those in control of transnational enterprises. Neoliberalism can be defined as 'the politics constructed from the individual, freedom of choice, the market society, *laissez-faire*, and minimal government' (Overbeek and Van der Pijl, 1993: 15). Neoliberal economic policies promote further market liberalisation in terms of trade and financial services, and overall deregulation and/or re-regulation of national economies, as well as the privatisation of state-owned enterprises. Whereas smaller and medium-sized enterprises, together with corporations with a predominant domestic, import-competing focus, tend to be less free-market orientated and seek protection from (foreign) competition, especially from large transnational corporations, the latter tend to push for an overall neoliberal restructuring of the economic and political conditions that obstruct processes of capital accumulation. In this vein, TNCs, which operate mostly within the EU, will seek neoliberal economic policies foremost within the realm of the common market. More globalised TNCs will seek the institutionalisation of free-market logics also in the multilateral realm (see also Van Apeldoorn, 2000: 44). Yet, the preference for a neoliberal outlook does not necessarily imply minimal government in the enforcement of competition laws. Corporations operating at transnational level have a stake in the elimination of all sorts of market barriers. Domestic competition laws privileging domestic companies, the absence, or then underenforcement of competition laws, run counter to their interests.

In addition, companies involved in economic transactions across national borders have a genuine stake in reducing transaction costs evolving from different jurisdictional regimes. Fast and business-friendly procedures ensuring a great deal of legal certainty, i.e. any form of disadvantageous regulation, are to the fore of their interests. Concerning competition laws, this implies that companies in general prefer a centralised enforcement regime, or alternatively, harmonised competition laws and enforcement procedures. TNCs particularly have a stake in reducing the necessity to comply with competition laws of different jurisdictions each of which handles different time schedules and information requirements. Jurisdictional overlaps in the decision making of competition authorities may lead to judicial conflicts, and hence increase transaction costs.

The power balance between TNCs vis-à-vis government institutions of geographically defined states is fundamentally skewed. Underpinning the activities of transnational corporations is a fundamental tension as national jurisdictions face structural limitations in their jurisdictional reach to rein the activities of TNCs, which range from intra-company trade with affiliates located in other countries, transfer pricing, strategic alliances, joint ventures, and mergers and acquisitions. To put the problematic boldly: business is going global and national jurisdictions remain local. As a direct result of the complexity and intertwining of economic interests that accompanies economic globalisation, discrete enterprises with clearly separable interests are increasingly difficult to identify. To illustrate this with an example: a merger may result in the acquisition of more than 50% of the share capital of another company. However, once a listed enterprise acquires 30%, and a few years later another 21%, the takeover is more difficult to trace (Cox and Watson, 1995: 321).

Those in control of (large) TNCs seek to maintain cosy relations with political decision-makers and influence the overall course of competition laws and their enforcement. The structural power of transnational corporations is reinforced by their capability to exit national economies and locate their production factories elsewhere, in particular in the manufacturing sector. Against the backdrop of regulatory competition in the attraction of foreign direct investment, political authorities are likely to be predisposed towards the interests of more powerful corporations. Corporate lobbying in the field of competition policy is a highly uneven process. Representatives of more powerful market players, mostly TNCs, have a comparative advantage in communicating their interests. They generally provide for the necessary financial and communicative capacities to hire contract lobbyists to address decision-makers, rather than liaising with existing business interest organisations first. Due to organisational difficulties, certain interest groups remain structurally excluded. Labour and consumer organisations or environmental groups face greater organisational costs when it comes to communicating their interests in competition laws and their enforcement. They generally provide less information about the policy process and the issues at stake, or are too heterogeneous in composition so that they are unable to formulate common positions. This is particularly the case for consumers, but increasingly more so for labour. Moreover, the interests of the two groups are not congruent: while labour organisations may want to see a merger blocked because it leads to employment reductions, consumers may welcome the synergy effects that result in lower prices or improved product quality. Furthermore, due to confidentiality reasons, labour unions and consumer organisations have hardly any access to pending competition cases, which structurally places these groups at a disadvantage in getting themselves heard on a case-by-case basis.

The particular situation of EU competition law enforcement further enhances this. Those directly subject to the EU competition authority, i.e. the European Commission, are corporations engaged in transborder activities displaying a significant Community dimension, hence, foremost but not exclusively (large) transnational corporations. The centralisation of law and decision making at EU level provided corporate interests with a welcome avenue to make their preferences heard and to transcend traditional business lobbying associations. As Van Apeldoorn (2000: 4) notes, leaders of TNCs gather in elite networks 'to reflect upon and discuss their medium and long term interests vis-à-vis the state and other groups in society, and work out common political strategies on the basis of which they seek to influence EU governance'. In contrast, small and medium-sized enterprises with a domestic focus generally fall under the jurisdictional authority of national competition authorities. Even though they share a common interest in curbing the power of the more dominant competitors, as a result of the institutional organisation, lobbying the Commission does not seem self-evident.

1.3.2 Theorising the European Commission

Even though the Commission's ultimate *raison d'être* is not spelled out in the Treaties (Cini, 1996: 19), as the Community's executive body it occupies a central position within the institutional architecture of the EU. EU competition law enforcement belongs in the domain of the European Commission and its Directorate General of Competition, which enjoys far-reaching discretionary authority in the field of competition law enforcement. It is, as it is often claimed, investigator, prosecutor, judge, and jury when taking competition decisions. It takes decisions that are binding to both private and public companies, and it can even intervene in Member State's government subsidies to private actors and can demand the privatisation of state-owned industries. In the case of a disagreement with the Commission, Member State governments and private actors can appeal before the European Courts, the *Court of First Instance (CFI)* and the *European Court of Justice (ECJ)* (see Chapter 2 for a detailed account on the respective powers). In addition to setting the agenda for the *Council of the European Union* by launching new policy initiatives for the Community pillar as specified in Article 211 (TEC), the Commission also enjoys significant legislating powers in competition matters. It can shape certain regulations without the approval of the Council or the *European Parliament (EP)* (see Chapter 2 and Chapter 4). By virtue of the Commission's institutional position and centralised powers, as well as its expertise and accumulated knowledge of legal processes at EU level, it constitutes an important actor, sitting in the driver's seat in determining the course of competition policy and enforcement.

In the literature, the Commission received a broad array of different labels, ranging from a policy broker, a think tank, an integration catalyst, to a political and administrative hybrid (cf. Nugent, 2001). Composed of officials recruited from Member State governments and the private sector, the Commission's identity is difficult to pin down. Often, Commission officials rotate (back) to the private sector again. To perceive it as a unitary actor is misleading, even though decisions and policy initiatives are taken by the *College of Commissioners*. Different DGs have different policy priorities, and different lobby groups target the Commission's 6,500 officials involved in the policy process (cf. EU LobbyNet, 2007), which increases the likelihood of internal disputes. Commission officials interact with a wide array of interest groups and lobbyists. Estimates suggest that the total number of lobbyists in Brussels amount to more 15,000 and 20,000. Professional lobbyists officially accredited at the EU amount to 13,000, compared to 25,500 lobbyists at the US Congress (ibid). More than two-thirds represent business associations, individual companies, sectoral groupings, or lobbying alliances from several companies established to influence a specific legislation, i.e. actors who usually have the means to make their preferences heard. To push forward their views, business associations formulate position papers and commentaries serving the purpose of inducing broader policy or regulatory changes, while individual representatives from the business community or their corporate lawyers have a stake in influencing the Commission's decisions in the day-to-day enforcement practice. Other actors that may seek to influence decision making or policy ideas of Commission officials are labour and consumer organisations, environmental pressure groups, Member State governments and competition authorities, as well as other Commission Directorate Generals (DGs) and EU institutions.

Against the background of the massive presence of corporate lobby groups in Brussels, the important question to be asked is, to what extent the Commission's DG Competition polices the marketplace, and to what extent it acts as the incognito voice of management boards. The critical reader will search the dominant existing literature of legal and economic scholars in vain for a clear answer to that question. Arguably, the Commission, as one of the most central EU institutions, may always be guided to some degree by institutional self-interest and the wish for self-preservation. The expansion of Commission competences into new areas of regulation increases the Commission's prestige and status as a whole, or that of individual Commission officials. It follows that the Commission, from an institutional point of view, is genuinely interested in the enhanced centralisation of new competences to EU level. However, conceptualising the Commission as merely a power-seeking organisation, vis-à-vis other EU institutions and the Member States, would not be conclusive for understanding the actual substantive nature of the policies it promotes. The Commission does not formulate competition policy objectives in a social vacuum. Moreover, the 'traditional' picture of the Commission as a passive receiver of the views held by lobbyists roaming its corridors also does not hold. The Commission also carries out active consultation, or contracts think tanks and epistemic communities to carry out research projects that subsequently inform the policy making process. One can presume that Commission officials become imbued with the ideas and concepts of dominant business interests. This means that market actors and political authorities form part of the same 'integrated ensemble of governance, a state-market condominium' (Underhill, 2003: 765), according to which Commission officials share more or less identical views with corporate representatives and their lobby groups. Moreover, the Commission's DG Competition forms part of a broader legal community composed of private practitioners and academics working in the field of competition law. The legal community can constitute a privileged source for regulatory inspiration and co-defining the direction of EU competition law enforcement. As Schmidt (2002: 247) noted, the Commission is not only seeking and receiving advice from outside, it is also actively creating discursive communities. In fact, Commission officials 'are surprisingly prolific in their scholarly writing' and in shaping the competition discourses (Schepel and Wesseling, 1997: 179-180). In search of advice on technical matters and for feedback on policy proposals, the Commission hosts important conferences and organises expert consultations, which are attended by legal and economic experts, academics, and corporate lobbyists. At the same time, its position as a 'policy proposer' allows it to exert considerable gate-keeping powers on policy-making.

In order to grasp better the context in which a political authority, such as the Commission, enforces competition laws, it is important to consider the underlying political discourses that set the parameters in which public policies and political institutions are framed. The Commission or the Commission's DG Competition forms a part of those social forces that promote a shared understanding of how to address anticompetitive conduct and how to interpret competition laws. Dominant political discourses can function as a cognitive filter in which political identities are formed, interests articulated, and the political battles carried out. They set the horizon of meaningful social practices and validate a particular understanding of the past. Through interacting with business representatives, the legal community, and other stakeholders, the Commission reflects and shapes such a discourse and thereby contributes to a discourse gaining the interpretative upper hand. Whether or not a discourse promoting certain ideas and policy solutions becomes dominant and thus articulated by the Commission, is not an automatic, 'god-driven' process, but spurred by social forces with particular interests. Nonetheless, 'ideas cannot be simply reduced to interests, nor can they be reified as existing prior to practice' (Van Apeldoorn, 2002: 14). This is not to give primacy to the power of political ideas above material interests. Rather, a discourse may be embodied or internalised in social practices and become a material force. Norman Fairclough (2003), interweaves the conceptual pairing of the material and ideational into a complex and interdependent whole, at least in ontological terms. He argues that there is a dialectic interaction between what he differentiates as the 'constructive' and the 'construal': the construal refers to the ideas and images promoted by a discourse, and the constructive to the remodelling of such construals into social practices. Moreover, although aspects of the social world such as social institutions are ultimately socially constructed, once constructed they are realities, which affect and limit the discursive construction of the social (Fairclough, 2003: 8).

Following from this, one can distinguish different phases or moments in the evolution of a dominant discourse: a deconstructive, a constructive, and a consolidating phase. In the deconstructive phase, articulators of the new political discourse problematise existing ideas and views and promote new ones. Once these new ideas and views become dominant, they are given shape by structural adjustments and the discourse enters a constructive phase. In the consolidating phase, the discourse becomes commonsensical and deeply engrained in institutional practices, and thus, reaches a state of hegemony above alternative discourses. The identification of a dominant discourse surrounding EU competition policy helps to acquire a more comprehensive understanding of the social and historical embeddedness of particular conceptions about the institutional design, scope, and content of competition laws and practices (cf. Overbeek, 1999 on the ascendancy of neoliberalism as a hegemonic project).

We also applaud the work performed by national and international bar associations to advance scholarship in the field [of competition policy]. [...] We welcome commentary from the academic community. And we are wise to consider carefully the perspectives offered by business organisations and individual opinion leaders within the global business community.

Charles James, Assistant Attorney General for the DoJ Antitrust Division (2001a)

1.3.3 Theorising Private Competition Practitioners and the Legal Community

The legal and economic community is frequently underrated as a political force in the enforcement of competition laws. With the expansion of competition regulations and the growing body of case law, legal and economic experts such as judges, lawyers, accountants, tax consultants, or notaries, as well as academic scholars, play an increasingly important role. They are not only involved in the enforcement of competition laws, but also in promoting the legal discourse, by means of professional commentaries that sustain the conceptions used and provide for a self-referential interpretative framework (cf. Schepel and Wesseling, 1997). The increasing complexity and refinement of competition law that parallels the growing number of mergers and other types of intercompany agreements, as well as unilateral corporate conduct, further adds to their prominence as a major source of specialised counselling for corporations. Legal and economic scholars based at universities co-determine the technicality and specificity of competition laws and their enforcement, how legal problems are defined, as well as the range of possible solutions for them (ibid: 170). They teach and train competition experts the legal and economic concepts, which designate certain types of business conduct as anticompetitive. They regularly comment and write about case law interpretations in specialised academic journals and suggest new competition policy directions. Moreover, corporate lawyers and economic experts working at commercial professional service companies, often also called law firms, not only advise and represent private enterprises in competition matters, but they also perform a significant role in the formulation of competition law and policies.

Practitioners from the private sector and academia provide intimate knowledge on competition laws and practices. They work on the same competition cases as public (Commission) officials – although often representing antagonistic positions when defending or advising a corporate client. Professional linkages between private and public competition experts ‘produce distinct policy dynamics in which legal ends, legal criteria, legal norms and legal participants pursue a policy that has its own logic' (Wilks and McGowan, 1996: 244). Public and private competition experts belong to the same interpretative competition community. They gather at the same conferences and workshops and develop shared legal practices. Thereby, they are socialised to speak, write and think about competition law technicalities in the same idiosyncratic way (Slaughter, 2004: 253). They wield a high degree of homogeneity and cohesion in norms and views, despite the fact that they often bring forth competing legal interpretations (cf. Schepel and Wesseling, 1997). Exchanges of professional personnel from the public and private sectors are common and many private professionals hold part-time tenures at universities. In that sense, the legal competition community 'personifies the interweaving of market, state, and academia (ibid: 182). Career paths in the sector of legal practitioners often depend on academic prestige, and vice versa, practical experience feeds into doctrinal writings. Universities provide for the intellectual infrastructure which creates a pool of well-trained professionals (Monti, 2003b).

As representatives of the interest of corporate clients, private experts perform an intermediary and connecting role between public authorities and the private corporate sector. They transmit principles developed at the Community level to top management of the business community, and they are therefore likely to be involved when competition policy is drafted and reformed. They indirectly formulate the business input into competition policy making (Wilks and McGowan, 1996: 244). At the same time, the self-referentiality of their legal interpretation and their fundamental stake in keeping the area of European law as the preserve of their profession renders the legal community a political force also in its own right. For this reason, Shapiro and Stone (1994) conceptualised these experts as a 'policy community'. This policy community has 'institutionalised certain perspectives at university law schools', also encompassing the presence of economists and economic theories. This has created an increased reliance on and use of econometric modelling in substantiating anticompetitive corporate conduct in the actual enforcement. The presence of US law firms has further enhanced the use of economic thinking in the analysis of anticompetitive conduct. With the ascendancy of the Chicago School of Law and Economics, US antitrust enforcement relied on a more sophisticated economics-based approach from the 1980s onwards (see Chapter 2).

The marked presence of professional law companies is inherently linked to the European integration processes on the one hand, and the growth of transnational corporations engaging in economic transactions in different jurisdictions simultaneously on the other. The enhanced pace of Community law production triggered by the Single European Act (SEA) in the mid-1980s and the creation of the European Union in the early 1990s, created new avenues for private professionals to offer their services to corporations operating in the common market and beyond. Enhanced cross-border corporate activities created a huge market for private competition practitioners to offer a broad range of new counselling services to their clients. The overall structural corporate enmeshment through acts of concentration and intercompany agreements, a development that in itself is the result of the ongoing economic integration project, subjugated the compliance with competition laws to a process of commodification. Corporations have to contract legal counselling from the professional services market in order to comply with competition laws on the market of professional services. An increase in economic cross-border transactions creates an increase in the demand for legal advice. Furthermore, the large share of transatlantic corporate transactions created an influx of US law firms into Europe. This stimulated the creation of EU-based 'mega-law firms and alliances that are socially well connected to Community institutions' (Schepel and Wesseling, 1997: 182). In the EU, there are currently about 100,000 judges and 450,000 lawyers (ibid: 187).

Private commercial, as well as academic competition experts, therefore, enjoy a quasi-monopoly in terms of influencing legal discourses that eventually provide the broader interpretation framework of Commission officials in the field of competition law enforcement. They occupy an intermediary position between the public authorities and private companies that have to comply with competition laws. In this position, they can be assumed to embody largely the interests of their clients, i.e. private companies.

Chapter 2

Competition Law Enforcement Models and Schools of Economic Thought

Introduction

What constitutes competition policy varies over time and between different countries. Competition laws and practices have a strong evolutionary character. Notwithstanding, something like a traditional core of competition policy can be identified. Competition laws, generally, promote economic rivalry among companies and regulate the conditions for concluding commercial agreements, market concentration through mergers and acquisitions, as well as market access for newcomers. For a thorough understanding of competition policy, one needs to consider not only the substantive content of the laws, but also the prevalent principles, guidelines, and the institutions implementing the laws. Actual enforcement practices are the result of a complex interplay between (corporate) lobbying, enforcement institutions, and scholarly discourses on legal and economic ideas (see Chapter 1). This chapter presents two opposing 'competition models', each entailing a simplified account of competition law enforcement: the European *ex ante* administrative public control model, which has the EU as its most prominent exponent, and the *ex post* court model, which is prevalent in the Anglo-Saxon world, most notably in the US. It subsequently breaks the models down into their component parts and discusses their major implications for competition law enforcement. It thereby introduces and clarifies the central concepts and competition terminology, the peculiarities of the institutional enforcement practices, and the economic schools of thought referred to throughout this dissertation. The analysis of the two models eventually serves as a heuristic device that allows for the exploration of the historical tensions which led to the transformation of the EC/EU model, i.e. the convergence of the EU's administrative public control model with the more market-based US private enforcement model (see Chapter 8).

Each model has its particular traits and leads to a different type of competition control. Although 'not sharply etched', the EC/EU model (Part I) constitutes a counter-model to that of the US (Part II). Both models fit into the wider socioeconomic perspectives of the varieties of capitalism debate, notably the Rhenish or coordinated capitalism versus the more market-based, liberal Anglo-Saxon variety. Moreover, both models are composed of an amalgam of substantive competition laws, regulations, and institutional enforcement arrangements. They build on differences in legal cultures and experience, which can affect actual legal practice and expectations (Gerber, 2002: 124), and follow, in broad lines, the contours of the Continental European civil law and of the Anglo-Saxon common law tradition, a dichotomy made by scholars of comparative law. Legal traditions refer to a set of ‘deeply rooted, historically conditioned attitudes about the nature of law, its role in society and in the organisation and operation of the polity, as well as about how laws should be made, applied, studied, perfected, and taught’ (Merryman, 1985: 2). Furthermore, the models have been historically shaped by different schools of economic thought, each with its own theoretical core concepts and principles, as well as its own vocabulary, values and conceptual structures (Gerber, 1998: x). Different dogmatic foundations have configured different priorities in the enforcement of the competition laws.

The EC/EU model is generally associated with economic fairness and public market intervention, serving the purpose of creating an integrated common market (Sjostrom, 1998: 1). The US model, in contrast, tends to be associated with a laissez-faire approach and fierce competition, giving primacy to market forces in the allocation of resources and production factors (ibid). Accordingly, the EC/EU model would lead to a ‘gentlemanly’-type of competition, whereas the US model encouraged a more Darwinian-type of competition (Monti, 2004e: 4). As will be demonstrated below, these differences manifest themselves in the prosecution of economic concentrations, in particular monopoly conduct, and the prosecution of cartels.

2.1 Competition Laws and Anticompetitive Conduct in General

As a part of the wider regulatory body of the state-market organisation, competition laws commonly prohibit a range of core activities, including collective or unilateral conduct aimed at restricting or eliminating competition between companies in a given marketplace. Collective conduct presumes an agreement among companies, which can be signed either on paper, or take the form of a direct, tacit, or indirect understanding. One can distinguish further between horizontal and vertical agreements. Horizontal agreements concern agreements between direct competitors of the same product market. Vertical agreements concern agreements or mergers between companies operating at different levels of the same production or distribution chain, such as between suppliers, subcontractors, retailers, and distributors, i.e. companies, which are not direct competitors of each other. Depending on the interpretation, horizontal and vertical agreements could be conceived as a cartel. Cartel practices often constitute the most straightforward category for prohibitions. They generally include agreements on price fixing, output limitation, market sharing, the division of territories or customers, boycotts, and different forms of bid rigging, i.e. agreements among horizontal competitors as to who will submit the winning bid for a contract in a competitive bidding. Cartels can effect barriers to entry and thereby foreclose other competitors. Often, the concept of collusion is used interchangeably with that of a cartel. Collusion, however, can also refer specifically to individual and tacit practices by companies that lead to higher prices, restricted output, and higher profits, yet 'in recognition of the interdependence with competitors and the jointly exercised market power' (European Union, 2003). An example of a collusive practice would be predatory pricing: pricing a product below its production costs in order to expel competitors from the market. Vertical agreements can also fall into the category of cartels or collusive practices. Examples are exclusive deals, tying contracts, i.e. agreements between buyers and sellers that bind buyers to purchase one or more products in addition to the product in which they are mainly interested. Similarly, resale price maintenance, where a seller agrees with a buyer on the price at which the product will be resold, sometimes also referred to as vertical price fixing, can fall into this category.

Unilateral conduct can result further in anticompetitive conduct, such as an attempt by a company to create a dominant market position or a monopoly position. A dominant market position can be the result of 'natural' growth of market power or of acts of concentration. Acts of concentration in turn refer to mergers and acquisitions (M&As), or what are also indicated as takeovers – again all notions that are often used interchangeably. The more generic term 'merger' refers to a process in which two previously separate enterprises become one legal entity, which are not to be dissolved again in the future. In the case of stockmarket-listed companies, the terms 'acquisition' and 'takeover' are commonly applied to refer to combinations in which those in control, i.e. management and/or shareholders, acquire ownership or control of another company. Such combinations can be friendly or hostile in nature, depending on whether they are based on a mutual consent or the absence thereof. Acts of concentration through mergers and acquisitions are always a double-edged process: merging parties may profit from synergy effects, such as higher profits resulting from economies of scale, increased market shares, product diversification, or reduced taxes. At the same time, M&As reduce the number of competitors and create a situation of concentrated market power, which eventually may lead to market dominance, or a monopoly position. This carries the risk of foreclosing market access to newcomers or expelling competitors from the market. In a situation of reduced competition, companies may ask higher prices in order to increase revenues. Moreover, they may refrain from investing in product innovation, all to the detriment of consumers. In addition, as concentration activities often generate restructuring measures and the closure of duplicate divisions, they have an impact on the internal employment structure, such as changes in the company board and reductions in the overall employment.

Part I: The European Competition Model

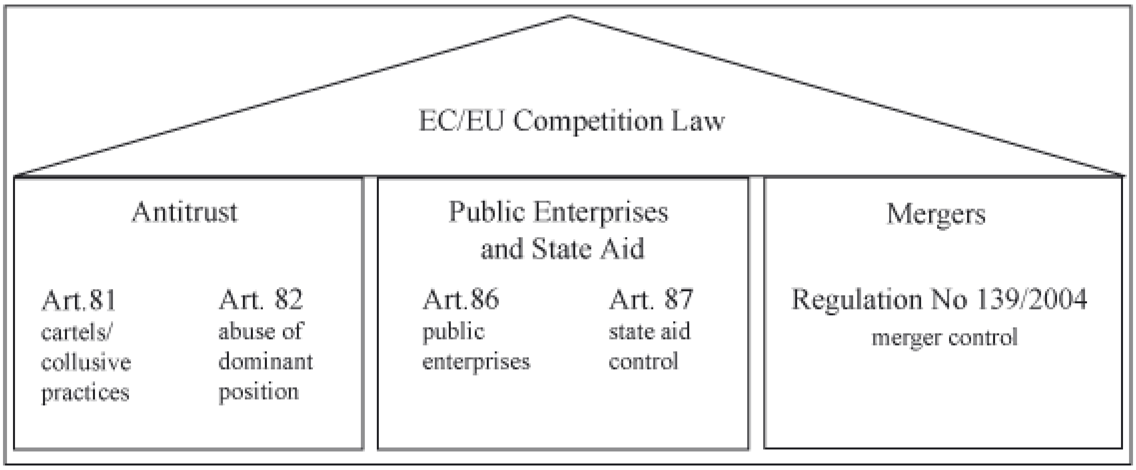
Competition laws have evolved as one of the most prominent policy areas within the EU. They form part of the wider regulatory regime that organises European economic integration. Since their incorporation into the founding Treaty of Rome, the historically grown particularities of the European competition model were further worked out. EU competition laws were enriched and specified by a vast amount of detailed regulations, and an abundance of jurisprudence by the European Courts.

2.2 The Substance of EU Competition Legislation

The European competition model comprises a complex system of substantive laws, principles of enforcement, and the institutional settings that are responsible for the actual enforcement of these laws. With regard to the substance of the competition laws, one needs to distinguish between primary, secondary, and tertiary legislation (see Table 1). Primary legislation encompasses the laws formulated in the treaties and other agreements with similar status that were negotiated and finally agreed by the Member State governments, and where constitutionally required, ratified by national parliaments. In the founding Treaty of Rome, primary competition legislation is formulated in Articles 81-89, in Part 3, Title 1, Chapter 3. The most central provisions of the Treaty of the European Community (TEC) are Article 81 (ex 85), 82 (ex 86), 86 (ex 90), and 87 (ex 92) (*see* Figure 1). Whereas Article 81 and 82 address private enterprises (cartels and other restrictive business practices, and the abuse of dominance), Article 86 on public enterprises, and 87 on state aid apply to the Member States. Of the remaining Articles, Article 83 provides a basis for secondary legislation, Article 84 outlines conditions for temporary enforcement, and Article 85 specifies the Commission's enforcement powers.

The substantive treaty articles were bound to general and abstract legislation, which left ample room for interpretation. Over time, more detailed regulatory frameworks complemented the substantive laws. This secondary legislation takes the form of regulations, directives, and decisions. In addition, tertiary legislation in the form of case law produced by the European courts, the *European Court of Justice (ECJ)*, and from 1989 onwards also by the *Court of First Instance (CFI)* complemented the treaty legislation. Given the strong constitutional character of the treaties, secondary and tertiary legislation needs to be in accordance with the treaty articles. In addition, *Notices and Guidelines*, as well as *Best Practice Guidelines* also provide a basis for the interpretation of the laws and regulations.

Figure 1: *The Three Pillars of EC/EU Competition Law*



2.2.1 Article 81 and Article 82

Article 81 entails the prohibition of anticompetitive agreements and practices, notably cartels and other collusive business behaviour. It specifically refers to 'all agreements between enterprises and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market' (Article 81(1)). Such restrictive intercompany agreements can include price-fixing, quota-fixing, as well as market-sharing and market-allocation agreements between direct competitors, generally referred to as horizontal agreements, as well as agreements between companies involved in the different stages of the production and distribution process, referred to as vertical agreements.

Article 82 prohibits 'any abuse by one or more enterprises of a dominant position within the common market or in a substantial part of it in so far as it may affect trade between Member States'. This means that no company should distort competition by holding a dominant position. Article 82 is sometimes also referred to as the EU's antimonopoly law. This is slightly misleading because it is not prohibited to hold a dominant market position, but rather to abuse such a position. In that sense, the European competition model does not fight monopolies or oligopolies, even though Article 82 might give this impression. Nonetheless, Article 82 reaches further than the antimonopoly law embedded in Section Two of the US Sherman Act or the Clayton Act (see Part II), which prohibits 'attempts to monopolise'. Abusive dominant behaviour generally includes unilateral or bilateral conduct that purports to disadvantage other market players. It can concern the application of dissimilar conditions to equivalent transactions with other trading partners, such as discriminatory purchases or prices or tied-selling agreements, i.e. the selling of a product that is tied to another, but which the buyer does not want to purchase (McGowan, 1996: 14). Moreover, it can also concern the limitation of production in order to create scarcity in a market, which in turn allows prices to be raised (ibid). The Commission and the European Courts have interpreted the concept of an abuse of a dominant market position differently at different times, partly because market dominance of a market player was defined in relative terms with regard to other market players. In certain cases, a company holding market shares between 20-40% was considered dominant. At the same time there were rulings in which market shares of 50% and 60%, and occasionally even 80% were still allowed (Schmitz, 2002: 558). As definitions on relevant product markets are notoriously difficult to establish, the Commission has enjoyed much scope in the interpretation of Article 82. Companies have sought to take advantage of this and to lobby for favourable treatment. Nonetheless, market shares above 40% are generally considered an indicator of dominance. US jurisprudence, in contrast, established market shares of 70% to indicate monopoly power (cf. Kim and Hutton, 2006). In other words, by comparison, US antitrust law enforcement is far more tolerant towards large companies. There is no equivalent of Article 82 in US law. Article 81 on the prohibition of cartels, however, was formulated in the line of the US antitrust provisions. As will be illustrated in the next section, that EC competition laws exceed the regulatory scope of those in the US can also be seen from Article 87-89 (ex 92-94) on the control of state aid policies, which in the US Federal context was never an issue at all.

2.2.2 Article 86 and Article 87

Article 86 entrusted the Commission with the power to control public enterprises that were granted special or exclusive rights by the Member States, with the exception of enterprises that provided services of general economic interest. The article addresses nationalised industries and public monopolies, such as the public utility sector, including energy, transport, telecommunication, and water. Based on Article 86(3), the Commission could adopt directives and decisions in individual cases, which require Member States to demonopolise or privatise public enterprises. Article 87 (ex 92) prohibits state aid that may distort competition and intra-community trade. During the first two decades, Article 87 was hardly enforced. From the mid-1980s on, however, it became one of the most prominent pillars of EC competition law enforcement (see Chapter 5). The remaining Articles 83, 84 and 85 further specify the competences of the Commission, the Council, as well as Member State competition authorities in the application of EC competition law.

2.2.3 The Merger Regulation

In addition to Article 81 and 82 of the treaties, the Council adopted the Merger Regulation 4064/89 in December 1989, now replaced by Council Regulation (EC) No 139/2004 and Implementing Commission Regulation (EC) No. 802/2004 (see Chapter 5 and 8). The regulation provided the Commission with the legal armoury to control concentration activities, such as mergers and acquisitions (M&As) or structural joint ventures, which create or strengthen a dominant market position impeding competition. Prior to the introduction of the merger regulation, the Commission occasionally applied Article 81 and 82 to control economic concentrations. However, it could only rule over concentrations after they had been completed (see Chapter 5). The regulation applies to acts of concentration between companies of a 'Community-dimension', measured in terms of turnover thresholds. Concentrations that fall into this category involve companies that generate a combined aggregate worldwide turnover above € 5 billion, or where at least two of the companies have an aggregate turnover above € 250 million in the EU. Excluded are companies that generate more than two thirds of their aggregate EU-wide turnover within a single Member State. The turnover thresholds provide for a 'one-stop shop' for mergers. This implies that the Commission enjoys exclusive control of 'Community-dimension' mergers. Multiple merger reviews by national competition authorities (NCAs) were thereby ruled out. The Merger Regulation further entails procedural requirements, deadlines, and hearing rights. It requires all companies involved in a concentration meeting the turnover threshold criteria to notify their endeavours to the Commission in advance.

Table 1: *Sources of EU Competition Law*

Type of Legislation	Legislator	Form	Examples
Primary legislation	Member State governments and/or national parliaments	Treaties	Articles 81-89 TEU
Secondary legislation	Council Commission, European Parliament	Regulations by the Council and the Commission; Directives; Commission decisions; Commission notices; Guidelines; Annual reports	Council Regulation 17/62; Council Regulation 19/65; Council Regulation 1/2003; Council Regulation 139/2004; Commission Regulation 802/2004; Commission Regulation 67/67
Tertiary legislation	Court of First Instance (CFI) European Court of Justice (ECJ)	Court rulings	*Continental Can Co. v Commission (Case 6/72)* *General Electric v Commission (Case T-210/01)* *Microsoft Corp. v Commission (Case T-201/04 R)*
Bilateral/multilateral agreements	Council, Commission	Treaties and agreements	1991 EU/US Competition Cooperation Agreement Agreement between the EU and Japan concerning cooperation on anticompetitive activities

2.3 The Peculiarities of Enforcement of EC/EU Competition Laws

2.3.1 The Two-Tier Enforcement Regime

Competition law enforcement in the EU builds on a system of multilayered jurisdictions, in which the supranational EU level and the national competition regimes of the 27 Member States coexist next to each other. Germany and the UK were the first European countries to adopt competition laws (see Chapter 3). The German competition law and enforcement regime served as a reference point for the establishment of the EC competition regime. This in turn provided a reference point for most Member State competition regimes, which were emerging gradually from the 1950s onwards. According to Harding and Joshua (2003: 99), the German competition model 'evolved into the European norm, travelling first to the EC and then in due course back to other national systems from there'. In the Member States where a national tradition of competition policy had long been absent, such as Italy, Ireland and Sweden, the competition regimes were strongly orientated towards the EC model, and therefore, indirectly on the German competition laws and practices (Eyre and Lodge, 2000: 65; see also Grossekettler, 1996).

Most of the Southern Member States introduced competition laws in the mid-1980s, generally after they joined the EC. Italy, however, as one of the founding EC Members, constitutes an exception. Powerful industrial opposition could block the enactment of competition laws until 1990 (Gerber, 1998: 406-410). When Italy adopted its competition statute, the EC-level Article 81, with the exemption regime of Article 81(3), as well as Article 82, and the merger law, together served as a template (ibid). Similarly, in the French tradition of *dirigisme* and *planification*, competition laws had long played a subordinate role. They barely had an identity before the mid-1980s: they were constituted by a nameless collection of different sets of norms and sanctioning devices, which focused foremost on price controls. Industrial policy, in contrast, occupied a central place. Moreover, the French enforcement institutions for competition law were rather forceless. Only after the 1986 reform did competition control achieve a higher standing in France. German competition experts assisted their French colleagues in establishing a central and independent enforcement institution, the *Conseil de la Concurrence* and with drafting new legislation. As a result, the French and German legislations now look very similar (ibid: 404). However, the national competition regimes of the EC Member States are not entirely identical.[4] They vary in terms of: the regulatory scope and content of the laws, the enforcement mechanisms, the degree of discretional autonomy enjoyed by the competition authorities, the institutional resources invested, as well as the legal and economic philosophies that underpin the enforcement practices.[5] As a result of an enhanced pace of economic integration over the past two decades, many national competition regimes have adjusted to that of the EC (Gerber, 1998: 224; cf. Drahos, 2001).

The two-tier system of EC/EU and Member State competition law enforcement is similar to the US Federal system, in which the *Federal Trade Commission (FTC)* and the *Department of Justice (DoJ)* complement State-level antitrust statutes and enforcement agencies. Depending on the scope of anticompetitive practices, either Community law or Member State law is applied. The distribution of the enforcement powers follows the logic that the best-placed authority should handle a competition complaint, as required by the European subsidiarity principle outlined in Article 5 (TEC). The European Commission, as a supranational competition authority, has exclusive powers over a range of areas. Community law usually applies to anticompetitive conduct with a significant cross-border dimension – that is 'if trade and competition between the Member States is affected'. In all other cases, Member State law applies. Nevertheless, NCAs could apply parts of Article 81 and 82. Prior to 2004, they could not grant exemption as ruled under Article 81(3), which provided little incentive to NCAs to cooperate with the Commission in the enforcement of EC competition law (Jones and Levin, 2003: 13).

2.3.2 EC/EU Competition Laws in the Continental Civil Law Tradition

Regulatory approaches in Western Europe tend to be rather 'informal, cooperative, and opaque, while relying less on the involvement of lawyers and courts' (Kelemen, 2007: 3). Regulators are generally free to pursue informal means of achieving regulatory objectives, with courts rarely challenging their decisions (ibid). In the Continental European civil law tradition, competition laws generally form part of public administrative law, and rely on a regulatory approach. Prevalent in the civil law culture are reasoning according to legal

[4] A detailed discussion on the heterogeneity of Member States competition regimes is beyond the remit of this chapter. Instead, the focus is on a few general commonalities that allow for a summary, in broad terms, of the European competition model.

[5] For example, Greece adopted the first general competition law in 1977 as part of the preparatory program for acquiring EC membership. Until far into the 1990s, competition law enforcement enjoyed only low priority. Officials at the Greek competition authorities used to work only part-time.

categories, and resolving problems by a literal interpretation of the statutes. As Monti (2007: 80) states, this does however, not mean that legal reasoning cannot be adventurous, on the contrary. A central feature of the civil law tradition is the 'clause-centric' approach, according to which existing laws tend to be further codified by another law (Slot, 2004: 452). In the setting of the EU, for example, where competition laws are enforced largely in an administrative manner, the Commission can issue regulations, directive, notices, or legal guidelines. Another central feature is the bureaucratic procedure of *ex ante* authorisation, according to which companies notify planned commercial transactions, such as mergers and acquisitions and intercompany agreements.

The legal notion *ex ante* derives from the Latin saying *ex ante facto* and refers to laws that are enacted before a particular transaction takes place. Conversely, the notion *ex post* derives from *ex post facto* and refers to a situation in which laws are enacted after the conduct has occurred, generally categorised as 'retrospective law' in which a violation of the rule of law is assessed after the deed. *Ex post* implies that a corporation is considered innocent until proven guilty. Due to the administrative character of competition law enforcement in Europe, *ex post* enforcement by courts and private litigants is traditionally far less important. Thus, judges tend to be equipped with limited powers to interpret legal statutes (Hwang, 2004: 114). This does however not imply that courts do not play a role at all. Strictly speaking, what here is identified as the European model, was always, in some form, a hybrid of a civil law administrative control model and common law court model (Gavil *et al.*, 2002: 54). Judicial precedence in the form of court rulings played an increasingly important role in the interpretation of EU competition law. The European courts were increasingly involved due to appeals by companies against the Commission's decisions. Nevertheless, to date, the administrative part of EU competition law enforcement prevailed over the judicial enforcement components (Gerber, 1998: 10).

2.3.3 The Integrated Agency Model and the Extraordinary Powers of the European Commission

Competition law enforcement in the EU polity constitutes a patent case of what Trebilcock and Iacobucci (2002) identified as the 'integrated agency model': the Commission's DG IV, which after Romano Prodi's reorganisation in September 1999 was termed the DG Competition, is equipped with far-reaching discretionary executive powers. In fact, there is no comparable first pillar policy area, in which the Commission enjoys similar wide-ranging powers. Whereas in other areas, the Commission usually sets the agenda for the Council and the European Parliament on what to decide, in the field of competition policy, it can act as an investigator, prosecutor, judge, jury, and executioner in one, unless its decisions get challenged at the European Courts. Even though the Commission takes important decisions as a collective in the College of Commissioners, due to the technicalities that accompany competition law enforcement, it provides considerable leeway in decision making. The Commission's DG Competition fulfils a key leadership role in the daily enforcement of competition laws. It can investigate anticompetitive conduct upon its own initiative (i.e. *ex officio*); it can take action based on a complaint, or, on the *ex ante* notification regime. It can prosecute anticompetitive conduct by stopping M&As, a commercial intercompany agreement, or a unilateral corporate conduct. It can request modifications of a notified proposal, or even requiring the break up of a conglomerate and force it to sell some of its divisions (Bannerman, 2002: 8). In the cases of non-compliance, it can sanction companies by the imposition of fines up to 10% of a company's annual turnover. Even though the Commission has to elucidate its decision, it does not need to give meticulous reasons for why it allowed or prohibited a deal. Companies disagreeing with the Commission's decisions and procedures can address the European Courts in Luxembourg, the CFI and the ECJ.

In addition, the Commission is also entrusted with considerable legislative powers. Similarly to the Council, it can issue exemption regulations for cases falling under Article 81(3), a right established by the Council Regulation 19/65. The Commission can thereby formulate binding regulations for companies. The right to enact autonomous legislation is unique. The Commission does not have to accommodate other Community institutions, such as the European Parliament (EP) or the Council. Nor does it have to account for a particular decision, as is the case in the US or in the UK (cf. Cini, 2003). Moreover, the Commission can also issue directives under Article 86(3) requiring the privatisation or liberalisation of public enterprises, and on the basis of Article 87, intervene in state aid granted by Member State governments. This particularly strong position of the Commission's DG Competition is also reflected by the fact that, over decades, it was located in a separate building, which was hermetically sealed to outsiders for data protection reasons (i.e. companies under investigation share highly confidential information and fear economic espionage. In 2004, the DG Competition joined the other

Commission DGs in the renovated Berlaymont, the Commission's headquarter. Nonetheless, the special position of the DG Competition remains. Additional security ports make it impossible for non-authorised officials to physically access the DG.

The issuance of regulations and directives build up cumulatively in number and scope over time. It follows that the Commission could exert considerable influence on the future course of competition law enforcement. The European Parliament, in particular its *Committee on Economic and Monetary Affairs,* can try to exert influence by commenting on the Commission's *Annual Competition Policy Report*. The Commission, however, is not obliged to follow the EP's report, which renders parliamentary influence extremely weak. Lobbyists, nonetheless, often target the Committee's *rapporteur*, who scrutinises the work of the Commission in competition matters (Wilks and McGowan, 1996: 240). Furthermore, the Commission is not respond to voter's preferences and electoral results. The combination of these competences renders competition policy a unique field of Commission power. As Competition Commissioner Frans Andriessen remarked, the Commission is 'not dependent on the reluctance or inability of the Council of Ministers to reach decisions on proposals, which it has put forward, and takes such decisions virtually every week' (Andriessen, 1983b: 5). The Commission's far-reaching discretionary regulatory powers were further enhanced by the general and ambiguous notions within which EC competition laws were framed, as well as the absence of a detailed analytical framework specifying how competition laws should be enforced in practice. For example, the notion 'if trade between the Member States is affected', which specifies which anticompetitive conduct falls under Article 81 and 82, and hence, under the authority of the Commission, provided the Commission, in principle, with a *carte blanche* in the interpretation of competition laws, – although it also needed to take into account the possible interference of the Courts. On the one hand, this led to fierce criticism by business as it rendered EC competition law enforcement highly ambiguous and uncertain. On the other hand, the absence of a clear-cut, rule-driven enforcement also provided a welcome avenue for corporate lobbying.

2.4 The Ex Ante Administrative Public Control Regime and the Possibility of Exemptions for Commercial Intercompany Agreements

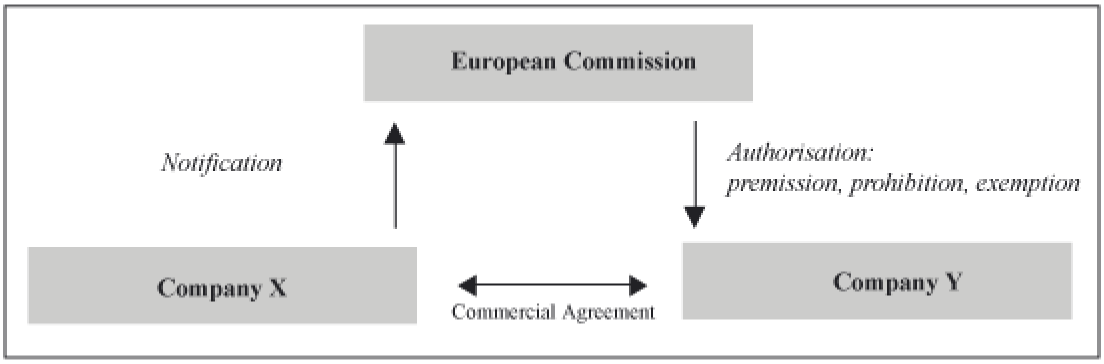
The EC/EU competition model entails an *ex ante* administrative public control regime, which was designed to prevent, rather than to prosecute anticompetitive conduct. It builds on a notification regime, according to which the parties give notice to a public authority and ask permission prior to concluding a transaction. The notification procedure follows the logic that everything not permitted is forbidden. Most European competition regimes reveal this feature to some extent. Austria, Belgium, Denmark, Finland, France, the Netherlands, Norway, and Sweden can be subsumed in this category (Gerber, 1998: 173). In the EC/EU competition model, notifications are required for all three pillars of competition law, i.e. agreements falling under Article 81 (until the 2004 reform, see Chapter 8), for planned mergers above a certain turnover threshold (since 1989, see Chapter 5), as well as state aid projects intended by governments of the Member States. Article 82 and 86 constitute an exception. In all other cases, companies, and in the case of state aid, the Member State governments have to announce their plans to the College of Commissioners. The Commission's DG Competition reviews the received notifications in an administrative manner, which implies that most cases are settled, rather than litigated *ex post* by courts (Harding and Joshua, 2003: 111). Once a transaction is notified, it is automatically legally immune from prosecution by third parties. This renders the *ex ante* notification and authorisation a benign, safe-haven procedure for companies. Although there is no certainty with regard to the Commission's final decision on a notified case, companies, as well as Member States in the case of state aid, can always ask the Commission for permission without having anything to lose. As former Competition Commissioner Frans Andriessen pointed out: business representatives would be better off asking twice to avoid to go astray (1983c).

The benign notification and authorisation procedure created a situation in which jurisprudence in interpreting the loosely formulated competition laws was long absent. The Commission had a monopoly over enforcement, which meant that private enforcement never became a widely applied practice. Private enforcement entails the application of competition law in civil disputes before the courts and implies that private actors can litigate observed anticompetitive conduct before the courts as complementary to public antitrust enforcement (Commission 2005b: 4). Although private enforcement of EU competition laws was always possible, in Europe public authorities enforced 95% of the competition cases. Only in 5% of the cases did private actors take the initiative to bring an action to court (Kemper, 2004: 9). Non-compliance with the notification regime or with the decisions of the Commission was 'punished' by declaring a transaction invalid or by levying financial fines. 'Hard' measures in the form of criminal sanctions enforced upon individuals are absent at the EU, and in most Member States (Gerber, 1998: 175). Individuals could be fined in Germany, Denmark, Greece, Spain, France, Ireland, Luxembourg and Austria and in five of these countries, i.e. Germany, Austria, France, Ireland, Luxembourg, individuals could even face imprisonment (Gauer, 2002: 11). Nonetheless, criminal sanctions were seldom enforced.

Regulation 17 established the procedural framework for the application of Article 81 and 82 (TEU). As far as Article 81 is concerned, it introduced a system of notification for commercial agreements falling under Article 81 (1). Companies meeting the Community-dimension turnover threshold had to notify all sorts of envisaged commercial intercompany agreements and cooperative business practices to the Commission in advance (see Figure 2). Commercial intercompany agreements embrace all sorts of contracts – other than full-blown mergers and acquisitions (M&As), although the boundaries between intercompany agreements and mergers and acquisitions are often blurred. They can take place between direct competitors (horizontal agreements) or companies involved in the different stages of the production, distribution, or marketing process (vertical agreements). Examples are production and R&D joint ventures, joint distribution, marketing and sales agreements, (patent) licensing and franchising contracts, specialisation agreements, information exchange and other cooperative activities. They can also integrate more structural long-term business objectives, or take the form of equity joint ventures, involve equity swaps or minority holdings (Ullrich, 2003: 219).

Once notified, the Commission reviewed each case and controlled whether the intended deal had the object or the effect of 'prevention, restriction or distortion of competition within the common market' as spelled out in Article 81(1). The Commission could either prohibit or allow the deal, or grant exemptions. Based on Article 81(2), it could declare all agreements prohibited by Article 81(1) null and void. Based on the conditions set out in Article 81(3), it could grant exemptions on the basis of macroeconomic objectives. Exemptions were justified as long as amongst others the intended deal 'promoted technical or economic progress', or 'improved the production or distribution of goods', or as long as it 'allowed consumers a fair share of the resulting benefit'. Furthermore, the 'agreement should not go beyond what is essential to attain those objectives and competition should not be substantially eliminated' (see Article 81(3) TEC). Article 9(1) of Regulation 17 stipulated that the Commission was the only instance that could authorise exemptions. The Commission could grant individual exemptions to commercial agreements that in principle were prohibited either on a case-by-case basis, or in the form of block exemptions. Block exemption specified whole groups or categories of types or sector-specific agreements, which were categorically freed from prosecution, i.e. not considered anticompetitive. They took the form of regulations, which could be issued by the Commission, either without the approval of the Council, or by the Council after a Commission proposal. Companies disagreeing with the Commission's decision could file a complaint at the European courts based on Article 230. Over time, the exemption regime came to cover a broad range of agreements: vertical agreements, R&D agreements, specialisation and standardisation agreements, servicing arrangements, technology transfer agreements, as well as specific agreements in the motor vehicle distribution sector, the maritime and air transport sectors and the insurance sector (Cini and McGowan, 1998: 98). It follows that, because of the cumulative character of competition law enforcement, it became ever more tolerant towards intercompany agreements over time.

Figure 2: *The Centralised ex-ante Administrative Notification Regime of Regulation 17*



The *ex ante* notification requirement only concerned companies with a Community dimension. Based on the *de minimis* rule (OJ, 2001: 13-5), restrictions to competition by companies with an aggregate market share below a certain threshold were considered to be of 'minor importance' and not to 'appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community'. All exceptions that cannot benefit from this rule are are outlined in the Commission Notice on Agreements of Minor Importance

(OJ C 368, 22.12.2001). Small and medium-sized enterprises (SMEs) anticipating the conclusion of an intercompany agreement were usually excluded, because their actions were assumed not to affect trade and competition within the Common Market. A company is considered small or medium-sized if the annual turnover lies below € 40 million, or if the balance sheet is below € 27 million, and if it employs a staff of no more than 250 people (Commission Recommendation of April 03 in OJ, 1996: 4).

The administrative *ex ante* public control model reflects an institutional artefact of the more generic Rhenish or Continental European coordinated variety of capitalism (cf. Wigger and Nölke, 2007).[6] The Rhenish variety, or the 'coordinated market economy' model, is still the most widespread variant in the EU, not only because of the weight of the German economy, but also because most of the old EU-15 (with the notable exception of United Kingdom) fall into this variety (Hall and Soskice, 2001: 19). The central characteristics of this variety are: a fairly balanced and consensual relationship between labour and capital, strong employee involvement, a corporate governance regime of co-determination, a supporting role of the state, and the availability of patient capital provided by major banks (*Hausbanken*), or internally generated funds. These features have been conducive to a relatively long-term perspective with regard to the economic wellbeing of firms. Stable ownership and control structures have provided companies with considerable protection against hostile takeovers, which has particularly benefited SMEs, all factors supportive to long-term investment strategies in human resource development, high skills, and quality products.

The administrative *ex ante* public control model of the EU closely reflects the basic institutions of the Rhenish model of capitalist organisation. It draws on the competition law enforcement institutions of Germany, which constitutes a patent case of the Rhenish model. The notification regime and the possibilities for exemptions created the necessary flexibility in realising the Common Market. It provided the Commission with a market interventionist tool to achieve the long-term goal of a balanced market structure. The basic idea was to control the market and to withhold companies from engaging in harmful anticompetitive practices. Whenever the Commission considered the overall benefits of an anticompetitive conduct to be greater than its restraints on competition, it could allow a deal, or declare entire categories of intercompany collaboration acceptable, or even

6 This sections draws to some extent on Wigger and Nölke (2007).

desirable. In other words, based on the notifications and their evaluations, the Commission could distinguish between 'good' or 'bad' cartels and 'good' or 'bad' business practices. The loosely defined conditions for exemptions provided ample scope for pursuing a multi-goal approach in the enforcement of competition laws. It allowed for tailor-made decisions with regard to industrial sectors or for sector-specific crisis management in times of economic recession. This was the case in the 1970s, when the Commission allowed crisis cartels and temporary government subsidies to rescue industrial sectors in recession, such as coal and steel, sugar, the motor vehicle or shipbuilding industry (see Chapter 4). Furthermore, the Commission could create incentives for corporate entities to share economic risks in developing new products and technologies, engage in technological transfers, and set product standards (Hall and Soskice, 2001: 17-21). This is exemplified by the block exemption regulations for intercompany R&D cooperation (Regulation 418/85), technology transfer (Regulation 240/96), specialisation (Regulation 417/85), and standardisation (Horizontal Guidelines).

Rather than focusing on more narrowly defined competition effects, such as innovation, efficiency, and lower prices for consumers, the Commission could enforce competition laws as a macroeconomic market-interventionist tool. Referring to Article 3(1) (TEC), which declares the strengthening of the competitiveness of the European industry a central Community goal, it could focus on broader policy objectives in its decision making, such as: favourable treatment of SMEs, employment and environmental considerations, broader trade and industrial policy goals, as well as the more general promotion of market integration and cohesion. The label 'cartel agreement' did not apply as long as the Commission sustained its decision with reference to an improvement of production and distribution of goods, or technical or economic progress as ruled under Article 81(3). The exemption regime thereby reflects the continuation of a tradition, which 'respected close links of loyalty between suppliers and their customers, manufacturers and their distributors, rather than the free play of competition' (Goyder, 1998: 68). The exemption regime introduced a legal possibility for excluding certain intercompany agreements from competition, often for the sake of competition, or as Chapter 4 argues, also for the sake of a neomercantilist strategy to make European corporations fit for competition in the world market.

Placed in the broader historical context of capitalist development in Europe, the *ex ante* public control model reflects the macroeconomic policy aspect of the broader embedded liberalism bargain that lasted from postwar Europe to the late 1970s (see Chapter 4 for a more detailed account). The overwhelmingly administrative character of the *ex ante* notification authorisation practice, in combination with the generous exemption regime, provided the European business community with a high degree of public support in the pursuance of long-term strategies. The legal immunity from prosecution resulting from the notification procedure provided companies with a safe-haven procedure in doing business. It became a conventional practice to notify commercial agreements falling under Article 81, amounting to hundreds of cases per year (cf. Hwang, 2004). Moreover, the *ex ante* notification regime also endowed companies with an avenue for lobbying. It could use the vagueness of the legal devices to persuade the Commission to take a favourable decision in their case. Usually, contacts between Commission officials and corporate managers increased, particularly in the negotiation of exemptions.

As will be outlined in the next section, the *ex ante* public control model and in particular the institutionalisation of a proactive powerful public market surveillance institution with wide-ranging competencies, namely the Commission, reflects in many ways the legacy of ordoliberals of the Freiburg School, who developed a theory of 'comprehensive' competition control in the 1930s.

2.5 Schools of Economic Thought: The Political Project of the Freiburg School

The introduction of competition laws in Germany, and later in the EEC, was informed by the ideas of a group of scholars from the Freiburg University in Germany: the ordoliberals. Their ideological positions and theories influenced a range of German politicians and academics alike, who were involved in the building of economic institutions and the formulation of policies in the postwar period. Although the overall influence on economic regulatory policies that draws on the intellectual work of ordoliberals has waned since the 1960s, ordoliberal dogmas continued to have a remarkable stronghold in the field of EC competition policy during the first decades of its existence (cf. Budzinski, 2003; Djelic, 1998; Gerber, 1998; Hölscher and Stephan, 2004; Monti, 2007: 79-82). References to ordoliberal influence in the building of the EC/EU competition model often remain at the margins in the competition policy literature, thus concealing the ordoliberal manifestation in the evolution of supranational competition policy. Often, ordoliberals are merely indicated as 'the Germans', who were 'obsessed with reproducing the German model and the German virtues of competition policy at European level' (Wilks and McGowan, 1995: 260). The parochial role of ordoliberal thinking in the history of EU competition policy provided a philosophical framework for a balanced and flexible interventionist strategy in the administration of anticompetitive conduct. The multi-goal and long-term orientation of the ordoliberal understanding of competition created a strong role for a politically independent competition authority in shaping the marketplace. Nonetheless, the regulatory practice and policy formulation of EC competition law enforcement was far from a diligent translation of the economic theory promoted by ordoliberals from the Freiburg School. Had the founding fathers been taken seriously in the aftermath of the War, there would be no large corporations in the Europe of today.

2.5.1 The Debates of the Founding Fathers: Organising Capitalism and the Need for an Economic Constitution

In the late 1920s and early 1930s, the economist Walter Eucken (1891-1950) and the lawyers Franz Böhm (1895-1977) and Hans Grossman-Dörth (1894-1944) came together at the University of Freiburg. With the support of their scientific assistants and friends in exile, Alexander Rüstow (1885-1963) and Wilhelm Röpke (1899-1966), they developed ideas on how to reconfigure the institutional foundations of German society. The intellectual work of the German ordoliberals shared a clear vocation: as the term 'ordoliberalism' already suggests, they sought to establish *Ordnung* (order). This was a reaction to the political turmoil during the fourteen years of the Weimar Republic, the Great Depression, and later, the excesses of the totalitarian Nazi regime. Partially due to a political climate that traditionally welcomed liberal ideas, but probably also because of its geographical location at the periphery of Germany, the Freiburg University evolved as a hotchpotch for intellectual resistance to the Nazi regime.[7] As their ideas were considered highly controversial, the development of their ideas took shape in secret. Some Freiburg scholars were even imprisoned, others dismissed from the University or sent into exile (Gerber, 1998: 232-235).[8]

[7] Franz Böhm and Walter Eucken also participated in the *Freiburger Kreise*, a resistance group of intellectuals that became famous for their ideas on how to rebuild German society after the war (Gerber, 1998: 235).
[8] Alexander Rüstow and Wilhelm Röpke eventually left Germany, whereas Hans Grossmann-Dörth had to go to the *Wehrmacht*, where he died in 1944 (cf. Joerges, 2004).

Although the Freiburg scholars did not hold identical views, the endeavours of the founding fathers of ordoliberalism, nonetheless, had a strong programmatic mission. They signed the *Ordo Manifesto of 1936* and entitled the first of their jointly edited volumes of the series *Ordnung der Wirtschaft:* 'Our Task' (Vanberg, 2004: 1). They launched an academic journal called *ORDO*, which became the most important forum from the 1950s onwards to promote their political views. Ordoliberals sought to make their ideas accessible to a broader public by means of books, pamphlets, and newspaper articles. The *Frankfurter Allgemeine Zeitung* in particular sympathised with ordoliberal ideas. For example, Leonhard Miksch, an outspoken adherent of ordoliberalism, managed the economic policy section and published many articles until the Nazis forbade the newspaper in 1943. After the war, when the newspaper was re-established, ordoliberals occupied central positions at the newspaper (Gerber, 1998: 258). This effective publishing strategy allowed ordoliberals to approach both the intellectual and political elite, as well as the wider public (cf. Commun, 2004).

What ordoliberals had in common was that they were all essentially market liberal in orientation. They envisioned, however, a particular type of liberal market economy. As a point of departure, they criticised the 19th century economic theorists that followed the tradition of Adam Smith's *laissez-faire* market capitalism, which reduced the role of state to a night-watchman function. Böhm noted in this respect, that even though a market free from state intervention may be free, it is not *ordered* (Böhm, 1937: 107). Ordoliberals anticipated bringing forth a more comprehensive view on society and markets, by exceeding the scope of mere economics and law in their theories. They criticised the neoclassical liberal tradition for perceiving 'the economic' in isolation of 'the political' and 'the social' (Gerber, 1998: 237). The narrow conceptions and the basic institutions promoted by neoclassic liberalism, i.e. contractual freedom, private property and free trade, as well as the self-regulatory forces of the free-market play, were not considered sufficient to advance societal virtues such as 'honesty, incorruptibility, considerateness, self-discipline and fairness' (Schüller, 2005). The 'social', democratic principles, and humanist values occupied a central place in their work. In the words of Eucken, 'everything is socially important' and 'social security and social justice should be the greatest concerns of our time' (in Schlecht, 1989: 303). Similarly, Röpke claimed not to decouple the free-market economy from societal, political, and moral spheres, but to embed it in a frame of economic and social policy, which beyond the market also protects the feeble, curbs the self-indulgent, and curtails the negative spin-offs of economic power. A market economy, in his view, was a necessary but not a sufficient prerequisite for a free, wealthy, just and ordered society (in Borth *et al.*, 1988: 218).

The more moderate economic liberalism promoted by the Freiburg School can be traced back to the broader intellectual discourses of that time. The early work of ordoliberals appeared in the Great Depression, a time of national protectionism, and a general widespread discrediting of liberal ideas. John Maynard Keynes, for example, published one of his first essays *The End of Laissez-Faire* (1926), and started to promote state-led countercyclical demand management. At the same time, the critical ideas of the first Frankfurt School on the political economy were thriving. Against this backdrop, Eucken published a book on structural changes in the state and the crisis of capitalism, entitled *Staatliche Strukturwandlungen und die Krise des Kapitalismus* (1932).

Ordoliberals expected the state to play a strong role and to act as guarantor of social justice and human functioning of the market. They rejected the neoclassical, utilitarian view that an aggregate of self-interested private market actors would act for the benefit of the society as a whole simply by making use of their (economic) freedom. The strong emphasis on the role of the state among its critics evoked the undertone of ordoliberalism favouring a highly authoritarian state. Rather than an authoritarian state, ordoliberals advocated the establishment of an economic constitution, which delineates the role of the state in the marketplace on the basis of a strictly *procedural* and *rule*-oriented liberalism (Gerber, 1998: 237; Vanberg, 2004: 2). An economic constitution, from the ordoliberal point of view, would complement the political constitution. It would form the basis upon which fundamental economic institutional choices and substantive market principles could be derived. This was necessary to guarantee what ordoliberals called 'an effective degree of economic and political freedom that was morally justifiable' (Gerber, 1998: 241). According to Eucken, the distinction between form and process was essential: 'the nature of state activity should influence the form of the economy, but not amount to state planning and control of the economic process' (Eucken, 1951: 95 in: Goldschmidt, 2004: 2). In his understanding, the whole economy and its rules, both national and international, needed to be consciously shaped and reshaped in the democratic process according to humane principles (1950: 314). The notion of *Interdependenz der Ordnungen*, the interdependency of orders, occupied a central place in ordoliberal theorising. In the holistic view of ordoliberals, politics, the rule of law, the state administration, and churches, schools, business and labour organisations, as well as the media, were all important ordering institutions for society as an organic whole. Nonetheless, ordoliberals gave primacy to the economic constitution as an ordering instance of the market, and to economic activity, which was considered to form the central means by which society could be integrated. Economic freedom would be a precondition for political freedom, and henceforth democracy and the economic wellbeing of society as a whole.

2.5.2 The Core of the Ordoliberal Doctrine: A Policed Competition Order

Regulated competition constituted the centrepiece of *Ordnungspolitik,* the politics of order. In marked contrast to the self-regulatory markets guided by Adam Smith's (1776) 'invisible hand', ordoliberals held the view that unconstrained private economic power presented a persistent threat to the creation of economic welfare, the cohesion of society, and, ultimately, democracy. They were strong proponents of the German *Mittelstand*, the small and medium-sized enterprises (SMEs) and advocated the maintenance of dispersed economic, as well as political power. In a free-market situation, SMEs would not survive. Convinced that once market actors achieve excessive economic power, they would try to get hold of political power as well, ordoliberals therefore promoted the idea that the separation of power within the state apparatus also needed to be realised in the realm of the market. The dense enmeshment of economic and political power in the Weimar Republic and later the Nazi regime gave the impetus for this conviction. According to Eucken, therefore, not only the abuses of economic power should be prosecuted, but excessive economic power in itself (Eucken and Hensel, 1952: 334). The political remedy against economic power concentration, in the view of ordoliberals, was to make market actors compete.

Ordoliberals did not expect competition to evolve naturally. Only the careful cultivation of the visible hand of the state would guarantee a 'continuously policed competition order' (Budzinski, 2003: 15). As there was no such thing as genuine economic behaviour, ordoliberals reserved a crucial role for the interventionist arm of the state as the *Hüter der Wettbewerbsordnung*, the guardian of the competitive market order. All economic behaviour, ordoliberals claimed, was shaped by political and legal decision making (Gerber, 1998: 245). Therefore, a politically independent state institution, the competition authority, was considered essential for competitive processes to take place. The competition authority needed to be politically independent in order to avoid rent-seeking market players inducing political leaders to go along with their preferences and change the rules to their benefit. Böhm noted in this regard that ‘a government is constantly faced with a considerable temptation to meet the contradictory demands of pressure groups’ who, in the pursuit of their narrow objectives ignore the common welfare of society (1989: 66).

The mandate of the competition authority, similarly to other state institutions, needed to be constitutionally determined and subject to the rule of law of a modern *Rechtsstaat*. The substantive content of competition laws needed to be formulated by the legislature and made constitutionally amenable. In this vein, an independent and strong quasi-judicial authority free from partisan influence would preserve the prerequisites for a balanced and ordered market structure. The primary task of the competition authority was to establish the proviso of *vollständiger Wettbewerb,* complete competition, a notion that in the ordoliberal ideal world refers to a state of affairs in which no corporate entity in a market has the power to coerce the conduct of other firms (Eucken, 1938: Chapter III). Companies needed to meet in the market as equals and economic exchange needed to take place on a voluntary basis (Böhm, 1937: 105). A market order of equally matched market players was deemed a prerequisite for the smooth running of competition. ‘Competitive diversity’ would benefit consumers, and the general wider society (Horton and Schmitz, 2002: 4). Although ordoliberals agreed that complete competition was impossible to achieve in reality, it should nevertheless constitute a normative reference point. This implied that excessive private power in the form of monopolies and dominant market positions needed to be prohibited. In the view of ordoliberals, economic power concentration was not an indispensable element of a capitalist market economy, but the result of the reluctance of the state to intervene in the market. According to Eucken, all relevant fields of economic law, ranging from patent to corporate law, shareholder rights and liability schemes, tax and trade policy, needed to be subordinated to the maintenance of minimised economic power (Eucken, 1940 in: Vanberg, 2004: 14). This view also included the idea that shareholders should not be allowed to hold shares in different companies, as this might lead to limited competition (see De Long, 1990; Oswalt, 1996).

In the view of Eucken, ‘the monopoly office was as indispensable as the highest court’ (in Gerber, 1998: 254). Still, the competition authority should not directly engage with microeconomic processes of competition. Eucken’s colleagues Alexander Rüstow (1932) and Wilhelm Röpke (1942, 1950) elaborated this view further by claiming that ‘liberal interventions’ were justified as long as they did not impinge on the free play of supply and demand, free producer and consumer choice, and free price mechanisms. Ordoliberals, therefore, largely distanced themselves from Keynesian ideas of macroeconomic steering by the state. They considered Keynesian ideas too experimental and tentative (Gerber, 1998: 238). Nonetheless, for the sake of establishing an ordoliberal market order, a certain degree of state intervention in order to curb economic concentrations that hinder the unfolding of competitive forces was considered justified, regardless of whether a company had achieved market dominance or a monopoly position through competition with others. As a company might abuse this position in the future by raising prices and imposing market barriers for smaller companies, the competition authority needed to intervene. Thus, competition authorities needed to be empowered to deconcentrate the economy and to deprive dominant companies of their economic power and split them up into smaller components. Ordoliberals suggested measuring dominance by the position of the largest market player in a specific market, rather than relying on a fixed maximum company size. In addition to curbing economic concentrations, price fixing and market-allocating cartels also needed to be prohibited in order to arrive at the competitive market ideal. Hans Grossmann-Dörth fiercely condemned the way in which large corporations and cartels created their own legal rules in order to circumvent societal obligations and state law (cf. Grossmann-Dörth, 1933). Similarly, Franz Böhm published a study (1933) in which he analysed the ineptness of German cartel law enforcement during his time at the cartel section of the German Ministry of Economics in 1923, which enforced the first German cartel law.

Ordoliberals differed in their views about the stringency of competition. Ideally, an ordered market economy was privilege-free and non-discriminatory. Nonetheless, as fierce competition could be detrimental, ordoliberals considered certain forms of intercompany collaboration acceptable (or even desirable). Although in principle Wilhelm Röpke (1994: 172) condemned cartels, he was nevertheless a proponent of allowing exceptions, in particular if it served the rationalisation, specialisation, or diffusion of technology and research. He particularly argued that competition should not become a guiding principle for all spheres of societal organisation (1992: 191).

The ordoliberal legacy of the EU competition model is reflected by the institutionalisation of a powerful public enforcement agency that is equipped with wide-ranging enforcement competencies. It can 'order' the economy and balance the decision making according to broader political views, such as a particular concern for fair competition, particularly in terms of protecting small and medium-sized companies.

Table 2: *The Central Features of the EC/EU Competition Model*

Institutional setup and enforcement features	Influential schools of economic thought
■ Administrative *ex ante* public contorl model based on a notification and authorisation procedure ■ Integrated agency model: enforcement by a strong public authoritiy, rather than private enforcement ■ Political and legal reasoning	German Ordoliberalism long-term efficency, multiple-goal, macroeconomi orientaiton, i.e. SME protection, R&D collaboration, balanced and 'fair' competition

2.5.3 The Continuation of the Ordoliberal Project: Facts and Fiction

Ordoliberalism is sometimes equated with the political programme of *Soziale Marktwirtschaft*, social market economy in post-war Germany (cf. Peacock and Willgerodt, 1989; Vanberg, 2004; Goldschmidt, 2004; Zweynert, 2004). The notion of social market economy was coined by Alfred Müller-Armack (1901-1978), Professor of Economics and Cultural Sociology at the University of Münster and later State Secretary in the Ministry of Economic Affairs. Although the central propositions of *Ordnungspolitik* delivered the intellectual underpinnings, ordoliberalism and social market economy were not congruent. To put it differently, in the course of the 1950s and 1960s, the social market economy-formula became increasingly detached from its ordoliberal origins. Similarly to ordoliberalism, social market economy gave the state a strong role in providing social welfare. Ordoliberalism, however, did not proclaim a (strong) redistributive role for the state. In the ordoliberal ideal world, state intervention in the market was mostly procedural or framework-orientated. Supplementary social provisions would eventually not be necessary, because the state-controlled order of complete competition ameliorated social problems. Once the basic conditions for a free, but a state-controlled market economy were fulfilled, social inequality would be automatically reduced. Even though ordoliberals considered minimal income guarantees in the form of a safety net for those who are temporary or permanently unable to participate in the market necessary, they were not proponents of far-reaching social redistribution mechanisms in the form of generous welfare awards (Vanberg, 2004: 2). In contrast to Marxist critiques on capitalism, ordoliberals did not problematise the structural power imbalance between capital and labour. In fact, they paid only scant attention to the correction of more deeply engrained structural class segregations that shape inequalities in opportunities.

Müller-Armack's conception came to form part of the political programme of the conservative *Christlich Demokratische Union (CDU),* the Christian Democrats, which was the political party of the middle class and of catholic workers. With the support of the Liberals (FDP), the CDU pushed for a free market with a social welfare tint in order to generate sufficient public support to a free-market approach. A key figure was Ludwig Erhard (1897-1977), Minister of Economics from 1949 to 1963 under Chancellor Konrad Adenauer, and Chancellor himself from 1963 to 1966. In the *Düsseldorfer Leitsätze* of July 15 in 1949, Erhard's conception of a social market economy was promoted as a reaction to the central macroeconomic planning economy in the *Deutsche Demokratische Republik (DDR)* and the subsequent nationalisation of the industry. His book *Wohlstand für Alle* (1957), prosperity for all, became his political slogan.

Political rhetoric and implementation practice, however, were not congruent. Erhard did not envision a strong role for the state in redistributing welfare. His formula of social market economy mainly served to appease the German population and its anticapitalist conviction with the workings of a capitalist market economy. Rather than welfare benefits, Erhard sought to realise 'prosperity for all' through income increases and price reductions (Berghahn, 1986: 205). In line with the Fordist perspective, borrowed from the US, he believed that the rationalisation of the work process would lead to lower costs per unit and to higher productivity rates, and consequently, to lower product prices and higher wages. In Erhard's Fordist welfare logic, sufficiently large corporations that were able to reap the benefits of economies of scale needed to be created. He did not problematise large corporations and monopoly positions in the market (see Chapter 3). Ordoliberals, in contrast, feared that economic power concentrations in the form of large companies would seek to gain political power, and to secure their status quo by the rule of law (Oswalt, 1995: 10). Erhard never considered himself as the executor of Eucken's and Röpke's ideas, or as an exponent of the Freiburg School.[9] Ordoliberals, nonetheless, formed part of his team of personal advisors, such as Leonhard Miksch, a less well-known protagonist of the Freiburg School. Erhard's approach received fierce criticism from the political left. The *Christian Social Union (CSU)* and the *Social Democrats (SPD)*, the largest left-wing party, denounced the weight given to the word 'social' as mere rhetorical camouflage, to generate support among the opponents of liberal capitalism. The 'social' in the term social market economy was perceived as an antithesis to market capitalism, an oxymoron, or, 'a weasel word', which refers to the characteristic skill of a weasel to 'empty an egg without leaving a visible sign' (Hayek, 1988: 116-17). As an alternative, they proposed democratic socialism, entailing the nationalisation of important industries, such as coal, iron, and steel, as well as macroeconomic state planning, although without success.

In present scholarly discourses, ordoliberalism is occasionally conceived as a specific form of neoliberalism (cf. Hank, 1999; Plehwe and Walpen, 1999; Boas and Gans-Morse, 2006). Walter Eucken vehemently refused to be called a neoliberal. He attempted to arrive at a more comprehensive view on society, and in fact, to provide an alternative to neoliberal ideas (Gerber, 1998: 236). In the first edition of *ORDO*, he claimed to support an economic model that was equally far away from a free-market economy as it was from a planning economy (ibid). Suffice it to say that ordoliberals were undoubtedly predisposed towards a free-market economy, although in contrast to neoliberal *laissez-faire* capitalism, ordoliberals reserved a strong role for the state in curtailing market forces. Their argument was that only in a controlled and stable competitive environment, would humanist and democratic values prosper. With the ascendancy of neoliberalism that has being taking place since the 1980s, the ideas of the Freiburg School seem to have celebrated a kind of comeback. This upsurge in the ordoliberal tradition is reflected in think tanks, such as the *Aktionsgemeinschaft Soziale Marktwirtschaft* in Tübingen, the Action Group for Social Market Economy, or, the *Walter Eucken Institute* in Freiburg. Similarly, the Department of Economics at the Philipps University of Marburg became one of the ideological offshoots dedicated to the further development of ordoliberal thinking (Budzinski, 2003: 14). The type of ordoliberalism promoted by these institutions deviates from its founding fathers Walter Eucken, Franz Böhm, and Alexander Rüstow. The example of the *Walter Eucken Institute* is particularly telling in this regard.

[9] Experts on German ordoliberalism debate the categorisation of Ludwig Erhard as an adherent to ordoliberal philosophy. Whereas Goldschmidt (2004) is convinced that there is no doubt about Erhard's affiliation with ordoliberalism, Commun (2004) denies this.

The *Walter Eucken Institute,* founded by Ludwig Erhard in 1954 and sponsored by the *Commerzbank*, is devoted foremost to the ideas of Friedrich August von Hayek, whose ideas had already become influential in the late 1960s (Süddeutsche Zeitung 1994: 34). Somewhat ironically, the Institute largely ignores his ideas. There is not a single monograph of, or on Walter Eucken, whereas contributions from Hayek or on Hayek's work are countless (TAZ, Tönnies, 2000: 14). The Institute left Eucken's legacy of books and unpublished work to his family, who founded the *Walter-Eucken-Archive* (Oswalt, 1995: 10). The subordinate position of Walter Eucken has also long been apparent in the Institute's entry hall, which was up to recently decorated only with Hayek's portrait. Eucken's portrait now hangs there, but diagonally facing that of Hayek (ibid). Considering that Eucken and Hayek were antagonistic colleagues, this is rather ironic. Even though Hayek once worked at the Freiburg University, he and his disciples never supported the ordoliberal idea of strong and proactive state institutions that would correct the workings of the market by curbing economic power concentration (see for more Vanberg, 2002).

The *Walter Eucken Institute*, and also the *Aktionsgemeinschaft Soziale Marktwirtschaft* form part of the elite networks and think tanks that are linked to the *Mont Pèlerin Society,* a profoundly neoliberal think tank founded by Hayek in 1947 and named after the Swiss mountain Mont Pèlerin. With a broad range of activities devoted to the spread and development of Hayekian ideas, it encompasses a membership of approximately 500 individuals of high-ranking positions and an institutional machinery of more than 70 think tanks around the world (Plehwe and Walpen, 1999: 4, see also Plehwe and Walpen, 2006). The success of the Mont Pèlerin Society is revealed by the fact that since 1974 seven of its members have received a Nobel Prize in Economic Sciences, an alternative prize modelled on the official Nobel Prizes in the memory of Alfred Nobel and awarded by the Bank of Sweden to outstanding contributions of economists. Notably, Hayek himself, in 1974 belonged to this group of Nobel Prize winners, next to Milton Friedman in 1976, George J. Stigler in 1982, James M. Buchanan in 1986, Maurice Allais in 1988, Ronald H. Coase in 1991, as well as Gary S. Becker in 1992 (Plehwe and Walpen, 1999: 10).

The linkage between the Mont Pèlerin Society and the Nobel Prize awards in the discipline of economics is no coincidence: the longstanding chair of the committee for this unofficial Nobel Prize, Erik Lundberg, was a member of the Society himself (ibid). Most importantly, many of these prize winners were highly influential in developing theories on competition economics. Thus, through the institutional enmeshment of neoliberal think tanks, the attribute 'ordoliberal' acquired a different meaning over time. A speech on 'the modernity of Eucken's thinking and his solutions' by Frits Bolkestein, Internal Market Commissioner, at the Walter Eucken Institute in Freiburg is illustrative in this regard. Bolkestein considered the fact that European competition policy was still using concepts of ordoliberalism, such as the ordoliberal idea of 'a government that keeps itself very much in the background' (Bolkestein, 2000). Moreover, he considered the 'ongoing programme of deregulation and increased labour market flexibility by means of wage and price flexibility a major step in the direction of an ordoliberal Europe' (ibid). Therefore, he claimed 'today's liberal policy-makers should also in the future draw on Eucken's work in their reflections on the institutional dimension of establishing a free market liberal Europe' (ibid).

2.5.4 *Ordoliberal Influence at the Commission's DG IV*

A range of officials of German origin and nurtured in German competition law occupied strategic positions in the Commission's DG IV until far into the 1980s, many of whom were outspoken advocates of ordoliberalism.[10] For years, the German *Bundeskartellamt* and the Federal Economics Ministry strongly lobbied for ordoliberal candidates to take office in the DG IV (Budzinski, 2003: 14). In Germany, committed adherents of ordoliberalism held tenures at the *Bundeskartellamt* until far into the 1990s. For example, its first President Eberhard Günther served for 18 years, from 1957 until 1976. His successor, Wolfgang Karrte, was in office for 16 years, from 1976 until 1992 (Wilks and Bartle, 2002: 165; see also Sauter, 1997). Dieter Wolf, also an outspoken adherent of ordoliberal ideas, headed the *Bundeskartellamt* from 1992 to his death in 1999. When his successor Ulf Böge resigned in April 2007 after eight years in office, *Der Spiegel* (2007), a German weekly magazine, announced in its headlines 'Farewell to an Ordoliberal'. At the Commission, German office holders inspired by ordoliberalism held similarly long tenures. Hans von der Gröben, who was President of the DG Competition for nine years, from 1958 until 1967, exemplifies this. The Commission Cabinets particularly formed enclaves for German ordoliberals as the Commissioners in charge could hire and fire personal advisors and experts according to his/her own discretion. Furthermore, a vast range of Director

[10] Traditionally, the Commission's DG for agriculture was headed by a French official, and the Internal Market DG by a British official. Moreover, a Spanish official tends to preside over the DG Regional Policy and an official from the Northern Member States the DG Environmental Policy (Hooghe and Nugent, 2002).

Generals and Assistants of the Director General were trained in German competition law. Ernst Albrecht, for example, was *Chef de Cabinet* under Hans von der Gröben from 1958-1967, and ascended to become Director General from 1967 to 1969. Manfred Caspari, Director General, similarly was in office from 1980 to 1990, and his successors, Claus-Dieter Ehlermann, and Alexander Schaub, held this post from 1990 to 1995, and 1995 to 2002, respectively. Assistant Director General Götz Drauz was appointed in 1999 and will remain in office until 2009. Furthermore, Competition Commissioner Karel Van Miert (1989-1994), a Belgian socialist, sympathised with ordoliberal ideas. He claimed 'to have developed an interest in the writings of Ludwig Erhard very early on both privately and professionally' (Van Miert, 1998d: 1-2). In 1998, when he was awarded the Ludwig Erhard Prize, he acknowledged that 'ordoliberalism had lost nothing of its relevance' and that 'again and again German politicians and competition specialists have taken a leading role in the shaping and practical development of the European competition rules' (1998d: 3).

The unwritten rule that every Director General needed to be a German started to lose its hold with the arrival of the Prodi Commission (Kassim, 2003). With the imposition of Philip Lowe from the UK as Director General for Competition in 2002, ordoliberal influence was on the demise. He characterised the DG Competition as ideologically divided in two camps, notably that of the 'Modernists' and that of 'Jurassic Park'. The 'dinosaurs' of the DG Competition, according to Lowe, were those still adhering to the ordoliberal philosophy (Walbroeck, 2005).

To conclude, tracing and quantifying the continued influence of German ordoliberals over time is an arduous task, particularly considering how ordoliberal ideas have changed over the years. Discrepancies between theory and daily enforcement practice were commonplace. Nonetheless, ordoliberal reflections continued to underlie the policy mission of the DG in the 1960s, 1970s, and the early 1980s, a period in which EC competition policy followed the broader embedded liberalism ideology (see Chapter 4).

Part II: The US Antitrust Model

2.6 The Substance of US Competition Law: The 'Per Se' Prohibition and the 'Rule of Reason'

The US Sherman Act of 1890, the Clayton, and the Federal Trade Commission Act of 1914 are the most central US competition laws (see Figure 3). Since the inception of the Clayton Act, the legal basis of antitrust enforcement expanded cumulatively with new statutes and amendments, such as the *Webb-Pomerene Act* of 1918, the *Robinson-Patman Act* of 1936, the *Celler-Kefauver Act* 1950, and the *Hart-Scott-Rodino Antitrust Improvements Act* of 1976. The Sherman Act strictly prohibits cartels and the Clayton Act regulates acts of concentration, such as mergers and acquisitions, which are in essence considered harmless, as long as there is no attempt to monopolise a market position. The Sherman Act, and the jurisprudence that followed from it, established a division between conduct deemed essentially harmful in principle, that is per se illegal, and conduct that needs to be assessed under the rule of reason, that is in the light of its character and effects under the given circumstances. Two legal notions, the 'per se' prohibition rule and the 'rule of reason' became the hallmark of US competition control, which were also exported into other country's competition laws (Djelic and Kleiner, 2003: 3).

The *per se* prohibition as spelled out in the Sherman Act implies that horizontal cartels and the like are categorically ruled out. Prohibited, without exception, are horizontal restraints, such as price-fixing intercompany agreements; agreements on reducing the production volume, dividing markets and customers; bid rigging; and companies in a monopoly position engaged in economic activities such as exclusive dealings and product tying. The mere existence of these practices provides sufficient evidence for the strict illegality of such behaviour in the US, i.e. there is no need to prove that it produced anticompetitive effects (Litan and Shapiro, 2001: 18). To date, the prosecution of horizontal price-fixing and bid rigging among competitors constitutes the core enforcement goals of the US antitrust authorities. The *per se* prohibition of such cartels was restricted to the actions of companies in the domestic market. US companies involved in international export cartels, in contrast, were not considered *per se* illegal. The Webb-Pomerene Act of 1918 even formally permitted export cartels as long as they had no effect 'upon domestic conditions within the United States' (Slot, 2004: 460). For nearly a century, US antitrust law has allowed export cartels.

Anticompetitive behaviour judged upon the ‘rule of reason’ implies that anticipated harm to trade is pondered against the benefits on a case-by-case basis. In addition, conduct falling under the Sherman Act are assessd under the rule of reason. Article 7 prohibits acts of concentrations only where they effect a ‘substantive lessening competition’, a notion that brought forth the far-famed ‘SLC’-test in US merger control. The rule of reason considerably increased the leeway of judges in interpreting the legality of market concentrations. Moreover, it gave way to more lenient judgements. Antitrust cases required an ‘efficiency defence’: as long as mergers and acquisitions resulted in more efficient production and reduced costs, they could proceed. The mere size of a company, or the existence of dominant market power, therefore, was not by definition considered an offence. In practice, the rule of reason institutionalised an oligopolistic understanding of competition (Peritz, 1996 in: Djelic and Kleiner, 2006: 289). Moreover, it implied that a company was innocent until proven guilty. The differentiation between cartels as harmful and company size as relatively harmless had important repercussions on the US market structure. Mergers and acquisitions were legally accepted as the natural outcome of successful competition and considered beneficial for achieving economies of scale. As the formation of cartels was strictly ruled out in the US, companies choose to merge instead, which resulted in particularly large companies. Until the end of the Second World War, market structures in Europe, and most notably in Germany, were dominated by cartels as the prevalent form of corporate organisation (see Chapter 3). Moreover, the European model of *ex ante* notification and exemption procedure for commercial agreements implied that, what in the US would fall into the category of cartels, were never completely ruled out in Europe (see Part 1 of this chapter). In order to allow certain industries to deal with chronic overcapacities, crisis cartels were sporadically permitted (see Chapter 4).

Figure 3: *US Federal Antitrust Law*

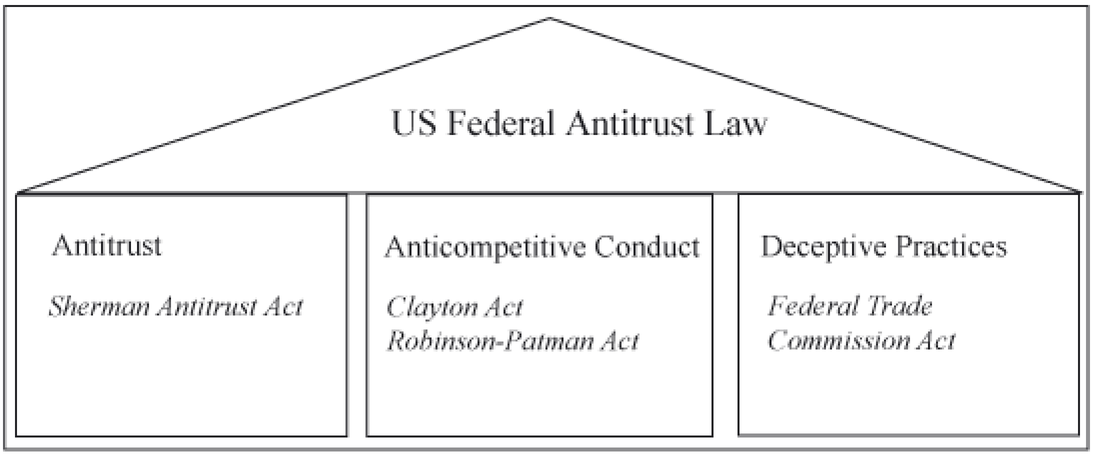


Table 3: *Sources of US Competition Law*

Type of Legislation	*Examples*
Statutes	■ Sherman Antirust Act ■ Clayton Act ■ Hart Scott Rodino ■ International Antitrust Enforcement Assistance Act ■ Federal Trade Commission Act
Guidelines	■ Horizontal Merger Guideline

2.7 The Peculiarities of US Antitrust Enforcement

2.7.1 A Two-Level System of Antitrust Enforcement

Similarly to the EU, the US antitrust model builds on a two-level enforcement regime, involving parallel antitrust enforcement from both the Federal and the State competition authorities. The division of power is less clearcut in the US than in Europe, where EU law enjoys supremacy over national law, and where the Commission's involvement in a case pre-empts that of the Member States. In the US, most States have their own antitrust statutes, which, however, are not allowed to contradict Federal court interpretations of the Sherman and Clayton Act. Similarly to the EU Member States, the States are entitled to enforce Federal antitrust laws in addition to their own statutes. As competences at Federal and State level are not clearly separated, jurisdictional overlap by different US States is common. A European lawyer noticed in this regard:

> *The American process is daft! U.S. lawyers complain about having to notify an American transaction in Romania, but force me to vet a deal between two European companies before antitrust regulators not only in Washington, but also in state offices in Santa Fe, Des Moines, Albany, Tallahassee, Austin, Portland, Seattle and Sacramento.* (In Calvani, 2003: 20)

State-level antitrust enforcement can strongly deviate from that of the Federal authorities. Harmonising antitrust law enforcement in the US, however, has never been an issue on the political agenda (Calvani, 2003: 419). The authorities of the States have a reputation for being more aggressive in the prosecution of anticompetitive conduct than their Federal counterparts are. Moreover, they often seek to protect local companies from the consequences of the anticompetitive behaviour of 'foreign' companies. In particular during the Reagan administration, State-level antitrust enforcement sought to redeem the lax enforcement of the Federal authorities (Fox and Pitofsky, 1997: 243). As the next section illustrates, in addition to the parallel enforcement of the State-level and Federal antitrust authorities, two government agencies at Federal level are responsible for antitrust enforcement.

2.7.2 The Public Enforcement Agencies: The Department of Justice and the Federal Trade Commission

Federal US antitrust enforcement is organised according to what Trebilcock and Iacobucci (2002) identified as the bifurcated agency model: two public authorities deal with Federal antitrust laws, the *Department of Justice (DoJ)* from the executive department, and the *Federal Trade Commission (FTC)*. A particular systemic feature is that the composition of the DoJ is subject to presidential control, i.e. the President nominates the Assistant Attorney General for Antitrust and the head of the DoJ Antitrust Division to the Senate for approval. Moreover, the President allocates the budgetary resources to the DoJ, and nominates the Federal judges. This results in an intimate relationship between the political views of the Presidency and the antitrust enforcement agencies. Consequently, a President can influence the ideological course of antitrust enforcement through strategic appointments and resource allocation. Although antitrust law enforcement is generally not politicised in presidential elections, it is a highly political issue.

The FTC is an administrative agency installed by US Congress based on the *Federal Trade Commission Act* in 1914. The purpose of the FTC was to bring in more checks and balances and to counterbalance the influence of the DoJ and therefore, the Presidency. The new enforcement body was a response to an ‘insufficiently aggressive DoJ in pursuing antitrust violations’ (Litan and Shapiro, 2001: 12). Powerful industrial interests frequently targeted the President with their lobbying. In return for lax antitrust enforcement, individual business representatives rewarded the President with financial and policy support. The idea of the US Congress was to staff the FTC with politically independent antitrust experts, rather than politicians (Gavil *et al.*, 2002: 970). Three institutional features are important in this respect: first, US Congress confirms the appointees to the FTC and approves the FTC budget; second, at least two of the five Commissioners who are in office for a seven-year term need to be from another political party than the President;

and third, US Congress can co-define the course of enforcement by amending antitrust statutes and other legislative measures. Thereby, the drafters of the Federal Trade Commission Act sought to limit dominant partisan influence.

The bifurcated institutional division and the political influence overshadowing the composition of the two agencies, resulted in a rather tense relationship between the DoJ and the FTC (Gavil *et al.*, 2002: 55; Fox, 1997: 341). The FTC often challenges the practices of the DoJ. The political divisions are also manifested in the staff composition of the two agencies: while the FTC was traditionally the preserve of economists, the DoJ Antitrust Division is more comprised of lawyers (Peters, 1996: 59). Tensions emerge as lawyers tend to be more conservative in their approach, balancing their arguments against precedents and legal principles, while economists tend to be more willing to try out new approaches and economic modelling (ibid). The DoJ and the FTC share the enforcement of US antitrust law and fulfil similar tasks. Most notably, they both lack the authority to block anticompetitive conduct and are merely equipped with investigatory powers. Courts, rather than the two antitrust agencies, have the final say in the US. This renders US antitrust enforcement a case-orientated endeavour in which the agencies have to litigate each case before the courts. The public antitrust authorities find themselves on equal stance with private actors who also enjoy the statutory right to prosecute antitrust violations before the courts, a feature that is generally known as private enforcement. This why the US model is also referred to as the court model, or the ‘bifurcated judicial model’ (cf. Trebilcock and Iacobucci, 2002).

The litigation powers of the FTC and DoJ differ. Generally, the DoJ is responsible for both the Sherman and Clayton Act, and deals with the cases that require criminal sanctions. Violations of the Sherman Act, i.e. horizontal cartels involving price fixing, bid rigging, and market-sharing agreements, constitute so-called ‘white collar crimes’ that can be punished under US criminal law. As companies are considered to be legal fictions unable to commit crimes, individuals are liable for antitrust breaches. Next to administrative or civil sanctions in the form of an order to stop with a certain anticompetitive conduct, or in the form of monetary fines, courts can jail individuals for up to three years (Chemtob, 2002: 199).[11] This implies that cartel prosecution in the US can easily resemble a

[11] In the 1990s, there were, on average, 35 individuals jailed for antitrust breaches, coupled with fines averaging US$ 90,000 (Chemtob, 2002: 200). Over time, the fine maximum was increased several times: in 1974, Congress raised individual fines to US$ 100,000 and fines for companies to US$ 1 million in an

Hollywood-type feature film. The US antitrust authorities, for example, occasionally make use of the FBI and investigation practices such as phone tapping and body wiring by undercover agents (McGowan, 1996: 15). The FTC was primarily established for the enforcement of the Clayton Act, and can only address those parts of the Sherman Act that do not lead to criminal prosecution. To avoid the duplication of work, the agencies notify cases to each other, and then decide which agency will conduct the investigations (Gavil *et al.*, 2002: 970). On an informal basis, the two agencies have divided cases on an economic sector basis: while the DoJ specialises in the airline and telecommunication matters, the FTC handles foremost the oil industry and pharmaceuticals (Litan and Shapiro, 2001: 12). The fact that both agencies have to litigate anticompetitive conduct before the courts results in a peculiar feature of the US antitrust model. As litigating a case before the courts is a time-consuming and costly procedure, on average more than 80% of US government cases are either abandoned or settled on a voluntary basis between the parties without a court judgment, i.e. so-called consent decrees (Venit and Kolasky, 2000: 96). This has resulted in a situation where since 1975, the US Supreme Court has not ruled in a substantive merger case (Hwang, 2004: 133).

2.7.3 US Merger Control Regime

Another particular feature of the US antitrust model is its merger control regime. Similarly to the EU, the US has an *ex ante* notification system in place for mergers, established by the Hart Scott Rodino Act of 1976, amending the Clayton Act of 1914. What is called the *Hart Scott Rodino (HSR)* filing implies that companies meeting a certain turnover threshold have to notify planned mergers, acquisitions of securities, asset acquisitions and the formation of joint ventures to both the FTC and the DoJ. The US threshold measure is about 25 times lower than that in the EU, which means that a lot more concentration cases are scrutinised by the US authorities. In the event of the merger wave of the 1990s, the US agencies received as many as 4,728 notifications, 28% more than in the previous year and three times the number of filings received in 1991 (Parisi, 2000). Since the 2002 reform, companies located outside the US planning to acquire the stock of another foreign company with substantial exports into US (more than US$ 50 million) have to comply with

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amendment of the Sherman Act (ibid: 197). In 1997, the maximum fines were increased once more to US$ 350,000 and US$ 100 million respectively, and the famous vitamin cartel, *Hoffman-La Roche, Ltd.* was punished with a fine of US$ 500 million (ibid).

the HSR (Davidow, 2002: 497).[12] Thereby, all over the world, companies involved in a merger have to determine whether or not they need to notify to the DoJ or the FTC, even if there are no anticompetitive elements involved (Pitofsky, 2002: 56). As those companies that are subject to antitrust enforcement also finance the lion's share of the costs of the Federal antitrust agencies, i.e. companies have to pay a filing fee of US$ 45,000 for each transaction, companies not located in the US co-finance the operations of the US antitrust authorities, something which eventually could turn to their disadvantage. In 2000, over US$ 100 million and in 2001 US$ 86.3 million were collected under the HSR Act (ibid). The reluctance to notify can lead to the imposition of fines. Notifying parties have to meet the deadline of 25 working days before an agreement leading to a concentration will be signed. In high-level cases, this deadline usually does not cause many problems, because notifications tend to be preceded by informal 'triangular' contacts not subject to a legal deadline (Venit and Kolasky, 2000: 94). Meanwhile, other countries have also adopted filing fees, such as Canada. In the EU, the notification regime is still free of charge, although there are discussions on increasing the DG Competition's resources by introducing a baseline fee of € 30,000, adjustable to the size and complexity of the merger (Bannerman, 2002: 11). So far, no decisions have been taken.

> *No other country has adopted an antitrust statute that contains equally broad substantive provision and relies so heavily on a common law method of judicial interpretation to implement them.*
>
> William Kovacic and Carl Shapiro of the US FTC and DoJ (2000: 58)

2.7.4 The Ex Post Court Model and the Anglo-Saxon Common Law Tradition

The US constitutes a leading example of an Anglo-Saxon common law scheme, which underpins the institutional setup of the US antitrust authorities (cf. Boffa, 2004). This means that US antitrust law enforcement is a case-orientated endeavour in which courts constitute the ultimate resort for stopping anticompetitive conduct. The Sherman Act and the Clayton Act are framed in vague and imprecise terms, embracing 'a simplicity virtually unknown in modern legislative enactments' (Gavil *et al.*, 2002: 52). Initially, the rationale

[12] In addition, the reform raised the notifying threshold in order to reduce the number of cases that fall under the scrutiny of the FTC and the DoJ. Under the new rules, a transaction is judged if one parties has sales or assets of at least US$ 100 million and the other at least US$ 10 million (Venit and Kolasky, 2000: 90).

was that too detailed laws would undermine the flexibility of the regulators that allows them to adjust to different economic circumstances. In fact, there is no other competition regime than the US in which antitrust rules have been formulated so broadly. Throughout the past century, however, Federal judges produced lengthy judicial precedents that interpreted, clarified, and refined US antitrust laws, rendering enforcement a highly complex and specialist area.

As a direct consequence of the court model, anticompetitive conduct is prosecuted *ex post*. The notion *ex post* derives from the Latin saying *ex post facto,* which refers to the situation in which laws are enacted after the conduct has occurred. It is sometimes also categorised as retrospective law. A central feature of the *ex post* court model is private enforcement, entailing that private plaintiffs can bring antitrust breaches to the courts. Private antitrust enforcement has a tradition of more than a century in the US. The Clayton Act of 1914 introduced a range of systemic features that made it particularly attractive for private actors to initiate legal proceedings against corporations. The most prominent feature is the system of 'treble damages' according to which a successful plaintiff in the US can be awarded not only the costs of suing (expert fees and attorney's fees), but up to three-times the damage suffered from anticompetitive conducts. In terms of damage compensation, no other national antitrust jurisdiction is as generous as that of the US. Even victims of anticompetitive conduct from outside US territory may be awarded treble damages. According to Section 16 of the Clayton Act 'any person, firm, corporation, or association' directly harmed in his or her business or property by unlawful conduct has the right to sue before the US courts.

Other features that make it attractive to bring cases to the courts are class actions, which allow plaintiffs to group together, sue collectively and share the costs of suing. Other pro-plaintiff rules are extensive discovery rights, the right to invoke a jury trial, as well as the right of professional litigators to offer contingency fees, or to sell their legal services under a 'no-cure-no-pay'-condition. There are only a few restrictions to private antitrust litigation, such as limitations to indirect purchasers who can only sue at some State courts, but not at Federal court-level, or limitations concerning pass-on defences according to which companies cannot forward damage claims to other companies. The US antitrust model also entails a leniency scheme, which grants immunity from prosecution to those who first confess to having participated in a collusive or other unlawful agreement. All of these features constitute incentives for private actors to bring antitrust infringements to the US courts, which has caused high levels of private enforcement throughout US antitrust history. Litigation by the antitrust authorities merely constitutes a supplement to private filings. Hitherto, more than 90% of all formal US antitrust actions were brought to the courts by private litigators, or to put it differently: for every action pursued by the US authorities before the courts, private actors pursue ten (Kemper, 2004: 9; Wils, 2003: 477; Dörn, 1996: 25). Over time, the level of private enforcement has increased. Whereas from the early 1940s until the mid-1960s the ratio of private to government cases tended to be 6:1, from the mid-1960s to the late 1970s, private filings contrasted with public ones by a significant 20:1. In the 1980s, as part of the influence of the Chicago School (see following Section), private actions declined to a ratio of 10:1, which was due to the imposition of higher burdens of proof for private plaintiffs and reduced options for receiving treble damages (Gavil *et al.*, 2002: 1000). Currently, class action filings in the US are ten times as high as a decade ago. Even though the number of antitrust filings dropped by 10% from 2004 to 2005, private actions rose by 8,8% (McCarthy *et al.*, 2005). In the first half of 2006, the number of private antitrust actions doubled (ibid), which indicates that even private actors play an increasingly important role.

Private enforcement constitutes one of the most characteristic elements of the US antitrust model, which has both its friends and foes. Proponents celebrate it as an additional check and balance to the enforcement of the public agencies, which helps to remedy (potential) laxness of public authorities and corruption, and to more generally increase the overall level of antitrust enforcement. According to proponents, those who fall victim to anticompetitive conduct – which can be competitors, distributors and suppliers, as well as consumers – are likely to be more watchful than public agencies, and the double jeopardy of public and private enforcers would create deterrence to antitrust violations. The downside of the system of private enforcement is an excessive culture of litigation, in which frivolous lawsuits are common. As the barriers for lawyers to certify class action are very low, the net result of the US antitrust system is that a vast amount of private lawsuits in the US are of a dubious nature.[13] According to White House estimates, in the US, every

[13] This can end up in bizarre outcomes, such as reported by credit cardholder Brian M. Carney, who was awarded US$ 0.03 in the class action case *Schwartz v. Citibank.* He was not informed about the trial, nor was he aware about having been treated unfairly, nor did he give his permission to sue the Citibank in his name for late processing of payments. 'His' lawyers, however, garnered US$ 9 million of the US$ 18 million compensation payment (Carney, 2005). Customers of Citibank, henceforth, are now more likely to be confronted with 'higher interest rates' or the limitation of credits as a result of the awarded damage payments.

two seconds a lawsuit is filed (Greenberg, 2003). The annual 'Stella Awards', although rather a hoax than a serious contest, are symbolic for a litigation culture that has run out of control. The Stella Awards honour the most outrageous and ridiculous lawsuits that are brought to the US courts. The event was named after Stella Liebeck, the 79-year old woman who in 1992 sued McDonald's for her burns after she spilled hot coffee on herself. Mrs. Liebeck was awarded US $2.9 million as compensation for the damage suffered (*see* for more www.stellaawards.com). Furthermore, private enforcement, in particular in the US, tends to be biased towards plaintiffs. Private actors may first bring complaints to the Federal antitrust institutions, which will provide them with necessary evidence for the anticompetitive conduct, and then sue for damage compensation afterwards. In this way, public enforcement by definition produces a multiplier effect: every public ruling triggers further private lawsuits (Litan and Shapiro, 2001: 15). Since this can take place at both the Federal and State courts, the US model, almost by definition, leads to a high number of litigations. For this reason, the number of informal and voluntary settlements between companies and public authorities tends to be high. Exorbitant damage payments may bring corporations to a crisis, cause financial instability, hostile takeovers, or eventually bankruptcy. This has created a situation in which US companies prefer to buy out plaintiffs that threaten to litigate in order to avoid the vast costs of court trials and the risk of a damaged reputation. US business representatives have repeatedly complained about the easy access for private plaintiffs to the courts being a hidden 'tax on corporate America' (Litan and Shapiro, 2001: 15). In fact, in the end, this hidden tax is likely to be passed on to employees and consumers, through lower wages, job cuts and higher prices. In addition to the litigation risk, private enforcement increases judicial complexity for companies who have to comply with the law. This is further enhanced by the fact that different judges produce different interpretations of the same law. In short, the US business community is interested in getting rid of the onerous elements of the US model, such as criminal prosecution, class actions, and particularly the costly private treble damage action rule.

The ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood.

John Maynard Keynes (1936)

2.8 The Role of Schools of Economic Thought: The Ascendancy of the Chicago School of Law and Economics

In the late 19th century, a community of antitrust specialists emerged in the US. Law firms employed antitrust lawyers and offered their services to other companies, such as litigating, legal counselling, and lobbying. After the Second World War, the US antitrust community became increasingly professionalised and specialised. Not only law scholars, but increasingly also economists formed part of the community. The strong evolutionary character of the Sherman and Clayton Act on the one hand, and the rule of reason approach on the other, provided an avenue for economic facts, and therefore, for microeconomic theories and econometric analysis in the investigation of anticompetitive conduct (Ehricke, 2003: 119). Antitrust specialists, including both lawyers and economists, organised their interests in the *American Bar Association (ABA)*, conveying the US antitrust community at the Annual Meeting of the Section of Antitrust Law. It provided a broad intellectual platform to influence the course of antitrust law enforcement by retaining strong 'cordial ties with the FTC and the DoJ's Antitrust Division (ibid: 120; see also Morgan, 2005). To uphold the closeness with government institutions, most law firms who specialised in antitrust matters established a base in Washington, D.C. The US antitrust community of today is large, sophisticated, and well financed (Gerber, 2002: 133). In addition to Washington, many law companies today hold offices near to Wall Street in New York, in order to be close to their contractors. Already in the 1960s, a US historian, observed:

> *(T)he business of studying, attacking, defending, and evaluating oligopolistic behaviour and its regulation has become one of our small industries, the almost exclusive concern of a technical elite of lawyers and economists.* (In Freyer, 2006: 119)

In order to stimulate the cross-fertilisation of the discipline of law and economics, special antitrust departments at US universities were established. This was also the time when the intellectual work of the Chicago School of Law and Economics at the University of Chicago (hereinafter the Chicago School), started to gain influence. The Chicago School incrementally changed antitrust discourse in the US, as well as wider political and economic views. It was established by a group of intellectuals, of both US and European descent, among which were many refugees from fascist regimes in Europe. The maxims of the Chicago School underwent different phases of influence. Already in the 1930s, when Henry Simons fiercely criticised the central planning of the New Deal under Franklin Roosevelt, Chicago scholars sought to influence the legal thinking in Federal antitrust matters (Kovacic and Shapiro, 2000).

The early Chicago School emerged in a time when 'deconcentrationist' views of the Harvard School were dominant. Louis Brandeis from the Harvard School, a fervent advocate of diluted market power, and author of *The Curse of Bigness* (1934), formed part of Roosevelt's team of political advisers. Under the influence of Brandeis, economic power concentration was fiercely prosecuted as it was considered to have a negative impact on industrial development and innovation (Hart, 2001: 4). The US encounter with the high degree of industrial cartelisation in Nazi-Germany particularly stimulated US antitrust enforcers to prosecute collusive practices, such as price fixing and market allocation, and dominant positions, more vigorously and more stringently back home (Harding and Joshua, 2003: 61-62).[14] Structuralist approaches, i.e. approaches where the market structure stood central, were dominant. Similarly to ordoliberalism, the emphasis of the Harvard School scholars was 'to preserve a society of small, independent, decentralised businesses' and to keep 'economic power dispersed' (Fox and Pitofsky, 1997: 236). For example, the merger section of Clayton Act, which was barely applied in the past, was amended with the *Cellar-Kefauver Merger Act* in 1950, which sought to protect the interests of small and medium-sized business (ibid). In reaction to the antimonopoly attitudes of the New Dealers, business representatives of larger combines pushed strongly for more regulatory leeway in the formation of intercompany agreements instead. Chicago scholars sympathised with these interests, and with the early work of Aaron Director on antitrust issues in the late 1940s and early 1950s, the Chicago School started to challenge the ideas of the Harvard School (Kovacic and Shapiro, 2000: 53). It only started to have some impact on US Federal antitrust practices, however, from the late 1960s onwards, and

[14] The focus of antitrust enforcement at that time was particularly directed against monopoly positions and economic concentration. All economic concentrations with a combined market share above 20% were deemed illegal (Mueller, 1997: 658). In addition, US trustbusters attacked international cartels involving US companies like *Allied Chemical*, *DuPont*, *Standard Oil,* and *General Motors* (Wells, 2002: 59, 64). Landmark cases were the Alcoa, short for *US v. Aluminium Co. of America* (1945), and the *American Tobacco* (1946) decision. Nonetheless, under the New Deal, cartels were not categorically condemned. On the contrary, government controlled industry-wide cartels were considered a means to steer economic development (ibid: 35-37).

became dominant from the late 1970s on (cf. Gerber, 1998; Budzinski, 2003). In the antitrust literature, the interwar period from the 1920s to the 1930s, is therefore sometimes referred to as the first Chicago School, the 1960s and 1970s as the second, and the time between the 1970s until today as the third Chicago School (Rutherford, 2003: 6). Representatives of the Chicago School held coherent viewpoints and shared a commitment to a broader political mission, which justifies speaking of a 'Chicago approach'. As Gary Becker, Chicago graduate and winner of the alternative Nobel Prize in 1992 described the situation back in the 1950s:

> *There was a lot of self-confidence that we had the right answers and the rest of the profession was wrong. We saw economic analysis as a powerful way to understand behaviour, providing a lot of insight not only into the economy itself, but also how society is organised.* (Cited in Yergin and Stanislaw, 1998: 146)

As a common denominator, Chicago scholars propagated deregulation and liberalisation of markets, and monetarism. They perceived capitalism and democracy as natural and inseparable allies: free markets and individual economic freedom were considered a precondition for political freedom, and vice versa (cf. Friedman, 1962). In Adam Smith's tradition, Chicago scholars built their premises on neoclassical economics, departing from the notion of self-regulating markets as the best way to generate wealth. They assumed that markets were competitive and guided by what Smith called 'the invisible hand' in *Nature and Causes of the Wealth of Nations* (1776). The power of Chicagoan ideas strongly correlates with the number of Chicago scholars or affiliates winning alternative Nobel Prizes in economics. The number has amounted to 19 since 1974, the highest number a single University department has produced (Yergin and Stanislaw, 1998: 149). Famous Chicago scholars in antitrust theorising are Richard A. Posner, Aaron Director Edward Levi, and Nobel prize winner George Stigler (1957). The most prominent representative of the third Chicago School was without doubt Milton Friedman, who won the Nobel Prize in 1976. Charismatic and provocative, he brought the Chicago School into the glare of publicity. His membership in the *Mont Pèlerin Society* since 1947 (see also Part 1 of this chapter) provided him with an international network to disseminate his intellectual work to other parts of the world (Yergin and Stanislaw, 1998: 145).

2.8.1 The Chicago Theorems of Consumer Welfare and Efficiency Gains

The Antitrust Division of the Chicago School's Law and Economics Department was established in the 1950s. It emerged as a reaction to a thirty-year long period of macroeconomic steering by the state, and activist antitrust enforcement. Committed to the Darwinian logic of 'survival of the fittest', Chicago scholars saw competition as a dynamic force that continuously restored inefficient market outcomes towards presumed market equilibrium. In their view, markets regulated themselves through continuous competitive dynamics in which corporations try to undercut each other's prices. In other words, Chicago scholars considered the competitive process to be self-perpetuating. The prime virtue of competition was, according to Robert H. Bork, that more efficient firms would take business away from the less efficient' (in Freyer, 2006: 122). Eventually, these dynamics would reach equilibrium of economic power, referred to as perfect competition. Even though in reality this equilibrium was unreachable, the artificial situation of perfect competition nonetheless served as a benchmark for their theories. Building on the premises of methodological individualism, they assumed that rationally behaving company boards and managers would attempt to generate economies of scale and economies of scope as ways to achieve efficiency gains and maximise profits. The Chicago School distinguished between two types of efficiency benefiting consumers with lower prices: productive and allocative efficiency. As an aggregate of corporations would strive to maximise profits though efficiency gains, the allocation of resources and production processes would ultimately be efficient. Once efficiency gains were achieved, marginal production costs were expected to decrease, and – due to the competitive environment in which rival companies offer similar products passed on to consumers.

The idea of perfect competition implied that the concept of market failure did not have any meaning (Yergin and Stanislaw, 1998: 147). Chicago scholars put much emphasis on the self-healing mechanisms of the market. Anticompetitive corporate behaviour was only considered a temporary phenomenon, and hence, public market intervention was more damaging in essence than anticompetitive conduct. Consequently, they attributed marginal importance to competition control: structural market interventions should be the exception and regulatory steering from the state should be restricted to a minimum necessary. Cartels, however, should be prosecuted as they have clear negative effects on consumer welfare in the short-term. With the single exception of cartels, 'the Chicago School showed very little interest in busting anything else' (Fox, 2003b: 91). Whereas most Chicago scholars considered a certain degree of public market intervention necessary, the most libertarian wing preferred no antitrust law at all (Fox, 2003b: 91). Even cartels would eventually be self-destructive and wither at the expense of competition. Illustrative of this is the view of the legendary Chicago scholar Milton Friedman, who considered antitrust laws to be unduly intrusive, and to do far more harm than good. He suggested ‘getting rid of them’ (Friedman, 1999). In his view, corporate complaints about restrictive business behaviour of dominant players were simply ‘the cries of competitors’, which sought government protection from competition. Nonetheless, overall Chicago Scholars considered cartels tantamount to corporate fraud against consumers and the supreme evil of corporate market distortions.

The Chicago perspective on market behaviour was predominantly orientated on the short-term, which implied that the market performance of individual companies constituted the focal point of attention, rather than market structures of entire industries. Due to the dynamics of competition, market structures were expected to recover themselves. For this reason, there was no need for public policy to find structural solutions to regulate markets. Chicago scholars propagated a permissive attitude towards ‘size’ and dominant market positions, as long as companies maintained competitive prices for consumers. Although the market shares of a dominant market player could serve as an indicator of anticompetitive conduct, they agreed that this should not be taken as conclusive evidence (Baker, 2003: 3). Due to the workings of economies of scale and scope, greater economic concentration was believed to bring greater efficiency effects. The product life cycle theory of Vernon (1966) supported the view that the competitive game would eventually live on and monopolies would vanish. Due to the high profit margins of new technologies, new products, manufacturing processes, or business techniques, new competitors will enter the market and undermine the ‘monopoly windfall of the early starter’, break it into an oligopoly, and eventually, induce a situation of fierce competition in which economic power concentration has dissolved. Therefore, merger restrictions of any sort were considered a needless regulatory burden on companies. In the view of Milton Friedman, ‘private unregulated monopoly was the lesser of the evils when compared to government regulation and ownership’ (in Yergin and Stanislaw, 1998: 148).

The whole *raison d’être* of competition was subordinated to the consumer welfare paradigm. In the view of Bork, ‘competition may be read as a shorthand expression, a term of art, designating any state of affairs in which consumer welfare cannot be further increased' (Foer, 2004). Thus, the maximisation of the 'consumer surplus' became paramount in the assessment of anticompetitive conduct. Chicago scholars focused on price reductions as the primary indicator and developed rigorous econometric models based on neo-classical price theory (Fox, 1997: 340). Strongly behaviourist in nature, this advocated an 'economic approach to legal analysis' (Gavil *et al.*, 2002: 63; cf. Posner, 1978; Slot, 2004: 445). The implication of this is that the use of price theories and price modelling as a central reference point for determining anticompetitive conduct quintessentially gives precedence to a microeconomic perspective and to short-termism. The focus on prices limits the perspective to single company behaviour in relation to consumers at a particular point in time and disregards macroeconomic issues like market power concentration and market structure. The Chicagoan view therefore excludes broader goals, such as the overall welfare of a society. It reduces societal interests to a generalised view on consumers and corporate actors, and ignores the interests of other potential stakeholders.

The US antitrust model demonstrates the characteristics of Anglo-Saxon capitalism (cf. Albert, 1993), or market-oriented variety of capitalism (cf. Rhodes and Apeldoorn, 1998). Competition occupies a central position in the organisation of economic life and the role of the state is to ensure the free play of market forces and to limit the abuse of market power. State intervention in the market, however, is also limited in this area. As part of the common law tradition, the US antitrust model relies significantly on an *ex post* enforcement by private plaintiffs, which renders it a highly market-oriented model with a vast army of predominantly 'private attorney generals'. Whether or not antitrust rules are enforced depends largely on the willingness of private actors to litigate before the courts. Private antitrust enforcement, by definition, entails a short-term view on anticompetitive conduct, which is another central feature of the Anglo-Saxon type of capitalist organisation. A short-term orientation is generally associated with corporate finance by stock market capitalisation and shareholder value performance. In the field of antitrust enforcement, however, the short-term orientation is revealed by the fact that only behaviour that negatively affects other market actors finds its way to the courts. Without clear evidence of the actual damage suffered, there will be no ruling. Only actual individual company behaviour in the short-term, rather than structural concerns about potential future impacts of market conduct, can form the conclusive basis for antitrust enforcement. Both parts of the US antitrust system, i.e. the short-term orientation and the focus on the actual harm caused, rely on the critical notion that public market intervention should be kept as limited as possible.

It follows from the litigation-orientated approach that there can be only one decisional criterion upon which anticompetitive conduct is judged, otherwise the discretionary power of the courts would exceed that of the political decision-makers, and the rule of law would no longer be guaranteed. It should therefore be no surprise that the basic objectives of competition policy and the mode of enforcement are closely intertwined. The Chicago paradigm that came to dominate US antitrust enforcement further corroborated these elements. The focus on efficiency gains, defined in terms of consumer welfare and measured in terms of competitive prices, marginalised long-term market structure concerns. Apart from overt monopolies, market concentration through mergers was not considered a bad thing as long as prices remain competitive. Only collusive market behaviour belonged in the category of anticompetitive practices. As a result thereof, long-term intercompany collaboration, which is meant to enhance the diffusion of technological innovation, has no priority in the Anglo-Saxon variety of competition control.

Table 4: *The Central Features of the US Competition Model*

Institutional setup and enforcement features	*Influential school of economic thought*
<u>Common Law Tradition</u> ■ court model ■ enforcement by (private) litigation ■ ex-post control ■ economic reasoning	<u>Chicago School</u> ■ short-term efficiency ■ single goal orientation, i.e. price reduction for consumers

2.8.2 The Rise of the Chicago School in the 1970s and 1980s

Chicago scholars penetrated US antitrust thinking in the 1970s, at the zenith of Keynesian ideas in the Western world. Richard Posner wrote his influential book *Antitrust Law*: *An Economic Perspective* (1976) and Robert H. Bork wrote *The Antitrust Paradox. A Policy At War With Itself* (1978). Although Keynesianism in the US never found a comparable fertile ground to that of Europe, in the 1960s and early 1970s, the Supreme Court and the Federal agencies balanced their decision making against wider social welfare objectives, and were overtly hostile towards economic concentration. Commentators from the Chicago School condemned the practice of dismantling larger companies in the 1970s as ‘unthinking zealotry’ and ‘economic primitivism’ (Kovacic, 2003: 384; Kovacic and Shapiro, 2000: 52; Fox, 2003b: 91). They fiercely criticised the authorities for punishing ‘normal’ business transactions like criminal acts. Under attack was the *per se* illegality of non-price vertical restraints, such as exclusive deals and tie-in selling practices for business entities with a dominant market position or a monopoly, i.e. those with a market share of over 50% ‘in the relevant product market’ or respectively a market share above 65% (Murakami, 2002: 98). Chicago scholars deemed tie-in sales harmless as long as the buyer was not forced to buy a tied product and as long as market access to competitors was guaranteed. They were convinced that certain vertical restraints actually enhanced efficiency, and thus competition. Most of the Chicagoan criticism was aimed at the practice of condemning behaviour without proving its anticompetitive effect. In their view, negative effects on competition needed to be substantiated and measured.

President Richard Nixon (1969-1974) appointed four antitrust judges to the US Supreme Court who strongly sympathised with the free-market ideology and the permissive stance towards conglomerate mergers of the Chicago School. The Supreme Court’s decision in the *Sylvania* case in 1977 (*Continental T.V. Inc. v. GET Sylvania Inc*) entered US antitrust enforcement history as a turning point. The case concerned a particular form of vertical price fixing. In line with narrow efficiency interpretations of the Chicago School, the Court argued that the conduct was not anticompetitive, but rather conducive to competition (Baker, 2003: 28). For the first time, it based its judgements on a ‘comprehensive economic analysis’ and set a precedent for enhancing consumer welfare as the only goal of antitrust law (Ehricke, 2003: 115; Hwang, 2004:116). Thereby, references to broader social and political goals within Federal Court rulings ended (Litan and Shapiro, 2001: 20). The influence of the Chicago School celebrated its heyday under the presidency of Ronald Reagan (1981-1989). What later was coined as *‘Reagonomics’*, i.e. economic politics of tax cuts, deregulation, monetarism, government retrenchment and free markets, was greatly inspired by leading Chicago scholars. Reagan included Milton Friedman in his *Economic Policy Advisory Board,* which was composed of a group of experts advising him from outside the government during his tenure. In addition, the CATO Institute, headquartered in Washington, D.C. and founded in 1977, also served as a platform for intellectual breeding that advised the Reagan Administration. As one of the many sister think tanks of the Mont Pèlerin Society, it held close ties to Milton Friedman and awards the *Milton*

Friedman Prize for Advancing Liberty (see for more information www.cato.org). In a speech at the White House, Reagan declared:

> *Chicago school economics, supply-side economics, call it what you will – I noticed that it was even known as Reaganomics at one point until it started working – all of it is fast becoming orthodoxy. It's not just that Milton Friedman or Friedrich Von Hayek or George Stigler have won Nobel prizes; other younger names, unheard of a few years ago, are now also celebrated.* (Reagan, 1987)

Under President Reagan, nearly all appointees to the DoJ's Antirust Division came from the Chicago School. William Baxter, who became the head of the Antitrust Division, was a particularly zealous believer in the free- market idea (Wood and Anderson, 1993: 27). Reagan also appointed a range of prominent Chicago scholars to the position of Antitrust Attorneys at the different branches of the Federal Court. Richard Posner and Frank Easterbrook held a seat in the Court of Appeals for the Seventh Circuit in 1981 and in 1985, respectively. Robert Bork was appointed to the Court of Appeals, yet his nomination to the Supreme Court in 1987 failed due to blocked votes by the Senate. In addition, James Miller became chair of the FTC and the first Chicago economist holding this position. The influence of the Chicago scholars in the state apparatus was vital. The credo of free markets, free from public regulatory intervention, planning, and public ownership, prevailed. It evoked a period of antitrust retrenchment at Federal level. Antitrust enforcement was not only reduced in scope, but also in the number of cases investigated: from 1611 cases in 1977, by 1989 the number had declined to a mere 638 (Motta, 2004: 9). The diminished scrutiny in antitrust analysis was accompanied by a significant reduction in staff and resources during the 1980s. At the DoJ level, the number of lawyers was reduced by 51% (from 422 to 254), and the number of economists by 11% (from 45-40) (Shepherd, 1991: 129). The overall budget dropped by 45% (ibid). Moreover, the number of private antitrust suits also decreased: whereas during the 1960s private antitrust litigation increased sevenfold, it amounted to 1,052 cases per year in the 1980s (Freyer, 2006: 148).

Based on Chicagoan efficiency logics, a particular market conduct needed to be demonstrably inefficient before public intervention was justified. The rule of reason offered the necessary interpretative room to support a more lenient, *laissez-faire* approach (cf. Motta, 2004). Practices falling under the rule of reason, such as non-price vertical restrictions, resale price maintenance, attempts to monopolise, boycotts, and vertical and conglomerate mergers were no longer contested. Antitrust enforcement in the field of mergers ushered in an almost complete 'hands-off' approach at Federal level. Chicago scholars did not problematise corporate size as long as there was no direct hazard to consumers and competitive prices were maintained. An example of this is the acquisition of *Gulf* by *Chevron* in 1984, which amounted to the largest corporate merger of US history at the time (for more details see Kovacic and Shapiro, 2000). The 'hands-off' approach also manifested in a reduced number of cases prosecuted on an extraterritorial basis. The *Foreign Trade Antitrust Improvements Act* of 1982 limited the jurisdictional reach of US antitrust laws (Freyer, 2006: 149).

The relaxed merger controls in the Reagan era, combined with an overall deregulation of corporate governance laws at that time, spawned the fourth big merger wave in US history, which lasted from 1981 to 1989. There were more than a dozen mergers each day, which mainly concerned larger companies acquiring smaller ones with the acquiring company being, on average, ten times larger (Mueller, 1997: 656, 676). Market concentration occurred in various sectors, but the changes in the banking industry were most far-reaching: from the 1980s to the 1990s, more than 6,300 bank mergers were concluded in the US, reducing the total number of banks by a third (Pryor, 2001: 315). In contrast, in the 1980s, price-fixing or market-sharing cartels falling under the *per se* prohibition rule were prosecuted and also penalised more harshly (Litan and Shapiro, 2001: 18). Compared to previous years, the number of incarcerated individuals increased significantly in the 1980s. In the years between 1980 and 1984, 273 individuals spent a total of 1,008 months in jail due to antitrust offences (Gallo *et al.*, 2000: 129). The cases that were prosecuted almost exclusively involved small enterprises (Kovacic, 1989: 173-206). Against the backdrop of the fourth merger wave, smaller and medium-sized companies were particularly inclined to conclude cartel-like agreements in order to be able to face the standards of competition set by larger and more dominant players. In addition, small companies typically lacked the necessary financial resources to employ professional legal counsellors for a successful defence at the courts (Gallo *et al.*, 2000: 119). The acme of the Chicago School took place against the backdrop of worldwide economic downfall. With the collapse of the Bretton Woods regime and the two subsequent oil crises of 1973 and 1979, US companies had to back-pedal from their leading position in the world market. Competitors in Japan and Western Europe, and Australia, increasingly posed a competitive challenge. Enhanced mergers and acquisitions formed part of the US countervailing corporate strategy to face foreign competition. The efficiency doctrine of the Chicago School and the highly developed econometric modelling instruments served to legitimise public non-intervention into US concentration activities. The strict prosecution of cartels, mainly concluded by smaller competitors, matched the interest of larger corporations. In this sense, the minimised antitrust enforcement of Chicago scholars represented an overt political effort to strengthen domestic firms to compete in global markets.

The Chicago School raised considerable political controversies. Democrats and Republicans alike criticised the Chicagoan laxity towards mergers.[15] Criticism also came from academia. For many years, major US universities, most notably Harvard, Yale, Berkeley, and the Massachusetts Institute of Technology (MIT), refused to hire students from the Chicago School (cf. Kangas, 2006). Other universities, however, also became melting pots of the free-market ideology, such as the University of California Los Angeles (UCLA), Rochester and of Virginia (ibid). The radicalism of certain prominent Chicago scholars also led to heated academic 'vendettas'. Ronald Dworkin, an eminent law professor and legal philosopher from the York University Law School and Oxford University, became a well-known foe of Richard Posner. Dworkin steadfastly accused Posner of holding a very limited and immoral vision of wealth distribution and poverty, when he claimed that free markets were preferable to all other systems as they allocated goods to those who most wanted them and were ready to pay the price (MacFarquhar, 2001). Repeatedly, the conceptual points of departure were criticised for not matching economic reality. The Chicagoan premise of 'perfect competition' particularly came under attack as being a phantasm existing only in the minds of economists and their textbooks. For example, the *Coase Theorem* by Ronald Coase, a Chicago scholar and later Nobel Prize winner, builds upon this premise. Under Reagan's deregulation drive in the 1980s, it served as a theoretical justification for the political choices taken (cf. Schmidt and Rittaler, 1986). The Chicago pundits were also criticised for their single-goal orientation in antitrust matters. Sceptics predominantly attacked the efficiency doctrine for being vague and undefined, and the belief that 'efficiencies' were automatically passed on to consumers, as if managers pursued efficiency improvements as their only goal (Pitofsky, 1996a).

[15] Punches below the belt were common. In a speech before the American Bar Association's Section of Antitrust Law in 1987, Senator Howard Metzenbaum, Chairman of the judiciary Subcommittee on Antitrust, Monopoly and Business Rights, called the Reagan antirust leaders 'a garbage barge of ideologues' (Pitofsky, 1996a).

2.8.3 The Continuation of the Chicago School in the US: Facts and Fiction

Although Chicago School doctrines have been fiercely criticised since the Reagan Presidency, its premises have had an enduring impact on US antitrust enforcement. As Chicago scholar Richard Posner declared:

> *Almost everyone professionally involved in antitrust today […] not only agrees that the only goal of the antitrust laws should be to promote economic welfare, but also agrees on the essential tenets of economic theory that should be used to determine the consistency of specific business practices with that goal. Agrees, that is, that economic welfare should be understood in terms of the economist's concept of efficiency […].* (In Foer, 2004)

Throughout the 1990s, the Chicago School continued to instigate academic discussions, and Chicago scholars remain widely cited from 2000 onwards. For example, Robert H. Bork generated renewed attention with his book *The Tempting of America: The Political Seduction of the Law* in 1990. Commentators sometimes consider current times as the Post-Chicago School era, which started in the early 1990s (First, 2002: 183). The post-Chicago 'blend' fails to form a 'unified school' (Schmidt and Rittaler, 1986: 11-2). Nonetheless, the central neoclassical yardsticks of microeconomic price theory, efficiency, and consumer welfare maximisation continue to be emphasised, albeit in a slightly less orthodox way than by the Chicago scholars under the Reagan Administration. The vision that antitrust is fundamentally about consumer interests, rather than wider social goals, such as employment or the protection of SMEs, is commonly accepted in the US (Crandal and Winston, 2005: 42-3). The actual enforcement practice of the Federal antitrust authorities supports this. Up to the present day, monopolisation cases constitute a small fraction of the overall investigations, which can be seen as a vestige of the Chicagoan permissive attitude towards corporate size. On average, less than ten investigations a year concern monopoly cases (cf. Hwang, 2004; Kovacic and Shapiro, 2000; First, 2002). In this regard, mergers and acquisitions also continue to be subject to an overall diminished scrutiny (Hwang, 2004: 116). Similarly, most forms of unilateral action, even if conducted by monopolists, tend to be considered harmless. Post-Chicago scholars, however, took a slightly more interventionist stance, particularly with regard to challenging exclusionary and vertical market conduct, such as tied-in selling, or predatory pricing (Foer, 2004). Therefore, to date, no successor paradigm has replaced the dominance of Chicagoan thinking. In contrast to the theory-minded first generation, post-Chicago scholars conducted greater empirical research and collected evidence that was more factual. Econometric modelling became more sophisticated. Game theoretical insights, as an analytical device in the investigation phase, made their entry in the detection of cartel cooperation and oligopolistic market abuses (Kovacic and Shapiro, 2000). Game theoretical logics, most notably the assumptions of the prisoners' dilemma, also underpinned the introduction of leniency schemes in the US, according to which the first cartel member to disclose information was granted immunity.

The sustainability of the Chicagoan legacy is due to several factors. Up to the present day, courts and generations of lawyers have continued to employ the views and analytical concepts of the Chicago School (Gavil *et al.*, 2002: 64). In fact, prominent scholars of the Antitrust Division were elected as judges into the US Supreme Court. Richard Posner, leading Chicago scholar and appointee to the Court of Appeals in 1981, became its chief judge from 1993 to 2000, and more than half of the Federal judges participated at the *Chicago Trainee Program* (ibid). Conservative, neoliberal foundations usually cover all expenses of the two-week indoctrination of Chicago economics, which usually takes place somewhere in the Caribbean (Lea, 1999). In these programmes, judges learn that antitrust enforcement is wrong and that monopolies are good, something which is also emphasised in the literature, supplied to judges afterwards (ibid). Thereby, Chicagoan theorems continue to penetrate US antitrust jurisprudence. As a commentator put it, the Chicago School remains a potent force as long as its adherents still sit on the Federal bench (Hart, 2001: 10). The voice of the judiciary is further enhanced by the case-by-case litigation approach. Rulings by judges are not easily reversed. Once established, economic and judicial concepts therefore tend to endure. They become part of a deeply engrained philosophy, locked into the body of law that is constitutive for future antitrust rulings. The Merger Guidelines, adopted under Reagan in 1982 and 1984 are an example of this. They calibrated the scope and content of anticompetitive mergers to the economic concepts of the Chicago paradigm and marked a considerable shift away from the more market structure-inspired 1968 Guidelines (Mueller, 1996a: 236). Whereas the 1968 Guidelines were based on statistical concentration levels as a focal point of determining anticompetitive mergers, the Reagan Guidelines were biased towards efficiency gains, rather than market size. In the 1992 revision of the Merger Guidelines, Chicagoan influence was dominant again. The permissive attitude towards unilateral competitive effects of mergers and the efficiency reasoning was not touched upon (Gavil *et al.*, 2002: 68).

The Chicago views underwent a revival under the presidencies of Bush Senior and Junior, which also made it difficult to attain changes in enforcement attitudes. Under George Bush Senior, who already served as Vice President under Reagan, a slightly more activist approach was adopted. However, in essence, little changed. The bias for corporate bigness endured and mergers could be concluded unimpeded by the antitrust authorities (Mueller, 1993: 160). Under the maxim 'Back to the Future', his son, George W. Bush re-employed many of the Chicago-brigades that already served during the Reagan administration in the early 1980s, the epitome of the Chicago-School. Timothy Muris, Chairman of the FTC since 2001, for example, was one of the main architects of Reagan's antitrust agenda in the 1980s. He became famous for his *laissez-faire* view according to which not corporations, but governments posed a threat to competition. In line with Chicago-style thinking, George W. Bush defended the lenient stance of US antitrust authorities by saying that 'the application of antitrust laws needs to be applied only where there were *clear* cases of price-fixing' (Wolffe, 2000: 14).

The US antitrust laws are often assumed to be the strictest in the world (Taylor, 2006: 349; Mueller, 1996b: 415). This is true for the 1960s and the early 1970s, which can be classified as an overtly active period of antitrust enforcement. The overall enforcement attitude of the US antitrust authorities under the Reagan Presidency, however, was lax. The enforcement attitudes of the 1990s demonstrate that the norms established during the 1980s persisted. Antitrust officials under the Clinton Administration (1993-2001) generally argue that they 'tried to strike a pragmatic middle ground between the excessively active enforcement in the 1960s and the minimalist *laissez-faire* enforcement of the 1980s' (Pitofsky, 1996b; Kovacic, 2003: 378). Leading officials of Clinton's antitrust crew criticised the way the Chicagoan efficiency dogma continued to be applied by the US courts, i.e. Robert Pitofsky, FTC Chair from 1995 to 2001, Eleanor Fox, Assistant Attorney General for Antitrust of the United States from 1997-2000, and Harry First, Law Professor at the NYU. For example, in 1979 Pitofsky wrote an article entitled *'The Political Content of Antitrust'* in which he stressed that political values, and not the Chicagoan type of efficiency should be the benchmark of antitrust law enforcement (Ullrich, 2003: 10). During the Clinton Presidency, and its ambition to walk the 'Third Way', a more activist antitrust enforcement policy was adopted, the budgets of the FTC and the DoJ were increased substantially, and experienced private attorneys were hired (Crandal and Winston, 2005: 42). Compared to 1981, in the year 2000 the total antitrust budget increased by more than a third (from US$ 107.7 million to US $ 146.9 million), whereas the enforcement expenditures for controlling monopolies and mergers almost doubled (from US$ 31,1 million in 1981 to US$ 57,2 million in 2000) (Kovacic, 2000). In total, the Federal Government spends roughly US$ 150 million per year on antitrust enforcement (Ehricke, 2003: 118). The enforcement focus shifted away from the short-term Chicago views on actual price effects for consumers, to a more long-term orientation, which took the future impact of economic transactions into account (Litan and Shapiro, 2001: 5).

The enhanced antitrust enforcement under Clinton, however, only holds if it is compared to previous enforcement records. In total numbers, the FTC challenged 35 mergers in 1995, the largest annual record since 1979 (Baker, 2003: 8). The DoJ Antitrust Division's involvement in analysing transnational corporations rose from 5% to 29% between 1993 and 1997 (Freyer, 2006: 151). Intervention mostly took place in cases of horizontal mergers in relatively concentrated markets, such as the soft drink industry, of which *Federal Trade Commission v. Coca-Cola Company* became a landmark case (cf. Pitofsky, 2000). Nonetheless, against the backdrop of a considerably increased merger activity from the mid-1990s onwards, the absolute number of blocked concentration activities is misleading. The financial market deregulation that started under Reagan and Bush continued under the Clinton Administration, which facilitated both horizontal buyouts and mergers and acquisitions. In 1995, 2800 mergers and joint ventures were filed, and there were more than 4000 mergers per year in the period from 1998 to 2000 (Pryor, 2001: 312). In less than 5% of the proposed transactions, the US antitrust authorities initiated more detailed investigations (ibid: 3). Even though the public authorities challenged a few high-profile mergers between corporate giants and monopolies before the courts, such as *Microsoft*, *Intel*, *Visa* and *MasterCard*, *American Airlines* and *Toys-R-Us*, the proportion of litigated mergers was rather low (Litan and Shapiro, 2001: 12). Similarly to his predecessors, the bottom line of antitrust enforcement under the Clinton Presidency was 'to account more generously for mergers synergies in analysing competitive effects' (Baker, 2003: 32). The view that antitrust enforcement was 'supposed to encourage efficiency in order to serve consumer welfare' also prevailed among Chicago School critics (Pitofsky, 1996a). When the Merger Guidelines underwent a reform in 1997, the Chicagoan efficiency notion survived as the most central yardstick for assessing anticompetitive conduct. In other words, since the 1980s the degree of industrial concentration through mergers increased considerably in the US (Pryor, 2001: 317). Since the ascendancy of the Chicago School, ‘only a handful of the thousands of merger concluded per year are prevented’ (Mueller, 1997: 680), while the vast majority of antitrust cases (about 1500 cases on an annual basis) was dismissed without further investigation (Lea, 1999). The Post-Chicago era meant that interpretations were refined with highly sophisticated analytical techniques and specific algorithms for the definition of markets and market boundaries were developed, without touching, however, on the essence of the Chicago theorems on efficiency gains.

Chapter 3

Going Back in History:
The Evolution of the European Model of Competition Control

Introduction

This chapter analyses the historical evolution of competition laws and practices in the US, Germany, and henceforth in the European Community. On the basis of an analytical narrative covering the time period of US military occupation in post-war Germany until the adoption of the Treaty of Rome in 1957, it unravels the particular historical interest configuration that brought competition laws and practices into the realm of European integration. It subsequently embeds the evolution of competition laws in Germany, the European Coal and Steel Community (ECSC), and eventually the European Economic Community (EEC), in the context of the wider political economy at that time. First, it reveals that competition laws formed part of the wider political project to establish a market capitalist regime in Europe, an endeavour initially carried by a US coalition of political and economic interests. However, the political and economic elite in Europe subsequently endorsed it.

Going back in history reveals that strong US influence in the aftermath of the War was crucial for why competition laws came to form the constitutional cornerstone in the restructuring of the German economy and subsequently, in setting in motion the European economic integration project. Second, the chapter argues that rather than a wholesale 'Americanisation', the specific outlook of the competition law enforcement institutions was shaped by the ideas and concepts of a small group of economic and legal theorists, the German ordoliberals of the Freiburg University. Due to the prominence of the Freiburg School on economic thought in Germany and its legal system, US antitrust discussions never had a serious chance to become established in Germany (Fikentscher, 2003: 17). By drawing on existing, but widely disregarded research and archival documents, the chapter lays bare how this small group of intellectuals, under the patronage of the US Occupation Forces, ascended from their enclave in Freiburg to restructure the German political economy, and subsequently shaped the first supranational competition laws in European Coal and Steel Community (ECSC) and the Rome Treaty. The close supervision of the US authorities during the formative phase of the European integration project opened a 'window of opportunity' for ordoliberals. Third, the chapter demonstrates that by lobbying the political decision-makers drafting the Treaties, national industrial elites blocked a wholesale translation of ordoliberal ideas. Concomitantly, US political support of ordoliberal influence in the institution-building process was critical in both Germany and integrating Europe, but not all determining. National industry opposition could not prevent the inclusion of competition laws, but influence the particularities of what previously was identified as the European competition model – a heuristic device to characterize the institutional enforcement structure of EEC competition laws.

Most of the literature on European integration largely ignored the influence of ordoliberal doctrines on the institution building process in the European Community. Only a limited range of authors, mostly from the disciplines of economics and law, and foremost of German origin, paid attention to the important role of Freiburg scholars (cf. Joerges, 2001; Budzinski, 2003; Gerber, 1998; Gillingham, 2003). A possible explanation for the reason why so many scholars outside Germany disregarded the ordoliberals is probably because their work is almost exclusively in German. English translations or analyses recapitulating their work were long hard to find. According to Joerges, the more complex explanation is that 'political scientists do not take normative theories seriously enough' (2004: 13). Here it is argued that the particular normative ideas of the ordoliberals find their origin in the opposition to the politico-economic structure of (totalitarian) monopolistic capitalism in Germany.

Part I: Monopolistic Capitalism and the US Roots of the Antitrust Idea

3.1 Monopolistic Capitalism

'Monopolistic capitalism', or 'organised capitalism', refers to an economic system in which the interests of the capitalist elite imbue state institutions and state policies. The concepts indicate a market structure in which monopolies and/or hierarchically controlled cartels, or 'trusts', as well as other forms of corporate intertwinements, such as 'networks of interlocking directorates and supervisory boards, control the marketplace (cf. Bukharin, 1929 see Chapter IV 'The Inner Structure of 'National Economics' and the Tariff Policy; Neumann, 1942; see also Resch, 2005). In contrast to a state planned economy, or command economy, under monopolistic capitalism private property is safeguarded, and capital accumulation remains in the control of private hands.

In line with Marxist reasoning, Neumann (1942) ascribes the evolution of monopolistic capitalism to the dynamics of competition against the backdrop of freedom of contract, free trade, and free competition. The fiercer the competitive struggle, the more the exploitation of economies of scale, expansion, and hence, capital accumulation for investments in new technologies becomes crucial for economic survival. Thereby, competition turns into a coercive force transforming classical small and medium-sized (family-owned) companies into large-scale corporate entities able of eliminating economic risks and generating the necessary investments. The process of ongoing economic power concentration and centralisation culminates in an oligopolistic, monopolistic, cartel-dominated market structure. After a period of consolidation, the corporate elite, running cartels, oligopolies, monopolies, and the financing banks, forms a community of interest seeking to maximize profits. Consequently, to secure economic power and the institutional prerequisites for capital accumulation, carteleers and monopolists seek to influence the state machinery in order 'to subordinate the masses to the policies of industrial empires' (Neumann, 1942: 260). State-imposed protectionist policies, such as the establishment of tariff walls, help cartels to gain additional profits. With reduced competition in the domestic market, prices can be raised, and more surpluses extracted. Bukharin noted in this respect:

> *[…] various spheres of the concentration and organisation process stimulate each other, creating a very strong tendency towards transforming the entire national economy into 'one gigantic combined enterprise under the tutelage of the financial kings and the capitalist state, an enterprise which monopolises the national market' […].* (Chapter IV, The Inner Structure of 'National Economics' and the Tariff Policy, emphasis in the original)

3.2 The Sherman Act of 1890 and the US Antitrust Movement

Rules on competition as a component field of economic policy are undoubtedly a US invention. It was in 1890 that US Congress adopted the proposal of Senator John Sherman to prohibit the large 'trusts' which set prices and output limitations for whole industries. The *Sherman Act* constitutes the oldest legislation on competition control, and the most widely know competition legislation. To date it forms the most essential statutory basis for

US antitrust enforcement. It is often considered 'if not the most powerful instrument for economic policy in the United States, definitely the most characteristic' (Letwin, 1981: 3). In 1914, the Clayton Act complemented the Sherman Act. Together with the Sherman Act, they constitute the 'Magna Charta' of free enterprise. They were the political result of a broad-based popular protest movement against the concentration of economic power in a period of monopolistic capitalism.

The Sherman Act was adopted in the context of rapid industrialisation in the late 19th century US. Markets grew in size, the subsequent extension of railroads facilitated transportation, and new technologies increased industrial productivity and communication. When the economic depression of 1883 hit the economy, demand stagnated and industries engaged in overproduction. Competition intensified. Against the backdrop of the open world economy at that time, this was even more so the case. In the period between 1870-1914 cross-border trade and investment was greater than at the end of the 20th century, relative to the world population at the time. Cross-border trade grew 3.4% per annum and its value was 33% of total world output (Hirst and Thomson, 1999: 21-22). In response to tightened competition, giant trusts emerged – a sort of 'vesting shareholdings' or holding companies of several legally independent companies in a particular industry (Goyder, 1998: 4; Djelic, 2002: 241). The term 'trusts' derives from the certificates issued to the 'trustees' of these inter-firm networks. The participating companies remained independent legal units, while combining their endeavours in a larger unit. In contrast to the much more loosely organised price cartels, trusts institutionalised cooperation on a more permanent basis. Trusts controlled operating and investment decisions, fixed prices, imposed output limitations, and allocated local and regional markets. Thrusts eradicated competitors, coerced suppliers and distributors, and dictated high prices for customers. They wielded monopolistic control over entire industries, such as steel, cattle, cordage, cottonseed oil, lead, oil, sugar, tobacco, whiskey, and linseed oil (Djelic, 2002: 241).

The emergence of trusts brought with it a concentration and centralisation of ownership and capital accumulation. Concentrations in the banking sector and the establishment of a network of interlocking directorates between banks and industry, often also referred to as 'money trusts', further contributed to this (Fennema, 1982). Entire industries came under the control of a few people, among which were prominent corporate giants, such as John D. Rockefeller's *Standard Oil* and J. P. Morgan's investment bank (Hartman, 2005). The financiers that controlled these trusts also enjoyed monopoly power over new technologies, in particular that of railroads and telegraphs (Wells, 2002: 28). They were located at the financial centres in New York, Boston, Philadelphia, and Baltimore and sometimes even London. Most notably, they held close ties with the political elite (ibid). Farmers and small companies, but eventually also the wider society, struck by poverty, and unable to compete with the prices of the large trusts, came to protest against the practices of large trusts, which culminated in the formation of an 'antitrust movement' demanding an antitrust legislation. The issue of antitrust control made its way into public consciousness to an extent that was probably never seen again. Bankers were often the target of the popular antitrust movement as their decisions often turned against smaller shareholders (Fennema, 1982: 4). Commentator Timberg embedded the broad-based resentment of the 'little man' against economic power concentration of large trusts in the particular historical constellation that characterised the 'American way of life': farmers and small town entrepreneurs were all 'ambitious, mobile, optimistic, speculative, anti-authoritarian, egalitarian, and competitive' (2003). At the heart of the antitrust debate was the question about the role of the state in relation to the emerging corporate market order and the power of large companies. The central issue at stake was the extent to which private companies were to be granted the right to organise the market by themselves, and to what extent the state authorities should intervene, as well how large companies should grow. In 1890, Senator John Sherman drafted a law to prohibit large trusts. Section 1 prohibited 'every contract, combination in the form of trust or otherwise, or conspiracy' that restrained interstate or foreign trade. Section 2 forbade 'attempts' to monopolise. In his speech before Congress, Sherman argued that 'early trusts were governed only by selfishness':

> *If anything is wrong, this is wrong. If we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessaries of life. If we would not submit to an emperor, we should not submit to an autocrat of trade.* (Statement of Senator Sherman (1890) in Bork, 1966)

In the years to come, the driving forces of the antitrust movement, i.e. the strong farmer lobbies and small entrepreneurs, also pushed for antitrust laws at the level of the States. In 1899, almost all states located in or near the Mississippi Valley adopted antitrust laws. Boudreaux and DiLorenzo (1993: 82) ascribe this to the fact that the powerful farm lobbies from the Midwestern agricultural states attempted to thwart competition from the large centralised meat or wheat processing industries of the cities. Today, the term 'trusts' is rarely used anymore. Instead, the more general amalgam ‘cartel’ has become more widespread. Nevertheless, the word ‘antitrust’ endured among US practitioners and academics specifically to refer to the fight against cartels and restrictive business practices, whereas in Europe and the rest of the world, the more generic analogue ‘competition policy’ became more widespread.

3.2.1 The Clayton Act and the First Merger Wave

Ironically, the strict prohibition of inter-firm collaboration by the Sherman Act induced companies to merge instead, which resulted in the oligopolisation and sometimes, even monopolisation of entire industries. The takeover battle lasted from 1895 to the stock market crash of 1904. It entered US history as the first and biggest merger wave if measured relative to the size of the economy (Djelic and Kleiner, 2003: 3; Bittlingmayer, 1985). In 1909, economic concentration amounted to a situation in which the 100 largest US companies accounted for 18% of all industries (Gaughan, 2002: 23). Horizontal mergers, i.e. mergers between direct competitors of the same industry, were common in the sectors of (fabricated) metal, food products, petroleum, chemicals, transportation equipment, machinery and bituminous coals (ibid, Djelic and Kleiner, 2003: 3). The merger between J.P. Morgan’ *US Steel* and Andrew Carnegie’s *Carnegie Steel* was the first billion dollar mega merger in US history. In a deluge, the merged entity swallowed up the remaining 785 rivals (Gaughan, 2002: 23). The US authorities, the Federal Justice Department and the Supreme Court, did little to stop economic concentration. In the context of poor economic performance and the difficulties in achieving economics of scale, companies could expand in order to secure profits. Large-scale bribery of judges and elected officials also played its part (ibid: 25, 27). Moreover, the liberalisation of corporation laws in some US States also facilitated the vast takeover boom (ibid). The ‘Great Merger Wave’ considerably weakened the banking system and as a result thereof came to an abrupt end with the stock market crash of 1904 (ibid: 28).

The enactment of the Clayton Act took place against the political backdrop of an upcoming protectionism in the world economy, in which national government blocked cross-border trade flows by imposing tariff walls as high as 40% (Scholte, 2001: 522). In the time of economic crisis in the US, antitrust sentiments revived and socialist ideas prospered (Zweynert, 2004: 11). Under the Presidency of Theodore Roosevelt (1901-1909), antitrust enforcement became steadily more stringent. Large corporations came under attack and public market intervention culminated in the administration of prices (ibid). Increasingly, the Sherman Act was considered an insufficient legal basis to tackle economic power concentration and the accumulation of capital into ever fewer hands. In 1914, under the tenure of President Woodrow Wilson (1913-21), US Congress adopted the Clayton Act. Section 7 regulated large companies and mergers that 'substantially lessen competition' and that tend to create a monopoly. It prohibited exclusive agreements and tied-selling agreements, i.e. the practice of linking the selling of one product to another (cf. Fox and Pitofsky, 1997; Litan and Shapiro, 2001). Moreover, it also prohibited three types of interlocks between boards of directors: between banks, between directly competing firms, and between railroads and their potential suppliers (Fennema, 1982: 20). In addition to the new antimonopoly legislation, in the same year the Federal Trade Commission Act was adopted to prohibit 'unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce'. It erected the *Federal Trade Commission (FTC)* next to the Antitrust Division of the *Justice Department (DoJ)* as a second independent administrative body to enforce the new law.

The Clayton Act expanded the regulatory scope of antitrust control. Similar to the Sherman Act, it entailed provisions to protect the interests of smaller and less powerful companies. However, broadly formulated notions such as 'substantially lessening competition' lacked a clear definition (see also Chapter 2). In essence, the Clayton Act did not inhibit companies from growing in size, but rather attempted to control concentrations in the context of the existing market structure. Whether or not a merger created a dominant position was irrelevant as long as it did not substantially lessen competition. In other words, even though the Clayton Act was established to curb the economic power of large enterprises, it did not prohibit economic concentration. The judiciary enjoyed far-reaching room for interpreting the Clayton Act. The US Supreme Court subsequently used the Clayton Act in the favour of large industries (cf. Mueller, 1997). In the years immediately after the First World War, the US experienced an economic boom, which resulted in an enhanced liquidity of capital markets and gave companies the possibility to acquire other companies by means of debt creation. The investment banking industry was fundamental in the financing of concentration activities. It was both the trigger factor for the second merger wave, and eventually also for its halt, when the increasingly high returns on investors slowed down the economy (Gaughan, 2002: 28-30). Also the level of concentration in the banking sector was unprecedented in US history, and henceforth competition was virtually absent (ibid). The US antitrust authorities, the DoJ and the FTC adopted a lax enforcement attitude. The 1920s, in particular, were marked by a *laissez-faire* attitude towards economic concentration, which mostly concerned vertical mergers and mergers of companies from unrelated industries. Examples of conglomerates concluded during this merger wave, which have lived on until today are *General Motors*, *IBM*, *John Deere* and *Union Carbide Corporation* (ibid: 28-31). The emergence of large US companies led to rapid industrial expansion. In 1929, the US economy accounted for the 42% of the world's industrial output, followed by Germany, UK, and France, whose economies together accounted for 28% (Hobsbawm, 1994: 97). The US merger wave ended with the Wall Street stock market crash of October 29 in 1929, the day that entered history as 'Black Thursday'. The inter-war world economy collapsed in the time of the Great Depression. During the early New Deal economic recovery programmes of the 1930s, the US authorities effectively shelved vigorous antitrust law enforcement as part of the wider protectionist measures to stimulate national economic survival. There were on average less than ten cases per year (Gallo *et al.*, 2000: 92). In order to avoid mass scale bankruptcies and the resulting social tensions from unemployment that came with the sweeping economic recession of the late 1930s, US antitrust authorities even gave their blessing to the formation of 'crisis' or 'depression' cartels, which endured until the early 1940s (Motta, 2004: 37; Baker, 2003: 26).

3.2.2 Antitrust Control and Fordism

Fordism, named after Henry Ford's Ford Motor Company, was the term to indicate the new liberal capitalist regime of industrial mass production of consumption commodities in the US after the First World War. Central to Fordism was the idea that large companies could exploit economies of scale and scope, through a rigid division and fragmentation of work. The recipe for large-scale production of cheap consumer goods consisted of the use of unskilled or semi-skilled labour carrying out single or a limited number of tasks at assembly lines, enhanced mechanisation, meticulous managerial control, and organisational hierarchies. The resulting efficiency gains, which led to higher wages and improved living standards for workers, were in turn expected to increase demand for the goods produced for the mass consumer markets. Typically, Fordist companies were characterised by a high vertical integration in which a few dominant firms assembled the finished products from their manufacturing subsidiaries (cf. Knudsen, 1996). High levels of vertical integration freed companies from their dependence to suppliers and distributors and allowed for centralised managerial control.

The enforcement of antitrust laws constituted one of the supportive regulatory frameworks that facilitated the Fordist production model. The tolerant attitude towards economic concentration and centralisation buttressed the diktat of ‘efficiency’ in the production process. Under the guidance of Thurman Arnold, the DoJ’s Antitrust Division did not problematise company size, but industrial inefficiency, particularly if efficiency gains were not passed on to the consumers (Wells, 2002: 41). Thereby, the purpose of antitrust control was to force companies to be ‘efficient’ in their production. The number of antitrust officials at the DoJ and the cases scrutinised in the late 1930s increased considerably from 58 to 200 and from 11 to 92 (Wells, 2002: 40). The emphasis on corporate efficiency brought Arnold and his antitrust crew into battle with labour unions, which feared increased unemployment (ibid: 41). However, political opposition to the new Fordist course in antitrust control soon vanished. Large-scale mass production provided cheaper consumption products, such as cars, washing machines, radios, vacuum cleaners, and refrigerators that became available to broader segments of society, and this subsequently weakened support for labour organisations. Strange to say, but in 1940, the DoJ even attacked labour unions on the basis of ‘anticompetitive practices’ of organised labour (Wells, 2002: 55). The weakness of labour organisations contrasted sharply with the strength of business.

US involvement in the Second World War led to a rapprochement between the US government and US business. Large companies like *Ford*, *DuPont*, *General Motors,* and *General Electric* were involved in the production of war machinery and held a tight relationship with the Federal government. A centralised body the ‘War Resources Board’, mainly headed by chief executives of leading corporations, coordinated the large scale weapons production for the US defence (Wells, 2002: 53). The privileged corporate elite profited from state contracting during the War. For example, *General Motors* built large factories to produce aircrafts and trained more than 40,000 unskilled workers and 2,000 foremen in a very short term, while employment at *Alcoa* and *DuPont* more than tripled (Wells, 2002: 67). In turn, US business could exert considerable influence over antitrust issues. Indulging in wishful thinking, business representatives even demanded the amendment of the Sherman Act in order to allow the integration and coordination of business efforts' (ibid: 54) – an euphemistical demand for abolishing the Sherman Act and thus allowing cartel-like agreements. Yet, cartels were still perceived to be too controversial (ibid: 85). Nevertheless, as private industry was crucial to the US defence machinery, antitrust enforcers turned a blind eye on cartel behaviour during the War. Examples of US companies engaging in international market sharing 'cooperative agreements' with foreign competitors are *General Electric, DuPont*, *Allied Chemicals, Standard Oil*, and *Imperial Chemical Industries (ICI)*, which had a strong stake in cartel ties with the German *IG Farben,* as it invested heavily in a process to produce oil from coal (Wells, 2002: 46, 75-6).

The following sections demonstrate that the emergence of large-size companies in the US and their intimate relationship with US government was not only crucial for the hegemonic economic and political role played by the US after the Second War, but also for the export of US-type antitrust laws to Europe.

Part II: Competition Laws in Europe – An Artefact of the Post Second World War Period

In Europe, there was never a widespread antitrust movement comparable to that in the US. Until the late 1950s, competition laws were practically absent, or relatively underdeveloped. The view that cooperative agreements and industry networks represented a form of 'corporate conspiracy', cheating the public only became prevalent after the US started to promote antitrust laws in post-war Europe. Initially, most of the national competition regimes that developed in Europe in the 1950s and the 1960s mainly served to please the US for the receipt of financial aid from the Marshall Fund. When the UK introduced its first competition law, it was hardly enforced: until 1965 there were as little as two competition cases on average per year (Travares de Araujo Jr., 2000). Nonetheless, attempts to introduce rules on competition were also discussed in the context of progressing industrialisation, thus before US presence in post-war Europe. The situation was similar to that of the US antitrust movement. Small and medium-sized enterprises protested against the abusive behaviour of larger companies. An example of this is the broad political support for competition laws in Austria in 1890 – the same year the US enacted the Sherman Act. Due to the dissolution of the legislature, however, these laws failed to pass the legislative process (Gerber, 1998: 7).[16] According to Fennema (1982: 3) one of the reasons for the absence of a popular antitrust movement was that socialist forces were rather unconcerned about the 'trustification' of industries and banks. The prevalent view was that cartels and alike 'only had to be socialised to function perfectly' in a socialist planning system (ibid).

3.3 (Totalitarian) Monopolistic Capitalism in Europe

The formation of monopolies and cartels, consortia, or corporate syndicates in Europe intensified with the process of industrialisation. They often endured for years, sometimes even decades.[17] The propensity to form cartels varied between different national economies and different industrial sectors. In the early 20th century, cartels and monopolies constituted the prevalent form of industrial organisation most notably in Germany, Czechoslovakia, and Switzerland, controlling the markets for steel, iron, aluminium, chemicals, potash, explosives, salt, cement, paper and fertilizers, as well as shipbuilding (Fear, 2006: 11). Also in France, the UK, Austria and Russia, syndicates, cartels, and investment trusts dominated industrial production (Bukharin, 1929, see for details Chapter IV). The features of monopolistic capitalism manifested in the fact that many European governments encouraged and monitored cartels in order to formally limit economic competition (Djelic and Kleiner, 2003: 3). The political elite engendered the interests of carteleers and monopolists by promoting cartels and monopolies as something intrinsically good. Political elites endorsed the view that fierce intercompany competition in the form of price warfare constituted a danger for economic and political stability. Cartel agreements were often supervised by government agencies, not, however, to prohibit, but to legitimate their existence (Resch, 2005: 2). For example, in the UK, private monopolistic combinations and associations enjoyed the political support of British governments in the 1920 and 1930s (Wells, 2002: 94). Sometimes cartel agreements were even enforced at court level, such as in the case of the appeal of a wood manufacturer in Saxony in 1897 against an existing cartel that was foreclosing geographical market access to third parties.

[16] See also Harding and Joshua (2003) for a more detailed account on the early attempts to establish competition laws in other European countries.

[17] Medieval guilds, the *Hanseatic League of Northern Europe* allying merchants and the economies of entire cities with specific trade privileges, as well as the trading monopolies of the *English East India Company* (1600), the Dutch *Vereenigde Oost-Indische Compagnie* (1602) and the French *Compagnie des Indes Orientales* (1664) would today account for a cartel-like institutions (cf. Harding and Joshua, 2003).

The German *Reichsgericht* ruled that the existing cartel agreement was valid, and that the freedom of contract exceded the freedom to compete, and in a wider sense, the freedom of each company to establish a business where it wanted (Deringer, 2003).

In Europe, the pinnacle of cartel activity was concentrated in Germany, where monopoly capitalism 'forged ahead with feverish rapidity' (Bukharin, 1929, see Chapter IV). The German industrialisation process was relatively late and concentrated foremost on the capital intensive, large-scale heavy industries of steal, iron, and coal. Similar to the US, railway construction constituted one of the leading industrial sectors, facilitating communication and reducing transportation costs for other industries. Close connections to banks and other financial investors providing patient capital were established, a particular feature that later developed into the system of *Hausbanken*, or *Grossbanken*, the universal bank system of the Rhenish variety of capitalism (cf. Gerschenkron, 1962). The evolution of large cartels in Germany parallels the drastic political and institutional transformation accompanying the German state building process and the subsequent imperial expansion. The unification of German kingdoms into the German Reich in 1871 created new avenues for burgeoning entrepreneurs to enter the marketplace, which led to a boom in the establishment of new enterprises. The enhanced competition raised uncertainty among established market players, a development that was further intensified by the economic downturn of 1873-79. The number of cartels steadily increased and encompassed virtually every sector of the German industry (Djelic, 2002: 8). Cartels and enhanced concentrations emerged in the time of the Second Industrial Revolution lasting from 1870 to 1913, in which the chemical and electrical industries also expanded. Banks often acted as the entrepreneurs of mergers and cartels, in order to rationalise the industrial structure and to increase profitability (Edwards and Ogilvie, 1996: 430). Representatives of banks occupied central positions in the supervisory boards of so-called joint stock companies, which proliferated from the 1880s onwards: from 2,143 in 1886 to 5,486 in 1913 (ibid: 428). The powerful industrial networks, which in Germany were called *Kartelle, Konzerne*, or *Interessen Gemeinschaften (IGs)* (cf. Djelic, 2002), lasted from the turn of the 19th century until the decartelisation by the Allied Forces after 1945. Tentative statistical data reveals that the number of cartels rose from four in 1865, to eight in 1875, to 90 in 1885, to 210 in 1890 (Harding and Joshua, 2003: 66). As part of the liberal trade regime at that time, many of these cartels exhibited a strong transnational dimension, transgressing national borders. According to an analysis by Schröter (1996), in 1897 there were about 40 cross-border cartels with German companies involved. At the time of the Second World War, more than 40% of world trade was controlled by cartels (Fear, 2006: 15). In 1905, roughly 400 cartels existed, including about 12,000 companies in Germany alone (Schröter, 1996). Five years later, the number had almost doubled (ibid). Cartel formation in Germany, but also in the rest of Europe, had its heyday in the 1920s and 1930s, the interwar period. Germany was confronted with horrendous reparation payments, which, combined with the financial instability of the early 1920s, the shattered public finances of the politically weak governments of the Weimar Republic (1919-1933), and the worldwide Great Depression of 1929 resulted in hyperinflation (Borth *et al.*, 1986: 167-8). Social disruptions, economic chaos, mass unemployment, and the pauperisation of large parts of society marked the political climate. Against this backdrop, cartels prospered. In 1930, cartel activity in Germany reached a peak with 2,100 cartels (Fear, 2006: 11).

The German *Mittelstand,* consisting of smaller retailers, wholesalers and artisans, formed an opposing force to the large cartels and monopolies. The opposition never amounted to an antitrust movement similar to that in the US (see Part I of this chapter). Notably thirty years after the enactment of the Sherman Act in the US, in 1923, Germany adopted a decree against abuses of economic power, the *Verordnung gegen den Missbrauch wirtschaftlicher Machtstellung*, which sought to counterbalance cartels and cartel-like organisations that surfaced in the time of rising interwar inflation (Harding and Joshua, 2003: 73). Gustav Stresemann emerged as its major proponent. He was a representative of the *Mittelstand* and the *Reichsverband Deutscher Konsumerverein*, a consumer organisation, (ibid). However, the view that cartels were an important stabilising factor for the Germany economy was so dominant that the law did not prohibit cartels, but rather made them subject to the surveillance of the state institutions (Deringer, 2003). This first German encounter with some sort of competition law was only short-lived. The law was abolished again as part of the broad-based hostility towards liberal markets which arose during the worldwide economic depression following the New York Stock Market crash on 24 and 29 October 1929 (see for more details Djelic, 2002). Nonetheless, Germany's ephemeral experience triggered a political discussion on the introduction of competition laws in the 1920s and 1930s in other countries, albeit without concrete political results (Gerber, 1998: 7).

Cartels played a pivotal role in the rise of the fascist regime of National Socialism in Germany, and vice versa: the regime sponsored the emergence of cartels and monopolies. The enmeshment of the totalitarian state within the corporate elite exemplifies 'totalitarian monopoly capitalism' (Neumann, 1942). Totalitarian monopolist capitalism stands for the particular historical junction in which a monopolistic economy combinations with the command economy of the totalitarian state. With the advent of the National Socialists, a law was enacted in July 1933 declaring the formation of big industrial cartels compulsory. A cartel tribunal, a sort of cartel supervisory institution within the Ministry of Economic Affairs was erected to supervise cartels (cf. Feldenkirchen, 1992; Djelic, 2002: 13). With the adoption of Göring's Four Year Plan in 1936, the integration of cartels and monopolies into the totalitarian state apparatus intensified further. Mergers were promoted by means of fiscal incentives, which resulted in a considerable degree of economic concentration in the 1930s (Feldenkirchen, 1992). Also a range of other measures added to the economic concentration, such as complex forms of patent rights, interlocking directorates, proxy voting, plurality votes, exchange of shares, and pooling of profits. This led to the erection of economic combinations 'not surpassed in any country, not even the United States' (Neumann, 1942: 288). Rather than nationalising German industries, as would be the case in a command economy, the Nazi government, in the interest of the corporate elite supported a regime of corporate self-governance. The CEOs of the most powerful companies administered the cartels in an autocratic style (ibid: 270). Thereby, the centralised Nazi state apparatus could communicate with centralised cartels and monopolies (ibid). By awarding contracts of guaranteed procurement, the Nazi government helped the corporate elite to secure economic profits. In turn, it provided the Nazis with the indispensable production of military equipment and financial, hence, political, support. The symbiotic relationship between the state machinery and the capitalist elite entailed also the distribution of Jewish industries or industries of annexed territories to the corporate elite (ibid).

The most powerful cartels were formed in the capital intensive heavy industries, such as coal and iron, and chemicals 'where the homogeneity of products facilitated the specification of quotas and prices' (Landes, 1969: 245). The coal and steel syndicates constituted the core of the German war machinery. The highly vertically integrated *Vereinigte Stahlwerke* was probably the largest mining and steel company, producing more crude steel than any other steel company in Europe. It was founded in 1926 by August

Thyssen and later split into two conglomerates, led by the sons Fritz and Herbert Thyssen. Fritz Thyssen was involved in financing the *National Socialist German Workers Party*. Later he titled his memoirs *'I paid Hitler'* (1941). Cartel regimes, such as *IG Farben*, which at the Nuremberg Trials in 1947 was dismantled into *Hoechst, Bayer,* and *BASF (Badische Anilin- und Sodafabriken)*, also played a crucial role under the Nazi regime. Apart from its help in planning the war, it profited from forced labour camps, unrestrained experimentation on camp prisoners, as well as from supplying Auschwitz and other concentration camps with chemicals such as the notorious Cyclone B.

During the Third Reich, closed market structures eliminated competition from outside. However, within Germany, the carteleers found themselves in a 'relentless struggle for supply, production, and sales quotas' (Neumann, 1942: 291). The consolidation of the totalitarian monopolistic capitalism marginalised the position of the German *Mittelstand.* This was particularly pronounced in the case of joint stock companies functioning as financial centres and capital funds for member companies. Joint stock companies institutionally centralised economic power: the board of directors of the largest firms took important decisions. In need of capital, small and medium-sized companies formed the majority of stockholders, and thereby often came to co-finance the expansion of the large ones (Neumann, 1942: 281). To give an example, the *Rhenish-Westphalian Coal Syndicate* also operated as a joint stock company (Fear, 2006: 4). It encompassed more than 67 firms and employed more than 500 people solely to run the cartel (Djelic, 2002: 12). In addition, banks participated in the economic expansion of the large industrial combinations. However, with enhanced competition among banks, they did not fully control large cartels and monopolies (Harding and Joshua, 2003: 66; Resch, 2005: 3). Concentrations in the banking sectors brought consortia of several large banks onto a supervisory board, which reduced their collective ability to influence the course of the company (Edwards and Ogilvie, 1996: 440). Moreover, with the growing size of industrial companies and the high profitability, no single bank was large enough to finance further expansion, which also limited the influence of financial capital on the supervisory boards (ibid).

After the Second World War, Germany was the first country to establish a broad based competition regime in Europe. Although the UK had already adopted the *Monopolies and Restrictive Practices Control and Enquiry Act* in 1948, it was only between 1965 and 1980s that more all-encompassing competition laws were adopted (cf. Eyre and Lodge, 2000). The next section illustrates that Germany's second encounter with competition laws was more enduring. The establishment of competition laws in Germany forms part of the heritage of US Occupation Forces during the economic and political restructuring after the Second World War. The German experience was of vital importance for the evolution of competition laws in the European Community, and subsequently also in other European states in the late 1950s and 1960s.

3.4 The Influence of US Antitrust Architects on Rebuilding Post-War Germany

After the Second World War, the Allied Military Government sought to restructure the German economic and political system. The US Occupation Force became the most dominant ally. At the Yalta Conference in February 1945 which divided Germany into four occupation zones, the US suggested a 'radical decartelisation' programme (Freyer, 2006: 248). President Dwight D. Eisenhower noted in April 1945:

> *You will prohibit all cartels or other private business arrangement and cartel-like organisation. [...] it is the policy of your government to effect a dispersion of the ownership and control of German industry.* (Cited in Wells, 2002: 140)

Only a few months later, at the Potsdam Conference in July, the heads of the US, British and Soviet occupation zones agreed upon a US initiative to dismantle the cartel-dense German economy 'at the earliest practicable date' (Article 12 of the Potsdam Treaty in Feldenkirchen, 1992: 261). The military governor of the US zone, General Lucius D. Clay, was a key figure in determining the course in this regard and included the following goal into his four-D programme: *denazification*, *demilitarisation*, *democratisation*, and hence, *decartelisation* (Freyer, 2006: 247).

The staff of the US Decartelisation and Deconcentration Branch was drawn directly from the US Justice Departement's Antitrust Division. Initially, it could do little more than study the situation as it occupied only the Southern states of Bavaria, Hesse, and Baden-Württemburg, which were not heavily industrialised (Wells, 2002: 148). The British occupied the Ruhr Valley, the industrial heart of Germany where more capital-intensive companies were based. When the US zone fused with the British zone in 1947 the US Occupation Forces could take the lead in the economic and political reconstruction of

Western Germany and impose a statute on antitrust.[18] Cartels and 'cartel-like agreements', such as syndicates, trusts and other monopolist arrangements were declared unlawful (Djelic and Kleiner, 2003: 4). Additional legislations restricting the combination of commercial and investment banking were introduced to disentangle corporate finance from the productive sector (Wells, 2002: 153). Subsequently, more than 1,000 cartel agreements were dissolved, including *IG Farben* and *Vereinigte Stahlwerke. IG Farben* constituted the world's largest chemical company and held close ties with the Nazi Regime. At the Nuremberg Tribunal in 1947, the managers of the *IG Farben* were sentenced for crimes against humanity for the exploitation of foreign slave labourers (Freyer, 2006: 249). Ironically, many sectors of the US industry formed part of the large international industrial cartels in which also German corporations, supporting the fascist regime, participated.

After the four years of Allied occupation, the German economy was far from deconcentrated, in marked contrast to the successful breakdown of big German industrial cartels. Several reasons account for this. On the one hand, the chief executives of large German companies fiercely opposed the deconcentration efforts of the Allied Forces, and this considerably slowed down the endeavour.[19] On the other hand, the US Decartelisation and Deconcentration Branch suffered from internal divisions. The Decartelisation Unit, most notably composed of zealous lawyers, was convinced of the necessity to break the German industry up into small pieces. It even sought to establish more stringent rules than that of the US in order to set a precedent which would have an impact both at home, as well as in the rest of Europe (Wells, 2002: 147). The Deconcentration Unit, which was composed of economists, executed its task with less vigour, and eventually shelved the deconcentration activities altogether (Freyer, 2006: 259; Wells, 2002: 261). Notably, under US antitrust law and enforcement practice, large corporations were not *per se* evil, and thus, the need to deconcentrate the German industry was considered less important. As one of the Deconcentration Unit noted:

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[18] The UK and France were also involved in the decartelisation project of particularly concentrated industries, such as coal and steel production, banking, motion pictures, and chemicals. Yet, in the absence of antitrust laws in these countries, the implementation by these occupation forces was markedly less severe than the approach taken in the US zone. The British did not share the same aversion to cartels as the US Occupation Forces. The French, on the contrary, did not prohibit cartels as such. Instead, action could be taken only if an anticompetitive effect could be examined (Harding and Joshua, 2003: 87; Wells, 2002: 147).

[19] Exemplary is the blackmailing power exerted by two managers of the *Metallgesellschaft*, who announced their deep concern to the military government about maintaining 'friendly' relations with the their competitor *British Metal* with regard to other companies in the markets (Freyer, 2006: 250).

In any approach to the German people on the subject of decartelisation, I think that we should honestly stress that we have no intent or desire to pulverize German industry; that our purpose here is not to permit the rest of the nations of the world the benefits of large-scale production. (In Feldman, 2006)

The intention was to focus on the largest firms only, including companies like *Henschel & Sohn*, *Robert Bosch*, *Siemens & Halske*, and *Metallgesellschaft* (Wells, 2002: 155). Eventually, Bosch and Siemens underwent only a marginal restructuring. The 'Big Three' of the banking sector, the *Deutsche Bank*, the *Drezener Bank* and the *Commerzbank*, which controlled the financial system of Germany and held large stocks of leading German companies, were divided only into nine, rather than thirteen different banks as initially envisaged (Berghahn, 1986: 110).

3.4.1 Exporting Competition Laws to Germany and the Marshall Plan

With the changed political course of the US, the restoration of large German companies came to prevail. Initially, Roosevelt and Churchill signed a plan by Henry Morgenthau in September 1944 in Quebec, which entailed destroying the German manufacturing industry in its entirety, and refocusing its economy on agricultural production only (Buxbaum, 2006: 5). While the Soviet and the French government demanded reparation payments, a small group of powerful US businesspersons lobbying in Washington vigorously opposed the plan. It wanted 'to ensure that German industrial assets would be available to support the recovery of capitalist Europe', in particular the heavy Ruhr industries (Van der Pijl, 1984: 145), The famous Marshall Plan, building on the ideas of George C. Marshall, Chief Military Officer during the Second World War, led to seeking to restructure the German economy instead.

The political elite of the US Occupation Forces, most notably Lucius D. Clay and his successor John J. McCloy, the head of the *European Recovery Programme (ERP)*, the forerunner of what became the Marshall Plan, held close connections with US business and certain German industrialists (cf. Link, 1978; Van der Pijl, 1984). In 1946-1947, Clay invited US business representatives to travel through the Western zones in order to 'gain a first hand impression' on the state of the West German economy and to establish close ties with their German counterparts (Berghahn, 1986: 82-3). In a *Report on Germany* in 1947, US business representatives suggested reinstating the board members and directors of

German companies to their posts (ibid). Their requests had the desired effect. Exemplary are the cases of Krupp and the chief executive mangers of *IG Farben.* In 1951, McCloy released Krupp from prison and reversed the confiscation of his property, deeming the prior judgment to be 'repugnant to American concepts of justice' (Van der Pijl, 1984: 174). In 1952, he also released the *IG Farben* chief executive mangers from prison, who regained their high-ranking positions in the German industry (cf. Heall, 2005). The US corporate elite had a strong interest in the creation of free market access for their technologically far more advanced and more competitive US companies. In particular, Fordist-type, export-orientated companies producing cheap mass consumer goods were seeking new consumer markets in post-war Europe to offset their products and expand in size. The financial loans of the Marshall Plan supplied the necessary purchasing power for innovating production into Western Europe, and hence the first important step in exporting American accumulation conditions (Van der Pijl, 1984: 184). By exporting the US economic model and industrial culture to Germany, the German industrial system was meant to be integrated into the US dominated world economy. Eventually, the rest of Europe would follow the German vanguard and buttress the system of market capitalism against communism.

US industry representatives invited German industrialists to inspect US factories and to take part in 'Training-within Industry' courses. The purpose was to teach Fordist production methods and Taylorist management strategies, as well as advertising and marketing practices. This also required a radical transformation of the structural scope conditions of the German industry, such as the abolition of the far-reaching cartel-structure and other restrictive private barriers that inhibit free market access. The US corporate elite considered competition laws crucial for levelling the road towards market capitalism in West Germany and for forming a bulwark against communism in the East. It strenuously pressured for the establishment of a competition regime (Djelic, 2002: 21).

This pressure was a reaction to the German industry representatives, who sought to reinstall cartels in the aftermath of the War. They were convinced that cartels help to create technological progress and economic stability, and to curb labour radicalism and class conflicts (Freyer, 2006: 247). Or as Carl Duisburg, Chairman and Director of *IG Farben*, noted 'industrial combinations were the consequence of the necessity to economize' (in Harding and Joshua, 2003: 42). In particular, Germany's (heavy) industry, confronted with enormous devastation after the War, had no sympathy for the US project of outlawing cartels and opening up their markets to foreign competition. The *Bundesverband der Deutschen Industrie (BDI)*, the Federal Association of German Industry, encompassing 39 business associations counting more than 100,000 member companies, started an aggressive propaganda campaign together with the Ruhr industrial elite against the establishment of an antitrust regime (Djelic, 1998: 231). The connections between the industry oligarchs and the state officials were highly personalised and the lobbying attitude rather rude (Berghahn, 1986: 189-190). The enduring opposition of the industrial elite, as well as of the German *Mittelstand*, implied that the US industrial culture could not be exported as quickly as had been envisaged. Only in the 1960s did the first structural industrial changes become visible (Berghahn, 1986: 259). Nonetheless, the US banking system did not gain a foothold in Germany and the great universal banks were reconstructed (Feldman, 2006: 8). The cooperative industrial relations were re-established, and co-determination became the central mechanism within German corporate governance regimes. In other words Germany established different a kind of capitalism to the liberal market economy model of the Anglo-Saxon world, notably, what came to be known as the Rhenish or coordinated capitalism (cf. Albert, 1993; Hall and Soskice, 2001; Crouch and Streeck, 1997).

The broader political context also contributed to this. In the aftermath of the war, political sentiments were overly hostile towards ideas of free market capitalism and the concept of free competition. The attractiveness of unbridled economic liberalism propagated by the US authorities seemed to be losing the battle against the socialist solutions offered by the Marxist-inspired Social Democratic Party (SPD) and the Christian-inspired socialism based in Roman Catholic regions (CSU) (Gerber, 1998: 257). According to Zweynert (2004: 16), the deep rooted aversion to economic liberalism was founded on a strong holistic conviction that society and economy should form an organic whole. The introduction of US-style market capitalism was anticipated to run counter to this view. According to Blum, the question was less about choosing between capitalism and socialism, but how socialism should be organised (Blum, 1969: 26-37 in Zweynert, 2004: 16). Also in other European countries, the free market ideas promoted by the US did not find a fertile ground. In France, an era of *étatist* capitalism made its entry, marked by *planification* and state *dirigisme*, as well as strong elite alliances between government and corporate interests. In the United Kingdom, the Labour Government nationalised its heavy industries of coal and steel in 1949 and strongly sympathised with government planning with regard to gas, electricity, transport and telecommunications (Resch, 2005: 15).[20]

3.4.2 Exporting Competition Laws to the Multilateral Level: The Plans for the International Trade Organisation

The massive attack on international cartels and the US project to establish competition regimes in Germany and Japan was auxiliary to a much broader project of creating a new liberal post-war world. Already in 1944 Franklin D. Roosevelt proposed to make 'cartel practices that restrict the free flow of goods in foreign commerce' subject to the multilateral regime of the United Nations (Harding and Joshua, 2003: 89). He envisaged exporting the US tradition of antitrust rules to the whole world. A multilateral agreement on competition issues seemed tangible with the momentum of the *United Nations Conference on Trade and Employment* in Havana, Cuba, from November 21 1947 to March 24 1948. The draft proposal resulting from the conference, the *Havana Charter,* suggested establishing the *International Trade Organisation (ITO)* as the central pillar of the multilateral liberal regime of the Bretton Woods Accords of 1944. The US government put the prosecution of cartels, together with other restrictive and protective business practices, high on the ITO agenda. The Havana Charter did not only address governmental barriers to trade, but also corporate behaviour, involving both 'private and public commercial enterprises' (Havana Charter, 1948: Article 54, Section 2, b and c). Chapter five on 'Restrictive Business Practices' (Articles 46-54) would have required the signatories to combat all 'business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control' (Havana Charter, 1948: Article 46, Section 1).[21] The ITO was meant to provide a platform to file complaints with regard to 'price-fixing, territorial exclusion, discrimination, production quotas, technological restriction, misuse of patents, trademarks and copyrights', hence, all sorts of practices applied by (international) cartels (Wells, 2002: 123). The competition rules were drafted by US State Department's special *Advisory Committee on Private Monopolies and*

[20] Although the subsequent Conservative Government of 1953 immediately evoked a process of denationalisation, the public corporation remained an intact pillar for decades until the advent of Margaret Thatcher in 1979.

[21] The inclusion of competition policy in the international domain surfaced for the first time in the discussions surrounding the international institution building in the 1920s and the 1930s. In the League of Nations' *World Economic Conference on 'Concerted Economic Action* during March 16-18 in 1931, proposals for multilateral competition rules were brought forth (Archives of the League of Nations 2006). They never materialised as the issue moved to the background again during the Second World War.

Cartels and (Djelic and Kleiner, 2003: 7). Their aim was to create a worldwide open door for US exports and investment. The US delegates built in the loophole that, in any cases in which the ITO failed to intervene, the US could enforce its own laws instead (ibid: 118).

The ITO was never ratified. The Soviets did not participate in the talks and several European countries expressed their opposition to the Draft Charters that addressed cartels and inter-governmental commodity agreements (ibid: 120). Rather than joining the US liberal project, developing countries instead planned to steer domestic industrialisation and to adopt protective measures such as import restrictions and subsidies to domestic manufacturing industries (ibid: 121). In the end, US Congress also refused to ratify. The ITO would have implied the delegation of a considerable amount of decision making power in the field of trade, investment, and competition to the multilateral level. In particular, the Republicans surfaced as staunch opponents, but also investors and US business successfully lobbied against the Havana Charter.

Initially, the impetus for enacting multilateral rules on competition was based on the wish for unhindered market access of US companies to European markets, in particular with an eye to breaking down the economic power of large concerns and cartels that had supported the fascist regimes in Germany, as well as in Italy and in Japan. Moreover, US companies also had an interest in liberalising market access to the (former) colonial empires of France and the UK, whose companies enjoyed privileged access (Wells, 2002: 119). However, in the end US corporate interests feared that the ITO entailed too much room for public market intervention as it was shaped according to the ideas of John Maynard Keynes, one of the leading delegates from the UK (Aaronson, 1996: 3). Keynes suggested including provisions for intergovernmental commodity accords to regulate production in sectors with extensive surpluses, to control national commodities buffer stocks in order to stabilise prices to the benefit of both consumers and producers, and to promote consumption increases in national markets (Wells, 2002: 119). As the Keynesian countercyclical demand management could have imposed production and investment constraints on business, corporate actors lobbied against the proposal. In particular the 1919 established, Paris-based *International Chamber of Commerce (ICC),* one of the most comprehensive business fora committed to economic liberalisation, protested against the fact that governments had the permission to conclude agreements that were forbidden for private actors (ibid: 124). Instead of the more ambitious and wide-ranging ITO, the less controversial *General Agreement on Tariffs and Trade (GATT)* was adopted in 1948. As part of the Bretton Woods regime, or what commonly is referred to as the *Washington Consensus,* the GATT complemented the *International Monetary Fund (IMF)* and the World Bank, which served to provide US capital with an integrated international circuit of financial flows. Despite the initial interim character of the GATT, it endured for more than 40 years, until it was incorporated in the *World Trade Organisation (WTO)* in 1995. It contained a set of rules on the reduction of state imposed customs tariffs that were originally proposed as a part of the ITO. Rules on cartels and private market restraints were not included in the GATT and the idea of establishing a multilateral agreement on competition rules reached a stalemate.

In the meantime, the US authorities exerted political pressure on the other Allies to adopt antitrust laws (Freyer, 2006: 248). The US government used the provision of military aid, and reconstruction loans with the later Marshall Plan, as political leverage. The UK in particular, suffering from a considerable payment deficit, depended on Washington's commitment not to seek repayment for received military aid (Wells, 2002: 109). Already in 1941, the US and the UK adopted a Mutual Aid Agreement entailing a commitment to support each other politically and to pool their efforts in international economic affairs (Keenwood and Loughead, 1999: 237). In response to relentless US pressure, the UK adopted the *Monopolies and Restrictive Practices Control and Enquiry Act* in 1948. As Gerber (1998: 214) pointed out, the adoption of competition laws was 'a convenient and relatively cost-free means of demonstrating a spirit of cooperation with the US'. The export of competition laws to other countries formed part of the liberal trade order promoted by the US government, which established the long-lasting US economic and political hegemony. It served the purpose of facilitating US corporate expansion into geographically new markets without the imposition of 'discriminatory tax and labour laws, as well as the constant threat of expropriation in Europe' (Van der Pijl, 1984: 144). Germany constituted the centre of gravity of US efforts. As the next section demonstrates, US pressure was crucial for the adoption of competition laws in Germany. However, even though the competition laws of the US continued to be operational until the establishment of the West German Republic in 1949, they did not last.

[...] there is a tendency to argue that the US brought us free competition. [However] the Freiburg School, which had already developed a concept of free competition and free market economy during the Third Reich, and Professor Böhm in particular, was actively involved in advising on the law against restrictions of competition.

Arved Deringer (2003, own translation)

3.5 Competition Law and Institution Building in Post-War Germany

In the changed spirit of the Marshall Plan, the US made the endorsement of competition laws a precondition for turning over sovereignty to West Germany. The US Occupation Force authorities realised that they could not force the rules of capitalism upon Germany and that the endeavour to establish competition laws was doomed to failure without German cooperation. The West German political and industrial elite needed to be convinced of the advantages of competition laws during a longer period of political re-education (Berghahn, 1986: 103). Therefore, the US government required the German authorities to draft their own competition legislation. The preparatory stages were enacted under the patronage of the US military government, which commissioned a group of experts to draft antitrust legislation in 1946. In the meantime, the interim competition laws of US military government remained in force.

Heinrich Kronstein, a Jewish German lawyer who fled to the US and, while in exile, became responsible for the prosecution of international cartels at the US Antitrust Division, drew the attention of the US Occupation Forces a small group of legal and economic theorists from the University of Freiburg, the ordoliberals (see Chapter 2). Their political colour perfectly matched the outspoken liberal goals and the denazification standards of the US. With the political support of the US, a range of eminent ordoliberals successfully ascended from their enclave in Freiburg. They took over ranking leadership positions and the role of academic consultants in the economic policy planning of post-war West Germany. Walter Eucken gave a range of advisory opinions to the Allied Forces on the organisation of the economic transition in 1946 and 1947 and Franz Böhm became a Member of the *Bundestag* during 1951-1961. In the years before, he closely cooperated with the Bavarian authorities. Thereby, ordoliberals exerted considerable influence on the shaping of the competition laws and the accordant institution-building process in Germany. Due to ordoliberal influence, Germany did not adopt a competition regime exactly resembling that of the US, despite the US effort to proselytize the German competition model towards that of the US (Gerber, 1998: 177; Slot, 2004: 443). However, neither did the ordoliberal proposals materialize in the way ordoliberals had initially envisaged them. Fierce industrial opposition not only protracted the adoption of competition laws, but also led to a watered down legislation.

3.5.1 The Failure of the Josten Draft and Industry Opposition

Heinrich Kronstein advocated his friend and ordoliberal Franz Böhm as an 'excellent leader of the German antitrust movement' (Freyer, 2006: 249, 253). The US Occupation Forces commissioned him with the task of drawing up competition laws. Under the leadership of Paul Josten, also an adherent of ordoliberal ideas, Böhm took over a position as a referee in cartel questions in 1952. Under Böhm's influence almost all members of the *Wissenschaflicher Beirat*, the Academic Advisory Council, established in 1947 to advise the government on the development of economic policies were adherents of ordoliberalism (Gerber, 1998: 257). Together with other ordoliberals from the Ministry of Economic Affairs, i.e. Walter Bauer, Wilhelm Kromphardt and Berhard Pfister, as well as a range of business leaders, he contributed to the *Josten Entwurf,* the Josten Draft of 1949. The Josten Draft suggested the introduction of a strong monopoly commission according to the ordoliberal ideal, which enjoys the right of criminal enforcement with regard to all forms of horizontal and vertical agreements, as well as the right to deconcentrate large conglomerates (Drahos, 2001: 242). Moreover, it promoted the dissolution of large corporations.

Parts of the German ministerial bureaucracy, the US Occupation Forces, and the industrial elite of the Ruhr and the BDI immediately boycotted the proposal. Industry representatives in particular considered the way in which the draft proposal problematised economic power concentration far too radical. Disputes emerged also with the US authorities (Freyer, 2006: 254). Despite the shared conviction on establishing a liberal market economy in Germany, ordoliberals did not represent mainstream US economic thinking, which propagated human salvation through free market play and which did not see evil in large corporations. Ordoliberals fiercely criticised the piecemeal approach of the US Antitrust Faction of the US interim military government towards economic deconcentration and accused it of supporting the monopoly practices of business people with a Nazi background (ibid). In his role as an economic advisor to the US Occupation Forces, Eucken also recommended *Konzernentflechtung,* the immediate dissolution of large corporations, and the overall break-up of the cartels and syndicates that had contributed to the rise of Nazi Germany. In his declaration *Über die Gesamtrichtung der Wirtschaftspolitik* (1946), he promoted ordoliberalism as an intellectual alternative to free market capitalism. He also recommended abandoning the existing banking system (Oswalt, 1996). He received political support in this regard from the Social Democratic Party (SPD), the Christian Socialists (CSU) and the ordoliberal wing of the CDU (ibid). The fierce controversies that arose from the Josten Draft led to a ten-year delay in the establishment of competition laws. More than twenty more draft versions passed under review until laws on competition could be adopted (Freyer, 2006: 264). The Josten Draft ended up shelved without a parliamentary debate (Eickhof and Isele, 2005: 93).

Faced with the sword of Damocles of the US authorities and the Marshall Plan funds, Ludwig Erhard, heading the *Ministry of Economic Affairs* strongly favoured the establishment of competition laws. Repeatedly, he emphasised that controlled competition should constitute the motor of economic growth after the War (cf. Erhard, 1957). However, in marked contrast to the Josten Draft, he envisaged the imposition of a similar competition regime as that in the US. Although he did not have an 'intimate knowledge of US antitrust laws and practices', he sympathised with a strict ban on cartels in combination with mild merger control regulations (Berghahn, 1986: 158, 167, 289). Erhard opposed the far-reaching deconcentration of the German economy. Instead, similar to 'the spirit of America's economic policy', he sympathised with the idea of stimulating large enterprises to be able to compete in the world market (ibid: 159). After the political failure of the Josten Draft, Erhard committed an *ad hoc* commission to come up with competition laws in 1953. The enactment of a strict regime prohibiting cartels and other restrictive business practices should take place quickly as otherwise the resurrection of industrial cartels could not be stopped anymore. Erhard had a hard time defending his position in favour of antitrust rules to the BDI, as well as to the ministries of Agriculture, Transport and Finance, who pushed for a 'less prohibitive approach to cartels' and for completely abandoning the idea of a law for controlling mergers (Eyre and Lodge, 2000: 66). Corporate actors denounced the *Ministry of Economic Affairs* to be merely an instrument for the US Occupation Force to weaken or even destroy the German economy (Djelic, 1998: 231).

The opposition of large industrialists and their associations could not block the adoption of competition laws banning cartels in Germany. However, it was effective in delaying the legislative process until 1957, when the *Gesetz gegen Wettbewerbsbeschränkungen,* the Restriction of Competition Act, and the enforcement institutions were adopted. The ordoliberal project dramatically failed to control economic concentrations through mergers. The adoption of mergers laws tumbled over political and industrial opposition. From the US Occupation Forces, industry representatives 'learned' that large companies and oligopolies were necessary to achieve economies of scale. They considered German enterprises not yet large enough to be able to compete. By keeping close ties with the CDU, the BDI and its ally, the *Deutscher Industrie- und Handelstag (DIHT)*, successfully blocked the introduction of laws that could constrain economic concentration (Drahos, 2001: 245). The ordoliberals in the Josten Committee lacked the political power and the necessary support to include rules on mergers in the new competition regime. Thereby, the German industry rapidly re-concentrated again. Exemplary are the companies *Hoechst, Bayer,* and *BASF* resulting from the deconcentrated *IG Farben.* Today, each of these companies is about twenty times larger than *IG Farben*. Organised in the *Verband der Chemischen Industrie,* the Chemical Industry Association, these companies systematically invested in the careers of political leaders, such as Helmut Kohl who worked as a lobbyist for the Association between 1959 and 1969, in order to secure their political influence further (cf. Heall, 2005).

In response to enduring industry opposition, Erhard eventually promoted a 'reasonable cartel policy', one that gradually supported the German industry in adapting to the new situation, rather than policing them (Berghahn, 1986: 170). Merger controlling laws were completely dropped from the agenda. The heated debates on the introduction of competition laws in Germany engendered the division between different corporate interests, notably between larger, dominant corporations mostly from the heavy industrial sectors and chemistry, and the small and medium-sized enterprises. Exemplary is the *Arbeitsgemeinschaft selbständiger Unternehmer (ASU)*, the association of small independent entrepreneurs, which welcomed the introduction of competition laws as a way to curb the practices of the large conglomerates (Drahos, 2001: 245). In the end labour organisations, such as the *Deutsche Gewerkschaftsbund*, also chose the side of the competition law proponents (ibid).

3.5.2 'Bonn's Elastic Cartel Law'

The ordoliberal ideal competition regime was only partially realised, because of the fierce opposition by both the political and industrial elite, and the BDI. The result was a political compromise reflecting traits of US influence, ordoliberal thinking, and industry opposition. In substance, the German competition laws resembled those of the US. However, there was not a wholesale 'Americanisation' (Djelic, 1998: 234; Djelic and Quack, 2003). With regard to the design of the enforcement institutions, the German regime departed from the US model. Not the efficient allocation of resources, but, in line with ordoliberal thinking, the promotion of 'economic democracy' was declared the most important objective of competition law (Jenny, 2000: 28). The absence of a private (criminal) enforcement regime in the German, and subsequently also the EU model of competition law enforcement, displays the limits of US political influence during the occupation and institution-building period.

The ordoliberals involved in the drafting process strongly opposed the US antitrust enforcement practice that relied so heavily on courts and on private enforcement allowing private litigators to bring breaches of competition law to the courts (Freyer, 2006: 248). Instead, they preferred a system governed by administrators who constantly supervise the marketplace.[22] As a result thereof, German competition laws received a strong constitutional status, embedded in public administrative law. This reflects the ordoliberal idea of a stable framework of principles for the distribution of power, not only between the state and the market, but also within state institutions. The *Bundeskartellamt*, the Federal Cartel Office, the cartel offices of the *Länder* were shaped as (supposedly) politically independent agencies with far-reaching administrative and discretionary powers to control and to prosecute anticompetitive conduct. Additionally, in 1973 when Germany adopted merger control laws, the *Monopolkommission,* the Federal Monopoly Commission, was erected to monitor economic concentration and entrusted with an advisory task. To ensure a certain degree of checks and balances and transparency, following the US model (see Chapter 2), the *Ministry of Economic Affairs* was authorised to supervise the *Bundeskartellamt.* The physical distance between the government located in Bonn and the

[22] As will be demonstrated in Chapter 9, the political resistance of German authorities against the introduction of private enforcement at EU level more than 40 years later is rooted in the legal and economic history of the post-war period. From the very beginning of a competition law tradition, these sentiments endured.

Bundeskartellamt in Berlin was meant to ensure political (partisan) independence (ibid).[23] Next to appointing the president, the Ministry was entitled to give general or individual directions that may overturn decisions with reference to the general national economic interest of Germany. Such interventions, which needed to be published in the *Federal Gazette* (Wilks and Bartle, 2002: 163), reflect the ordoliberal macroeconomic vision according to which market structure is conceived to be more important than individual corporate market performance.

The traces of corporate lobbying became manifest in the fact that the proposal for a merger control regime was dropped from the agenda and cartel law came to include the possibility of a more flexible interpretation. Although cartels and vertical agreements were outlawed on a *per se* basis like the US model, the *Bundeskartellamt* was given much leeway in granting exemptions to the existing law, based on *the rule of reason.* On the basis of an exemption regime, the *Bundeskartellamt* was empowered to temporarily authorise 'rationalisation cartels', i.e. intercompany agreements promoting technological progress, and 'structural crisis cartels' preventing the loss of business due to a temporary decline in demand (Buxbaum, 2006: 6). In addition, the competition laws excluded export cartels. This implied that an administrative institutional body could discriminate between harmful and harmless cartels. In other words, the cartel authority in every sense of the word was an authority that could authorise cartels. This particular in-built authoritative leeway can be seen as the result of a political compromise between those favouring a free market economy with free competition, and those favouring the traditional cartel approach in line with the interests of German industry. The possibility for exemptions constitutes an institutional remainder of the longstanding cartel tradition in Germany as it provides a legal escape to cutthroat competition. From the perspective of the German industry representatives, cartel formation was believed to evoke rationalisation, standardisation and specialisation in European industries – all features considered important for the implementation of economies of scale and mass-production techniques (ibid). Cartels and other forms of collective corporate agreements were seen as 'functional equivalents' to the large corporations that could be found in the US (Djelic, 1998: 232). Thus, the possibility

[23] After the German reunification and the relocation of the government to Berlin, the *Bundeskartellamt* moved to Bonn in order to keep the much-cherished independence of the competition authority from governmental influence. Probably nowhere else in Western Europe was the importance of the rule of law and the separation of political power implemented with such vigour. What from the perspective of outsiders is sometimes sardonically perceived as *Deutsche Gründlichkeit* originates in the traumatic experiences under a totalitarian regime.

for exemptions effected the waning of industry opposition to the endorsement of competition laws in Germany.

The system of granting exemptions to cartels denominates an important attribute of the *Grundgesetz der Sozialen Marktwirtschaft,* the Magna Charta of the Social Market Economy (Borth *et al.*, 1988: 219). It represents a legal feature of the German variety of 'embedded liberalism', the system that sought to absorb the social costs of open markets in domestic settings. The essence of exempting temporary depression or crisis cartels was to forestall bankruptcies, unemployment, and major profit losses in economically harsh times. The institutionalisation of exemptions entailed a social bargain. It sought to adjust to the interests of capital and labour alike. Only a few marginalised Communists opposed the political course chosen (Freyer, 2006: 267). Concerned about any form of economic concentration, they preferred a *per se* prohibition of cartels according to the US model (ibid). Eventually, the disputes were not about the embodiment of exemption rules in the newly established competition regime, but their scope. The legal loophole of exemptions stands in marked contrast to the US antitrust model. The US Sherman Act of 1890 prohibits cartels on a *per se* basis and offers no formal room for exemptions in cartel questions. The fact that Germany 'did it its own way' raised much criticism in the US. The German cartel law was accused of facilitating cartels, rather than banning them (Berghahn, 1986: 171). The *Wall Street Journal* is reported to have concluded that the attempt to sell US-style capitalism to big business in Germany had failed as commerce and industry had been able to restore their traditional pre-War patterns of cartels (ibid: 175). *The Economist* (1957) reported on the adoption of competition laws with the title 'Bonn's Elastic Cartel Law'.

In conclusion, strong US influence, consisting of the combined efforts of political authorities and US industry representatives, provided the political impetus for introducing a competition regime in Germany. The purpose was to create market access and to teach the West Germans a lesson in 'free' enterprise, and thus propel the country towards a capitalist market economy. The success of West Germany's transition, but also the impressive economic growth that followed the Marshall Plan and US restructuring policies, generally identified as the *Wirtschaftswunder,* the German economic miracle, should free the way for capitalism all over Western Europe. Nonetheless, the procedural rules and the institutional outlook of the German competition regime came to look different to the US model. The opposition of industry representatives was decisive in preventing ordoliberal drafters from imposing restrictive rules on cartels and economic concentration. At the same time, industry opposition was not strong enough to block the wholesale introduction of competition laws. However, ordoliberals could not fully establish the competition regime they envisaged.

The next part demonstrates that the combination of US interests, industry opposition, and ordoliberal experts was not only dominant in the socioeconomic institution building of post-war West Germany, but also of crucial importance during the formative phases of the *European Coal and Steel Community (ECSC).*

Part III: The European Integration Project and Competition Policy

After the War, when Germany was building up a serious competition regime, most European countries were rather ignorant of the supposed virtues of competition laws. The German experience was pivotal to the inclusion of competition laws in the *European Coal and Steel Community (ECSC),* and the later Treaty of Rome in 1957 establishing the *European Economic Community (EEC)*.

3.6 The European Coal and Steel Community – A Clever Cover for a Gigantic European Cartel?

When the European Coal and Steel Community (ECSC) was established in 1951 in Paris, the governments of the six founding Member States of France, Germany, Italy, and the Benelux agreed to include competition laws. However, fierce political battles preceded this decision. Similar to Germany, the driving forces pushing in favour of competition laws were composed of a combination of transatlantic political and industrial elites, and German ordoliberals, who played a pivotal role in shaping the competition laws and in building up the procedural and institutional framework necessary for the enforcement.

3.6.1 Establishing a Framework of Political Control for Germany

The whole *raison d'être* of the ECSC is unequivocally linked to the experience with Nazi-Germany and the decartelisation of the German economy by the Allied Forces in the aftermath of the War. Paul-Henri Spaak, the Belgian Foreign Minister and one of the ECSC's intellectual fathers, considered European integration 'the real way to solve the German problem' (in Buxbaum, 2006: 9). The 'German problem' was of a geopolitical nature and referred to the decisive role of the German steel and coal industries in the seizure of power by the Nazis. Germany was Europe's chief coal producer and its steel industry controlled more than 55% of it (Berghahn, 1986: 110). After the War, the Ruhr area continued to host the greatest concentration of economic power on the continent (ibid: 112). This raised concerns about a potential resurgence of Germany's economic and political power among the governmental elites and industry representatives of other European states alike. A serious shortage of coal, the major energy resource for industrial production at that time, could block the economic recovery of other West European states (Wells, 2002: 170). The political aim of the ECSC was to encapsulate the Germany economy in a framework of control and to safeguard access to coal and steel, the key production factors for the national industries of the Member countries. The subordination of these industries to the supranational framework of the ECSC should therefore prevent the German industry from acquiring a dominant position again.

When Robert Schuman, the French Foreign Minister, brought forth the plan for the ECSC, rules on competition were not included. The draft text of the Paris Treaty was composed during the few months between summer and fall of 1950 and was dominated by a 'semi-private' group headed by Jean Monnet, head of the French *Commissariat du Plan,* the Planning Commission, and later the first President of the High Authority. At that time, France did not have competition laws. Given Monnet's political career in the field of economic *planification*, he did not have a clear vision on competition laws (Hoeren, 1999: 410). As a matter of fact, the French negotiators initially envisaged price regulations where prices would be fixed by national governments and producers' associations (Witschke, 2001: 7). With the historical experience of the devastating German invasion in mind, French industry representatives and politicians initially favoured a particularly hard line against the German steel and coal mining industries. They were vertically integrated, which implied that German steel companies enjoyed privileged access to coal. For the French, decoupling the German steel production from the ownership of coal mines, or then its privileged access, was considered highly important for securing the economic survival of the less competitive French steel industry, which so strongly relied on access to the precious Ruhr coal resources (Karagiannis, 2004: 12-13). When the US Occupation Forces executed its deconcentration efforts with less vigour (see previous sections), French business associations were overtly concerned about Germany's rapid economic recuperation. Moreover, German corporations enjoyed a vast resource of highly qualified people – a resource France could not compete with (Gehler and Gröben, 2002: 20). Regulated prices and controlled market access were therefore in the interests of the French industry association *Conseil National du Patronat Français (CNPF).* It even imposed a 'Commission for German Affairs', whose chief official kept close contact with Robert Schuman (Karagiannis, 2004: 12-13).

The prospect of European supranational price controls within the framework of the ECSC raised immediate concerns in the US. When US Secretary of State, Dean Acheson was confronted with the draft treaty on 7 May 1950, he noted that the ECSC was 'a clever cover for a gigantic European cartel for coal and steel producers' (Acheson, 1969: 383-384). He threatened that without the inclusion of antitrust articles in the Treaty, the US government could not support 'in good faith that the general idea is a single market characterised by competition' (in Witschke, 2001: 17). Moreover, he noted that the cartel question with regard to the ECSC would have 'greatest effect on public opinion particular in the US' (ibid). Concerned about market access, US business associations shared this view. In a telegram to Schuman, they put much emphasis on the necessity of establishing a regime in which competition would be safeguarded (Berghahn, 1986: 134-5). The concerns of US business and government alike took shape in the context of the beginning of the Korean War in June 1950. The creation of an economically strong Western bloc vis-à-vis the Communist bloc received a new dimension: European industries should support the US with the necessary raw materials in the production of military equipment. The increased US demand for steel, due to their involvement in the Korean War, raised prices, and henceforth increased the power of European heavy industry (Berghahn, 1986: 136).

Both French and German heavy industry came to hold the view that European unification in the coal and steel sectors should take place via national cartels which would privately administer themselves on the basis of an international framework, rather than through a centralised, supranational organ such as the proposed High Authority (ibid: 131-2). With the prospect of supranational competition laws addressing all national coal and steel industries alike, the French industry representatives joined forces with the German BDI. The French steel industry did not seek a wholesale prohibition of horizontal cartel agreements, but merely the vertical disentanglement of the German steel and coal mining industry. This German-French *rapprochement* resulted in a joint resolution against the inclusion of competition laws in the ECSC and in favour of protecting the European tradition of national and international cartels (Karagiannis, 2004: 17). Old cartel ties across the French and German borders were revived (Berghahn, 1986: 114). Protests also came from Belgium, in particular from the *Société General de Belgique,* a major Belgian bank involved in coal and steel industries, and from the Netherlands (Witschke, 2001: 14).

In reaction to these developments, the US authorities strongly pressured for the inclusion of competition laws into the ECSC. The rules initially designed for the deconcentration of the German economy were also to be applied to the industries of the other Member States. They did not only want to tackle large industry cartels in Germany, but bring the entire European cartel tradition to a halt. Any form of producer price agreements should be ruled out (Buxbaum, 2006: 8). US-style competition laws were considered indispensable for the US project to export their vision of economic freedom in order to establish the same Fordist-type consumer market in Europe, and secure market access to resources for its industries. Moreover, the creation of a strong Western European bloc should inhibit the Communists from gaining political ground. Similar to Germany, the US government intended to decartelise the French economy and to enact competition legislation modelled after the Sherman Act. The US government was concerned about France nationalising its coal industry and imposing partial governmental control on its steel industry (Freyer, 2006: 271-272). The practice of nationalising coal mines and steel industries formed part of a broader strategy on a worldwide basis to 'allow marginal industries to survive at public expense' (Schmitt, 1964: 103). The situation was similar in Italy, where a state holding company controlled half of the steel industry and in the Netherlands, where the state held shares in the most significant steel firm (ibid: 104). As the introduction of national competition laws in post-war France was highly contested, US officials, as a part of the Marshall Plan's Technical Assistance programme invited a team of French experts to the US in order to train them in US antitrust law and enforcement. Back in France the group of experts concluded that 'an easy transplantation of US laws to the French scene' was unlikely – due to the different economic and legal conditions (Pederson, 1996: 269). The

US meddling with French economic policy raised considerable opposition from large parts of the state administration, as well as the French business community, and the French Communists, albeit for different reasons. The protests of French industrialists towards competition policy were particularly entrenched. The US endeavour to direct France towards market capitalism included the strategy of inviting French manufactures on study trips to the US, as well as holding numerous seminars and meetings in which the virtues of free competition and US-style capitalism stood central (ibid: 268-271). The US 'teaching' endeavours did not book the expected success, mainly because the old guard of high-ranking management officials stayed at home, and these were the very ones involved in cartel practices, and controlling the powerful trade associations or the US Chamber of Commerce (ibid). The US 'courting' of French industrial interest could not change the prevalent view that price fixing and market allocation cartels were necessary for stifling economic growth and stability.

3.6.2 The Franco-American Unison in Drafting Competition Laws

With a stark interest in preventing the ECSC from becoming a cartel-like institution, the US government was kept briefed about the progress of the negotiations. The US government found a loyal ally in Jean Monnet and his staff, who assured it that the Schuman Plan would be the exact opposite of a cartel, stating that the new organisation would promote the fusion of markets and the increase of production (Buxbaum, 2006: 4). As recipients of the US Marshall Fund, the French government was willing to make concessions. This financial dependence intensified in 1950 when the French government received military aid from the US to conduct the war in Indochina (Berghahn, 1986: 117). To play safe, the US government 'transferred' Robert Bowie, a private antitrust lawyer and professor at the Harvard School, as well as close friend of Monnet to Paris (Djelic and Kleiner, 2003; McFadzean, 2003). Under the US Occupation Forces in Germany, Bowie worked as a General Legal Counsellor. Under the auspices of McCloy, Bowie drafted the interim anti-cartel legislation, aimed at breaking up the Ruhr based German coal and steel monopoly. Initially *International Authority for the Ruhr (IAR)* supervised these Ruhr monopolies. The IAR was a body established by the US in cooperation with the British government to control the production and distribution of coal and steel.[24] Bowie's work for

[24] Robert Bowie served as a policy advocate in the Truman, Eisenhower, Kennedy, Johnson and Carter administration during the Cold War. John J. McCloy, who is reported to have been the unofficial 'Chairman

the Schuman Plan in Paris led to a replica of the legal provisions that he previously designed for Germany. These draft provisions were reviewed by the US government in Washington and by George Ball, another close friend of Monnet, and also a private antitrust lawyer with 'close ties to Washington and New York' (Gerber, 1998: 338; McFadzean, 2003: 56).

Under the political pressure from the US government and its 'technical assistance', Monnet took a leading role in drafting competition law provisions. In addition, the French Ministry of Foreign Affairs supported the introduction of competition laws, which by then were also appositely called *Lex Ruhr*. In order to generate the necessary business support for competition laws, Monnet even 'mobilised countervailing forces', such as the manufacturing industry as a leverage for the growing power of the heavy industries (Berghahn, 1986: 131-2). The manufacturing industry was traditionally less cartelised and more easily convinced about the endorsement of the principle of competition into the European integration project. In order to avoid giving the signatories the impression that US interests controlled the process, US influence was deliberately disguised: the provisions were re-written in a 'European idiom' by Maurice Lagrange, a member of the French *Conseil d'État* and one of the first Advocate Generals of the European Court of Justice (Harding and Joshua, 2003: 95). US representatives did apparently not surface during the treaty negotiations in order to achieve a quick consensus. For example, George Ball wrote in his memoirs that he used to take the back door during the negotiations phase 'just in case Europeans arrived' (Gerber, 1998: 338). Nevertheless, the extent of the US influence on the establishment of the ECSC and competition law in particular is a much-contested issue. According to Gerber (1998) there is little outspoken evidence that US politicians directly pressured for the incorporation of competition law provisions. Yet, it cannot be denied that US experts assisted in the drafting phase of ECSC competition laws. The pressure of the US authorities were also of a monetary nature. In a loan of US$ 100 million to the ECSC, the US authorities imposed the condition that the money would be used 'in a manner consistent with the operations of a common market free from national barriers and private obstruction to competition' (Report by the Department of State, March 16, 1955 in Wells, 2002: 202).

of the Establishment' and a patron and close friend of Bowie, also introduced Bowie into the transnational elite of the US and European *classe politique*, academia and business (cf. McFadzean, 2003).

The Franco-American unison, most notably represented by Monnet and McCloy and his antitrust experts Bowie and Ball, eventually pressured for a breakthrough on competition laws, which was achieved on 14 March 1951 (Hoeren, 1999: 412-3). Only a few days later, on 19 March 1951, the ECSC Treaty was signed. Monnet recalled later that the Treaty 'would never have been signed but for McCloy's support' (in Djelic, 2002: 26). The competition laws were formulated in Article 65 and Article 66, and constituted one of the Treaty's most important parts. Article 65 prohibited agreements that aimed at preventing, restricting, or distorting the normal operation of competition (i.e. the cartel law). Article 66 laid down rules for controlling transactions leading to a concentration, such as mergers and acquisitions, and the prohibition of restrictive business practices, such as the abuse of a dominant position. The striking resemblance of the formulations in the cartel prohibition (Article 65) and the merger law (the first part of Article 66) with the US provisions signals strong US presence. Political pressure from the US in favour of establishing competition laws epitomize the rising hegemonic weight in orchestrating the political economy of Western Europe towards market capitalism – hegemony understood in the Gramscian sense of a dominant ideology, permeating cultural, economic, and political layers of society. The cartel and merger laws of the ECSC undoubtedly drew on US experience with the Sherman Act of 1890; they do not, however, exactly mirror the US blueprint.

3.6.3 Compromising Industry Opposition and Adding an Ordoliberal Touch

When drafting competition laws, Monnet and his US experts were not alone. Upon the advice of the ordoliberal Wilhelm Röpke, the German government nominated Walter Hallstein (1901-1982) to negotiate on behalf of Germany (Berghahn, 1986: 120). Walter Hallstein is one of the often forgotten pro-integration personages in the history of the European Union. He was a candid adherent of ordoliberalism and a close friend of Franz Böhm – one of the leading exponents of the Freiburg School. Hallstein and his delegation fiercely protested against the 'French' proposal and demanded considerable revisions, which led to a situation where the inclusion of competition laws threatened the ratification of the entire ECSC Treaty. In the course of the ten year deadlock in enacting competition laws in Germany, ordoliberals seized the opportunity to exert their influence on the ECSC treaty. Yet, in marked contrast to the founding fathers of the Freiburg School, they were less dogmatic and 'prepared to think pragmatically' (Berghahn, 1986: 151).

The controversies between the French and German delegations centred on whether ECSC competition law should follow the *prohibition* or the *abuse* principle. These led to two different systems with important repercussions on the stringency with which competition laws would be enforced. The 'French' proposal entailed a *per se* prohibition on cartels, which, following the US antitrust model, implied that all cartels and other restrictive business practices would be categorically declared illegal. In contrast, the German proposal followed the abuse principle, according to which cartel practices and alike would be legal in principle and only be prosecuted in the case of abuse. The German preference for a more lenient approach to cartels was imbued by the presence of strong industrial interests favouring the continuation of a cartelised economy. During the negotiations, Hallstein and his team were surrounded by a group of experienced and cartel-minded industrialists, among whom was Max Boden, the director general of *AEG* electrics, as well as Max C. Müller, who headed the *Vereinigte Stahlwerke* and held 'first class connections to the steel industry (Berghahn, 1986: 120-1).

The coal and steel industry felt cornered by foreign (French) competitors. Ludwig Erhard also campaigned for the more lenient German proposal. In a letter to Adenauer on 11 December 1950, Erhard tried to convince him to adapt the treaty text to the better-qualified German draft on ECSC competition law. As not every cartel was *per se* evil, he considered the US and French suggestions for prohibiting cartels to be inept for Germany (in Hoeren, 1999: 414). Although Hallstein held the view that 'cartels, even under the strictest supervision of the state remained highly suspect', he eventually drafted Article 66 according to the German model (Freyer, 2006: 274). The law reserved a strong role for the High Authority, which, as one of the ECSC's principal institutions, next to the Council representing the Member governments and the European Court of Justice (ECJ), was declared responsible for administering and applying competition laws. Designed almost simultaneously with the *Bundeskartellamt* in Germany, and similar to the German model, the High Authority was entrusted with far-reaching discretionary powers to differentiate between harmful and harmless commercial agreements. In times of economic crisis, it could exempt horizontal cartel agreements from existing law. It could impose production quotas (Article 58) and specify conditions of sales. Presumptively, due to the influence of the French delegations, it could also fix price margins (Article 61). All these far-reaching market interventionist powers were designed to serve to increase the productivity or the distribution of products.

In addition, Article 66 also came to prohibit the abuse of a dominant position, a legal device that finds no equivalent in the US antitrust legislation where only intentions to monopolise are ruled out. The abuse of dominance prohibition draws on the ordoliberal distrust of 'bigness', i.e. in order to allow a vast range of competitors to compete on equal terms, companies should not grow too big. Walter Hallstein thereby attempted to include a commitment to 'social market economy' in the new legislation. Article 66 also empowered the High Authority to intervene in already existing dominant positions of both private and public enterprises. It could block a transaction or require the breaking up of a company if prices were affected, the production or the marketing restrained, or the maintenance of effective competition in a substantial part of the market impaired. As only the High Authority could enforce the law, it virtually enjoyed unlimited discretionary powers to structure the market. Private actors could appeal to the European Court of Justice (ECJ), although, direct private lawsuits similar to the private enforcement regime of the US were forbidden (Gerber, 1998: 341). The inclusion of these provisions demonstrates that the German treaty drafters preferred a strong state authority to the mechanism of free competition as a market ordering force.

The cartel provisions drafted by the US lawyer Robert Bowie in Germany were directly translated to the Schuman Plan. He drafted most of Article 66 (Freyer, 2006: 274). However, here Hallstein and his team of ordoliberals and industry representatives also made an enduring imprint. This was reflected in the enforcement procedure, according to which concentrations needed to be authorised by the High Authority prior to its completion through a system of notification. Again, the High Authority enjoyed plenty of scope for interpretation as it could outlaw 'unreasonable' concentrations that might evade competition. Given the far reaching powers of the High Authority, it should not come as a surprise that the leaders of the business communities also fiercely opposed the incorporation of competition laws as a central pillar of the ECSC (Djelic and Kleiner, 2003). However, their opposition could not block the inclusion of competition provisions for the following reason: government representatives were reported not to have informed the industry representatives about the state of affairs of the negotiations until it was too late for them to formulate a common position and to effectively lobby for it (Büthe and Swank, 2005: 28). Similarly, for industry groups like the BDI it was to late to intervene as they expected the negotiations to be unsuccessful on this issue anyway (Gehler and Gröben, 2002: 12, 21).

Yet, industry opposition was still successful in swinging the provisional treaty text in its favour. The burden of proof came to lie with the High Authority: only if it could successfully prove that a merger would lead to a situation in which the new combination can control prices and distribution channels, it could prohibit it (ibid: 15). German industries pressured for the inclusion of a non-discrimination clause, according to which the High Authority had to take into account the different economic positions of other companies when assessing mergers, taking the size of the largest company as point of reference (Witschke, 2001: 16). Thereby, the German industry had less to fear with regard to the reconcentration of the coal and steel industry and could move towards an oligopolistic market structure. Although the French industries were not directly involved in the French delegation of 'politically experienced top civil servants', they stayed in regular contact during the preparatory stages of the drafting process (Berghahn, 1986: 128-9). Their influence led to the inclusion of a notion that concentrations concluded prior to the ECSC ratification would not be subject to the High Authority. This meant that the bulk of concentration activity in France did not fall under the merger rules (Haas, 1958: 153). Nevertheless, the French steel industry, in particular was very discontent with the result. It did not want to ask prior permission from a supranational authority for envisaged mergers or producer agreements. Moreover, it had much to fear from competition laws, as strong cross-participation between companies and inter-locking directorates constituted the order of the day (Witschke, 2001: 14-17, 27).

When confronted with the institutional outlook of the ECSC competition laws, the enthusiasm of the US government for European integration dampened. US concern was instigated by the far-reaching powers entrusted upon the High Authority, including the possibility to set price margins and to allow cartel agreements. When the US 'reviews' of the draft text arrived from Washington, Monnet, Bowie and Hallstein had already completed their work (Freyer, 2006: 273). To recapitulate, the same US antitrust experts who drafted the competition rules in the aftermath of Nazi-Germany co-authored the cartel and merger law of the ECSC Treaty. The differences in a large part of the substance of the laws are negligible. However, the US influence was not all determining. The institutional design of the enforcement mechanisms and the responsibilities attributed to the High Authority came to look very distinct from that of the Federal antitrust agencies of the US. At a lower level of abstraction, the combination of the ordoliberal weight in the drafting phase and the opposition of the industrial elite were arbitrative. Once the ECSC competition laws were established, US influence vanished. In the years to come, the competition law provisions of the ECSC were hardly enforced. Despite its wide-ranging powers, the High Authority was anxious to keep the goodwill of the industrialists who forcefully opposed the anti-cartel and merger provisions. The joint endeavours by industry representatives from the ECSC Member States can be hold accountable for this. In a declaration in 1951, the *Council of the Federation of European Industries*, the first transnational organisation, encompassing the main employers associations from France, Belgium, the Netherlands and Germany, protested that the High Authority would become too powerful in combating cartel behaviour and intervening in economic concentrations (Witschke, 2001: 14). In addition, national governments also opposed the enforcement of competition laws. Ludwig Erhard the German Minister of Economics contested the inclusion of supranational merger laws from the start (Hoeren, 1999: 412-3).

As a result, of the more than eighty registered syndicates only three were dissolved, none of them being important, and of the more than 59 concentrations falling under Article 66 of the ECSC none was prohibited (ibid: 19; for details see also Schmitt, 1964). In other words, the High Authority 'took a friendly view of mergers' (Berghahn, 1986: 282). It failed to set up a coherent and transparent enforcement policy for Article 66. In any case, mere size was not considered a problem. Thus, the German industries deconcentrated rapidly. Under the consent of the High Authority, many of the thirteen independent successor companies of the deconcentrated *Vereinigte Stahlwerke* rapidly re-concentrated and re-established their links with the coal sector and merged again (Witschke, 2001: 3). In addition, the German steel producers *Mannesmann* and *Hoesch* re-concentrated by 'restoring vertical integration with down and upstream companies', including coal producing companies (ibid: 19). Similarly, the High Authority took a reluctant stance towards dismantling the German coal syndicate *Deutscher Kohleverkauf*, which succeeded the Ruhr syndicate (Resch, 2005: 16). French industry was also actively engaged in concentration activities. In 1954, a French consortium, supported by government loans, took over the biggest West German coal mine, the *Harpener Bergbau AG* (Witschke, 2001: 21).

In conclusion, the political project of establishing a competition culture similar to that of the US faced considerable difficulties in gaining a foothold in Europe. Nevertheless, first institutional steps were taken in the immediate post-war era. In addition to Germany and the ECSC, Austria and the Netherlands enacted their first competition laws in 1951, while France adopted some sort of embryonic competition laws in 1953, and Belgium and Denmark in 1960. Yet, in response to received loans from the Marshall Plan the adoption of competition laws initially reflected ‘a mere formality to please the US’ (Gerber, 2003: 8, 171). To illustrate this with anecdotal evidence, when James Rahl, a US law professor, paid a visit to Denmark in the 1960s, he noted that the competition authority consisted of a director and a secretary only (ibid). In spite of the initial difficulties for competition laws and practices in early integrating Europe, the competition idea was meant to endure, even without direct involvement of US interests. As the next section demonstrates, when drafting the Rome Treaty a few years later, the European political elite already had engendered the idea of competition as the centrifugal dynamic of economic integration.

3.7 The European Economic Community (EEC) – Establishing A System of ‘Undistorted’ Competition

The Rome Treaty was signed on 27 March in 1957 establishing the *European Economic Community (EEC)* and came into effect on 1 January in 1958. Originally, the EEC was designed as a framework for political cooperation with the purpose of establishing enduring peace in Europe. Its founding fathers, however, mostly channelled the decision towards economic integration. The concept of ‘competition’ came to occupy a central position in the Treaty of Rome. The opening articles are straightforward in this respect. The EEC should promote ‘a high degree of competitiveness’ (Article 2 of the EEC Treaty) and establish ‘a system ensuring that competition in the internal market is not distorted’ (Article 3f). Moreover, the Member States were to adopt co-ordinated economic policies 'in accordance with the principle of an open market economy with free competition’ (Article 4(1)). The actual competition provisions came to involve three pillars: a cartel law, a monopoly law prohibiting the abuse of dominant positions, and rules on state aid – stipulated in Article 85, Article 86 and the Articles 90 to 94, which after the renumbering through the Treaty of Amsterdam (ToA) became Articles 81, 82 and 86 to 89. For the sake of simplicity, I will refer to the renumbered articles of the new system hereafter.

The German experience with competition laws, and the inclusion of competition laws into the ECSC treaty was crucial for the enactment of competition laws in the EEC. The EEC did not only embrace the institutional structure of the ECSC, but also used the competition laws of the Paris Treaty, i.e. Article 65 and 66, as a template. The basic idea was that the rules designed for the coal and steel industries should be applied to other economic sectors, too. The idea was that discrimination among corporations on grounds of nationality should be outlawed and free market access guaranteed to all enterprises. Committed ordoliberals from Germany contributed to the nascent phase of EEC Treaty legislation and the subsequent institution building. They evolved as particularly enthusiastic proponents of European market integration and competition across borders. Again, Walter Hallstein was the principal negotiator on behalf of the German government. He also became the first President of the European Commission, which he headed for nine years. In his writings and speeches during the formation period of the EEC and during his Presidency, he referred extensively to ordoliberal concepts (Gerber, 1998: 263). The German Hans Von der Gröben (1907-2005), a lawyer by origin and an outspoken adherent of ordoliberal ideas became the first Commissioner for Competition Policy in the newly established Directorate General (DG) IV, which he presided over during the first two terms from 1958 to 1962 and from 1963 to 1967. He was also called 'Jean Monnet of Germany', as he drafted much of the Spaak Report, the basic document for the Rome Treaty. He played a pivotal role in the drafting phase of competition laws into the Treaty of Rome. Von der Gröben and Walter Hallstein were not only friends in private life, but also shared the ordoliberal view that political integration was to be achieved foremost through establishing a common market (cf. Von der Gröben, 1965b; Gehler and Gröben, 2002: 8). Their marked presence in the negotiations, in the run up to the EEC, explains why the Rome Treaty came to embody the programmatic idea of an economic constitution in which competition plays the primary structuring device for societal welfare in an integrated Europe.

3.7.1 The EEC Negotiations of the Competition Laws

Similarly, to the ECSC, the incorporation of competition laws created a range of controversies between the French and the German governments, which were predicated upon their preferences for a system of economic planification and *ordered* market capitalism, respectively. The influence of ordoliberal thinking during the formation phase of the EEC eventually prevailed. The 'road not taken' were the proposals brought forth by the French Socialist Prime Minister, Guy Mollet (1956-1957), who favoured the 'harmonisation of social regulations and fiscal burdens as a precondition for the integration of industrial markets' (Scharpf, 2002: 646). He opposed the idea of a law-based market economy with competition laws as the centrepiece steering economic integration. Jean Monnet also attended the negotiation phase as an independent advisor. In line with his economic planning background, he suggested a common market that would be steered by a strong economic planning authority. While the Italians were inclined by the French option, the representatives from Benelux supported the German proposal, which secured ordoliberals the necessary leverage power. This was particularly the case with respect to the negotiations on competition laws.

Similar to the ECSC negotiations, disputes between the French and the German delegates flared up with regard to the detailed outlook of the competition laws and the enforcement competences entrusted upon the competition authority. Again, the choice between the *prohibition* and the *abuse* system gave reason for controversy. Compared to the positions taken on competition laws in the formative phase of the ECSC, however, the French and the German delegates changed camps. This time the German government vehemently postulated a prohibition system for all cooperative agreements that affect trade in the common market, whereas the French government sympathised with the abuse system (Hoeren, 1999: 414). In line with the ECSC competition laws, however, both governments agreed on incorporating possibilities for granting exemptions.

The German option of a general prohibition rule with the possibility of granting exemptions implied an authorisation system that required an *ex ante* notification of all intercompany agreements. Following the ordoliberal spirit of a continuously policed competition order, a strong competition authority should take over the task of reviewing these notifications and of taking decisions independent of governmental influence. The French delegates proposed an abuse system according to which only predefined abuses of business would be subject to legal control. Rather than installing a mechanism of prior notification controlling for all business agreements, an abuse system implies an *ex post* abuse control. Only detected abuses would be subject to jurisdictional control. The abuse system tends to more lenient. Consequently, France envisioned a supranational competition authority with limited powers. Notably, it should merely coordinate the different national competition laws and make them compatible (Warlouzet, 2005: 66). Given these controversies, the French delegates opposed the German proposal to include provisions on the precise application of these laws. Rather than fully-fledged laws and procedures, it proclaimed the view that only a declaration of intent should be included into the treaty.[25]

The reasons why the French and German delegates reversed roles lays in the changed situation of their national industries. During the formative phase of the ECSC, the French Ministry of Economics, which maintained strong ties with the French industry, supported the French delegates. Why they favoured the inclusion of competition laws was primarily due to the geopolitical goal of weakening the German coal and steel industry and creating market access for the French industries to these resources. Once competition laws were applied to all industries in all Member States in the same way, the French preference for the blanket *per se* prohibition of cartel agreements was no longer supported. A more tolerant competition regime, allowing for cooperative intercompany agreements, would allow French industries to face foreign competition better. In the vein of national *planification*, national competition authorities should take over the bulk of competition control, while the European Commission should be merely entrusted with coordinating and harmonising national approaches (Warlouzet, 2005). The German delegates, however, feared that the more protectionist Member States, such as France and Italy, would foreclose their national markets to German competitors (Warlouzet, 2005: 66-67). The imposition of strong competition laws at EEC level would prevent this.

Eventually, after many draft texts, and with the political support of the Dutch and the Belgians, the German delegate Von der Gröben succeeded in imposing an administrative *ex ante* notification control regime with possibilities for exemptions drawing on the prohibition principle (see Chapter 2). As he noted at a later stage, the proposal was taken up as he designed it (Gehler and Gröben, 2002: 18-19). Although he was not a party member of the Christian Democratic Union (CDU), he was backed up by Ludwig Erhard, who was a staunch supporter of the inclusion of cartel laws into the EEC. He could make use of the assistance of advisory committees composed of members of the German competition authority (Gehler and Gröben, 2002: 56). The in-built possibilities for exemption mirror the ordoliberal emphasis on establishing a strong public authority that can balance its decision making in a flexible way against wider policy concerns. Von der Gröben (1966a: 4) elucidated the introduction of the exemption regime with the argument that the Commission should hold multiple objectives rather than just one, implying that the

[25] See for a more detailed account Hoeren (1999), Von der Gröben (1982), and Narjes (2004).

particularities of individual cases needed to be taken into consideration. Rather than choosing a strict formal and single goal-oriented approach, competition law enforcement should contain room for flexibility. He emphasised to enforce competition laws in line with the broader economic situation of the Community. An economic upswing required a different type of cartel policy than a downswing (Von der Gröben, 1962: 19)

Although the Rome Treaty prioritised competition policy more than the ECSC Treaty, eventually, the competition law provisions were only partially transferred to the new treaty. As Cini and McGowan (1998: 17) noted, the EEC competition laws represented ‘a much watered-down version of those of the ECSC rules’. Like the German competition regime, merger laws were excluded. Industry representatives, but also government institutions opposed the inclusion of merger laws. The German Ministry of Economics, in particular, considered merger laws a discriminating measure against its industry (Witschke, 2001: 6). However, during the formation of the EEC competition laws, the presence of industry representatives was less marked. Primarily, the creation of a common market was in the interests of large corporations as it provided new opportunities to expand and to achieve economies of scale. In addition, the reluctance of the High Authority to enforce Article 56 and 66 of the ECSC gave the impression that there was little to fear. So far, Ruhr giants had not been hindered in their process of reconcentration. Consequently, the representatives of large companies, among which the Ruhr industry, but also business associations such as the BDI, were not worried about competition laws any more (Karagiannis, 2004: 24-25; see also Buch-Hansen forthcoming).

Despite the absence of merger laws, no other EEC policy field was so eminently inspired by the imperatives of ordoliberal thinking as competition policy. As Joerges (2004: 16) pointed out, the rationale of the ordoliberal economic constitution appeared particularly appropriate for legitimising the economic orientation of the integration project. The inclusion of competition laws in the founding Rome Treaty gave competition laws a strong constitutional status. Secondary legislation of the EEC or the Member States could not overrule the competition laws. In the view of Von der Gröben, ordered competition, rather than central planning should provide the key steering instrument for economic integration (1962: 16). All other socioeconomic policies should be brought in line with competition policy, in particular those meant to guarantee price stability and other policies preventing economic fluctuations (ibid, 1963: 7-8). However, both the system of market economy and ordered competition, were not objectives in themselves, but merely served as an instrument to achieve broader socio-political ideals (ibid: 2). In line with the broader macroeconomic view of establishing a common market, the EEC competition provisions were formulated in vague and ambiguous terms, including notions such as violating 'Community-interest' or 'if trade between the Member States is affected' – all concepts that leave ample room for interpretation. The ordoliberal notion of combating the abuse of dominant positions endured. It was included in the Rome Treaty as Article 82. Additional rules addressing governmental restraints on public and private enterprises were also included. Based on Article 86 (TEC) the Commission could take action against a Member State in cases of special, or exclusive rights granted to companies and state monopolies. Section 3 stipulated the right of the Commission to bind the Member States by directives without the prior approval of the Council of Ministers. Although Article 86 was not used very often prior to the 1980s as its interventionist nature was considered too controversial (ibid: 18), it granted the Commission an extraordinary right to intervene in the public sector of the Member States. Similarly, Article 87 to 89 on the prohibition of subsidies by national or sub-national authorities, constitute a pillar of central importance, which has neither a complement in the ECSC, nor in the US antitrust regime.

3.7.2 The Core of the Ordoliberal Influence: Regulation 17/62

Ordoliberal influence materialised in a more substantial way only three years after the Rome Treaty had come into effect. Convinced of the fact that the European Commission should be delegated more powers than originally foreseen in the Treaty of Rome, ordoliberals at the DG IV sought to establish a more detailed regulatory framework that further fleshed out the rules of enforcement, and the enforcement powers of the Commission. They formulated the much renowned Regulation 17 adopted in 1962, which provided, for more than forty years, the statutory provisions for the application of Article 81 and 82 (TEU), and the procedural and interpretative framework for their application (see Council Regulation No. 17/1962). Regulation 17 strongly reflects German procedural provisions. Arguably, this is no coincidence as Arved Deringer, a German competition expert from the private sector, and later name partner of the well-known transnational law company *Freshfields Bruckhaus Deringer*, appears to be the founding father of Regulation

17 (Deringer, 2003).[26] At that time he served as a *rapporteur* at the European Parliament and relied on the Economic and Social Committee and the European Parliament when drafting Regulation 17 (Goyder, 1999: 69). He modelled Regulation 17 according to the example of the German enforcement regime and realised the ordoliberal idea of a strong competition authority entrusted with far-reaching executive competences into the EEC setting. Deringer later explained that Regulation 17 was designed to foster economic integration (Deringer, 2003). Deliberately or not, Regulation 17 secured the Commission from the influence of Member State governments, and provided European corporations and their lawyers with merely one institutional body at which to direct their lobbying efforts.

Due to the opposition of the French government, in the run up to the EEC, to equipping the Commission with further enforcement powers, no procedural enforcement rules could be included in the Rome Treaty. Three years later, this issue ended up on the negotiation table again. This time it received the necessary French support. Why the French government voted in favour of Regulation 17 was due to a package deal. In exchange for the goodwill of the German government for the generous *Common Agriculture Policy (CAP)*, Regulation 17 was adopted on 14 January –only shortly after the difficult CAP negotiations were concluded (Warlouzet, 2005: 67). Not unimportant with regard to the French approval, was the fact that a broad range of economic sectors was constitutionally exempted from the EEC competition laws: the agricultural sector (falling under the CAP), the defence industry, the transport sector, and nuclear energy (Neven et al., 1998: 5). The coal and steel sector continued to be regulated separately under the ECSC until it was fully incorporated into the EC Treaty in 2002.

The adoption of Regulation 17 was vital for the development of the EC competition model. It spelled out the powers of the European Commission and granted it considerable executive powers. Owing to Regulation 17, the Commission was entitled to act as a supranational competition authority, i.e. investigator, prosecutor, judge, jury, and executioner altogether. The Commission could investigate competition cases, either on its own initiative or on the request of a Member State, a third state, business, or consumers. It held the right to access to all relevant documentation of the company under investigation,

[26] Arved Deringer contributed not only to the further development of European competition law, but also to the drafting of competition laws in countless countries (Deringer, 2003), a tradition that has been taken up by other competition law experts at *Freshfields Bruckhaus Deringer*. More than forty years after Regulation 17, he still held the ordoliberal view that concentrated market power in the form of monopolies constitutes the biggest threat to a competitive economy (ibid).

search this documentation unannounced (i.e. dawn raids), interrogate employees, and sanction anticompetitive conduct with up to 10% of the company's annual turnover. It allowed the Commission to intervene in the competition control of the Member States, both with regard to private and public companies, and most notably, Regulation 17 allowed the Commission to formulate its policy without the Council and the European Parliament having a say, which has been crucial for setting the tone for further competence expansion of the Commission.

To conclude, this chapter has identified the subsequent adoption of competition laws in Europe in the aftermath of the Second World War, as part of a broader project of US corporate and political interest in incorporating Western European countries into a capitalist world economy. Competition laws served the purpose of creating market access to (US) newcomers in the domestic home markets. Whereas the imposition of competition laws in both German and the ECSC took place against the backdrop of strong US presence, in the EEC the treaty drafters had adopted the idea of competition laws without direct US involvement or help. As Van Apeldoorn et al. (2003: 39) noted, even though the transatlantic link fundamentally influenced European integration, European integration is not simply subject to or determined by American control. After the ECSC, European integration developed as a relatively autonomous project. In the field of competition law, US corporate and political pressure joined forces with a particular liberal minded group of academics, the ordoliberals. Rather than a wholesale Americanisation, the particular configuration of influential adherents of ordoliberal thinking and enduring industry opposition gave shape to what previously was identified as the European competition model. The ordoliberal Hans Von der Gröben, who became the first Competition Commissioner, can be held responsible for the ultimate inclusion of rules on competition as one of the core constitutional founding principles of the Treaty of Rome. Arved Deringer, also an adherent of ordoliberal ideas and a lawyer from the private sector, further developed the subsequent regulatory procedures for implementing these laws. The ordoliberal paradigm gave primacy to market structure over individual market performance. Creating and maintaining a balanced ideal-type market structure, rather than 'competition by all means', constitutes one of the central contributions of the ordoliberals in the drafting phase. It formed the basis for multi-goal and long-term orientation, which until the 1980s, shaped the views and conceptions of the European Commission's

Directorate General of Competition on ways to enforce competition laws (cf. Gerber, 1998; Joerges, 2001; Budzinski, 2003; Schmitz, 2002).

Chapter 4

The 'Liberal Embeddedness' of EC Competition Law Enforcement: From the Treaty of Rome to the Single European Act (SEA)

Introduction

This chapter provides an analysis of EC competition law enforcement from 1958 until 1985, two moments of caesura in European political history: the EC's birth year and the year of adoption of the *Single European Act (SEA)*. It identifies and explains the prevalent accent of practices and strategies in the enforcement of EC competition laws, against the background of the wider political economy developments at that time. Based on a periodisation from roughly the 1960s to the 1970s, and the 1970s to the 1985, the chapter argues that EC competition law enforcement formed part of the institutionalised nexus of 'embedded liberalism' (cf. Ruggie, 1982; see also Crouch 2000), also referred to as 'corporate liberalism' (Overbeek, 1993). The concept of embedded liberalism embraces the economic order, which evolved in the post-war era in advanced industrialised states, including the EC Member States. It refers to the broad-based commitment to an open and competitive world economy, in combination with domestic regimes of government-steered socioeconomic market intervention. The era of embedded liberalism manifested in various forms of mixed economies, protective industrial policies, and Keynesian welfare economics and social policy, all policies meant to accommodate domestic economies with exposure to enhanced open markets.

Against the broader background of embedded liberalism at Member State level, EC competition policy and enforcement strategies were fine-tuned to a broad set of socioeconomic objectives, exhibiting strong neomercantilist and protectionist traits. Thus, the notion of 'embeddedness' refers to the situation in which the Commission sought to protect the European economy, or parts of it, from the potential detriments of the ever more liberalised regime of free trade and free(r) capital movements. Rather than strict competition criteria promoting corporate rivalry, the European Commission interpreted EC competition laws in a tolerant way, streamlined with a proactive industrial policy stance. It was overtly responsive to the interests of European industries, which sought to catch up with the much stronger US economy. In the 1960s, protectionist industrial policies at Member State level were enacted in order to compromise with the presumed competitive pressures from larger and technologically more advanced US companies, which tried to gain a foothold in the newly created EC market. Corporations in Europe generally did not meet the standards of their US competitors, which tended to be larger in size and far more vertically integrated. In Europe, a similar homogeneous market situation to the US, with, therefore, similar scope conditions allowing European corporations to reap the benefits of economies of scale and other advantages, was absent. As a countervailing strategy, EC Member States gave primacy to the creation of national champions who were able to compete in the world economy. At EC level, the Commission sought to thwart the practice in which governments picked their national winners, by stimulating *Eurochampions* instead. It adopted a pro-economic concentration stance and actively motivated European business to conclude intercompany agreements, in particular across Member State borders, in order to catalyse European integration. In addition, spurring technological innovation as a source of economic growth and competitive strength received central attention. In the US, the institutionalisation of research on technological innovation at US universities directly fed into corporate success. A similar institutionalisation of R&D was absent in Europe; however, the Commission particularly stimulated intercompany cooperation in this field. In the economic crisis years of the 1970s, the liberal embeddedness of competition control was substantiated in the toleration of so-called ‘structural crisis cartels’, or ‘emergency cartels’ as they were sometimes also called. Industries in despair turned to the Commission, who, based on the *ex ante* authorisation and exemption regime, sought to alleviate economic recession problems. In the context of ongoing trade liberalisation through the *General Agreement of Trade and Tariffs (GATT)*, EC Member State governments embraced ‘new protectionist’ strategies to cushion national industries against the competitive pressures of the opening world economy.

The Commission never lost focus on the market integration project. At a time of political stalemate in the economic integration process, the approach was twofold. On the one hand, it sought to dismantle internal market barriers and open up domestic markets through competition law enforcement. On the other hand, in line with Member State and corporate interests, it gave preferential treatment to certain industrial sectors facing competitive pressures from mostly US companies, and increasingly also from Japanese companies. Ordoliberal-inspired tenets of fair competition informed competition law enforcement practices at the Commission’s competition division, although in a much diluted form of the views promoted by ordoliberal thinkers in the 1930s. The maxim of curbing economic power concentration – one of the centrepieces of ordoliberal doctrine – did not materialise. On the contrary, boosting economic size almost became an obsession. The ordoliberal ideal of a balanced common market structure translated into special support for SMEs instead. Small and medium-sized enterprises (SMEs) were largely excluded from complying with EC laws. This chapter argues that the interplay of the Commission and European industry representatives was crucial for the chosen course. Against the backdrop of competitive pressures from abroad, industry also increasingly pushed for protectionist competition rulings at EC level. The institutional peculiarities of the EC competition regime facilitated the neomercantilist approach. The possibility for exempting certain business conducts, either on a case-by-case basis, or categorically through block exemption regulations, provided a welcome avenue for corporate actors to lobby for business-friendly treatments. In order to fortify European players in the world market, the Commission adopted a flexible and lenient enforcement strategy.

The breakdown of the *Bretton Woods* regime in August 1971 is generally taken as a critical historical moment, ending the post-war regime of 'embedded liberalism' (Ruggie, 1982). However, in the field of EC competition law enforcement, 'embedded liberalism' ideology endured until the early 1980s. The advent of neoliberal ideas in the 1980s evoked a period of transition that endured until the 1990s. According to Overbeek (1999), in the ascendancy of neoliberalism as a hegemonic project there are three moments to identify. In the early 1980s, neoliberalism evolved foremost as a deconstructive project, in which previous enforcement practices were heavily criticised. In parallel, established protectionist enforcement practices endured, in particular in economic areas facing difficulties to compete. Only gradually did the 'neoliberalisation' of EC competition law enforcement make its inroads (see also Chapter 5). Structural changes in the global economy formed the background against which neoliberal policy discourses nestled within the EC. With the enhanced presence of large European companies in the global market, global competition increased. In response, US-based competitors further diversified their production and expanded around the world, which again triggered similar corporate strategies in Europe. Vested business interests, mostly originating in the US, sought to enhance their global competitiveness through the promotion of deregulation of capital markets and further liberalisation of trade. What started in the US increasingly captured European business elites, who started a vigorous political campaign at the Commission in the 1980s and

1990s, requesting the endorsement of neoliberal policies which open up markets and free capital investment (Cox and Skidmore-Hess, 1999).

Part I: The 1960s – Building Up Corporate Competitiveness in Europe

The literature on EC competition law and policy tends to describe the first twenty years of competition law enforcement as 'ineffectual' and as lacking a straightforward and coherent policy orientation (Wilks and McGowan, 1996). Similarly, the Commission's DG IV was identified as a small and unremarkable part of a supranational administration (Goyder, 2003: 31). Arguably, EC competition law enforcement was still in its infancy throughout the 1960s, and the Commission's DG IV takeoff after the adoption of the Rome Treaty rather timid. Commission officials were inexperienced in interpreting competition laws and their enforcement. However, seen in the wider political economy context, the early enforcement practices appeared as a manifestation of the prevalent social compromise of 'embedded' liberalism (Ruggie, 1982). The Bretton Woods regime of stable exchange rates sustained the enhanced openness of national markets to foreign trade, which at domestic level were accommodated by institutional arrangements of Keynesian-inspired macroeconomic and social policies. In the field of EC competition law enforcement, 'embedded' liberalism found a particular articulation at supranational level. It was entrenched with industrial policy: the Commission sought to synthesise the removal of barriers to trade and competition, with the promotion of strong *Eurochampions* who were able to face the presumed 'American challenge' on the one hand, and a supportive strategy towards small and medium sized enterprises (SMEs) on the other hand. The maintenance of social peace, 'fairness', and equal opportunities had high priority. Through a proindustrial cooperation and concentration stance, the Commission's DG IV sought to accelerate the economic integration project through stimulating cross-border alliances.

The weight of the institutional positioning of the Council in the Community structure left the Commission with little scope for playing a prominent and proactive role in competition law enforcement. The Franco-German *rapprochement*, personified by the flamboyant personages of Charles De Gaulle and Konrad Adenauer, and the negotiations of the Common Agricultural Policy (CAP) overshadowed Community politics. Moreover, a range of ambitious proposals by Walter Hallstein, President of the Commission, provoked the famous 'empty chair crisis' in which President Charles De Gaulle, together with other French representatives were absent from Council meetings from 30 June 1965 until 29 January 1966, until the conclusion of the Luxembourg Compromise. Hallstein and his German staff surfaced as enthusiastic Federalists. As convinced ordoliberals, they held holistic conceptions of market regulation and supported a market order governed at supranational level. Hallstein wanted to implement the following changes: to expand the Commission's powers, to introducing qualified majority voting (QMV) at Council level, to create an independent source of Community finance and to revise the budget for CAP, as well as to create a political union. After the French protests over the delegation of more powers to the Brussels bureaucracy, Hallstein's ideas were put on ice for more than twenty years until Jacques Delors, also a staunch Federalist, became President of the Commission in 1985. Von der Gröben later noted that Delors only continued what the ordoliberals had started (Gehler and Gröben, 2002: 53).

Nonetheless, as will be argued in a following section, the Commission's DG IV managed to acquire far-reaching powers in the field of competition policy only shortly after the adoption of the Treaty of Rome, which allowed it to intervene in the common market structure with much discretional authority. With the benefit of hindsight, the early institution building for the enforcement of competition laws, as cautious as it may initially appear, was vital for the future course of competition law enforcement. It provided the Commission with a solid underpinning for a flexible and more activist enforcement stance in the future.

4.1 The American Challenge and the Creation of 'Embedded' National Champions

Competition law enforcement in the 1960s was informed by the international political context of the liberal post-war economic and financial Bretton Woods system erected by the US. The Dillon and Kennedy GATT Round of the late 1950s and early 1960s reduced tariffs to trade, which generated a period of expansion of the world economy, marked by high levels of trade and capital flows. From the 1960s to the early 1970s, the world's manufacturing output doubled and trade in manufactured products trebled (Overbeek and Van der Pijl, 1993: 5). Economically, politically, and culturally, the US evolved as the new hegemon, also referred to as *Pax Americana.* The economic power of large US companies was based on their dominance in the market for high-value goods and superiority in the technological sector. The structural advantage of a large, homogenous home market, supported by a single currency, one language, as well as a rather business-friendly antitrust policy, allowed US companies to reap the benefits of economies of scale and scope production, and grow in size through mergers and acquisitions. In 1960, 27 of the 30 largest industrial companies worldwide originated in the US (Adams and Brock, 1990: 175). They were able to compete in global markets and to expand in transatlantic trade and investments. In this time, the largest US companies located more than half of their total assets abroad, and generated most of their profits across the Atlantic (Woods, 2001: 284). In 1969, US multinational corporations accounted for approximately US$ 140 billion worth of goods and services, which, with the exception of the USSR, exceeded that of any other economy at that time (ibid).

In contrast, European companies were much smaller. The European marketplace was highly fragmented along national borders even after the creation of the EC. The different national regulatory regimes reduced opportunities for economies of scale and scope production. Cultural-linguistic barriers, but also the institutional landscape of varying regulatory settings of the Member States, imposed structural constraints on the growth of corporations. Mergers and acquisitions were relatively seldom. With the gradual opening of national market barriers, the EC member governments sought to establish analogous market conditions to that of the US. The European integration project always constituted a political response to the challenges posed by the US market. It was subordinated to the creation of the basic prerequisites that allow market players to compete. As Commissioner Walter Hallstein noted, the goal of ‘the transformation of the market relations in the European Community as a whole was to build a new giant big enough in a world of giant powers’ (in Freyer, 2006: 282). The project took shape through the subsequent abolition of trade-related quotas and tariffs among the six Member States and the establishment of a customs union that came into force on 1 July 1968, earlier than initially agreed in the Treaty of Rome. The customs union entailed a *Common External Tariff (CET)* and a joint foreign trade policy. In combination with the elimination of trade barriers under the GATT regime, and the stepwise liberalisation of capital controls in the early 1960s, European companies were confronted with enhanced competitive pressures, and subsequently addressed their national governments for protectionist measures.

Concerned about potentially restrictive EC policies, expansion-orientated, capital intensive US business urged the US government to negotiate reciprocal tariff reductions with the EC (Cox and Skidmore-Hess, 1999: 106-109). A closed EC market would have implied not only limited possibilities for the export of high-value added products, but also the reliance on the more expensive European-based producers for inputs needed for US production. An abundance of corporate think tanks and interest groups drafted position papers that suggested reducing trade and capital barriers further in order to access the emerging European market, i.e. the *National Foreign Trade Council*, the *International Chamber of Commerce (ICC)*, and the *Committee for National Policy (CNTP)*, and individual companies such as *General Electric*, *Caterpillar*, *Gillette*, *IBM*, and *Westinghouse* (ibid). US businesses, which were more protectionist oriented, such as the textiles, timber, and oil sectors, found themselves increasingly politically isolated from the proliberalisation branch (ibid).

The depreciation of the US dollar and the stable exchange rates secured by the Bretton Woods regime led to enhanced capital investments by US corporations in Europe. In 1960, almost 60% of all FDI originated from the US (Overbeek, 1999: 243). US companies were taking over European companies on a broad scale from the mid-1960s onwards, which led to increased levels of market concentration. According to a sample analysis of the Commission in 1971, in the time from 1966 to 1970, the acquisition of holdings and the establishment of subsidiaries, as well as bilateral operations increased by a factor 3.5, often involving non-Member State companies, most notably from the US, followed by British and Swiss companies (European Commission, 1972: 171-77; 1973b: 30). The expansion of US companies into Europe brought with it ‘a critical shift in functional differentiation from the level of country and sector to the level of product and firm’ (Ruggie, 1982: 401). Two thirds of the increase in world trade from 1955 to 1973 was due to transatlantic trade flows. The bulk was constituted by the intra-industry and intra-firm trade, which marks a fundamental difference to the era prior to 1914, in which the levels of intercontinental trade were overwhelmingly intersectoral (ibid: 400).

The dominant presence of the large US companies displayed the competitive disadvantage of the relatively smaller, domestic corporations of the European Member States. In the information technology sector and the emerging computer industry, in particular US companies were leading (Sauter, 1997: 81). Through mergers and acquisitions, a range of

European companies, such as *Philips* or *Siemens*, were transformed into virtual trading companies for US or Japanese producers (Hager, 1987: 59). This evoked the picture of a growing submergence of so-called national champions in US economic hegemony. This picture prevailed mainly in France, where politicians feared that 'US transnationals would be a Trojan horse undermining French economic sovereignty' (Gill and Law, 1989: 485). The French Socialist and journalist, J. J. Servan-Schreiber, captured the phenomenon of offensive US capital investment in the EC in his bestselling book of 1967 *'Le defi américain'*, the American challenge, in which he sought to raise awareness about the comparative advantage of giant US companies seizing power in Europe. In addition to technical advancement and innovation potential, he observed unmatched dynamism and managerial organisation. He quoted a US businessperson saying:

> *The Treaty of Rome is the sweetest deal ever to come out of Europe. This is what brought us here. We're happy to be here. We are making money. And we are going to make a lot more [...] Prospects in commerce and industry are better for us here than they are in the United States.* (1967: 22, own translation)

In order to remedy the lagging competitiveness, he advocated creating large European corporations that were able to invest in R&D projects in order to form a counterweight to the dominance of US industries. To keep up with the presumed technological challenge posed by the US economy, European governments should financially kick-start European businesses in sectors such as 'electronics, data processing, space research and atomic energy', as well as invest more in education (1967: 53, 93).

Against the background of progressive trade liberalisation within the GATT, and economic integration within the Community, national governments could no longer apply conventional protectionist measures. High tariff walls and import restrictions as a way of insulating national companies from foreign competition were not a viable option anymore. A range of European governments embraced the concerns of domestic industry representatives about their lagging competitiveness, the growing technological gap, and the drastically reduced production cycles. They opted for the strategy of creating 'national champions', both in the private and public sector. They adopted far-reaching industrial policies meant to boost the growth of national champions and industries considered 'strategic'. These measures generally included protectionist non-tariff policies, such as guaranteed preferential public procurement contracts, tax rebates for some industries, national standard setting, and the stimulation of mergers among national companies, as well as (research) subsidies and investment in technical education (Sauter, 1997: 81; Ruigrok and Van Tulder, 1995: 106). Moreover, national governments adopted proactive programmes to encourage concentration activities among domestic corporations as a catalyst for technological advancement. Corporate size was deemed vital in achieving global competitiveness and in gaining market shares in the world market. For example, in 1968, the British Prime Minister Wilson announced the intention to fundamentally rethink British hostility to monopolies and to restructure British industries 'on a scale and at a speed such as we have not seen in this century' (Adams and Brock, 1990: 177). The enhanced mergers and acquisitions in Europe that followed brought forth an unprecedented industrial restructuring during the 1960s. Between 1960 to 1969, more than 5,635 companies were absorbed through concentration activities, compared to 5,486 during the decades of 1900 to 1959 (Cox and Watson, 1995: 308). A journalist observed that there was

> *[...] a fascination with gigantism, a mania for mergers, call it what you will, but Europe's leading businessmen are infected with it. They are merging companies with such haste and sweep that no label seems quite adequate.* (Siekman, 1970: 95)

State aid also became an increasingly common instrument (Commission 1972: 16). Thereby, national champions were 'embedded' in a tolerant and protective national context, regardless of the discriminatory impact against SMEs, as well as against competitors from abroad. In addition to the pro-concentration stance and protectionist non-tariff barriers, the strategy of 'embedded' liberalism also entailed Keynesian monetary and fiscal strategies to spur economic demand, complemented by welfare benefits for individuals. The French government was particularly proactive in stimulating national champions. In the post-war capitalist regime of *dirigisme* and *planification,* the French corporate elite held close ties with the political elite. In line with the quests of French big business, the government adopted protectionist and state-led industrial policies. In the era of De Gaulle (1958-1969), nationalist sentiments moved to the fore in reaction to the first steps of European integration. The goal to reinforce a competitive position for French industry was formally spelled out in the Fifth Plan of the French planification economy, covering the years of 1966-1970 (cf. Cinquième Plan de développement économique et social in: Hayward, 1995: 4). The French government planned to strengthen a limited number of large scale corporations through massive capital infusions and government-sponsored mergers in key sectors of global competition, such as pharmaceuticals, defence, engineering, and utilities (Schmidt, 1996: 176; see also Schmidt, 2003; McGuire, 2005). The concern about the US corporate invasion even formed one of the reasons why De Gaulle blocked the accession of the UK into the EC in 1963 and 1967. The UK was accused of holding too close economic ties with the US, which would endanger both the autonomy and the competitiveness of the Community (Freyer, 2006: 283). The French government even made market access for US companies difficult (Gill and Law, 1989: 485). However, when US companies started establishing themselves in other Member States and selling their products to French customers from there, the French government changed its attitude to a more welcoming one in the late 1960s (ibid).

The US inflow of capital through mergers and acquisitions brought with it a technology transfer, as well as a transfer of production methods, increasingly industrial organisation, and corporate governance methods. A similar transfer of organisational techniques was imported from Japanese companies. Therefore, a range of European companies in high-technology industries preferred piecemeal alliances with an economically superior US partner to merging with enterprises from another Member States (Hayward, 1995: 5). The alliance between *Olivetti* and *AT&T* and the collaborative venture of *Unidata* in the computer production sector are exemplary in this respect. The joint venture *Unidata,* which initially involved the European companies *Siemens*, *CIT,* and *Philips,* is particularly illustrative. The project failed only after three years due to a decision by the French government to draw up a transatlantic alliance between its national champion *CIT* and *Honeywell-Bull* (ibid).

Against this overtly protectionist national context in the 1960s, the Commission applied the supranational EC competition laws as a market integrationist tool meant to break down intra-EC barriers, although, in a manner consistent with the overall bolstering of European companies against competition from abroad. It pursued policies meant to stabilise the adjustment process of companies faced with the competitive threat of ongoing trade liberalisation. The Commission's Director General for Competition justified economic concentration by saying:

> *It would be absurd […] to prevent the creation of an enterprise, which would dominate the market of a small country, when such an enterprise would need its size to be competitive on the export markets.* (In Fennema, 1982: 61)

4.2 The European Counteroffensive of 'Embedded' *Eurochampions*

4.2.1 The Commission's Pro-Cooperation and Pro-Concentration Stance

In a political climate marked by new national protectionism and the empty chair crisis at the EC Council, Member State governments probably would not have tolerated a highly interventionist strategy from the Commission running counter to their own national industrial policies. The Council announced in its Annual Report in 1965 that the 'really big firms should go ahead on their own', whereas 'the rest must keep their position by drawing up agreements among themselves at the national and international level' (Council, 1965: 60). The Council even called for enhanced intercompany cooperation by saying:

> *If these smaller firms share their burdens and expand their potential, they will win their place in the Common Market and be in a position to cope with foreign penetration of their national trade. A new attitude, involving pooling of effort and resources, is by way of replacing the old individualism.* (Ibid)

Three years later, the Council assured the European business community, that 'cooperation was not banned by the Treaty in any case in which the position of enterprises concerned, as a whole, is too weak to cause an appreciable limitation of competition in the common market' (Council, 1968: 465). The Commission emulated the concern of the Council about the settlement of 'excessively large, financially and commercially powerful firms from the US prompted by a wish to dominate' (Von der Gröben, 1965a: 3, 15-16). However, as the guardian of the treaties, the Commission sought to supersede the Member States' attempts to create national champions. Instead, the Commission sought to create large European corporations, so-called *Eurochampions,* in order to improve overall competitiveness of the European economy vis-à-vis that of the US or Japan. The creation of the common market should provide for the necessary economies of scale and expansion opportunities, analogous to the large US market that brought forth corporate giants. Although the EC was not actively involved in directly financing *Eurochampions,* based on a selective competition law enforcement strategy, the Commission adopted an overtly lenient approach towards cartels and economic concentrations between European enterprises. Moreover, it promoted the creation of 'an appropriate fiscal and legal framework' for European business (Sauter, 1997: 75). By adopting a straightforward pro-industrial cooperation and pro-concentration stance, the Commission applied EC competition laws as a vehicle to make the European business community able to compete. It did therefore not deviate from EC industrial policy, which strove for the same goal. In the spirit of economic integration, the Commission generally considered cooperative agreements among corporations that transcended national borders beneficial for market unity. This led, amongst others, to enduring and successful cross-border alliances (certain critics would call these alliances government-sponsored production cartels). Illustrative examples were *Concorde* and *Airbus*, the *European Space Agency (ESA)*, or the *Train à Grande Vitesse (TGV).* The development and production of the supersonic passenger aircraft *Concorde* was a joint project negotiated by the French and British government (Dinan, 1999: 392). The collaborative endeavour ended in 2003 after a major crash due to technical mistakes in 2000 in Paris. The industrial collaboration within the consortium *Airbus* came to encompass the governmental support of France, Britain (until 1968), the Netherlands, and Spain (ibid). As a range of national armies and government-controlled airline companies were the main customers, the consortium was always state-sponsored in one way or another.

The Commission based its pro-cooperation and pro-concentration stance on the issuance of block exemption regulations. The next section introduces the importance of the acquisition of this new enforcement tool in terms of the discretionary authority of the Commission on the one hand, and for corporate lobbying on the other hand.

4.2.2 The Adoption of the Block Exemption Regulation

For the first four years after the establishment of the EEC, the DG IV focused on the creation of a regulatory framework for the application of Article 81 prohibiting cartels and other restrictive business practices by private actors, and Article 82 prohibiting the abuse of a dominant market positions. In 1962, the Council Regulation 17 was adopted requiring companies located in the common market to notify envisaged commercial agreements with other companies to the Commission (see Chapter 2). Immediately upon the enactment of Regulation 17, the centralised regime of notification was fraught with immense difficulties. The Commission's DG IV lacked jurisdictional and procedural experience, and still needed to develop clear enforcement strategies. In 1964, the Commission's DG IV was equipped with only 78 officials without previous national experience in enforcing competition laws (Wilks and McGowan, 1996: 231). Regardless of the overall embryonic state of affairs, Regulation 17 committed corporations in the EC to notify to the Commission all existing and planned commercial intercompany agreements before 1 November 1962. An abundance of notified agreements arrived in Brussels, which created a serious deadlock right from the start: prior to 1 February 1963 approximately 34,500 notifications, requests and complaints of bilateral intercompany agreements were registered and 920 multilateral agreements notified (Council, 1963: 585). In 1964, the number climbed up to 37,000 notifications (Slot, 2004: 468; Cini and McGowan, 1998: 20). The immense flood of notifications overburdened the Commission's small staff to an extent that it was not even worth getting started with the review process. The Commission urged the Council to expand the staff of the DG IV to a level commensurate with the work to be done (Von der Gröben, 1965a: 11). However, against the backdrop of the empty chair crisis politics, this request remained unsuccessful.

Nonetheless, the notification impasse of the early 1960s led to a much more far-reaching decision. Rather than reviewing each notified case individually, the Commission suggested that the Council adopted the possibility of block exemption regulations. Such block exemption regulations would categorically exclude whole groups of intercompany agreements from the notification requirements that fall under the loosely defined conditions spelled out in Article 81(3) (TEC) (see Chapter 2). In March 1965, the Council enacted the first block exemption regulation, which excluded certain vertical agreements from Article 81 (cf. Council Regulation No. 19/65). As the number of notifications remained high, only two years later in March 1967, the Council delegated the Commission the power to issue its own block exemption regulations. This move was crucial as it opened up the gate for enhanced discretionary powers on behalf of the Commission. It meant that the Commission could enact its own legislation, which excluded whole classes of commercial intercompany agreements from prosecution – in addition to exempting intercompany agreements on a case-by-case basis. Thereby, the Commission could not only investigate and prosecute anticompetitive conduct, but also codify existing competition laws further, and hence, steer its competition policy in the desired direction. As will be demonstrated throughout this dissertation, with the legislative tool of block exemption regulation, the Commission was in a position to significantly affect the course of competition law enforcement in the coming decades and conduct a real policy in this field. The Council ratified the Regulation merely to create administrative convenience for the Commission and could not foresee the future impact of the far-reaching competences entrusted upon the Commission in the 1960s. Warlouzet (2006: 6) suggests that the

Commission mobilised the still inexperienced national civil servants in competition matters through a range meetings. Even there was never a consensus on ‘technical questions’, once the Commission made the issuance of block exemption regulations a Council agenda point, it claimed to have reached an agreement with the national civil servants on the Regulation.

Under the exemption regime of Article 81(3) and a series of notices issued during the 1960s, the Commission allowed a broad range of commercial intercompany agreements as a part of its strategy to create ‘embedded’ Eurochampions. As the next section demonstrates, initially, the business community was not convinced of the Commission’s goodwill.

4.2.3 Accommodating European Industry Opposition

The requirement to notify commercial intercompany agreements to the Commission immediately raised the opposition of the management boards of European corporations, which rendered the Commission’s relationship with European industries rather conflict-ridden. Although national business associations were geographically rather divided and did not deem the events at European level relevant enough for lobbying, this changed with the enactment of Regulation 17. European business associations feared losing too much of their economic freedom and urged the Commission to adopt a soft line (Warlouzet, 2006: 7). The *Union des industries de la Communauté Européenne (UNICE)* even declared competition policy one of the most important subject matters in the 1960s (ibid). Leading German industry representatives became particularly active in lobbying as they had been exposed to both the competition regime of the *Bundeskartellamt* and the Commission’s DG IV (Von der Gröben, 1964: 4).[27] In contrast, most of their counterparts in the Member States were not amenable to any national cartel law, simply because there was none. Commissioner von der Gröben visited a broad range of national business associations, in particular those in Germany, and tried to reconcile European business representatives with competition policy (cf. Von der Gröben, 1964, 1966b).

[27] In the aftermath of the adoption of Regulation 17, German industry representatives protested to Chancellor Konrad Adenauer against the reappointment of von der Gröben as a Competition Commissioner in 1962 (Gehler and Gröben, 2002: 47). To speed up the process, von der Gröben was offered the running of the *Konjunkturinstitut* in Berlin instead – a prestigious position, which he however rejected. He later said about his office as a Competition Commissioner that it had a strong political meaning, which ‘displeased certain people in Germany’ (ibid).

The possibilities for exemption from Article 81(1) provided a welcome avenue for corporate lobbying in favour of a lenient and protectionist decision making that would remedy lagging international competitiveness. In the end, the EC business community was rather pleased with the benevolent measures aimed at improving the overall competitiveness of European industries (Dinan, 1999: 393). As the notification regime provided companies with provisional validity and immunity from fines until the notifications were evaluated and the decisions taken, most of the cases were generally settled in an administrative, business-friendly manner. At least, until 1970, no fines were imposed. The Commission adopted a favourable stance towards commercial intercompany agreements. However, it did not artificially stimulate cooperative agreements between companies, but remained passive, leaving the decision to cooperate to the entrepreneurs (Von der Gröben, 1963: 6). In line with the ordoliberal standpoint, the Commission's DG IV did not intervene in market processes, but confined its role to shaping a favourable economic framework. In this vein, companies could proceed with the scheduled agreement in more than 85% of the cases (i.e. cases that were closed by formal decisions in the time from 1964 to 1970).

The Commission allowed the vast majority of the deals, either by negatively clearing the cases (i.e. allowing them straight away), or by granting exemptions under Article 81(3). Almost a third of all cases received exemption. Eventually, less than 15% of the cases infringed Article 81 and Article 82 (TEC).[28] In the context of the presumed American technological challenge, it considered commercial agreements between companies in high-technology industries to be harmless to competition, in particular if they involved the exchange of experience, R&D contracts, cooperation in fields such as accounting and credits, joint statistics or market research. In addition, agreements regarding the joint use of production and storage facilities, partnerships in the purchase of resources, as well as common selling and repair arrangements were also excluded from prosecution. In 1967, the Commission adopted a block exemption that was particularly far-reaching in this regard. Regulation 67/67 exempted bilateral agreements on exclusive selling and exclusive purchasing as long as the participating companies belonged to at least two Member States (Commission 1972: 99). The regulation officially authorised cartel-like cross-border agreements. The Commission adopted the Regulation to boost cross-border commercial

[28] The percentages are based on calculation retrieved from all official decisions on the notified agreements referring to Article 81 and Article 82, published at http://europa.eu.int/comm/competition/antitrust/cases/older_antitrust_cases.html.

interdependencies in order to further the economic integration project and to enhance the competitiveness of European industries. The expiry date of the Regulation was set for 31 December 1972. However, three weeks before expiry, the Commission extended the validity for another ten years through the adoption of Regulation 2591 (European Commission, 1973b: 19). Regulation 2591 included further specifications intended to facilitate the specialisation of products, and limited the exemption to companies with a market share that did exceed 10% in their national home market, in order to warrant a sufficient degree of competition in the respective geographical markets (ibid, 1972: 21).

In order to make the exemption process more transparent and to reduce the number of notifications, the Commission specified eight categories of cooperation activities that did not fall under the prohibition of Article 81(1) in a *Notice on Cooperation* published in 1968. What commentators interpreted as an attempt by the Commission to reduce the administrative burden (cf. Bright, 1996), formed part of the Commission's pro-industrial cooperation policy. In the same way, a range of concrete economic policies were formulated in the Colonna Report of 1969, a programming statement on how to strengthen the competitive position of corporations in the Community, to achieve a reasonable degree of technological independence from the US, and to facilitate the creation of European champions (see for more details Sauter, 1997: 71). In the face of the resistence of the Member State governments, the Commission did not tackle state aid granted to private companies, or the preferential treatment of state-owned companies, although prohibited under EC law, and ignored Articles 86 and 87 in the 1960s (Cini and McGowan, 1998: 22).

Like the proactive cooperation and pro-state aid policy, the Commission encouraged economic concentration throughout the 1960s. Again, it considered mergers in technology sectors with a high R&D intensity, particularly important, and again, it did not actively order concentrations, but left the decision to entrepreneurs. The Commission held the view that it was the task of industrialists to instigate concentrations by mergers and acquisitions, and the task of the authorities to facilitate them (Adams and Brock, 1990: 177). Von der Gröben noted that 'the need of the age for companies was to form larger groups' and that artificial and psychological obstacles to mergers needed to be removed (Von der Gröben, 1965a: 4, 13). The Commission's reluctance to apply Article 82, prohibiting the abuse of a dominant position indirectly, led to the situation where no large corporations resulting from mergers and acquisitions were prosecuted.

Following the holistic ordoliberal perception that competition control formed one of the several regulatory fields responsible for creating order, von der Gröben emphasised that competition policy was inseparable from overall economic policy-making and called for an 'approximation of legislation' (cf. Von der Gröben, 1969). He considered the different national corporate tax burdens and taxation for merging companies a major distortion for the healthy functioning of competition. In this vein, von der Gröben proposed to harmonise corporate turnover tax regimes and of 'the law governing companies or partnerships with limited liability, and especially joint stock companies' (ibid: 12). The Commission's pro-cooperation and pro-concentration policy of the 1960s was not informed by ordoliberal ideas, despite the presence of adherents of ordoliberal ideas at the DG IV. The Commission adopted a tolerant approach towards market size, although, the Freiburg scholars of the 1930s considered it important to curb the concentration of economic power (see Chapter 2). Competition Commissioner von der Gröben was aware of the conflict between market concentration and the ordoliberal goal of developing a balanced market structure. In *Ordo*, the academic journal of the ordoliberals, he justified the Commission's policy course by arguing that the state of science and statistical evidence could not yet sufficiently indicate when market concentration was harmful (Von der Gröben, 1963: 5-6). Elsewhere, he noted that 'it was impossible to generalise about the optimum size of companies', but 'there was definitely a limit for amalgamated firms to gain market power' (ibid, 1966a: 7; 1965a: 12, 17). However, in general, economic concentrations, he continued, formed 'a constructive and positive part of the competition policy' (ibid, 1966a: 6).

The presence of devotees of the ordoliberal paradigm in the Commission endured. With the establishment of the Rey Commission (1967-1971), von der Gröben took over the Directorate General Regional Policy in 1967. Maan Sassen, his successor from the Netherlands, reassumed most of his personnel and assured the continuation of the von der Gröben's course. A range of background studies drafted in the early years became influential in the formulation of later policy priorities (Cini and McGowan, 1998: 22). Moreover, von der Gröben's *Chef de cabinet*, Ernst Albrecht, a Christian Democrat from Germany and fervent adherent of ordoliberal ideas, became Director General under Sassen (ibid).

4.3 Cushioning Small and Medium-Sized Enterprises

The Commission sought to counterbalance the promotion of successful *Eurochampions,* by devoting special attention to the overall improvement of the economic position of small and medium-sized enterprises (SMEs) in the EC. It strongly encouraged intercompany cooperation between SMEs (Von der Gröben, 1966b). Commissioner von der Gröben declared that ‘cooperation between SMEs of different Member States was not only irrelevant in terms of EC cartel law, but actually politically much desired (ibid 1963: 6). In 1970, SMEs were categorically exempted from EC competition laws with the adoption of the *De Minimis* Notice (see OJ No C 64/70; the Notice was subsequently followed by a series of revisions, cf. OJ No C 313/77 in 1977; OJ C 231/2 in 1986; OJ C 368/20 in 1994, and in 2001). The Commission deemed SMEs not able to ‘significantly affect trade between Member States or competition within the common market’, the notion that specifies the boundary of the application of EC competition law. As SMEs were ‘more vulnerable’ to competition in the Common Market, they required special protection. Based on the *De Minimis* rule, smaller enterprises should be better able to compete with bigger ones.

The *De Minimis* Notice freed SMEs from the notification requirement, and more importantly, declared their operations subject to legal immunity before EC competition laws. This meant that cooperation agreements of all sorts among SMEs were admitted, even those prohibited by Article 81(1). Aggregate market share thresholds determined the boundaries. Companies with market shares below 5% and an aggregate worldwide turnover below 300 million units of account fell into the SME-category. Although this may sound unspectacular at first glance, in the 1960s and 1970s more than 90% of the companies operating in the common market fell under the *De Minimis* rule (Bright, 1996: 440-1). The Commission’s broad scale exemption of SMEs generated fierce criticism among large corporations who regarded the Notice as an affront to corporate size (ibid). Moreover, SMEs often conclude commercial agreements with large companies. The *De Minimis* Notice neglected this interconnectedness within the private sector.

It would be misleading to conclude from the Commission’s overall pro-cooperation and pro-concentration stance, that competition laws were not applied at all. As the following section demonstrates, the prosecution of vertical agreements between companies stood in the limelight of attention.

4.4 Integrating Europe: Opening Up National Markets To Competition

After the establishment of the customs union and the abolition of tariffs among the Member States in the 1960s, the Commission directed its attention to open up national markets to competition through the prosecution of vertical distribution agreements under Article 81. Vertical agreements concern agreements between companies involved in the different stages in the production chain, such as agreements on supplier-distribution networks, resale price maintenance, tied selling, specialisation, marketing, and (patent) licensing schemes, or private standard setting agreements. They mark the interface between competition and trade as they may have implications for the access of goods and services from abroad. Domestic companies can seek to foreclose (foreign) competitors from importing their products into their national markets by concluding such agreements. In the 1960s, such agreements were widespread in Europe and generally considered legitimate by both business and public regulators. During the first five years, the Commission received 40,000 notifications of which the bulk (29,500) concerned vertical agreements (European Commission, 1980: 15). Many of these vertical agreements concerned exclusive dealing agreements (OECD, 2005), which could have the effect of price discriminations and refusals to deal, and hence, distortion of trade between Member States. Often, such agreements were managed through national trading associations and embedded in a tolerant national context (Harding and Joshua, 2003: 119). EC competition laws did not explicitly prohibit such vertical agreements. However, the Commission justified its harsh interventionist stance with regard to vertical agreements on Article 81, which applies when 'trade between Member States was affected'. Breaking down private, vertical market barriers served the purpose of market integration and the enmeshment of cross-border corporate activities.

The Commission's DG IV prosecuted the first Article 81 infringement in September 1964, two years after the adoption of Regulation 17. It did not grant exemption to the notification of an exclusive distributorship contract between the German company *Grundig* and the French company *Consten*. It concerned a so-called 'closed circuit' vertical agreement in which the companies agreed not to make use of each other's distributor network, which implied an export ban. The two companies appealed the Commission's decision at the European Court of Justice (ECJ), together with the Italian and West German government. The Court reaffirmed the Commission's decision. It ruled that Article 81 refers to all agreements, which distort competition within the common market (Schinkel et al., 2004:

4). Thereby, the Court backed up the Commission in interpreting Article 81 as a solid legal tool to tackle private restraints that constitute a direct or indirect threat to the market integration project. The latter element was important, in so far as the common market provided the decisional criterion for blocking an agreement, and not competition as such (Sauter, 1997: 119). Whether or not vertical agreements were outlawed required a *rule of reason* (see Chapter 2). Only those agreements that distort trade flows across Member State borders, including export and import restrictions, were considered illegal in the 1960s. The *Grundig-Consten* ruling became a landmark case. It signalled to the European industries that they could no longer ignore the Commission as a supranational competition authority. Moreover, it illustrates the important role played by the ECJ as a principal integration force at a time in which the process seemed to be stagnating.

Until very recently, the Commission's harsh stance towards vertical intercompany agreements constitutes 'one of the most notorious fields of controversies' (Gerber, 2003: 175). In particular, antitrust experts of the US criticised the Commission's approach, because the US approach towards vertical agreements was always much more lenient. This was further enhanced by the fact that horizontal producer cartels, the 'sharp end of competition policy', remained largely untouched by the Commission until far into the 1970s (Harding and Joshua, 2003: 110; Berghahn, 1986: 471). Horizontal cartels could operate 'with impunity' (Goyder, 1998: 70). In response to the enhanced economic concentration at that time, the formation of cartel-like cooperation agreements gradually weakened as larger combines were less dependent on reducing competition (Berghahn, 1986: 282). Nonetheless, the Commission did not hinder Europe's industrial elite in its traditional approach of forming cartels. Only in 1969, the Commission started to prosecute horizontal cartel agreements based on Article 81 infringements. The *Quinine* and the *Dyestuffs* cases are exemplary in this regard. Both cases concerned export cartels, so-called 'gentleman's agreements' that purported to protect national product markets. Moreover, both agreements entailed price fixing elements. The *Quinine* case is particularly interesting, as the case only attracted the Commission's attention after the US antitrust authorities took legal actions and imposed fines. The cartel, which dated back to 1913, concerned an agreement between French, German, and Dutch producers on the cinchona bark, the base material for quinine used in the production of malaria medicines. They fixed prices, allocated markets, and stabilised the supply. When the prices for the raw material for the production of malaria medicines increased, in response to the increased demand for malaria treatment resulting from US military involvement in Vietnam, the US authorities prosecuted the European cartel. Eventually, the Commission also took up the case and based the prosecution on the same evidence as the US authorities. The companies appealed to the ECJ and lost – apart from a slightly reduced fine due to the double sanctioning. The case constituted the Commission's first major cartel prosecution. Again, the Commission enjoyed the support of the Court. Astonishingly, the Commission did not include this case in its First Annual Competition Report (cf. European Commission, 1972), possibly due to the politicisation of the case by the US authorities. The case nonetheless became a landmark case, as it created a pioneering legal precedent, which subsequently was referred to in the prosecution of other cases (Harding and Joshua, 2003: 121-122).

4.5 A Blend of Embedded Liberalism with Neomercantilist Traits

To recapitulate, by looking at the record of competition law enforcement in the 1960s, one could assess the Commission's takeoff in the enforcement of competition laws as timid, cautious, and mostly administrative in nature. However, against the broader political economy of embedded liberalism in the 1960s, the Commission's favourable disposition towards commercial intercompany agreements and economic concentration denotes significant neomercantilist traits. The improvement of the competitiveness of European companies constituted a strategy to fence off indigenous companies from harsh competition from abroad. The creation of *Eurochampions*, rather than national champions, constitutes a neomercantilist regionalisation strategy. As Van Apeldoorn (2001) elucidated:

> *A strong European home market was expected to serve as both a stepping-stone to conquer the world market as well as a protective shield against outside competition. The neo-mercantilist project thus constituted a defensive regionalisation strategy oriented towards the creation of a strong regional economy, not only through the completion of the Internal Market, but also through an industrial policy aimed at the promotion of 'European champions', if necessary protected by European tariff walls.* (Van Apeldoorn, 2001: 75)

Like the large unified market of the US, European economic integration should provide a platform for *Eurochampions* to exploit economies of scale and scope. Competition policy in the 1960s was subordinated to this goal. It was employed to open up national markets and create access to competitors. Against the backdrop of lagging competitiveness of European corporations, the Commission adopted a pro-cooperation and pro-concentration stance in order to strengthen *Eurochampions* who were able to face competition from their larger counterparts in the US, and increasingly also from Japan, where companies had successfully adopted the logics of Fordist production culture of cheap mass products. At the same time, SMEs received a preferential treatment through generous exemption regulations freeing them from compliance with EC competition laws.

Part II: The 1970s – Coping With Economic Crises

EC competition law enforcement in the 1970s continued to form part of the grand social bargain of embedded liberalism. The liberalisation of trade and capital on the global scale that started in the 1960s with the GATT Dillon and Kennedy Round was reconciled at European and Member State level by institutional adjustments meant to absorb external shocks. The collapse of the Bretton Woods regime in August 1971, the unregulated monetary transactions, and the two subsequent oil crises in 1973 and 1979, induced Member States to impose a range of protectionist measures. This part demonstrates that, in the 1970s, the Commission's enforcement practices were foremost subordinated to a broad-based crisis management, meant to rescue industries in despair. Similarly, to the 1960s, the Commission adopted a much more liberal tone than most of the Member States, at least rhetorically. The Commission's enforcement approach focused on the continuation of building up the competitiveness of *Eurochampions* in the world market and protecting small and medium-sized enterprises in the EC's common market.

4.6 Economic Crises and Protectionism

The post-1971 developments in the global political economy affected EC competition law enforcement. First, the collapse of the Bretton Woods regime ended the international financial order of the convertibility of the US dollar into gold and introduced floating exchange rates. This transformed not only the global financial landscape, but also the nature of economic transactions. Already in the 1960s, but increasingly so in 1970, US-based multinationals deemed the Bretton Woods system too restrictive and started to lobby in favour of a liberalised financial market structure (Cox and Skidmore-Hess, 1999: 5). The passive stance of the US FED to stabilise the overall dollar supply in the world resulted in high inflation. Together with exchange rate volatility and liberalisation of financial flows, new possibilities for speculation on foreign exchange markets were created, i.e. the type of monetary transactions the Bretton Woods regime had previously sought to constrain. As one of the direct spin off's of the speculative behaviour after the collapse of Bretton Woods, economic concentrations through mergers and acquisitions activity increased considerably in the early 1970s (Oster, 1999: 223). From 1974 to 1975, share acquisitions sharply increased, amounting to a growth rate of 49% (European Commission, 1977: 150-152). The number of non-Community firms involved in share acquisition rose from 9% in 1974 to 24% in 1975. US capital owners, in particular, acquired EC based companies, of which many sought to make quick profits from undervalued assets (Dawkins, 1987b: 2). Also the US economy underwent a rapid concentration. In 1972, the largest 200 corporations held 60% of the manufacturing assets in the US (Freyer, 2006: 137). Thereby, US companies continued to be the largest and the most technologically advanced in the world. To illustrate this: in 1969, the US company *Standard Oil* was double the size of *Royal Dutch Shell*, *General Motors* was seven times larger than the German company *Volkswagen*, and *Chrysler* twice as large as *Volkswagen* (Mueller, 1993: 159). Similarly, *General Electrics* was double the size of *Philips*, and *US Steel* was double the size of *British Steel* (ibid).

The decision by OPEC to increase oil prices precipitated a situation of stagflation in 1973-74. European economies were in severe crisis, facing unemployment, worsening inflation rates, and overall balance of payments disequilibria. The economic recession and insecurity culminated in a climate of 'new protectionism' at Member State level. European industrialists facing economic decline turned to their national governments to offset the effects of foreign competition. The creation of a favourable macroeconomic environment that stimulates investment was deemed crucial for overcoming the overall economic malaise in Europe. As the imposition of higher import duties, as a means to curtail the inflow of competing goods, was not a viable option, protectionist market interventionist industrial policies of a non-tariff nature were employed. They generally included quotas, voluntary export restraints, state aid, a broad range of supportive export-promoting and import-controlling measures (cf. Kahler, 1985). However, occasionally this went as far as the control of wages, prices, credits and imports, to the 'wholesale direct subsidisation of loss-making industries' (Sauter, 1997: 77). The spirit of the GATT Kennedy Round of the 1960s, devoted to keeping economic frontiers open, seemed to have been reversed. In line with Keynesian full employment macroeconomic policies, new protectionism formed the centre of gravity in countries with left-wing governments and/or labour-based coalitions (Kahler, 1985: 500).

Against the background of domestic protectionism, European integration reached a stalemate, despite three new Member States entering the EC in 1973, i.e. Denmark, Ireland and the United Kingdom. The EC Member governments were not willing to sacrifice their shattered national economies to enhanced inter-Community competition. Primacy was given to national, rather than common, EC solutions. Ambitious plans for enhanced political integration, such as the Werner Plan in 1970, named after Pierre Werner, the Prime Minister of Luxembourg, which sought to establish a European Monetary Union (EMU) ended up shelved for the next twenty years. The Community institutions suffered from the image of a bureaucratic slump and overall inefficiency, and the Commission was accused of being a wasteful spendthrift, in particular when the exorbitant travelling expenses of Franco Malfatti, President of the Commission (1970-72), reached publicity (Dinan, 1999: 77). The Commission's attempts to further the integration of the common market failed. In the early 1970s, almost 1,000 Commission proposals failed to pass the unanimity rule of the decision making in the Council of Ministers (ibid).

The Commission redefined its role as the 'guardian against the development of protectionists tendencies' -(European Commission, 1979: 10). Nonetheless, throughout the 1970s, the enforcement of EC competition law continued to be overly permissive. Elsewhere, the Commission's enforcement attitude was summarised as 'a light-handed approach towards anticompetitive conduct' (Geradin and Henry, 2003: 5). The Commission held the view that competition policy should be adapted to the economic reality of economic stagflation and the resulting socioeconomic problems. In the First Annual Report dating from 1972, not competition, but the fight of inflation, unemployment, underutilisation, and underpayment of workers were declared central policy goals (European Commission, 1972: 12). Although the overarching purpose of competition policy was still 'the creation and proper operation of the common market', the Commission emphasised that a reliance on the dynamics of the competitive process created 'intolerable social tensions' (ibid: 17). In the vein of the broader 'embedded' liberalism ideology, competition policy was seen as an instrument to create 'an environment in which European industry can grow and develop in the most efficient manner and at the same time take account of social goals' (ibid: 18). In response to the prolonged economic downturn in the 1970s, the Commission assured that it will not 'lose sight of the social and human factors involved, which may justify aid beyond what is required by strictly economic reasoning' (ibid).

The key word in the enforcement of EC competition law throughout the 1970s was flexibility, which was declared more important than 'a dogmatic approach' (cf. European Commission, 1977: 9). The Commission steadfastly defined its overarching maxims with concepts such as equality of opportunity and fairness, notions that reflect the ordoliberal ideal of 'complete competition' in which market players compete on equal terms. In the Ninth Annual Report on Competition in 1980, the Commission announced that it would preserve a situation of 'equality of opportunity' in the internal market by helping certain industries to 'adapt to new economic circumstances' and by supporting an industrial policy which promotes the necessary restructuring' (ibid, 1980: 10). Moreover, in line with the full-employment policies and the Keynesian-inspired demand management at the Member State level, the ideal of equal opportunity was also formulated in terms of a necessity to take into consideration 'the legitimate interests of workers, users and consumers' (ibid). The next section illustrates that these broader policy goals were manifested in a lenient stance towards cooperative intercompany agreements and state aid.

4.6.1 EC Crisis Management: Tolerating Crisis Cartels and State Aid

The enforcement of EC competition laws stood in the light of a broad-based crisis management. The Commission largely ignored the aid granted by EC Member States to national 'champions' and other domestic industries, and left Article 87, prohibiting state aid, unenforced. Next to direct financial aid, state aid practices included subsidised loans, tax concessions, guaranteed procurement, financial guarantees, and export assistance. These practices were not only common in *dirigist* France, but also in more liberal Member States, such as Germany and the UK (Dinan, 1999: 392; cf. Kahler, 1985). This resulted in a proliferation of state aid granted to crisis-stricken industrial sectors and companies. In the Sixth Annual Report on Competition, the Commission's DG IV declared to be 'firmly in favour of aid which solves long-term social problems' (European Commission, 1977: 10). At a time of economic recession, it did want to reverse the enforcement of competition laws on European companies. To rescue declining industries and alleviate employment problems, the Commission tolerated so-called 'structural crisis cartels', or 'emergency cartels' as they were sometimes also called (ibid, 1981a). Old industries of steel, shipbuilding, chemistry, and textiles, as well as the sugar industry, gratefully took advantage of the permissive attitude of the Commission. Rather than outcompeting each other, competitors could engage in joint ventures and make use of production quotas, in order to deal with disparities between production capacities and actual demand (i.e. chronic excess production), as well as with prices that did not cover production costs. Reduced competition in the short-run would, according to expectations, spur the recovery of the affected industries, and ultimately benefit the competitiveness of the European economy in the long run. The Commission argued that 'the decisions made in this context did not easily fit into a general pattern, since each case needed to be treated according to its particular characteristics (ibid, 1972: 25).

The notification and exemption regime provided a convenient and flexible tool to deal with the pressing problems of the European economy. The Commission qualified a large number of notified agreements as individual exemptions ruled by Article 81(3), or permitted them right away. It allowed structural crisis cartels, and agreements designed to spur innovation, particularly if they concerned R&D support and cooperation or a transfer of technology. Similarly, also employment considerations were used to justify crisis cartels. This approach was further reinforced by an ECJ ruling in the case of *Metro SB-Grossmärkte GmbH & Co. KG v. Commission* in 1977. The ECJ ruled that Article 81(3) exemptions to intercompany agreements could be granted when they had a beneficial impact on employment, particularly in times of unfavourable market conditions (Monti, 2007: 96). The Commission, however, warned the business community that these temporary protectionist measures could not be taken as a commitment to similar protectionist measures in the future (cf. European Commission, 1977). Nonetheless, a range of these crisis cartels endured until the restructuring initiatives of the mid-1980s, in which the Commission took the role of assisting companies to undertake restructuring measures (see the next part of this chapter). In its Twelfth Annual Report in 1982, the Commission continued to publish 'informal' conditions for the exemption of crisis cartels under Article 81(3). Particularly companies suffering from structural overcapacity, without prospect of improvement in the medium-term, and confronted with the risk of social dislocation, qualified for the establishment of crisis cartels (cf. European Commission, 1982). Only in a few instances did it order the termination of an agreement, and only a few companies appealed the decision before the court, i.e. the Belgian Wallpaper case (*Papier*

Peints) in 1974, the Cement case (*VCH*) in 1972 and the Belgian Tobacco case (*FEDETAB*) in 1978 (see for more on these cases Harding and Joshua: 119-120).

The notification regime also served as an institution to enforce EC competition laws on an extraterritorial basis and thereby, to control the terms of trade inflows. In its Second Annual Report of 1972, the Commission announced that, under certain circumstances, it would apply EC competition laws to companies based in third countries, and more generally, multinational companies. It declared that all commercial agreements concluded outside the EC's territorial boundaries, but which had an impact on the common market, also needed to be notified to the Commission (ibid, 1972: 27). By declaring extraterritorial transactions subject to the EC notification regime, the Commission gained control over agreements regarding US and Japanese imports, which posed a competitive threat to many European industries. Subsequently, the Commission intended to adopt a similar strategy with regard to 'concerted practices with the effect of eliminating independent competition or abuses of dominant positions within the oil industry' (ibid, 1973b: 24, 28). As a reaction to the OPEC's rise in oil prices, the Commission issued a press release 'to open the necessary investigations into producer companies and dealers in the oil industry' (ibid, 1973a). Eventually, the Commission's announcement to tackle oil-producing cartels on the basis of EC competition laws was never substantiated. It seems that the Commission did not dare to engage in such high politics.

In addition to the toleration of crisis cartels, the Commission sought to encourage the competitiveness of European corporations in a more structural way. In a joint conference on *Industry and Society in the EC* in Venice in 1972, industry representatives and Commission officials proposed special measures for high technology industries and industries facing crisis conditions, which eventually were included in a Memorandum on Technological and Industry Policy in 1973 (Sauter, 1997: 74). European industry representatives complained about being trapped in a vicious circle of lagging competitiveness. The presumed technological challenge of US and Japanese competitors resulted in ever-shorter product life cycles, and hence, shorter time to regain R&D expenditures. European corporations faced difficulties in amortising their product development costs through products sales only in the EC. As the European market was still rather fragmented and the possibilities for reaping the benefits of economies of scale limited, they requested further economic integration. Moreover, expansion into third country markets increasingly became a prerequisite for economic survival and success.

Whereas Member State governments sustained the export of indigenous producers through state funded R&D projects, guaranteed procurement, and export subsidies, the Commission's DG IV took a proactive stance towards joint corporate investments in R&D instead. It considered strategic alliances in R&D-intensive, high value-added sectors necessary to pool technological know-how and to avoid duplicating innovative research (European Commission, 1981a: 13). Thus, as part of a broader neomercantilist strategy, the stimulation of technological innovation reached a central position on the Commission's agenda to build up the competitiveness of Eurochampions in the world.

4.6.2 EC Concentration Policy: Fencing Off European Industries or Protecting Competition?

In the 1970s, the Commission faced the dilemma of preserving the ordoliberal ideal of 'greater economic and social justice' in the common marketplace, while at the same time promoting large Eurochampions that were able to compete on a global scale and keep pace with the technologically more advanced companies of the US and Japan. The renewed invasion of US capital into the EC, through a series of major merger cases, provided the Commission with a rationale to push for increased competences in the field of merger control in the early 1970s. It considered EC merger rules highly necessary 'to deal effectively with the dangers arsing from excessive concentration' (European Commission, 1974: 28). It concluded that in certain sectors the number of competitors was reduced to as much as half and that large firms controlled between 80% to 90% of the sales or production – a state of affairs it considered 'alarming' (ibid: 28-32). In contrast to the pro-concentration stance of the 1960s, the Commission stated the 'excessive concentration of economic, financial and commercial power produces such far-reaching structural changes that free competition is no longer able to fulfil its role as an effective regulation of economic activity' (Annual Competition Report of 1980: 10). In order to avoid aggravating 'the deepening trauma of structural changes' of the 1970s, the Commission announced its 'constant vigilance over abuses by dominant firms and over mergers' (Annual Competition Report of 1980). The Commission presented the proposal for a pan-European merger law in October 1972 to the Council (European Commission, 1973b: 11).

In the absence of proper EC merger laws, the famous *Continental Can* decision in 1972 is illustrative of how the Commission applied Article 82 instead. In the first decade of EC competition law enforcement, Article 82 was deliberately not applied, in order to strengthen European companies against foreign competitors (see previous part of this Chapter). The Commission's sudden distrust in bigness, however, was directed foremost towards non-community companies. In the *Continental Can* case, the Commission sought to avoid that a leading US company in the production of metal containers would take over the Dutch packaging company *TDV*, an economically weaker European competitor. Prior to this, *Continental Can* already acquired the German firm *SLW*, also a producer of containers and related products. The Commission banned the planned takeover under Article 82 and argued that the acquisition constituted an abuse of its already dominant market position in both the Benelux and in Germany.

The decision by the Commission evoked a series of criticisms by US business representatives and US political authorities, who considered the case exemplary for fencing off indigenous companies and oppressing the market access of US companies (European Commission, 1982: 12). The company *Continental Can* appealed at the ECJ against the decision, on the basis that the Commission did not provide sufficient evidence to prove that the concentration led to an abuse of dominance (*Continental Can vs. Commission*). The ECJ agreed with the complaint and ruled against the Commission's prohibition. Thus, the deal could go through anyhow in 1973. Nonetheless, even though it did not fully back up the Commission, the ECJ supported the fact that Article 82 could be used to block mergers and acquisitions (cf. European Commission, 1972). It clarified that Article 82 was applicable to companies, which already held a dominant market position and were planning to expand their market shares further through the acquisition of a competitor. With the ruling in the *Continental Can vs. Commission* case, the ECJ freed the path to a *de facto* merger control law, which allowed the Commission to intervene in economic concentrations on a *post hoc* basis. Consequently, the Commission began to apply Article 82 with new vigour, and the ECJ eventually reconfirmed this ruling, in nine other cases, in the early 1970s (ibid). In addition to the *Continental Can* case, other infringements prosecuted and fined by the Commission on the basis of Article 82 were; the *United Brands Corporation,* a US banana exporting company in 1978, and *Hoffman-La Roche* in 1979, a Swiss pharmaceutical giant. This was crucial for the legal evolution of EC competition law. It illustrates how the ECJ endorsed the Commission's drive to expand its competences in a climate of political deadlock with a view to further European integration.

Nonetheless, the Commission considered Article 82 an insufficient device to control mergers effectively, because it failed to cover all forms of concentration activities *leading* to a dominant position. As it could only intervene after the concentration took place, the Commission continued to push for the introduction of supranational merger rules. It had already made this proposal in the late 1960s in a *Memorandum on the Problems of Concentration in the Common Market* (Slot, 2004: 460). The draft proposal for an EC Merger Regulation entailed the adoption of an *ex ante* notification regime similar to Regulation 17, according to which companies would have to ask the Commission's permission prior to engaging in a concentration activity. Any concentration involving companies with a joint aggregate turnover of higher than 2,000 million units of account and with market shares exceeding 25% should be notified to the Commission in advance (Goyder, 1998: 382). Similarly to Regulation 17, the Commission suggested introducing the option of granting exemptions to mergers, which were 'indispensable to the attainment of an objective which would give priority treatment in the common interest of the Community'. Thereby, it included the opportunity for a flexible, multi-goal approach in merger control, similar to the control of cooperative agreements. The Commission, in turn, would be committed to taking a decision on a case within twelve months (European Commission, 1974: 16).

The timing of the Commission's expansionist drift, with regard to controlling mergers, was no coincidence. When the merger law of West Germany, the *Fusionsgesetz,* had already passed the preparatory stages – it was adopted in 1973 – the Commission sought to seize the opportunity and to reinvigorate the merger discussion at EC level. The Commission emphasised that a piecemeal emergence of national merger rules was not sufficient. In particular, after the conclusion of a bilateral free trade agreement of the EC with the Member governments of the *European Free Trade Area (EFTA)* in 1972, EC competition rules underwent a geographical expansion, which strengthened the overall position of the DG IV as a supranational competition authority. Although the Commission could not directly prosecute anticompetitive conduct in the EFTA, it participated in the joint surveillance committee, which provided it with an opportunity to ask the respective national authority in charge to take action against observed anticompetitive conduct. Prior to drafting the proposal for a pan-European merger law, the Commission sought to generate political support and increase its leverage power vis-à-vis the Council, by consulting an impressive range of national and international business organisations, as well as a few labour and consumer organisations (see for a complete overview European Commission, 1974: 38).

In a climate of revived protectionist tendencies at Member State level, the Commission's endeavour to convince the Council to delegate more powers to the Community level remained unsuccessful. The European business community also remained unconvinced. It feared that a supranational merger control would run against their concentration interests and problematise mergers. It considered the turnover and market share thresholds too low and the envisaged review time of one year far too long. The German business representatives opposed the idea, because they feared that the German *Bundeskartellamt* and the Commission would be double-checking their mergers. The German authorities in turn opposed the idea of sharing the newly acquired merger controlling powers with the Commission. Eventually, the German, French, and also British government fiercely opposed the idea of delegating merger control to the Commission (McGowan and Cini, 1999: 179).

The lack of Council support for more Commission competences fits into the overall landscape of the integration deadlock of the 1970s and early 1980s. In other words, the Commission explored the limits of its institutional competences and found them. Even though the merger wave of the late 1960s and early 1970s did not endure, the Commission put much effort into keeping the merger regulation proposal on the negotiation table. Rather than problematising mergers, it started to adopt a more favourable stance towards mergers again. In its Third Annual Competition Report in 1974, it argued:

> *[There is a] desire and need of Community firms to adapt constantly to the new scale of their markets and to improve their competitiveness on the world market. Many mergers, as a result of the structure of the markets in which they occur, in no way lessen competition but, on the contrary, can increase it.* (European Commission, 1974: 28)

4.6.3 Addressing Anticompetitive Conduct in Multilateral Fora

During the economic turmoil of the 1970s, greater importance was attached to international institutions as platforms for orchestrating the global political economy. Already in the 1960s, the Commission had featured a leading role for the EC to hold the reins of world politics in the context of the GATT negotiations, where it expressed the wish to harmonise competition rules, and to monitor worldwide anticompetitive conduct (Von der Gröben, 1965b: 2). A range of developing countries favoured the inclusion of competition laws into the GATT trading system to curb the new protectionist wave of industrialised countries (Kohr, 1996). The accent was foremost on combating restrictive commercial practices of corporations located in the industrial world, most notably multinational corporations. However, their efforts remained unsuccessful (see also Chapter 7). Only a resolution was adopted stipulating that the GATT would serve as an *ad hoc* forum for contracting parties to consult on anticompetitive business practices (see GATT BISD 9S/28, 1961 in European Commission, 1977: 8).

The far-reaching competences allocated to the DG IV provided it with a power structure that allowed it to promote competition rules and trade liberalisation outside its borders. The Commission occupied a dominant place in the OECD's Committee on Restrictive Practices and its various specialised working groups. The DG IV promoted international cooperation in competition matters, in order to deal with the growing liberalisation of trade and the difficulties with regard to 'the activities of major international companies' (European Commission, 1974: 38-39). Consequently, two OECD recommendations were issued on 10 October 1967 and on 3 July 1973, which promoted voluntary frameworks of consultation, exchange of information and coordination among its members. In June 1976, a Declaration on *International Investment and Multinational Enterprises* was adopted, which entailed a voluntary code of conduct that addressed the responsibility of multinational enterprises to comply with the competition rules (ibid, 1977: 33). Similarly, DG IV officials also participated in the expert groups of the *United Nations Conference on Trade and Development* (UNCTAD), which were entrusted with the mandate to draw up a set of multilateral rules for the control of restrictive business practices. The Commission took an active part in the creation of a *New International Economic Order (NIEO)*. Yet, the views of the industrialised countries drastically diverged from those of the developing and the socialist countries. None of the Commission's suggestions made it to a final draft stage (ibid, 1979: 52-53). The Community representatives were not willing to compromise with the agenda of developing countries. Although ultimately a non-legally binding 'Restrictive Business Practice Code' in 1980 was adopted within the UNCTAD framework (see for more Ruigrok and Van Tulder, 1995), the well-meant NIEO project remained, to the large part, unsuccessful. The emphasis on fairness and equity on a global scale was confined to a political rhetoric of good intentions, which failed to be translated into concrete solutions.

Part III: The Early 1980s – A Period of Transition

The late 1970s and the early 1980s formed a period of transition. The Commission continued to enforce EC competition laws in a protectionist and neomercantilist manner. However, the advent of neoliberal ideas in Europe echoing what is commonly called the Reagan Revolution or Reaganomics in the US, and Thatcherism in the UK in 1979 had important repercussions on competition law enforcement. Voices in favour of free market mechanisms became louder. The proponents of the neoliberal course sought salvation in the completion of the common market, which was considered not half as open as that of the US, and hence a severe handicap for the development of a prospering economic situation. Deregulation and privatisation became key words. State run sectors and monopolies were disparaged as incompetent, inefficient, bureaucratic, and highly overstaffed. The privatisation of public sector enterprises, which had previously been, excluded from the competitive process, such as energy, transport, telecommunications and postal services, offered new prospects for corporate expansion in new lucrative sectors.

The *caesura* in the history of EC competition law enforcement needs to be located in the structural changes of the political economy at that time. The new direction and convictions reflect the course promoted by leading corporate interest groups. Large European companies started to transform into true transnational corporations from the late 1970s and early 1980s onwards, seeking expansion in new geographic markets. Van Apeldoorn (2002: 82) discerns, in this regard, a more pronounced distinction between two rival capital factions in the 1980s, the 'Globalists' and the 'Europeanists', consisting of export-competing companies producing for the world market and import-competing companies producing primarily for the European market, respectively. Import-competing companies with a focus on the European market favoured further economic integration, but generally sought protectionist, neomercantilist measures against outside competition. In contrast, large export-orientated corporations were more globally orientated and interested in the free movement of goods, services, and capital on a global scale. Transnational corporations with a global focus surfaced as staunch supporters of the completion of the common market, guaranteeing free market access and free movement of goods, services, capital, and people. They became active in the promotion of the neoliberal discourse of free markets. A new tide of protectionism in Europe could trigger similar reactions elsewhere and inhibit market access for Community products and the purchase of raw materials. This could negatively affect net industrial exporters and transnationally operating corporations with extensive intra-firm trade flows.

This part argues that the DG Competition, which by then was still called DG IV, increasingly embraced the neoliberal tone in the enforcement of EC competition laws in the 1980s. In the presence of political counterforces, the process of ideological transformation did not take place overnight and radically break with the enforcement philosophies of the past two decades. The economic crisis of the 1970s was not yet overcome. The proponents of a neoliberal course did not drown out the protectionist corporate interests of the neomercantilists within the Community. Requests for protectionist measures even underwent an upswing with the rise of M&As and strategic alliances, enhanced FDI flows, and the presence of ever fiercer competition from Japanese and corporations from South East Asia. Adherents of neomercantilist strategies sought to cure the situation in the adoption of investment stimulation measures aimed at fostering the competitiveness of European companies, a strategy in favour of European regionalism with a protectionist edge (Ruigrok and Van Tulder, 1995: 128-130). When drawing on the different phases in the ascendancy of neoliberalism as a hegemonic project by Overbeek (1999: 248-249), it can be argued that neoliberalism in the early 1980s evolved as a deconstructive moment, in which neoliberal reasoning gradually made its inroads, and a significant share of high-level politicians subsequently endorsed the new ideology. However, the strength of the neoliberal orientation only started to reveal its impact from the mid-1980s onwards. Therefore, the enforcement of EC competition law in the early 1980s formed part of a transition period.

4.7 Neoliberalism as a Deconstructive Project in Competition Law Enforcement

The manifestation of neoliberalism as a deconstructive project surfaced in a critique on the era of embedded liberalism, notably the 'market-correcting institutions that were created in the post-war era of European capitalism' (Van Apeldoorn, 2002: 68). In retrospect, neoliberal thinkers in 1970s coined the terms the 'European Disease' and 'Eurosclerosis'. In addition to referring to the lethargic stupor of European integration in the 1970s, the terms entailed a fundamental critique on the ideas of the Keynesian-welfare state institutions, selective market intervention, and a pro-industrial policy, i.e. the cornerstones of what constituted the embeddedness of corporate liberalism in domestic settings. Herbert Giersch (1985), a German professor of economics and president of the Mont Pèlerin Society (1986-88) brought forth the term Eurosclerosis in 1985.[29]

In the field of competition policy, the deconstructive moment of neoliberalism as a hegemonic project paralleled the continuation of much of the crisis management of the 1970s and the neomercantilists strategy of fortifying the competitiveness of European companies vis-à-vis outsiders. In other words, the lenient course in favour of restructuring 'sick' industries through state aid, and the toleration of structural crisis cartels, which engendered the preservation of both companies and jobs, did not abruptly end, nor did the ordoliberal rhetoric immediately vanish. As the Dutch Commissioner for Competition, Frans Andriessen (1981-1985) noted, 'competition should not be an objective in itself, but constitute an instrument to create a market structure within which effective competition can take place (1983b: 5). Elsewhere he confirmed that the relevance of the ordoliberal goal enshrined in the Treaty, notably 'the promotion of the harmonious development of economic activities throughout the community' had not lost its relevance (1981a: 5). Moreover, the 'temporary moderation of the rigours of the rules' was still deemed inevitable, in particular cases of 'structural overcapacity such as a prolonged reduction in capacity utilisation rates, an important decline in production, and prolonged exploitation losses due to a profound change in patterns of demand' (ibid, 1983a: 7). The Commission framed the overall policy mission in terms of creating an environment within which European industry can grow and develop and at the same take account of social goals. As in previous years, it continued its activist policy aimed at strengthening and preserving an auspicious environment for small and medium-sized enterprises (SMEs). In its Annual

[29] To date the Mont Pèlerin Society is committed to the goal of promoting neoliberal ideas entailing according to its own saying 'the redefinition of the functions of the state so as to distinguish more clearly between the totalitarian and the liberal order' (Mont Pèlerin Society, 2005).

Report of 1986, the Commission announced the protecion of SMEs against powerful competitors, including transnational companies by enforcing Article 82 and the banning of abusive dominant positions. It argued that 'abusive market power by a few should not undermine the rights of the many' (European Commission, 1987). This policy manifested itself in the prosecution of 'the charging of abnormally low prices intended to squeeze out small competitors and against refusals to supply products essential to the activity of SMEs (European Commission, 1988: 29). The continuity of competition law enforcement can be ascribed to the economic recession of the 1970s, which continued into the early 1980s. The prospects for recovery remained gloomy. According to the Annual Economic Report for 1982 and 1983, national economies were still suffering from heavy public sector debts, zero-growth rates, overall high interest rates, inflation and mounting rates of unemployment. In 1982 there were about 11,5 million people unemployed in the EC, about half of which were young people, an overall increase of 17% compared to 1981 (Andriessen, 1982a: 1).

Nonetheless, a more stringent enforcement philosophy gradually made its inroads. The Commission announced its intention to act with more firmness, especially in times of recession when companies in particular were inclined to cartelise (ibid, 1981a: 2). While it still considered state aid, in certain cases, perfectly legitimate, in others it was compared to 'woodworms eating away the carcass of the ship of integration' (ibid, 1982b: 6). The Commission endorsed neoliberal reasoning in a range of restructuring measures, in which the tolerant approach of the 1970s was increasingly tightened. Industries facing prolonged economic downturn were despicably called 'sunset industries' or 'lame ducks'. The crisis cartels and branch-wide agreements that previously were meant to shelter indigenous companies from foreign competition were increasingly phrased as 'anomalies' and as examples of a 'frozen economy' (ibid). Rather than crisis cartels, the Commission's DG IV actively encouraged and monitored 'restructuring plans'. Based on industrial rationalisation programmes, the Commission sought to ensure that the 'healing process' was not delayed or obstructed' (European Commission, 1981b). In practice, these programmes often implied the downsizing of employment and the strict prohibition of price and market sharing agreements.

The new rigours in the enforcement of competition laws were first felt in the ailing European steel industry. Under the alleged reason of revitalising the industry, the

Commission demanded a radical restructuring by 1985, which included the termination of quota levels, but also a limitation on state aid. In the case of the highly indebted steel group *Saarstahl*, the Commission rejected Bonn's request to permit any further government grants unless a radical 'restructuring' took place (Merritt, 1982a: 2). With the ongoing recession, the Commission found itself in an extremely delicate position, but it nevertheless opened up simultaneous investigative procedures against several cases of subsidies granted to the private sector (Andriessen, 1982a: 7). It argued that state aid carried the risk that companies would become 'dependent on the state, delay the reallocation of resources, and that unviable firms in business would be maintained to the detriment of those that are competitive' (European Commission, 1982: 10). The new course of the Commission bore success in terms of notifications of national aid schemes: there were 45 notifications in 1976, and by 1982 the number had amounted to 257, of which 133 were of the ailing steel sector alone (ibid, 1983a: 9).

4.8 The Opposition of Neomercantilist Oriented Forces

The stiffened competition promoted by the Commission and its gradual implementation in the enforcement of competition laws raised opposition by neomercantilist minded business representatives and political elites from certain Member States that would have preferred relaxed EC competition rules in times of economic downturn (Andriessen, 1983b: 13). Competition Commissioner Andriessen described the tensions as following:

> *You might say that the Treaty of Rome provides the frame for lifting Europe out of the shallows. But is has proven an extremely difficult task to get obstinate European into the frame.* (Ibid, 1982b: 2)

The French government, in particular, embodied the concerns of neomercantilist minded corporate interests. The competitiveness of much of European industry considerably fell behind that of the US and Japan, particularly in the import-competing electronic sectors and the car industries. Therefore, in a Memorandum to the Council in September 1983, the French government suggested adopting a European-wide protectionist policy to sustain Eurochampions in high technology sectors. European companies in this sector faced the problem that they were too small to match the amount of investment into R&D of their much larger competitors in the US and Japan. For example, in 1979 the US had six times more computer terminals than Europe (Ellis, 1983: 5). Similarly to the late 1960s, the strong presence of US and Japanese companies evoked the picture of an 'industrial and economic infeudation of Europe' (Gibb, 1986: 17).

The pressures were successful insofar as the Commission adopted a range of block exemption regulations to counter the lagging technological competitiveness in the early 1980s. Yet, investments in new technologies and science remained a private affair. Nonetheless, by means of exemption, the Commission provided for a supportive regulatory framework for intercompany collaboration. The block exemptions concerned R&D cooperation agreements, patent licences, as well as an enlargement of the existing block exemption regulation on specialisation and exclusive distribution agreements. The latter, in particular, aimed at enabling small and medium-sized companies to achieve economics of scale, by allowing them to concentrate their production and form joint ventures. The 'green card' for SMEs to cooperate was extended and the suppleness of the Commission continued (Andriessen, 1981b: 11). Commissioner Andriessen (1984:11) elucidated at the *Internationalen Kartelkonferenz* in Berlin in 1984 that 'cooperation prevented the duplication of research and hence the squandering of resources', which could give 'a substantial boost to integration in the Community. He further noted that 'cross-frontier cooperative schemes bring economies of scale and assure sales in all the countries concerned, which pulls countries out of the fragmentation of markets' (ibid). Business representatives of import-competing sectors advised the Commission 'to grasp the nettle' and apply cooperation schemes to 'genuinely European companies only, those having their headquarters in European countries and with their profits remaining in Europe', rather than to transnational corporations from the US trying to convince European governments of their 'Europeanness' (Butler, 1986: 17). As one representative postulated

> *The US Government knows which are American companies. We know which are European. […] (Our companies) have to forget that they are long-standing rivals and remember the danger of hanging separately if they do not stand together. They have to make deals under which they produce complementary products and buy them from each other. They have to form joint venture companies to produce hardware and, indeed, whole IT systems. They have to find ways of pooling their marketing efforts, either for particular products or by region. […] Ways of thinking must be changed in the European Commission, in governments, in boardrooms and in middle-management.* (Ibid)

Nonetheless, the neomercantilist corporate branch striving for protectionist measures against foreign competition was increasingly losing ground. The GATT Ministerial Meeting of 1982 placed heavy pressures on governments involved in protectionist measures and committed Member States to the abolishment of both tariff and non-tariff barriers. The Commission endorsed the GATT spirit and in particular emphasised that the free trade agreements concluded between the EC and third countries should not become 'a dead letter' (Andriessen, 1981a). 'Free trade should constitute the mainstay of the common market and the trump card of its economy' (European Commission, 1982: 9). In addition, the French government started to adopt a more neoliberal stance on competition and tempered its protectionist industrial policy. This was particularly the case after the conclusion of a range of deals between French nationalised companies and US companies, which consisted of direct investments, joint ventures, research collaboration in the sectors of computers, telecommunication, integrated circuits, biotechnology, medical equipment, and energy (Hayward, 1995: 8).

4.8.1 Protecting the Electronics Industry: Challenging US Giant IBM

Illustrative of the end of protectionism in the field of competition law enforcement is the accusation by the Commission against the leading US computer giant *International Business Machines (IBM)* in 1980, which amounted to the biggest prosecution in the history of EC competition law enforcement at that time. What initially seemed in line with a protectionist move by the Commission, however, in the end, dampened the enthusiasm of those seeking protection. The parallels with the *Microsoft* case more than 20 years later are striking (see Chapter 6). According to estimates, *IBM* covered 60% of the world market in the production of mainframe computer processors and software programmes. Only the Japanese manufacturers *Fujitsu* and *Hitachi* were able to mount a serious challenge to the supremacy of IBM. Similar to *Microsoft*, the Commission based its accusation on Article 82, prohibiting the abuse of dominant market positions. The company refused to disclose information that would allow smaller competitors to supply products that could be attached to IBM systems, including European computer suppliers, such as *Bull*, *Remington Rand*, *Olivetti*, or *RCA*. Like the Microsoft case, the US DoJ's Antitrust Department, under William Baxter, dropped the case in January 1982 after 13 years legal action. Under the influence of Chicago School thinking in the Reagan administration (see Chapter 2), corporate size was no longer considered an issue. Similarly, the fact that IBM also concluded strategic alliances with competing companies, such as with the market leaders in the production of semiconductors and telecommunication equipment suppliers, *Intel* and *Mittel,* did not raise concerns. In the face of Japanese competition, US antitrust authorities supported their national champion by adopting an utmost lenient stance.

The Commission took a different view to its US counterparts and was ‘willing to assert its view to enforce antitrust law in a way the US might not’ (Fikentscher, 2003: 24). IBM fiercely protested against the allegations and started a massive lobbying campaign in Brussels. It eventually challenged the Commission's decision at the ECJ in 1981. The accusation against IBM also raised concerns among US authorities about protectionist tendencies at the Commission. In response to political pressure from the US, the Commission eventually suspended its proceedings against IBM, in August 1984 and comforted US authorities and corporations with the promise that the EC would ensure ‘a non-discriminatory treatment of all corporations operating inside the common market’ (Andriessen, 1981a: 5). In return, the IBM made (minor) concessions in a settlement agreement and proposed, in good faith, to provide competitors with a technical description that was ‘sufficient to enable a competent professional skilled in the art to attach a product of his design to an IBM System/370 product’ (FT, 1984: 2). Moreover, IBM demonstrated its willingness to cooperate in *Esprit*, the programme designed by the EC to boost the development of the European electronics industry. John Opel, CEO of IBM said about the settlement: “This undertaking satisfies the Commission's desires and puts the matter behind us, without requiring us to make significant changes in how we do business". (Cheesright and De Jonquieres, 1984) Thereby, IBM kept the right to safeguard the information about the inner workings of its machines. Competitors believed, however, that this continued to enhance the dominance of the IBM's technical standards worldwide (FT, 1984: 2). The Commission warned the company that it might start up the legal processes at any time again. In fact, it did so right after the settlement to check whether IBM had withheld the source code of software packages.

4.8.2 Protecting the European Car Industry

The block exemption regulation on the selective distribution regime in the car industry in 1985 exemplifies that the protectionist and neomercantilist forces in certain industrial sectors were still going strong in the 1980s. The car manufacturing industry constituted one of the best protected sectors in Europe. Member States shielded their national champions from the logics of open competition. From the 1980s onwards, European producers faced increased competition from car manufacturers in the US, Japan, and later Korea. In the battle for supremacy in the Western European car market, they had difficulties in competing with the much cheaper imports. Member State safeguarded their indigenous car producers by imposing entry barriers for mostly Japanese importers. Exemplary are the Italian and French governments, which concluded bilateral agreements with Japan entailing a restriction on Japanese imports to their domestic car markets of 1% and 3% respectively (Seidenfuss and Kathawala, 2005). In response to the intense lobbying of national car producers and Member State governments, the Commission endorsed the view that the car sector needed special protection. It made use of the legislative powers derived from Regulation 17 (see Chapter 2), and adopted the Block Exemption Regulation 123/85 in 1985. The Regulation was limited to ten years and exempted exclusive distribution regimes of European car manufacturers with their car dealers from Article 81(1). Thereby, the EC level officially formalised national protectionist practices (Akbar, 2003: 4). The block exemption was established under the pretext of warranting quality services. However, in essence, car manufacturers could install exclusive and separate dealer distribution systems in order to reduce the exposure of brand names, and hence (foreign) competition. Japanese manufacturers such as *Nissan* and *Toyota* fiercely opposed the protectionists and discriminatory block exemption regulation. However, after they invested in their own exclusive distribution networks in Europe, the companies supported the continuation of the regulation in 1994 similar to their European producers (see Chapter 5). Only smaller car manufacturers, such as *Honda*, *Mitsubishi*, and *Mazda*, which lacked a similar distribution network, opposed its continuation (Ruigrok and Van Tulder, 1995: 278).

Nonetheless, despite the Regulation's protectionist character, the Commission used it to induce a transition towards a more free competition orientated regime. The Regulation imposed the condition that manufacturer's pre-tax car prices were not allowed to differ more than 12% in the long-term and not more than 18% for periods of less than a year between the Member States. As the lowest price would become the new benchmark for the 12% and 18% clause, the Commission hoped to stimulate enhanced price competition. This led to stern protests by European car manufacturers, who argued that losing revenue also meant losing the financial capacity to invest in R&D, which would have detrimental effects on their competitiveness vis-à-vis Japanese and US manufactures. They started a broad lobbying campaign to the Member State governments, in particular those of Britain, Germany, and France, and urged them to put pressure on the Commission. Based on Regulation 17, the Commission could adopt the regulation without consulting the EP or national governments (see Chapter 2). Mr. Anthony Fraser, director of the *UK Society of Motor Manufacturers and Traders*, nonetheless threatened to challenge the Commission at the ECJ because it was 'exceeding its legal powers as it imposed price controls on the EC's car manufacturing market (in FT, 1983: 1). This did not happen. Despite the conditions in place, car manufactures never complied with the 12% clause. In a report of the Commission in January 1991, five car manufactures were identified (i.e. *Ford*, *Honda*, Citroen, *Mazda*, and *Audi*), which revealed price differences that exceeded 40% in the time between January 1988 and January 1991 (FT, 1992e: 3).

To recapitulate, the centralisation of regulation in the car industry to Commission level implied that the scope for governments to protect their national champions from outside competition was on the demise.

4.9 The Lobbying of Transnational Elites

The transition phase of EC competition law enforcement of the early 1980s took place against the backdrop of the 'hands-off' approach of antitrust officials under the Reagan administration in the US (cf. Motta, 2004). In the late 1970s, US industry blamed the antitrust policy for the economic downturn in the US. Extensive business lobbying by corporate elite groups brought representatives of the Chicago School into the Federal Antitrust agencies and courts (see Chapter 2). Their seizure of power implied that the focus of antitrust enforcement would trim down narrow economic efficiency problems (Hwang, 2004: 116). This resulted in a period of antitrust retrenchment at US Federal level, relaxed merger controls, and an overall diminished scrutiny of antitrust analysis. This shift was accompanied by a significant reduction of staff and resources in the 1980s, especially at the level of the US Department of Justice (DoJ) (Litan and Shapiro, 2001: 20).

The Commission kept a close eye on the US competition administration, but still clearly distanced itself from the US *laissez-faire* approach in antitrust matters. Compared to the US, the Commission adopted a more activist approach. Consequently, business representatives started to complain on a broad scale about the ‘capricious’ administration of EC competition policy (FT, 1982: 14). In addition, US investors were increasingly worried as they were confronted with a more stringent regime in Europe than they were used to from the Department of Justice back home (Merritt, 1982b: 13). US business associations, such as *AmCham*, the American Chamber of Commerce, which had been located in Brussels since 1948, established a special EC Committee in 1977. It soon evolved as the most influential lobbying association that sought to influence EC policies towards transnational organisations (Green-Cowles, 1994: 298-300; Peterson *et al.*, 1995; Wilks and McGowan, 1996: 242). *AmCham* benefited from the fact that most lobbying activities of European industries had long been tied to the Member States only. In 1982, it set up a subcommittee on competition policy to systematically monitor and influence the development in this field (Green-Cowles, 1994: 298-300). As the voice of US corporate giants, it very much welcomed European integration as an effective lobbying platform.

With the enhanced presence of true European transnational companies from the 1970s onwards, the *European Round Table of Industrialists (ERT)* appeared on the political stage of the EC. Leading CEOs of transnational corporations, Wisse Dekker of *Philips*, Pehr Gyllenhammer of *Volvo*, and Umberto Agnelli of *Fiat* joined forces with another forty CEOs of leading transnational corporations, the so-called captains of European industry, and launched the ERT in 1983. The ERT became one of the major driving forces of the institutionalisation of neoliberal policies within the EC. The emergence of the ERT reflected the rise of transnational corporations in developed countries that started in the 1960s. The number of TNCs increased from 7,000 at the end of the 1960s to 40,000 at the end of the 1990s (Djelic and Kleiner, 2006: 293). Sales of foreign affiliates increased from US $ 3 trillion in 1980s to US $ 14 trillion today, exceeding the level of world trade (ibid). As a transnational elite forum of mostly European transnational corporations, the ERT held privileged access points to the Commission, in particular to the DGs for trade, internal market, and competition. The high-level elite character of the ERT seemed sufficient to establish a dialogue with the Commission and national politicians and to set the agenda for future economic integration in Europe (Van Apeldoorn, 2002). As Wilks and McGowan (1996: 242) sketched, ‘Fiat ‘wields more influence than many Italian ministries, Philips writes the briefs with which Dutch officials negotiate, and no Commission official will refuse to see the representatives of Daimler Benz. In fact, as a member of the ERT reported, the Commission was 'extremely open to the business community, which implied that whenever necessary, businessmen had access to Commissioners (in CEO, 2000).

Initially, the ERT did not advocate a radical neoliberal *laissez-faire* stance. In the mid-1980s, the ERT directed the bulk of its attention towards formulating policy solutions that bolster the competitiveness of European companies. According to Van Apeldoorn (2002), import-competing companies with a focus on the European market dominated the ERT, which favoured a 'Europrotectionist' stance: a borderless, integrated common market that served as a 'homebase to reach the scale necessary to resist the pressures from non-European competitors, mostly from the US and Japan' (ERT, 1983). The concern that 'international competitors were developing a lead over Europe in certain new technologies' stood central (ibid). In 1984, the ERT set up *Euroventures*, a pan-European venture capital organisation largely funded by the ERT member companies, which had the purpose of stimulating 'Europe's position as an independent source of innovation in a world dominated by the US and Japan' (Batchelor, 1988: 9). The target groups for the corporate venture were small and medium-sized corporations. The Euroventures project generally ended with ERT companies taking over smaller companies in order to control innovative ideas and products, which they lacked the time to develop themselves (ibid). The ERT gradually started to promote more globalist views in the late 1980s. In search of ever-larger and ever-freer markets on a worldwide scale, the export-orientated corporations of the ERT mostly, resolutely required to speed up neoliberal reforms and to create an uttermost business-friendly climate unhindered by public interferences and regulatory barriers (see Chapter 5). For this purpose, the ERT closely cooperated with other corporate lobby groups, such as *AmCham* and UNICE. They 'exchanged a lot of information, had joint meetings, and even published joint papers in order to strategically reinforce and supplement each others' positions' (in CEO, 1999a). As a general strategy, the collaboration was kept rather non-transparent, as it was 'more effective not to say everything together, but to have different people telling the institutions more or less the same thing' (ibid).

The ERT took a leading role in advocating a new course in the enforcement of EC competition laws from very early on. It established its own competition division, the working group on competition policy, which over the years regularly responded to Commission proposals, Green Papers, as well as initiating new policy proposals in its position papers. At the European Management Forum Symposium at Davos in 1983, Wisse Dekker, later chairman of the ERT (from 1988-1992), suggested the fundamental rewriting of the EC's competition rules (Andriessen, 1983a: 2). The Commission should reconsider the basis upon which it took decisions and to relax the stringency of competition rules (ibid). The quest for a relaxation of stringency concerned only interpretations with regard to the Commission's interpretation of dominant positions and vertical agreements, i.e. issues related to corporate size and market shares. The ERT clearly favoured the removal of anticompetitive practices, such as price fixing and market allocation cartels as well as state aid, to certain industries, in other words, all practices that led to fragmented markets and that directly inhibited their market access. Moreover, the free marketeers highlighted the link between competition rules and international trading relations. They urged the Commission to seek greater consistency in the application of competition laws in order to facilitate 'the emergence of transnational industrial structures that allow them to compete on a world wide scale' (ERT, 1983).

This early attempt by the ERT to influence the future course of competition laws was successful insofar that the Commission's DG IV introduced a new post, called *conseiller-auditeur*, which would make sure that the Commission heard a company's defence. The post was entrusted with the task to guarantee 'fairness and balance' in the investigative process of anticompetitive conduct and to directly advise the staff on the restrictive practices and abuse of dominant market positions. Thereby, business representatives were provided with an avenue to express their interests. Roland Mussard was appointed and thereby, for the first time an economist entered the DG IV's bastion of legal staff. In an interview, former Competition Commissioner Andriessen validated this move by arguing that the previous administrations had operated in an ivory tower without understanding the needs of business (Andriessen, 2006). To remedy the situation, Andriessen cooperated intensively with business associations, such as UNICE and the EVV, as well as with the legal community.[30] Concomitantly, new guidelines were introduced for making the enforcement of the rules more predictable for corporations.

In conclusion, in the early 1980s, the room for protectionist measures subsequently narrowed, marking the end of an era characterised by an easygoing attitude towards

[30] The speeches held by Commission officials at antitrust law conferences provide evidence. For example the conference of the American Bar Association on 6 November in 1981, the International Antitrust Law Conference in Oxford 16 September in 1983, and the Conference of the International Bar Association on 27 January in Brussels.

cooperative intercompany agreements. Whereas previously EC competition law enforcement was justified as an instrument to foster social cohesion and regional development, ‘new remedies’, such as the improvement of industrial efficiency, competitiveness and overall improved economic performance’ entered the vocabulary of the Commission’s DG IV (European Commission, 1987:13). As Chapter 5 will demonstrate, this course was vigorously followed after the adoption of the Single European Act (SEA) in the second half of the 1980s.

Chapter 5

The Ascendancy of Neoliberalism: EC Competition Law Enforcement from the SEA to the End of the Century

> *Europe will feel the squeeze if it lags behind in making itself a truly competitive place to do business. […] Europe will increasingly be in competition with developing countries which can offer attractive alternative bases for business [...] To be competitive in this shrinking world, Europe has to be flexible, drive out unnecessary costs, and be open in its trading relationships.*
>
> Keith Chapple, *AmCham* Chairman and Marketing Director of *Intel* (1998)

Introduction

From the mid-1980s onwards, the EC's project of creating an 'ever-closer Union' consecrated by the *Single European Act (SEA)* took shape in an ever more self-confident and more proactive manner. The neoliberal tenet promoted in the early 1980s, as a counter project to embedded liberalism and to neomercantilist, protectionist ideas, increasingly gained the discursive upper hand. Neoliberalism became 'the' general articulating ideology involving a wide-ranging array of concrete policy positions, which, in essence, promoted the superiority of free market forces and competition-driven mechanisms above state-regulated social and economic organisation. Academia echoed the prevailing neoliberal tenor. Academic pundits like Francis Fukuyama (1992) proclaimed *The End of History*, in which the victory of liberal democracy and neoliberal economic principles were praised as constituting the 'end point of mankind's ideological evolution' and the 'final form of human government' (1992: xiii).[31] In Europe, the deregulation of the market and the removal of 300 non-tariff trade barriers (NTBs) were the central mechanisms put in place to achieve the single market goal. Often, deregulation took shape as re-regulation at the supranational level, as freer markets tend to require more rules (cf. Vogel, 1996). By abolishing domestic market barriers, the SEA embodied a course of negative integration,

[31] This triggered a range of academic bestsellers. Samuel P. Huntington announced that primary conflicts will take place between civilisations rather than political ideologies, a statement which he further worked out in his book *The Clash of Civilizations and the Remaking of World Order* (1996). In his view in the post-Cold War world, the most important distinctions among peoples are not ideological, political, or economic, but cultural (1996: 21). In *Jihad vs. McWorld* (1992), Benjamin R. Barber took a similar stance by prophesising that despite the thwarting impact of 'Jihad' – symbolising Islamic and tribal fundamentalism, Western democracy and liberal market capitalism will eventually endure as the prevailing forms of societal organisation.

rather than positive integration in the form of a comprehensive formulation of market-creating policies – a trend had already started with the famous ruling of the ECJ in the Cassis de Dijon case in 1979. The constructive moment of neoliberalism found its expression in the accomplishment of the Maastricht Treaty of 1991 establishing the *European Union (EU)*. The enshrinement of the four freedoms of movement transformed the EU in a businessperson's Europe. Neoliberal ideas served as the predominant ideological framework, which led to the *Economic and Monetary Union (EMU)* decision for a common currency, giving primacy to the economic doctrine of monetarism. The *European System of Central Banks (ESCB)* pushed national central banking towards the maintenance of price stability. The establishment of the *European Central Bank (ECB)* in 1998, the ESCB's core institution, enshrined the supremacy of monetarism in the form of institutional independence, which reached an extent unparalleled to that of any other central bank. The Convergence Criteria of the Maastricht Treaty put a tight straitjacket on Member States' fiscal policies, which rendered Keynesian-orientated macroeconomic steering of aggregate demand and full employment a precarious endeavour.

One of the key agenda setters for the SEA was the corporate elite organised in the *European Round Table of Industrialists (ERT)*. In a series of reports, reform proposals, position papers, and newspaper interviews, it voiced its discontent with EC institutions and their failure 'to keep pace with the liberalisation which has transformed the global economy over the past 10 years' (Maucher in: FT, 1996f: 16). The Commission was utterly receptive to the ERT's initiatives. Boosted by deepening integration and confident in making use of its powers, the Commission surfaced as a major protagonist in orchestrating the neoliberal organisation of the common market. The salience of the Commission as a pivotal political actor grew with the increase of its workload. As the guardian of the treaties, it kept close track of the progress of the single market project and did not shy away from reproaching national governments for their lax implementation of EU rules. It proclaimed that the common market should become 'synonymous with rationalised production and stronger competition' (European Commission, 1988: 14).

The political momentum of the SEA, and the creation of the EU, spurred the salience of competition law enforcement as a mechanism to dismantling intra-European market barriers. As a commentator remarked 'competition policy is an idea whose time has come' (Jenny, 1998: 8). Neoliberal reasoning expanded in EC competition law enforcement. The subsequent appointment of two Anglo-Saxon neoliberal hardliners, Commissioner Peter Sutherland (1985-1989) and Sir Leon Brittan (1989-1993), changed the course of competition law enforcement. The broader macroeconomic welfare vision of EC competition law enforcement, which had survived until the end of the 1970s and early 1980s, gave way to enforcement objectives defined in terms of rigorous competition and more market-based economic considerations. Corresponding with the interests of the transnational business elite, the DG IV was committed to the view that fierce competition constitutes a catalysing force for the allocation of production factors in the most efficient and profitable way, and therefore, for increased social wealth. This raised considerable controversies with other DGs, which were more attached to neomercantilist and ordoliberal views on competition policy.

This chapter analyses in two parts the enforcement of competition law in the ascendancy of neoliberal ideas. It identifies and explains the political motives of the driving interest constellation that supported a neoliberal approach in competition control and traces the political struggle with opposing forces. The first part addresses developments after the SEA in 1985, and the second part after the Maastricht Treaty in 1993.

Part I: From 1985 Onwards – Neoliberal Wind in the Sails of European Integration

Under Jacques Delors, president of the Commission twice in the years 1985-1988 and 1989-1995, the idea of 'an ever closer union' received new impetus. With the Commission's *White Paper to the European Council on Completion of the Internal Market* of 14 June 1985, European integration was put back on track. It declared the ambitious goal of finalising the single market by 1992. The subsequent adoption of the Single European Act (SEA) in 1986 renewed constitutional status to the economic foundation of the Rome Treaty. Whereas the SEA was biased towards an overall trend of less state at all levels (Van Apeldoorn, 2002: 81), rather than a *laissez-faire* attitude towards the free-market mechanisms, the Commission adopted an activist, and interventionist role in the field of competition policy ambitiously fighting market-distorting behaviour, both in the private and public realm. Neoliberal in nature, competition policy was subordinated to the sole purpose of re-establishing competition as a major regulatory instrument to warrant a genuinely free-market economy. The incumbency of two committed free-marketeers from the Anglo-Saxon Member States, Ireland and the UK in the DG IV, Peter Sutherland (1984-1989) and Sir Leon Brittan (1989-1992), was crucial in this regard. Margaret Thatcher, who was keen to influence the allocation of British Commissioners to portfolios closest to her heart, sent off her cabinet minister Sir Leon Brittan, who was located at the neoliberal wing of the Conservative Party. Under the 'sheer evangelism' of Sutherland and Brittan (Wilks and McGowan, 1996: 164), the Commission was self-assured in making use of its powers. Regulation 17 was applied to its full potential against agreements that hampered European integration. Under the new Anglo-Saxon Commissioners, the DG IV engaged in the fierce prosecution of cartels. The previously dormant prohibition of state aid and the prohibition of the abuse of a dominant position were implemented with enhanced vigour. Similarly, for the first time, the Commission made use of the possibility to issue directions demanding the privatisation of national monopolies. Moreover, with the adoption of the Merger Regulation in 1989, the Commission acquired a new instrument to intervene in the common market structure. Overall, the Commission's activism led to more than 8,000 decisions a year in the early 1990s (FT, 1992f: 15).

5.1. The New Neoliberal Vigour in Competition Matters: Fighting State Aid and Busting Cartels

The embodiment of neoliberal ideas in the European Commission was manifested in the appointment of strong, neoliberal orientated EC Competition Commissioners. In the history of the DG IV, the Irishmen Peter Sutherland, a lawyer by origin, will probably be remembered as the most forceful and most controversial Competition Commissioner ever.[32] Young and charismatic, he devoted his tenure (1985-1989) to challenging national governments before the ECJ for acts of state aid granted to national industries. Whereas the Commission in previous decades merely interfered with private market actors, it started to challenge the industrial policies of Member State governments. In the mid-1980s, direct and indirect state aid was estimated to cover 3% of the EC's total GDP (McGowan, 1996). Member States generally granted state aid to stimulate the competitive advantage of so-called national champions, or to rescue private and public enterprises in economically difficult times, such as industries in the field of textiles, steel, and man-made fibres, which faced fierce outside competition (European Commission, 1987: 17-18). State aid could

[32] Anecdotal evidence suggests that his fellow Commissioners ascribed Sutherlands' pugnacious negotiation style to the fact that he was a committed rugby player who had broken his nose several times. His tactics were similar to running a rugby game: opening the game aggressively to shock and exhaust opponents in order to tie them in a more strategic approach later (FT, Dawkins, 1987a: 18).

take the form of straightforward grants and tax reductions, soft loans, equity participations or public procurement guarantees.

Under Competition Commissioner Sutherland, the toleration of state aid was declared incompatible with the single market and perceived as a Member State trade barrier that 'distorted competition more than before and ran counter to the objectives for 1992' (ibid, 1988: 15). By specifying the conditions for state aid, the Commission narrowed the leeway for public market interventions, and thereby acquired an enhanced grip on the course of the Member States' national industrial policies. The Commission's shift from a permissive to a prohibitive stance did not comprise state aid in all industries equally. For example, in the shipbuilding industry, state aid schemes were developed that would eventually phase out government subsidies in the long run. As the industry faced fierce competition from cheaper imports from Japan and South Korea, whose governments also subsidised their shipyards, the restructuring of the sector was made conditional on the adoption of a 'fairer' pricing policy of Japan and Korea (FT, 1989b). The Commission thereby delayed the reduction and eventual elimination of state aid in the shipbuilding sector until other countries stopped subsidising the sector. Whereas the shipbuilding sector was spared from having to compete more vigorously, the aviation sector underwent a stricter approach. The Commission scrutinised the bilateral cooperation agreements between different airline companies and in 1986 and 1987 charged as many as thirteen airlines of anticompetitive conduct, a measure that indirectly also addressed government subsidy of national airlines (Dimitrakopoulos, 2004: 114).

What started as a case-by-case approach developed into more detailed Commission inventories on the varieties of Member State state aid practices. Italy, Greece, and Ireland were marked as the 'bad boys' on almost all fronts. Italy, in particular, exhibited a level of state aid about five times as high as France, the UK, or Germany, and under circumstances the Commission considered unacceptable (FT, 1989a). In certain cases, the level of Italy's state aid outweighed that of direct taxes and in some extreme cases, the volume of state aid was even bigger than the entire budget deficit (ibid). In the UK, Prime Minister Thatcher welcomed the Commission's rigorous course of busting state aid: state aid to UK manufacturing companies dropped by over a third in the five years from 1981 to 1986 (ibid). As the overall prospect of receiving permission for state aid from the Commission was increasingly limited, the number of government notifications concerning state aid steadily declined after it had reached a peak in 1982 (European Commission, 1987: 17-18). When Commissioner Sir Leon Brittan, who later became Lord Brittan of Spennithorne, succeeded Commissioner Sutherland, the vigorous prosecution of state aid continued with even more scrutiny (cf. Smith, 1998; Cini, 2001). Similarly to Sutherland, Brittan came from a Member State (the UK), which had already privatised national monopolies in the early 1980s. Under his tenure, the French and British car manufacturers Renault and Rover even had to pay back their national subsidies to their governments.

In addition to state aid, the Commission also started to tackle state monopolies under Article 82 (TEC) prohibiting the abuse of market dominance. The DG IV endorsed directives under Article 86(3) (TEC), a hitherto virtually unused law, which allowed the Commission to issue directives in the field of public enterprises and state monopolies without the approval of the Council of Ministers. By means of so-called privatisation directives in the utility sectors, such as telecommunication networks, the aviation sector, rail transport, postal services, electricity, natural gas and water, the Commission entered a field, which used to be the prerequisite of the Member States (Pollack, 1998: 230-1; Nugent et al., 2001: 251). Commissioner Sutherland fully realised that this was ‘as close as you can get to touching the nerve of national sovereignty’ (FT, 1987a: 18). The Commission defended the view that state monopolies, similar to state aid, rendered whole industrial sectors inefficient (ibid). By the application of Article 90, the Commission steadfastly opened up previously closed sectors to competition. In order to sell the new strategy to the Member States and their constituencies, the Commission published estimates on the link between privatisation, generally referred to as liberalisation, and the creation of new jobs. In the telecommunication sector alone, up to 500,000 new jobs were expected by 2000, rising to 1.3 million by 2005 (Van Miert, 1998c: 4). However, while the privatisation of the telecommunication sector proceeded rapidly, in sectors that were more sensitive, such as electricity, the Commission was less successful. Here, enduring Member State opposition slowed down the privatisation efforts.

Similarly, the prosecution of cartels and other anticompetitive behaviour led to a stringency level unprecedented in EC competition law enforcement records. In 1987, on its own initiative, the Commission started up cartel investigations in 42 cases, which subsequently amounted to a total of 166 pending cases (European Commission, 1988: 55-56). In 334 other cases, a settlement was agreed between the companies involved without a formal decision (European Commission, 1987: 15). The fines imposed on those breaching EC competition laws reached previously unparalleled levels. For example, a price-fixing and market-sharing cartel involving 15 chemical companies was fined 60 million ecu in 1986 (ibid). Moreover, the era of structural crisis cartels was over. Exemptions to commercial intercompany agreements were only given if there was strong evidence that the agreement furthered technical progress and benefited economic integration across borders. This implied that exemptions were confined to intercompany cooperation in the field of R&D, the transfer of technologies, and innovation. Similarly, franchising agreements received the Commission's straightforward permission, as they were considered market making by nature, rather than market distorting. In particular, distribution networks were considered of great importance for the further integration of the common market (ibid). In 1983, the Commission permitted more than 83,000 cross-border franchising agreements (cf. European Commission, 1988). In order to exclude franchising contracts categorically from the obligation of notification, a block exemption regulation was adopted in 1988, blacklisting and whitelisting certain categories of franchising (ibid). The Commission applied a comparable rationale in the block exemption regulation with regard to joint ventures between companies that control less than 25% of a product market. Thereby, smaller competitors would be able to grow bigger. The Commission wanted to encourage cross-border joint ventures (The Economist, 1987: 65). This policy was exemplified in a joint manufacturing company set up by *AEI* and *Reyroll Parson*, which, despite its monopolistic position, received exemption in 1988, based on the Commission's arguments that its product innovations would benefit consumers (Carchedi, 2001: 128).

5.2 Centralising Merger Control:
The Adoption of the Pan-European Merger Regulation

One of the greatest achievements under Sutherland's leadership of the Commission was his contribution to the introduction of the Merger Regulation, which could subsequently be adopted under his successor, Brittan. After 16 years of long and arduous negotiations and a series of unsuccessful attempts dating back to 1973, 1982, 1984, and 1986, the Commission acquired the vigorous means to intervene in the corporate structure of the internal market. The adoption of the Merger Regulation significantly strengthened the authority of the Commission's antitrust division in terms of both visibility and prestige. Under Article 82, the Commission's powers were restricted to dealing with monopolistic situations only after they were created. With pan-European merger control, it could now intervene beforehand to prevent companies from building up dominant position by means of mergers.

Shortly after the adoption of the SEA, cross-border mergers with a Community-dimension became more frequent and geographically more extensive, involving heavy stock market activity. Viewed over time there were: 115 European cross-border mergers in 1982-83, 208 in 1984-85, 498 in 1988-89, and 622 in 1989-90 (Tsoukalis, 1993: 103). In West Germany alone, the number of mergers amounted to 802 in 1986. Although most of the mergers notified at the *Bundeskartellamt* in 1985 and 1986 concerned acquisitions of small and medium-sized enterprises, the biggest merger ever in the German history so far occurred in this period, i.e. the merger between *Daimler-Benz* and *AEG* (FT, Hermann, 1987: 8). Enhanced economic concentration and a temporary decline in US economic power, partly due to the stock market collapse in 1987, brought a comparative advantage to European companies vis-à-vis their US competitors (Freyer, 2006: 290).

The Commission took the enhanced merger activity and the adoption of the SEA as an occasion to relaunch the merger control regulation once more. In 1988, Peter Sutherland revised the much-cherished proposal of 1973 into a fully-fledged Merger Control Regulation. The draft proposal would have transferred exclusive competences to the Commission to control all mergers above a dual turnover threshold: 1) the combined annual turnover of the two companies must exceed ecu 1 billion; 2) the turnover of the smaller of the two companies must exceed ecu 50 million. Only concentrations with more than 75% of their combined sales in a single member state would be excluded from the Commission power and fall under the control of the national competition authority. Moreover, similarly to Regulation 17, it included a notification regime for mergers. After reviewing the notification, the Commission could accept the merger, prohibit it, or impose conditions, such as the divestiture of specific assets. Similarly to the previous attempts at a pan-European merger control, Sutherland's proposal also faced considerable opposition from both the business community and the Member State governments. The solid coalition between the corporate interests represented in the ERT, UNICE and the Commission explains why the Council adopted the Merger Regulation No. 4064/89 on 21 December 1989. Competition Commissioner Brittan celebrated the occasion as 'a historic breakthrough in the creation of a single market' (FT, 1989c).

As the adoption of the Regulation required unanimity by the Council, each Member State could insist on its own amendments. Commissioner Sutherland warned the Council that if it did not come up with 'adequate agreement' by the autumn, the Commission would simply start to review mergers under existing competition law (Dawkins, 1987b: 2). To demonstrate the seriousness of his warning, the Commission started to investigate the planned merger between Fiat and Alfa Romeo, and applied Article 81 to the Philip Morris case (ibid). The appeal by Philip Morris at the ECJ became an important landmark case. In 1987, the ECJ ruled that Article 81, prohibiting cartels and other anticompetitive business practices, could also apply to 'agreements between two or more companies that allowed one of the companies to obtain legal or *de facto* control over the other'. With this proactive ruling, the ECJ provided the Commission with a 'backdoor route' to deal with mergers (Pollack, 1998: 233-234). The Commission started to apply Article 81 to a range of high profile mergers such as the takeover of *British Caledonian* by *British Airways* and banned the takeover of *Irish Distillers* by *GC* and *C Brands* (Gillingham, 2003: 251). This move caused a climate of legal uncertainty for companies with intentions to merge and companies voluntarily started to notify their planned mergers to the Commission.

The growing jurisprudence eventually motivated the European business community to support the adoption of a supranational merger regulation. Initially, European business representatives feared that the new merger regulation would constrain their freedom to expand, in a time when US companies were seeking ever-larger mergers across the Atlantic (FT, Dawkins, 1987b: 2). Against the backdrop of the Reagan administration, where the Federal antitrust authorities no longer prohibited mergers, European-based business feared that the EC would move in the opposite direction and constrain the power of large corporations. However, whereas Commissioner Andriessen pushed for a merger regulation in the 1980s in order to prosecute concentrations with a detrimental effect on competition (Andriessen, 1983a: 13), Commissioner Sutherland assured the business community that the introduction of a Community-wide merger control would not be applied to inhibit economic concentration (European Commission, 1987). Sutherland used the single market project as a proxy to gain support for the long-delayed pan-European merger laws and argued: "Those who favour the completion of the internal market must logically favour a Community-wide regime." (FT, Cheesright, 1985: 3) Moreover, to take away the biggest concern of the business community, he assured: "We're not taking the line that bringing the big together is bad." (ibid)

Both the ERT and UNICE were closely involved in the drafting of a new version of the regulation. The ERT started to press for the creation of a 'level-playing field' that committed companies to one merger regime only, a metaphor borrowed from the language of team sports, which entered the Eurojargon in the late 1980s. It became synonymous with the creation of free play for market forces unhindered by public authorities. This resulted in the inclusion of a one-stop-shop rule for mergers, implying that once the Commission opens up a case, no other Member State authority could intervene. Moreover, it implied that the companies involved did not have to notify to any of the EC or EEA jurisdictions any more. The one-stop-shop rule created the desired legal certainty, and henceforth, a significant reduction in the negative externalities that came forth from the multi-jurisdictional overlap that emerges with merger notifications to five or six different competition authorities of EC Member States. In a declaration, UNICE further emphasised that merger control should be exercised on the basis of 'pre-defined, objective, economic and legal criteria' that genuinely facilitate cross-border mergers within the common market (European Commission, 1988: 25). In response to business concerns, a tight timetable was imposed on the Commission. The investigation phase should take no longer than one month, after which it could ban or clear a merger (phase one), or then decide to assess the situation with greater scrutiny for another four months, after which time it had to come up with a final verdict (phase two). Compared to the 1973 proposal, where the Commission envisaged an investigation time of a year, the new Regulation catered to the business community with wished-for speedy procedures.

In order to generate the necessary leverage power, the Commission also sought intensive contacts with the national business associations to assure their support (European Commission, 1988: 26). It contacted the *Conseil National du Patronat Français (CNPF)*, the representatives of the West Germany industry, the *Bundesverband der Industrie (BDI)* and the *Confederation of British Industry (CBI)* (ibid). In addition, the Commission asked the legal community to review and comment on the draft proposal. Most notably, the involvement of the *Consultative Committee of the Bars and Law Societies (CCBE)* was crucial in the preparatory phase (ibid). Of the 120 responses to the Commission's Green Paper that were made public on its website, the legal community was far more active in submitting its opinion than individual companies and business associations. When the Council negotiations started, European industry representatives started to feel bypassed and feared that the Ministers were moving the proposal into a direction that it would not agree with. Eventually, the national and transnational business organisations lobbied intensively, at national level, in favour of the introduction of pan-European merger rules (Pollack, 1998: 232). For example, the CBI feared that the Council would eventually settle on a watery text, which failed to include the one-stop shop for companies contemplating significant cross-border acquisitions or mergers. It urged the Member Governments to stick to the Commission's original proposal (Directorate General in the CBI in: FT, 1989e). German business associations also started a lobbying campaign, at government level, in favour of the new regulation and the one-stop-shop principle, as they could thereby escape the vigilance of the *Bundeskartellamt.* More generally, the pro-free market Financial Times strongly favoured the introduction of the Merger Regulation. The positions of the FT and Sir Leon Brittan hardly differed: this can be ascribed to the fact that Sir Leon's influential brother, Sir Samuel, worked as an economics commentator at this influential newspaper (Gillingham, 2003: 252).[33]

In the end, both the Commission and the business community had to make concessions. The draft regulation went through several changes in order to accommodate the 12 Member States. The German and British governments, in particular, both of countries with established antitrust authorities, consistently opposed the expansion of the Commission's powers. In contrast, the Belgium government, which enjoyed much less power to control mergers, strongly favoured the Commission having a larger say in the merger area. The turnover thresholds that required the Commission's involvement caused a major point of disagreement. The Council adopted the regulation only after these thresholds were raised considerably. Yet opinions diverged extensively. While the UK and Germany wanted to raise the turnover threshold to ten billion ecu, Belgium favoured a threshold less than two billion ecu (Kellaway, 1989). The final Merger Regulation stipulated that the Commission had exclusive competence over deals involving companies with a combined worldwide turnover of what today is equivalent to € 5 billion, or then each with more than € 250 million in sales in Europe, unless they each realised more than two thirds of their European turnover in one and the same country (Article 1). The Member States would handle all mergers below this turnover threshold. In an interview with the Financial Times, Wolfgang Kartte, the president of the *Bundeskartellamt* and adherent of ordoliberal ideas, explained that the German government only eventually agreed with the regulation because it was

[33] *The Financial Times* celebrated Sutherland's and Brittan's success in transforming competition policy into a positive force for creating and policing the emerging single market and portrayed the previous DG IV as dry legal theory not grounded in market realities (FT, 1992d: 22).

convinced that the number of cases for the EC Commission would be kept within reasonable limits. Yet, the *Bundeskartellamt* was overtly concerned that the Commission would gain too much power in the merger field. However, it thought it unrealistic that the Commission would become a leading competition authority in merger control, due to the constraints of personnel at the Commission's DG IV. At that time, the *Bundeskartellamt* employed 230 people, which is about twice as many as the DG IV (FT, Fisher, 1989: 3). Furthermore, in the perception of ordoliberals at the German *Bundeskartellamt*, the DG IV suffered, in critical cases, from the high politicisation of merger control and lacked political independence. Whether or not a merger was considered to lead to a dominant market position was not decided by the DG IV, but by the College of Commissioners, and all 17 Commissioners could exert political influence in their vote (Kartte, 1990 in: Wilks and McGowan: 265). Due to German intervention, a so-called German clause came to be included in Article 9 of the Regulation, which provided national competition authorities with the right to ask permission to intervene in a Community-level merger that fell under the exclusive competences of the Commission. The German authorities reminded the Commission of the principle of subsidiarity to guide the competence allocation (Wilks and McGowan, 1995: 266). Although the word subsidiarity was not mentioned, the German delegates succeeded to include their postulation. In hindsight, the Commission was reluctant to give away its newly acquired powers and rejected four of the first five requests of the *Bundeskartellamt* right away, i.e. in the merger of *Varta-Bosch*, *Siemens-Phillips*, *Alcatel-AEG*, and *Mannesmann-Hoesch* (ibid), which it sought to block, although without success.

The Member States were split into two camps in the discussion centred on the inclusion of strict competition criteria for the assessment versus industrial and social concerns. While the British and the German government favoured strictly competition-oriented criteria in the assessment of mergers, the French urged the inclusion of social and industrial policies. The final version resembled more the British and German position, which laid emphasis on the strict application of competition rules. However, French opposition managed to build in a loophole. Article 2(1) stipulates that the Commission can also balance its decisions against the 'development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition'. Nonetheless, the central measure of the Merger Regulation was the 'dominance test' enshrined in Article 2(2). Accordingly, the yardstick for prohibition was formed by whether or not the concentration ‘created or strengthened market dominance whereby effective competition would be significantly impeded in the common market or in a substantial part of it’. The emphasis on ‘dominance’ as a point of reference implied that the particular ordoliberal essence of Article 82 lived on in the EC Merger Regulation. Nonetheless, Merger Regulation contrasts markedly to the competition laws of the Rome Treaty, of which many required testing a case against the particular notion of whether ‘Community interest’ would be harmed, a wording that allowed aspects such as wider societal interest, labour, or environmental concerns to be taken into account. The Dominance Test implied that a company’s market shares provided the central decisional ground for judging a merger. Mergers and acquisitions leading to a market structure in which a dominant position was strengthened were suspect. By laying emphasis on market shares as the legal basis in the assessment of proposed mergers, the Merger Regulation significantly narrowed the decisional ground to competition criteria only. For mergers falling under the new regulation this was not obstructive. The actual enforcement practice of the coming years revealed that the Merger Regulation was meant to facilitate economic concentrations, and not to block them. The next section demonstrates that the Commission approved the vast majority of mergers. Only in 1991, did the Commission prohibit a merger for the first time on ‘pure competition grounds’.

Part II: The 1990s – The ‘Neoliberalisation’ of Competition Law Enforcement

EU competition law enforcement during the 1990s needs to be placed in the broader political context. The amalgamation of neoliberalism into the European integration project was constituent to the spread of neoliberal ideas elsewhere in the world. In the course of the 1990s, competition policy became ever more prominent as a tool for the successful management of economic politics, not only within the EU, but also increasingly beyond. With the end of the Cold War, the collapse of socialist regimes in Eastern Europe and the downfall of the Soviet Regime, a range of new countries entered a period of transition and institutional ‘restructuring’ towards a free-market economy. Most of the Western media and leading politicians corroborated the failure of centrally planned socialist economies. In this vein, the EU ascended to become one of the major protagonists in guiding the *Central and Eastern European Countries (CEECs)* through the transition to free-market capitalism. Alongside the institution of market freedoms and ownership rights, competition policy achieved high agenda status. Competition policy was promoted as a key instrument for introducing the logic of open competition to previously government-controlled economies where monopolies and centralised price fixing constituted the norm. Supported by financial instruments such as the PHARE Programme and a range of further political and economic co-operation agreements, the Commission considerably expanded the geographical scope of influence. It fulfilled a key role in gearing the transposition of EU legislation into national laws – one of the key premises for CEECs to participate in the common market project. In a vast process of privatisation and demonopolisation in these countries, economic activities were subsequently dismantled from the state and competition laws adopted.

The geographical scope of EC competition rules expanded substantially with the fourth enlargement of Austria, Finland, and Sweden, and the creation of the *European Economic Area (EEA)* with Norway, Iceland, and Liechtenstein in 1992. Moreover, in response to heightened prominence of cross-border competition cases and the resulting complaints by TNCs on the heightened transaction costs, the Commission engaged in a series of bilateral agreements with competition agencies from non-EU states, of which the transatlantic cooperation agreements evolved into the most far-reaching of all (see Chapter 6). In the spirit of optimism of the 1990s, the Commission evolved as a powerful pro-market orientated force on a global scale. Commission embarked on its most ambitious endeavour: 'crafting' a common understanding of the competition principles around the world, by establishing a multilateral competition agreement in the WTO setting as a means to break down barriers that affect cross-border trade (see Chapter 7). As the next section demonstrates, all these developments are inherently linked to the 'competition for competitiveness' discourse that is in the interests of the corporate elite in charge of transnational corporations.

5.3 The 'Competition for Competitiveness' Fundamentalism of the Transnational Business Elite

In the early 1990s, Europe was overshadowed by a small economic recession, while the US renewed its hegemonic position in the world market (Freyer, 2006: 290). European companies were losing market shares in the world export of manufactured goods, especially in the export of high technology products. The ERT deplored the bad performance and the lack of competitiveness in the European economy. Due to a range of institutional features, it considered Europe not attractive enough to attract foreign direct investment flows. It argued that profit margins and the return on capital were 40% lower in Europe compared to Japan and the US (FT, 1995c: 3). The ERT identified high tax levels, high social costs on industry, and high energy costs as reasons for this difference. Whereas European tax levels of 46% of GDP were argued to compare to 31% in the US and 34% in Japan and energy costs to be 30% higher, social costs on industry stemming from the contracts between social partners and from environmental legislation were declared 'exorbitant' (FT, 1994b: 2). The ERT's criticism sometimes went even a step further and addressed the 'European attitude' in its totality.[34]

The ERT discursively linked the imperative of generating higher economic growth, prosperity, and competitiveness, with EU competition policy. It declared that unfettered competition was the backbone of spurring economic growth. It suggested a whole string of neoliberal measures, such as a broad-based deregulation of the market for goods, services, and capital – flexibility, improved education and training, as well as the rolling back of the public sector and its 'entrenched' bureaucracy (Maucher in: FT, 1996f: 16). It pushed for the liberalisation and privatisation of allegedly high-cost national energy, telecommunications, and transport systems and the abolition of subsidies to loss-making companies (ibid). It praised the approach of Anglo-Saxon Member States as a paragon for the rest of Europe and suggested the Irish business-friendly fiscal policy and the British post-Thatcherite flexible labour markets as a yardstick for other Member State governments (ibid). The ERT established the *Competitiveness Working Group* to address the issue of competitiveness, which published a large number of reports and policy recommendations (ERT, 1996a, 1998; Tabaksblat, 2000; ERT, 2001a, 2001b, 2002b, 2003). It suggested imposing a C*ommissioner for Competitiveness* at Commission level, with the task of scrutinising EU legislation for its aptness to industrial interests, and preventing all kinds of directives that might harm the interests of large corporations attempting to compete on a global scale (FT, 1994b: 2). Furthermore, governments at Member State level should be subject to a benchmarking system with clearly measurable

[34] The ERT complained about the social attitudes of the European management model, which it saw as losing out in terms of flexibility and economic effectiveness. *Nestlé* Chairman Helmut Maucher declared the mentality of Europe to be one of a dying society and dominated by hedonism, narcissism and the unwillingness to take risks (in FT, 1996f: 16). In the centre of the ERT's criticism were, in particular, the lack of a vigorous risk-taking attitude originating from a tradition of semi-regulated markets, the lack of a teamwork culture, and a worldview that seeks to adapt to every new country and culture with a tailor-made treatment (Bloom *et al.*, 1994).

targets that allowed for a regular assessment of European competitiveness against that of the US and Japan (cf. ERT, 1996a).

The ERT pushed for the reformation of competition law procedures and principles. It in particular suggested to the Commission ‘to be a priori more ready to define the world market as the relevant geographical market when assessing mergers’ and ‘to examine barriers to entry from a worldwide perspective’ (ERT, 2000). Moreover, it suggested interpreting competition in a way ‘that is more in line with economic analysis’, including a more economics-based assessment and the adoption of new economic concepts, such as the theory of contestable markets and efficiency considerations (Jenny, 2000: 21). In other words, the transnational business elite of the ERT envisaged a Darwinian logic of the survival of the fittest, building on a notion of ‘market justice’ according to which anticompetitive practices were considered ‘unfair’ to others. Eventually, the number of those winning from the removal of private market barriers and enhanced exposure to market competition was expected to offset the damage suffered by those losing from it. A range of Commission officials embodied this fierce neoliberal tone of the transnational corporate elite and suggested major reforms. Competition Commissioners Brittan and his predecessor Sutherland are cases in point. Under their tenures, the DG Competition, and its *Merger Task Force (MTF)* in particular, held an open-door policy towards business representatives. It strongly encouraged companies and their legal advisors to discuss their proposals 'early and often' (FT, 1992c: 10). According to a study by Neven et al. (1998) on the contact between company representatives and Commission officials, only a small share (13%) proceeded by written or phone contact (Neven *et al.*, 1998: 137). The vast majority met with high-level staff, i.e. the Head of the Unit (78,4%) and the Director (55.4%) of the different units within DG Competition (ibid: 138). In fact the larger the company, the more high-level the contact was. In the run up to formal decisions in competition cases, person-to-person contact became more frequent (ibid: 137-8). In addition to regular case-by-case contact, the elite network of the ERT also succeeded in influencing the course of EU competition policy more generally.

I very much believe in competition, but not as a religion. You must observe a proper balance. [...] You can't just look at your competition textbook and say: That has to be No, and that's it.

Karel van Miert, Former Competition Commissioner (FT, 1993: 29)

5.4 Counterforces to the Neoliberal Trend in Competition Matters

Political forces at the supranational level, as well as at Member State level, opposed the staunch neoliberal programme that started to take shape within the Community from the mid-1980s onwards. Within the Commission, the strong presidency of Jacques Delors counterbalanced the neoliberal course. The neoliberal camp and the pro-industrial policy camp internally divided Commission officials on ideological grounds. Delors envisaged a Community distinguished by enhanced social equality and supranational social policies. In the White Paper on *Growth, Competitiveness, Employment* of 1993, which was issued shortly after the ratification of the Treaty on the European Union, Delors brought the issue of unemployment, and social and environmental questions to the fore (European Commission, 1993). In marked contrast to the neoliberal tone on labour market flexibility, adopted by the ERT and some fellow Commissioners, he included a Social Chapter that sought to establish minimum standards in EU level social and labour policy (Maucher in: FT, 1996f: 16). Even though competition policy was not mentioned in the White Paper, there was much emphasis on industrial policy as a stimulant of economic growth and the creation of employment. Coming from the French *dirigiste* tradition of active government intervention, Delors proposed breathing new life into a sector-based industrial policy and protecting SMEs (Wilks and McGowan: 256). His views on a proactive industrial policy and on adopting social and employment policies as flanking devices to the internal market programme caused considerable tensions with the neoliberal-orientated Competition Commissioners Peter Sutherland and Sir Leon Brittan. Frictions were commonplace. Delors fiercely criticised the staunch free-market approach in competition control, which neglected employment considerations. His adversarial relationship with Commissioner Brittan in these matters reached the status of a public secret (Pond, 2002: 31; Gillingham, 2003: 252).

At the end of Sutherland's tenure, the politically influential *Bundeskartellamt* and the Ministry of Economics, then headed by Helmut Haussmann, started a lobbying campaign in favour of the imposition of the German Martin Bangemann as a political counterweight to the neoliberal course, which had started with Sutherland (FT, Dawkins, 1988: 20). The

Bundeskartellamt had a stark interest in reviving the more moderate liberal approach of the German ordoliberal tradition at the DG IV. Bangemann, lawyer by origin and former German Economics Minister (1984-1988), as well as Member of the European Parliament (MEP) from 1973 to 1984, sympathised with ordoliberal ideas and an active European industrial policy (cf. FT, 1992a). The endeavours to reinstall a German at DG IV failed and the Council appointed 'Thatcherite' Brittan to the post. Bangemann became Commissioner for Industry and Internal Market from 1989 to 1999. Commissioner Brittan subsequently replaced the remaining ordoliberal top-grade competition officials from Germany with disciples of the neoliberal ideology. For example, Manfred Caspari started his career in DG IV as *Chef de Cabinet* under Commissioner Hans von der Gröben in 1963. After a few other high-ranging posts in the DG Internal Market, he became Director General of Competition in 1981. When he had to leave the Commission in 1989, the leading international newspaper *The Financial Times* reporting on this change of personnel, wrote that 'the private fiefdom of Germany' had came to an end (FT, 1989d). The views of Brittan and his new staff at the DG IV clashed on a regular basis with the DG III of Industrial Policy. In an interview in *The Financial Times*, Bangemann said that he was very angry about academics in the DG IV, mostly lawyers by profession, who have no idea of the reality of economic life' (FT, 1992a). Also officials from the Regional Policy DG regularly complained about the views held by competition officials (cf. Menon and Hayward, 1996; Wishlade, 1993). The neoliberal hardliners were nicknamed 'ayatollahs' or 'gurus', as a way to refer to their 'arrogance and unshakable faith in their beliefs' in the rationality of the market (Guerrera, 2002b).

At the end of Commissioner Brittan's tenure in December 1992, the French, Italian, and Spanish governments lobbied in favour of reshuffling the competition portfolio. What these governments had in common was a total reluctance to liberalise national monopolies in sensitive sectors, such as energy and telecommunication services and infrastructures. In France, above all, neoliberal ideas did not nestle easily. In the French tradition of *étatisme* and *dirigisme,* political and corporate elites revealed a deep mistrust towards the functioning free-market mechanisms. With the view that there was nothing wrong with hedging large nationalised industrial sectors, the French government refused to liberalise its large state-owned sectors or to cut down on state aid to their national champions. In the few privatisation projects undertaken in France until the early 1990s, the control of either the state or state-controlled banks endured (FT, 1993g: 58). This led to a highly tense relationship between the French government and the DG Competition under the leadership of the Anglo-Saxon Commissioners Sutherland and Brittan. Consequently, the socialist government of Francois Mitterrand urged the Council to appoint a Commissioner that was more inclined to a French-style industrial approach. The request to change direction in the field of competition control achieved heightened prominence with the French government announcement to hold a referendum on the Maastricht Treaty in 1992, shortly after the Danish 'No' in the same year. Aware of the fact that a French Competition Commissioner would probably face difficulties in generating sufficient political backing by the other Member governments, such as those of the Anglo-Saxon countries and Germany, the French government endorsed Karel van Miert as the appropriate candidate for the post. Karel van Miert was a Flemish socialist and served as Commissioner of the DG Transport and Environment Policy from 1989 to 1993. Member States cherished the hope that van Miert would shelve the plans to liberalise the national monopolies in sectors such as energy, telecommunication, and postal services. Publicly controlled and/or publicly owned *France Telecom*, *EDF*, and *Gaz de France*, and also *Air France* therefore supported the imposition of van Miert as Competition Commissioner (Van Miert, 2000: 48, 56). Moreover, Van Miert's partisan roots, and his commitment to redirect EU competition law enforcement towards more social and industrial policy objectives, rendered him a close ally of President Delors, and hence, assured him of French support.

With the appointment of the Flemish Commissioner Karel van Miert to the competition portfolio, counter-hegemonic forces to the neoliberal project temporarily thrived. Van Miert rearticulated the long-standing ordoliberal discourse, which had prevailed for so long at the DG Competition and which seemed to have vanished with the neoliberal enforcement practice that started with the Commissioner Sutherland and Brittan. In an interview, van Miert declared that 'from a philosophical point of view, he will choose for a different attitude on how to cope with the rules' (FT, 1993g: 12). Rather than a stringent 'competition-only' focus and efficient production as the sole guiding principle, he announced that he would 'broaden the scope of competition policy' in line with the German ordoliberal approach and adjust competition policy to economic, political, social, and environmental goals by 'looking at the whole picture' (FT, 1993d: 1; 1993g: 12). He underlined the ordoliberal view that competition laws served to safeguard a pluralistic democracy, which could not survive a strong concentration of economic power (in Jebsen and Stevens, 1996). He emphasised that a strong pro-market interventionist stance, rather than less state intervention, was needed to enhance industrial competitiveness (in FT, 1993d: 1). The state should especially continue to play a role in big infrastructure programmes ’where private investors do not want to invest’ (FT, 1994d: 2). Also in the accession negotiations with the candidate Member States, Van Miert employed a more moderate tone than his predecessors did. He steadfastly applied ordoliberal reasoning and argued that talking the language of ‘Erhard-style social market economy made it easier to convince the candidate Member States of the value of having competition laws than the language of the Chicago School’ (Van Miert, 1998d: 2). Nevertheless, over time, the ‘old-style socialist’ – as *The Financial Times* used to call van Miert – started to adopt more free-market oriented, neoliberal views. In his previous office, he had navigated EU transport policy towards enhanced liberalisation and open competition, and thus, demonstrated a willingness to tackle government-run industries. Enforcement records only offer a partial picture and are not entirely conclusive as an indicator for the type of reasoning applied in the enforcement of competition laws. However, when placed side by side, the record of merger and state aid cases from van Miert’s tenure in 1993 seems equally stringent to that of Brittan in 1992: the ratios were 58:60 for mergers and 435:502 for state aid, respectively (FT, 1994e: 2).

The following section addresses the political conflicts underpinning the Commission’s stringency with which it enforced EU competition laws. It demonstrates how the interests of the transnational corporate elite took shape and how their policy requests were gradually implemented. For this purpose, it is necessary to understand the structural context that transformed the common market situation and how these informed the interests of large transnational corporations with regard to competition policy.

5.5 Economic Integration Taking Shape:Waves of Mergers Rolling Over Europe in the 1990s

5.5.1 Taking Stock of Merger Activity

The early 1990s marked the beginning of an accelerated pace in mergers and acquisitions. Several indicators illustrate the phenomenon. In the time between 1980 and 1999 the total number of all M&A-activity (cross-border and domestic) grew worldwide at 42% per year (UNCTAD, 2000: 10). In aggregated value terms, global merger activity rose hundredfold in this period, mostly affecting the industries of telecommunications, pharmaceuticals, media, automotives, energy, utilities, defence, food retail, and financial services (Oram, 2003). In particular, the mid-1990s indicated a marked increase of merger activity, reaching a peak in 2000, in terms of absolute number of mergers. In terms of volume, mergers increased from about US$ 0.5 trillion in the early 1990s to US$ 3.5 trillion in 2000, while about a third concerned cross-border mergers (Bannerman, 2002: 3). Assessed on the *Foreign Direct Investment (FDI)* flows, mergers and acquisitions formed the majority part, exceeding the total share of greenfield investments (investments in the form of the creation of new assets by a foreign investor in a host country). In the industrialised world, the share of M&A activity in total FDI flows was estimated to account for 87% during the 1990s (UNCTAD, 2000: 10). In 1997, transnational corporations (TNCs) invested US$ 1,400 billion in foreign affiliates, which accounts for a fifth of the total global capital investment. In addition, companies from the developing world increasingly became takeover targets. In the late 1990s, for the first time in history, the principal 'consuming' companies of M&As in developing countries were TNCs originating from the EU, accounting for more than two fifths of all cross-border concentrations (ibid: 16).

In the past, mergers were characterised by larger companies 'eating' smaller ones. The late 1990s were rolled over by a wave of mergers of similar-sized companies, including successful global players and touching on virtually every industry. This is generally counted as the fifth big wave of mergers in history (cf. Carrol, 2002; Gaughan, 2002: 23-56), and it exemplified significant transnational dimensions. Notable are the mega-mergers between *Vodafone* and *Airtouch-Mannesmann*, and the *AOL-Time Warner* merger in 2000, which concerned respective transactions of US$ 190 and 166 billion, which compares to the GDP of a middle-sized industrial country like Portugal, with about US$ 120 billion (Budzinski, 2002: 2). The (hostile) takeover of *Mannesmann* by *Vodafone* entered merger history as the biggest merger ever. TNCs grew in number and displayed a high degree of economic power concentration. Today, the aggregate annual income of the largest TNCs surpasses the level of GDP of most countries in the world. Although TNCs differ in many respects, the sectors in which they operate are generally 'limited to the world economy's most dynamic sectors, including electronic products, chemicals, automobiles, drugs, machinery and banking and telecommunications' (Went, 2002: 100). More than 70% of all M&As involved companies of the same industrial sector, i.e. horizontal mergers, but also vertical concentrations involving companies along the production chain were also on the increase (UNCTAD, 2000: 10). The food industry displayed a particular high level of M&A activity, i.e. in with transnational corporations such as *Unilever*, *Nestlé* or *BSN* growing ever larger (Gillingham, 2003: 453). After the 2000 peak, concentration activity slowed down slightly. Yet, levels of concentration activity stayed comparatively high. The bursting of the 'dot.com' bubble was held responsible for the slowdown. However, one is tempted to argue that after the high tide of M&A activity, the takeover market did not leave much to acquire. In addition to obvious concentration developments resulting from M&As, various forms of commercial intercompany agreements and strategic alliances, such as partnerships, joint ventures, business consortia and alike proliferated too (Goddard, 2003: 438). The degree of corporate enmeshment remains opaque. Most intercompany agreements and intra-company trade lines are not public, and fall under the confidentiality of the involved companies. Such forms of economic integration are more commonplace than M&As and highly complex in nature. Furthermore, TNCs are marked by high rates of intra-firm trade. Estimates suggest that the first couple of thousands of TNCs make up for half of the total aggregate global trade flows, whereas one third is generally assumed to be linked to intra-firm trade only (Vernon, 1998: 10).

5.5.2 Understanding the Causes and Consequences

The accelerated pace of merger activity on a global scale was due to the combined impact of developments in the technology and communication industry, especially in the ICT-sector, and ongoing trade liberalisation, ever more mobile and unrestricted capital flows, as well as deregulation and public utility sector privatisation. Moreover, against the backdrop of historic events surrounding the dissolution of the Soviet regime, and the transition from centrally planned economies towards capitalist market economies in Central and Eastern Europe, the market for corporate takeovers achieved unparalleled dimensions. Within Europe, the bulk of merger activity was inherently linked to the fundamental reconfiguration of several national markets into one giant common market, which created the prerequisites to transnationalise, to expand in size with increased velocity, and hence, to be more globally competitive. The progression of the single market project, the establishment of the EMU and the prospect of a common currency significantly changed market conditions. The decision for the euro eliminated exchange rate fluctuations, which significantly reduced transaction costs for cross-border business deals of all sorts. As indicated above, concentration activity increased significantly after the adoption of the euro. Whereas, in the early 1990s, most concentrations took place between countries with a geographical or cultural proximity, i.e. between the UK and Ireland, the Scandinavian countries, Germany and the Netherlands, Spain, Portugal, and France, or France, Belgium and Germany (Martinez Torre-Enciso and Bilbao Garcia, 1996), with the introduction of the euro and enhanced market integration, this played less of a role. Another development, which should not be underestimated, is the fact that competition in the common market increased, which forced many industries to restructure their production and seek synergy effects, such as economies of scale and scope, through mergers. On top of that, the phenomenon of intensified concentration activity in the form of merger waves often triggers a self-perpetuating mechanism: the more economic power becomes concentrated, the more onerous it becomes for smaller competitors to keep up, and the more the option of a merger becomes the only viable solution left for corporate survival. Jumping on the merger bandwagon can become a necessity to avoid so-called ‘fire sales’, i.e. cheap acquisitions of companies in dire straights. Moreover, in the climate of merger waves, CEOs also ‘try increasingly daring and complex transaction combinations’ (Draghi, 2003: 10-11). Shockwaves created by enhanced concentrations may eventually result in the oligopolisation or monopolisation of market power – at the expense of competition and market diversity.

With the increase of cross-border merger activity in Europe, similarly to the 1960s, the share of mergers revealing a transatlantic dimension was significant. In the race for market dominance, US companies tried to get a foothold in the common market not only by mergers and acquisitions, but also by the conclusion of different forms of cooperative intercompany arrangements, such as alliances, joint ventures, distribution and supplier agreements, cross licensing of intellectual property, and franchising. As illustrated in previous chapters, since the 1960s the influx of US companies into European markets had constituted an ongoing phenomenon. However, with the rapid pace of European integration in the early 1990s, the expansion of US corporations into Europe achieved new dimensions. In 1990, US investment in Europe accounted for half the total earnings of US companies, which held assets of more than US$ 175 billion in Europe – close to half the total of US overseas foreign direct investment at that time (The Economist, 1990: 23). In 1994, more than a third of all mergers involved a company from across the Atlantic (36% and US$ 21.8 in value) (Martinez Torre-Enciso and Bilbao Garcia, 1996: 7). Of the 1950 notifications of large transnational mergers reviewed by the Commission during the period from 1990 to 2002, 435 transactions involved at least one US company (Schaub, 2002b: 3). In 1999, for the first time, the number of concentrations in the EU exceeded that in the US, which indicated that large-scale M&A activity was no longer confined to the US market only. Moreover, the increased number of merger cases at the Commission's desk prompted a revitalised judicial activism, which contributed to the complexity and the subsequent refinement of the merger control procedure.

The fundamental changes in the corporate governance regimes and enhanced stock market activity since the 1980s constitute another important aspect in the emergence of the 1990s merger wave (cf. Holmstrom and Kaplan, 2001). The progressive importance of stock market capitalisation as means for corporate finance in addition to, or instead of, traditional bank loans, facilitated a growing 'market of corporate control'. Companies were bought and sold like other commodities, epitomising the commodification of corporate control (cf. Höpner and Jackson, 2001; Horn, 2004). Mergers and acquisitions provided a welcome opportunity to fast track such market consolidation and control tangible and intangible assets. Monetary indicators, such as shareholder value maximisation, surplus value, and after tax yields became primary corporate objectives and takeover decisions became ever more disciplined by the influence of capital markets (cf. Lütz, 2000). The increased presence of hedge funds and private equity funds further enhanced the primacy of shareholders in both concentration and deconcentration activities. In this regard, it is worth mentioning that the use of M&As for generating rapid liquidity did not lead to the anticipated positive results in terms of 'real' economic effects such as profits and productivity' (UNCTAD, 2000: 12).

Traditionally, the strong shareholder value culture of the Anglo-Saxon world involved higher levels of M&A activity. On the Continent, especially in coordinated market economies, such as Germany, hostile takeover bids used to be relatively seldom. More protective corporate government regimes account for this, such as large block holders and relatively limited rights for minority shareholders, as well as lower rates of return (cf. Hassel and Beyer, 2001). Moreover, in a system in which *Hausbanken* form stable sources of long-term funds for industries, the market for corporate control tends to be much weaker. What used to be a prerequisite of the Anglo-Saxon variety of capitalism, however, increasingly transferred to the coordinated market economies of the Continent. Financial investment institutions seeking short-term capital gains in the equity market were increasingly involved in leveraged buyouts and predatory bidding for shares. Today M&A activity strongly correlates with booming stock markets, with the bulk of it taking place against the background of raising stock prices signalling higher than normal profits (Mueller, 1997: 664). This picture is confirmed by UNCTAD statistics: in the time between 1980 to 1999 less than 3% of the total number of cross-border M&As can be classified as true mergers, if defined in terms of a mutual consent of executive directors. The vast majority of transactions were acquisitions, either by purchasing the majority of shares or assets of a corporation. A third of all acquisitions in this time period were full acquisitions (UNCTAD, 2000: 10). Minority acquisition accounted for a fifth in developed and a third in developing countries. In 5% of the total value of M&A activity, the acquisitions were of a hostile nature (ibid), i.e. shareholders acquiring the stocks of a company against the wish of company boards.

The bulk of takeover activity in Europe was concentrated in the UK and displayed a strong transatlantic dimension. In 1994, a third of all merger activity in Europe involved British companies: it concerned 854 of a total of 2,933 deals with a corresponding volume of US$ 32.3 billion of a total of US$ 103,8 billion (Martinez Torre-Enciso and Bilbao Garcia, 1996: 281; Ietto-Gillies *et al.*, 2000). The strong presence of US financial investors in the City provided not only the necessary mobile capital, but also introduced new financial products for ‘lending, leasing, hedging and stripping’ (Gillingham, 2003: 453-454). The assets of US companies in the UK alone equal that invested in Asian, Latin American, and Middle Eastern countries combined. The corporate governance regime of the UK rendered companies much more vulnerable to predatory takeovers, creating a situation in which British companies ended up being taken-over by foreign capital, while they themselves could not easily expand elsewhere in Europe. As rumour has it, alongside entrenched lack of sympathy, particularly the ‘aggressive takeovers by French nationalised companies proved especially irritating to the British’ (FT, 1991b: 14).

5.5.3 The Commission’s Role in Controlling Mergers

The Merger Regulation of 1989 came into effect in 1990. As the number of mergers requiring Commission review increased with every year, the Commission acquired a forceful means to intervene in the internal market structure. In the years after the introduction of the Merger Regulation, the Commission ruled in about 50 high-profile mergers a year. There were 72 cases in 1997, and by 1999, the number had reached almost 300. Enforcement statistics reveal that the Commission was overtly permissive towards market concentration and predisposed towards the expansionary interests of large market players. From 1990 to 1992, the Commission hardly ever came across an anticompetitive merger. Of the 136 notifications that were filed at the Commission's Merger Task Force, more than 100 planned mergers were permitted after one month of investigation (phase one). Ten of the notified mergers underwent a more detailed four month lasting investigation (phase two). Eventually, two were permitted, six permitted after concessions were made to modify the proposal, while the other cases were withdrawn during the process. In 1994, the Commission only scrutinised six mergers in detail from a total number of 95. When assessing the enforcement practice over a longer period, the approach remained lenient. Of the 3558 merger cases that the Commission decided upon in the time from 21 September 1990 to 31 December 2007 (excluding the 110 merger that have withdrawn in both phase one and phase two), only 20 have been prohibited (European Commission, 2007). More than 95% of all merges were directly approved, and of the 5% of the cases that required further investigation, only 1% were eventually prohibited (ibid). More than 90% of the cases were settled within one month after notification (see also Resch, 2005: 19).

Neither the neoliberal Commissioner Brittan, nor the 'old-style socialist' Commissioner van Miert problematised the concentration of economic power through mergers and acquisitions. Brittan held the view that competition policy should be devoted to consumer interests only – a view that he disseminated in more than 400 speeches delivered during his four years in office (Gillingham, 2003: 252). In his opinion, as long as a merger was beneficial to consumers (in terms of expected lower prices), there was no reason to block it. Similarly, van Miert was firmly convinced that the EU had 'to accept the trend for more mergers' (Van Miert, 1999). In fact, when comparing the DG Competition's decision records under Brittan and Van Miert, there were roughly as many positive and negative decisions under both Commissioners (FT, 1994e: 2).

The Commission was generally highly receptive to the interests of CEOs and chairpersons of large transnational corporations. Eventually, they preferred a ruling by the Commission over that of national competition authorities, as it provided a convenient escape from a more stringent Member State jurisdiction. According to a company lawyer from *Allen &*

Overy's Brussels' office, many lawyers tried to present so-called borderline mergers in a way that the deal would pass the required turnover threshold needed for a Commission ruling (FT, 1993i: 15).[35] The business community in particular welcomed the fast and efficient clearance procedures of the Commission. The maxim ‘speed is our friend – time is our enemy’ was best matched with the centralised merger control regime. The Commission took most of its decisions within one month (Phase 1). According to a study conducted by the Centre for Economic Policy Research (CEPR) called *Merger in Daylight*, business preferred the Commission’s quick procedures, and its flexibility and willingness to accommodate, as most national competition regimes were under no obligation to stick to clear deadlines. Similarly, corporate lawyers preferred the Commission, as it published ‘reasoned’ decisions, which provided some guidance with regard to the scope of what counted as anticompetitive and what not.

In line with requests of transnational business, the Commission sought to facilitate cross-border mergers. In a review on the ‘success’ of the Merger Regulation in 1993, it suggested lowering turnover thresholds that determine the Commission’s responsibility on cross-border mergers (FT, 1993c: 3). The Commission adopted a similar strategy to that of the introduction of the Merger Regulation in order to convince the Council of its endeavour (see Part 1 of this Chapter). It consulted almost 300 companies and a range of EC industry associations, such as the ERT, UNICE, and national business organisations to gain political support (ibid). Consumer organisations and labour unions did not voice their opinion. The response was wholly enthusiastic. The German BDI particularly supported the idea. In this manner, corporations could evade the firm rulings of the *Bundeskartellamt*, which, in a survey, had been rated as the toughest domestic policeman in terms of merger decisions (Neven *et al.*, 1993b). Ironically, the Commission’s DG Competition anticipated that it would be ‘tougher’ than the competition authorities of the Member States (The Economist, 1997: 25).

National governments and competition authorities, however, fiercely opposed ceding more powers to the Commission in merger control. The well-established competition authorities of Germany, the UK, and France announced that their Member Governments would vote against Commission proposals that aimed at lowering turnover thresholds by referring to

[35] Several other sources confirm the picture that the number of borderline cases was high (The Economist, 1993: 124). The actual number is unknown though, as talks that ‘adjust’ so-called borderline cases to a ruling by the Commission took place behind closed doors.

the subsidiarity principle (FT, 1993b: 2). The German *Bundeskartellamt,* the stronghold of ordoliberals in competition matters, fiercely criticised the Commission's 'soft on mergers' approach (FT, 1995a: 14). In the past, it had attempted to retrieve merger cases of national significance from the Commission's authority, although without much success. The Commission largely ignored what came to be termed the German clause in the Merger Regulation (see Chapter 4). Nevertheless, it repeatedly sought to revive the issue of lowering turnover thresholds for a Community ruling. Only three years later, in 1995, Competition Commissioner Karel van Miert picked up the subject again in the Commission's Annual Report on Competition Policy. In response to corporate pressure, the Commission issued a Green Paper on the review of the Merger Regulation in January 1996, proposing to lower the turnover thresholds to ecu 2 billion for mergers on a worldwide basis and 100 million for mergers involving at least two of those companies in the Community (European Commission, 1996a). The Meger Regulation was eventually reformed in 2004 (see Chapter 8).

5.6 The Neomercantilist Opposition Losing Ground in the 1990s

Not all business interests were in tune with the neoliberal philosophy of unfettered competition. Industrial sectors that were afraid to branch out from the single market sought to revive neomercantilist and protectionist measures. The conclusion of the Uruguay GATT Trade Round lowered the average weighted import duty on industrial goods between the EU, the US, and Japan to below 4% (European Commission, 1995b: 3). Thereby, the degree of import competition in particular from industrial giants of the US and Japan increased considerably in the EU. In combination with the enhanced intra-EU competition generated by the common market and the increase in hostile takeovers, smaller corporations, and import competing corporations feared reduced profit margins, which tempered their enthusiasm on the neoliberal free-market project.

The appointment of Commissioner van Miert to the competition portfolio received plaudits from those sectors seeking protectionist measures and those penalised for anticompetitive conduct by his predecessors. Van Miert warned the European business community: 'If you think I'm a sort of anti-Sir Leon, forget it' (FT, 1993l: 3). Nonetheless, he assured protection to certain industries confronted with fierce outside competition. This concerned mostly the car and electronics sector, which faced competition from Japan and Korea, and the airline and telecommunication industries, which were challenged by their US counterparts and which according to van Miert grew strong ‘on the back of the biggest, best protected market in the world’ (FT, 1993e: 36). In particular, under President Clinton, US antitrust orientation displayed a greater willingness to assist important strategic US industries to expand. Against this backdrop, van Miert claimed that a pro-protection stance was necessary to avoid the situation of a boxing match in which European featherweights meet US heavyweights (ibid). This policy stance manifested in a series of exemptions granted to joint ventures that were meant to strengthen European corporations vis-à-vis foreign competition, despite the fact that they adversely affected intra-EU competition. Examples thereof are the Commission’s exemption granted to the joint venture between *Alcatel Esaci* and *ANT Nachrichten Technik* (Carchedi, 2001: 128) and its tolerant stance towards acquisitions and joint ventures in the airline sector (Jenny, 2000: 20).

Nonetheless, the industries confronted with enhanced (outside) competition and thus seeking neomercantilist and protectionist policy measures were increasingly losing ground to those holding more neoliberal conceptions of open competition. The examples of the European car sector, the *De Havilland* merger, and the steel sector illustrate the high-level politics involved in the exposure of previously protected sectors, or sectors dominated by national champions, to enhanced competition.

5.6.1 Liberalising the Protected European Car Sector

In 1994, several months before the expiry date of the 1985 Block Exemption Regulation in the car distribution sector (see Chapter 4), the *European Automobile Manufacturers Association (Acea)* urged the Commission to renew the block exemption for another ten years (FT, 1991c: 13). In the interests of maintaining its status quo, the car manufacturing industry claimed that the exclusive distribution regime was necessary for providing high quality services, as well as maintaining a level of employment. With more than 10 million direct and indirect employees, the European car production sector constituted the largest in the world (European Commission, 2005a). It accounted for 3% of Europe’s GDP and for 7% of the total employment in the EU (ibid). The industry argued that a completely open car market would amount to 70,000 job losses in the long run (FT, 1991c: 13).

The Commission was receptive to the demands of the car industry and adopted the Block Exemption Regulation 1475/95, for a limited period, until the end of 1999. The idea was that the car industry, in the meantime, would undertake restructuring measures to adjust to a more competitive situation after the expiry date of the Regulation. What might give the impression of a rather generous protectionist's exemption regulation that postponed the opening of the Community market to Japanese, Korean, and US car imports until the end of the century, was a halfway house towards more open competition. The regulation required car manufacturers to supply any dealer demanding a vehicle with a foreign specification at local prices. In addition, independent service garages would have the right to gain easier access to the manufacturers technical information. Thereby, the Commission hoped to destroy one of Europe's most restrictive market division regimes and to provide 'unofficial' traders with market access, giving them the possibility to undermine the prices of the established networks of car manufacturers and dealers.

Opposition to the inclusion of this notion came from both manufacturers and distributors. Car manufacturers had an interest in reduced inter-brand competition and did not want car dealers to be engaged in multiple franchising contracts, selling more brands under the same roof. Car distributors, who derived their commercial existence from exclusive contracts with manufacturers were reluctant to cede their territorial monopolies to competitors and give up their stable position. At the same time, the car distributors' camp was not unified in its stance, because becoming more independent from producers also offered new chances. Exclusive distribution agreements with car manufacturers often imposed a repressive regime on them, such as a prohibition on selling cars to foreigners, due to different pricing tactics in the different Member States. If car distributors did so anyway, manufacturers might reduce the premium or dissolve contracts (Van Miert, 2000: 63).

The *Bureau Européen des Unions de Consommateurs (Beuc)* lobbied against the prolongation of the 1985 block exemption regulation and urged the Commission to open up the market completely. The director of *Beuc* compared the fact that consumers could not make cross-border purchases of cars to 'an unmitigated disaster for consumers' (FT, 1994a: 17). The abolition of the exclusive distribution regime was considered essential in increasing consumer choice across Europe. Consumers eventually succeeded in 2002, when Regulation 1400/2002 imposed the same competition rules on the car sector as in other industrial areas. Car manufacturers could no longer impede liberalisation. Two years prior to its enactment, the Commission actively consulted 'consumer associations, dealers, independent importers and repairers, spare-part producers, firms that sell through the Internet and all the motor vehicles manufacturers' and asked for their input (Akbar, 2003: 12). In response to enhanced competitive pressure resulting from the new regulation, the car manufacturing industry underwent an industrial restructuring by mergers and acquisitions. Examples are the high-level mergers between *Daimler* and *Chrysler*, *Rover* and *BMW*, and the growing amount of shares in *Fiat* held by *General Motors*.

The Commission supported acts of concentrations in the sector by the adoption of a permissive stance towards corporate size. Illustrative in this regard is *AutoEuropa,* a joint venture involving the two direct competitors, *Ford of Europe* and *Volkswagen,* which combined their resources for the production of a minivan in Portugal. The German *Bundeskartellamt* prohibited the deal by arguing that each of these large car manufacturers had the necessary resources to carry out the production alone. Underpinning the decision was a fear of job losses in Germany. The Commission, however, overruled the German prohibition and exempted the joint venture from Article 81(1) in 1992. It argued that laggard Portugal needed the investments boost more urgently than Germany (Motta, 2004: 16). *AutoEuropa*, which since 1999 was fully owned by *Volkswagen,* was the biggest foreign direct investment event in Portugal ever. The EU and the Portuguese government co-financed the project. The EU sponsored almost US$ 1 billion, the highest level of EU subsidies ever. In addition to vocational training programmes sponsored by the European Social Fund, financial support was manifested in tax exemptions for the first five years and the building of the necessary infrastructure, such as railways, *roll-on-roll-off* ports and terminals, and wastewater treatment facilities (cf. Alves and Abrantes Pires, 2000).

5.6.2 The End of Industrial Policy: The Banning of the De Havilland Merger

In a range of mergers, competitors and national competition authorities complained about the Commission's lenient stance with regard to dominant market positions. Examples of large mergers that raised controversies are: in 1991 *Varta-Bosch* (car batteries), *Tetra Pak-Alfa Laval* (food packaging), *Alcatel-Telettra* (telecommunications); in 1992 *Nestlé-Perrier* (food and beverages), *Mannesman-Hoesch* (steel tubing and instruments); in 1993 the stainless steel tubes joint venture between *Mannesman*, *Vallourcee* and *Ilva*; in 1994 *Mercedes Benz-Kässbohrer* (busses) and *Procter* and *Gamble-Schickendanz* (hygiene products). Competitors feared that the newly created combinations led to market dominance, which would eventually push them out of the market. The *De Havilland* merger became an important landmark case.

In the four years during which the Merger Regulation was in force, the *De Havilland* case was the first industrial concentration the Commission blocked. The case is symbolic for marking the end of the Commission's tolerance towards Member State industrial strategies that aimed at creating national champions. The Canadian aircraft manufacturer *De Havilland* was a daughter company of the giant US aircraft manufacturer *Boeing*, which was no longer interested in the regional turbo-propeller commuter aircraft market and thus, put the company on sale. The consortium ATR, involving the French company *Aerospatiale* and the Italian state aerospace group *Alenia*, supported by the French government, proposed a bid to take over *De Havilland*. The joint endeavour would have made them market leaders (FT, 1991d). The bid formed an attempt to survive the economic slump in the regional turbo-propeller commuter aircraft market which resulted from the end of the Cold War and reduced military spending (FT, 1991a). In September 1991, the Commission blocked the takeover for reasons of market dominance that eventually would deter newcomers. It expected the concentration would lead to a market share of 67% in the sector commuter aircraft of 20 to 70 seats (ibid). Thereby, it sought to maintain competition among European players in each sectoral segment. The ruling entailed a resignation of active neomercantilist industrial policy. The companies, as well as the French and Italian government, lobbied the Commission to reconsider its decision, as the merger would have created a Eurochampion (FT, 1991d). European competitors, such as *British Aerospace* lobbied against the merger. Yet, the intentions were similar to those of the Franco-Italian alliance, as the company sought to create a consortium similar to *Airbus* – together with *Aerospatiale*, the *Deutsche Aerospace, Casa* of Spain, and the Dutch *Fokker*.

The merger raised controversies among the *College* of Commissioners, who had to give its blessing to the DG IV decision as a collective. The Commission was split into a neomercantilist camp and a neoliberal camp. The neomercantilist Commissioners were located foremost in the DG responsible for Industrial Policy, and the neoliberal Commissioners in the DG Internal Market and Competition. The Industrial Policy Commissioner Martin Bangemann, as well as the Commission's President Jacques Delors, fiercely criticised their colleagues from the DG Competition for downplaying industrial and employment reasoning in their assessment. Bannermann denounced the competition officials as ‘ayatollahs’ and ‘gurus’ that adopted an over-legalistic approach in competition matters. In the past, an active industrial policy and competition policy had complemented each other. Primacy had been given to the creation of Eurochampions able to compete on a global scale (see Chapter 4). The *De Havilland* ban broke with this tradition. The camp in favour of a proactive industrial policy was too weak. Competition Commissioner Sir Leon Brittan eventually ‘changed a lot of minds’ in the Commission (FT, 1991a). The Commission’s neoliberals all went along with Brittan, while others were simply giving way to the ‘Commissioner in charge’. Delors abstained from the vote and the swing vote of Commissioner Manuel Marin was ‘traded’ for Brittan’s support of the reorganisation of the European fishing fleet (Ross, 1995: 178). At a later stage, Commissioner van Miert (1998c: 4-6) emphasised that ‘the concept of national champions was dead’ and that industrial intervention was an ‘old-fashioned policy’. Not to expose companies to full competition, in his view, was ‘a false economy’ (ibid).

The repercussions of the *De Havilland* case went further than this. The Commission’s ban also came as a shock to those fearing a turnaround in the Commission’s lenient enforcement policy towards mergers. The European transnational business elite reacted with a sense of outrage, proclaiming that the ruling was based on rigidly defined maximum permissible market shares. As industrial competition primarily came from large dominant players mainly from the US, elite networks, such as the ERT, promoted large European players that could ‘punch their weight in a globalised economy’ (ERT, 2004). The dominance of the new combination was restricted to the European market. On the world market, it had to survive alongside larger competitors, such as the Canadian *Bombardier* and the Brazilian *Embraer.* After the Commission’s blocking, *Bombardier* took over *De Havilland*, which eventually set an even harsher pace of competition for European players. Thereby, the ban in the *De Havilland* merger became symbolic for EC competition policy, inhibiting an approach that allowed European industries to catch up with their (US) competitors. The ERT demanded the adaptation of competition laws to allow European players to achieve economies of scale and operate on the world market. It urged the Commission to view the world market as the relevant market by which to judge a merger (ibid).

5.6.3 *Phasing Out Subsidies: Though on Steel and Coal Industries*

The sectors that the founding fathers of the European integration project had considered the most important, namely coal and steel, but also the automobile, shipbuilding and textile sector, found themselves in the neomercantilist camp. While the coal and steel sector had continued to decline since the 1970s, the car manufacturing sectors largely stagnated (with the sole exception of the German manufacturers producing luxury class vehicles for export to the US) (Gillingham, 2003: 453). In the 1990s the so-called old industries of steel (and with it the coal sector) were hit by enhanced competition. The influx of cheap non-EC imports, especially from Eastern Europe, combined with overcapacity resulted in declined profits. The Commission continued the strategy of the late 1980s, which included an austere phasing out of state aid and the privatisation of state-owned steel plants and coalmines. This measure was highly unpopular as it brought high levels of unemployment to whole communities in particular regions. As far as redundancies were concerned, the Commission refused to publish estimates. However, the approximate calculations by the industry talk about 50,000 or more job losses under the new Commission proposals (FT, 1993a: 1).[36] The steel industry suggested reviving the crisis cartel approach of the 1970s as an alternative to bankruptcies and large-scale unemployment. About 70 steel manufacturers, mainly from the Basque Region in Spain, Southern Italy, and East Germany, opted for the conclusion of a collective agreement on cutting down the overall capacity so that prices would rise again.

The Commission, however, insisted with genuine toughness on the closure of steel plants of both the private and state-owned sector, a remedy that followed the rhetoric of a step-by-step 'restructuring' the industry. The liberalisation process should take place stepwise. By the end of 1995, the closure programmes were scheduled to be finished. In the short run, the industry was committed to cutting capacity to 30 million tons, which corresponds to a quarter of the total EU steel production. In return the Commission offered to contribute to the closing costs with a budget of ecu 900 Million (FT, 1993e: 36). The Commission's stance was highly disputed by Member State governments who sought to protect their industries from capacity cuts and the loss of state aid, such as those of Italy, Spain, and Germany. Steelworkers in Taranto, Southern Italy demonstrated against the proposed closures, and the Italian Industry Minister, Paolo Savona, announced that it would challenge the Commission before the European Court of Justice (FT, 1993h: 2). The

[36] The Italian industry federation, *Federacciai*, estimated that the plan to restructure privately-owned steel industry would cost more than a quarter of the 25,000 jobs in the private sector (FT, 1994c: 2).

Commission feared that concessions to the steel sector would make governments require the right to subsidise other national sectors in crisis and eventually undermine the whole idea of a single market driven by the neoliberal idea of unfettered competition. In the end, the political pressure of the state-owned steel industries in Italy, Spain, and Germany was successful, insofar as far as the restructuring plans were conducted in a less radical manner than previously envisaged by Commission. State aid was permitted as a temporary rescue in return for negotiated capacity cuts. Moreover, temporary antidumping duties were imposed on cheap imports from Eastern Europe to protect the EC steel industry (FT, 1993j: 5). In 1994, the Commission launched a proposal to abandon quotas on steel imports from Slovakia and the Czech Republic, although without success.

In conclusion, from the mid-1980s onwards, the accelerated pace of the creation of the common market and the advent of neoliberal ideas informing policy decisions increased competition in the EU. The ongoing liberalisation on a global scale, and the growing presence of competitors in previously state-protected industries further enhanced competitive pressure. To cope with the new situation, corporations strong enough to compete, mostly large transnationally operating corporations and/or corporations in the export sector, came to favour free competition. Free competition meant free from privately imposed market barriers such as cartels and other restrictive behaviour, and free from public intervention privileging certain economic sectors or corporations over others by protectionist measures. The creation of the common market and subsequently the liberalising global economy enlarged the scale for competition. Globally competing corporations pushed for a tolerant stance towards mergers and acquisitions, and hence, towards economic power concentration at EU level. In contrast, corporations unable to stand up to fierce outside competition gradually lost their influence. Pushing for protectionist measures at both the Member State and EU level was no longer an option. The centralisation of competition policy at the Commission was crucial in this regard. It provided a platform for a private-public alliance favouring open competition and stringently enforced competition laws. The neoliberal tenet was set. After van Miert’s interlude at the DG Competition, the staunch neoliberal course surfaced again with the tenure of Mario Monti and his successor Neelie Kroes as Competition Commissioners, leaving little room for a macroeconomic and pro-industrial policy competition vision.

Chapter 6

The Politics of Transatlantic Economic Integration: Conflict and Cooperation in the Bilateral Trajectory

Our marketplaces are similar, and our antitrust outcomes should reflect these similarities.

Stuart E. Eizenstat, US Undersecretary for International Trade (2003: 13)

Mutual acknowledgement of different, but equally effective systems, will also be necessary. We shall all have to compromise on something […].

Frits Bolkestein, Internal Market Commissioner, 10 Oct 2002 in Brussels

Introduction

In the course of the 1990s, the EU and the US authorities concluded a range of bilateral cooperation agreements in the field of competition policy. This chapter outlines the background that led to the first and second transatlantic agreements and explains why transatlantic cooperation in competition matters has evolved into the intensive working relationship we witness today. It identifies the joint interests of the transatlantic business elite as the major driving forces. The same forces that lobbied for the creation of a transatlantic marketplace, also sought to abolish transatlantic regulatory barriers, which had evolved from different approaches in the field of competition control. This chapter argues that the interests of the transatlantic business community were predicated on the structural economic integration across the Atlantic. Enhanced cross-border concentration activities of the 1990s brought the growing risk of jurisdictional overlaps to the fore, and concomitantly, negative externalities of economic transactions. Apart from administrative burdens for transnational business, the problematic of extraterritorial application of competition law started to form a regulatory obstacle for corporations in the transatlantic realm. This constitutes part of the reason why transatlantic cooperation in competition matters emerged and, in a wider sense, is also indicative of a transformed transatlantic power (im)balance. Previously, US competition authorities had never shied away from applying their competition laws on an extraterritorial basis. Alongside the course of European integration, the Commission, as a supranational competition authority, emancipated and acquired additional decision making powers. With the right to control mergers, the Commission received more media coverage and became more visible to the outside world. Notably, the involvement of giant transnational corporations brought its activities into the public attention spotlight. In addition, the incumbency of a new generation of powerful Competition Commissioners meant that the US competition officials could no longer ignore their European counterparts. They had to curb the application of US competition laws outside US territory.

6.1 Conflict and Cooperation Across the Atlantic

Equipped with new competences in the field of merger control, the Commission was not only reviewing EU-wide cross-border concentration activities, but also concentrations with a transatlantic dimension. This brought the problem of multi-jurisdictional overlap to the fore, and therewith the prospect of divergent rulings and disputes. In 1991, Competition Commissioner Sir Leon Brittan declared at the Cambridge Research Centre for International Law on *Competition Policy and Merger Control in the Single European Market* that the transatlantic relationship was fragile:

> *With the best will in the world […] the US and the Community may well one day soon take different views of a competition case. […] The problem cases may be rare now, but they will increase in number and complexity.* (In Blumenthal, 2005: 1)

To avoid conflicts in competition matters, the European Commission and the US competition authorities, the *US Department of Justice (DoJ)* and the *Federal Trade Commission (FTC),* formalised a range of bilateral cooperation agreements as a prophylactic measure. Over time, these agreements formed the basis of an intensive working-relationship taking place to this day on an almost daily basis. Officials of the competition authorities cooperate on a case-by-case basis in the form of videoconferences and in-person meetings. They routinely share information, coordinate their strategies, and conduct simultaneous raids on the investigation process with regard to anticompetitive conduct affecting the transatlantic marketplace. In order to facilitate interagency contacts The *US Mission to the European Union* created a permanent antitrust and competition division in Brussels, and vice versa, the *Delegation of the European Commission to the*

USA in Washington with a division covering the antitrust issues.[37] The agreements encompassed the whole spectrum of competition control, but they were most advanced in the mergers field. Cooperation in competition matters takes place quietly and largely goes unnoticed by the wider public. Exceptions are the merger between *McDonnell-Douglas* and *GE-Honeywell,* which almost caused a trade war. According to the adage 'there is no cooperation without conflict', the next sections embed the subsequent cooperation agreements in the broader context of political conflict, and identify the particular interest constellation that lobbied for these agreements.

It is difficult to overstate the effect the TABD has had on trade liberalisation [...] in fact virtually every-opening move undertaken by the United States and the EU in the last couple of years has been suggested by the TABD. [...] The idea was simple: to identify those barriers to trade or opportunities for liberalisation on which both business communities (in Europe and in the United States) could agree as targets for government action. We should put the business 'horse' before the government 'cart'.

Timothy Hauser, Deputy Under Secretary for International Trade (1997)

This [TABD] process is not a fifth wheel. It has become part and parcel of the entire transatlantic agenda.

No one would have quite imagined the degree to which the TABD has influenced government decision-making on both sides of the Atlantic. It has become deeply enmeshed and embedded in to the US government decision-making process on a wide range of regulatory, trade and commercial issues. It is regularly cited and it is part of the ongoing discussion between the EU and the US.

Stuart Eizenstat, US Undersecretary for International Trade (in Green-Cowles, 2000a: 2)

6.2 United Corporate Agenda Setting: More and Faster Liberalisation

The bilateral competition agreements need to be understood against the broader context of a transformed transatlantic power balance. In a speech in Berlin in December 1989, James

[37] The US Mission to the European Union is the biggest mission by a government in Brussels, staffed by more than 50 diplomatic deputies specialised in different issue areas. See for more at: http://useu.usmission.gov.

Baker, US Secretary of State, announced that the United States and the European Community should consider 'working together to achieve, whether in a treaty or some other form, a significantly strengthened set of institutional and consultative links' (in Piening, 1997: 108). This proposal led to the *Transatlantic Declaration,* signed on 20 November in 1990 in Paris, in which the US and EU agreed on a framework 'for regular and intensive consultation' (see for more Piening, 1997). The decision to foster the institutional glue across the Atlantic finds its roots in enhanced US scepticism on establishing economic, monetary, and political union. Similar to the adoption of the ECSC in 1951 and the Treaty of Rome in 1957, the prospect of a 'Fortress Europe' in which US corporations would be disadvantaged raised concerns across the Atlantic. The stalemate in the closing phases of the 1990 Uruguay Round, looming trade wars on bananas, beef, and biotechnological products, but also past experiences with protectionism and state aid supporting domestic industries in Europe, fuelled these concerns.

Previous scholarly explanations on the transatlantic bilateral competition agreements focus on the competition authorities as a driving force. For example, Damro (2006a: 173) explains EU and US cooperation as a reaction of competition regulators 'acting within the constraints of domestic political institutions to the external challenge of economic internationalisation'. In contrast, here it is argued that the bilateral trajectory of the EU and the US in competition matters received considerable intellectual support from the private business sector, notably from the transnationally operating business community. The strong presence of US companies in Europe led to an ever-stronger representation of their interests at European institutions. US lobby institutions, such as the EU Committee of *AmCham,* the American Chamber of Commerce, doubled in size during the 1990s. As John Russell, Manager for European Affairs at *AmCham* explained*,* US companies preferred to 'deal with Brussels rather than with fifteen Member State administrations and political systems' (in CEO, 1999a). *AmCham* wrote about 60 policy papers and 10 books in 1998 alone, and held countless meetings with Commission officials and Members of the European Parliament (CEO, 1999a). It became the most effective lobbying organisation in Brussels and a regular source of influence on European business associations, such as the ERT and UNICE (see also Chapter 4).

The establishment of the *Transatlantic Business Dialogue (TABD)* on 11 November 1995 in Seville, Spain, added a new dimension to corporate lobbying. It officially institutionalised the influence of a group of about 200 EU and US top executive-level management staff from leading transnational corporations on political decision making in the EU. The TABD was the result of an initiative of the US Commerce Department and the European Commission. Ronald Brown, US Secretary of Commerce, convinced the Commission's Vice President and former Competition Commissioner Sir Leon Brittan and Industry Commissioner Martin Bangemann in February 1995 of the idea to create a strong transatlantic corporate-state alliance (cf. Green-Cowles, 2001). The EU and US governments instituted the TABD for the purpose of formulating joint corporate policy positions and facilitating transatlantic industry ties. In April, Brown, Brittan, and Bangemann entrusted the corporate elite with a mandate to identify barriers to transatlantic trade and investment; in other words, anything that ran against the agenda of transnational corporations. They sent out letters to 1,800 industry officials from the EU and the US, the so-called famous 'Three B' letters (Green-Cowles, 2000a). As the founding fathers of the TABD project, the Commission and the US state bureaucracies demonstrated a genuine promptness in taking the regulatory recommendations by high-level industry representatives seriously and granting privileged day-to-day access. As Competition Commissioner Brittan explained:

> *We [the European Commission] and the American government asked businessmen from both sides of the Atlantic to get together and see if they could reach agreement on what needed to be done next. If they could, governments would be hard put to explain why it couldn't be done. The result was dramatic. European and American business leaders united in demanding more and faster trade liberalisation. And that had an immediate impact.* (Brittan, 1996)

The TABD was established with the great support of ERT (Van Apeldoorn, 2002: 111). The ERT had a major stake in a transatlantic pendant attuned to its lobbying efforts that were directed at the creation of a barrier free transatlantic market (TABD, 2005; 2007). Many members of the ERT were also members of the TABD, such as the CEOs from *Asea Brown Boveri*, *Bayer*, *Bertelsmann*, *Ericsson*, *ICI*, *Olivetti*, *Pirelli*, *Philips*, *Siemens*, BASF, *Solvay*, and *Unilever* (CEO, 1999c). Influential TABD members from the US included *Boeing*, *Enron*, *Federal Express*, *Ford*, *IBM*, *Motorola*, *Nokia*, *Pfizer*, *Procter & Gamble*, *Time Warner*, *Westinghouse,* and *Xerox* (cf. Green-Cowles, 2001; Graf, 2000). As Reinhard Quick, the TABD's Global Issues Manager, noted: "We work together, we consult with each other. The ERT is part of the TABD network." (In CEO, 1999a) Through the TABD, transnational business interests could influence the governance of the transatlantic realm and soon evolved as the most crucial and most powerful political forces in setting the political agenda. As the TABD's co-chair Michael Treschow stated, the TABD was not a lobby group, but an invited advisor (CEO, 2001). Five subject-specific working groups sought to generate a broad-based consensus in 15 key areas of concern. Right from the start competition policy constituted one of these key areas. Additional areas covered were: standards certification, issues regarding the WTO, export controls, customs issues and trade liberalisation, information technology and intellectual property, government procurement, taxes, investment and R&D, transportation, international business practices, small and medium-sized enterprises, and product liability. The type of regulatory regime envisaged by representatives of transnational corporations was straightforward and utterly neoliberal in character. As Jérôme Monod, European co-chair of the TABD, stressed:

> *The underlying premise is that the market itself has the capacity to come up with pragmatic positions, on the assumption that business leaders are better able to establish a dialogue among themselves than are governments and administrations.* (In CEO, 1999c)

The creation of a free trade zone in the transatlantic marketplace and the right to compete freely in each other's markets constituted the primary objectives. In this vein, the TABD lobbied for a deregulation of 'excessive domestic laws and regulations' which hampered corporate competitiveness, and suggested instead a more business-driven and market-orientated approach (FT, 1995b: 2). It demanded the abolition of double regulatory requirements, discriminatory regulations, and non-tariff trade barriers (NTBs) and suggested harmonising regulatory matters step-by-step. It advised harmonising corporate governance standards, corporate and VAT taxes, and abolishing the withholding of taxes on intercompany royalty and interest payments. In fields such as Internet commerce, it urged governments to leave issues to private self-regulation (ibid, 1998f: 12). Furthermore, it recommended the adoption of *Mutual Recognition Agreements (MRA)* on testing and certification standards (ibid, 1996b: 6).

On both sides of the Atlantic, the political elite supported the TABD's requests. The meetings took place largely behind closed doors. The privileged access of transatlantic elite business interests to political decision-makers led to an extraordinary symbiotic relationship, in which the interests of corporate and political elite were enmeshed into one effective power block ‘marked by consensus on many important issues’ (in CEO, 1999c). Former Competition Commissioner Brittan confirmed, in a letter to the TABD Chair, ‘his full personal support for the TABD process and well as on the continuing cooperation of his officials’ (ibid). In addition to frequent informal contacts, TABD interlocutors monitored internal working documents of the Commission, and issued replies and follow-ups (European Commission, 2006c). Stephen Johnston, TABD Director noted in this respect that each of the TABD issue groups had a Commission contact point in order to ensure ongoing cooperation and a structured dialogue. He observed that the ‘Commission was cooperative, helping business by giving them the information that they needed’, eventually, however, ‘it was business that made recommendations’ (in CEO, 1999c).

The TABD’s stark influence is revealed in the proposal to create a *Transatlantic Free Trade Agreement (TAFTA*) brought forth by Sir Leon Brittan in 1995, which would form a transatlantic analogue to the *North American Free Trade Agreement (NAFTA)* established in January 1994. His ambitious proposal for ‘a transatlantic economic space of free trade’ failed to generate the necessary support of the EU Member governments and the US government (The Economist, 1995: 49). In particular, the French government fiercely criticised the free rein given to Commissioner Brittan in promoting free trade areas between the EU and third countries, despite the fact that agricultural production was excluded in the proposal. As a result thereof, the negotiations reached a stalemate and the TAFTA proposal never materialised. Nonetheless, US President Clinton and Commission President Santer adopted the *New Transatlantic Agenda (NTA)* in December 1995, a follow-up agreement to the *Transatlantic Declaration of 1990.* The NTA’s Action Plan did not include a free trade zone, although it did entail a framework for the progressive reduction and eventual elimination of barriers that hinder the flow of goods, services, and capital. The NTA’s purpose was to bring the two economic superpowers closer to a free trade zone. In this regard, it constituted a significant milestone, although Commissioner Brittan condemned the surrogate solution as ‘slow and producing only limited results’ (The Irish Times, 1995: 11). The NTA provided a welcome platform for the TABD to voice corporate interests. Eventually, the NTA included more than 60% of the recommendations issued by the TABD in Seville (FT, 1996g: 6). Moreover, less visible is the fact that the TABD also succeeded in cancelling, delaying, or watering down business-constraining environmental and consumer-protectionist regulations in the transatlantic realm (Holt, 2000). Thousands of alterglobalists and civil society movements regularly demonstrated at TABD meetings against the ongoing liberalisation of trade and financial markets (FT, 1996g: 6), as well as against the fact that the TABD could influence the direction of economic decision making by evading parliamentary control. TABD members were largely unimpressed by the protestors. According to TABD Chair Monod, the 'remarkable success rate justifies the institution's existence all by itself' (in CEO, 1999c). Or, as EU Trade Commissioner Pascal Lamy remarked, it was more important to find 'new ways of getting across the benefits of freer trade', rather than engaging with the concerns raised by the demonstrators (Alden, 2000: 10).

Not only alterglobalists protested against the political influence of the TABD, but also standing national industry associations, as well as the UNICE in Brussels. As the TABD bypassed other industrial associations at the national and EU level, as well as national governments, the relationship with other businesses was tense. AmCham's chairman Russell reckoned that European TNCs 'tended to be very much their natural allies' – in marked contrast to those 'parts of European industry that are tied very much to the local economies' (in CEO, 1999a). These tensions find their origin in the fact that corporations, either with an intra-EU or national focus, or smaller or import-competing corporations, did not necessarily share the neoliberal oriented free-market focus of transnational corporations.

The TABD was the joint endeavour of a selective group of the transnational business elite. It excluded the greater variety of other business interests. Illustrative in this regard is the TABD's inaugural conference. While the large share of national business associations were not included, only CEOs equipped with red cards could make themselves heard during the inaugural conference. Lower-ranking officials and government representatives were assigned blue cards, which merely granted observer status with no right to speak (Graf, 2000). Existing business associations in Europe felt overlooked and challenged. The *European Union of Craftsmen and Small and Medium-Sized Enterprises (UEAPME)*, for example, repeatedly complained about denied access to powerful groups that influence EU policy-making (Carchedi, 2001: 125). The *De Minimis* rule (see Chapter 2 and 4) excluded most SMEs from the direct authority of the Commission, which implied that they traditionally had no reason to direct their lobbying activities at the supranational level. A study by Neven *et. al* (1998: 139) shows that SMEs and their associations indeed contacted national competition authorities more frequently, as they were more sensitive to their interests. However, with the prominent presence and influence of transnational business interests at the Commission, they also tried to make themselves heard at EU level. Similarly, officials from the German industry association, the BDI, noted that if member companies of the TABD took such visible interest in a specific topic, industrial organisations, such as the BDI should be alarmed (cited in Green-Cowles, 2000b: 172). Furthermore, many leading European business leaders organised in UNICE, as well as in the ERT, also did not share the enthusiasm about the TABD (Woolcock, 1996: 175). The TABD's prominent US label caused a certain degree of discomfort among ERT Members. Horst Langer, CEO of *Siemens* noted that many CEOs already had 'effective channels for direct contacts with government circles in Brussels and Washington'. Given the great differences among business associations across the Atlantic, they did not need the TABD (Graf, 2000).

Aware of these tensions, both the TABD and ERT sought to incorporate existing European business associations, such as UNICE and small and medium-sized enterprises, into the political agenda. The unifying purpose was to accommodate the broader interests of industry within the EU, as well as to draw on the knowledge and organisational structure of specialised working groups. The TABD let the UEAPME participate in its informal framework of political contacts (see for more UEAPME, 2007). Also the ERT sought to build closer links with SMEs as a way to generate broader support and accelerate political change (cf. Servan-Schreiber, 1967). Moreover, in order to avoid the picture that European corporations were controlled by their US counterparts, the ERT, rather than the TABD communicated high-profile policy initiatives to the Commission (in CEO, 1999a). Nonetheless, the scruples of European business about the invasion of US capital as first described in Schreiber's best-selling book *Le défi américain* (1967) increasingly vanished throughout the 1990s (Van Apeldoorn, 2002: 112). Transnational business elites spoke with one voice to those in charge of the regulatory decision making. Gradually, European corporations also started to adopt US-style lobbying practices as a result thereof (Van Miert, 1999). The success of the TABD generated a few organisational clones in other areas, such as the *Transatlantic Consumer Dialogue (TACD)* and the *Transatlantic Environmental Dialogue (TAED)*. Moreover, the TABD-concept was used as an inspiration for the establishment of the *Global Business Dialogue (GBD)*, which, in addition to CEOs from US and EU based corporations, also involves CEOs from Japan and Australia, as well as business associations of the OECD regions.

The transatlantic pact of unified corporate forces allowed for a maximisation of political pressure on US and EU institutions. According to Stuart Eizenstat, US Under-Secretary of International Trade, ‘when both business communities agree that a particular action is in the interest of both sides, it is much easier for governments to act – and to act quickly’ (Aroon, 1998). The first transatlantic competition agreement needs to be seen against the backdrop of broader transatlantic economic cooperation. Even though it pre-dates the establishment of the TABD, transatlantic corporate forces urged the EU and US authorities to cooperate in competition matters and to streamline the investigation process. Corporations operating in the transatlantic marketplace had a direct stake in reducing the costs and uncertainty when their competition case involved authorities at both sides of the Atlantic. As the next section demonstrates, transatlantic business interests were crucial in setting up the first transatlantic competition agreement.

> *The good news is that over the past decade we have achieved a remarkable record of cooperation and convergence. Despite our different legal traditions and cultures, and despite substantial differences in the language of our governing laws, we have been able to work together to develop generally coherent and largely consistent competition policies, built on sound economic foundations, directed at a common goal: to promote consumer welfare through competition.*
>
> William J. Kolasky, Assistant Attorney General at the Federal Trade Commission (2002a: 1)

6.3 The First Transatlantic Competition Agreement

The Agreement between the European Communities and the Government of the United States of America Regarding the Application of Their Competition Laws – in short, the 1991 transatlantic competition agreement - was concluded on 23 September, 1991 (see European Commission, 1991). It was the first in a whole series of competition agreements. The signatories agreed to cooperate in competition law enforcement and coordinate their investigations. Yet, cooperation should take place voluntarily and was restricted to mergers only. Based on mutual notification, the competition authorities agreed to alert each other on cases that affect the ‘important interests’ of the other party by means of reciprocal notification (Article 2), as well as to refrain from measures that affect the important interests of the other. The principle of ‘traditional’ or ‘negative comity’ (Article 5 and 6) constitutes the centrepiece of the agreement. Literally, comity means ‘courtesy’, ‘complaisance’, and ‘respect’. In international law, the principle of comity is generally non-binding and applied as a mild form of unilateral conflict prevention.[38] In the particular field of competition law, traditional comity finds its origin in a series of non-binding OECD recommendations that were issued from the 1960s onwards (OECD, 1967, with revision in 1973, 1979, 1986, 1995). Prior to its inclusion in the transatlantic competition agreement, the principle of negative comity was hardly applied. The primary purpose of the negative comity principle was to avoid regulatory conflicts in competition matters, or, according to the Commission (1994a: 72), 'the possibility or impact of differences between the parties in the application of their competition laws'. Eventually, the cooperation and coordination endeavour had the goal of harmonising the different approaches of the Commission and the US authorities, and hence facilitating economic transactions across the Atlantic. In addition to cooperation on a case-by-case basis, the signatories scheduled discussions, on general matters a propos the future course of competition policy, on a twice-a-year basis. The 1991 transatlantic competition agreement thereby came to form the prelude of a slow but steady process of convergence in which the EU incorporated decisive elements of the more market-based, US competition model (see Chapter 8).

The impetus for regulatory cooperation in the course of the 1990s is linked to the enhanced pace of transatlantic concentration activities since the 1980s, such as mergers, alliances, joint ventures, and other types of intercompany agreements. With the emergence of a transatlantic market for corporate control, regulatory barriers in the field of competition control increasingly formed an obstacle for transatlantic business transactions. Corporate representatives repeatedly complained about the delays and lack of transparency in rulings and, therefore, the uncertainty created by parallel competition investigations. Michael Treschow, CEO of *Electrolux*, called the process 'horrendous' as in many cases the businesses of merging companies were essentially frozen for a year or more, until both competition authorities reached a decision (Alden, 2001: 10). Waiting for decisions pushed up the costs of M&As, which, according to James Schiro, CEO of *Price Waterhouse Coopers*, was 'detrimental to value creation' (ibid). The Commission took these complaints seriously and repeatedly emphasised the need to synchronise and coordinate regulatory barriers, such as: the differences in the investigation procedures and

[38] There is no general binding definition of traditional comity. According to the Black's Law Dictionary (1997), traditional comity can entail the 'recognition that one sovereignty allows within its territory the legislative, executive, or judicial actor of another sovereignty having due regard to rights of its own citizens'. It can imply that courts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation, but out of deference and mutual respect (ibid).

the information requirements, the applied definitions, the time schedules, and the remedies (Van Miert, 1997). The 1991 transatlantic competition agreement was therefore instrumental in opening up the transatlantic market space by eliminating regulatory constraints for business. In a wider sense, the agreement served the purpose of facilitating free competition and free market access – undisturbed by public market intervention.

The 1991 EU-US Competition Cooperation Agreement is also illustrative of the role of the Commission and the European Court of Justice (ECJ) as major pro-free market forces, which embodied the concerns of transnational corporations in the creation of a transatlantic marketplace. The autonomous role of the Commission in concluding a competition agreement caused considerable political turmoil among Member States. The Commission entered the agreement with the US government without the political consent of the Council of Ministers. In December 1991, the French government, supported by Spain and the Netherlands, challenged the legality of the Commission's competence to sign such a formal international agreement with a foreign government before the ECJ. In the US, no such disputes emerged as US law solved the competence question more swiftly: the 1991 agreement accounted as a binding international executive agreement, which, however, cannot override domestic law since the US Senate did not ratify it (Janow, 2000: 30). In defence, the Commission claimed that the agreement was of a purely administrative nature. It emphasised that it could negotiate and conclude agreements without the approval of the Council as long as this did not lead to an increase in the Community's budget, basing its argument on Article 101 of the Euroatom Treaty. By virtue of the 1969 Vienna Convention (Article 46), which rules that an international agreement concluded by an authority that was 'not manifestly incompetent' binds the state for which it acts, the Commission asserted that the agreement would remain valid in international law.

In August 1994, the ECJ ruled in *France v. Commission* (see for details Case C-327/91, ECR 1-3641) that the Commission indeed acted *ultra vires* and exceeded the scope of its 'discretionary authority' (see also Damro, 2002, 133-135; Cini and McGowan, 1998: 202). Nonetheless, the ECJ still supported the argument put forward by the Commission as it did not declare the 1991 cooperation agreement void. It somewhat vaguely ruled that the agreement produced a legal effect – without, however, further specifying what kind of legal effect. Moreover, it ruled that the Council of Ministers still had to approve the agreement. Nevertheless, the Council of Ministers officially signed the same agreement on April 10 in 1995. Thereby, the document was declared retrospectively valid, from the initial signing date onwards (Commission, 1994a: 72-73). The ruling of the ECJ thereby not only supported the Commission's attempt to expand its executive powers in competition matters, but also the quest of transatlantic business interests to facilitate economic transactions.

6.3.1 Transatlantic Cooperation and Conflict in Practice

The transatlantic cooperation agreement soon developed into an intensive working-relationship. As stipulated in the agreement, cooperation took place mostly in the field of mergers. In other fields of competition control, such as cartel cases and other harmful restrictive business practices, cooperation was largely absent. Based on the negative comity principle, the Commission had made 61 notifications to the US competition authorities by 1994. The US authorities had in turn notified 112 cases to the Commission. Mergers and acquisitions accounted for 45 of the 61 Commission cases, and 77 of the 112 US cases (Commission, 1994c). Examples of successful EU-US cooperation cases are the *Shell-Montedison* joint venture in 1994 (Pitofsky, 2000), the proposed acquisition of the *Federal-Mogul* by *T&N* in 1998, or the *Exxon-Mobil* and *Alcoa-Reynolds* mergers (Monti, 2002a: 77).

Transatlantic cooperation in competition matters in the 1990s resulted in the further liberalisation of a range of economic sectors, such as the air transport sector, telecommunications, and the defence industry. In the aviation sector, the Commission induced a subsequent liberalisation proposals, which, once they were adopted, regulated that Member States could no longer negotiate beneficial traffic rights and that low-cost carriers could enter the aviation market. To face the growing competition in the aviation market, EU based companies concluded a great number of mergers and cooperative agreements with US operators, such as alliances and partnerships. Examples are: *British Airways* and American Airlines, *Lufthansa/SAS* and *United Airlines*, *Delta*, *KLM*, and *Northwest*, or the cooperation agreement *'Amadeus'* between *Lufthansa*, *Air France* and *Iberia* (cf. Van Miert, 1997). The Commission and the US authorities launched a joint investigation project by raising questions about market foreclosure and reduced competition on the routes between the US and the EU. According to Van Miert, the airlines launched their activities ‘as if they were one single entity, while remaining legally autonomous’ (ibid, 1998e: 5). In their joint attempt to open up the aviation market to competition, the US authorities wanted to go much further and pushed for a full-blown liberalisation. They suggested concluding a separate bilateral *Open Skies Agreement* allowing airlines to fly every route in the EU and US markets. EU Member States considered such an agreement to be to the advantage of US carriers only and successfully opposed the agreement until April 2007, when EU and US authorities signed the *Open Skies Agreement* nonetheless. When the agreement takes effect in March 2008, the aviation market will be fully liberalised.

Transatlantic cooperation on competition control, and hence, its impact with regard to the further liberalisation of the transatlantic marketplace, generally took place without raising the awareness of the wider public. The risk of conflicting views became more prominent in the second half of the 1990s. The number of mergers across the Atlantic was on the increase and the magnitude, in terms of combined turnovers, unmatched. The *Boeing McDonnell Douglas* merger, the *General Electric Honeywell* merger, as well as the *Microsoft* controversy led to heavy disputes between the EU and US competition authorities – despite the initial successes of the existing 1991 cooperation agreement.

6.3.2 The Boeing McDonnell-Douglas Controversy

The disagreement between Brussels and Washington in the proposed merger between *Boeing and McDonnell Douglas* in 1997 brought the EU and the US to the brink of a trade war: whereas US regulators gave their unconditional approval to the merger, the Commission initially intended to block the deal. The merger concerned two companies situated in the US. *Boeing* was the world’s leading commercial aircraft manufacturer based in Seattle, and *McDonnell-Douglas*, the second largest US defence supplier based in St. Louis, Missouri. Together, the companies employed a total of 200,000 people in twenty-seven states, with an estimated combined revenue of US$ 48 billion in 1997 (Boeder, 2000). The companies announced the planned merger in December 1996 in the midst of the fifth great merger wave, which involved nearly all industries and considerably transformed the US market structure. The companies notified the merger to the US authorities for review in January 1997 under the terms of the *Hart-Scott Rodino Act (HSR)* (see Chapter 2). The FTC cleared the case on July 1 1997, after six months of reviewing the massive amount of documents submitted to support the deal – the paper load was reported to be the most extensive in US merger review history (Boeder, 2000: 141). In a written decision, the FTC argued that the deal would not negatively affect ‘consumers’, who in this case were purchasers of aircrafts. The Commission received the notification a bit later in February, 1997. Although the companies had no major manufacturing facilities in Europe, the high level of sales in Europe demanded that the companies also notify the planned merger to the Commission. After the four week long ‘phase one’ of the EU notification procedure, the Commission announced that it would start the much-feared investigation ‘phase two’, which required more in-depth analysis and hearings during the next four months. On July 4, the Advisory Committee of the Commission suggested blocking the deal.

The different rulings of the US and the EU competition officials generated an expansive and detailed analysis by commentators (cf. Lévêque and Shelanski, 2003; Johnson and Turner, 2000). The political repercussions on the transatlantic cooperation in competition matters, however, lacked similar coverage. The Commission’s plan to ban infuriated not only the companies involved in the merger, but also the US government. The stakes were high, as the merger not only concerned a concentration between two direct competitors in the market for commercial civil aircraft manufactures, but it would also create a synergy in the US defence sector. As the major purchasers of defence products, the US government had a vital interest in the merger. With McDonnell Douglas facing tremendous financial difficulties, and potential bidders from Asia already expressing their interest in a takeover (Van Miert, 2000: 269), the US government, under President Clinton, wanted to avoid a foreign company interfering with US defence interests. The US authorities portrayed the Commission’s plan to ban as an attempt to protect the already heavily state-subsidised French, German, British and Spanish *Airbus Consortium*, which in Europe was hailed as the ‘most successful case of post-war European economic cooperation’ (Boeder, 2000). Airbus was the only serious competitor to Boeing in the market for large jet engines.

The Commission’s line of reasoning was that the Boeing-Airbus duopoly already reflected a case of immense concentration and that the combined worldwide market share of more than 70% provided enough reason to prohibit the deal. The Commission was particularly concerned about the possibility that Boeing would abuse its dominant position in the future and inhibit market entry for newcomers. According to van Miert (1997), the deal would create an 'incumbent with enough market power to stifle competition and foreclose potential entry'. Moreover, with the US government as a major purchaser of defence products from the new combination, the Commission argued that the company's privileged access to publicly funded R&D projects would further enhance this dominant position, and hence, increase their bargaining power vis-à-vis suppliers (Van Miert, 1998e: 10). From the viewpoint of the Commission, the merged companies would be able to conclude exclusive agreements along the production chain 'that could evolve into a snowball that is very hard to stop' (ibid). The Commission's argument is inherently linked to the differences in market structures across the Atlantic. Prior to the announcement of the Boeing and McDonnell Douglas merger, the US defence-related industry was undergoing a rapid restructuring in a wave of large-scale mergers, i.e. *Lockheed-Martin Marietta*, *Northrop-Grumman*, *McDonnell Douglas-Hughes Helicopters*, *Raytheon-Hughes Aerospace & Defence,* while a further merger between Lockheed Martin-Northrop Grumman had been announced (Van Miert, 1998e: 11). By concentrating economic power, the US defence industry sought to consolidate its global competitiveness. In marked contrast to the US defence sector, the European equivalent was still highly fragmented (ibid). Thus, by allowing the merger, the Commission would not only tolerate a US champion in defence and related sectors such as civil aerospace, but also the demise of European competitors.

Despite initial opposition, the Commission eventually allowed the deal, due to political pressure from the US government. Insiders argued that the deal was made possible due to dubious political trade offs between US and EU officials (Bannerman, 2002: 44). The negotiations were reported to have been nerve-wracking. The case also caused internal divisions in the Commission, as a reaction to which Karel van Miert even threatened to resign (Van Miert, 2000). The threat of a trade war emerged in the picture. US Vice President Al Gore warned the Commission that 'the administration would take whatever action is appropriate' to prevent the EU from impeding the merger' (in FT, 1997: 1). The US authorities threatened to limit flights between the US and France, to impose a tax on European airplanes sold in the US, as well as to file an official protest with the WTO (Boeder, 2000: 143). 'Tit for tat' negotiations involving high-level government interference eventually resulted in an agreement. Despite the fact that the international press provoked heated debates on both sides of the Atlantic, it remains obscure whether the concessions made by the companies alone constitute the actual tradeoff. Boeing promised not to abuse its dominance in the world market and agreed to modify the terms of the merger. It agreed to offer competitors the use of any ’government-funded patent’ as well as the technicalities and know-how related to such a patent, on a licence-basis. Moreover, it committed itself to reporting to the Commission annually for the following ten years, on the development of publicly funded, non-classified aircraft projects.

The reproaches made by competition officials on both sides of the Atlantic were harsh. The Commission was accused of megalomania, harming important US defence interests (Van Miert, 2000: 10). In particular, *The Financial Times* attacked van Miert for his delusions of grandeur and for lacking diplomatic flair. The Commission, in turn, sought to revise the image of being the ‘junior partner’ of the US. As Frédéric Jenny, a French commentator remarked:

> *I hope what Europeans have done, written and said over the last 40 years has done enough to persuade our American friends that the antitrust world is at least bipolar. It may not have been until the Boeing-Mc Donnell Douglas merger case last year that some people […] realised just how true this is.* (Jenny, 1998: 7)

As no government alone could have achieved similar concessions to those achieved by the Commission, the Commission left the battle in a position of increased political credibility from the point of view of the EU Member States (Schaub, 1998). Despite the fundamental dispute in the Boeing-McDonnell Douglas merger, it called the cooperation with the US authorities a success story.

6.3.3 Reframing the Boeing-McDonnell Douglas Dispute: A Bump on the Road Towards Convergence?

The debacle around the Boeing-McDonnell Douglas merger had weighty repercussions on the transatlantic interagency cooperation in competition matters. Apart from the defence interests of the US government and a protectionist attempt to safeguard the future economic survival of European competitors, the disagreement touched upon the fundamental differences in the enforcement of competition laws between the EU and the US. As Joel Klein, Assistant Attorney General of the DoJ’s Antitrust Division remarked:

[The Boeing merger] graphically demonstrated, even the US and the EU, which agree entirely on the importance of sound antitrust enforcement, diverge significantly in our application of merger enforcement and related monopoly rules. (Joel Klein in FT, 1998e: 20)

Under US competition law, only a company's attempt to monopolise was prohibited. Large companies that were efficient were generally permitted – a view that was further sustained with the ascendancy of the ideas of the Chicago School (see also Chapter 2). In the EU, dominance and potential future abuses of dominance were problematised, a remnant of ordoliberal influence. The logic was that dominant players could undermine the market position of competitors (located in other Member States), and thereby, threaten the political basis for economic integration. In the US these differences were captured with the famous adage 'we protect competition, and you protect competitors' (cf. Fox, 2003a). In fact, Robert Pitofsky, Chairman of the FTC, rebuked the Commission for being more concerned with competitors than competition in the Boeing-McDonnell Douglas merger:

[I]n Europe, the concern is with mergers that increase the leverage that can be exercised by a dominant firm and the possible impact of the merger on competitors. […] In the United States, the emphasis is less on competitors and 'competitive leverage,' and more on the effect of a merger on future prices. (Pitofsky, 2000)

He accused the Commission's protectionist industrial policy of being a bankrupt concept (ibid). The Commission in turn accused its US counterparts of following the powerful lobby of companies to create a national champion of unprecedented scale. In defence, Van Miert proclaimed that 'EU law was not a football to be kicked around by special interest groups' (Van Miert, 1997). He reminded the US officials that the Commission would resist any attempts by companies to dominate the market by a merger or a takeover, 'regardless of the protagonists, the location of their headquarter and however powerful their friends may be' (ibid). The disputes with regard to company size and alleged protectionism formed part of the reason why the Commission's later proposal to address competition issues at WTO level was bogged down by US authorities (see Chapter 7).

US antitrust officials took the disagreement in the Boeing-McDonnell Douglas case as an incident to problematise the differences in enforcement practices. To avoid similar disputes over transatlantic mergers in the future, the *Transatlantic Merger Working Group* was established. Several joint subgroups, involving staff members of both agencies, were given the task of looking into the various procedural and substantive aspects of merger control and identifying the scope for convergence of analysis and methodology (cf. US Mission, 1999; FTC, 2002). The Working Group specifically had the task to ease tensions and take necessary precautions to avoid future conflicts, such as aligning legal standards that guide the respective merger control regimes, defining 'best practices', and reconciling the different approaches of the EU and the US (ibid). What started with 'cooperation' was gradually replaced by a call for more convergence.

At a later stage, US competition officials downplayed the political turmoil of the Boeing-McDonnell Douglas dispute as an incidental 'bump on the road'– the road towards convergence (Pitofsky, 2000). As will be illustrated in the next section, the *GE-Honeywell* controversy in 2001 proved that the road remained bumpy in the aftermath of the Boeing-McDonnell Douglas merger. Yet, with the conclusion of a second bilateral cooperation agreement, a further step was taken to avoid conflicting decisions in the future.

> *The centrepiece of the TABD's power is clearly the symbiosis, which has been built with (parts of) the European Commission – a unique and disturbing example of an international corporate-state alliance.* (CEO, 1999c)

6.4 The Second Transatlantic Competition Agreement

Transnational corporate business interests gave the impetus for the conclusion of a second transatlantic agreement. The select business elite represented in the TABD asked the competition authorities to establish further procedural convergence in the application of merger laws. The quest to 'remove barriers to cross-border mergers and acquisitions both within the EU and across the Atlantic' and to seek convergent procedures to vet mergers' became a high priority on the TABD's agenda (TABD, 1995: 8; see also 2006: 21; 2007: 11). Former Competition Commissioner and GATT/WTO Director General Peter Sutherland actively participated in the formulation of the second transatlantic agreement. He continued his international professional career as chairman of *Goldman Sachs International* and *BP* from 1995 and 1997 onwards, and regularly chaired the 'tripartite' TABD meetings between transnational business representatives and the US and EU governments. Building on the existing 1991 agreement and the negative comity principle, the TABD advocated the EU and the US authorities to make use of the positive comity procedures in antitrust enforcement, and to focus thereby on mergers and acquisitions in particular (TABD, 1995: Section II.10 and II.12). Only two years later, the TABD worked out a draft proposal on positive comity that would form the basis of a closer EU-US cooperation (TABD, 1997: 6). On 4 June in 1998, the Commission and the US government concluded the *Positive Comity Agreement (PCA)* in Washington, which formed part of the *Joint US-EU Action Plan* that was established in parallel to the *New Transatlantic Agenda (NTA).* The PCA allowed the signatories to request the other party to begin investigations in cases outside its jurisdictional reach, but which still affected its important interests. It entailed a mutual commitment to act 'promptly, responsibly, and diligently in examining allegations at issue' and not to act unilaterally in cases falling under the other party's jurisdiction, unless all means provided by positive comity were exhausted (Pitofsky, 1998).

The underpinning rationale behind the specific reference to positive comity was to facilitate communication with the competition authorities and to reduce the level of friction that can arise from different rulings in cross-border enforcement situations. Similar to the 'one-stop-shop' rule in the EU Merger Regulation (see Chapter 4), positive comity should channel competition cases with a transatlantic dimension to only one competition authority (Van Miert, 1998b: 2). As Draghi (2003: 10-11), Vice Chairman of *Goldman Sachs International,* explicated 'the negative externalities resulting from multi-jurisdictional overlap in merger review constituted 'a significant transaction risk'. With positive comity, inconsistent rulings could be eliminated and the review procedure and decision making considerably accelerated. Yet, the inclusion of positive comity reached further than the problem of multi-jurisdictional overlaps. As the next section illustrates, it also sought to curb the extraterritorial application of competition laws.

As the Community has never formally claimed territorial jurisdiction as extensive as that which is claimed by the US, this situation was viewed as an imbalance in our bilateral relations and an obstacle to any further deepening of these relations. For this reason we have decided to negotiate a strengthening of the positive comity instrument.

Karl van Miert, Former Competition Commissioner (1997)

6.4.1 Positive Comity and the Politics of Extraterritoriality in the Application of Competition Laws

Positive comity is very much Janus-faced. On the one hand, it allows the signatories to exert influence on each other's jurisdictions by asking the other to start up proceedings in a case. On the other hand, it also seeks to diminish extraterritoriality in competition matters. Extraterritorial jurisdiction refers to a situation in which a jurisdiction rules over foreigners as well as over acts committed outside its own borders, despite the geographical restraints of its jurisdictional reach. It constitutes one of the 'thorniest' issues in public international law (see for more Shaw, 2003: 611-620). Applying competition laws on an extraterritorial basis represents one of the most aggressive ways of approaching cross-border competition cases. It is problematic as it violates the basic principles of international law with regard to 'territoriality' and 'nationality'. The principle of territoriality rules that a state can exert jurisdiction in its territory 'unless it disables itself by treaty or by customary rules of international law' (see for more Gavil *et al.*, 2002: 611-620). The nationality principle entails that a national jurisdiction can proceed against its own nationals 'with respect of their activities abroad only provided that this does not involve interference with the legitimate affairs of the other states' (Dixon and McCorquodale, 2003: 284). In the field of competition control, this implies that a national jurisdiction can only start proceedings against companies or individuals if the anticompetitive conduct has taken place in its territory. Moreover, a highly problematic dimension, often neglected in the extraterritoriality discussion, is constituted by the fact that a foreign jurisdiction fundamentally intrudes into the market organisation of another state while lacking any form of democratic legitimisation by a national constituency.

The extraterritorial application of domestic laws is the 'priviledge' of a group of large Western countries, but most notably constitutes a by-product of US political hegemony in international affairs. The embargo politics of the *D'Amato Act* and the *Helms-Burton Act* of March 1996 are probably the most well known examples of US extraterritorialism.[39] Yet, also within the field of competition law, the US record stands out. The earliest extraterritoriality case in competition matters concerned *American Banana* accusing *United Fruit* for having intented to monopolise the banana trade in Costa Rica before the US Supreme Court in 1909 – the *American Banana Co. v. United Fruit Co.* (Gavil et al., 2002: 934). The Supreme Court ruled that the Sherman Act does not address acts committed outside of US territory. This changed in 1945 with the legendary *Alcoa* case*,* short for *United States v. Aluminium Co.*, which led to the *Effects Doctrine*, a document that gave the exercise of US extraterritorial jurisdiction a statutory basis. Accordingly, foreign business conduct, which has an effect on US import commerce, falls within the application of the Sherman Act. In other words, the Effects Doctrine entitled US jurisdictions to prosecute market conduct by non-nationals that had a significant effect on consumers or markets in the US, such as price fixing cartels, organised outside US territory and selling their products in the US. The extent to which US authorities made use of the Effects Doctrine varied over time. While the competition authorities under the Reagan administration were less belligerent in the extraterritorial enforcement of competition law (Hwang, 2004: 117), from the 1990s to the turn of the century, the US practice of extraterritorial application increased considerably, and in addition, also became a rather lucrative business. From 1996 to 1997, the US DoJ prosecuted more than 50 companies for international cartel activities and obtained fines of more than US$ 1.9 billion, and it also imprisoned about 20 senior executives for cartel activities (Kolasky, 2002a: 1). In 1997 alone, US courts imposed fines amounting to a total of US$ 200 million in criminal antitrust cases, all involving international cartels (FT, 1998e: 20). In 1998, more than 30 criminal cartel investigations were pending, involving companies based in more than 20 countries (ibid). A third of all cases involved foreign defendants, compared to 1% in 1991 (ibid, 1998d).

The US practice of extraterritoriality generated fierce controversies and evoked the picture of a hegemonic gesture of aggressive unilateralism (Gavil *et al.*, 2002: 935). The EU and a

[39] The D'Amato Act was officially titled *Iran and Libya Sanctions Act 1996,* and the Helms-Burton Act, named after the US Senator Jesse James and Dan Burton, the *'Cuban Liberty and Democratic Solidarity (Libertad) Act 1996'.* Both were designed to foster the US economic embargo against Iran, Libya, and Cuba, and meant to prosecute any foreign citizen, company, or government involved in business transactions with these countries. In the case of non-compliance, the punishment ranged from the confiscation of the property of companies in the US, to the banning of company directors and their families from entry into the US, even if there was little demonstrable 'effect' of their actions within US territory (Dixon and McCorquodale, 2003: 285; Lane, 2000: 280).

range of EU Member States sharply criticised US unilateralism in competition matters. A range of governments adopted laws or so-called blocking statutes ‘designed to prevent US efforts to assert extraterritorial jurisdiction’ (Calvani, 2004: 4).[40] Blocking statutes rule that a domestic jurisdiction prohibits companies to comply with the laws of another and to provide other jurisdictions with information. The US authorities, however, saw no evil in the extraterritorial application of their antitrust laws and claimed they would intervene in cases in which foreign jurisdictions failed to enforce their competition laws effectively (Jenny, 2003: 620). When the US adopted the *D'Amato* and the *Helms Burton Act* in 1996 to punish foreign investment in and trade with Cuba, Iran, and Libya, the EU fiercely protested, particularly in Spain, which had strong trade and investment links with Cuba (FT, 1996c: 5). The EU eventually challenged the US Helms-Burton Act before the WTO for breaking with numerous free trade rules. Former Competition Commissioner Sir Leon Brittan explained that ‘the EU cannot accept that the US on the basis of unilateral legislation determines and restricts the EU’s economic and commercial relations, and that an extraterritorial extension of US jurisdiction had no basis in international law (Renfurm, 2005). The US government claimed exemption under the WTO’s vague national security provisions and argued that the embargo was a matter of national security. In the end, the EU and US signed a compromise agreement on the basis of which further legal action in the WTO was dropped in 1997 (see for more details Roy, 1997; 2000).

In reaction to the steadily growing number of US extraterritoriality cases in the field of competition law enforcement in the 1990s, the Commission also started to apply EU competition law more frequently to companies located outside the EU. Early examples are the 1972 *Chemical Industries* and the famous 1985 *Wood Pulp* cartel cases, in which the ECJ decided that Article 81 was also applicable to companies located and registered outside the EC, provided that there is reason to expect substantial, direct, and intended adverse impacts on the European economy (Sachse, 2006). The number of extraterritoriality cases increased in the late 1990s. The Commission’s decision in the *Boeing-McDonnell Douglas* merger of 1997 falls into the category of extraterritoriality (see earlier Section), as well as the *Exxon-Mobil* merger in 1999, and the *GE- Honeywell*

[40] Canada is exemplary in this respect, but also Germany, the UK, and Switzerland adopted a rule that limits the effect of US judgements (Freyer, 2006: 128). German law addresses the issue in section 328 of the Civil Procedure Laws, ruling that a foreign judgment may be denied if it would ‘lead to a result that is irreconcilable with material principles of German law, especially if recognition is irreconcilable with constitutional rights’ (Buxbaum, 2006: 12). The German courts in particular referred to this provision ‘to deny recognition of the practice of multiple damages awards in antitrust cases’ (ibid).

merger 2001 (see following section in this Chapter). Particularly illustrative is the merger between the South Korean electronics manufacturer *Samsung* and the US computer manufacturer *AST Research Incorporated*. The Commission fined the two companies for not having complied with the notification requirement of the EU Merger Regulation (European Voice, 1998). The merger did not have a damaging effect on competition in the computer market and the Commission would have cleared the merger anyway. However, as the companies did not ask prior permission from the Commission, the fine demonstrated merely an act of symbolic power meant to communicate to the transnational business community that it could not ignore the Commission as a competition authority and that extraterritoriality rulings were no longer exclusively a US hobby. Yet, the legal grounds for the Commission's extraterritoriality were highly insecure. There were no provisions in the treaties on the jurisdictional reach of EU competition laws, and court rulings so far interpreted the extraterritoriality question inconsistently, i.e. there were no explicit decisions regarding Article 82 or merger cases (Monti, 2002a: 71).

In 1999, the *European Court of First Instance (CFI)* played a significant role in providing a legal basis for the extraterritorial application of EU competition law. Its judgment in the *Gencor-Lonrho* case constituted a landmark decision in this regard. Briefly, the Commission prohibited a merger between the mineral mining companies *Gencor* from South Africa and *Lonrho* from the UK. Both companies operated outside Community-borders and had no assets in the EU. The Commission blocked the merger, regardless of the fact that the South African competition gave its permission. It argued that the new combination caused a dominant position in the world market for platinum and that it affected trade between the EU Member States. When the companies appealed at the CFI (i.e. *Gencor Ltd vs Commission)*, it ruled that the Commission was authorised to block the deal because 'it was foreseeable that the proposed concentration will have an immediate and substantial effect in the Community'. The Commission very much welcomed the newfound clarity (Monti, 2003: 72). One could say that the ruling equipped the Commission with its own 'Effects Doctrine'. Similarly to the US, it could now prosecute anticompetitive conduct, irrespective of the companies' national origin, as long as it had a major effect on the common market of the EU. In contrast to the US Effects Doctrine, which was extended to conduct restraining trade with the US Foreign Trade Improvements Act in 1982, the Commission maintained that the EU version was less sweeping as it did not cover 'adverse effects' on European exports markets (Monti, 2003: 72).

Although other competition authorities also increasingly started to trespass jurisdictional sovereignty in competition law enforcement, the extraterritorial application was foremost a US-EU play. The 'Effects Doctrine' significantly consolidated the Commission's role as a competition authority with a global reach. It created a certain degree of co-deterrence in the extraterritorial application of competition laws. In fact, the US competition authorities tempered their conduct (Griffin, 2000: 41). The US authorities increasingly had to come to terms with an ever more powerful Commission on a more equal footing in the global realm. At the conference celebrating the 10th anniversary of the EC Merger Control Regulation in September 2000 in Brussels, Joel Klein, US Assistant Attorney General had to admit that 'EU antitrust underwent a process of 'extraordinary growth and maturity' (Klein, 2000). In response to underlying tensions between the EU and US competition authorities, Competition Commissioner Mario Monti reminded his US counterparts that 'the EU and US carried comparable global weight in the area of competition law enforcement as Europe acted as one, and not as 25 countries separately' (Monti, 2004c).

To recapitulate, structural economic interdependence, which intensified with the growing number of transatlantic mergers in the course of the 1990s, led to enhanced transatlantic interagency cooperation in competition matters. On institutional grounds, the adoption of an EU Effects Doctrine was critical in increasing the prospect of inconsistent rulings and judicial conflicts regarding economic transactions. The inclusion of positive comity into the agreement needs to be understood as a political response to both the request of transatlantic business interests seeking to reduce inconsistent rulings and the elimination of extraterritorial application by a one-stop-shop rule similar to that found in the EU Merger Regulation. According to Jenny (1998: 1), 'if the taste for the extraterritorial adventure spreads further, the result is likely to be chaos and increased uncertainty for business. Therefore, positive comity seeks to offer a 'robust alternative to the extraterritorial extravagance of certain players' (ibid: 3). The EU Effects Doctrine challenged the US authorities and their longstanding hegemonic practice of applying competition laws on an extraterritorial basis. Prior to these challenges, there was no direct need for the US to engage or cooperate with other competition authorities. When faced with the significant strengthening of the Commission's competences in competition matters alongside the intra-EU development of further market integration, the US competition authorities could no longer ignore the Commission. Bilateral cooperation, in practice, implied that the competition authorities would continue to notify competition cases to each other in order to keep each other mutually informed. In addition, competition officials attended each other's staff meetings. Part and parcel of the cooperation endeavour as envisaged by the business community was to arrive at a process of substantive and procedural convergence in order to reduce the negative externalities involved in complying with different jurisdictions, and hence, to reduce the costs inherent to cross-border transactions more generally. As far as substantive convergence was concerned, CEOs observed that the Commission '*de facto* did have a more conservative approach to merger review' (Draghi, 2003). They noticed an ever-toughening stance by the EU Merger Task Force in the late 1990s. The Commission blocked concentration transactions with increased frequency' (ibid). Therefore, corporations had a stake in bringing the EU model of merger control closer in line with US practice.

The interests of the transatlantic business community in interagency cooperation were limited to the field of mergers. It is for this reason that the exchange of confidential information became a highly politicised issue. The *International Chamber of Commerce (ICC)* and the TABD repeatedly stressed that confidential corporate information should only be exchanged in merger cases and only on the basis of prior consent from the companies involved (TABD, 1997: 6; ICC, 1999a, 1999b). In addition to the imposition of institutional safeguards guaranteeing the leakage of sensitive commercial information, business associations requested that companies refusing to cooperate should not be subject to a less favourable treatment or sanctioned in any way. The corporate request was successful in both the first and the second cooperation agreement (i.e. Article 3 and Article 4 respectively). To indicate the importance of this business request: even though the new agreement was intended to supplement and to be interpreted consistently with that of 1991, business interests made sure that this point was reiterated (cf. ICC, 1997). Based on these specific provisions, competition authorities could only exchange information on general matters in the implementation of the laws, and were obliged to protect the confidentiality of this information. Without the prior permission of companies under investigation, officials from the other competition authority could not participate in hearings. In other words, transatlantic cooperation was entirely dependent on the companies' goodwill to grant waivers for exchanging confidential information concerning their case (Schaub, 1998). Without the exchange of confidential information, mutual notification consisted merely of filling in standardised forms with little more than the companies' names (Commission, 1994b). As a result, transatlantic cooperation was most common in the field of mergers where business had a greater incentive to cooperate with the competition authorities, and to allow joint EU-US interviews in order to speed up the review procedure and receive consistent rulings. Exemplary cases in which reciprocal consultation procedures and coordinated enforcement were applied are *Daimler Benz-Chrysler* (1998), *British Petroleum-Amoco* (1998), Deutsche *Bank-Bankers Trust* (1999), and *Ford-Volvo* (1999), *WorldCom-MCI*, and *MCI-WorldCom-Sprint* cases (FT, 1998a: 3).

The Commission wanted to enter a cooperation agreement with the US authorities that went much further in terms of the exchange of confidential information (Monti, 2002a: 78). This would facilitate the Commission's combat of cartels. In contrast to the Commission, the US DoJ and US FTC are, by law, entitled to conclude agreements containing such provisions. The *International Antitrust Enforcement Act (IAEAA)* that came into force in 1994, and the *Antitrust Enforcement Guidelines for International Operations* issued in the same year, formed the basis of so-called 'second generation agreements'. In the US, cartels constitute a major crime against consumers and are *per se* prohibited, and prosecuted under criminal law (see Chapter 2). For this reason, the US competition authorities possess extensive powers to detect cartels, including the entitlement to exchange confidential information by law. Transnational corporations generally seek to avoid US criminal sanctions, the treble damage compensation rule, but also private enforcement and class actions (see Chapter 2). In the EU, where cartel prosecution is traditionally less firmly rooted, breaches can only be sanctioned based on fines. Upon the initiative of the US, in the 1998 OECD Recommendation devoted to combating hard-core cartels, Member States were encouraged to conclude agreements on the exchange of confidential information (OECD, 1998). The US authorities entered the most far-reaching bilateral competition agreement with Australia, which was due to Australia's particular strong confidentiality laws (Calvani, 2004: 6). To date, fierce lobbying of business associations constitutes the reason why there is no transatlantic IAEAA-type agreement. Company directors in Europe (and elsewhere) in particular fear exposure to the US jurisdiction in cartel matters. For corporate actors, the inclusion of a provision allowing the exchange of confidential information may lead to more hazards than benefits. Rather than a second-generation agreement that would also make it possible to cooperate more extensively in the prosecution of cartels, only a non-binding *Administrative Arrangements on Attendance (AAA)* was concluded with the US authorities in 1999.

6.4.2 The GE-Honeywell Controversy

The merger between the two US companies, *General Electrics* and *Honeywell* further fuelled transatlantic competition controversies. The merger concerned the aerospace industry, most notably the market for jet engines, aircraft systems, and engine controls on a worldwide scale (Motta, 2004: 379). The situation was similar to that of the Boeing McDonnell-Douglas merger. While the US DoJ allowed the deal, subject to minor modifications, the Commission blocked it in July 2001. Again, the different rulings were highly politicised, and again, the different antitrust statutes and enforcement principles across each side of the Atlantic rose to the surface. Ironically, the disagreement took place against the background of the 10th anniversary of the first transatlantic bilateral cooperation agreement. Competition officials acknowledged that 'cooperative efforts and good intentions were not enough' (James, 2001a). The contradictory rulings were ascribed to a 'fundamental, doctrinal disagreement over the economic purposes and scope of antitrust enforcement' (ibid). While US authorities conceived the new company to be an effective competitor, the Commission argued that it discouraged rivals from future investments and drove them out of the market. Again, US competition officials accused the Commission of giving preference to competitor interests above both efficiency and consumer welfare arguments, and hence of being unduly protective (Kolasky in Guerrera and Hill, 2002). The US critique points at the heart of the two schools of economic thought that dominated in the competition authorities of the EU and the US in the past decades: the Freiburg School and the Chicago School. The Commission's blocking was considered antithetical to antitrust enforcement, as it was neither economically sound, nor supported by empirical evidence (James, 2001b). Similar sophisticated econometric analyses to those conducted in the US were absent in the Commission's analysis. Instead, as in the Boeing-McDonnell Douglas merger, the Commission based its decision in the GE-Honeywell merger on general industry assumptions (Boeder, 2000: 142).

The US authorities proclaimed that sound economic analysis would help to disentangle trade aspects from competition matters. Substantial efforts were made to streamline economic thinking across the Atlantic. Over time, Commission officials adopted this view. Illustrative of this is the declaration by Alexander Schaub, Director General of Competition, that 'successful cooperation depends upon rigorous economic analyses based upon strictly legal rules' (Schaub, 1998). Moreover, trade policy issues should not become entwined with competition issues (ibid). As will be argued in Chapter 8, in the course of a series of reforms, the European competition regime was institutionally transformed and came to incorporate a broad range of key substantive features from the US competition model and procedures, such as streamlining the timing of the merger review process. The DG Competition employed more economists, and fine-tuned microeconometric modelling replaced the previous, macroeconomic deliberate approach.

6.4.3 The Microsoft Controversy

The *Microsoft* controversy is similarly illustrative of the fundamental difference in approach between the US competition authorities and the European Commission. It highlights the enduring dominance of Chicago School reasoning at the US antitrust authorities and the engrained suspicion towards exorbitant corporate size within the European competition model, one of the vestiges of ordoliberal influence. Initially, the US DoJ, under the Clinton Presidency, prosecuted Microsoft for attempting to monopolise its market position over desktop operating systems in 1998. The ruling of the Supreme Court in *US v. Microsoft* in 2000 supported the decision by the DoJ and required the dismantling of the company. Whereas size hardly mattered under the previous administrations, the ruling indicated a greater reservation towards the belief in the self-healing mechanisms of capitalist markets. When the case was pending, Microsoft engaged in a tremendous lobbying campaign against the US antitrust authorities, which, amongst others, was targeted at reducing the budget of the DoJ (Pryor, 2001: 317). Bill Gates supported his campaign with the argument that the Antitrust Division was harming the company's reputation (ibid). When Microsoft brought the case to the US Appeals Court, the lower court's decision was reversed based on efficiency grounds, supported by the rule of reason (see Chapter 2). The ruling indicated that Chicago doctrines could easily be bypassed: as long as a company could prove to be efficient and not to overcharge consumers, corporate size and unilateral conduct was not problematised or considered an infringement of US antitrust laws. The Microsoft ruling of the US judiciary stands out as a landmark case in the fostering of a tolerant approach to economic power concentration.

The European Commission challenged Microsoft in 1998 based on Article 82 prohibiting the abuse of a dominant market position, and required Microsoft to give up its monopoly position with regard to tying the Windows Media Player exclusively to its Windows PCs. Microsoft holds a 95% market share in desktop publishing and a 70% market share in server operating systems. The Commission fined Microsoft € 497 million for 'abusing its market power' in the EU after five years of investigations – the largest antitrust fine ever imposed by the Commission (but unlikely to hurt Microsoft with US $ 54 billion cash flow at its disposition) (Smith in Dombey and Waters, 2004). When Microsoft appealed at the Court of First Instance (CFI), it ruled in December 2004 that Microsoft violated the EU objective of guaranteeing 'equal opportunity' in market integration when bundling its Media Player with the Windows Operating System. It ordered that Microsoft had to disclose complete and accurate specifications for the protocols necessary for its competitor's server products to be able to 'talk' on equal footing with Windows software. This implied a 'code removal', which, according to Brad Smith, Microsoft's General Counsel, constitutes the 'broadest compulsory licensing of intellectual property right since the EU was founded 50 years ago' (Litan and Shapiro, 2001: 55).

Although the DoJ had attacked Microsoft on similar grounds in 1998, US government officials were furious about the Commission's decision to challenge Microsoft based on monopoly accusations, which considerably increased tensions in the transatlantic relationship. Microsoft, which is estimated to spend more than US$ 6 million a year on lobbying activities in Washington alone, lobbied the US government extensively, demanding that it increase political pressure in order to convince the Commission, at that time headed by Mario Monti, to withdraw the case (Pitschner, 2004). US Senator Bill Frist, a Republican, accused the Commission of 'threatening the vitality of America's IT industry', which touches upon American jobs, American consumers and the American economy (Hart, 2001: 10). Again, the leverage of US-EU trade disputes emerged into the picture. In 2002, the Commission and the US antitrust authorities agreed to conduct a joint investigation procedure (Helmore, 2004). As inconsistent rulings by the EU and the US authorities could have created uncertainty and higher transaction costs, Microsoft gave its consent for the transatlantic cooperation endeavour. However, while the US authorities reached a comprehensive settlement with Microsoft in 2002, the Commission did not. It continued to prosecute Microsoft for having abused its dominance by tying the Windows Media Player to Windows, and in 2006 it imposed another fine of € 280,5 million on Microsoft for failing to comply with the 2004 decision. Thereby, the Commission went against a prior decision of the US authorities and neglected the positive comity agreement. Microsoft appealed again at the CFI, which supported the Commission's ruling on 17 September 2007, after nine years of arduous investigations. The company agreed to comply with the ruling of the CFI and announced to take concrete steps to provide competitors with the demanded access to its technology. In the view of US antitrust authorities, the approach taken by the EU reconfirmed the view that it attempts to protect competitors, rather than competition (see previous sections). Thomas Barnett, head of the DoJ's Antitrust Division, reacted on the ruling by saying that it had 'unfortunate consequences of harming consumers by chilling innovatrion and discouraging competition' (in FT, 2007: 8). According to the Chicagoan single goal orientation of efficiency gains, and hence, consumer welfare, that is prevailing in the US, competition policy should not protect smaller companies from competition by larger companies.

The McDonnell Douglas merger, the GE-Honeywell merger, and the Microsoft case are illustrative for the political limits of bilateral cooperation in competition matters across the Atlantic. These high-profile cases brought the differences in approaches to the fore, and increased tensions between the EU and the US competition authorities. Consequently, the European Commission put much effort in the conclusion of multilateral competition agreement, as the next chapter demonstrates.

Chapter 7

The Politics of the Multilateral Trajectory: The Convergence Crusade of EU and US Competition Authorities

The greatest long-term challenge in terms of convergence will be the task of 'managing' the worldwide proliferation of antitrust regimes. Many of these regimes are very new, and we – both the EU and US need to be advocating that competition policy should be used to foster competition, and not as a protectionist instrument, as an instrument of old-fashioned industrial policy, as an instrument of social policy, or whatever.

Alexander Schaub, Director-General for Competition at the European Commission (2002a: 12)

Introduction

Competition policy gathered political momentum in the 1990s when it reached the global agenda. In the 'road-levelling process' towards the formalisation of a binding multilateral agreement on competition within the institutional setting of the *World Trade Organisation (WTO)*, the European Commission positioned itself at the fore. A sequence of staunch proponents of the neoliberal free-market ideology at the DG Competition campaigned to establish a comprehensive competition culture on a global scale. What started with the energetic Commissioners Peter Sutherland and Thatcherite Sir Leon Brittan (1989-1995), continued with Karel van Miert (1995-1999) and Mario Monti (1999-2004). By means of the multilateral trajectory, the Commission's DG Competition sought to transpose the subsequent subordination of EU competition policy to neoliberal ideas onto a global level. The idea of establishing multilateral competition rules at the WTO was formed in the context of the larger geopolitical transformations of the early 1990s and the finalisation of the Uruguay Round, two important historical circumstances that fostered belief in opening up markets to competition and removing barriers to trade. Alongside the subsequent reduction of government imposed tariff and non-tariff barriers, so-called 'private barriers to trade' were identified as the most important problem needing to be solved.

The impetus found its origins in the quest of the same transnational business elite that demanded enhanced transatlantic cooperation in competition matters (see Chapter 6). Against the backdrop of the breathtaking pace in which structural economic developments made it easier for companies to transnationalise and engage concentration activities and other kinds of commercial intercompany transactions, private market barriers and state aid measures for domestic companies inhibited free-market access for TNCs and the possibilities of expansion into new product and labour markets. Moreover, the growing number of domestic competition regimes around the world, particularly the adoption of merger controlling laws, enhanced the problems resulting from multi-jurisdictional overlaps, and hence imposed additional transaction costs on TNCs. As a broad-scale harmonisation of national competition laws was not a viable option, hopes were cherished that, by the establishment of WTO competition rules, national laws and review procedures would at least converge. The transnational business elite, most of whom had their headquarters in the OECD world, found a committed ally in the Commission's DG Competition for exporting the free-market logic to the global realm. The initiatives for a multilateral agreement began to take shape in 1996 when competition was declared one of the *Singapore Issues* at the Singapore Ministerial Conference of the WTO, together with three other market-making policy issues, such as trade and investment, transparency in government procurement and trade facilitation. The subsequent proliferation of non-tariff related issue-linkages, so-called 'trade and …' issues within the WTO meant the conclusion of an agreement on competition rules appeared to be within striking distance. In September 2003 at the Cancún Ministerial Conference of the WTO, however, the project of multilateralising competition rules experienced an embarrassing downturn. Due to fierce opposition from the US authorities, and a number of developing countries, albeit for different reasons, the idea of a binding global competition agreement was abandoned.

This chapter explains why the EU proposal arrived at the WTO, which social forces supported this process and their reasons for doing so. Established accounts explaining the Commission's multilateral endeavours tend to suggest that 'competition regulators desired convergence of competition laws as a means to increase international cooperation in areas under their discretionary authority' (Damro, 2006b: 869). In contrast to this view, this chapter demonstrates that the reason why the Commission sought to 'craft' a common understanding on competition principles around the world needs to be understood in the context of transnationally operating companies seeking worldwide market access for goods, services, and capital. Commission officials embraced the desire of TNCs to institutionalise free competition as a means of ensuring the right to compete, and hence, the right to access new markets. This chapter starts with a brief walk through the history of attempts to multilateralise rules on competition. There were many initiatives for the conclusions of a binding multilateral competition agreement; however none of them was successful. The idea dates back to as early as 1947, to the *Havana Charter* (see Chapter 3), and was revitalised in the 1960s (see Chapter 4). Except for a few non-binding OECD Recommendations in the 1980s, which were limited to the economically successful industrialised world, virtually nothing happened until the mid-1990s, when the idea of multilateralising competition rules had its comeback within the WTO.

7.1 From Havana to Munich: A History of Unsuccessful Attempts to Multilateralise Rules on Competition

7.1.1 Rules on Competition in the Uruguay Round of the GATT Negotiations

Due the difficulties, within GATT, in agreeing terms with regard to a multilateral trading system (i.e. the Kennedy, Tokyo, and Uruguay Rounds), competition rules had always remained inferior to trade issues. Nonetheless, there had always been attempts to include competition rules. In the preparations for the *Punta Del Este Declaration,* launching the GATT Uruguay Round in 1986, developing countries demanded multilateral competition rules. However, industrialised countries, including the EC, blocked the initiative, because progressive trade liberalisation was central on their agenda (Carl, 2001: 2). The new GATT round was pretentiously declared the 'biggest reform of the world's trading system'.[41] It sought to abolish government-imposed tariff and non-tariff barriers to trade, except for agricultural products, the issue that brought the negotiations to the verge of collapse after almost eight years of difficult negotiations (from September 1986 to April 1994). Although provisions touching upon questions on competition were not fully excluded, they were mostly sector-specific, such as in the case of the telecommunications' and financial services' agreements in the *General Agreement on Trade in Services (GATS)*.[42] Nonetheless, the successful completion of the Uruguay Round at the 1994 Ministerial Conference in Marrakech, Morocco, boosted a spirit in which the removal of

[41] *See* for more on the history of the WTO at www.wto.org.
[42] The GATS addressed the regulation of monopolies and exclusive service suppliers in Article 8. Similarly, the annexed agreements on *Trade Related Investment Measures (TRIMs*) and the agreement on the *Trade-Related Aspects of Intellectual Property Rights (TRIPs)* contained provisions on the control of anticompetitive business practices relating to the transfer of technology and other proprietary information. In the TRIPs agreement, Article 40 on the *Control of Anticompetitive Practices in Contractual Licenses* directed against anticompetitive practices relating to the licensing of intellectual property rights. Article 22(2) (b) addressed *Acts of Unfair Competition* and Article 5(5), measures to avoid disturbing conditions of competition. In the *Textile Agreement*, Article 6(16) prohibited market segmentation for competing products. Furthermore, the *Agreement on Basic Telecommunications Services* in 1997 included a commitment to the elimination of exclusionary practices (cf. Anderson and Holmes, 2002: 6; Schoneveld, 2003: 466).

the remaining barriers seemed tangible, including barriers to free competition. Moreover, the larger geopolitical transformations, caused by the breakdown of the Soviet Regime in the early 1990s, fostered the belief that the logics of free competition were to be orchestrated in the multilateral realm. In the early 1990s, a group of foremost German academics and practitioners located in Munich submitted the *Draft International Antitrust Code (DIAC)* to the GATT Member States.

7.1.2 The Draft International Antitrust Code (DIAC)

What came to be referred as the Munich Group came up with a very detailed code, the *Draft International Antitrust Code (DIAC),* in 1993, a proposal aimed at supplementing the trade-orientated approach of the GATT with a plurilateral competition regime binding those Member States that ratified the code. The group comprised mostly German academics and private practitioners, and a few Americans and Japanese experts in the field of competition laws (Gerber, 2002: 128). Wolfgang Fikentscher, Professor of Comparative Law at the University of Munich, and Ulrich Immenga, Professor for International Economic Law from the University of Göttingen were the leading figures in the DIAC (see Fikentscher and Immenga, 1995). Under the auspices of the *Max Planck Institute*, the DIAC did not bring up the issue of harmonisation of competition laws and practices, but mainly focused on establishing minimum standards with regard to so-called 'hard-core' business restraints, including various *per se* prohibitions on horizontal and vertical intercompany agreements. It suggested disjointing competition provisions from trade issues and establishing an *International Antitrust Authority (IAA*), which would exclusively deal with transborder cases and provide a dispute settlement mechanism in cases where contracting states failed to implement the agreed standards. Rather than being an all-inclusive world competition authority entrusted with far-reaching powers, the IAA, like private actors, would challenge national competition authorities before national courts. The logic was that national governments and an international agency were mutually responsible for the enforcement of competition laws.

The DIAC proposal received careful thought in the Marrakech Agreement on the establishment of what later became the *World Trade Organisation (WTO)*. However, it did not create the necessary enthusiasm within the international community. Much of the criticism pointed to the DIAC's far-reaching regulatory approach and the strict cartel prosecution at international level (Brömmelmeyer, 2000: 197). The US government considered the DIAC too interventionist and suggested a regime of private enforcement, instead, according to which all interested parties, foreign or domestic, private or public, could bring anticompetitive cases to national courts (Gerber, 2002: 128). The *International Antitrust Committee* of the *American Bar Association (ABA)* launched an alternative proposal, which advocated an agreement among states with regard to some basic principles, such as unlawfulness of cartels and the partial harmonisation of filing requirements for mergers, rather than establishing a dispute settlement mechanism (Canadian Competition Bureau, 2001: 8). This proposal, like the DIAC, did, however, not materialise. Nonetheless, it triggered a discussion about multilateral competition laws.

> *With the solid support of their business communities, our governments can speed up on international negotiations.*
>
> Horst Langer, Management Board Siemens AG (in CEO, 1998b)

7.2 The Transnational Business Elite Setting the Agenda for a Multilateral Competition Agreement

The transnational business community had a stake in reducing negative policy externalities arising from cross-border transactions not only in the transatlantic realm, but also on a global scale. Priority agenda points were: the harmonisation or convergence of the different national procedures in the clearance of mergers and acquisitions, and the creation of free-market access through the institutionalisation of competition laws on a global scale. The interest in harmonisation or convergence is inherently linked to the fact that competition regimes proliferated around the globe, and multijurisdictional overlaps became more common. In 1989, only 31 countries had competition laws, of which 20 were situated in the industrialised OECD world and 11 in the developing world (Schoneveld, 2003: 434). Today, there are nearly a hundred states that have adopted competition laws and about 70 countries require a pre-merger notification. According to estimates, in 2010 there will be 110 countries with some sort of a competition regime (Gavil *et al.*, 2002: 59). More than 60% of all competition regimes were introduced during the 1990s, mostly by developing countries, and another 20 countries are still in the process of adopting competition laws (ICPAC, 2000: 33 in Damro, 2004: 12). Competition regimes emerged foremost in South American countries, marking a wide gap with most African countries (except for Zambia, Gabon, and South Africa) and much of Asia. South American and Caribbean countries even went as far as to establish regional cooperation agreements on competition, i.e. *Mercosur*, the *Andean Community*, and the *Caribbean Community and Common Market*, in short, *Caricom* (cf. Lee and Morand, 2003).

The proliferation of competition regimes in both developed and developing countries, implied that different approaches to competition, and hence, different conceptions of market access emerged. Moreover, mergers and acquisitions, and sometimes other types of commercial agreements, needed to be filed to multiple antitrust jurisdictions, each enforcing different competition laws and handling different notification procedures, timetables, information requirements, and levying different review fees. To give an example, while in the EU and the US, turnover thresholds decide whether merging companies have to notify to the respective competition authorities, in other countries market share tests are determining, i.e. Brazil, Slovenia, and Turkey (Djelic and Kleiner, 2003: 9). Moreover, while notification in the EU is free, the US authorities charge a minimum of US$ 45,000 and a country like Croatia US$ 140,000 (ibid). Business representatives repeatedly complained about the *Tower of Babel* in the compliance with different national competition laws. To comply with 15 to 30 different merger regimes, which all yielded different results, increased transaction costs, complexity, and uncertainty. An extreme example was the planned merger of *MCI WorldCom and Sprint*, which was notified in 37 different jurisdictions before the two companies finally abandoned the deal in 2000 (Bannerman, 2002: 55-56). Similarly, the merger between *Exxon* and *Mobil* was notified to 20 and the *GE-Honeywell* merger to 25 different jurisdictions (Morgan, 2005: 12). In addition to financial and administrative burdens, multiple filings and inconsistent penalising of anticompetitive market conduct created great potential for judicial conflicts. As companies often submit over a million pages of paperwork in order to support a deal (Bannerman, 2002: 11), different rulings by different competition authorities should not come as a surprise. It follows that transnationally operating businesses had a stake in the harmonisation, or then convergence of domestic competition rules and practices on a global scale in order to create a more business friendly environment on the global marketplace.

The *TABD*, the *ERT*, *UNICE* and *AmCham*, as well as the *ICC* constituted the choir of transnational corporate interests. The ICC, involving more than 7,000 member companies and business associations from over 130 countries, including law firms and other professional service companies, evolved into a 'triumphant lobbyist' for global economic deregulation in fora such as the WTO, the G8, the OECD, as well as UNCTAD (cf. Carrol and Carson, 2006). In 1994 at the ERT Summit in Essen, Germany, ERT members urged the political leaders of the EU, among which the Commission, to consider a more outward focus on EU competition policy. Holding exceptionally privileged access points to the European Commission, it set the agenda, together with the TABD. Together, they articulated their wish for more consistency in global economic transactions and to extend the coverage of the WTO to 'additional relevant areas, such as competition policy in order to address structural impediments to market access which foreign investors might come across' (ERT, 1996b; TABD, 1996). They demanded that the EU and the US authorities take the lead and to make joint efforts within the WTO to harmonise strong and effective competition laws (TABD, 1995: Section II.13 and II.14). As free trade and free competition were both deeply entangled areas of economic regulation, they advocated the establishment of a WTO committee on trade and competition policy at the Singapore Ministerial Conference (Business Law Europe, 1996). The transnational business elite were motivated by the fact that, in addition to conventional tariff barriers to free trade, barriers that impeded free competition created an obstacle to corporate expansion and thus the achievement of a competitive market position. It wanted to expand onto a worldwide scale what in *Eurojargon* was formulated as 'creating a level playing field'. The process of market liberalisation in Europe should not take shape in isolation, but be fortified by an energetic commitment to a free-market environment by 'the rest of the world' in order to allow free-market access to natural resources and new geographical product markets. In a report, the ERT spelled out its claim as follows:

> *The world economy is the proving ground. Industry wants a strong Europe in a growing world economy, which cannot be achieved by building a fortress closed against our neighbours. The largest companies of the European Round Table operate on a global scale and can clearly identify the causes of declining competitiveness. […] Industry [...] expects more open access to world markets, in return for giving our competitors better access to the Single Market in Europe.* (ERT, 1993: 10, 14)

The transnational business community had a stark interest in the removal of cartels and private restrictive practices in domestic market settings. Even though tariff barriers were low, transnational business representatives regularly complained about the closed Japanese and Korean markets (The Economist, 1994: 55). For example, in Japan, foreign producers were restricted from entering Japanese markets by an extensive quota system, tariffs, and special technical and administrative import requirements (Ruigrok and Van Tulder, 1995: 42). In addition, 'lax enforcement of competition laws, biased regulation in the banking and insurance sector, biased production, distribution and retailing networks, and other restrictive private practices were also identified as major barriers to entering the Japanese market (FT, 1993k: 2). Similarly, it urged the abolition of protectionist policies promoting national champions, or policies that used 'the cloak of patriotism or national security to prevent overseas investment' (Draghi, 2003: 10-11). In addition to the removal of regulatory and private market barriers, the transnational business community also had a strong interest in significantly eliminating the potential for conflicts arising from extraterritorial competition law enforcement. The TABD urged the 'US and EU governments to cooperate closely with the private sector in order to arrive at the most constructive approach in the promotion of a better understanding of the relationship between competition policy and the issues significant market access in the WTO' (TABD, 1996). It also reminded the US and the EU authorities to work closely with the private sector in order to 'develop the most constructive approach to this issue' (TABD, 1996: 7).

Even though the US Department of Commerce established and nurtured the TABD in collaboration with the Commission (see Chapter 6), over time the TABD's alliance with the Commission became much stronger, and the TABD even located its office near the Commission's headquarters in Brussels. The Commission stressed the TABD's role in setting priorities in the EU's WTO agenda (CEO, 1999c). As the next section illustrates, the Commission took the transnational business elites' demands to 'multilateralise competition policy' seriously.

7.3 A Role to Play by the European Commission: Taking the Initiative in the 1990s

The developments in the 1990s demonstrated that competition policy became one of the EU's most formidable international powers (Damro, 2006b: 868). Commissioner Brittan's opening speech at the Cartel Conference of 19 June in 1990 hosted by the

Bundeskartellamt in Berlin formed the prelude of a series of Commission initiatives that were launched in the 1990s to establish a multilateral competition regime. The conference was held shortly after the fall of the Berlin Wall and marked the beginning of a larger geopolitical transformation of the centrally planned economies of the Central and Eastern European countries (CEECs) into capitalist market regimes (Calvani, 2004: 11). At an audience of competition experts from all over the world, Brittan declared 'the time ripe to address international antitrust convergence' (ibid). Two years later, the call for convergence converted into the idea of building a multilateral competition regime. At the 1992 Annual Meeting of the *World Economic Forum (WEF)* in Davos, Brittan predicted that international competition rules would become one of the most crucial issues in the next decade and anticipated a strong role for the EU in drafting these rules. In his speech, which he later recalled as the most important of his career, Brittan compared 'unfair trade' to cancer and asserted that through competition policy 'the cancer can be cured before it takes hold' (FT, 1992b: 14). Clear international definitions of cartels and restrictive practices were necessary, according to Brittan, to distinguish 'between acceptable industrial cooperation and unacceptable restrictive practices' (ibid). He audaciously suggested 'common rules on the appraisal of mergers', state subsidies, and public monopolies, and proposed the GATT as an appropriate international forum to handle competition disputes (ibid). Moreover, he recommended establishing an international panel involving several Member State jurisdictions, which 'provided a forum for the discussion of merger cases and impartial analysis of the merits of merger cases, as well as for deciding which authority was best placed to deal with it' (ibid). These issues were already to be taken up in the next round of GATT trade discussions.

The fall of the Berlin Wall, and the expansion of market capitalism in the CEECs, led to a missionary wave of activities in which the European Commission actively sought to export its competition laws into new regions of the world. Similarly, in the run-up to the *North American Free Trade Agreement (NAFTA)*, US antitrust officials from the DoJ and the FTC targeted their efforts at bringing the competition regimes of Canada and Mexico more in line with the US model. Assisted by the competition task force of the *American Bar Association (ABA)*, the US competition authorities also sent out antitrust specialists to abroad for longer periods of time to exert substantial influence in building up competition regimes from scratch around the world. Together, the EU and US competition authorities were involved in building up nearly 100 competition jurisdictions in emerging markets worldwide (Gavil *et al.*, 2002: 4; Djelic and Kleiner, 2003: 8). In the early 1990s, the Commission's focus was primarly on training officials from candidate countries awaiting EU accession. Through various cooperation or association agreements, the Commission expanded its global reach and provided technical assistance in newly emerging competition regimes in North African, the Baltic and Mediterranean countries, Latin and Central American, and Asian countries (Gerber, 2002: 134). The Commission organised conferences and held seminars promoting competition policy as the centrepiece of a smooth functioning of a capitalist market in modern societies, and outlining basic economic concepts and theories on the workings of free and open markets (Ehlermann, 1995). Financed by the PHARE programme, it trained competition practioners and organised the exchange of staff. In the *Europe Agreements*, the existence of competition laws and effective enforcement were made one of the core preconditions for candidate countries awaiting EU accession, together with the restoration of private ownership, the introduction of company laws, rules on bankruptcy and liquidation of companies, the liberalisation of prices, trade and FDI (Commission, 1995a). The Commission claimed that the EU competition regime provided a 'useful model' for the accession countries and demanded an 'approximation of the national competition laws of the CEECs to the EC law (ibid).

After the successful 'exportation' of EU competition laws, the Commission enthusiastically announced to follow the same logic on a worldwide scale (Commission, 1994: 7). While the EU approach to competition control won out from the US in Central and Eastern Europe, many countries with newly established competition authorities combine features of both the EU and the US model, i.e. Argentina, Brazil, Chile, Colombia and Venezuela (Slaughter, 2004: 175). The core distinguishing elements of the US model, such as multiple enforcement agencies, criminal prosecution and private litigation rights, however, were employed only by a small number of developing countries (Gavil *et al.*, 2002: 930). Newly emerging competition regimes often preferred the European competition model for several reasons. The EU's civil law approach was more compatible with the legal traditions of most transition economies than the US court model (ibid: 60). Codifications with *per se* prohibitions were easier accessible for countries lacking specialised professionals in competition matters (Depypere, 1995: 9). The rule of reason approach, in contrast, required economic and judicial interpretation on a case-by-case basis by specialists. Furthermore, in contrast to the strongly efficiency orientated US model, the

European model was preferred because of its more egalitarian competition standards and the greater concern for the protection of small and medium-sized companies, as well as the flexibility in achieving both economical, political, social goals that go beyond achieving greater efficiency (Jenny, 2002: 297).

Against the backdrop of broad-based missionary activities in competition matters, the Commission started to put much effort in the conclusion of a global framework promoting the harmonisation of competition laws and practices around the world. Brittan's quest for a multilateral competition agreement found considerable support from his successors Commissioner Karel van Miert and Mario Monti. Van Miert took the lead in instigating think tank gatherings, which had the task of formulating concrete proposals for a multilateral competition agreement.

7.3.1 Substantiating the Initiative: The 1995 Karel van Miert Report

In June 1994, Commissioner Karel van Miert assigned a group of 'Wise Men' with the mandate to come up with a possible framework for a multilateral agreement on competition. The subsequent *'Wise Men Report'* of July 1995, or *'Karel van Miert Report'* as it was also called, was officially titled *Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules* (European Commission, 1995a). Wise Men groups became a common mechanism for drafting policy innovations in the EU setting. Van Miert's group was constituted foremost by the staff of the DG Competition, among whom was senior-level staff such as Director-General Claus-Dieter Ehlermann (1990-1995) and Assistant Director General Jean-François Pons (1994-2002). In order to keep up the appearance of an independent expert report, it was emphasised that the Wise Men group was 'independent' (European Commission, 1996b). It entailed the usual disclaimer that this report represented the views of the group of experts and did not bind the Commission (ibid: 1,22). Three 'independent experts' joined Van Miert's Wise Men. Among the external experts were Ulrich Immenga from the Munich Group, which had come up with the DIAC proposal, Frédéric Jenny, Professor of Economics and member of the French competition authority, as well as Ernst-Ulrich Petersmann, Professor of Economics at the University of St. Gallen, Switzerland (ibid: 23). Similarly to the Munich

Group, the strong 'German' (ordoliberal) representation in the Wise Men Group was notable.[43]

Van Miert realised that at this stage a worldwide and independent competition agency in the form of a World Competition Authority (WCA) was not feasible (FT, 1993k: 2). The signatories of a multilateral agreement would not accept such far-reaching constraints on national sovereignty. Van Miert therefore emphasised the establishment of 'minimum' competition rules in the first place. The 'Wise Men' proposal served as a blueprint for the EU to take the lead in setting competition rules on the agenda at the WTO's Ministerial Conference in Singapore in December 1996. Together with his predecessor Brittan, van Miert modified the 25-page long Wise Men Report and presented it to the Council (see Brittan and Van Miert, 1996). Rather than a full-scale harmonisation of competition rules, the Commission advised 'to strengthen international cooperation between competition authorities and a *first* harmonisation of certain national rules and procedures' (ibid: 3, emphasis added). It recommended a 'gradual construction of a plurilateral agreement on a set of jointly determined competition rules' (ibid: 12-15). The signatories would initially only include the world's major trading partners and then expand in membership in a tier-like fashion. At a later stage, the founding members would decide upon an institutional framework for a new international body to conciliate and arbitrate in the event of disputes and differences' (ibid: 10).[44]

In contrast to the more ambitious DIAC proposal suggesting a strong international competition control regime, the envisaged plurilateral agreement would not replace or interfere with individual decisions by domestic competition regimes. Thereby, national competition authorities would enforce agreed minimum standards. The main tasks of an international competition controlling level would be settling disputes between Members and monitoring and disciplining their compliance. The Commission carefully referred to the dispute settlement mechanism of the newly established *World Trade Organisation (WTO)* as an appropriate framework. In a subsequent report to the Council, van Miert and

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[43] In addition to the German Claus-Dieter Ehlermann, Ulrich Immenga and Ernst-Ulrich Petersmann were heavyweights in competition matters, looking back on an extensive record of work experience in competition authorities and international fora. Mr. Petersmann studied economics among others at the University of Freiburg, the ordoliberal core. He later worked as Consultant Legal Adviser from 1990 onwards in the GATT/WTO Secretariat and participated or chaired six GATT/WTO dispute settlement panels.

[44] The report identified the following countries as the potential signatories: US, Canada, Australia and New Zealand, EU and the countries of the EEA and CEECs, Japan and other Asian industrialised countries such as Hong Kong, Singapore, and Taiwan, as well as the most advanced Latin American countries (European Commission, 1995b: 15-16).

Brittan made this idea more explicit. They promoted the WTO as the most appropriate forum as it 'included a system of transparency and surveillance through notification requirements and monitoring provisions' (Brittan and Van Miert, 1996). In addition to the first phase of the plurilateral trajectory, the Commission advised deepening the existing bilateral competition agreements. This meant the Commission continuing on its path, particularly by increasing technical assistance in the establishment of competition laws and procedures in the CEECS, the *Newly Independent States (NIS),* and Russia.

The recommendations of the Wise Men Report were essentially 'European' in nature, in terms of both substance and form. Like the historical evolution of the EU, the plurilateral competition agreement should have a 'domino effect' and progressively expand its coverage in terms of member states, substance, and surveillance competences of the international body (ibid: 22). At the same time, the report sought to avoid cumbersome processes for coming to terms with signatories. Those sharing an interest in proceeding with a competition agreement could do so, while others were free to opt out (ibid: 22). Thereby, single signatories could not block multilateral decision making, a notion that draws directly on the EU's experience with integration. Concerning the substance of the rules, the report was quite straightforward. Although a few passages referred to 'consensus' and 'jointly determined principles', it suggested shaping the common competition rules on existing EC laws and enforcement procedures. More specifically, dominant market positions were to be ruled according to 'a regime similar to that of Article 82 (TEC)' (ibid: 17).

Analogous to the European competition regime, the report advocated establishing notification procedures, according to which contracting states notified cases of commercial transactions, including those that would fall under the block exemption regime of the EU. Moreover, it included a possibility for other members or companies that had fallen victim to anticompetitive practices to bring cases to the attention of the international body, which would then mandate the best-placed competition authority to take action (ibid: 18). In other words, the report suggested adopting the administrative *ex ante* notification model of the EU in which the WTO would operate in a similar way to the Commission (see Chapter 2). To support the proposal, van Miert argued that such an international system of common competition rules for cross-border issues 'has been working effectively within the European community for decades' (1998a: 6). The proposal's 'Europeanness' stands in marked contrast to US competition model, which the Commission considered 'to have evolved in ways which were not necessarily reflected on this side of the Atlantic' (European Commission, 1995b: 9). This also constituted the reason why bilateral agreements were limited and why a multilateral agreement was needed. The Commission noted in this respect:

> *[...] the limits to existing instances of cooperation (in particular between the European Union and the United States and between the European Union and Japan) are mainly due to the fact that competition law and its enforcement differ [...]. For example, the purpose of Community law, via competition, is not only to increase the efficiency of firms or to improve the allocation of resources, but also to bring about the integration of the internal market. The latter concern is not so pressing or non-existent in the Unites States.* (Ibid: 9)

> *(T)he effective application of competition law becomes an important contributor to creating and maintaining open and accessible markets [...].*
>
> The Wise Men Report (1995b: 3)

7.3.2 The Unimpaired Market Access Rationale of the 'Wise Men Report'

The rationales outlined in the report for why a multilateral agreement was necessary, reflect the core interests of TNCs. In line with the transnational business elite, it declared the phenomenon of multijurisdictional overlap a pressing problem that constituted 'a major barrier to the expansion of trade and investment' and highlighted the high transaction costs and increasing uncertainties suffered by companies operating on a transnational scale. It spelled out that also lax or non-enforcement of competition law worked as a barrier. In addition, the report identified potential conflicts as a major obstacle, which may emerge from the practice of extraterritorial competition law enforcement. Thereby, it explicitly referred to the US practice of imposing its own competition laws on an extraterritorial basis as a highly distorting gesture. Furthermore, it problematised the absence or weak competition law enforcement practices of developing countries, which after the further liberalisation of trade found themselves exposed to increased anticompetitive practices and interference by other countries enforcing their laws extraterritorially (European Commission, 1995b: 3-4).

The issues not taken up in the report also reflect the compelling influence of the transnational business community. There was no mentioning of limiting corporate concentration by a merger control regime on a global scale. This is remarkable as Commissioner van Miert once noted that the increasing concentration in certain industries posed a threat to the idea of free markets and thus formed one of the central reasons for a multilateral agreement on competition. He said: "One of the dangers ahead of us is that we will end up with private monopolies or companies with dominant monopolies worldwide." (Van Miert in FT, 1998i: 4) Aware of the fact that attacking corporate size in the WTO framework was not a feasible option, he estimated that negotiations on monopolies and vertical restraints would take longer, while an international agreement could easily be reached in the field of horizontal restrictions, such as: price and output fixing, market sharing, bid rigging and export cartels (Van Miert, 1998c: 20). The head of the German *Bundeskartellamt*, an adherent of ordoliberal ideas, also suggested building an international body that would control large-scale cross-border mergers. With the mergers between *Deutsche Bank* and the US *Bankers Trust*, and *Daimler-Benz* and *Chrysler* in mind, he warned that some mergers were too big for national bodies and also 'also a size too big for European merger control authorities' (FT, 1998b: 3). The issue of concentration, however, remained unmentioned in the report. At a later stage, van Miert called the report 'prudent and pragmatic', which indicates that he might have envisaged going much further (Van Miert, 1998a: 6).

To recapitulate, the Commission eventually proposed a multilateral competition agreement that did not discriminate against the interest of transnational business. The multilateral competition agreement thereby served the interests of transnational corporations to create, as the TABD expressed it, 'unimpaired market access on a worldwide scale for foreign goods, services, ideas, investments, and business people' (TABD, 1995: Section II.13 and II.14). As rules on competition and cross-border investment flows are two highly entrenched regulatory fields, TNCs also pushed for the inclusion of rules on investment in WTO trade rules. Domestic investment-blocking statutes can work as an impediment to the logic of free markets. They can limit the freedom of corporate establishment, hinder foreign investors from acquiring domestic companies, and hence, impose barriers to free competition. Such investment rules can range from provisions on minority shareholding for non-nationals to conditions on minimum export standards for foreign-controlled factories in order to generate a positive trade balance. Furthermore, they can prohibit foreigners from controlling strategic industries, such as coastal shipping lines, oil pipelines, domestic airlines, or broadcasting networks (The Economist, 1996: 80). In the course of the 1990s, a range of governments concluded bilateral investment treaties to facilitate foreign corporate activities. For example, in 1994 OECD countries concluded nearly 600 bilateral investment treaties with developing countries (The Economist, 1994: 55). A multilateral investment agreement at the WTO, according to transnational corporations, would lead to one common denominator in the rules regulating market access for foreign investors, and hence, facilitate mergers and acquisitions. This becomes particularly apparent when taking into account that FDI flows mainly proceed by mergers and acquisitions. In terms of value, the ratio of mergers and acquisitions of FDI in the 1990s amounted to 80%, and occasionally even 90% (cf. UNCTAD, 2000).

7.3.3 The Commission's Rationale for Entering the Corporate Liaison

In the evolution of the EU, competition policy was paramount to breaking down internal market barriers. The developments of the 1990s indicate that the Commission's efforts to stage-manage cross-border competition control were no longer restricted to 'Brussels' and the subsequent levels below. Instead, the EU's notoriously understaffed semi-executive branch reached out beyond its geographical boundaries. It attempted to become an important actor in 'crafting' a common understanding of the competition principles around the world. The outward focus in competition matters illustrates a fundamental shift in the Commission's field of activities. Arguably, taking the lead in global competition matters was certainly due, to some extent, to institutional self-interest and the wish for self-preservation. On institutional grounds, the WTO provided the Commission with an opportunity to maximise the spectrum of its external negotiation mandate, similar to that enjoyed in trade affairs. More important, however, was the political power game centred on the question of what kind of competition policy should be multilateralised.

The Commission's efforts took shape in an ideological climate in which neoliberal market views were dominant. Therefore, the incorporation of competition rules within the remit of the WTO need to be understood as an attempt to consolidate the idea of global free markets, trade liberalisation, and worldwide economic integration. In that sense, the expansionary drifts of the Commission epitomise a further phase of construction in the ascendancy of neoliberal discourses. With the proliferation of competition regimes around the world, political pressure grew on those countries that did not adopt a competition regime. A binding multilateral competition regime would have allowed for the imposition of more market-based competition control precepts on other national jurisdictions. A multilateral competition agreement, therefore, constitutes the epitome of a hegemonised political discourse, as it entrenches a particular competition paradigm in a domestic institutional setting. The conclusion of a multilateral competition agreement minimises the political leeway to adopt national varieties of competition laws and promotes a 'one size fits all' logic, leaving little scope for alternative ways of organising national economies other than the dominant neoliberal free-market access view. Once established, domestic political opposition would be weakened and the chosen direction difficult to change again. Alexander Schaub, former Director-General for Competition, defined the Commission's mission to 'manage' the worldwide proliferation of antitrust regimes in cooperation with the US. The purpose was to avoid competition policy used as an 'old-fashioned industrial protectionist instrument' or 'an instrument of social policy'. He argued:

> *This is crucial to the proper functioning of these countries' economies. But it is also crucial to the health of the global economy, to facilitating trade, ensuring that condition for business can be optimised: sound antitrust policies should not only mean open markets, but should also mean legal certainty, consistency, predictability, and an absence of regulatory arbitrariness.* (Schaub, 2002a: 12)

The overall subordination of competition policy to open markets and the guarantee of 'legal certainty, consistency, predictability, and an absence of regulatory arbitrariness' represent the stark interests of transnational corporations. In fact, the Commission received direct 'instructions' from the transnational business community. The TABD issued an Implementation Table in 1998 with recommendations on how to proceed in the WTO and the Commission assured its 'full support to the recommendations of the TABD'. It concluded that 'nearly all WTO items identified by the TABD have been taken up' (TABD Implementation Table 1998: Working Document by the Commission Services, referred to in: CEO, 1999c).

The Commission internalised the requests of the transnational business elite and portrayed divergence or inconsistent competition law enforcement as a 'burden to international commerce' and 'global competition' (Pitofsky, 1998). Therefore, the rationale for a multilateral competition agreement constitutes an attempt to protect transnational business from the regulatory arm of governmental market interventionism. The Commission's sales talk repeatedly put the emphasis on social peace rhetoric, according to which all market players should have equal opportunities. It frequently used connotative keywords, such as 'social', 'equal opportunities', 'fairness', and 'freedom'. For example, Mario Monti elucidated his vocation:

> *[...] we, the competition authorities, have the difficult mission of ensuring that the integrating markets are made and maintained competitive, thus making the globalisation process both economically more efficient and socially more acceptable.* (Monti, 2000b)

References to 'equal opportunities' served the purpose of justifying the free-market access objective. For the sake of competition, governments should treat foreign competitors on the same terms as domestic market players. However, small and medium-sized enterprises face difficulties living up to the competition standards set by large and powerful TNCs. Ignorant of this fact, the Commission sided with the interests of TNCs. According to Helmut Maucher, CEO of *Nestlé* and former ERT and ICC president, 'local industry should not be scared of TNCs moving in newly-opened markets – it might be tough at first, but later they will be stronger and more competitive' (in CEO, 1998a).

The reason why the idea for a multilateral competition agreement initially found a sympathetic ear at the WTO headquarters was the particular configuration of successive Competition Commissioners holding important strategic positions in both the industry and international organisations. Competition Commissioner Sir Leon Brittan was a committed neoliberal who not only set a new course for the Commission's endeavours, but also engineered his own career. After heading the DG Competition, he took over the newly established external trade portfolio and became chiefly responsible for the GATT/WTO negotiations. As Trade Commissioner, he continued to proclaim the necessity of introducing a multilateral agreement on competition laws and for subjecting such laws to a sanctioning mechanism (The Economist, 1998a: 14).[45] Brittan's immediate predecessor, Commissioner Sutherland (1985-1989), after his tenure took over the position of the

[45] After his ten-year tenure at the European Commission (1989-1999), he 'job hopped' to the investment bank UBS Warburg, where he became vice-chairman. In addition, he worked as a consultant on competition policy, especially on mergers and state aid, as well as on WTO issues and market access issues at the private law company Herbert Smith, and at Unilever, where he became Advising Director. Since 2001, Brittan works as chairman of the LOTIS Committee of International Financial Services London (IFSL), a lobby group representing the British financial sector (Hoedeman, 2002).

GATT/WTO Director-General (1993-1995), from where he backed up the proposal for the conclusion of a multilateral competition agreement (FT, 1998i: 4). The successive DGs under Karel van Miert and Mario Monti, adopted the idea of establishing a multilateral agreement on competition rules. Moreover, Claus-Dieter Ehlermann, who contributed to the drafting of the Wise Men Report in 1995, was transferred to the WTO's Appellate Body in Geneva in December 1995, where he worked until 2001, where he became chair in the last year of his mandate before he switched to a private law company. Therefore, the particular configuration of former Commissioners in strategic posts not only facilitated the political momentum to set competition policy on the WTO agenda, but also contributed to the particular enmeshment between corporate and political elites.

7.4 Competition Rules at the WTO's Singapore Ministerial Conference

The transnational business community urged the EU and US to make a joint attempt to convince WTO Member States to agree on competition laws and regulations that give priority to free-market access. The Commission's DG Competition responded to these requests with a proactive stance at the WTO Singapore Ministerial Conference in 1996, which led to the establishment of the *Working Group on the Interaction between Trade and Competition Policy.* Although there was no commitment to future negotiations in this area, trade and competition became one of the 'Singapore Issues', next to trade and investment, transparency in government procurement, and trade facilitation.

The prospects for a multilateral agreement on a common set of principles for national competition policies looked gloomy from the outset. The Member States could not agree which components of competition control should be discussed (FT, 1996d: 6). The proposal for setting up an international framework for competition rules, however, was not the thorniest issue on the agenda. Nonetheless, controversies loomed large. US scepticism and the opposition of a few developing countries eventually led to a rather weak mandate for the Working Group, which merely entailed to 'study issues raised by Members relating to the interaction between trade and competition policy, including anticompetitive practices, in order to identify any areas that may merit further consideration in the WTO framework' (WTO, 1996). The EU received considerable political backing from the Japanese government. Prior to that, the Commission organised joint seminars with European and Japanese competition authorities, lawyers, and academics (FT, 1993e: 36).

The US on the contrary, blamed the EU and Japan for distracting attention away from the liberalisation of trade in agricultural products. The reduction of tariffs and non-tariff barriers to trade in the agricultural sectors constituted one of the most pressing agenda points of the US, and other leading exporters of agricultural products, such as Australia, Brazil, and Canada. The EU negotiators, however, insisted on what in *Eurolingo* came to be termed ‘ABA’, an acronym for ‘anything but agriculture’, a stance broadly supported by other WTO Members with a highly protected agricultural sector, such as Japan, Norway, South Korea and Switzerland (The Economist, 1999). The overwhelmingly pro-free market attitude in the Council of Ministers bolstered the free ‘marketeers’ at the Commission. In particular, the broad political backing of the Northern EU Member States for an ‘aggressive’ EU approach in launching the preparations for a new trade liberalisation round at the WTO Ministerial Conference in Singapore in December 1996. After an informal meeting of EU trade ministers in Dublin in September 1996, Commissioner Brittan declared:

> *There was a clear orientation on the part of ministers that Europe should take a positive forward line, that Europe should take the lead. It seems to me a very fundamental watershed that we have passed today.* (In FT, 1996a: 6).

A series of reports and conferences followed, in which the Commission tried to persuade the Council, the international community of competition authorities, legal experts, and private practitioners of the need for a multilateral agreement on competition rules. At the Annual Conference of the *Fordham Law Institute* in 1997, one of the most prominent platforms where leading experts and competition practitioners discuss the future course of competition policy, van Miert announced that the EU ‘will play a full part in persuading the Members States of the WTO of the merits of a framework for competition rules’. He suggested a core of common principles, positive comity provisions as a ‘positive’ alternative to the extraterritorial application of competition rules, and a dispute settlement mechanism for clearly specified circumstances (Van Miert, 1997).

The Commission’s rationale for taking a proactive role advocating a global competition regime extended much further than this. It is novel that, in the global political history of the post-war world, this time the major protagonist taking the lead in further configuring the free-market system was of European origin. The US authorities, the founding fathers of the Bretton Woods institutions, seemed to have resigned as active proponents of international economic institutions. Against this backdrop of longstanding US hegemony in global institution building, the Commission's endeavours signal that the EU evolved as an important political force in shaping the regulatory parameters in the global economy. The enhanced process of economic integration and the centralisation of regulatory powers at Commission level made it possible for Europe to speak with one voice. When Competition Commissioner Monti took over the ambitious multilateral agenda of Karel van Miert, he joked that 'today Henry Kissinger would know who to phone if you want to speak to Europe about competition policy' (Monti, 2004a). He noted further, that EU now carries comparable global weight in the area of competition law enforcement, in particular in the area of merger control (ibid).

As a result of far-reaching disagreements, the Working Group's first report in 1998 lacked the necessary vigour to substantiate serious negotiations (WTO, 1998). In 1999, at the WTO Summit in Seattle in November 1999 Commissioner Mario Monti strongly advocated expanding the mandate of the Working Group on Trade and Competition to go beyond the stage of studying the interaction between trade and competition policy. This, however did not prove to be successful (Monti, 2002a: 81). In addition, the TABD, especially US business, became more sceptical about the success of negotiations over competition policy in the WTO (CEO, 1999b). In order to avoid a stalemate, the Commission tempered its proposal considerably. Whereas it had initially envisaged a detailed and binding competition agreement subject to the WTO's dispute settlement mechanism, the emphasis shifted to reaching a voluntary WTO agreement on common basic principles for national competition authorities, which were intended as a means to strengthen the stance of competition authorities in domestic settings around the globe. At the subsequent Ministerial Conference in Doha, Qatar, in November 2001, the competition agreement was declared a long-term objective.

Consistent lobbying by the Commission accounts for the reason why the competition issue had not yet been dropped. Nothing had been decided yet, except that multilateral rules on competition had been made a long-term objective and that the negotiations on the Singapore Issues were postponed until the Fifth Ministerial Conference at Cancún, Mexico, during 11-14 September 2003. In its final report, the WTO's Competition Working Group recommended merely some loosely defined 'core principles'. It entailed stipulations on the transparency of rules and regulations and a provision on non-discrimination requiring the removal of nationality-based discrimination between firms. Moreover, it included provisions on procedural fairness, such as: due process and recourse to judicial procedures, provisions on outlawing hardcore cartels and bid rigging, basic modalities for voluntary cooperation, support for progressive technical assistance, and institutional capacity building in developing countries (WTO, 2003b). In Doha, officials from developing countries insisted that an 'explicit' consensus was necessary for the launch of future negotiations. Commissioner Monti was nonetheless convinced that the time was ripe to start negotiations on a multilateral framework in the next WTO trade round and that this round would be short (Monti, 2002a: 81). Despite substantial scepticism, especially from the developing world and the US, he claimed that there was a widespread agreement that the WTO should play an increasingly important role in the field of competition policy (ibid). After the 'first track' of core principles, the Commission envisaged setting up a more elaborate second track, in which further educational and analytical work would take place so that a consensus could be achieved with regard to more complex issues (Monti, 2002a: 82). At the Cancún Ministerial Conference, however, fierce resistance from the US and a number of developing countries, led by Brazil and India, albeit for different reasons, brought the negotiations to a halt after only four days. In the subsequent 'July 2004 Package', the Singapore Issues, and with them the idea of a binding multilateral competition agreement, were dropped from the WTO agenda for the time being.

7.5 The Motives of the Blocking-Coalition Against the Multilateral Competition Agreement

7.5.1 The Opposition of the US Authorities

US resistance to the EU's plan to establish a common set of multilateral competition principles surfaced early in the process. When Commissioner Sir Leon Brittan announced his plans to address international antitrust convergence at the 1990 Cartel Conference in Berlin, US competition officials made sure not to go down the road of a binding international competition agreement and claimed that the bilateral trajectory also brought convergence. However, under the Clinton Administration, much of the US reluctance towards a multilateral approach waned, which made it possible to schedule competition policy at the Singapore Ministerial Conference in 1996. Nonetheless, the Clinton

Presidency could not generate the necessary support of US Congress for the 'trade and…' liberalisation projects. Clinton even tried to prolong the 'fast-track' authority that Congress granted for the Uruguay Round of the GATT negotiations, which would have obligated US Congress to approve or reject trade agreements without any further amendments. He did not get the support of Congress for his quest. Rather than a comprehensive commitment to multilateralism, the US authorities nevertheless wanted to raise awareness about the necessity of establishing a culture of competition control and more procedural and substantive consistency. According to Joel Klein, US Assistant Attorney General for Antitrust of the DoJ:

> *What is needed is to develop an international culture of sound antitrust enforcement, built on the basis of shared experience, bilateral co-operation and technical assistance to countries just starting down this road.* (In FT, 1998e: 20)

US officials did not share the EU's enthusiasm for the WTO as the principal coordinating body, even though the Commission tried to convince its US colleagues of WTO competition rules on several occasions (FT, 1993k: 2). US opposition was deeply rooted, due to a combination of reasons. Primarily, the US hegemonic approach in enforcing its own competition laws extraterritorially did not immediately create a pressing need to conclude a multilateral agreement (see Chapter 6). As a commentator remarked, the US competition regime has long been 'the only show in town' (Jenny, 1998: 7), and US officials held the view that global competition laws were to be defined in Washington and in Washington only. Cooperation and coordination in competition matters should take place under the leadership of the Department of Justice as 'they were the folks who should take the lead' (Pitofsky, 2002: 59). Moreover, 'convergence by law would be an aspiration, it was just not going to happen' (ibid: 58). The US system was considered simply 'the best and most effective' (Dörn and Wilks, 1996: 308).[46] As Joel Klein explained to his European colleagues:

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[46] *'Looking-glass, looking-glass, on the wall, who in this Land is the fairest of all?'* In a survey carried out by the Global Competition Review (see www.globalcompetitionreview.com), a specialist journal, on behalf of the DoJ and the FTC, thousands of competition lawyers and economists rated antitrust enforcement in 25 countries. In a report published in July 2002, they identified the US authorities as 'the only five star authorities in the world, well ahead of their counterparts in the EU'. The US agencies were the most 'sophisticated in the world' (Guerrera, 2002a), while the European Commission was positioned third with the Italian and the Australian enforcers, after Germany, the UK and France. The lack of a business-orientated career on the Commission's staff was the reason for the relatively low ranking. The report noted that the Commission 'can therefore be particularly frustrating to deal with' (ibid). In 2003, the Global Competition Review issued a new survey based on more than 500 questionnaires from business groups, legal departments, and the competition authorities themselves. This time the Commission was identified as one of the best of the

If you want a perfect solution, there is only one perfect solution, one that I haven't been able to persuade anybody to adopt, and that is to let the United States Department of Justice do global enforcement! […] (I)t would be terribly efficient. […] And my friends at the Federal Trade Commission, I'm sure would be the first people to support this idea. (Klein, 2002: 338)

Moreover, from the US viewpoint, it would be hard to agree 'on a strict application of neutral legal and economic principles within the framework of the WTO' (Klein in FT, 1998e: 20). Multilateralising competition rules would have required coming to terms with 132 WTO Members, of which the overwhelming majority were developing countries, as well as with China and Russia, which at that time were still queuing up to enter the WTO, i.e. all countries with different socioeconomic interests, different economic structures, and different legal traditions. According to the US authorities, the different objectives and standards for assessing anticompetitive conduct and enforcement procedures were unbridgeable, and negotiations on WTO competition rules both premature and counterproductive. Alternatively, basing a multilateral competition agreement on the lowest common denominator principle would water down the high standards of the US, and legitimise weak and ineffective competition law enforcement – all at the expense of trade liberalisation, market access and antitrust enforcement. As Klein argued:

[…] there are 83 countries now who have antitrust codes, three-quarters of whom don't enforce them. So why would I want to double the number and watch this continuing non-enforcement? […] No one remotely thinks that's right. So what I know I see when I look out at the world is first, a system that essentially is working and second, I don't see any great need. […] Is it really a belief that if the United Arab Emirates had an antitrust system there would be no barriers to entry in a trade-based sense? (Klein, 2002: 338-339)

The different competition law enforcement practices across the Atlantic spurred US reservations in this regard. The Boeing-McDonnell Douglas, the GE-Honeywell, and the Microsoft controversies reinforced US scepticism (see Chapter 6), but France's overly supportive industrial policy also raised concerns. The recurring US critique was that the EU competition regime was outlined in order to protect competitors, rather than competition (Fox, 2003a). If these differences were to be played out on a global scale, trade relations were expected to be further politicised. US competition authorities had a

world, although still below that of the US, Germany, and the UK. Respondents declared that the Commission's work was 99% sound (Dombey, 2003a). The US regime was declared better at economics and less instinctively interventionist (ibid).

marked interest in keeping competition control uncontaminated from trade issues (cf. Dörn and Wilks, 1996; Varney, 1996; Schoneveld, 2003). After all, the argument was, competition issues were deemed too complex to allow interference from trade authorities. As WTO rules did not directly address company behaviour, but rather Member State administrations instead, the risk of an international body interfering with the rulings would have damaged the reputation of a longstanding pundit in trust-busting such as the US (FT, 1998h: 4). In particular, the prospect of having to cope with the diplomatic style of 'career diplomats' at the WTO's permanent missions in Geneva was out of the question for an agency that had previously been used to a hegemonic approach in competition matters (Schoneveld, 2003: 465). On systemic grounds, the US model of private enforcement in antitrust matters (see Chapter 2) would have implied that US courts had to deal with private lawsuits referring to WTO rules. As private parties do not have access to the WTO's dispute settlement mechanism, this scenario was rather realistic. Therefore, US authorities did not want to lose control over the future direction of competition law enforcement and politicise competition cases by having an international body ruling against the decisions of the Federal competition authorities. As numerous other cases demonstrate, this fits into the broader picture of US aversion to multilateral agreements.[47] Similarly, even when the US government delegated powers to the WTO, it always ensured that US Federal law would enjoy supremacy over WTO agreements. For example, the *US Uruguay Round Agreements Act* stipulated that no provision 'inconsistent with any law of the Unites States shall have effect' (Section 102 (a) (1)).

The US authorities announced they could not agree on a multilateral regime until there was 'more convergence in enforcement of existing national laws and more experience was gained in cooperative enforcement efforts between national authorities' (Pitofsky, 1995). Political resistance to a centralised multilateral competition agreement within the WTO's setting also came from a range of developing countries, although for different reasons.

[47] Examples are: *International Criminal Court (ICC)* (2002), *Kyoto Protocol* (1997), *Mine Ban Treaty* (1997), *Comprehensive Test Ban Treaty* (1996), *Rio Pact on Biodiversity* (1992), *Protocol Against Child Soldiers* (1989), proposed Protocol (verification regime) *Biological Weapons Convention* (1975) and the *ABM Protocol* (1972).

7.5.2 The Neoliberal Bias Revisited: Opposition from the Developing World

At the WTO negotiations in Cancún, more than 70 WTO Members from the developing world fiercely opposed the Singapore Issues, i.e. trade and investment, trade and competition, transparency in government procurement, and trade facilitation. The Ministerial Conference collapsed after only four days and the EU had to drop the proposal for a multilateral competition agreement. The reason why competition issues had survived the previous Doha Round can be ascribed to the inclusion of provisions on technical assistance to developing countries in the core principles (Lee, 2005: 23). A few African countries brought forth a paper, called the 'Kenyan paper', outlining their unwillingness to negotiate on the Singapore Issues in August 2003. They noted that 'the benefits of negotiating a multilateral framework for each of these issues were not evident to them' and that 'many developing countries, which were already grappling with the implementation of existing WTO rules, had scarce resources to meaningfully negotiate these issues' (WTO, 2003a). Even though the developing world did not form a monolithic block with regard to the Singapore Issues, a range of other developing countries joined the position of the African countries. In addition to the fact that competition rules were not a priority agenda point, a common critique was that the inclusion of a WTO competition agreement constituted a 'Trojan Horse' for further importing market liberalisation and was thereby an instrument of neo-colonialism from the Western world. The non-discrimination clause included in the final report of the Singapore Competition Working Group gave rise to concerns as it disproportionally benefited large transnational corporate interests.

The proviso of non-discrimination constituted the hallmark of the neoliberal philosophy that underpinned the multilateral competition project. The *Most Favoured Nation Treatment (MFN)* inspired the stipulation. It implied that national competition laws and enforcement provisions were not allowed to discriminate between domestic and foreign companies. Thereby, the non-discrimination clause would have formally institutionalised the linkage of free competition and free access for foreign companies to the national markets of WTO Member States. Moreover, it would have implied that preferential treatment of domestic companies was outlawed, i.e. any form of affirmative action targeting developing domestic companies, SMEs, or infant industries. In other words, industrial or protectionist policies would have been forbidden, and alternative economic policy choices, other than those of unbridled competition and free-market access significantly limited, even completely ruled out. Similarly to the proposal on competition rules, the Singapore Working Group on Trade and Investment included provisions such as the of 'right of establishment' by foreigners through FDI and 'national treatment', which would have equipped foreign companies with the same rights and duties as national companies. The non-discrimination clause would have provided transnational corporations, which overwhelmingly originate in the wealthy OECD world, with their desired level-playing field. Free-market access to valuable natural resources, new products and cheap labour markets, as well as new markets for corporate control through mergers and acquisitions, would have allowed transnationally-operating corporations to consolidate their position further in the world market. The draft proposal at the WTO ignored the fact that free competition and free investment triggered structural inequalities in economic power between companies in the developed and developing world. Companies in developing countries do not have similar access to capital, marketing and distribution networks, or general expertise. Dominant new competitors can oust smaller indigenous competitors out of the domestic market and extinguish competition in the end. The prospects for sustainable economic development eventually worsen, and the prospects for these companies to compete globally become few and far between.

The non-discrimination clause also raised opposition from the Korean government, which sought to negotiate exemption rules, particularly considering many of the industrialised WTO Members already had long-standing exemption regimes in place (WTO WGTCP, 2002a). The Thai government advocated a 'special and differential' treatment of the core principles of competition policy for developing countries (WTO WGTCP, 2003), and the Indian government called for differential treatment of domestic companies with regard to the large transnational corporations (WTO WGTCP, 2002b). In addition, a range of WTO Members feared that even though the competition agreement had a plurilateral character, at a later stage those not signing could be confronted with coercive pressure to comply anyway, either by other Member governments or by investors (World Development Movement, 2003). Rather than discussing competition policy within the WTO, a range of developing countries suggested UNCTAD, which was generally more open towards the interests of developing countries, as a more appropriate forum for discussing competition rules (FT, 1996e: 6).

That the WTO proposal of core competition principles entailed a political bias in favour of creating market access for transnational corporations, was also reflected in the issues deliberately excluded from the agenda, such as the prosecution of export cartels and antidumping practices. A range of developing countries announced that they would not support the inclusion of competition rules unless they included a discussion on the prohibition of antidumping policy, which was mostly applied by industrialised countries to restrict cheap imports (FT, 1998h: 4). WTO rules allowed Member governments to impose duties on imports sold below the price of the home market or the costs of production (Artis and Finger, 1993; Marceau, 1995). Proponents of antidumping rules typically argue that cheap imports flooding national markets eventually reduce competition, as they undercut prices of domestic producers and drive them out of the market, and hence, provide the new foreign company with a possibility to raise its prices again and earn back the losses from dumping products below the normal price. Critics, in sharp contrast, hold that antidumping rules are simply a guise for market protectionism, which fences off import competition and market access. In fact, after the completion of the Uruguay Round, when import duties or quotas were no real option anymore, antidumping rules had to do the job instead. Antidumping practices have become ‘a popular way of complaining about the unfairness of foreigners for an industry seeking protection from imports’, particularly as the categorisation of a practice as dumping is always based on arbitrary decisions and as comparisons between prices across borders are difficult to establish (Finger, 1993: 3). Often it is sufficient if a competing import company demonstrates the dumping damage, based on decreasing sales and the rising imports of a foreign competitor. Developing countries were particularly concerned about large transnational corporations profiting from antidumping rules (Hoekman and Holmes, 1999: 878).

The WTO antidumping rules were shaped according to those of the US (The Economist, 1998b: 75). This is no surprise as the practice of antidumping had long been a US habit. The US has an extensive record closely followed by the EU, of successful antidumping cases. From 1980 to 1997, 80% of all antidumping claims of US origin were successful, compared to 71% of EU origin (The Economist, 1998b: 75). Especially the US government, supported by influential business lobby groups, took a rather favourable stance towards antidumping lawsuits (FT, 1998c: 4; 1998g: 44). It even speeded up antidumping suit procedures and maintained that rules on antidumping were unrelated to competition control (ibid). Antidumping provisions were particularly common in the textiles sector, where they fulfilled the function of a protective shield against cheap

Chinese imports, or in the steel sector where their purpose was to curb imports from countries such as Brazil, Russia, and also Japan (The Economist, 1998b: 75). In the EU, antidumping rules led to the epithet 'Fortress Europe'. In order to keep the European cotton bleaching industry alive, the EU levies a duty on bleached cotton imports (ibid). Similarly, in order to sustain EU based rice mills, it levies import duties on certain types of processed rice as part of its antidumping rules. The omnipresent practice of antidumping explains why both the EU and US authorities refused to include the issue in the remit of the WTO Working Group on the Interaction of Trade and Competition. Their reluctance to drop antidumping rules explains why the discussions on WTO competition rules already faced a severe deadlock in the preparation phase.

The European Commission, and its delegation to the Singapore Working Group, tried to convince the opponents of the beneficial aspects of a WTO competition agreement, and actively lobbied a number of developing countries in favour of the envisaged WTO competition agreement. Therefore, the Commission adopted a 'competition for economic development' reasoning. Next to 'integrating developing countries into a rules-based world economy' and enhancing the capacity of domestic competition authorities to enforce competition rules against large (foreign) companies (Monti, 2003b), it would help to prevent consumers in developing economies falling victim to cartels, monopoly abuses, and the creation of new monopolies through mergers (Anderson and Jenny, 2005: 2). Moreover, it assured that the WTO agreement would include cooperation modalities that were 'sufficiently flexible to address the needs of countries at different stages in the development' (Monti, 2001c). To achieve this, Commissioner Mario Monti emphasised the necessity to 'strive to achieve a maximum of convergence and consensus on fundamental issues such as the substance and economics of competition policy, the enforcement priorities, and best practices' (ibid). As the next section demonstrates, the new avenue chosen to achieve these objectives was the International Competition Network (ICN).

(T)he EU has a real influence on the shape of antitrust policy more globally, an influence which is exemplified by the leading role we have played in putting competition policy high on the global agenda, including in various multilateral fora such as the OECD, the WTO, and more recently in a new multilateral forum dedicated to competition policy: the ICN.

Mario Monti (2004a: 4)

Networks, rather than countries, or economic areas, are the true architecture of the new global economy.

Manuell Castells (2002a: 61)

7.6 Exploring New Avenues: The International Competition Network (ICN)

In parallel to the negotiations of the Doha and Cancún WTO Ministerial Conference, the US competition authorities launched the *International Competition Network (ICN)* in 2001. A voluntary transnational framework, the ICN was established as an alternative avenue for international cooperation in competition matters within the WTO. Its purpose was to facilitate procedural and substantive convergence in the enforcement of competition laws by means of an informal, project-driven organisation, which formulates common standards and identifies 'best practices'.

The idea to come up with the ICN emerged from the *International Competition Policy Advisory Committee (ICPAC)* established in November 1997 by the US competition authorities. ICPAC was the US response to the proactivity of the European Commission's Wise Men Group, suggesting incorporating competition rules in the WTO. The US authorities entrusted ICPAC with the task 'to address the global antitrust problems of the 21st Century' and to 'provide the Attorney General and Assistant Attorney General with 'independent' advice on international antitrust issues'. The ICPAC involved business executives, economists, lawyers, and public competition officials (Djelic and Kleiner, 2006: 297). It published a few reports, which primarily focused on multijurisdictional merger review, and advised expanding bilateral cooperation among antitrust authorities in examining mergers further (Klein, 2000). In its final report, after two years of public hearings, the ICPAC advised the creation of a 'Global Competition Initiative', which would promote greater convergence of competition laws, although without a binding character, and without the institutionalisation of a dispute settlement procedure similar to that of the WTO (ibid). The ICPAC was dissolved again in June 2000 after the creation of the ICN was agreed.[48]

The US authorities presented their alternative to the WTO trajectory to the European Commission in the same year. In his speech *Time for a Global Competitive Initiative?*, US Assistant Attorney General Joel Klein urged the Commission that it was time ‘to develop a common language and to adopt a microeconomics-based competition enforcement, even if they could not achieve pure convergence’ (Klein, 2000). This ‘competition culture’ was to be broadened beyond the established players to a global scale by creating a venue where antitrust officials, business, academics, economic and legal experts can discuss matters of competition law. The transnational business elite welcomed the proposal with enthusiasm. The ERT reminded the competition authorities that the priority agenda point was to harmonise the different national procedures and to reduce the administrative and financial burdens in the clearance of mergers and acquisitions (ERT, 2002a). Commissioner Mario Monti assured the support of the DG Competition for the US initiative, although he also expressed his disappointment that the US suggested a ‘Global Competition Initiative without the establishment of a multilateral competition law framework at the WTO level’ (Monti, 2002a: 82). Nonetheless, after the downfall of the Cancún Ministerial Conference, the Commission promoted the ICN as the main vehicle to advance a process of convergence in competition matters on a global scale.

The flexibility of the ICN’s network structure remedied the US ‘tie anxiety’ to a more constraining rule system, such as the WTO. The recommendations issued by the several working groups are non-binding and informal in nature. The voluntary and non-binding character should not surprise, as the Antitrust Division of the US DoJ and the FTC sit at the driver’s seat in bringing more consistency and convergence among national and supranational jurisdictional agencies in the world. The European Commission soon joined forces with the US authorities, sharing the seat of the *pater familias* at the head of the global competition family table. To date, nearly all national and regional competition authorities of the world take part in the ICN’s 'best practices’ machinery. The number of participating national competition authorities increased from 14 at the time of the ICN’s creation to 60 at the time of its first conference in Naples in 2002, to more than 90 today. The ICN was designed for both developed and developing countries to share practical

[48] More details on the history of the ICN can be found at: www.internationalcompetitionnetwork.org.

problems in handling competition issues, and to adapt the proposed standards and procedures of competition control through mutual 'policy-learning'. Nonetheless, a process of convergence in competition laws and practices presupposes an identifiable common reference point, a target towards which systemic, legal, or regulatory devices are moving. The standards promoted by the ICN are unequivocally predisposed towards those of the US authorities and the European Commission, who form part of the ICN's steering group responsible for identifying projects and work plans. The ICN constitutes the perfect means for the diffusion of common norms and procedural standards, for raising awareness on certain problem definitions and solutions, and to socialise more peripheral competition authorities socialised in one global competition culture (Gerber, 2002: 123). The message of the ICN is simple: there is little room for different interpretations by national competition authorities to tackle questions of competition. Although the ICN officially declared that it would seek to establish consensus through persuasion and deliberation, it allows powerful members to exert significant political pressure on less powerful members to adopt the agreed set of rules, practices, or systems. As Commissioner Monti (2004c) pointed out, 'competition authorities and legislators had to move decisively forward with the implementation of the agreed ICN standards'. Anomalies, he continued, would be eliminated by through 'persuasion and other appropriate means' (ibid).

The power of the US-EU tandem is further enhanced by the ICN's ultra-light organisational structure: the ICN does not have formal decision making rules, a permanent secretariat, a letterbox, or a bank account (Monti, 2002a). The ICN provides the powerful competition authorities with the necessary flexibility to steer the future course of the ICN with greater ease. Through regular gatherings and an annual conference, the dissemination of working group reports, and surveillance through implementation reports on member countries, the ICN's framework allows the proactive agencies to exert peer pressure and to coerce competition authorities to adopt the ICN norms into their legal systems, and thereby fasten up the process of convergence. Most notably, the informal organisational structure allows private business representatives to play an important role side-by-side with the competition authorities. The ICN 'maintains close contact with and seeks input from international organisations, such as the OECD, WTO, and UNCTAD' (cf. Nederlandse Mededingingsautoriteit, 2007). The Commission was rather overt in this respect and announced that it would 'actively seek advice and contributions form the private sector and from the legal professions and individual members of the academic community (Schaub, 2002b). Similarly, the US authorities ‘believe that the private sector has an important role to play in the ICN, not as members but as partners’ (Government, 2002). Excluded from the list were labour organisations. In 2006, the ICN even established a subgroup on ‘Business Outreach’, which actively seeks contact with business organisations ‘in order to benefit from their knowledge, experience, and insights’ and to understand business realities (Barnett, 2006). It ‘maintains close contact with and seeks input from international organisations, such as the OECD, WTO, and UNCTAD’ (cf. Nederlandse Mededingingsautoriteit, 2007). Whereas representatives of large companies are keen to influence the ICN’s recommendation, small and medium-sized enterprises are notoriously under-represented in the ICN dialogue. Moreover, US law companies are particularly involved in providing expert input and support (Djelic and Kleiner, 2006: 299).

Initially, in line with the interests of the transnational business community, the ICN primarily targeted the area of merger control in the multijurisdictional context. Meanwhile, working groups on cartel investigation and prosecution, as well as on unilateral conduct were established. Three working groups alone were established on merger related issues. The dominant position of the ‘chief socialisers’ became visible through the ICN working group structure. Members of the US authorities and the Commission chaired most of the working groups that aimed streamlining investigative procedures in the assessment of mergers. They headed the subgroups focusing on ‘Notifications and Procedures’ and ‘Investigative Techniques’, as well as the ICN’s Advocacy Working Group, and its subgroups on ‘Capacity Building’ and ‘Competition Policy Implementation’, which were given the task to promote a ‘culture of competition’ in developing countries. For example, the ‘Notifications and Procedures’ subgroup issued seven recommended practices for merger notification procedures, a rather detailed guide on adopting a merger notification regime. As Commissioner Monti (2004c) explained, the convergence endeavour in the merger area entirely served the purpose of making compliance for companies with multijurisdictional merger review much less burdensome.

The ICN constitutes a palpable example of how the processes of regulatory convergence in the field of competition laws are not driven by inexorable and mechanical laws of the market. Rather, an alliance of public authorities and private business, seeking to establish an intellectual consensus on how to address competition questions around the world, orchestrated the convergence endeavour. The central practices underpinning the allegedly voluntary global convergence of competition laws and procedures were shaped in a language similar to that used in development aid. It includes notions such as ‘capacity building’, ‘technical assistance’, ‘policy advocacy’, the recommendation of ‘best practices catalogues’ (European Commission, 2004: 20) – all notions which imply a mature donor agency giving a young, inexperienced recipient agency a hand in imposing institutional structures to control competition.

The next chapter illustrates that the European competition model, alongside the bilateral and multilateral cooperation trajectory, underwent a process of convergence towards the more free market-oriented competition model of the US.

Chapter 8

The 'End of History'?
The 'Modernisation' of the EU Competition Enforcement Model

> *The European Commission is committed to develop a modern and efficient competition policy. A policy, which reflects a realistic economic analysis of the market place. A policy that takes into account the concerns of the business world in terms of transparency, certainty, and predictability. But above all, a policy, which ensures that the market functions in such a way as to maximise the benefits for the consumer.*
>
> Mario Monti, Former Competition Commissioner (2003c: 15)

Introduction[49]

From the mid-1990s onwards, the EU competition regime underwent a series of reforms. The most recent and the most incremental changes came into force on May 1 2004, coinciding with the accession of ten new Member States. The reform fundamentally transforms the EU competition model, both in terms of an impact on substance and enforcement procedures. What has been commonly termed the 'modernisation' (European Commission, 1999), came in the form of a package deal consisting of both substantive and procedural features, which according to former Competition Commissioner Mario Monti (2004b) comprised 'a revolution in the way competition rules are enforced in the European Union'. The reform represents a major step towards convergence with the US model of competition law enforcement. According to Monti (2004a), 'if there was ever a gap between both systems, it disappeared on 1 May 2004'. Two regulatory changes were crucial in this regard. First, the replacement of the more than forty year-old Regulation 17 with Regulation 1/2003 essentially altered the way in which anticompetitive conduct, such as cartels and other restrictive business practices, were prosecuted in the EU. The long-standing centralised administrative *ex ante* notification regime for commercial intercompany agreements was abolished, and replaced with a decentralised *ex post* private enforcement regime. Second, the Merger Regulation 4064/89 was replaced by the Merger Regulation 139/2004, which entailed a revision of the substantive measurement used for the assessment of mergers. Furthermore, it allocated more investigatory powers to the Commission.

[49] This chapter draws on Wigger (2007) and Wigger and Nölke (2007).

This chapter argues that the new regime consolidates the developments that started in the 1990s, notably the incorporation of a more neoliberal focus in the enforcement of EU competition laws through the adoption of a more market-based approach similar to that of the US, which entails a predisposition towards fiercer and freer competition. The institutional anchoring of the use of microeconomic theories reinforces this trend. Crucial in this regard, is the use of ever-more sophisticated econometric techniques in modelling anticompetitive conduct, as well as a general inclination, on the part of the Commission, to base its decision making on corporate efficiency and consumer welfare. The reform is intrinsically linked to the process of bilateral and multilateral cooperation between the US competition authorities and the European Commission (see Chapter 6 and Chapter 7), a cooperation that finds its origins in the relentless quests of the transnational business elite for enhanced global convergence in the application of competition laws. In line with the interests of transnationally operating business, the reform seeks to remedy the engrained tensions, which surfaced between the European and the US models throughout the 1990s. Moreover, by introducing private enforcement (see Chapter 2), the main burden of antitrust enforcement shifted to the private sector: the enforcement of EU competition laws will be increasingly determined by how proactive market actors are in litigating observed anticompetitive behaviour before the EU or national courts. Thereby, the business community cannot rely anymore on the sanction-free notification procedure, but has to assess by itself whether a planned economic transaction infringes the law or not. According to the Commission, companies will thereby take EU competition rules more seriously (Monti, 2001a). The mere threat of private litigation will cause sufficient deterrence, inducing companies to comply better with European competition law (Monti, 2004d; see also Kroes, 2005a).

The reform seeks in many ways to enhance levels of private enforcement in the EU. The launch of a Green Paper in December 2005, proposing the introduction of new judicial tools, such as damage compensation, seeks to render private actions more worthwhile for claimants. This chapter first examines the combined impact of the newly introduced Regulation 1/2003, and the enhanced emphasis on neoclassical microeconomic theories and econometric modelling. Second, it analyses the new decisional grounds in the assessment of mergers and acquisitions under Regulation 139/2004. Furthermore, by paying close attention to the question of *cui bono*, this chapter reconstructs the interest constellation, against the backdrop of the structural conditions, which enabled it to inform this process of neoliberal restructuring. The transnational business elite and the private practitioners are identified as the major driving forces in the reform process. In addition, it demonstrates that the enhanced possibilities for litigation in competition matters also play into the hands of a more shareholder value-orientated market economy. It highlights that a diffuse group of shareholders lobbied for class action litigation and criminal sanctions, alongside the competition reform. The reform, it will be argued, opens up a window of opportunity for groups of shareholders to increase their voice options, vis-à-vis management boards, in order to redistribute controlling powers in their favour. In conclusion, the chapter underscores the contradictions in the interest motives of the different transnational forces seeking enhanced market-based regulatory solutions.

> *We can confidently say that we share the same goals and pursue the same results on both sides of the Atlantic: namely, to ensure effective competition between enterprises, by conducting a competition policy which is based on sound economics and which has the protection of consumers as its primary concern.*
>
> Mario Monti, Former Competition Commissioner (2001a)

8.1 The Abolition of the *Ex Ante* Notification Regime - A Step Towards Convergence with the US Model

One of the central components of the 2004 EU antitrust reform package is the replacement of Regulation 17 with Regulation 1/2003 on May 1 2004, as procedural framework for the application of Article 81 and 82, governing the fight against cartels and other restrictive business practices, and the abuse of dominant positions. The new Regulation 1/2003 abolished the *ex ante* notification and authorisation system for Article 81-type of intercompany agreements.[50] Companies cannot rely anymore on the official approval by the Commission prior to concluding contractual business practices (other than mergers), nor can they seek individual exemption. By the removal of a public warranty to proceed with a transaction, companies have to assess themselves whether a particular cooperative agreement infringes Article 81(1), or whether the agreement is exempted under 81(3). This regulatory change marks the introduction of a system of *ex post* private enforcement, which relies more on private 'market intelligence' in spotting anticompetitive practices and

[50] For Article 82 there was never a notification regime. See also Chapter 2.

less on market supervision and intervention by public authorities. It means that companies are increasingly exposed to the risk of being litigated by other market actors, a jeopardy that, so far, has constituted a relatively alien feature in EU antitrust control. This reflects a retrenchment of the Commission and the end of the long-standing ordoliberal tradition of administrative and supervisory market control for commercial intercompany agreements. According to a speech by Competition Commissioner Mario Monti at the ordoliberal 'headquarter' Freiburg University, the 'Freiburg School and its basic concepts, to which many policy choices can be traced back, has made a major contribution to shaping the post-war economy and what sometimes is called the 'European Model' (Monti, 2000a: 1). However, in the 'presence of strikingly modern ideas, the whole of the competition law framework needed to be overhauled in order to ensure more efficient enforcement of the European competition rules' (ibid).

The reform seeks to boost the level of private enforcement in the EU, which reflects a major step towards convergence with the Anglo-Saxon antitrust model, in particular towards that of the US. The process of convergence constitutes mostly a one-sided phenomenon, in which the EU adopted crucial features of the US model of competition control. The Federal antitrust authorities, the Department of Justice (DoJ) and the Federal Trade Commission (FTC), never played as similarly comforting role as the Commission, nor was there an equivalent of the EU notification regime for commercial intercompany agreements in the US. Although private entities always played an important role in the enforcement of EU antitrust law, they tended to inform the Commission, rather than to litigate. The Commission received, on average, more than 100 private complaints per year (Paulis and Smijter, 2005b: 12), while private litigators in less than 5% of the cases invoked a claim at the European courts (Kemper, 2004: 9). The *ex ante* notification regime provided little ground for private actors to bring legal actions to the courts: once the Commission cleared a case or granted exemption, companies enjoyed legal immunity from further prosecution, leaving claimants with the only option of challenging the Commission's decision at court level. Positing a case at the Commission's desk was far more appealing as claimants would have needed to collect the relevant evidence and prove that a certain business conduct infringed the law, as well as cover the alleged costs of suing (Pirrung, 2004: 97). Alerting the Commission on competition law infringements was easier for claimants than initiating the litigation themselves. In addition, most of the legal features that make it attractive to initiate legal proceedings against corporations in the US were absent in the EU system. Successful plaintiffs in Europe were not awarded three times the damage suffered, on top of the costs of suing, nor was there a possibility for class actions in which several plaintiffs group together and sue collectively (see Chapter 2). Moreover, 'no-win-no-fee' or contingency fees, offered by most US law companies, according to which professional litigators representing the plaintiffs in court make their profit dependent on the monetary award, were prohibited in most European legal systems. Therefore, the absence of these judicial tools, together with the fact that national jurisdictions could not apply the whole of Article 81, rendered the legal landscape of the EU a rather hostile environment for private enforcement, which is why, in the European setting, a claimant's culture with exorbitant compensation payments, similar to that of the US, was a rather alien feature.

Even though the 2004 reform did not directly touch upon further legal modifications, the current discussion on a range of legal instruments for private plaintiffs is likely to render the reform a stepping-stone in a much broader process of enhanced convergence towards the US model. In particular, the creation of stronger incentives for private litigation has achieved high agenda status in the current discussions. Competition Commissioner Kroes (2005d) was quite overt in this respect when saying that 'the comprehensive enforcement of the competition rules was not yet complete – not enough use was made of the courts'. In December 2005, the Commission presented its ideas on how to 'increase the scope for private enforcement', in a Green Paper promoting the introduction of 'Damages Actions for Breach of the EC Antitrust Rules' (European Commission, 2005b). As a point of departure, it was noted that the current situation of damage claims for competition law infringements in the EU-25 presented a picture of 'total underdevelopment' and 'astonishing diversity' (ibid).

Whether a facilitated damage relief system was desirable at all did not form part of the Commission's 36 options specifying its implementation. Furthermore, jurisprudence by the European Court of Justice (ECJ) already laid the basis for damage compensation. In the seminal *Courage vs. Crehan* decision of September 20 in 2001, it ruled that 'any individual' injured from an agreement in violation of Article 81(1) must be able to obtain compensation for the economic losses suffered (Gerven, 2005: 2; cf. Reich, 2005). So far, only three Member States have a damage claim statutory, although, in principle, twelve allow such claims (McDavid, 2005). Since 1962, there have been only 12 competition cases where damages payments were awarded (ibid). As the rulings of the ECJ produce a direct effect, individuals can also evoke these rulings before national courts. The ECJ thereby played a proactive role, with regard to creating a legal basis for damage actions in national settings. It concluded from the Crehan case that ‘the existence of litigation right strengthens the working of the Community competition rules’ and that ‘actions for damages before the national courts could make a significant contribution to the maintenance of effective competition in the Community’ (in Schoneveld, 2003: 440). Also the Commission believes that once a system of damage relief is introduced at Member State level, private parties will bring more actions to the courts (Monti, 2004d). Moreover, the gradual rise in private lawsuits and facilitated court access is expected to increase the overall level of enforcement and render it at least ‘as effective as in the US, if not more so’ (Philip Lowe in Dombey, 2004).

Somewhat ironically, US enforcers have much critique on their own system (Wils, 2003). Even though US authorities have traditionally put much effort into narrowing the distance between the European and the US antitrust model, these efforts were never directed at promoting the US system of private enforcement (Davidow, 2002: 493). Timothy Muris (2004), chairperson of the US FTC, noted that private enforcement, particularly in combination with the US class action system, carried enormous costs, as lawyers usually left the battle as winners, leaving little direct benefits for consumers. On the contrary, consumers were even faced with indirect costs as damage payments imposed on companies were eventually incorporated in the price of consumer goods. In response to pressure by the US business community to reduce competition law enforcement in the US, the Bush Administration even sought to forbid certain litigation practices at Federal court level in the hope to curtail a claimant’s culture that has run out of control. It proposed a Bill in February 2005 that aimed to scale down the scope and the frequency of class actions before the US courts. The Democrats eventually opposed the bill, as it would have led to a massive dismissal of claims by Federal judges, and culminated in an attack on consumer rights. The next section highlights why private enforcement unequivocally stimulates a more market-based competition regime.

Markets, not politicians, are best placed to allocate resources efficiently. Markets, not politicians, are best placed to identify the companies and technologies of the future. Markets, not politicians, are what at the end of the day will generate the wealth we need to maintain our way of life, based on our shared social and environmental values.

Neelie Kroes, Competition Commissioner (2007a)

8.1.1 The 'Modernisation' in Perspective: Towards A More Market-based Regime

By putting the emphasis on private enforcement, the centre of gravity shifted from the Commission's desk to the proactivity of market participants. In addition, Regulation 1/2003 declared the whole of Article 81, together with Article 82 on the abuse of dominant positions, directly applicable, which implies that national competition authorities (NCAs) and national courts have to apply EU level competition laws in cases with a Community-dimension. Although competition authorities continue to be entitled to intervene in private market conduct, the new regime became more market-based. By evoking a situation of mutual policing by market actors, companies not only have to watch over themselves, but also over their competitors, distributors and suppliers, and bring antitrust breaches to the courts. In addition, consumers, employees, and other possible private litigants can also do so. The fear of litigation should deter companies from engaging in unlawful agreements and ensure a better compliance with antitrust laws. The retrenchment of a public authority in the surveillance of the market creates a new avenue for professional services firms specialised in competition laws to assist other companies in assessing whether a planned business transaction produces anticompetitive effects, or whether it belongs in the category of block exemptions. Whereas the previous notification system provided companies with a legal check, free of charge, under the new regime specialised legal advice needs to be purchased on the market similar to any other commodity. This is a case in point reflecting an overall 'deepening commodification', which started in the late 1970s, entailing the expansion of 'market relations and possibilities for private profit pursuit into ever further spheres and dimensions of human activity and existence' (Overbeek, 2004: 4). The ongoing trend towards more microeconomics in the assessment of anticompetitive business conduct is likely to reinforce the need for specialised legal advice.

Consumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of Articles 81 and 82. Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources.

Neelie Kroes, EU Competition Commissioner (2005c)

8.1.2 The 'Microeconomisation' of EU Competition Law Enforcement

The 2004 reform took place against the backdrop of a steady trend in the use of ever-more sophisticated neoclassical economic principles and econometric evidence in assessing anticompetitive behaviour. The conditions for block exemptions for Article 81-type intercompany agreements were reformed by Regulation 1/2003. They 'shifted from a legalistic approach to an interpretation based on sound economic principles' (Monti, 2003a). Concomitantly, over the past few years, the Commission has employed a growing number of economists and financial analysts to assist its legal experts. Arguably, the field of competition control has always attracted personnel with an interdisciplinary academic background, including legal experts and lawyers, paralegals, economists, industry specialists, accountants and the like. The DG Competition, however, traditionally hosted more lawyers and judicial experts than economists, exhibiting a ratio of seven to one (Cini and McGowan, 1998: 50; Monti, 2007: 80). Correspondingly, judicial interpretations of anticompetitive conduct were predominant as lawyers generally prefer rules to economic standards. This sharply contrasted with the US, where microeconomic principles and quantitative econometric data formed the epitome in antitrust decision making (Scheffman and Coleman, 2001; Katz, 2004). Since the 1960s, the maxims and analytical concepts of the Chicago School of Law and Economics has influenced generations of US antitrust practitioners (see Chapter 2).

At present, about half of the qualified officials working at the Commission's DG Competition have an academic degree in economics (Röller and Friederiszick, 2005). The sophistication of competition law enforcement with microeconometric modelling received a major boost under Commissioner Monti, an economist himself. His successor Neelie Kroes (2005a; 2005b) announced that further reforms facilitating high-quality economic analyses would also be at the top of her agenda. The reorganisation of the professional nature of the DG Competition, however, falls under the legacy of Monti, one of the chief architects of the 2004 modernisation. According to Monti (2001):

One of my main objectives upon taking office […] has been to increase the emphasis on sound economics in the application of the EC antitrust rules, in particular to those concerning different types of agreements between companies […].

Similarly to the US model, a post called the 'Chief Competition Economist' was established, which had the mission to scrutinise the Commission's antitrust investigations with a 'fresh pair of eyes' and 'independent economic viewpoints' (Monti, 2002b). Accompanied by an entourage of experienced economists called the Economic Advisory Group, the Chief Economist had the task of guiding the regular staff of lawyers, on a case-by-case basis, in all fields of competition control and advising on the future development of competition policy (Röller, 2005: 6). In addition to the increase in the number of competition officers trained in economics, a range of indicators lay bare that the kind of competition economics that has made its entry is grounded in neoclassical microeconomics, analytically premised on methodological individualism, and originally derives from the neoliberal free-market ideology. The new creed of economists maintains strong transatlantic contacts, which indicates that the substance of economic theories is likely to be streamlined with that prevailing in the US. Bilateral meetings on 'past case work' and 'economic methodology' with economists working at the FTC and the DoJ take place on a regular basis (Röller, 2005: 6). In this vein, it seems no coincidence that Professor Lars-Hendrik Röller, who was appointed Chief Competition Economist in July 2003, was educated in competition economics in the US. James Rill, former US Deputy Attorney General for Antitrust remarked on the reform that it was 'as close at it could get to the US-style without copying the whole caboodle' (Rill, 2003). Although differences in the legal instruments remain, the Commission is increasingly using 'the same microeconomic analytical tools as the US' (Schaub, 2002a: 3). Monti heralded the silent process of convergence as the 'most important success story in the transatlantic relationship' and argued that EU competition policy is now clearly grounded in 'sound microeconomics' (Monti, 2004d). Furthermore, he observed:

[…] (w)e share a common fundamental vision of the role and limitations of public intervention. […] We are both grappling with the same evolving economic realities and are both exposed to the same evolution in economic thinking. (Monti, 2004a)

This 'common fundamental vision' entails that the ultimate purpose of public intervention in the marketplace is restricted to safeguarding price competition and efficiency improvements at company level. The particular emphasis on economic efficiency and the declaration of consumer welfare (measured in the form of price reductions) indicates that macroeconomic-orientated visions, inspired by ordoliberal economic thinking, are definitely over. The use of price theories and price modelling as a central reference point in the assessment of economic efficiency, quintessentially give precedence to a short-term microeconomic perspective. The central focus on price limits the perspective to single company behaviour in relation to consumers, and disregards macroeconomic issues like market power concentration and market structure. In other words, the scope for a multigoal strategy, such as protectionist and neomercantilist decision making, has narrowed considerably. That consumer welfare arguments have increased in importance is revealed in the creation of a new post within the Commission's DG Competition called ‘Consumer Liaison Officer’ in December 2003. The new institution has the task of ensuring a permanent dialogue with European consumers and alerting consumer groups to competition cases ‘where their input might be useful’ (European Commission, 2003).

8.1.3 ‘Microeconomisation’ in a System of Private Enforcement

Economic principles and econometric analyses are by definition predicated upon ideologically held beliefs on how economic reality functions. Recalling that 'theory is always for someone and for some purpose' (Cox, 1981: 128) reminds us that there is no such thing as neutral theory. Reducing real-world complexity through both econometric modelling and analysis of empirical data, implies that excluded parameters - so-called exogenous variables - simply remain unnoticed in the decision making process. Mathematical economics merely measures what it can measure. Whenever price calculations, as an indicator of consumer welfare, receive priority in the assessment of anticompetitive conduct, other features are less likely to be considered in the final decision making. These include: the welfare of employees and more general employment aspects, the restructuring of certain industries in times of economic downfall, or the protection of the environment. Moreover, there is no such thing as testing against what Joseph Schumpeter (1942) called ‘the cold metal of economic theory’. The categorisation of a particular business transaction as anticompetitive is always based on a speculative judgment deriving from paradigmatic beliefs about market realities.

In combination with decentralisation, the new regime of private enforcement is likely to bring the speculative character of competition law enforcement to the fore. No less than 27 jurisdictions, with thousands of tribunals, will have to set their own yardsticks for infringements, and evaluate the soundness of technically complex empirical material used in accusations and court defences. In the absence of specialised competition courts, 'ordinary' judges will have to award damage compensation and impose fines. In the Member States where competition law infringements are prosecuted under criminal law, national judges will have to imprison CEOs for their unlawful activities. The chances for deviant interpretations are very high, and the legal forum shopping for claimants may become common. Because EU competition laws are formulated in loose and imprecise terms, due process of law, according to established rules and principles, will be difficult to maintain. National courts expect so-called 'borderline' cases to become rather frequent, which is part of the reason why the devolution of competences to national courts led to many controversies. The 'microeconomisation' of competition law enforcement becomes all-pervasive with the possibility of private enforcement in a decentralised enforcement regime. The growing body of judge-made case law, and the fact that future claimants may rely upon legal precedents, has the potential effect that certain economic data-gathering methods will be immured as the standard for decision making.

To recapitulate, whereas before, a public authority could balance the decision making in competition cases against broader political macroeconomic goals, in a regime of private enforcement, individual claimants are more likely to be driven by (pecuniary) self-interest when invoking a claim against allegedly anticompetitive behaviour. National judges similarly proceed on a case-by-case basis without taking into account market structures within the wider political economy. In combination with the trend towards a more microeconomics-based assessment, the new regime preludes a political bias towards narrower and more short-term conceptions of competition.

In addition to Regulation 1/2003, a new merger control regulation, Regulation 139/2004, was adopted. As will be demonstrated in the next section, this element of the modernisation package indicates similar trends.

(T)he competition systems in Europe and the US have more similarities than differences. And, most importantly, enforcers on both sides of the Atlantic are firmly headed in the same direction, with policies which increasingly go hand-in-hand. And there is so much we can achieve by consulting and co-operating with each other – and by continuing to recognise that listening to our stakeholders and benefiting from their experiences is important too.

Neelie Kroes, European Competition Commissioner
(2007b)

Its like listening to a piece of symphonic' music: you hear the main theme over and over again in different ways, so that by the time you leave the concert hall you are humming the tune.

John Fingleton, Chairmen at the 2004 European Competition Day in Amsterdam

8.2 The Reform of the EU Merger Regulation – A Step Towards Convergence with the US Model

In addition to Regulation 1/2003, the pan-European Merger Regulation of 1989 also underwent a major reform. Regulation 139/2004 came into force on May 1 2004, in combination with new Merger Guidelines designed to provide corporations with a preliminary indicator of anticompetitive mergers. Similarly to Regulation 1/2003, the new merger regulation reveals a paradigm change towards a more US-style and more microeconomics-based merger control. As Commissioner Monti pointed out, a European competition lawyer who picks up the US Federal Merger Guidelines will be struck by how much common ground is shared between the US and EU approaches to merger analysis' (Monti, 2004a).

8.2.1 From the 'Dominance Test' to the 'Significantly Impeding Effective Competition Test'

The new merger regulation and guidelines were designed in line with Chicago School-type efficiency reasoning and short-term consumer welfare considerations. At the heart of the reform lies Article 2, according to which the so-called 'Dominance Test' for assessing economic concentrations, was replaced by the SIEC Test, which prohibits mergers and acquisitions that 'significantly impede effective competition'. Under the old 'Dominance

Test', mergers creating or strengthening a dominant position, measured in terms of market shares, risked being illegal. The new SIEC Test radically breaks with the use of market shares as the decisional ground upon which to clear or prohibit a merger. It comes close to the US 'Substantive Lessening of Competition Test', in short, the SLC Test of the 1914 Clayton Act, which rules that concentrations can be prohibited if they result in a 'substantive lessening of competition' (see Chapter 2). The SIEC-Test is, in essence, just a derivate of the US SLC Test: the use of the words 'significant' rather than 'substantial', 'impediment' rather than 'lessening', as well as 'effective competition' rather than just 'competition', is merely a case of language cosmetics. In the US practice, according to the SLC Test, as long as mergers or monopolies were efficient, they were permitted, regardless of whether this created a negative effect for competitors or led to further market concentration (Davidow, 2002: 495). The rewording of the market share-based Dominance Test to become the SIEC Test implies, similarly to the US, that mergers and acquisitions are to be assessed by balancing the creation or strengthening of a dominant position with so-called expected future efficiency gains. Thereby, competition authorities have to allow mergers leading to 'competitive' monopolies. This means that the legal basis for problematising corporate size, based on the position of competitors, has disappeared. In other words, the protection of competitors from the concentrated power of dominant companies is no longer justified. The much cited US critique 'we protect competition, you protect competitors' no longer applies. According to Hewitt Pate (2004), Attorney General of the DoJ's Antitrust Division, the EU and the US competition authorities finally 'agreed to let even monopolists compete'. Or, as Competition Commissioner Neelie Kroes remarked:

> *(The) merger tsunami is a good sign. It shows that the market itself is adapting to change, and that European companies are adapting to global competition. Healthy restructuring is taking place in many sectors [...]. These processes [...] must be allowed to run their course without undue political interference. (Kroes, 2007c)*

8.2.2 The End of National Protectionism in Merger Control

The replacement of the Dominance Test with the SIEC Test led to controversies between the Commission and the German *Bundeskartellamt.* While the Anglo-Saxon Member States, the UK and Ireland, gave their political support to the SIEC Test, German competition officials opposed it. The long-standing Dominance Test and its market share criterion in the examination of mergers was more in line with the ordoliberal imperative to constrain dominant economic power concentrations, as well as the desire to protect the German *Mittelstand*, the SMEs sector. As Ulf Böge (2003), President of the *Bundeskartellamt*, put it 'Why should a dominant company pass efficiency advantages on to the consumer if it is no longer forced to do so by competition? After all, by definition monopolies imply a situation in which competition is absent'. The *Bundeskartellamt* declared that it would not apply the same test as the Commission, and eventually also the European Courts, applied. Instead, it would stick to the old Dominance Test. How long the German resistance endures remains to be seen, particularly as the new regulation equipped the Commission with a coercive instrument in bringing more consistency into merger assessments by Member State competition authorities. Based on Article 21 of the new Merger Regulation, the Commission can impose binding decisions on 'the legitimacy and proportionality of state measures that adversely affect mergers'. The exceptions are mergers affecting 'public security'. The Commission thereby gained new controlling powers in countering allegedly 'undue' protectionist Member States interventions in mergers. It can streamline competition law enforcement in the long term. This reduces the relevance of national competition laws as independent sources of law. Competition Commissioner Kroes (2006d) warned that it would intervene in 'each and every attempt by national governments to block takeovers that fall within the Commission's exclusive competence'. To date, the Commission has not hesitated to make use of its powers, which can be seen by its reaction to the recent upsurge of protectionist attempts by Member States to impose barriers on cross-border mergers. The Commission challenged the Spanish government before the ECJ when CNE, Spain's national energy commission, sought to frustrate the € 27 billion takeover of Spanish *Endesa* by the German *E.ON,* one of the world's largest private energy companies, through the imposition of 19 conditions (Kroes, 2007a).

The next section addresses the questions of who is benefiting from the transformation of the European competition regime, who has been driving the reform, and why.

8.3 Cui Bono? The Driving Forces in the Reform Process and Their Agendas

8.3.1 The Mixed Emotions of 'Corporate Europe' with Regulation 1/2003

Management boards of large transnational corporations emerged as the most fervent critics of EU competition law enforcement. They were in favour of 'modernising' the application of the EC antitrust rules (UNICE, 1995; 2001, 2002). A recurring point of criticism was that EU competition law enforcement was vague, inconsistent, complex, and non-objective, and that corporations were exposed to the 'arbitrariness' of competition authorities. Driven by a genuine interest in lifting regulatory barriers that hamper the free flow of capital accumulation, i.e. the creation of a so-called 'level playing field', the notification procedure was deemed too time-consuming and bureaucratically cumbersome, particularly as the Commission faced a backlog of more than 1000 unprocessed cases (European Parliament, 1999: 10). The Commission's workload was expected to increase by another 40% through the expansion of the EU with ten new Member States (Guerrera, 2003). As intercompany agreements were often concluded for short periods, business representatives wanted rapid decisions. Even though, in order to speed up the decision making process, the Commission concluded voluntary settlements with companies (Paulis and Smijter, 2005: 11), the administrative burden of notification was still there. To wait for clearance from the Commission produced extra regulatory transaction costs and always ran the risk of a blocking decision. Removing this burdensome, administrative straightjacket increased the leeway in making use of the freedom of contract. Companies could engage in all types of commercial agreements without being immediately controlled by the Commission's interventionist arm.

The corporate elite of the ERT repeatedly criticised the Commission's far-reaching powers that, themselves, were not subject to judicial control (ERT, 2001b: 3). It had a stake in a generous and encouraging environment when concluding investment-sharing R&D partnerships and other intercompany agreements, particularly in the field of new technology, which was characterised by increasingly shorter periods of amortisation (ERT, 2002a). Moreover, CEOs of large transnational corporations considered the systemic tension between the Anglo-Saxon conception of market capitalism and the EU conception of a coordinated market economy an obstacle (Waverman *et al.*, 1997: 414). Similar approaches between the EU and the US would make economic life a lot easier. As the US system was more favourable to their interests, members of the ERT encouraged the

Commission 'to emulate the US more fully' in its economics-based measuring of efficiency improvements in antitrust analyses (ERT, 2002a).

The macroeconomic context explains why transnational corporate elites lobbied for the modernisation of the enforcement regime for Article 81. Like mergers, the conclusion of intercompany agreements had increased considerably over the past 40 years. Estimates suggest that companies from the OECD world are responsible for 82% of all strategic alliances concluded worldwide (Ullrich, 2003: 210-211). In the 1990s, the total number of strategic partnerships, including joint ventures, underwent a growth unparalleled in history: from 1,050 in 1989, to 4,000 in 1990, with a temporal peak of 9,000 in 1995, and 8,660 in 2000 (ibid). In the 1990s, about half of all strategic partnerships involving European companies exhibited a transatlantic dimension, whereas only a quarter concerned pure intra-European deals (ibid: 211-12). In the competition literature, this phenomenon was captured with the buzzwords 'coopetition' or 'networked competition'(ibid: 220). For corporations, the conclusion of such intercompany agreements constituted a source of competitive strength to compete on a global scale. Consequently, corporations have a stake in removing regulatory barriers inhibiting or complicating commercial cooperation agreements. Similarly to cross-border mergers, a rigid reviewing process imposed extra transaction costs and, where multiple jurisdictions were involved, the probability of jurisdictional conflicts increased. Through the abolition of the *ex ante* notification regime, such corporate cross-connections could proceed largely unchecked. As contractual intercompany agreements generally fall under the confidentiality of the corporations, the web of corporate linkages becomes ever-more indiscernible to the wider public. At least, no market concentration indices can capture the global corporate entanglement anymore. Thus, the facilitation of corporate enmeshment, through commercial agreements, stimulates the global fragmentation of the production process and the resulting global division of labour. In other words, the removal of public control hides actual market concentration and blurs the boundaries between inter-firm and intra-firm trade further, all aspects that play into the hands of transnational corporations seeking to improve their competitive strength in the global economy.

Under the previous regime, similarly to EU merger control regime, market share thresholds determined whether an intercompany agreement required scrutiny by the Commission. For example, a market share of 30% for vertical agreements was considered less harmful than a share of 15% or 20% for horizontal agreements (Monti, 2001a). Compared to US standards, the Commission was used to handle a longer list of prohibitions with regard to agreements among corporations on the vertical chain of production or distribution (see also Chapter 4). According to Commissioner Monti (2001a), this difference was due to the market integration project, which required ‘a little more severity with regard to territorial and customer resale restrictions’. Under the new regime, the Commission no longer supervises such agreements. If there are no private litigants challenging such agreements at the courts, and if no national competition authority intervenes, they can proceed undisturbed, which might, in the end, render the system more tolerant to vertical intercompany agreements.

The Commission had already taken an overtly tolerant approach and allowed most of the commercial intercompany agreements in the past few years. Based on the generous block exemption regime under the new regime, different types of investment sharing R&D partnerships, specialisation, and distribution agreements were cumulatively excluded from the category of anticompetitive behaviour. In order to be on the safe side, the ERT lobbied nonetheless in favour of a further extension of provisions that formally exclude vertical agreements from prosecution. As a result, the reform broadened the conditional provisions for granting group exemptions under Article 81(3) (Ullrich, 2003: 216). Nevertheless, the Commission’s codification of the interpretation of Article 81 implies that there is little room for national competition authorities to exempt certain agreements on a more flexible basis. In other words, the discretionary power to safeguard agreements as enjoyed by the Commission under the previous regime has been phased out (see also Monti, 2007: 498). The situation parallels the case of hardcore horizontal cartel agreements falling under Article 81(1), such as price agreements, output fixing, and market sharing between direct competitors. The Commission has adopted a guideline approach similar to US practice, which allows corporations to orientate themselves on the boundaries of legal and illegal behaviour. In terms of content, the Guidelines on Horizontal Agreements were streamlined with that of the FTC and the DoJ published in 2000, providing companies at both sides of the Atlantic with the same regime.

Furthermore, the transnational business elite favoured a more microeconomics-based approach to competition law enforcement. One of the reasons was to keep certain stakeholders away from the negotiating table. The ERT quite overtly argued that the greater involvement of groups, like consumers and employees, 'risks diverting the attention from the competition focus of the Commission's analysis and increases both uncertainty and delay' (ERT, 2001b: 4). With the focus on 'competition only', which builds on short-term orientated econometric evidence, more diffuse societal interests are unlikely to be included in the assessment of a case. Additionally, it may provide managers with an avenue for less stringent enforcement. Concepts such as 'dynamic efficiency improvements' leave ample room for gerrymandering the decision making in the desired direction. Prior definitions of 'relevant product markets', or the distinctions of one product *vis-à-vis* another, can be used for 'moulding' evidence to support a particular claim. Moreover, as a commentator argued, estimates on the future impact on competition in an econometric model are based on defined confidence intervals, which are tantamount to an 'intuitive judgment in deciding whether a test has passed or not' (Dobbs, 2002: 3).

Nevertheless, the support of 'Corporate Europe' for Regulation 1/2003 was not straightforward. Emotions were mixed and certain elements of the reform were fiercely criticised (Berggren, 2005). The administratively burdensome, but secure, notification regime also had its proponents, particularly among UNICE, which comprises the whole range of European companies, including SMEs. It argued that 'the complexity of the rules required extensive expert advice' and 'substantial management time' (UNICE, 1999; 2001). This contrasts with Commissioner Monti's argument that the Commission's role was not to give comfort, and that 'after forty years of experience, the application of European competition law should be sufficiently clear to business' (Monti, 2004d). Elsewhere he compared the notification procedure to parking a car in a town: 'citizens must know where to park a car and shouldn't have to go to the police station to check first' (ibid). The fact that antitrust law enforcement is far more complex than Monti's car parking allegory, partially explains the discontent within the business community with the new regime, particularly when considering that the fines imposed on cartel cases exceed those of traffic offences! Also among the select group of TNCs represented in the ERT, the formal safe-haven regime constituted a much cherished good, as long as 'speedy and straightforward processing' was guaranteed (ERT, 2002a). Judicial advocacy by corporate lawyers could not provide the desired legal certainty in the competitive environment created by ever-shorter amortisation periods for new technology products – or so was the argument. In marked contrast to the enthusiasm of business representatives for a more microeconomics-based approach, the new risk of litigation and the exposure to compensation payments alarmed business associations (i.e. UNICE, 2006; DIHK, 2006; HDE, 2006; VCI, 2006). The reason is obvious: potential fines, damage compensation payments, and the costs of defence can be detrimental for companies (cf. Bizjak and Coles, 1995). Although the 2004 antitrust reform does not immediately lead to a US-style litigation culture, CEOs from the European business community were very much aware of this scenario. US business leaders, represented by the US Chamber of Commerce, alerted their European colleagues to the downside of an excessive litigation culture. With the asbestos cases in mind, which cost more than 70,000 jobs, they warned in particular of the introduction of class actions and the emergence of high-priced trial lawyers in Europe (cf. Donohue, 2003).

Another problematic issue was that the new regime of decentralised private enforcement, which allows private litigants to bring breaches of EU antitrust law also to national courts, was deemed to 'accentuate inconsistency, a lack of transparency, and unpredictability' by transnational business representatives (cf. UNICE, 1999; ERT, 2002a). In a range of position papers during the preparatory stages of the reform, business organisations sought to limit the exposure of companies to private lawsuits and urged the Commission to build in legal safety measures, such as *ex ante* reasoned opinions on a case by competition authorities and national jurisdictions. The issuance of such advices would come close to the reintroduction of the notification regime. In response, the Commission promised merely the occasional provision of general 'guidance letters', which it would publish on its website. Only in 'genuine cases of uncertainty', will it grant case-specific informal guidance (cf. Recital 38 of Regulation 1/2003). Business associations deeply regretted the Commission's loose commitment and pleaded for more guidance, particularly in cases of commercial agreements that 'are ancillary to, or involve a financial risk, capital investment, or an effect on shareholder value' (UNICE, 2001b: 5; ERT, 2002a).

8.3.2 Corporate Pressure in Favour of Reforming EU Merger Control

The new Regulation 139/2004 and the new Merger Guidelines provided an answer to the longstanding criticism of transnational corporations, as well as US antitrust experts and officials, on the Commission's treatment of unilateral conduct by dominant market players. Thresholds for categorising an enterprise as dominant were considerably lower in the EU than in the US. In the US, further investigation was only required in cases where there was an attempt to monopolise (see Chapter 2). The EU's elastic notions, such as the 'abuse of power' or the abuse of 'dominance', were considered disturbingly vague (Gerber, 1998; 174). In the EU, market dominance of a company traditionally provided reason enough to intervene, regardless of whether prices remained competitive. Conglomerate mergers, in particular, were seen as a threat to competition, because 'the merged entity could leverage its market power with the effect or object to foreclose one or several market players from effective competition' (Monti, 2001b). In the US context, competition officials buried similar conglomerate merger theories with the ascendancy of the Chicago School. In the EU, however, the maintenance of 'a high degree of competition in the common market' long enjoyed priority over other criteria in the assessment of anticompetitive conduct, such as consumer welfare protection and efficiency gains (ibid). As a general rule, the Commission applied the logic that a high degree of competition, *inter alia,* required a large number of competitors. Thus, too dominant market players could pose a threat to the broader project of market integration to which competition laws were subordinated.

The transnational business elite, however, criticised the Commission's way of taking narrowly defined market shares as a focal point of analysis as 'imprecise' (ERT, 2002a). It preferred the approach of the US authorities towards large, dominant corporations, which was more lenient and only considered the 'real' impact of M&As and commercial practices by focusing on efficiency improvements, such as lower prices or better quality products for consumers. Therefore, the ERT urged the Commission to introduce a more economics-based interpretation and to give priority to 'efficiency' and 'consistency' similarly to the US model (ibid). By virtue of their Chicago School trainings, US competition officials had more faith in the workings of free markets, implying that market dominance was generally conceived as a source of competitive strength, rather than a hazard to free competition. Moreover, representatives of transnationally operating companies, in alliance with US competition experts, considered the Commission's approach to be biased towards European players by giving 'undue weight to competitor arguments' (Pitofsky, 2000; Draghi, 2003). Underpinning this criticism was the fear that EU industrial policy would interfere with the merger enforcement. As Kolasky (2002c), Attorney General of the US DoJ, put it, the EU 'competition policy, designed to maintain fragmented markets or protect small business, was misguided'.

The criticism on the divergent approaches in merger control across the Atlantic endured for more than a decade. After the 1991 Transatlantic Bilateral Agreement, EU and US competition officials stayed in regular contact (see Chapter 6 and 7). In workshops, US officials shared their experiences with the Commission's Merger Task Force in the investigation and analysis of mergers (Pitofsky, 2000). When the Commission issued Merger Guidelines in 1997 on how to measure market power and define relevant markets, the US Merger Guidelines of 1982, which were slightly amended in 1992 and 1997, served as a template (Pitofsky, 1998; Gavil *et al.*, 2002: 967). In October 1999, a joint EU-US Merger Working Group was established and given the mandate to: seek more consistency in the respective approaches, come up with 'best practices' in the analysis of mergers, and identify the scope of further procedural and substantive convergence across the ocean (European Commission, 2002b). Nonetheless, the complaints about the merger control developments in the EU by US business interests and antitrust authorities persisted. According to Mario Draghi (2003), Vice Chairman of Goldman Sachs, despite the extensive and positive cooperative working relationship on merger review and the steps of convergence, 'antitrust review for transatlantic transactions remains a significant transaction risk'. A series of divergent rulings by the Commission in high-profile cases between US companies indicated that interpretations of the harmfulness of oligopolistic dominance differed substantially. In particular, the *Boeing-McDonnell Douglas* merger and the *GE-Honeywell* merger constituted the reason why the transnational business elite lobbied to reform the EU Merger Regulation (see Chapter 6).

The pressure to reform the EU's merger control regime also increased when the *Court of First Instance (CFI)* annulled the Commission's decisions in the mergers between *Airtours* and *Firstchoice* in 1999, *Schneider* and *Legrand* in 2002, and *Tetra* and *Laval-Sidel* in 2002. The Commission's prohibitions in the *Schneider-Legrand* and *Tetra Laval-Sidel* merger cases were particularly important. The cases involved French companies in the electricity distribution equipment sector and the liquid food-packaging sector, respectively. The Commission ruled, in both cases, that the mergers would lead to a situation of market dominance, eliminating competition in the future, and vetoed the deals. When the companies appealed to the CFI, it deemed the Commission's supporting economic evidence insufficient, and its economic logic unconvincing, and thus overruled the Commission's blocking verdict. The ruling was therefore a major critique on the Commission's expertise and competence in the review of mergers and other cooperative ventures. After these embarrassing court defeats, Commissioner Monti announced some reforms. He assured his critics that the Commission was not against mergers that create more efficient firms, even if competitors might suffer from increased standards of competition (Monti, 2001d). Moreover, consumer welfare was not just ‘a’ goal, but ‘the’ goal of competition policy (ibid). The US authorities applauded Monti’s leadership in encouraging more convergence, but remained suspicious, as it remained to be seen whether ‘the Commission would not only talk the talk but walk the walk’ (in Guerrera and Hill, 2002). As the 2004 reform demonstrates, the Commission matched its actions to the words. More economists, nurtured in US-style econometric analysis, were hired (see earlier section in this Chapter), which ‘greatly increased the awareness of Commission officials on efficiency-based reasoning in their practice’ (Jenny, 2000: 22). Alternative decisional grounds were portrayed as ‘misguided or not mindful enough of market forces’ (ibid).

The reliance on sound economic foundations in the decision making was meant to bring ‘comfort on the robustness of the decisions’ to the business community (Lowe, 2003). A large part of this ‘comfort’, however, can be ascribed to the fact that since 2002 the Commission had permitted most of the merger transactions, regardless of the resulting dominant market position (e.g. exemplary is the merger between BASF, Eurodiol and Pantochim, see Fuchs, 2003: 226). The number of M&As, and in particular large cross-border mergers, also remained high after the merger wave of the late 1990s (see Chapter 5). In terms of the combined value of deals concluded, the year 2006 exceeded the previous peak year of 2000. Of the ten largest worldwide deals ever, eight took place in 2006 (i.e. *AT&T-BellSouth*, *E.on-Endesa*, *Sueze-Gaz de France*, *Mittal Stell-Arcelor*). Low interest rates for lending money and the event of private equity companies attracting private investors to fund M&As provoked the upsurge of market concentration. The Commission took a highly positive stance on cross-border merger activity and considered, what it termed ‘corporate restructuring’, to be a normal response to globalisation. Commissioner Kroes (2006e) noted, in this respect, that he was pleased that industries in the Internal Market were able to restructure corporate ownership in order to meet the global challenges posed by competition. The Commission’s positive clearance decisions provide further evidence: in 2006, over 360 mergers were permitted, and the year 2007 will probably even beat this record (ibid, 2007c). Transnational business representatives tend to be equally pleased. With regard to economic concentrations, the EU merger regime converged towards the more tolerant approach of the US system, while the advantages of the EU system remain intact, such as: the one-stop-shop rule for large, cross-border mergers; tight deadlines; speedy procedures, and transparency (Draghi, 2003). Moreover, the new Merger Regulation seeks to harmonise the decisional grounds among Member State merger control by allowing the Commission to overrule decisions that run against its policy. National authorities can no longer interfere in cross-border mergers based on protectionist motivations.

The next section addresses private antitrust enforcement in terms of its potential impact on the corporate power balance of management *vis-à-vis* shareholders.

8.3.3 Enhanced Antitrust Litigation to Pursue Corporate Governance Goals?

There is an intimate connection between competition policy and corporate governance. The stringency with which competition laws are interpreted and enforced can have important repercussions on the patterns of ownership and corporate control. It can boost investor sentiments in procuring corporate equity, and influence strategic decision making with regard to mergers and acquisitions (M&A), financing capital, R&D investment, joint ventures, and other forms of cooperative business contracts. The interface of competition law enforcement and corporate governance is manifold. A range of studies suggest linkages between: anticipated mergers of listed companies and share price increases, filed antitrust lawsuits and negative share price reactions of defendant companies, overall lower shareholder returns, and between litigation and liability payments leading to bankruptcy (Bhagat *et al.* 1994; Bittlingmayer and Hazlett 2000; Alexander, 1999; Bhagat *et al.* 1998; Bizjak and Coles 1995). Other studies again, attempt to demonstrate how shareholder-initiated antitrust class actions can provide a powerful disciplinary tool to achieve boardroom reform and enhance corporate performance and managerial efficiency (cf. Gande and Lewis 2005).

Commissioner Kroes presented the enhanced antitrust litigation possibilities 'as a right for consumers and individual businesses in Europe who have lost out as a result of the anticompetitive behaviour of others' (Kroes, 2006b). The generalisation that only either consumers or competitors have an interest in rectifying abusive corporate behaviour downplays the existence of other stakeholders, such as labour and environmentalists. Diffuse groups such as labour, consumers, and individual businesses, however, face high administrative costs when organising claims against corporate fraud. On the other hand, another category of plaintiffs, namely shareholders, particularly institutional investors, and hedge funds prioritising short-term profits, is more likely to make use of the facilitated antitrust litigation possibilities. As the reform explicitly hinges upon enhanced private antitrust litigation, the so-called 'voice options' for shareholders increase (cf. Hirschman, 1970). At first glance, the modernisation and shareholder activism in antitrust litigation may not appear related. In addition to legal actions against accounting manipulation, or security fraud in cases of inaccurate disclosure of information, a wide range of other events can account for legal actions induced by shareholders, such as: breaches of contract, patent infringements, product failures, bankruptcy issues, slander, marketing, distribution and franchise disputes and notably, also antitrust violations (cf. Bizjak and Coles, 1995). As a rule of thumb, the more regulatory fields become subject to private enforcement, the more rent-seeking private investor groups are provided with new windows of opportunity to alter the corporate power balance in their favour and pursue corporate governance goals. Challenging mismanagement and fraudulent behaviour of CEOs at the courts may serve as a means to veto inauspicious decisions by CEOs, to intervene in the decision making in the cases of share value loss, to alter the composition of the management, or to conduct hostile takeover bids by litigating target companies. Shareholder activism in antitrust matters may expose management boards to new risks regarding long-term investment strategies and, in the worst-case bankruptcy, which makes for easy prey for hostile takeovers. The institutional anchoring of short-term performance indicators in antitrust assessments provides additional ground for litigation. Even the mere threat of suing may discipline company boards to deliver higher returns on investment in the short-run.

A number of shareholder rights organisations and institutional investors, such as public pension funds, have long urged national governments in Europe to introduce a range of legal modifications in litigation procedures, such as class actions and criminal sanctions (cf. Hollinger, 2005; Allen, 2005; Sherwood and Tait, 2005). Quests for more 'market justice' have particularly intensified with recent corporate scandals in the accounting sector, such as in the case of *Enron*, *Parmalat*, and *Ahold*, or in the turmoil of *ABN AMRO*'s acquisition of controlling stakes in *Banca Antonveneta*. Investor plaintiffs in Europe have a stake in getting the same leveraging powers as investors in the US (Allen, 2005). Shareholders, however, do not speak with one voice and there is no clear-cut interest coalition of shareholders to identify. Different categories of shareholders have different interests: whereas, for instance, certain hedge funds may follow an aggressive strategy of short-term profit maximisation, (investment) banks, insurance companies, and (certain) pension funds may be more inclined to secure more long-term investment. Moreover, the interests of the shareholders of one company are not equivalent to those of another company. The reason seems obvious. The exposure of a company to high damage compensation payments and, in the worst-case, even bankruptcy or hostile takeovers, eventually renders economic life more precarious for all stakeholders involved, including shareholders.

In view of the current proposals for facilitated shareholder litigation in the EU Member States, one is tempted to conclude that those shareholders opting for the Anglo-Saxon litigation practice find themselves on the winning side. While Sweden and the UK have already introduced the possibility for class action lawsuits in general, the German government specifically included a range of measures that facilitate private actions in its seventh amendment of competition law. As a part of the attempt to make Germany a global financial centre with ‘a stock market as a viable avenue for investment’, two government proposals were launched on 14 March in 2005 including a bill on shareholder class actions and a bill on shareholder derivative lawsuits (Kamar, 2005: 17-18). Similarly, in Italy shareholder rights have been strengthened and made conceptually reminiscent of US corporate legislation to attract US investors (ibid: 22). In Finland, the Netherlands, and France, the issue of facilitated shareholder litigation has also reached agenda status. For instance in France, President Chirac instructed his government to put forward initiatives for the introduction of class actions against abusive market practices – an incremental move that fits into the political landscape of the competition law overhaul.

8.3.4 Professional Service Companies, Also Beneficiaries of the Reform?

Private practitioners who specialised in Community law and their bars from both EU and non-EU law societies constituted an important force in shaping the preparatory stages of the modernisation (Gerber, 1998: xiv). As regular and influential guests, private law companies displayed their expertise in the form of lengthy advisory reports to Commission officials: their share of official comments on both the ‘White Paper on the Modernisation’ and on the 2005 Green Paper, outnumbered that of business and labour organisations, or national competition authorities (cf. European Commission, 2006b). The contemporary legal services landscape in the EU demonstrates that the phenomenon of law companies with a specialisation in antitrust issues is no longer a phenomenon restricted to the Anglo-Saxon type of capitalism (see also Chapter 1).

Since the 1990s, countless professional service companies, or law companies, with ever-expanding numbers of lawyers and economists have established offices throughout Europe. They emerged in the 1950s and 1960s in reaction to the expansion of US management ideas in Europe (Djelic, 1998). Their number rapidly increased in the 1980s and the 1990s (cf. Kelemen and Sibbitt, 2004; Kelemen, 2007). Many of these law companies originated from across the Atlantic and from the UK, and sought to gain a foothold in the thriving market of professional services in Europe. The dominant presence of US law companies in Europe can be ascribed to two factors: on the one hand, worldwide liberalisation processes required governments to open up national and regional markets for legal services. On the other hand, enhanced liberalisation and cross-border economic transactions also spurred the demand for legal services (see also Keleman, 2004: 111). The influx of US law companies brought US legal practices and forms of organisation into Europe, such as multijurisdictional litigation and lobbying services (ibid). Against the backdrop of the Bush Administration's anti-litigation stance, a new flow of US law companies expanded into Europe. As an US antitrust lawyer observed, 'some firms think Brussels will be the next Washington' (cited in: Henning, 2003).

Large Continental European law companies are also on the increase. Faced by the particular competitive dynamics created by the mere size and global presence of US law companies, implied that European law companies had to restructure along the lines of US law companies. Through mergers and acquisitions, as well as corporate alliances, they have organised themselves into larger units, similar to the US mega-law companies (Kelemen, 2007: 7). The booming consultancy market in competition matters in Europe forms part of the reason why. In France, the legal services market grew by 44% between 2000 and 2004, and is expected to grow another 41% by 2009. In Germany, the legal service market grew by 20% in the time period (ibid: 8). A study reveals that about 80% of the companies involved in a competition case turned to law companies for legal and economic consultants, as well as professional lobbyists (Neven *et al.* 1998: 136). In notification cases, 83,3% of companies made use of external legal advice. In cases where there has been a prohibition decision, 53% of the companies consult economists 'as a last sort resort defence' (ibid: 136-138). On average, professional services account for 6% of companies costs, at times increasing to 9% (Dombey, 2003b).

The workload of professional service companies increases not only with every new merger wave, but also with the introduction of private enforcement in the EU. The US experience with private enforcement best depicts the motivational grounds for the involvement of private antitrust counsellors in defining the course of European competition law: it simply earns their 'bread and butter' (Calvani, 2004: 18). Legal experts already played a significant counselling role under the previous notification procedure. The introduction of private enforcement, however, increases corporate demand for judicial advocacy. It provides a flourishing source of income for law companies specialised in competition questions. As well as navigating companies through legal actions with specialised litigators and more general judicial advocacy, professional services companies can offer tailor-made compliance programmes for companies who have to assess themselves with regard to Article 81-type agreements. In addition, the demand for specific market analyses and economic modelling also increases, as well as targeted lobbying activities at the EU and national regulatory authorities. It follows that law companies have a primary stake in open, but rules-based markets, in which they can offer a combination of legal and advisory services to other corporations. Moreover, fees will be higher, the more competition regimes diverge, and the less standardised the problem (Morgan, 2005).

Professional service companies took the lead in the detailed formulation of possible avenues to introduce enhanced private litigation in the EU. A comparative study conducted by *Ashurst*, a transnational law company specialised in EC competition law, provided the intellectual basis for the Commission's Green Paper on Damage Actions. In addition to a detailed account on the possibilities for damage actions in the EU, it covered a wide range of other litigation-related measures, such as the introduction of class actions (cf. Waelbroeck *et al.*, 2004). The legal community, including representatives from across the Atlantic, contributed a vast number of detailed responses to the Commission's Green Paper, which were overtly mild-mannered, if not wholeheartedly positive (cf. European Commission, 2006a). Large law companies have an interest in creating similar market conditions in the European litigation sector to the US.[51] Organised as integrated networks of individual partner agencies in different regions of the world, they do not only have

[51] According to a ranking by 'The American Lawyer' based on annual turnovers, US law companies dominate the list of 100 global law companies (see for more http://www.thelawyer.com/global100/).

transnational corporations as their clients, but they have transnationalised themselves. They are no longer restricted to domestic markets and clients, but comprise multijurisdictional counselling related to cross-border transactions with licensed lawyers in different national settings. With offices mainly in London, Brussels, and Frankfurt, they form part of a wider and diffuse expert community surrounding the DG Competition. A dense fabric of professional linkages marks their relationship. Law companies provide a vast source of recruitment for competition law specialists, which again seek to inspire the future development of competition policy. As Gerber (1998: xiv) noted, experts significantly influence competition decisions in ways that are important and concealed. Similarly, Enriques (2005: 44-45) argues that lawyers and legal scholars constitute an important lobbying force in the production of EU law. Often, the Commission also contracts law companies to prepare comparative studies on selected aspects of national laws, and to make specific suggestions on policy-making as the *Ashurst* study demonstrates. While the business community in Europe is expected to monitor itself and its competitors, with the support of consultancy from professional law companies, the Commission embarked on its own agenda, as the next section illustrates.

8.4 Decentralising Competition Law Enforcement: A Centralisation of Commission Powers?

The Commission's DG Competition conducted the reform with a steadfast commitment to listen to the demands of the transnational business elite and the legal community. This is apparent in the decision to decentralise Article 81 and 82 to Member State jurisdictions, who are then subsequently obliged, in all cases categorised as 'affecting cross-border trade', to enforce these articles in parallel with their own national competition laws. Thereby, national jurisdictions take over a share of the Commission's work, including major competition cases, previously the exclusive prerogative of the Commission. It may sound counterintuitive, but the decentralisation was deliberately shaped to expand the DG Competition's grasp on national competition policy. According to Wilks (2004: 12), the reform represents an 'audacious coup' by the Commission to 'extend its powers and to marginalise national competition laws' or, what George Orwell in his seminal book *1984* expressed with 'decentralisation is centralisation'. In other words, the reallocation of competences constitutes an attempt to catalyse intra-EU convergence, in a field where accomplishing a fully-fledged harmonisation was politically never feasible. To unfold the argument step-by-step:

As a part of the decentralisation endeavour, the *European Competition Network (ECN)* was established as a key-supporting feature, which provides a forum for national competition authorities (NCAs) and courts to coordinate the investigation, to cooperate, to exchange information, and to warrant legal consistency when enforcing Article 81 and 82. Although NCAs, courts, and the Commission already cooperated on a more informal basis, the ECN introduced a more formal way of cooperation. As the nodal point of the ECN, the Commission reserved far-reaching supervisory powers for itself. Similarly, to the new merger regulation, Article 11(6) in combination with Article 16 of Regulation 1/2003 provides the Commission with the right to intervene and withdraw proceedings in cases where conflicting decisions are expected. The opening of every new case needs to be reported to the Commission. In the event of conflicting decisions, i.e. 'decisions running counter to the decision adopted by the Commission', it can reclaim the cases. The well-established NCAs fiercely criticised the prospect that the Commission can theoretically trespass, and thus bypass, national procedures. In Germany, in particular, the reform led to an intensive academic expert debate. Officials from the longstanding ordoliberal camp feared that they would become 'semi-autonomous vassals' of the Commission (Bannerman, 2002: 38; Mestmäcker, 1999; Möschel, 2001; Deringer, 2003). At the same time, the Commission's previous monopoly position on cases with a community-dimension had often been criticised as a bastion of uncontrollable Commission power, marginalising NCAs to the prosecution of smaller antitrust cases. Through the decentralisation initiated by Regulation 1/2003, the enforcement power of NCAs would increase substantially, which explains why the Council ultimately adopted it.

The ECN, as a mode of governance to cope with decentralisation, provided an attempt to dilute the significance of diverse national competition laws and practices in the long term. It structurally integrates national jurisdictions into a larger EU level framework. In this regard, as there is only one common reference point in the interpretation of EC competition law, namely that of the Commission and of the case law established by the European Courts, the reform also displayed signs of a process of 'European integration through the backdoor'. The preamble of Regulation Nr. 1/2003 is straightforward in this respect. It reads that the goal of the modernisation is 'to establish a renewed system which ensures that competition in the common market was not distorted and that Articles 81 and 82 of the EC Treaty are applied effectively and uniformly throughout the community'. In this sense, both the decentralisation and the establishment of the ECN, serve the purpose of consolidating a culture of competition in the common market, as well as creating an increased commitment, on the part of NCAs, to more stringently ensure the workings of free competition. In an EU with heterogeneously structured national jurisdictions, distinct procedural practices may also raise the potential for conflict. Aware of this, the Commission financed specific competition law training schemes for more than 700 national judges in 2005 in order to streamline the jurisdictional enforcement (Kroes, 2005d), which constitutes an opening move to diminishing the significance of national competition laws and clearing the way for EU competition law.

Rather than making itself obsolete, the Commission hopes to refocus its staff resources on cracking down more vigorously on cartels at global level, leaving smaller cases to private trustbusters and national jurisdictions. To this purpose, Regulation 1/2003 considerably increased the Commission's investigative and sanctioning powers: it can conduct dawn raids more easily than before and take oral statements from witnesses of cartel practices. In addition to imposing fines that amount to 10% of a company's annual turnover, it can now also impose fines for procedural breaches and require periodic penalty payments. The incentive to patrol the globe for hard-core cartels needs to be placed in the context of the free market ideology, which underpins the transformation. Accordingly, the removal of privately erected barriers would guarantee the free flow of market forces. The Commission thereby follows the example of the US authorities, which celebrated the 'golden age' of cartel prosecution by dissolving a range of high-level price-fixing cases in the late 1990s. They levied the highest fines ever and imprisoned a range of CEOs (Litan and Shapiro, 2001: 27). In the absence of a 'world competition authority', the Commission has tried to expand the EU's powers beyond its borders and fight transnational cartels in duopoly with the US agencies. Similar to the US authorities, it drastically increased the size of fines imposed on companies involved in cartels. Compared to the 'ridiculously light' fines of 1969 with ECU 500.000 fine, and of 1983 with ECU 1.250.000, in 1986, fines reached ECU 58 million (McGowan, 1007b: 6). More recently, the fines levied upon carteleers reached new hights. Topping the list of the largest fines ever is the € 480 million fine levied on ThyssenKrupp in 2007.

The EU competition law reform was intended to convey 'a world class regulatory system' (European Commission, 2002a). The impetus, however, reaches further than mere prestige and competence seeking on the part of a regulatory body that long suffered from the image of being the junior partner of the US agencies. The reform constitutes a case in point that seeks to foster the project of an 'ever-closer Union' by deepening neoliberal market integration. It took root against the background of the reinvigorated discourse surrounding the Lisbon Agenda of 2000, aimed at making the EU 'the most dynamic knowledge-based and competitive economy by 2010', and in a wider sense, aimed at outperforming the US economy and the rest of the world. According to the dominant neoliberal view, this is best achieved by downsizing Brussels' 'regulatory jungle', which is also conform to the interests of the executive boards of transnational corporations. With the privatisation and decentralisation of important aspects of EU competition law enforcement, the reform seems to deviate no longer from this prevailing tenet.

To recapitulate, the enhanced emphasis on microeconomic analyses as focal points for investigating anticompetitive conduct - together with the declaration of consumer welfare - indicates that a macroeconomic-orientated vision on competition has been severely curtailed. Instead, a Chicagoan or post-Chicagoan view has taken the upper hand. These developments have a profound impact on the scope and nature of competition control in a regime of private enforcement. In the context of arduous competence struggles to expand EU competition control into new areas, the fast ratification of the modernisation represents a glorious triumph on behalf of the symbiotic alliance of transnational business interests with the Commission. The ongoing discussions on introducing further legal modifications in a decentralised private enforcement regime allow for the tentative conclusion that the harmonisation of litigation systems may be placed high on the Commission's future agenda. Inconsistencies in the enforcement of EU competition laws, however, are likely to be the order of the day, at least in the short and medium term, for the reasons outlined earlier. The DG Competition is unlikely to supervise NCAs and national courts in the EU-25 and powerful national competition authorities, such as the German *Bundeskartellamt* and the British *Office of Fair Trading (OFT)* are likely to maintain their own course in competition law enforcement in the near future.

The competition laws and policies of different countries should closely resemble one another and be as universal as the applicability of micro-economic analysis.

Frédéric Jenny, Chairman of the OECD Competition Law and Policy Committee (2000: 23)

Conclusion:
The Politics of the Transformation of the EU Competition Regime

The dissertation argues that EC/EU competition policy, in content, scope, as well as form, has undergone a profound transformation since its enactment in the Treaty of Rome in 1957, and that this transformation needs to be understood against the background of broader ideational and socioeconomic changes in the history of the European integration project. The transformation of what has been identified here as the European competition model (see Chapter 2), started in the mid-1980s. Neoliberal ideas increasingly gained a foothold in Europe, affecting EU economic policymaking, including competition policy. Throughout the 1990s, neoliberalism subsequently was established as the dominant ideology in the daily enforcement practice of the European Commission's DG Competition. In the early 21st century, a fundamental overhaul of the EU competition regime institutionally anchored the neoliberal orientation. Backed up by sophisticated econometric modelling in the assessment of anticompetitive conduct, the reform consolidated a narrow 'competition only' focus, and the use of microeconomic reasoning.

The transformation of the EC competition regime has been driven by a public-private alliance of the Commission's DG Competition and transnational business representatives, as well as their corporate lawyers, who form part of the so-called wider legal community specialised in competition law matters. The reason for this transformation lies in the transnationalisation of production and ownership structures. Processes of transnationalisation, most notably the detachment of national ownership structures and the (re-)location of production, fundamentally changed the interests and preferences of large corporations. In addition, enhanced market integration in Europe, and across the Atlantic, as well as the subsequent removal of global barriers to trade and capital, contributed to this process. The increased confrontation between transnationally operating corporations and different competition regulatory regimes evoked a shared interest among transnational corporations in more transparency and legal certainty regarding their economic transactions. This was to be realised preferably by national and regional competition authorities adopting uniform laws and enforcement practices, which ensured the highest degree of economic freedom and free market access to new (geographical) product markets. Law companies, specialised in corporate advocacy, responded to the increased demand for legal services regarding multijurisdicational competition cases, and operated as a transmitter between the transnationally operating business community and political actors, such as the European Commission.

Summarising the Argument

Prior to the emerging political and economic hegemony of the US in the aftermath of the Second World War, laws governing competition remained a distinctive institution of US-style capitalism. Looking back at the history of EC competition policy reveals that vested US influence in post-war Europe was decisive for the adoption of competition laws. Nonetheless, EC competition laws and practices eventually came to look different from those of the US, exhibiting a range of distinctive features that contrast the competition model of the US (see Chapter 2). In the wake of the US economic re-construction plans, US authorities sought to export their antitrust model to Germany (and to Japan) (see Chapter 3). Transatlantic linkages were also crucial in the subsequent incorporation of competition laws in the process of European integration, starting with the establishment of the European Coal and Steel Community (ECSC) in 1951. With the centralisation of competition laws to the supranational level, the state-supported market order of cartels and monopolies in key industries was meant to be dismantled, and market access for corporate newcomers guaranteed, including the market access for US corporations seeking to expand their market shares across the Atlantic (Chapter 3).

When competition laws became one of the core constitutional principles of the founding Treaty of Rome in 1957, establishing the European Economic Community (EEC), European Treaty-drafters had internalised the language of market competition, and considered competition laws important for the economic integration project. The reason why the EC competition model looked different to its US counterpart can be ascribed to the enduring opposition of powerful industry representatives in Europe, and to some extend the particular ordoliberal ideas of the so-called Freiburg School (see Chapter 2 and 3). Ordoliberalism promoted an ordered and balanced market structure, in which equally matched competitors, mostly small and medium-sized enterprises (SMEs), would engage in competition with each other. According to this paradigm, it was the task of strong state authorities to foster competition by actively curbing the emergence of excessive economic concentration, and dissolving anticompetitive corporate agreements. The concentration of economic power in the form of oligopolies and monopolies, as well as cartels, was believed to undermine the advantages offered by a free market economy, and in the end democracy, as concentrated economic power would also eventually seek political power. The EC competition law enforcement institutions and practices were to some extent inspired by ordoliberal ideas. Remnants of the ordoliberal ideology can be found throughout the 1960s, 1970s, and occasionally also in the early 1980s (see Chapter 4). The European Commission, however, never adopted a strict interpretation of ordoliberal ideas. This was to some extent due to the institutional positioning of the Council in the Community structure. In the 1960s, in particular, there was little scope for the rather inexperienced Commission officials to play a prominent and proactive role in competition law enforcement, despite the powerful powers entrusted upon the Commission by Regulation 17.

In the era of embedded liberalism, stretching from the 1950s to the late 1970s, and partly to the early 1980s (see Chapter 3 and 4), EC competition laws were enforced in a flexible market interventionist manner, displaying protectionist and neomercantilist traits. Rather than adopting a strict competition focus, the Commission adjusted its decision making to what in the preamble of the Rome Treaty was identified as ‘balanced trade and fair competition’. A range of developments had a major impact on content, form, and scope of EC competition policy in this time. Ongoing trade liberalisation within GATT made it increasingly difficult for EC Member States to erect conventional protectionist barriers to insulate national industries from foreign competitive pressures. This led to the adoption of ‘new protectionist’ measures at Member State level, which were directed at national industries and national champions, considered strategic both in the private and public sector. Protectionist non-tariff policies formed part of a countervailing strategy to boost economic growth and the ability of European corporations to face competition with the often larger, and technologically more advanced US companies. Various forms of state aid were granted, such as guaranteed preferential public procurement contracts, tax rebates for some industries, (research) subsidies, and investment in technical education, but also national standard setting, and the stimulation of mergers and acquisitions among national companies. In the 1960s and 1970s, EC competition laws were enforced in a consistent manner with the dominant embedded liberalism bargain at national level. In line with Member State and corporate interests, the Commission did not vigorously challenge national state aid, leaving the provisions prohibiting state aid largely unenforced. The protection of the competitive process was frequently subordinated to broader, macroeconomic industrial policy goals, also allowing public interest and employment considerations to be taken into account. EC competition law enforcement thereby formed a political response to the challenges posed by the much larger and more homogeneous US market. The Commission was overtly responsive to the interests of European industries seeking to catch up with the much stronger US economy, and adopted a supportive stance towards European companies. The gradual incorporation of national markets into one common market in Europe was intended to create the basic prerequisites that would allow sufficiently large (nationally based) corporations to reap the benefits of economies of scale production, and to expand in size. Without loosing sight of the European integration project, the Commission sought to synthesise the removal of internal barriers to trade and competition with the adoption of a rather lenient attitude towards mergers and acquisitions (M&As). It actively stimulated (cross-border) intercompany alliances, designed to pool R&D investments, and various forms of production, distribution, or marketing joint ventures. Thereby, it sought to thwart the practice in which governments picked their national winners, and actively stimulated strong *Eurochampions* instead, able to face the presumed 'American challenge'. The absence of merger control laws in the Treaty of Rome was constitutive in this regard. At the same time, in most cases, SMEs were exempted from the necessity to comply with EC competition laws, which provided them in practice with a *carte blanche* to engage in various types of corporate alliances.

In the years of economic crisis starting in the 1970s, EC competition law enforcement was subordinated to a broad-based crisis management, which aimed at rescuing various European industries in decline. The Commission gave preferential treatment to certain industrial sectors by (temporarily) exempting so-called structural 'crisis cartels' from the necessity to compete, which engendered not only the preservation of companies, but also of jobs. Once it became clear in the late 1970s and early 1980s that attempts to solve the enduring economic crisis were not successful, neoliberalism, as a counter project to embedded liberalism, increasingly gained the discursive upper hand among political and corporate elites in many European countries (see Chapter 5). The Commission, in particular, advanced a broader agenda of enhanced neoliberal market integration. Initially, neoliberalism took shape as a deconstructive project, in which macroeconomic, industrial, and social policy goals were increasingly considered illegitimate. In the presence of political counterforces, the neomercantilist strategy of fortifying the competitiveness of European companies vis-à-vis outsiders did not abruptly end. The strength of the neoliberal orientation at Commission level only started to reveal its impact from the late 1980s onwards, rendering the early 1980s a period of transition. With the exception of the adoption of the EC Merger Regulation, neither the Single European Act (SEA), nor its successor treaty, the 1991 Maastricht Treaty establishing the European Union (EU), introduced any substantive changes of EC competition laws. As part of the constructive phase in the ascendancy of neoliberal project, the dominance of neoliberal ideas revealed a major revitalisation of competition law enforcement in the 1990s. EC competition laws were enforced more stringently in the area of state aid prohibitions, cartel, and other restrictive business conduct, as well as the privatisation of state-owned enterprises.

The renewed emphasis on competition as a central market organising mechanism was not simply bound up with what is commonly referred to as the rationale of economic globalisation, but rather induced by social and political forces at the EC level. European business elites, heading large transnationally operating corporations, started a vigorous political campaign at the Commission in the 1980s and 1990s. Most notably, the European Round Table of Industrialists (ERT) requested the endorsement of concrete neoliberal policy positions at EC level. In addition to overall claims for more deregulation, it advocated the completion of the common market project. It considered the common market to be not half as open as that of the US, and hence a severe handicap for the development of economic growth. In search of new lucrative prospects of corporate expansion, the ERT promoted the liberalisation and privatisation of state-owned key utility and infrastructure sectors. In response, the Commission's DG Competition endorsed so-called privatisation directives under Article 90(3), a previously unused legal provision allowing the Commission to issue directives in the field of public enterprises and state monopolies, without the approval of the Council of Ministers. Similarly, in a joint effort with UNICE and its national member business associations, the ERT successfully pushed for the introduction of a pan-European merger regulation, which was adopted in 1989. Entrusting the Commission with exclusionary powers to vet large mergers and acquisitions meeting a defined turnover threshold meant that companies could bypass the often stricter Member

State merger regulations. Rather than prohibiting economic concentrations, the centralised merger control regime was designed to facilitate (cross-border) mergers. Against the background of the enhanced pace of economic integration, enacted by the 1992-programme, and the neoliberal deregulation and liberalisation more generally, the number of cross-border mergers sharply increased, leading to a profound restructuring of the common market. The Merger Regulation resulted in significant concentrations of transnational capital: since its enactment, the Commission approved more than 95% of all notified mergers. It should therefore not come as a surprise that transnational corporations were among the strongest supporters of the EU merger control regime.

Since the 1990s, EC competition policy has increasingly been complemented by an external dimension, which manifested in the increased application of EC competition laws on an extraterritorial basis. In addition to the EU's active participation in global trade liberalisation, the Commission concluded a wide range of bilateral cooperation agreements in the field of competition with other industrialised states, as well as states in transition to a market economy. The conclusion of bilateral cooperation agreements with the US authorities constituted the most far-reaching of all (see Chapter 6). One of the reasons for the bilateral transatlantic trajectory lies in a shared concern of the transatlantic business community to curb the potential negative effects of the extraterritorial application of competition laws. Based on streamlined schedules and enforcement procedures, and regular contacts in the investigation and decision making phase, the competition authorities sought to facilitate transatlantic economic transactions for corporate actors. The inclusion of positive and negative comity principles is similarly telling in this regard. The resulting intensive working relationship by the EU and US competition authorities was crucial for the steps of convergence towards the US model, enacted by the overhaul of EU competition laws and enforcement practices in 2004 (see Chapter 8).

The amalgamation of neoliberalism into the European integration project was constitutive to the spread of neoliberal ideas elsewhere in the world, in particular as the EU took an active role in setting the conditions for open and competitive markets, not only within Europe, but since the 1990s also on a global scale. The Commission's DG Competition evolved as one of the 'chief socialisers', who sought to craft a common understanding on competition policy as a tool for the successful management of economic policies around the world. It has played a major role in launching global initiatives, aimed at establishing a multilateral agreement on competition control within the WTO (see Chapter 7). Even though such an agreement did not materialise, due to the stark opposition of the US and a range of developing countries, these activities indicate that the Commission seeks to play a vital role in the promotion of global convergence of competition laws. Instead of a binding WTO agreement on competition, the non-binding and more informal International Competition Network (ICN) has been established. It was declared the chief mechanism for achieving global convergence of competition laws and practices. Currently, both the US competition authorities and the Commission take a leading role in defining regulatory standards and so-called best practices for competition authorities around the world. Moreover, the Commission engaged unilaterally in a range of 'advocacy' activities. It has started a dialogue on competition issues with developing countries and is providing material and immaterial 'aid' for building up competition authorities, as well opportunities for the exchange of personnel – activities that are generally referred to as 'technical assistance' and 'capacity-building'.

Corporate pressures and repeated critique on the lack of transparency and legal certainty of the Commission's still rather flexible decision making, eventually led to a fundamental overhaul of the EU competition regime in 2004 (see Chapter 8). The permeation of neoliberal ideas in the enforcement of competition laws entered a phase of consolidation, breaking definitely with the broadly defined macroeconomic industrial and social policy objectives that dominated competition policy in the era of embedded liberalism. Against the background of the broader neoliberal restructuring of the common market project since the mid-1980s, the transformed EU competition regime exposes competition law enforcement to market mechanisms and introduces a more microeconomic reasoning in the assessment of anticompetitive conduct. Through the abolition of the administrative public control model, and the concomitant decentralisation of Article 81 and 82, the administrative barriers posed by the necessity to notify intended cooperative agreements with other companies to the Commission were removed. This enhanced the freedom of companies to engage in various types of corporate alliances. The reform rested upon the view that 'less regulation is better regulation' and marketbased solutions are superior to the interventionist arm of a public authority. This strengthens the power of transnationally operating corporations not only in the realm of the common market, but also on a global scale. The primacy of enforcement has shifted to the proactivity of private parties who are expected to bring observed antitrust breaches to the national courts. Private enforcement, together with the institutionalisation of enhanced microeconomics in the assessment of anticompetitive business conduct, narrows the scope of competition law to short-term efficiency criteria and price indicators. With the retrenchment of the Commission as a central controlling instance regarding corporate agreements, broader and long-term orientated socioeconomic objectives, such as industrial and employment considerations, are ruled out in EC competition law enforcement. The decentralisation of the enforcement of Article 81 and 82 to the Member State jurisdiction implies that also Member State competition policy is deprived of a flexible, macroeconomic orientation. The requirement to enforce EC competition laws consistent with the Commission's approach, and the extensive interventionist powers entrusted upon the Commission, has significantly reduced the enforcement powers of national competition authorities. In addition to the decentralisation of enforcement powers, the involvement of private market actors as complementary controlling instances of the competitive process was intended as an encouragement to tougher competition, which is believed to feed back on overall economic welfare and the goals defined in the Lisbon Agenda set in 2000. In the absence of significant political opposition, private antitrust enforcement is likely to be further strengthened by subsequent reform steps as the 2005 Green Paper indicates.

The 'Modernisation' of the EU competition regime constitutes a considerable step of regulatory convergence towards the Anglo-Saxon style of competition law enforcement, by taking important elements of the US competition model as a reference point. In response to joint lobbying activities of the transatlantic business community, among which the Transatlantic Business Dialogue (TABD) and the ERT, convergence towards the US regime has taken place with the facilitation of private enforcement in Europe (in the US private enforcement is dominant practice, see Chapter 2). Moreover, in the field of merger control vital steps of regulatory convergence were taken in order to create a friendly regulatory environment for transnationally operating corporations in the transatlantic realm. The establishment of the Working Group on Transatlantic Antitrust Cooperation in the field of merger control, involving Commission officials and officials of the US Federal competition authorities, was crucial for matching the EU merger control regime with that of the US. The 'competition only' focus of US Federal competition authorities, and the primacy of efficiency arguments, sustained by the use of clear-cut microeconomic analyses in the assessment of concentration activities, traditionally led to a more lenient stance towards corporate size in the US. Increases in corporate efficiency that resulted from a merger or an acquisition were balanced against negative effects of economic concentration on competition. This implied that as long as prices remained competitive and 'economies of scale' was realised, US competition authorities adopted a permissive attitude towards mergers and acquisitions. In the EU, in contrast, market shares served as an indicator for the creation or strengthening of a dominant position, and hence, competition distorting behaviour. Although the Commission adopted a rather permissive stance towards economic concentrations already under the market shares based Dominance Test over time, with the newly adopted SIEC Test drawing on the SLC Test of the US, the prevalence of so-called expected future efficiency gains received a legal fundament (see Chapter 8). This allows dominant companies to secure their competitive strength in an ever more globalised economy more easily through corporate expansion. Similar to the US, not the concentration of market power as such, but cartels and other restrictive business practices with clear negative effects on consumer welfare, again measured in terms of efficiency conceptions, form the focal point of competition control under the new regime.

Reflections on the Transformed EU Competition Regime

The new regime is likely to produce a range of cross-purposes. The use of microeconomic instruments in the assessment of anticompetitive conduct can work to the advantage of corporations in terms of more consistency and transparency. The introduction of private enforcement, at the expense of the secure notification procedure, however, also entails severe risks. In the worst case, it leads to the advent of a claimant's culture similar to that of the US. Moreover, it can have significant consequences regarding the distribution of corporate wealth. The costs of suing may be unaffordable for certain potential plaintiffs, in particular SMEs, employees, consumers, or more diffuse interests of society at large. This has as a consequence that the new regime is likely to be predisposed towards those who can afford to by 'sound' economic analyses, and those willing and financially capable to take the effort of suing. Private practitioners from the professional services sector, specialised in competition law, are in any case benefiting from private enforcement. The heightened demand for antitrust counselling and litigation services resulting from the retrenchment of a public authority provides competition experts, working at intermediary law companies, with a lucrative business.

The transformed EU competition regime was designed to the advantage of competitive companies, most notably large transnational corporations competing on global markets. The process took shape without the involvement of citizens exerting their democratic rights. The Commission, who enjoys far-reaching discretionary powers in the enforcement of competition policy, is not subject to staunch democratic accountability. In order to legitimise the chosen path, in the course of the past reforms, the Commission repeatedly declared that competition policy, and hence, free competition, served the primary purpose of enhancing consumer welfare. Although this does not deny that the opening of markets and enhanced competition benefits consumers with a huge assortment of innovative products and services sold at lower prices, enhanced consumer welfare does not necessarily always result from competition. Whereas the liberalisation of the telecommunication and air transport sector has produced a number of desirable effects, such as providing companies with an incentive to innovate and cut prices, in other liberalised sectors, such as gas, electricity, railways, and postal services, consumer prices were not lowered.

In addition, it is also necessary to take into account the structural power balance between transnational corporations, domestic governments, labour, and small and medium-sized domestic companies. This balance of power has shifted considerably in favour of transnationally operating companies. With the emergence of transnational corporations operating on a global scale, the common distinction of European companies versus foreign companies has become increasingly problematic. Nonetheless, the overwhelmingly large share of transnational corporations finds its origin in the Western, industrialised part of the world. Transnational corporations generate combined annual turnovers that often exceed the GDP of developing countries. It is generally assumed that more than 40% of global trade consists of intra-firm trade flows, which implies that prices for goods and services are not determined by markets, but by transnational corporations. Internal transfer price mechanisms, the maximisation of economies of scale and scope, the ability to reduce market risks through outsourcing production, as well as the ability to generate large sums of capital, combined with the overall leverage power vis-à-vis governments, labour, and competitors, all these factors constitute sources of comparative advantage unmatched by small and medium-sized companies. Transnational corporations, as the central sources of foreign direct investment, enjoy considerable structural bargaining power vis-à-vis their host countries governments, labour, corporate affiliates, and local competitors, which allows them to influence market rules to their advantage. Free competition, and the right to freely access new markets, contributes to the very mechanism perpetuating socioeconomic inequality and power imbalances on the global market place. The standards of competition are set by those able to compete. The nature of global competition is rather oligopolistic. In order to expand market shares and to be able to invest in more efficient production technologies, capital accumulation constitutes a necessity for economic survival in a globally competitive environment. This has crucial repercussions for the overall structure of the global economy, in particular regarding the prospects for economic development by the structurally disadvantaged South. Seen from the contemporary worldwide distribution of accumulated wealth, that is the fundamental gap between North and South, competition erects a hierarchy of socioeconomic relations marked by inequalities in wealth and power, which extends from the individual, groups, or classes, to geographical regions in the world. Competition therefore is not exclusively the domain of companies competing with each other in the form of innovative products sold for low prices to consumers in the global market place. Cities, states, and entire geographical regions compete to attract business investments, work, and hence, social welfare.

The transformation of the EU competition regime reaches further than the realm of the EU, or the transatlantic market place. This becomes particularly apparent with regard to the Commission's involvement in the International Competition Network (ICN), which seeks to establish global convergence of competition laws and practices. The endorsement of the neoliberal free market philosophy at Commission-level implies that neoliberal ideas regarding competition policy will be promoted by the Commission also on a global scale. Convergence in a field such as competition policy is not simply the result of globalisation processes, or independent, unilateral governmental decisions, or decisions by state agencies, to reorientate their regulatory competition regime into the direction of another. Rather, convergence, if it can be observed, is the result of a political practice. In this case, dominant players, such as the US and EU competition authorities, promote a particular vision of competition laws and practices. Convergence is not in the primary interest of public institutions. Those pressing for more convergence of competition laws and enforcement are transnationally operating companies engaged in various cross-border business transactions. The proliferation of competition regimes around the world in the 1990s increased not only the transaction costs emerging from the phenomenon of multijurisdictional overlap, it also fuelled corporate concerns about the possibility that national competition authorities would choose a protectionist approach and discriminate against foreign competitors. Corporate elite networks, such as the ERT and the TABD, therefore pushed for the conclusion of a multilateral competition agreement ensuring that free competition on a global scale was realised. The right to compete freely in global markets in many ways presupposes the right for corporations, irrespective of ownership and origins, to locate their activities abroad, and to access (geographically) new product and labour markets, and concomitantly, to expand in scale and scope. Free competition thereby offers a way to expand market shares, and to take advantages of the opportunities offered by economic globalisation, as well as to select the location of production and foreign direct investment based on specific comparative advantages.

This dissertation sought to contribute to a critical political economy perspective on the transformation of the EU competition regime. A critical perspective on EU competition policies allows for addressing bigger political questions that lurk behind economic and legal technicalities that dominate the academic debate of economists and legal scholars, or the focus on microprocesses, such as regulatory negotiations, disputed mergers and cartel cases, as well as daily competition law enforcement practices, which is often employed by political scientists. Competition policy results from political struggles, which take place in the context of material realities and dominant ideological discourses. Like all forms of regulation, it benefits certain groups in society more than others. Future research on competition policy could profit from the inclusion of the question *'cui bono?'*. As this dissertation has demonstrated, the 'Competition for Competitiveness' strategy, employed by the European Commission's DG Competition, has been shaped by transnational business elites and their corporate lawyers, and is also to their advantage. There are always alternatives. A competition policy that emphasizes on fair competition, rather than free competition, in particular with regard to the economic situation of developing countries, and that curbs relentless economic power concentration, as once advocated by ordoliberals, could form a promising starting point.

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Samenvatting

CONCURRENTIE OM TE KUNNEN CONCURREREN: de politiek van de transformatie van het EU mededingingsregime

De dissertatie richt zich op het verklaren van de transformatie van het mededingingsbeleid sinds het midden van de jaren tachtig binnen de Europese Gemeenschap (EG). De analyse gaat na in hoeverre deze transformatie samenhangt met de verandering binnen het politiek-economische krachtenveld en binnen het Europees kapitalisme sinds het Verdrag van Rome van 1957. De toenemende invloed van transnationale bedrijven in Europa en de dominantie van het neoliberale gedachtegoed worden geïdentificeerd als doorslaggevende redenen voor deze transformatie.

Het beleid over de mededinging behoort tot de centrale beleidsterreinen van de Europese Unie (EU). Het wordt in essentie door politieke belangen bepaald. Bovendien heeft de inrichting van het mededingingsbeleid cruciale gevolgen voor de mate van economische concentratie, de werkgelegenheid, en de verdeling van de welvaart. Deze gevolgen beperken zich niet tot Europa, maar zijn ook voelbaar op mondiaal niveau, hetgeen het intrinsiek politieke karakter verder versterkt. Toch zijn er maar weinig politicologen, die zich met dit beleidsgebied bezig houden. Het mededingingsbeleid wordt voornamelijk bestudeerd door juristen en economen, die meestal een zeer technocratische en zeer specifieke invalshoek hanteren, zonder expliciet aandacht te besteden aan politieke factoren.

Door het mededingingsbeleid vanuit een politiek-economische perspectief kritisch te benaderen, legt de dissertatie belangrijke machtsfactoren bloot die in de afgelopen jaren bepalend waren voor de gevoerde politieke koers in EU mededingingsbeleid. De dissertatie valt uiteen in drie onderdelen: ten eerste, verklaart ze de ontstaansgeschiedenis van het mededingingsbeleid en waarom het mededingingsbeleid een dergelijk centrale plaats heeft kunnen innemen in de vorming van de interne markt van de EG. Ten tweede, wordt de ontwikkeling van het mededingingsbeleid gedurende de eerste drie decennia van de EG verklaard, en ten derde, de ontwikkeling van hoe en waarom het is veranderd in de afgelopen jaren.

Het mededingingsbeleid bleef lange tijd voorbehouden aan het Amerikaanse kapitalisme. De invloed van Amerikaanse belangen in het naoorlogse Europa was dan ook beslissend voor het opnemen van mededingingswetgeving in het verdrag van de *Europese Gemeenschap voor Kolen en Staal (EGKS)* in 1951. Met de plaatsing van het mededingingsbeleid op supranationaal niveau werd beoogd de staatsgesteunde nationale marktordes van kartels en monopolies in strategische industrieën, zoals de kolen- en staalindustrie, te ontmantelen, en de markttoegang voor nieuwkomers (in eerste instantie vooral Amerikaanse bedrijven) te waarborgen. Toen in 1957 de *Europese Economische Gemeenschap (EEG)* werd opgericht, hadden de opstellers van het verdrag zich de taal van marktconcurrentie inmiddels zo eigen gemaakt dat de concurrentiegedachte één van de kernprincipes van de economische integratie werd. De EG mededingingswetgeving diende een stapsgewijze opening van nationale markten voor de concurrentie vanuit andere lidstaten mogelijk te maken om zo de vorming van de gemeenschappelijke binnenmarkt te bevorderen.

Kenmerkend voor het beleid in de periode vanaf de jaren zestig tot het begin van de jaren tachtig was dat het mededingingsbeleid onderdeel vormde van een actieve industriepolitiek. Er werd een neonmercantilistische en protectionistisch beleid gevoerd dat er op gericht was de Europese markt af te schermen van de concurrentiedruk van de vaak grotere Amerikaanse en op een later tijdstip Japanse bedrijven. De Europese Commissie, functionerend als supranationale mededingingsautoriteit, heeft hierin een sterk sturende rol ingenomen. In deze periode, vaak ook aangeduid als de periode van het 'embedded liberalism', heeft het mededingingsbeleid ruimte geboden voor een sociale, op de duurzame vorming van arbeidsplaatsen gerichte besluitvorming. De bescherming van concurrentie werd hierdoor vaak ondergeschikt aan bredere, macro-economische doelstellingen met als gevolg dat het EG mededingingsbeleid op flexibele wijze werd toegepast.

In de tijd van het ‘embedded liberalism’ werd het EG mededingingsbeleid regelmatig als een compenserende strategie ingezet om Europese bedrijven klaar te stomen voor de concurrentie met de technologisch vaak geavanceerdere Amerikaanse bedrijven. Met de toenemende handelsliberalisering binnen het GATT werd het voor nationale lidstaten steeds moeilijker om conventionele protectionistische marktbarrières op te richten. Dit werd verholpen door andere, niet op tarieven gebaseerde, beschermende maatregelen toe te passen. Nationale overheden gaven bijvoorbeeld steun aan nationale ondernemingen in de vorm van subsidie, een voorkeursbehandeling bij openbare aanbestedingen, het geven van fiscale voordelen, en het plegen van publieke investeringen in het technische onderwijs, waar nationale bedrijven direct van profiteerden. De Europese Commissie was in haar beleid ontvankelijk voor de belangen van de Europese industrieën uit de verschillende lidstaten en liet de steun door nationale regeringen aan nationale bedrijven toe. Met name het koesteren van nationale kampioenen werd door de Commissie als toezichthoudend orgaan getolereerd en niet direct als concurrentievervalsend gezien. Desalniettemin probeerde de Commissie, met het oog op de vorming van de gemeenschappelijke binnenmarkt in haar eigen de bevordering van de vorming van Europese kampioenen boven de vorming van nationale kampioenen te stellen. De Commissie stimuleerde grensoverschrijdende fusies en samenwerkingsverbanden tussen nationale ondernemingen, met name samenwerking op het gebied van onderzoek en ontwikkeling. Fusies werden indirect bevorderd door de afwezigheid van controlerende regelgeving met betrekking tot fusies in het Verdrag van Rome: het Verdrag stelde geen grenzen aan de mate van economische concentratie. Bovendien was de werking van de bestaande regelgeving van Artikel 82 van het EG-Verdrag, beperkt tot een verbod op het misbruiken van een economische machtspositie door ondernemingen voorzover dat een ongunstige invloed had op de handel tussen de EG-lidstaten. Het hebben van een economische machtspositie an sich werd niet gezien als een bedreiging voor concurrentie. De geleidelijke integratie van nationale markten in één gemeenschappelijke markt door het verwijderen van steeds meer van de bestaande handelsbelemmeringen had bovendien tot doel de benodigde schaalvergroting te creëren teneinde de vorming van Europese kampioenen te bevorderen. De handhaving van de EG concurrentiewetgeving vormde daardoor een politieke reactie op de uitdagingen die kwam van de veel grotere en meer homogene markt van de VS.

In de tijd van de economische crisis in de jaren zeventig stond de handhaving van de EG mededingingswetgeving in het licht van Europees crisisbeheer: noodlijdende bedrijfstakken zouden van de toenemende concurrentiedruk worden gered door het toestaan van zogenaamde crisiskartels, die afspraken over het bevriezing dan wel de reductie van de productiecapaciteit mogelijk maakten. Door de aanname van zogenaamde groepsvrijstellingsverordeningen voor bepaalde soorten bedrijfsafspraken danwel door het verlenen van individuele ontheffingen, kon de Commissie bepaalde industriesectoren of ondernemingen een voorkeursbehandeling geven waardoor zij (tijdelijk) vrijgesteld waren van hun plicht om te concurreren. Voorts werd er voor gekozen om de invloed van de concurrentiewetgeving van de EG op het midden- en kleinbedrijf te beperken door overeenkomsten van geringe betekenis niet onder de supranationale mededingings-wetgeving te laten vallen. In de praktijk betekende dit dat veel soorten bedrijfsafspraken de facto niet getoetst werden aan de supranationale mededingings-wetgeving. Dit behoud van bedrijven had tevens tot doel de werkgelenheid te behouden.

Toen in de late jaren zeventig en de vroege jaren tachtig steeds duidelijker werd dat de pogingen om de economische crisis op te lossen niet succesvol waren, maakten neoliberale ideeën hun intrede onder de politieke en economische elites als een reactie op het compromis van ‘embedded liberalism’. De Commissie omarmde neoliberale ideeën, en nam een voortrekkersrol in door de versnelde marktintegratie op de Europese agenda te zetten. Aanvankelijk manifesteerde zich de neoliberale koers als een deconstructief project. De macro-economische visie gericht op het steunen van bepaalde industriële bedrijfstakken, alsmede het in acht nemen van sociale overwegingen over werkgelegenheid werden meer en meer als niet legitiem beschouwd. Door de aanwezigheid van politieke krachten tegen deze neoliberale koers werden de neonmercantilistische en protectionistische strategieën, die bedoeld waren om het concurrentievermogen van Europese bedrijven te versterken, niet abrupt beëindigd. De vroege jaren tachtig vormden een periode van overgang. De invloed van de neoliberale voorstanders werd pas in de late jaren tachtig duidelijk voelbaar. Ook het mededingingsbeleid heeft toen een ideologische verandering ondervonden. De materiele vertaling van het neoliberale gedachtegoed in nieuwe mededingingswetgeving liet nog op zich wachten. Noch in de *Europese Akte* van 1985, noch in het opvolgende Verdrag van Maastricht van 1991, werden substantiële veranderingen in de mededingingswetgeving aangebracht. Slechts de Europese concentratieverordening van 1989 vormde hierop een wezenlijke uitzondering. De feitelijke verandering in de jaren negentig werd met name doorgevoerd door een striktere toepassing van de bestaande mededingingswetgeving. De brede macro-economische oriëntatie van het tijdperk van het 'embedded liberalism' had plaats gemaakt voor een micro-economische, neoliberale oriëntatie, waarin harde concurrentie en vrije marktwerking centraal kwamen te staan. Het verbod op het geven van overheidssteun, op de vorming van kartels en ander restrictief gedrag van ondernemingen, werd in toenemende mate stringenter nageleefd. Stringente toepassing resulteerde ook in de privatisering van overheidsmonopolies en -bedrijven, die nu ook aan concurrentie onderhevig werden. In deze constructieve fase werd harde concurrentie gezien als het centrale mechanisme achter de organisatie van de gemeenschappelijke markt.

De noodzaak om te moeten concurreren werd versterkt door de aanname van de Europese concentratieverordening in 1989. Hiermee werd een op EG niveau gecentraliseerd fusiecontroleregime gecreëerd. Het beoogde doel hierbij was niet zozeer het belemmeren van economische concentraties, alswel het vergemakkelijken van de procedure bij grensoverschrijdende fusies. Fusiekandidaten die een bepaalde drempel van omzet haalden werden namelijk uitsluitend door de Commissie getoetst. Hierdoor konden fuserende ondernemingen de fusiewetgevingen van de striktere lidstaten ontwijken en hadden ze slechts nog maar met één paneuropese mededingingsautoriteit te maken. Tegen de achtergrond van versnellende economische integratie, neoliberale (de)regulering en voortschrijdende liberalisering, nam het aantal grensoverschrijdende fusies scherp toe. Sinds de inwerkingtreding van de Europese concentratieverordening, heeft de Europese Commissie meer dan 95% van alle aangemelde fusies goedgekeurd. Deze concentratieprocessen van transnationaal kapitaal hadden een diepgaande herstructurering van de gemeenschappelijke markt tot gevolg. Het is dan ook niet verbazingwekkend dat transnationale bedrijven tot de grootste pleitbezorgers van een supranationaal fusiecontroleregime behoorden.

De zakelijke elite, bestaande uit de vertegenwoordigers van grote transnationale ondernemingen, begonnen in de jaren tachtig en de jaren negentig een krachtige politieke campagne op EG niveau voor meer deregulering en liberalisering. In een gezamenlijke inspanning met de organisatie van Europese werkgevers (UNICE), hebben leden van de European Round Table of Industrialists (ERT) met succes voor de aanname van de pan-Europese fusieverordening gelobbyd. Hierdoor kwam steeds meer de nadruk op vrije concurrentie te liggen. Volgens deze zakelijke elite was de gemeenschappelijke Europese markt bij lange niet zo geopend als die van de VS. De voltooiing van het gemeenschappelijke marktproject werd gezien als een noodzakelijke voorwaarde voor verdere economische groei.

Mede door de druk van grote, op wereldschaal concurrerende bedrijven werd in 2004 voor een meer marktgeoriënteerd regime gekozen met als gevolg dat privé-actoren meer ruimte kregen om de rol van markt sturende autoriteit voor zich op te eisen en dat economische concentratie als een noodzaak voor concurrentie op de wereldmarkt wordt gezien. Het mededingingsbeleid heeft niet alleen een verschuiving van nationale markten, naar een gemeenschappelijke interne markt teweeggebracht maar wordt daarnaast sinds een paar jaar steeds meer ingezet als een instrument voor het openen van nationale markten op wereldschaal. De redenen voor deze transformatie liggen deels in de transnationalisatie van productie- en eigendomstructuren van grote bedrijven. Door de (re-) lokalisatie van productie is de aard van de belangen van grote transnationale ondernemingen fundamenteel veranderd. Ondernemersorganisaties, zoals *de ERT*, *UNICE* en de vertegenwoordiging van Amerikaanse transnationale ondernemingen in Europa (*AmCham*), maar ook de *Trans Atlantic Business Dialogue (TABD)* waren bijzonder invloedrijk in de besluitvormingsprocessen rondom een herziening van het bestaande mededingingsregime.

De inspanningen van deze, voor een groot gedeelte, eveneens transnationale ondernemersorganisaties beperkten zich niet tot het liberaliseren van het mededingingsbeleid van de EU, maar breidde zich ook uit tot de totstandkoming van een multilaterale afspraak over mededingingswetgeving binnen de Wereldhandelsorganisatie (WTO). De Europese Commissie heeft vervolgens een voortrekkersrol ingenomen in het behartigen van deze transnationale belangen op mondiaal niveau. Centraal in de voorstellen in het kader van de WTO was de gedachte van vrije concurrentie. Op basis van het principe van non-discriminatie zouden buitenlandse ondernemingen vrije toegang moeten krijgen tot nationale product- en arbeidsmarkten, evenals investeringsvrijheid en vrije toegang tot natuurlijke bronnen teneinde vrijelijk te kunnen concurreren met de lokale nationale bedrijven. Regeringen, of nationale mededingingsautoriteiten zouden buitenlandse ondernemingen daarbij niet mogen benadelen. Bij de Ministeriële Conferentie van de WTO, in 2003 gehouden te Cancun, Mexico, zijn deze voorstellen onder druk van de VS en een aantal ontwikkelingslanden, waaronder India en Brazilië, van tafel geveegd. Terwijl de delegaties van de ontwikkelinglanden voornamelijk bezwaar maakten tegen de gedachte van vrije concurrentie en daarmee samenhangende vrije markttoegang, verzette de Amerikaanse delegatie zich tegen het bindende karakter van de multilaterale concurrentieregels. Onder leiding van de Amerikaanse mededingingsautoriteiten en de steun van de Europese Commissie werd het *International Competition Network (ICN)* opgericht, waarin door institutionele samenwerking, het vaststellen van best-practices en benchmarking-praktijken, niet-bindende standaarden voor mededingingswetgeving geformuleerd werden. De ICN omvat inmiddels bijna alle mededingingsautoriteiten ter wereld. Ook transnationale ondernemingen zijn vertegenwoordigd in dit netwerk. Om economische transacties over grenzen heen makkelijker te maken, zijn deze ondernemingen, naast het zekerstellen van vrije concurrentie en markttoegang, ook gediend bij meer juridische zekerheid en transparantie van nationale mededingingswetgevingen en de procedurele toepassing hiervan. Een uniforme mededingingswetgeving, of meer convergentie, is daarom primair in het belang van transnationale ondernemingen.

De consolidatie van het neoliberale mededingingsregime van de Europese Unie heeft teweeggebracht dat de Europese Commissie zich niet langer meer concentreert op het beschermen van Europese industrieën, maar meer op het creëren van markttoegang voor transnationale ondernemingen, en dit niet alleen binnen Europa maar ook op mondiaal niveau.