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PLANNING A MERGER?

**-A Case Study of the Formal and Informal Decision Making
Procedure in the European Union**

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Gothenburg, the 18th of January 2001

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ABSTRACT

Today, globalisation drives companies to consolidate in order to remain competitive. This has resulted in an enormous amount of mergers within the European Union. To maintain a high level of competition, mergers need to be supervised by authorities. This study includes four merger cases, which have been subject of investigation by the European Authorities. This thesis provides a guide of how companies, intending to merge, should prepare an approach towards the European Union authorities. The study also explains the actual roles and power of the actors connected to the merger procedures. The information derived from interviews in this study is revealed from experienced practitioners within this area.

We have concluded that companies should begin preparing for approaching the EU Commission very early ahead of the merger procedures. The body within the EU Commission responsible for mergers is the Merger Task Force. Companies must submit substantial documentation for the process to run smoothly. For assistance, companies need specialist competition lawyers and economists. Equally important is an open and continuous dialogue between the top management and the Merger Task Force. Therefore, a mutual learning process should start promptly between the company and the Merger Task Force. The guidelines in this thesis help companies to avoid traps when intending a merger within the European Union.

Key words

**Competition Policy • European Commission • European Union •
Legislation • Merger Procedures**

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INTRODUCTION



1. INTRODUCTION

In this chapter we present the background to the problem as well as defining the problem. The purpose of the thesis is outlined and in the end delimitations and explanation of concepts are presented.

1.1 BACKGROUND AND PROBLEM DISCUSSION

Competition is one of few areas where the Commission has the power not only to make policy, but also to implement and enforce it, with minor involvement of the governments of the Member States within the European Union (EU). The Directorate General on competition (former DG IV) is the body, which possesses the entire responsibility for competition and thus plays the role of “policeman, prosecutor, judge and jury”¹. Hence, the Commission has, in principle, monopoly over handling these issues. Filing complaints of final decisions to the Court of Justice takes several years. This has caused suspiciousness and hostility of private and public organisations in the Member States.² Due to the recent waves of mergers and acquisitions, the European merger control, has become an even more widely debated topic.

The merger control might apply for companies with a European Community-dimension, which generally speaking means that the size of the company should have an aggregated worldwide turnover of more than € 2.500 million. It is a regulatory instrument initiated at a preparatory stage of the intended merger. Concerned companies are therefore dependent on the Commission’s blessings to be able to continue its merging strategy. When planning a merger the need to prepare for the Commission’s possible investigations are crucial. If rejected in the Commission, actors have no time to wait for appraisal; they need to find new alternative partners to avoid lagging behind their rivals.

In order to know how the Commission will decide in the merger case, a need for understanding how the Commission thinks is obvious. Hence, the business

¹ Wallace & Wallace, 1996, p.158

² Ibid

perspective should as much as possible correspond to the Commission's viewpoint, to be able to assume what the verdict will be. Consequently, businesses have to realise the legislation and how the Commission evaluates and argues considering different issues. Provided with that information, the chances of knowing at an early stage, how the Commission will react about the merger increases.

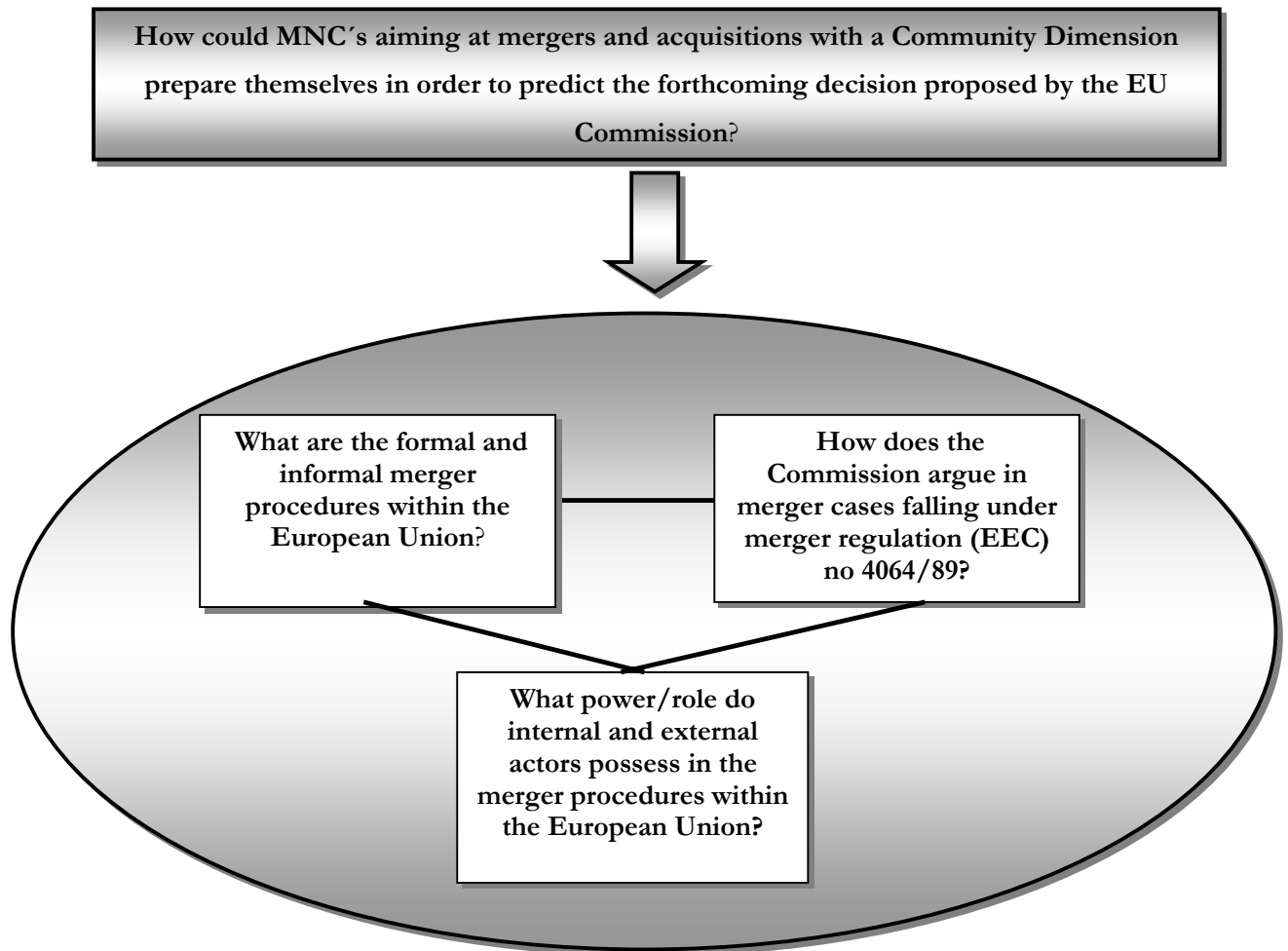
If problems arise, the company could consider what it takes e.g. divestments of activities in order for the Commission to approve the merger. On the other hand, if it turns out to be impossible, the company could at an early stage reconsider and seek another partner. This tactic avoids surprises and saves time and resources. It is argued that treatment of the cases in the Commission is inconsistent, where policies are changing and the Commission at times modifies its deadlines³. This implies that companies aiming at merging cannot be certain how the Commission treats their particular case if they do not understand how to handle the problem. The complex procedures within the institutions of the EU and forces influencing them are multifaceted. Following the above, our task in this thesis is to provide an understanding of the Commission's treatment of merger cases and assist the reader with guidelines regarding the matter.

This problem discussion leads us into the following main problem in the model below. The main problem is divided into three sub problems. Through the design of the model, we have tried to emphasis the high level of complexity of the problem we are faced with:

³ Financial Times, Anonymous, September 4, 2000

1.2 PROBLEM DEFINITION

FIGURE 1.1 MAIN PROBLEM



Source: Own construction

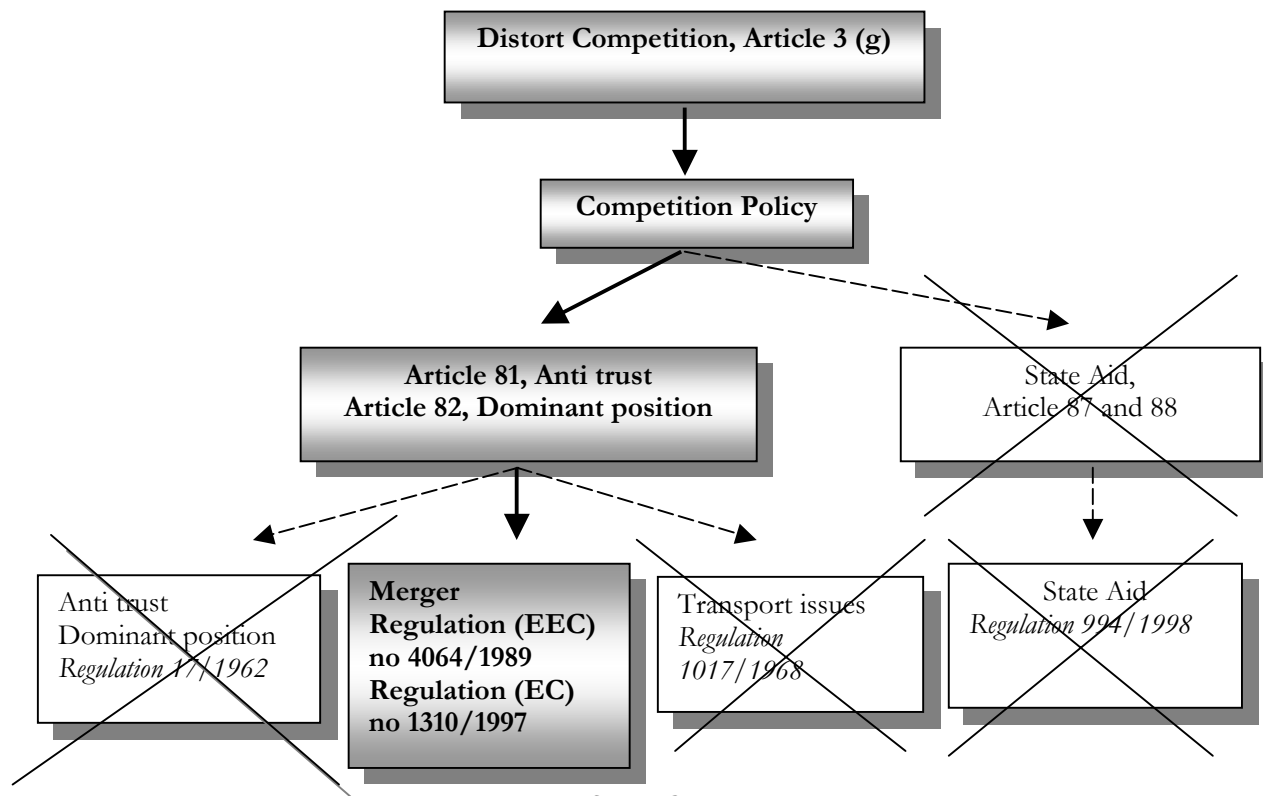
1.3 PURPOSE

The purpose of this study is to identify actors connected to the merger procedures within the EU. Furthermore, the purpose is furthermore to explain the formal and informal merger procedures therein. This forms the basis for explaining the powers of identified actors involved in the merger procedures. Finally, from this framework we intend to present guidelines of how companies, aiming to merge, should plan their approach to the Commission. In addition, we aim to provide the reader with some general recommendations to avoid unnecessary traps when dealing with the Commission.

1.4 DELIMITATIONS

- The study is delimited to the central regulations, in which these operations within the Commission rests, as illustrated below:

FIGURE 1.2 STRUCTURE OF COMPETITION POLICY



Source: Own construction

- We have decided to limit our research to focus only on mergers that are subject for notifying the European Commission's Directorate General on competition (DG on Competition). The operations within the Merger Task Force (MTF) within this Directorate General are thus the main centre of attention.
- Within the procedures we will treat activities until final judgement in the second phase investigation, hence we disregard possible appeal to the European Court of Justice (ECJ).
- The words "efficiency" and "strategy" are used as words only. Therefore, we do not define any assumptions or explaining concepts behind the words.

1.5 DEFINITIONS

BOX 1.1 DEFINITIONS

Community Dimension	Community Dimension involves cases that give the European Commission the powers to handle them. <i>(See 5.1.1)</i>
Form Co	The Form needed to be used by the company in connection to the notification. <i>(See 5.1.6)</i>
Hearing Officer	The person responsible for co-ordinating and leading oral hearings. <i>(See Regulation no 447/98, Article 15)</i>
MTF (Merger Task Force)	The unit within Commission's DG on Competition, responsible for investigation mergers.
Notification	The document in written form submitted from the company to the Commission to intend a merger, which will result in an investigation. <i>(See 5.1.4)</i>
One-stop-shop	Companies can turn directly to the Commission instead of notifying many Member States' national authorities concerning competition issues. <i>(See 5.1.1)</i>
Oral hearing	An occasion where in phase II investigation where the company can defend its case in front of the Commission together with the third parties, national authorities or others, having particular interest in the merger. <i>(Regulation no 447/98, Article 14)</i>
Rapporteur	The person responsible for co-ordinating the case-team within the Merger Task Force.
Relevant geographical market	"The relevant geographic market comprises the area in which the undertakings (<i>here: meaning "companies"</i>) concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas".
Relevant product market	"A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use." <i>(OJ C 372 December 9, 1997)</i>
Third parties	Include group of customers, competitors and suppliers or other parties having a particular interest directly connected to the intended merger.
Undertakings	Commitments submitted by the company in order to have the merger approved by the Commission. <i>(See 5.1.9.10)</i>

METHODOLOGY



2. METHODOLOGY

In this chapter we present the scientific basis of the thesis. This part commences with how we view reality and what perspectives the thesis is based upon. Furthermore, a discussion about research methodology and strategy is conducted, followed by case study design. Moreover, the chapter outlines how the data was collected and finalises with a theoretical discussion in conjunction to our contribution to science.

2.1 VIEW ON REALITY

Qualitative research is often presented in contrast to traditional research, this starting-point is a totally different view of reality. The foundation of traditional research is that one objective reality exists, which we could observe, know something about and most important measure. Researchers have collected immense amount of proofs to describe the world, sometimes creating rules to explain aspects of reality. From a research perspective this involves a conception of the world that reality is constant. The researcher strives to define what is out there and focuses on result and stresses the reliability in the measurements. In contradiction, qualitative research is based on the perception that there are many realities, that the world is not objectively constructed but rather a function of perception and interplay among human beings.⁴

We argue that this prove that traditional research transforms science since new theories may proof that reality is different. This means that the researcher's attempt to explain phenomenon is modified when our world changes. We agree with that explaining various events changes with the pace as our world changes. This implies that our study can contribute to science in this particular moment but at the same time, as the world changes new prerequisites exists. However, we disagree that there is only one reality, which can be observed. There are rather many realities that are not objectively constructed and therefore need to be interpreted rather than measured. Consequently we can present our interpretation

⁴ Merriam, 1994, p. 30f

of a reality, which we examine from our perspectives and way of looking at the world.

2.2 PERSPECTIVES

The case study is explorative, inductive and focuses more on processes rather than ends or final results. This view implies no defined hypotheses, no manipulation by controlled variables and no limitation of the end product. Instead, the researcher observes and explores intuition to obtain knowledge of what happens place in a natural environment.⁵

This study focuses on processes as we view persons'/groups' actions as processes evolving over time. On the one hand we can argue that the study can be viewed from a static perspective, since we study observable facts based on a particular moment. On the other hand the study concentrates on a perspective that centralise processes over time. The time perspective is for example linked with the historical actions performed by individuals and events throughout time. Therefore, history affects the picture of the institutions and its containing network. It is thus of vital importance to give the reader a presentation of historical activities forming the basis for merger legislation and competition policies. This history gives a background for why the activities are carried out within the EU at the time of our study. Moreover, the study emerges with discoveries in the field. This perspective affects our choice of methodology, as Merriam states above; a case study is appropriate when the processes are in focus, inductive and explorative.

Merriam argues that the view the researcher has on the world influence the whole research process. A theoretical perspective is one way of viewing reality.⁶ We have partly conceptualised the problem, thus we are equipped with a certain theoretical perception how of how to view reality. Our problem is taken from a business perspective. The Multinational Company (MNC) is placed in the centre whereas other actors are influential players in its environment. However, we argue that the phenomena studied in this thesis cannot be scrutinised properly without having juridical perspective in focus and reflect upon political aspects as well. This is

⁵ Merriam, 1994, p. 30f

⁶ Merriam, 1994, p. 61

unavoidable since we deal with a governmental institution whose operations rest on legislation as well as interpretation of it, which in turn is influenced by national authorities. This is important for understanding the whole. Furthermore, the approach allows strategic implications since the study results in preparing issues for the MNC. Thus, strategy is seen as planning activities before approaching the Commission for the forthcoming merger.

2.3 RESEARCH STRATEGY

Yin distinguishes between five research strategies: experiment, survey, archival analysis, history and case study. The variables guiding the researcher to choose strategy are: types of research questions posed, extent of control over behavioural events and relative focus on contemporary versus historical events. This study focuses on contemporary events and lack control over behavioural activities.⁷ Therefore, we are offered two options namely survey, case study or a combination of both. We opted for the case study.

Merriam defines a case study as a process, aiming at describing and analysing specific units in complex and general terms often continuously during a certain period of time.⁸ The case study gives the investigation opportunities to maintain holistic and important kinds of real-life events, Yin argues. Furthermore, case studies facilitate understanding of complex and social events.⁹ The case study is suitable regarding our perspective, having the process in focus and intends to provide an understanding of the whole.

However, the case study as research strategy is criticised for several reasons. Yin lists three of the most common objections against it: Case studies lack thorough research meaning that the researcher may present vague data or biased views to influence direction of results and conclusions. Another point is that case studies offer little basis for scientific generalisation. The third issue is that they are time-consuming.¹⁰ We believe that it is difficult to conduct research if the researchers' perspectives and values cannot play a central role. Therefore, above, we have tried

⁷ Yin, 1994, p. 3

⁸ Merriam, 1994, p.25

⁹ Yin, 1994, p. 3

¹⁰ Ibid, p. 9f

to clarify our view on reality and which perspectives we have when looking at the research problem. Furthermore, our aim is to present this study as objectively as possible to avoid manipulate directions of both results and conclusions.

Moreover, Yin distinguishes between exploratory, descriptive or explanatory case studies. The difference between them are driven by the first word in the research question namely: Who, what, where, how and why. Our research proposal is intended to provide an understanding of *how* the procedures within the EU are conducted. Yin reveals this to form an explanatory study and is thus likely to suit case studies, histories or experiments as preferred strategies. This is because such questions handle operational links requiring mapping over time.¹¹ Indeed, in order to understand the ongoing processes within the institutions in the EU, tracking activities over time are a prerequisite, since they obviously affect the picture of examined results. Yet, in order to explain the phenomena, a description of characteristics of examined units is needed. Thus, the study is descriptive as well.

2.4 CASE STUDY DESIGN

Yin presents four types of case study designs: single-case (holistic), single-case (embedded), multiple-case (holistic) and multiple-case (embedded) design. The first characteristic in designing case studies regards single or multiple cases. Single-case is favourable when the case is critical for testing a well-founded theoretical suggestion. The theory specifies a distinct collection of propositions and circumstances within which the propositions are supposed to be true. To verify, test, or widen the theory, there may exist a single case, assemble all of the conditions for testing the theory. Another reason for a single case is when the case represents an extreme or unique case.¹²

Our starting point of was the failed merger between Volvo and Scania and this particular case seemed to be critical. The mentioned case satisfied the arguments mentioned above to conduct this study properly. However, when initiating the empirical findings we found that the selected case was extraordinary unique, making it impossible to state some sort of generalisations to our problem. An

¹¹Yin, p.7

¹²Ibid, p. 38f

alternative could have been to delimit the study to markets of trucks and buses in which the two actors operate. Another option would have been to describe the significant case in detail from different perspectives delivered by the parties involved and their surrounding experts. In our opinion, this would jeopardise the understanding of the whole through focusing on details. We think that the study would have given minor contribution to businesses and to the academy since the risk of twisting objective facts in favour of subjective opinions was apparent.

Therefore, additional cases were required to be able to show different aspects of the problem. We ended up with four cases. Selection of these cases is further described in 2.6. A multiple-case study provides the opportunity to give guidelines to businesses in general, which might face a merger.

The next step is to select a holistic versus an embedded approach. Embedded analysis pays attention to sub-units, embedded units. A holistic method is conducted when the case study solely investigates the global nature of a programme or an organisation. The embedded technique has the disadvantage for being too focused towards the sub-unit level and therefore may fail to go back to larger aspects of the analysis. A holistic view on the other hand has the weakness of that the case study may risk being conducted at an abstract level, missing clear measures of data. Another obstacle is that direction may shift during progression of the study. Holistic analysis is appropriate when no logical sub-units could be identified and when relevant theory underlying the case study itself is of a holistic character.¹³

It is difficult to define explicitly whether the study is holistic or embedded based on these classifications. We could only argue for our thoughts behind the study and thus leave the categorisation to the reader. Our approach is taken from a holistic view bearing in mind the previous discussion and our perspective on the problem. The stated problem underlies the standpoint of being influenced by economic, juridical and political issues, which results in the holistic nature of it. Furthermore, no logical sub-units with clear boundaries can be defined. Also, arguments for a holistic approach are that relevant theory underlying the

¹³Ibid, p. 41f

investigation is of a holistic character, which is shown later in the theoretical framework.

One could argue that the MTF within the Commission is a sub-unit, where our primary focus lies. In that sense the approach could be said being embedded. However, we argue that this distinction is inadequate since this sub-unit is highly dependent of the remainder of the Directorate Generals on Competition, the Commission as a whole among other bodies in conjunction with external actors. Having all focus towards this sub-unit with rather unclear boundaries would most likely be misleading. Hence, endangering the understanding of the whole.

2.5 CHOOSING VOLVO-SCANIA

This study started off with a general interest in the EU. When we attended a course concerning the business perspective on the institutions of the EU in spring 2000, curiosity appeared around how competition and merger controls were handled in the EU. A case, which has achieved vast attention, was the failed merger between Volvo and Scania. We had the opportunity to talk to Mr Lars Anell at the Volvo Headquarters, who was involved in the case and gave us approval of look deeper into this issue, using this case as an example in the study.

Arguments for selecting the Volvo/Scania case are that it indicates the need for a deeper understanding of merger procedures. Another motive was that the case was the subject of deeper investigation by the EU Commission. Therefore, it reveals how the actors involved negotiate and interpret various issues when a case is put to the “extremity” and move through all procedural phases. Also, as previously mentioned it seemed to be a critical case, which reflects the complexity of the procedures within the EU. However, it was later shown to be the starting point of our investigation. Since Volvo/Scania was a unique case in recent time, we found that it was inappropriate to draw general conclusions solely based on this case. A distorted picture of the multifaceted operations within the Commission would have been presented if focusing solely on one case. However, since the Volvo/Scania was the starting point of the study, this case might have more space in the paper than the other three cases. A presentation of our thoughts when selecting additional cases is shown below.

2.6 ADDITIONAL CASE SELECTION

When choosing additional cases, we set up two criteria. The *first criterion* was that the case in question should have been the subject of a full investigation by the Commission under the Merger Regulation (EEC) no 4064/89. Thus, the case had fallen within the scope of the Merger Regulation and proceeded to a second phase investigation. We looked at 100 cases, published by the Commission, within the time period of September 29 1999 -- May 1 2000, and found ten cases that met the first criterion. An alternative would have been choosing a few cases from an earlier time period and a few recent cases and place Volvo-Scania in the middle as a “time-breaking point”, assuming that something had changed after the Volvo-Scania case. However, it would not have offered a solution to our problem definition. Therefore, the selection of the time period was chosen to make the results as up-to-date as possible. The second criterion became an obstacle since a comparable case where the Commission had opened full investigation did not exist. However, it is unavoidable not to mention the two merger cases, which were authorised within the same industry, namely Mercedes/Kässbohrer and Renault/Iveco when discussing Volvo/Scania. Yet, these will not be scrutinised in detail.

The *second criterion* was therefore to pick cases operating in different industries and consequently they operated in different market structures. Among the ten cases left, the most interesting cases were three; one pharmaceutical merger (Monsanto/Pharmacia Upjohn), one operating in the telecommunication industry (Vodafone Airtouch/Mannesman) and finally a merger in the textile industry (Sara Lee/Courtaulds). All these were approved with conditions. With this case selection we argue that we could present different aspects in order to illustrate the variety of Commission’s operations, for reasons stated below.

The pharmaceutical industry is interesting, since a lot of mergers have occurred in this industry¹⁴, and consequently the Commission is rather experienced in this area. We could therefore assume that it results in rather repetitive procedures within the Commission’s merger procedures. The telecommunication industry is a new industry, which most likely means that standards are relatively undeveloped.

¹⁴ XXIXth Report on Competition Policy, 1999

Unlike the telecommunication industry, the textile industry has over-capacity and rather stagnant sales figures. Hence, these cases have totally different backgrounds, which also could be said to correspond with our holistic approach of the problem.

2.7 RESEARCH METHOD

Classification of different methodologies is sometimes done between qualitative and quantitative research. The quantitative research is a study presented in numbers. Some would argue that this approach is more objective than the qualitative. However, there is a fundamental subjectivity in this method as well. The fact that data in quantitative studies are solely coded in exact numbers does not reduce subjectivity. There are subjective decisions in the problem defined, stated perspectives, chosen theories and models and reductions.¹⁵

Merriam says that qualitative research means that the researcher tries to understand how all the parts co-operate to create a whole.¹⁶ Since we regard the studied phenomena to be multifaceted, a broader perspective is needed than a quantitative approach would offer. In which case, we would have been forced to delimit the study even more to certain specific parameters and would most likely have missed to explaining processes and variations in the phenomena. With a quantitative approach, the attempt to present the whole would be lost. Furthermore, in order to select parameters to measure data, knowledge is needed in how to choose variables. We have little understanding of if there are different ways of handling merger cases within the Commission, e.g. estimation of future market shares etc. For these stated reasons, we found the most relevant method to be qualitative.

The advantage with case studies is that it allows studying complex and social units containing several factors as important to reach an understanding of the phenomena. Real circumstances are connected to the approach and therefore result in a substantial and holistic examination of observable facts. Furthermore, the method gives understanding and information in a way that increases the

¹⁵Wigblad, 1997, p. 75

¹⁶Merriam, 1994, p. 30

reader's knowledge. However, even if the study strives for a rich and broad description, the weakness may be the report to be too long, detailed or too deep. Case studies can furthermore simplify or exaggerate circumstances in a situation.¹⁷ To avoid this, we intend to present some issues in more detail while others are mentioned briefly, as objectively as possible. However, we argue that the report needs to be fairly long and deep, bearing in mind the complexity of the problem.

2.8 THEORETICAL USE

Pure inductive research starts with collection of empirical observations and thereafter the researcher creates theoretical implications with basis on the empirical evidence. On the contrary, the deductive approach is used when the researcher hopes to find information suitable for a theory.¹⁸ According to Wigblad, a third approach is abduction, meaning that the researcher uses interplay between empirical evidence and theory. It means that the researcher moves back and forth between theory and empirical evidence without having a certain point of departure. This interplay allows the subjective experience to be highlighted, which is an important source of knowledge. However, it also involves presenting the subjective and the social as objectively and critically as possible.¹⁹ Interviewing human beings involves obtaining subjective opinions from every individual that will affect the results. However, our intention is to present this study as objectively and critically as possible. We agree with Wigblad that there needs to be interplay between empirical evidence and theory in order to understand the whole of the studied phenomena. Our approach is partly inductive and partly abductive for the following reasons.

We argue that our approach is pure inductive regarding two of the sub- problems. These problems include analysing the procedures and cases, which are solely based on empirical data. Naturally, it depends on how we define empirical data. This is discussed and argued for in section 2.9.2: "classification of data".

The final sub-problem: analysing the power is abductive in its nature, we argue. We initiated the study through creating an actor-based model in order to *identify*

¹⁷Merriam, 1994, p. 46f

¹⁸Merriam, 1994, p.33

¹⁹Wigblad, 1997, p. 31f

internal and external actors connected to the MNC. However, the model was not explicitly defined at the point of departure. At that time, we identified internal actors, which we found in literature and in officially published material specifically connected to the merger procedures. The model containing the identified internal actors is thus our “theoretical framework”. The model then emerged due to our discoveries on the field. Hence, the final sub-problem is abductive, as we moved back and forth from theory and empirical evidence to be able to complete the final picture.

2.9 DATA COLLECTION

We started our research with selecting secondary data containing officially published data issued by the Commission on Competition such as the Competition Policy. Furthermore, regulations were added as well as articles and literature. Since the Volvo/Scania case was the starting point of our study we collected articles regarding this case and the officially published case from the Commission. In connection to this we made an unstructured interview with Mr Lars Anell at Volvo headquarters, regarding the case. At the time we had no idea of how to approach the problem empirically. We later decided that the Volvo/Scania as a company should not be our main focus in the study and therefore further interviews with Volvo seemed unnecessary.

2.9.1 INTERVIEWS

When we made our selection of interview persons we used a method that Merriam calls “selection based on personal knowledge”, which means that the researcher chooses individuals based on recommendations from “experienced experts” in a certain area.²⁰

An alternative would have been to search for views from the companies in the cases. The risk would have been to focus too much on subjective opinions. Therefore, we chose “independent” observers, who could state a general view on the problem as such without reflecting on specific cases. Apart from these views, people in the MTF within the Commission, were interviewed. The four merger cases published by the Commission gave a deeper understanding how the

²⁰Merriam, 1994, p. 63

Commission argues and thus helped us to formulate relevant questions to the MTF.

We therefore had to find experienced experts in the area. We initiated the search through consulting our tutor as to who would be most interesting to interview. These initial contacts were picked based on background and experience in the field, with the help of web pages. We hoped that these persons could give us further recommendations that could be valid to interview. After our first visit to Brussels, these contacts turned out to be our channel to other experts in the field as well as into the MTF within the Commission.

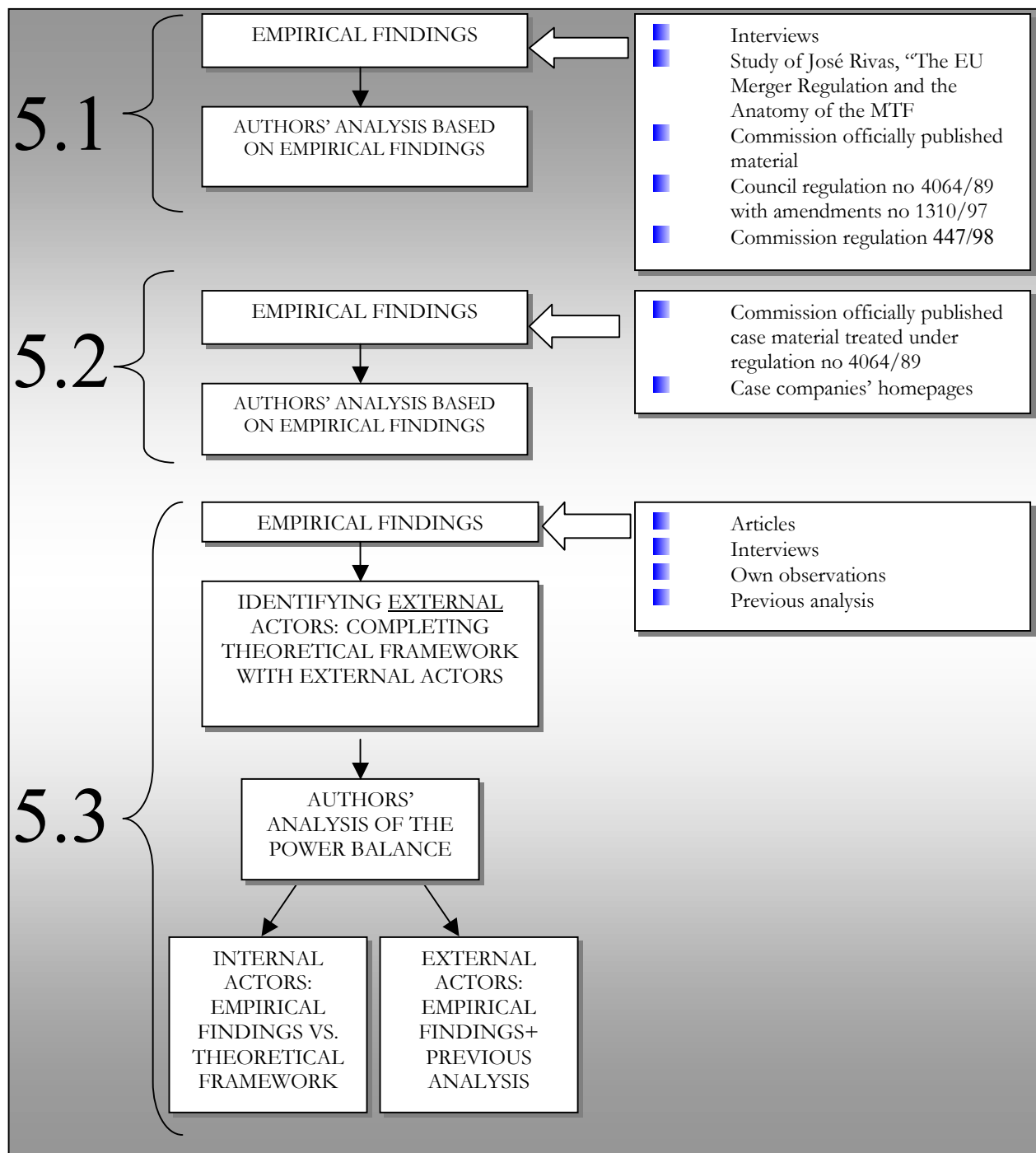
We regard the respondents to be relevant objects to interview since these persons are located around and within the Commission in Brussels, and are experienced in the area. We therefore consider them to have considerable insight and understanding of our problem. These experts have various backgrounds²¹ and assignments relevant for our purpose. Three interviews were conducted within the Commission in Brussels. In addition, we made a telephone interview with Swedish Competition Authorities in Stockholm. Moreover, we talked to representatives from the Council of Ministers and the Parliament and the Federation of Swedish Industries in Brussels. Furthermore, we spoke to Kreab, a lobbying company, also located in Brussels. Finally, we made two interviews with specialist competition lawyers located around the Commission in Brussels, who wished to be excluded in the thesis. All interviews were conducted in a semi-structured manner with open questions.

2.9.2 CLASSIFICATION OF DATA

Our structure of the analysis is illustrated in the following picture. The chapter is divided into three sections based on our sub-problems: 1) Procedures 2) Case Analysis and 3) Power-balance.

²¹Appendix 6

Box 2.1 STRUCTURE OF DATA



Source: Own construction

We classify the presented material in the right boxes in the figure as empirical findings (*not* theory). In the empirical findings we do not only have interviews but also legislation and the Commission’s officially published material among other secondary sources. In the first two sections (5.1 and 5.2) no theory is present, since we treat all material as empirical findings. When we have presented every section in the data the authors’ analysis will follow. When the “authors’ analysis” is

absent, we decided that interpretation of data is not needed to facilitate the understanding of the reader.

In the final section (5.3), the theoretical framework is presented. Note that in this section the model is initially presented in the theoretical framework (Chapter 4) and will be completed during our empirical findings. In the text, the authors' analysis will be followed in all parts.

The disadvantage is that the analysis results in large (perhaps heavy) analysis chapters, particularly the first analysis (5.1). This was our intention, since the thesis is in a large extent an empirical study. We also argue that it was necessary due to the complexity of the problem definition. Furthermore, we found that separating for example legislation (treating it as "theory"), between the practical procedures would give a distorted picture. Another factor is that we will interpret the legislation to facilitate for the reader in the analysis. This would not have been possible if we would have treated legislation as theory.

2.9.3 CONFIDENTIALITY

We realised that we were examining a pretty delicate matter and thus issues raised were in general very sensitive for the respondents. Several of the respondents did not want to be quoted or mentioned in the report. Questionnaire or telephone interviews therefore seemed unsuitable since confidential information would most likely not be mentioned. This secrecy also meant that we were unable to tape-record most of the interviews. The disadvantage is that we would risk missing valuable information. However, the value is that the respondent might feel more comfortable during the interview and may reveal sensitive information. In order to capture as much information as possible one of us asked the questions, while the other person took notes. To ensure objectivity, we discussed each interview afterwards to check that we interpreted the information similar. Also, we sent interviews via e-mail to allow changes or adding of statements. It should be noted that for the above reasons we chose not to mention sources derived from the interviews in the analysis.

2.10 INTERNAL VALIDITY

Internal validity is the question as to the degree to which the results match reality. Do the results measure reality? The researcher should actually measure what he or she believes that she/he measures. This depends on the researchers' ability to clarify standpoints and theoretical perspectives and with basis on that present reliable interpretation of the activities taken place.²² We have presented our perspectives and assumptions and with this as a background we have attempted to give a truthful explanation of the problem stated.

Our dilemma was to find out which phenomenon we should ask for to get a description of it. The risk was thus that we would have asked for phenomena that did not exist and therefore our follow-up questions would not be answered. However, as our knowledge emerged as we collected secondary data and interviewed experts in the area we realised how to pose the questions to focus around the problem. Also, the answers embody what we actually assumed to measure; therefore we argue that we measured what we supposed to measure.

2.11 EXTERNAL VALIDITY

External validity is the question of whether the empirical findings could be generalised. One way of doing this is to use several cases and to offer a full description with a variety of input.²³ We have used several cases in order to increase the external validity. If we had used one single case we would have been able to generalise the findings to a certain extent to cases having similar assumptions. Thus, every case is unique and based on this it is difficult to generalise the operations for all cases. However, underlying regulations drive the problem we were faced with. This means that the activities and manners that all involved actors have to follow is to a large extent bound by legislation. Thus, all companies facing the stated problem need to follow the pattern outlined in this thesis in order to succeed with its strategy. Therefore, we argue that we can generalise the study.

²²Merriam, 1994, p. 177f

²³Ibid

2.12 RELIABILITY

Reliability is an issue about the extent to which the investigation would give the same results if repeated. Merriam declares that if the studied area is dynamic, the definition reliability in a traditional meaning is impossible to reach.²⁴ Even if EU and the activities therein regularly change and the world surrounding the institutions is dynamic, we are dealing with a governmental institution. Hence, the activities are strictly based on legislation. This means that the actors within it, as well as external actors always need to follow a certain pattern. This pattern could thus be observed to a certain extent by scrutinising the legislation. Furthermore, the institution as such is built on strictly hierarchical structures, which reduce the pace of change. Accordingly, if a similar study was to be conducted with our perspectives and methodology it would most likely give similar results.

2.13 OUR CONTRIBUTION

There is a rather sufficient amount of literature written about the interpretation of the merger regulation and political factors affecting the EU as an institution. There are theories suggesting how to analyse the interplay of the EU's containing bodies for example Wallace & Wallace and Cini & Mc Gowan. Furthermore, there are a lot of articles containing different theories and ideas of how to "manage" the Commission regarding the merger procedures.

When initiating the study there was always a new idea of how businesses should handle the issue, as soon as we spoke to a new person. Furthermore, we did not find any thesis that had approached a similar problem. Therefore, we realised rather early that there was a need for research in the area. However, we found a study presented by José Rivas²⁵. He gives rather practical guidelines of how to deal with the Commission in connection with merger procedures within the EU Commission. We used important input from his study in order to supply the thesis with a thick description. His findings provide secondary data for our analysis.

Our contribution to science is therefore to identify the most important actors connected specifically to the merger procedures and determine what role these

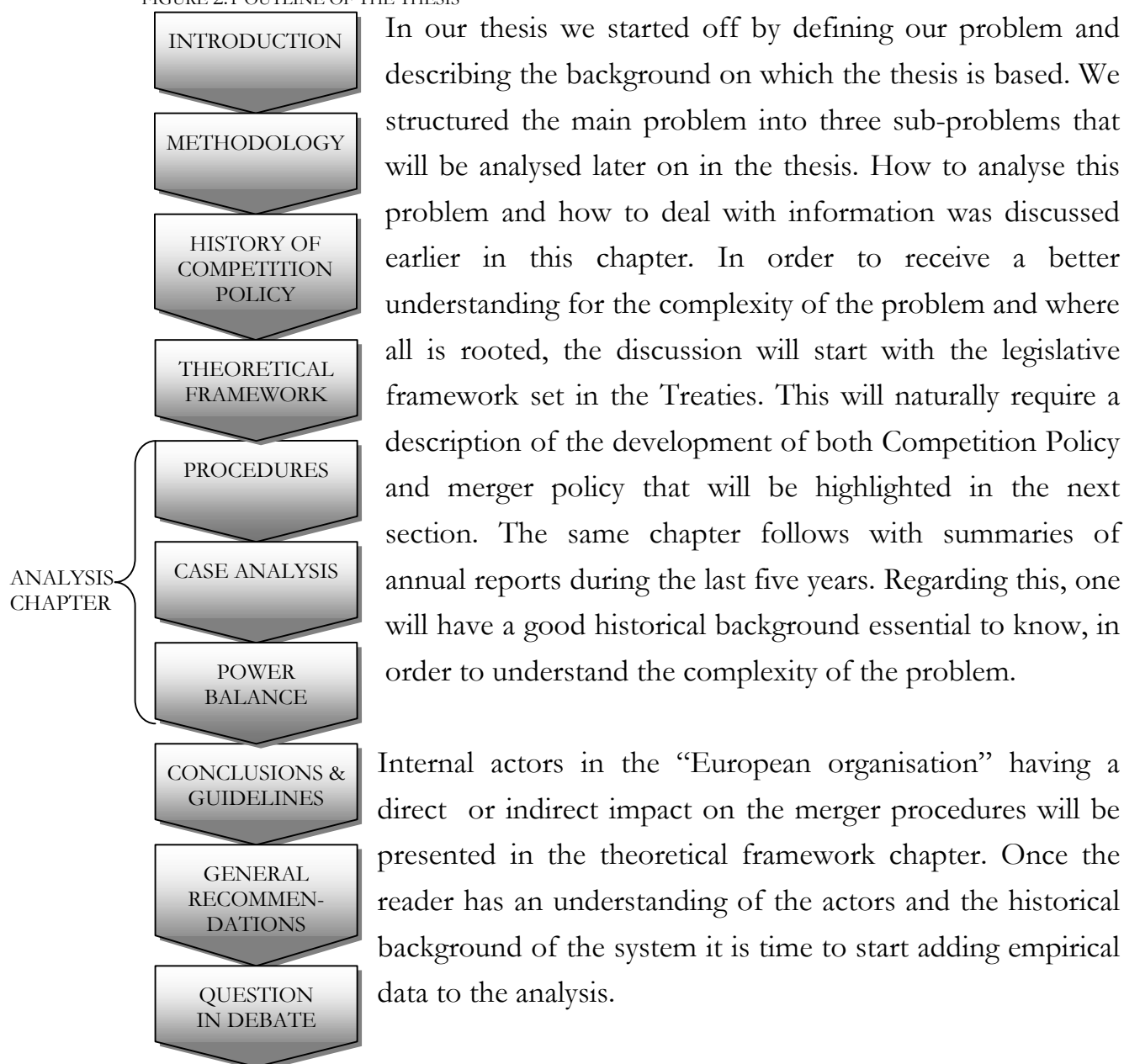
²⁴Merriam, 1994, p.180-182

²⁵Rivas, José, " *The EU Merger Regulation and the Anatomy of the Merger Task Force*" (1999)

actors actually have regarding this topic. Thus, our attempt to provide an understanding of the forces within the EU particularly connected to the merger procedures as such. Furthermore, we supply extensive practical guidelines from a company's point of view.

2.14 OUTLINE OF THE THESIS

FIGURE 2.1 OUTLINE OF THE THESIS



Source: Own

The chapter is divided in three chapters, procedures, case analysis, and power-balance analysis. In the first analyse chapter a description of the merger procedures are described including formal as well as informal activities. In the case

analysis we tried to see how the Commission dealt with certain issues in order to scrutinise the reality of the MTF's arguments in its actual investigations.

The third analysis chapter is an attempt to explain the roles and powers of the actors, both internal and external. Once all this is discussed the time has come to conclude and provide relevant guidelines. The final chapter is named "Question in debate". This is out of scope of the investigation but we found it important to reveal what currently are discussed about this topic. We will highlight arguments from the business perspective versus the EU's perspective regarding certain matters and leave the debate open for further discussion.

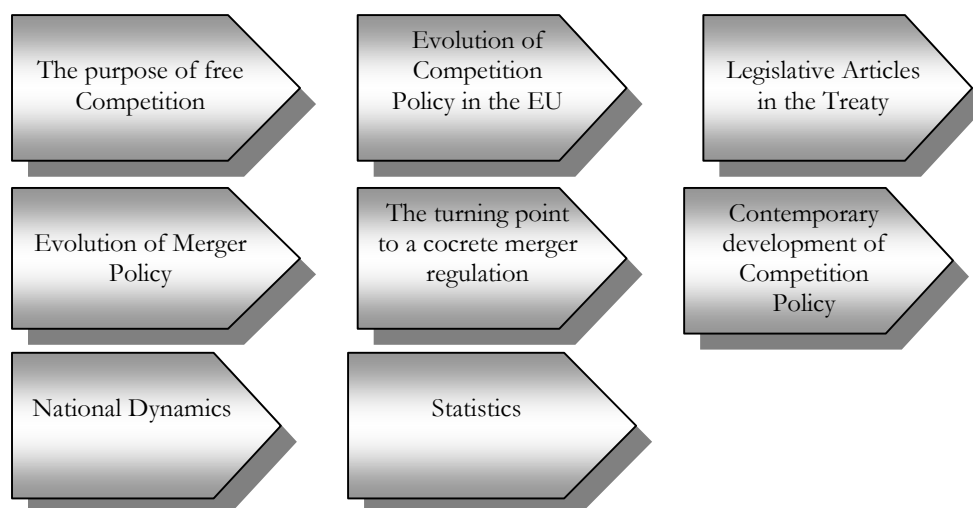
HISTORY OF COMPETITION POLICY



3. HISTORY OF COMPETITION POLICY

In this chapter we start off by explaining the fundamental thoughts of free competition and continuing with the historical development of competition and merger policy. The following part deals with the basic articles in the Treaties and the Merger Regulation. Important to note is that we have chosen to place Merger Regulation no 4064/89 including the Amending Regulation no 1310/97 together with regulation no 447/89 in appendix. At last we will summarise the five latest years of the competition annual reports with emphasis on merger regulation. Some reflections upon national dynamics influencing the EU are presented. The chapter finalises with the latest statistics of the Merger Task Force's activities.

FIGURE 3.1 STRUCTURE OF CHAPTER THREE



Source: Own construction

3.1 WHY FREE COMPETITION?

Competition has, and still is, defined as the most important ingredient in the free market economy and has never been questioned in this system.²⁶ The theory of perfect competition shows that no company or actor on the market could influence prices on goods and services, which will maximise the consumer welfare. Another consequence is that goods and services will be allocated and distributed when efficiency is maximised at the lowest cost. Even the leading visionaries arguing for free competition agree that the phenomenon cannot exist in its purest form, and a more realistic form of competition is desired.²⁷ In order to maintain this, a regulatory framework is requested where the government could

²⁶Cini & McGowan, 1998, p.2

encourage competition in favour of the consumer. Companies, on the other hand, often sense that competition regulation is a tool decreasing its ability to manoeuvre freely and causes uncertainty. Competition regulation prevents certain behaviour rather than encourages activities. Some objectives associated with competition policies are:

- *Consumer welfare.* This is the direct relationship between promotion of competition policies and increased economic performance.
- *Protection of the consumer.* Protection in favour of consumer towards big enterprises.
- *Redistribution of wealth.* The aim of not having a small number of enterprises gaining enormous wealth on the behalf of other companies being less powerful.
- *Protection of small and medium-sized enterprises.* The main thought is that a large number of companies are healthy on the market in comparison with a few but large companies.
- *Regional, social and industrial considerations.* Competition rules as a tool in order to balance regions and different industries.
- *Market integration.* Especially in the EU, competition rules are used to erase barriers between countries, in order to enhance the Single European Market.²⁸

Actions that disturb free competition are *cartels*, in which companies on informal basis agree on setting prices higher than market prices. Another is *monopoly* and *oligopoly* situations where one or a few large actors are able to abuse their situation to cut prices and take out all competitors on the market or increase prices where consumers have no or little alternative. *Mergers* and *joint ventures* may create a concentration similar to a monopolistic position. The main difference with mergers and joint ventures is that authorities have the ability to decide in *advance* whether the merge will create concentration or not.²⁹

²⁷Cini & McGowan, p.2

²⁸Cini & McGowan, p.4

²⁹Ibid, p.5

3.2 THE JOURNEY BEGINS...

When Robert Schumann, the French Foreign Minister, made his proposal for the construction of a coal and steel community, the ideas of a EU began. When Europe was restructured after the Second World War there was much influence from the United States. Europe was encouraged to apply economic and political principles favoured by the Americans. Located in the centre of these principles were competition rules and these are shown in the ECSC Treaty in 1951. Since it tried to apply a similar approach to all economic sectors it was highly controversial and a compromise was reached in 1957 in the Treaty of Rome (EEC Treaty), where the “American presence” was less tangible. In the EEC Treaty, the main objective was to create a common market and the framework was kept from the ECSC Treaty.³⁰

The competition provisions in the ECSC Treaty is remarkably similar to the competition provisions set in the US Sherman Act, signed in 1890. Historically, in the 50's and the 60's, the European Community was focusing on creating strong and large companies able to compete on the global market, with a particular focus on the US. As the European market became more integrated and the speed of removal of barriers increased, there was a need for competition regulation that could control European industry activities. As mentioned above, in 1957 the EEC Treaty was signed in Rome, with the main objective to create a common market and the result of this Treaty was removing the barriers. The next stage in the integration process was creating a customs union, and a logical step was to remove all trade barriers between Member States. The problem was that once all public barriers were erased, private barriers would most likely appear and therefore it was of great importance to regulate this by a Competition Policy that would protect the interest of the consumer. Informally, national power and interest reaches into the Commission itself and plays a role of influencing decisions on which Competition Policy has come to be based. Decisions are reached in the college by simple majority votes, not by qualified majority voting, because only very seldom, is the Council called to act. The complex legislative powers of the European Parliament (EP) are of minor relevance. Competition Policy has developed influenced by both internal and external factors. Internally, the devotion of three

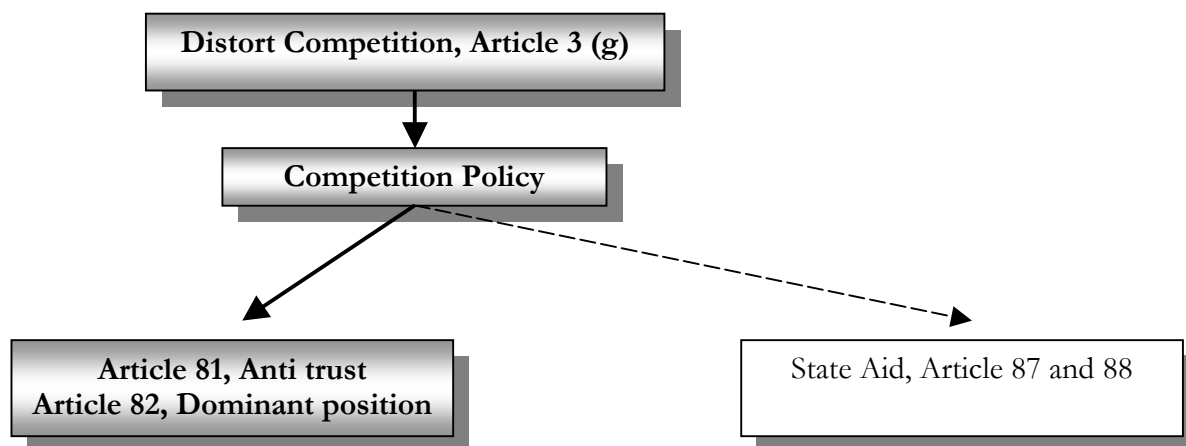
³⁰Ibid, p.10

Commissioners in the 1980s (Andriessen, Sutherland, and Brittan) forced policy in a new direction, even though they could be said to respond to the dominating economic and political climate at the time.³¹

3.3 LEGISLATIVE ARTICLES IN THE TREATY

In order to improve understanding for the Commission's control over mergers, we first need to realise the legislative rules. This is the basic knowledge needed in order to comprehend why the Commission carry out its activities. The Competition Policy contains a group of areas that are dealt with differently. Competition Policy is based upon Article 3 in the Treaties, which is discussed in the paragraph below, where it is declared that competition should not be distorted within the internal market. Based on this, they could then have different appearances, either anti trust, dominant position or state aid, each having basic regulations in the Treaties. This is illustrated in the model below:

FIGURE 3.2 LEGISLATIVE ARTICLES IN THE TREATY



Source: Own construction

As illustrated in the delimitation's³², the bold section in the model are the ones acting as a corner stone throughout the thesis. Below, there will be a description over relevant articles in the Treaties connected to Merger Regulation.

³¹Wallace & Wallace, 1996, p.158-160

³²See 1.4 Delimitations

■ Article 3(g) Principles

This article is the foothold in the Competition Policy regulation and sets the main objective; to ensure that free competition is not distorted. Former named 3 (f) in TEEC.

*“For the purpose set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein: (a)... (g) a system ensuring that competition in the internal market is not distorted;...”*³³

■ Article 81 Rules applying to undertakings

In Part 3, Title 1 and Chapter 3 in the Treaty of Rome, Articles 85 and 86 is demonstrated. Recently, the above-mentioned articles have changed numbers to article 81 and 82 and are the Articles referred to further on. The content of Article 81 concerns anti-trust:

“1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, hereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

*3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of: - any agreement or category of agreements between undertakings; - any decision or category of decisions by associations of undertakings; - any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.”*³⁴

■ Article 82 Rules applying to undertakings

Following paragraph was previously named Article 86 and deals with the abuse of dominant position:

“Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States. Such abuse, in particular, consists in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair

³³TEEC, Article 3 (f), 1957 (now TEU, Article 3 (g), 1997)

trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary which obligations, by their nature or according to commercial usage, have no connection with the subject of such contracts.”³⁵

3.4 EVOLUTION OF MERGER POLICY

The ECSC Treaty did not make any specific recommendation to the control of mergers. Although Articles 65 and 66 had given the “High Authority” the right to declare mergers in the coal and steel industry “unlawful” and prohibit them. Back then this was a considerable power to offer a supranational institution, especially considering the fact that no legislation of that kind was present in any of the six Member States. This was settled specifically to master potential German domination in the two industries. The absence of national legislation meant that there was also no institutionalised opposition to the transfer or sharing of powers.

In the initial phase of the EEC, the Commission regarded the lack of comparable merger-control powers as a serious omission that needed to be handled in the interests of protecting competition in the market. Article 86 of the EEC Treaty applied only in cases of firms, which could be proved to abuse dominant positions. This seemed to imply that holding a dominant position was not per se unacceptable. Except for the coal and steel industry, the Commission had no right of prior approval of mergers, even if they most likely would create dominant positions for involved actors. One option might have been to amend the EEC Treaty at the time when the institutions merged and to extend the ECSC merger powers to the common market as a whole. However, in 1967, this was not a realistic solution since the Member States did not want to extend supranational competence. The Commission was thus forced to pursue its merger-control aspirations by interpreting the Treaty as written and through make use of Regulation no. 17.

Attempts by the Commission to develop a policy on merger control, based on its powers to control monopolies, or the abuse of a dominant position as the Treaty states it, was inefficient. The reason for this was that many Member States wished to save and restructure their national industrial bases. Their aim was to challenge

³⁴TEEC, Article 85, 1957 (now TEU, Article 81, 1997)

³⁵TEEC, Article 86, 1957 (now TEU, Article 82, 1997)

the power of US and Japanese multinationals. During the late 1970s the Member Governments of the Community basically sought national solutions and attempted to create national champions in their exploration for economic development. They were interested in emit state aids, rather than prohibit them, and they cared little about the inflationary impact of restrictive agreements between firms, when inflation rates were at high levels. The shift was introduced in the 1980s, when non-tariff barriers were to be abolished, and Competition Policy was considered to be a crucial element to handle the concept of perfect competition. The Commission's long search (the first proposal came in 1973) for enhanced powers to merger control was finally reached in 1989 and came into power in 1990. Moreover, the new environment and the energetic effort of Peter Sutherland and sir Leon Brittan as Commissioners led to a renewed interest in dealing with restrictive practices, this time supported by a willingness to charge fines on those breaking the law.

The merger-control directives as finally agreed was a compromise between the Commission and those Member States, which occupied own national merger controls. On the sidelines were the representatives of industry who wished for the least restrictive regulation as possible. They did not want to be trapped, as they were from time to time under Articles 85 and 86, between national and supranational regulatory authorities.

The Commission and the Member States instead struggled with competence battles over thresholds beyond which Community powers could be exercised. The Commission would have preferred a threshold of 1 billion, so that any merger, which resulted in concentration with a combined turnover of more than that measure, would become subject to its authority. In the Council the governments from the smaller countries, who most often did not have their own merger authorities, were having a preference for supporting the Commission's proposal for a low threshold; but the governments from Britain, France and Germany all wanted thresholds of over 10 billion Euro. The compromise was settled to a principle threshold of Euro 5 billion, to be subject for analysis in 1993. When this review fell due, the Commission was keen on getting the threshold lowered, but

recognised that due to the ongoing integration and a strive for more national power, it was not a favourable time to drive this problem.

Several other restrictions concerning the competence of the Commission were added to the regulation, of which the most crucial was the so-called German clause. This empower a Member State to demand the Commission to allow national investigation of a merger if it is likely to have significant effects on its domestic market, even if it goes beyond the threshold. The contrary concept of the “German clause” is to be found in the “Dutch clause”. It permits a Member State to ask the Commission to analyse mergers not reaching the threshold if it seriously might affect the competitive situation in that Member State (presumably a Member State which does not possess merger controls of its own).

Discussions have arisen over which criteria the Commission should use for considerations. The regulation refers to the necessity for preserving effective competition, but it also says that “other factors” should be taken into account, including development of technology and economic progress. It is the MTF within DG on competition that applies the Regulation, but it is the Commission as a whole that takes the final judgements. Although those working in DG on competition might be interested solely in competition criteria, other interests come into force within the Commission as a whole.³⁶

3.5 THE TURNING POINT TO A CONCRETE MERGER REGULATION

Before the actual Merger Regulation came into power there was no well functioning legislation in this matter. The decision was the “*Philip Morris*” judgement in 1987, which gave the Commission the power to use Article 81 (former 85) and Article 82 (former 86) in intervening in “friendly mergers”, in a verdict in the ECJ. Industry representatives complained about this frustration and stressed the need for a functioning merger regulation, to allow businesses to know how to act when initiating a merger. In November the same year the Council gave the Commission permission for drafting the new merger regulation.³⁷ The political

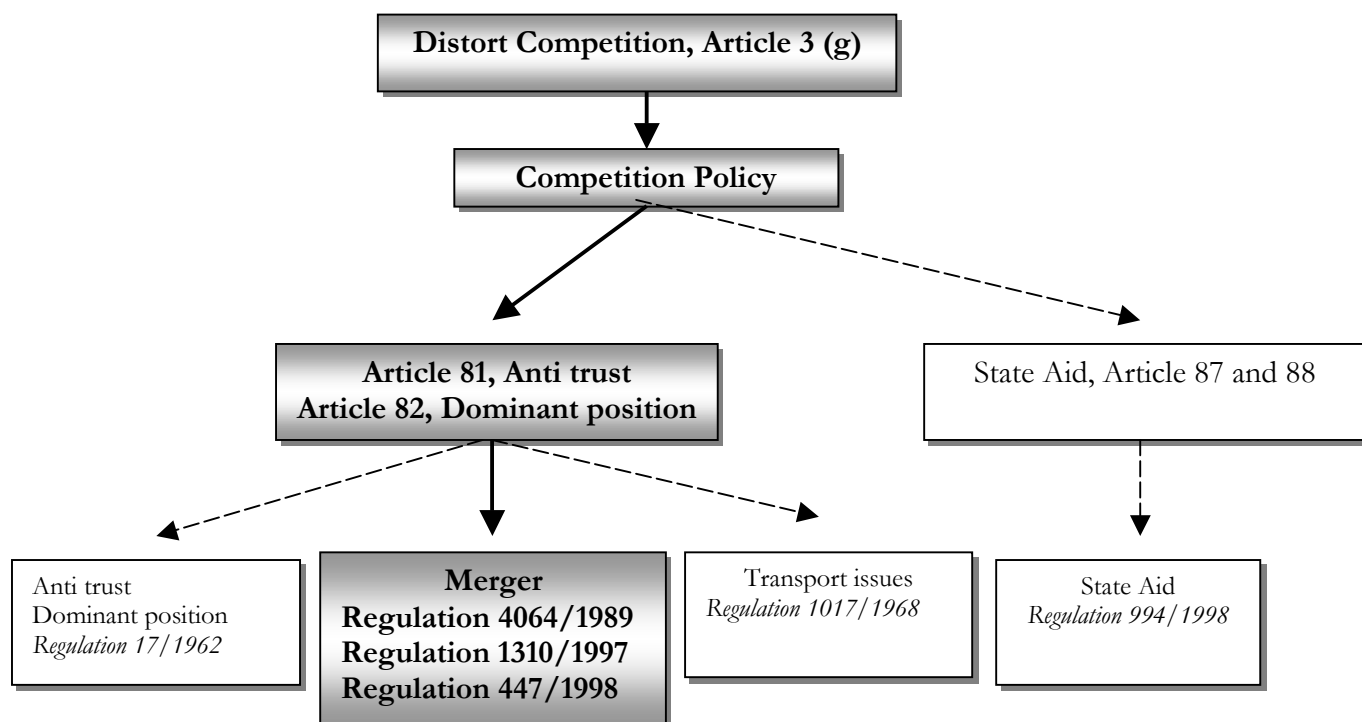
³⁶Wallace & Wallace, 1996, p. 158-160

³⁷Cini & McGowan, 1998, p. 118f

and legal reasons for creating Merger Regulation 4064/89 was to control the increased number of mergers that occurred in the Common Market in the 80's that threatened to distort competition.³⁸ As the market developed there was a need for additional regulations. The result is Regulation 17/1962 concerning the Commission's powers of using Article 81 and 82, and Merger Regulation 4064/89 and its Amended Regulation 1310/97 together with practical rules set up by the Commission's Regulation 447/98. The final regulation under Article 81 and 82 is Regulation 1017/1968 that concerns transport issues. Law concerning state aid is placed in the Treaties in articles 87 and 88 further regulated in Regulation 994/1998.

Once all these regulations have been put together the model, illustrated in Chapter 3.5 "Legislative articles in the Treaty", is complete and the fundament of Competition Policy is set.

FIGURE 3.3 LEGISLATIVE FRAMEWORK



Source: www.kkv.se, December 6, 2000

³⁸ Wallace & Wallace, 1996, p. 158-160

3.6 CONTEMPORARY DEVELOPMENT OF COMPETITION POLICY

Competition Policy has both negative and positive roles to play in the progression of the Community. On the one hand, it is concerned with policing the market by the utilisation of sanctions towards those who seek to abuse its freedoms. It could be argued that policy is unnecessary. Solely a need for laws of perfect competition, as expressed in the treaties, should be upheld, by using the instituted procedures. On the other hand, Competition Policy can be seen as having a more positive role, assisting the creation of the free market. To the extent that the latter role includes choices, there is a need for policies guiding them.³⁹

Since 1990, the Commission on a yearly basis hands out an annual report on the development within the area of Competition Policy. We will in the following section present parts from the recent five yearly reports (1995-1999). The main focus in the presentation involves mergers. However, there might be other important issues valuable for the reader regarding the EU as a whole. The purpose is to illustrate issues stressed in the annual competition reports during these years.

3.6.1 THE WAVE OF MERGERS STARTED TO BOOST IN 1995⁴⁰

The biggest change during this year was the rapid increase of cases dealt with. One reason for this was the increased number of new Members States entering the EU. Another reason was better awareness of companies that the European market is one single market on which they can be active with no physical barriers. As a consequence companies experienced the competition situation greater than before and sought to merge in order to remain competitive.

An objective set by the Commission during this year, was consumer protection, which meant that companies should not be able to take advantage of price differences and monopoly situations that does not favour the consumers. The competition Commissioner Mr Karl van Miert argued that on the agenda for 1995, issues such as Green Paper⁴¹ on mergers and on vertical restrictions in

³⁹Wallace & Wallace, 1996, p. 161

⁴⁰XXVth Report on Competition Policy, 1995

⁴¹[http://europa.eu.int/comm/COM\(96\)721](http://europa.eu.int/comm/COM(96)721), January 1997

distributions, would be central but also enhancing the co-operation with national authorities.

During this year, the main problem was that even though law and policies were well implemented, there were not enough resources to make the system effective, since new Member States increased the number of cases. On an operational level the Commission made an co-operative agreement with the US in April 1995, in order to prevent anti-competitive situations on the European as well as the American market.

Concerning Articles 85 and 86, the Commission wanted to stress decentralisation of the process to national courts and competition authorities. Still, the Commission should manage cases involving several Member States in order to simplify the procedure for the company. During this year there was an investigation undertaken by the Commission, whether the threshold level was appropriate or not. Member governments still play an important role via two main committees: the Advisory Committee on Restrictive Practices and Dominant Positions, and the Advisory Committee on Concentrations and the Conference of National Governments Experts.

During this year other issues dealt with of great importance was for example the first European Competition Forum, which was held in Brussels in April, discussing in particular vertical restraints. This meeting was also an opportunity to meet and exchange experiences on national levels.

In order for all citizens within the EU to understand the Competition Policy, the Commission decided to make the annual report more reader-friendly and decrease the number of pages, which in 1994 did exceed 600 pages.

3.6.2 ADJUSTING TO GLOBALISATION⁴²

In 1996 the main objective was to adjust the structure of the European market to the ongoing globalisation process. This would to a large extent affect Competition Policy, and that this process was emerging was due to four main factors: 1) high

⁴² XXVIth Report on Competition Policy, 1996

speed in technology and scientific progress, 2) population growth in developing countries, 3) increased production of goods and services, and 4) intensification of trade in goods and capital movements.

The challenge for the European market was to balance the opportunity meaning liberalisation of trade, and the threat of fragility as a result when the European market opened for its surroundings. These opportunities and threats were aimed to balance by using Competition Policy in order to adjust the European market to the new “rules of the world”.

In order to achieve this, three areas were emphasised. The *first* was to create an instrument for processing each case at the right level, meaning globally, European or at a national level. As in 1995, Mr Karel van Miert stressed the need for enhanced co-operation with national competition authorities in order to promote decentralised treatment of applications. According to the report this had been pretty successful since all Member States had more or less adjusted their systems to Community Policy and the new Member States (Austria, Finland and Sweden) had also by its EEA agreement adjusted their systems. The objective was to have harmonised policies globally. The *second* was speeding up the work on amending Community law and connect more to economic reality, concerning both merger cases falling under Article 85 (81) and 86 (82) and State Aid. The *third* area was modernising the rules of procedure so the process could be speeded up and increase transparency and foreseeability of decisions.

Furthermore, the Commission initiated a process resulting in a Green Paper that was published in January 1996, which led to a proposal for reviewing Merger Regulation⁴³. Key issues were, 1) lowering required turnover threshold (2 billion world-wide instead of 5, and 100 million instead of 250 for Community-wide turnover), 2) introduction of reduced threshold for concentrations which would require notifications at least in three Member States, in order to create “one-stop shop” for companies, 3) the extension of application of procedural regime of the Merger Regulation to all full function joint ventures, 4) simplifications for referral from the Commission to the Member State and vice versa (Article 9 and 22), 5)

⁴³ [http://europa.eu.int/comm/COM\(96\)19](http://europa.eu.int/comm/COM(96)19), January 1997

introduction of a provision that could foresee possible commitments in the first stages of investigation, and 6) several minor changes. The Council did not approve this proposal with qualified majority. By the end of the year the Commission held on to their current proposal with support from the European Parliament and the Economic and Social Committee.

3.6.3 MODERNISING THE COMPETITION POLICY⁴⁴

The Treaty of Amsterdam in 1997 confirmed the Commission's role as a competition authority, which led to efforts of modernising and restructuring the Competition Policy. The objectives in this modernisation were threefold: 1) adapting legislation to market reality, 2) increase efficiency for both business community and authorities, and 3) to create an open dialogue and apply the principle of subsidiarity. Moreover, the Commission emphasised the European Monetary Union and its impact on Competition Policy. Mr Karl van Miert argued that EMU provides *"the best of frameworks for the most effective interplay of competitive forces"*. The single currency would enhance the healthy competitive environment in the European market, based on price transparency. According to the Commission it would decrease costs and risks and also increase intra-trade since overall costs would decrease, with particular focus on transaction costs. A consequence would be the need for restructuring in certain economic sectors, and the Commission expected the need for mergers to increase as much as it did when the single market was implemented. A tight control had to emerge in order to avoid uncompetitive oligopolies. Current legislation was also based on the common market from the 60's and had to adjust to the single market for the 90's.

Another reflection concerning price transparency was, according to the Commission in their report, trade between Member States was expected to rise and would lower all costs for the consumer in the EU.

The 20th and 21st of November, an extraordinary European Council meeting was held in Luxembourg dealing with European unemployment. When reading the guidelines in that report, Competition Policy is highly involved as a tool for growth. With such an impact on the market structure, it could influence

⁴⁴ XXVIIth Report on Competition Policy, 1997

competitiveness of the European economy, so the Union's macroeconomic framework could increase the need for labour. Concrete examples were liberalising policy regarding monopoly markets, where in more Member States the number of actors have increased and consequently the need for labour.

In the report of 1997, the Commission stated that awareness of competition in a short-term perspective created a need for restructuring. This could have the effect of job losses and the Commission even stated that by promoting competitiveness in some cases are "*at least in the short run, job-destroying*". In a long-term strategic perspective, flexible internal market would provide labour mobility and thereby increase the need for employment.

Bearing the forthcoming 21st century in mind, the Commission during 1997 worked with potential new members. Concerning Competition Policy there was a need for supporting countries in East and Central Europe in influencing an attitude of competitive minds so they would adjust their markets to the European Market, for facilitating a smooth entrance. These countries have for more than 40 years been governed under the principles of central planned economy and the transition to a new market economy system is a tremendous complex process, where competition is the key factor.

During 1997 the high number of notifications continued and a proposal was launched to transfer notifications of agreements of minor importance, referring to Article 85 (81) and 86 (82), to national level instead. This proposal led to a debate about vertical restraints and a Green Paper⁴⁵ concerning the subject. One reason for prioritising the issue was the forthcoming Eastward Expansion.

Moreover, six legislative initiatives were launched in the Merger Regulation area. The first was the new *de minimis* notice a notice on co-operation between the Commission and national authorities and a common definition for the relevant market. The turnover threshold and market share threshold differs depending on whether horizontal or vertical agreements is present. This meant that the

⁴⁵ [http://europa.eu.int/comm/COM\(96\)721](http://europa.eu.int/comm/COM(96)721), January 1997

previously turnover threshold of € 300 million was removed. As a consequence the notice would apply to large enterprises with small shares of relevant market. The market share threshold stayed at five percent for horizontal agreements, and rose to ten percent for vertical agreements. The above mentioned Green Paper would lead to a proposal in 1998 regarding vertical restraints between distributors and producers. In addition, a similar investigation also started about horizontal restraints. This Green Paper offers four options; maintaining current system, wider block exemptions, more focused block exemptions, or the introduction of a reputable presumption of compatibility with Article 85.

On the 30th of June, Merger Regulation 4064/89 was revised and the new rule would simplify the procedure and harmonise the treatment of full function joint ventures. The decision, taken by the Council no 1310/97 was made on the argument that companies had to notify several authorities in different countries when to merge. The main change was to lower the threshold from 5 billion to 2,5 billion.

The above-mentioned definition on relevant market was made for the purpose of the Community competition law, with particular focus on Regulation 17 (which implements Article 85 (81) and 86 (82)) and the Council Regulation 4064/89, the Merger Regulation.

3.6.4 STRESSING GLOBAL CO-OPERATION⁴⁶

During 1998 Mr Karl van Miert argued for the importance of an international dimension in Competition Policy. This would be added to the already initiated changes in 1997, which according to Mr van Miert turned out very successful. The international approach would concern international co-operation between competition law enforcement authorities outside the EU. So far this co-operation had been characterised by bilateral agreements⁴⁷, though in long term, a

⁴⁶ XXVIIIth Report on Competition Policy, 1998

⁴⁷ The main bilateral agreements are: *Agreement between the United States of America and the Government of the Federal Republic of Germany relating to Mutual Co-operation regarding restrictive Business Practices*, Germany and United States, 1976, TIAS 8291, 27 UST; *Agreement between Government of the United States of America and the Government of Australia relating to co-operation on Antitrust matters*, Australia and United States, 1982, 21 ILM 702; *France-Federal Republic of Germany Agreement concerning cooperation on restrictive business practice*, France and Germany, 1984; *Co-operation and co-ordination agreement between the Australian trade practices Commission and the New Zealand Commerce Commission*, Australia and New Zealand, 1990/1994; *Agreement between the Government of the United States and the Commission of the European Communities*

multilateral framework would be developed ensuring laws and practices being properly applied and correctly used. This was necessary to avoid anti-competitive behaviour on the global market. This co-operation concerns for example US Department of Justice or Federal Trade Commission and European Commission on Competition Policy. In addition, the European department collaborates closely with developing countries.

The Commission observed, due to the successful Uruguay Round within GATT, trade liberalisation has further developed. Businesses have taken this opportunity, reflected by the “mega-mergers” taken place on a global market. If companies do not merge, they create strategic alliances in order to penetrate new markets. This is common in industries with high R&D costs, such as telecommunication and pharmaceutical sectors.

The increased numbers of mergers that took off in 1997 continued this year, and so did the adaptation and modernisation of the legislation that started in 1997. Furthermore, the preparations of the European single currency created possibilities to facilitate financial matters for companies active in several Member States. Another effect from the creation of the European Monetary Union was price transparency, which facilitates practices for persons engaged in competition issues. Widening the single market increased the demand for economies of scale and therefore mergers were not expected to decrease in future.

Moreover, in an attempt to make the process more smoothly and effective, the Commission made changes in both phase II and I in the merger procedures. This has contributed to more decisions having been taken during this year.

regarding the application of their competition laws, EU and United States, 1991/1995 (re-enacted April 27 1995, OJL 47); *Agreement between the Government of Canada and the Government of the United States of America regarding the Application of Their Competition and Deceptive Marketing practices laws*, Canada and United States, 1995, ILM 35/309; *Agreement between the European Community and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws*, EU and United States, 1998, June 8 1995, OJL 173; *Agreement between the government of the United States of America and the Government of Australia on mutual antitrust enforcement assistance*, Australia and United States, 1999; *Agreement between the European Communities and the Government of Canada regarding the application of their competition laws*, Canada and EU OJL 175, 1999. **Source:**

Rowley, Wakil, Omar and Campbell, p. 2, September 14 and 15, 2000

The Commission noted that many industry sectors were mature, and now knows how to handle these. However, during 1998 some mergers had one factor in common, the Internet, an area within which the Commission had no former experience. The task for the Commission was to find a market definition considering this new phenomenon that is spread throughout the global economy.

3.6.5 FACING THE 21ST CENTURY⁴⁸

The new Commissioner responsible for Competition Policy, Professor Mario Monti, was introduced in 1999. His main focus would be modernising the policy, to keep up with the dynamic changes occurring in the global economy, facing the 21st century.

In June 1999, a new rule was implemented concerning vertical restraints, (EC) No 1215/1999 the result of the publication the Green Paper in 1997. This step was significant since it focused on economic analysis, meaning that the impact on the market became increasingly important rather than its form. Furthermore, the objective was facilitating for companies through lowering their regulatory burden, with particular concern for small and medium sized enterprises, since these have relatively small market power. In conjunction to this the Commission stated that it would increase control for companies with large market power. All this led to a new regulation, (EC) No 2790/1999 that exempted some from certain categories of vertical restraints, namely those concerning final or intermediate products and services with a limited number of restrictions and conditions.

Another regulation was the Council Regulation (EC) No 1216/1999, where some vertical agreements were exempted from prior notification, which was compulsory in Article 4(2) and Regulation No 17. This year the urge for modernisation of the procedural implementation of Article 81 and 82 was emphasised. As a result, Regulation No 17, had to be reversed (settled in 1962). The European Parliament welcomed the White Paper from the Commission in January 2000, which contained the abolition of the notification and authorisation system under Article 81 with focus on increased power to national authorities. This White Paper had two main objectives; first, releasing the Commission from duties that were not

⁴⁸ XXIXth Report on Competition Policy, 1999

included in their core activities in order to enhance efficiency that would gain all companies. Secondly, decentralising the decision-making process places the operations closer to the European citizens. Another factor that put Regulation 17 in the light of history was the notification rule; the last five years only 0.5 percent of all notifications led to a prohibited decision and therefore it is valid to transfer this activity to national authorities. The argument was that national authorities are closer to the market and could analyse geographical scopes in ways impossible for the Commission to do.

Seven factors could summarise the happenings or issues raised during this year:

- 1st of January the Euro was adopted as the European common currency and Competition Policy tried to adapt to this process by modernising law to this change.
- Competition Policy urged to maintain free competition and optimal allocation of resources. It was stressed that it was crucial to be competitive on the home market in order to compete globally.
- Continuing developing the single internal market. National markets are nowadays exposed to a greater extent to competitors, and Competition Policy should make sure that no anti-competitive measures are taken. In order for Competition Policy to fulfil its aims, the internal market has to function totally.
- As mentioned above, two main objectives were stated to modernise the Competition Policy, implementing those became the fourth issue.
- Enlarging the EU. During the Helsinki European Council meeting, a remarkable progress in the negotiations for accessing Cyprus, Hungary, Poland, Estonia, the Czech Republic and Slovenia was reached. Therefore, attempts to help these countries adjust and create new competition laws able to apply in the Community have been completed.
- The Treaty of Amsterdam signed in 1997, came into force in March 1999. The Commission was announced to be responsible for enforcing competition rules, and as a consequence these changed numbers in the Treaties.
- Finally, the seventh issue raised was that the Commission wanted to reach out to the European citizens. Competition Policy is not so well

known among citizens within the Community and the Commission wanted people to realise the benefits of this policy, and therefore creating an information policy was said to be essential.

3.7 THE NATIONAL DYNAMIC FORCES REFLECTING THE EU

Often policy, where it was present, was characterised by very different approaches and generally neglecting agreements between firms with respect for national economic development. Thus, in the period between the First and Second World War many countries established legislation encouraging cartels. Nevertheless, while this has been a common element in national policies, there have been some significant differences between US. The most important has been certain ambiguity over the benefits of “competitive” versus “managed” markets. Such views not only matter regarding the understanding of the development of EC policy, but also influence the ongoing relationship between national and EC policies.⁴⁹

Consequently, there has been ambivalence within Member States on the role of the Competition Policy. At the same time as a trend towards a more thorough and less tolerant method, some reluctance to enforce rules still remains. This is especially apparent when national interest or practices are threatened, although the extent differs greatly. In addition, in many states, governments have been unwilling to stop using certain types of aid to help national firms, to encourage investment or to pursue other policy goals. Hence, controlling these matters has been difficult.⁵⁰

3.8 STATISTICS OF THE MTF'S OPERATIONS⁵¹

To conclude this chapter we show data revealing the changes in the MTF's activities during the 10 years existence of the merger regulation. The first figure involve the number of notified cases to the MTF, followed by the amount of I phase decisions issued by the MTF. Finally, judgment of cases taken by the second phase investigation is presented.

⁴⁹ El-Agraa, 1994, p. 175

⁵⁰ El-Agraa, 1994, p.177f

⁵¹ Issued by Merger Task Force at EC Merger Control, 10th Anniversary Conference, September 14 and 15, 2000

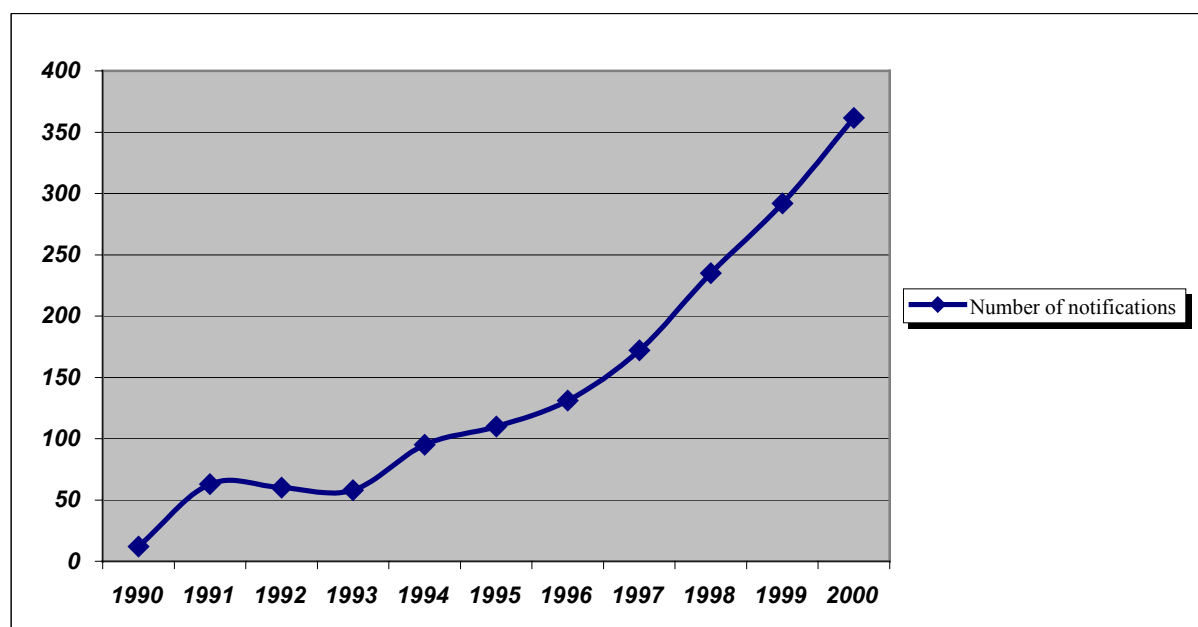
The figure below illustrates the large number of notifications, subject for the Commission's inspection.

TABLE 3.1 INCREASE IN THE NUMBER OF NOTIFICATIONS FROM 1990 TO 1999

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
Number of notifications	12	63	60	58	95	110	131	172	235	292	362
Cases withdrawn - Phase 1	0	0	3	1	6	4	5	9	5	7	9
Cases withdrawn - Phase 2	0	0	0	1	0	0	1	0	4	5	5

Source: MTF, EC Merger Control, 10th Anniversary Conference, September 14 and 15, 2000

DIAGRAM 3.1 INCREASE IN THE NUMBER OF NOTIFICATIONS FROM 1990 TO 1999



Source: MTF, EC Merger Control, 10th Anniversary Conference, September 14 and 15, 2000

The recent five years (1995-1999) the number of notified cases has increased from 110 cases to 292 cases (165 %). During the same time the number of officials have not increased significantly within the MTF. We could thus conclude productivity has grown remarkable as well as efficiency of the operations. Furthermore, between 1995-1997 the number of cases boosted with 35 %. It was a result of new Member States entering the EU and an increased awareness among enterprises of the EU as one internal market⁵².

⁵² For support see 3.6.1 The wave of mergers started to boost in 1995

Following statistics about notifications, we conclude that phase I decisions taken by the MTF have increased with 62 % in the recent five years (1995-1999).

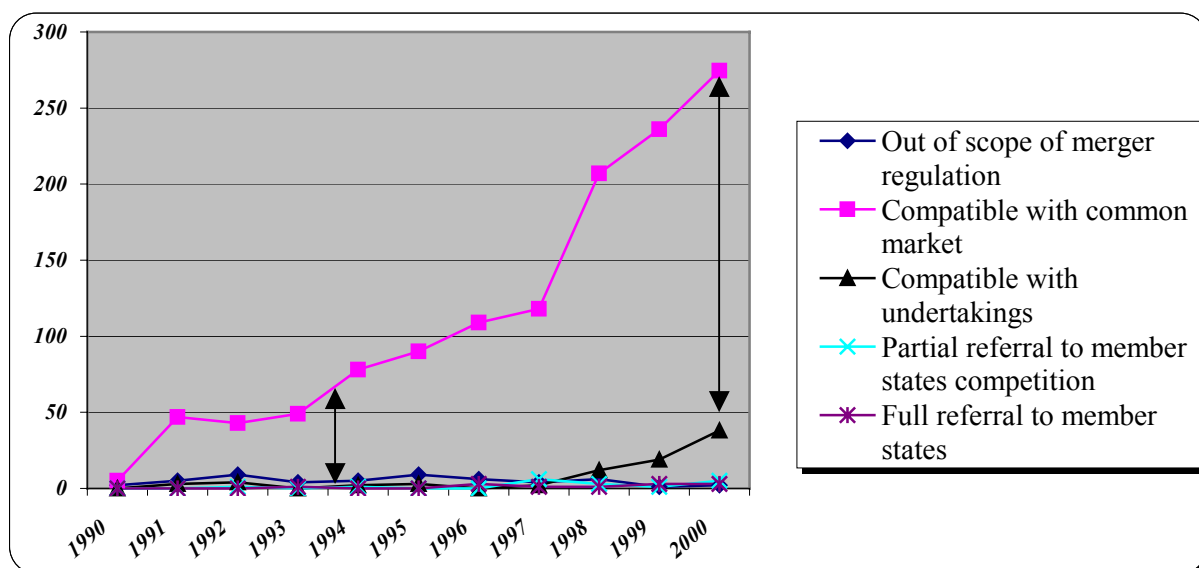
TABLE 3.2 NUMBER OF PHASE I DECISIONS ISSUED BY THE MTF FROM 1990 TO 1999

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000*
Out of scope of merger regulation	2	5	9	4	5	9	6	4	6	1	2
Compatible with common market	5	47	43	49	78	90	109	118	207	236	275
Compatible with undertakings	0	3	4	0	2	3	0	2	12	19	38
Partial referral to member states competition	0	0	1	0	1	0	0	6	3	1	5
Full referral to member states	0	0	0	1	0	0	3	1	1	3	3

*Stipulated on annual basis on data until September 11, 2000

Source: MTF, EC Merger Control, 10th Anniversary Conference, September 14 and 15, 2000

DIAGRAM 3.2 NUMBER OF PHASE I DECISIONS ISSUED BY THE MTF FROM 1990 TO 1999



Source: MTF, EC Merger Control, 10th Anniversary Conference, September 14 and 15, 2000

The highest growth concerns decisions compatible with the common market. During recent years, undertakings (commitments) are more common; note 19 cases in 1995 compared to estimated 38 cases in 2000 (100 %). We assume that this development is a result based on four factors:

- The number of mergers and notifications has obviously increased.
- The Commission has stressed pre-notification meetings where the companies could start formulating commitments already in phase I. This process may save the company for entering a second phase

investigation. In addition, there is a willingness for the Commission to do its utmost to shorten time in the procedures.

- Improved learning process between the Commission and businesses. Better understanding of each other means larger possibilities to reach an agreement already in Phase I.
- Companies have created larger and larger entities through mergers and acquisitions rather than grown organically. As this trend continues companies have to, in a greater extent, propose commitments in order to not create a dominant position.

Lastly, the number of cases entering the second phase investigation is very small in comparison with decisions in phase I (275 entered phase I and of these 19 cases proceeded to phase II). The Commission thus approves 93 % of the notifications in the first phase.

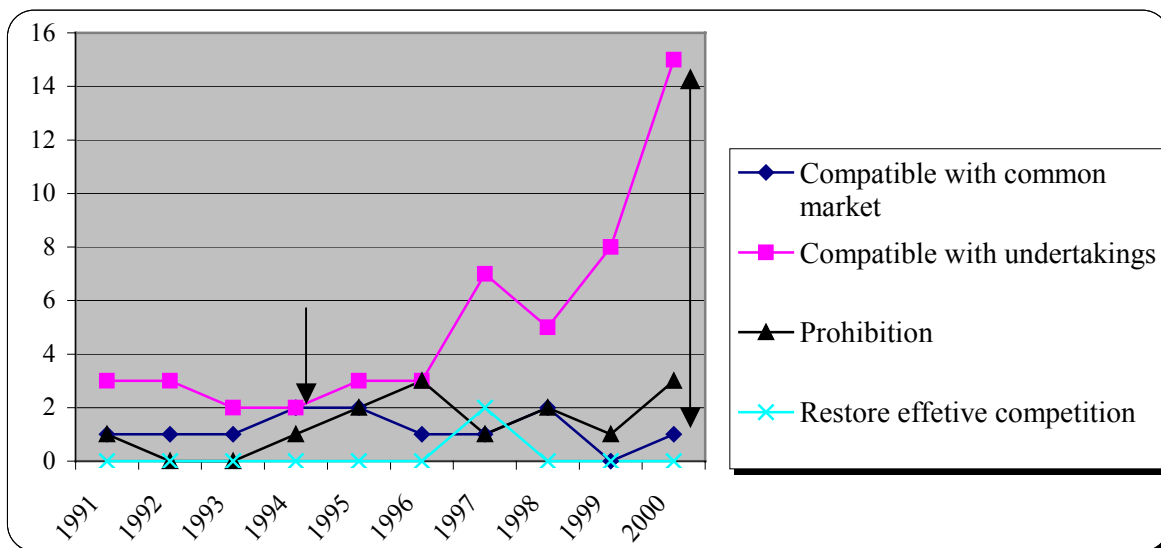
TABLE 3.3 NUMBER OF PHASE II DECISIONS ISSUED BY THE MTF FROM 1990 TO 1999

	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000*
Compatible with common market	1	1	1	2	2	1	1	2	0	1
Compatible with undertakings	3	3	2	2	3	3	7	5	8	15
Prohibition	1	0	0	1	2	3	1	2	1	3
Restore effective competition	0	0	0	0	0	0	2	0	0	0

*Stipulated on annual basis on data until September 11, 2000

Source: MTF, EC Merger Control, 10th Anniversary Conference, September 14 and 15, 2000

DIAGRAM 3.3 NUMBER OF PHASE II DECISIONS ISSUED BY THE MTF FROM 1990 TO 1999



Source: MTF, EC Merger Control, 10th Anniversary Conference, September 14 and 15, 2000

During year 2000, so far, only one case has been approved without any undertakings. 15 cases were approved with conditions and three cases were prohibited. We conclude that when a company reaches the second phase investigation, the case will most likely not be approved without commitments. We assumed above that it is more common, nowadays, that problematic cases are discovered in pre-notification meetings. Based on that, we conclude that a second phase investigation often means highly complex cases. Meaning that the company reach high market shares, often across several markets, which might be difficult to solve. This issue is highly related to the definition of relevant geographical market, which will be discussed deeper in the case analysis 5.2. Naturally, e.g. national market definitions mean easier to reach high market shares compared to a global market definition.

Concluding thoughts

By the statistics we have learnt the workload in MTF has steadily increased. This trend will most likely not slack either, bearing in mind the ongoing negotiations with the new Member States. Keeping up the pace, means major challenges for the MTF in future. A fact is also that almost no one escapes a second phase investigation without proposing undertakings. Negotiating undertakings are very complex issues for companies to solve. In practice, it might mean for example divesting certain activities or providing a distribution network to a competitor. It

definitely involves high costs and large efforts in order to restore effective competition.

THEORETICAL FRAMEWORK



4. THEORETICAL FRAMEWORK

In this chapter we present the theoretical framework, namely an actor-based model. We will, based on theoretical data, identify the internal actors within the European institutions that are linked to the merger procedures.

We have chosen to approach the problem based on an actor-based model as illustrated below. The design of the model is taken from Prof. Hans Janssons' institutional model⁵³. His basic idea is dividing the surroundings of the company to institutions relating to the company as well as to one another. He also argues internal actors to directly be connected to the company, meanwhile the external have an indirect relation to the MNC. We will thus use his model as a structured way of *identifying* actors that may relate directly or indirectly to the company in the merger procedures. The identified actors are divided into internal and external actors. Internal actors are those actors within the institutions of the EU that are directly or indirectly connected to specifically the merger procedures. External actors are selected from what we found most relevant based on collected information such as empirical evidence, literature, articles and official reports from the Commission that have a direct or indirect role in the procedures. Thus, at this time, the external actors are not presented. External actors are added in the third analysis 5.3. In this section, only the internal actors will be introduced. We have decided to give the actors' different amounts of space, dependent on their importance for the problem. In the analysis, the actual power of the internal actors and the external actors' role will be presented based on our empirical findings. Furthermore, the roles and the importance of the actors will be presented based on where in the process the companies are.

FIGURE 4.1 THEORETICAL FRAMEWORK

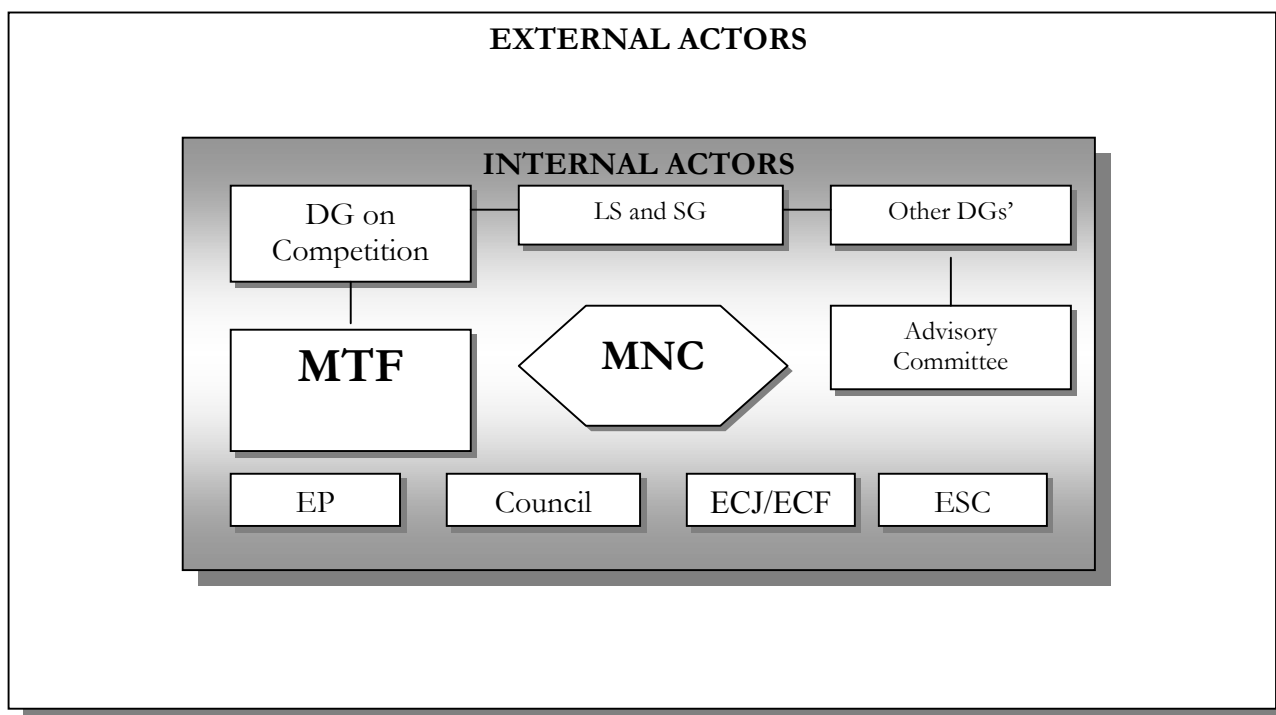


Figure: Own construction based on Jansson, 2000, Figure 1.1 "Basic Institutional model"

Before commencing the presentation of the internal actors, a few remarks may be appropriate.

The Commission's Directorate General on Competition is the body responsible for Competition issues. Within this body the Merger Task Force (MTF) is the unit handling merger cases. Consequently, these actors hold most of the direct power in day-to-day cases. The Advisory Committee has a consultative role in these cases. To assist the bodies, experts are found in other Directorate Generals'. In contrast, European Court of Justice and European Court of first instance (ECJ/ECFI), the Council and the European Parliament (EP) have more of a long-term power, influencing Competition Policy and legislation.

4.1 THE COMMISSION'S DG ON COMPETITION AND THE MERGER TASK FORCE (MTF)

The Commission has, as mentioned earlier, a central role regarding the Competition Policy and the DG on competition has a central role within Commission's activities. The DG on competition has the responsibility to handle

⁵³ Jansson, 2000

all administrative issues, draft proposals from the Commission, and negotiate with Member States' governments. The Directorate consists of legal representatives, economists and engineers and others that deal with different tasks that could be either of a regulatory character (state aids and mergers) or within economic sectors. DG on competition's work is case-based, meaning that they make investigations either on own initiatives or on requests from companies' or organisations. Sometimes there are disagreements within the DG, and it is often based on the fact that DG responsible for specific industries wants a more liberal approach towards policies from the DG on competition. Nevertheless, the final decision lies within the hands of the Commissioner liable for competition.⁵⁴

⁵⁴ Wallace & Wallace, 2000, p.122

BOX 4.1 ORGANISATIONAL STRUCTURE OF DG ON COMPETITION

Director General: Alexander Schaub

Director-General and staff

- Assistants to Mr Schaub, H. Mørch, B. Friess
- Counsellor auditors: J. Temple Lang, H. Schröter
- Comp-01: Personnel, budget, administration.
- Comp-02: Information, informatics. J. Puigs Saques

Directorate A: Competition Policy, K. Metha

- Coordination, international affairs and relations with institutions.
- Counsellor auditors: G. Rounis, J. Riviere, Y. Marti

Directorate B: Merger Task Force, G. Drauz

- Control of concentrations between undertakings, sub-units I, II, III, IV
- Counsellor auditor: G. Giacomello

Deputy Director, responsible for Directorate C, D and good practice issues, J-F. Pons

Directorate C: Information, Communication and Multimedia, A-M. Wachtmeister

- Post and telecommunications, information technology; media and music publishing; information industries and consumer electronics.
- Counsellor auditor: H. Ungerer

Directorate D: Services, E. Moavero Milanese

- Financial services (banking and insurance), transport and transport infrastructure, distributional trades and other services.

Deputy Director, responsible for Directorate E, F and security issues, G. Rocca

Directorate E: Cartels, Basic Industries and Energy, A. Tradacete Cocera

- Steel, non-ferrous metals, non-metallic minerals, construction, timber, paper and glass industries; basic and processed chemical products and rubber industries, energy and water.

Directorate F: Capital and Consumer Goods Industries, S. Norberg

- Mechanical and electrical engineering, motor vehicles and other transport and associated manufactured goods; agricultural, food and pharmaceutical products.

Directorate G: State Aid I, L. Dormal-Marino

- State aid policy, horizontal aid, regional aid, analysis.

Directorate H: State Aid II, H. Drabbe

- steel, non-ferrous metals, mines, shipbuilding, cars, synthetic fibres, textiles, paper, chemicals, pharmaceuticals, electronics, and other mechanical and manufacturing industries, public undertakings and services, inventories and reports.

Source: <http://europa.eu.int/comm>, November 23, 2000

- People reporting directly to the Director-General are those handling with staffing issues.
- Directorate A has a co-ordinating role, ensuring policy consistency throughout DG and manages administrative concerns. This includes responsibility for general policy, legal and procedural matters, and is the first formal point of contact for outside bodies. Responsibility for DG on competition's relations with international organisations is also included.
- Directorate B is what normally is called the MTF. The MTF was born in 1990 and comprises four sub-units. Teams within the Directorate manage cases from start to closing. Each merger case is dealt with by a team, which is selected from the four units based on their individual competence, e.g. language skills, legal knowledge and economic analysis. Team members have a generalist perspective; even though draw to a large extent upon the expertise of the specialist directorates also.
- Directorates C, D, E and F are divided into thirteen units, each of which has responsibility for a particular industrial sector or functional area. Directorate E also contains the units dealing with cartels and inspection. Together, these Directorates are responsible for administering and implementing policy on restrictive practices, dominant positions and monopolies under Articles 81 (85) and 82 (86) of the EEC Treaty. This form of sectoral specialisation is seen as a way of improving specialised knowledge and streamlining procedures. Each unit is responsible for its cases from start to finish, although this does not preclude co-ordination with Directorate A or with any other division, Directorate or DG whenever necessary.
- Directorate G has the responsibility for all state aid matters and comprises seven units, dealing with policy co-ordination; horizontal aid; regional aid; industry/sectoral aid (2 units); public undertakings and services; and finally, analysis, inventories and reports. This Directorate

operates in a rather different way from the others, reflecting its very different function and procedures although it does have relationships with Directorate A.

4.1.1 ORGANISATION OF DG ON COMPETITION

Holding only approximately 400 officials of all grades managing all aspects of policy from cartels, mergers to state aid and liberalisation, the lack of resources weaken DG's ability for enforcement. DG on competition has experienced a number of reorganisations, due to new policy responsibilities and to try to increase policy effectiveness.⁵⁵

Placements within DG on competition are very attractive and people are recruited to those through conventional Commission channels, after lengthy processes of tests and interviews. Once employed, officials are likely to continue working for a long time. National experts are often recruited from national ministries or competition organisations, which is a more flexible but temporary route into the DG. The national experts carry out several specific functions, including providing specialist national knowledge and contribute to the balance between lawyers and economists. A large amount of the work in DG relies on a *dossier* system, as in much of the Commission's services. This includes "A" grade officials at Principal Administrator level, having the responsibility for individual cases. The *rapporteur* for a case is responsible for drafting the proposals required, contact other DGs during the consultation processes, and make sure that other interested officials within DG on competition are informed. The *rapporteur* should ensure that procedures are handled correctly. This implies that one official handles a great part of the initial responsibility for the case. Nevertheless, the official has a well-defined path to follow but there are yet informal decisions and judgements to be taken regardless of the routine procedures.⁵⁶

⁵⁵Cini & McGowan, 1998, p.47

⁵⁶Ibid. p.48ff

4.1.2 ORGANISATIONAL CULTURE WITHIN DG ON COMPETITION⁵⁷

The shared value identified within DG on competition is faith in individualism and loyalty to the consumer, mistrusting of big business and an aversion for intervention by states in the marketplace. Neo-liberalism, at least rhetorically, is the philosophical and the economic basis in DG on competition. However, disparities clearly exist between reality and rhetoric.

A difference in emphasis between state aid and anti-trust ideologies also exists, although both have the free market as principle. The state aid part, dealing with national governments, places much more weight on the anti-interventionist objective. On the other hand, the anti-trust side, dealing with industrial players, stresses in a greater extent the freedom of big business to restrict trade. However, practically there is little separating them. The formally stated policy goals, repeatedly expressed in the annual competition reports are twofold: the purpose of fair and free competition in conjunction with European integration. Policy objectives are directly connected to DG on competition's philosophy and thus important elements of the culture. Formal policy and internal organisational aims are integrated. It is assumed that prestige of DG on competition will also be advantageous for the policy. The positive personality of DG's workers is revealed in a similar reputational image beyond the DG, especially within the Commission. The staff in the DG on competition is proud to be working in the field of Competition Policy; they are loyal towards and defensive of their "institution" and feel that the mission they have is needed and important. It is this missionary passion that distinguishes the DG on competition culture from others in the Commission.

It was the procedural framework of Regulation 17 that offered the Competition DG with its most important power concerning article 81 and 82 in the Treaty, namely independence, it provided the freedom to act separately from the Council of Ministers in this policy area. This has been the most significant difference between DG on competition and other Commission DGs. This sense of

⁵⁷Ibid. p.50ff

differentiation, high morale together with dedicated and self-confident members, have created the culture within DG on competition.

4.2 OTHER DG'S AND ITS HORIZONTAL SERVICES

The administrative part of the Commission consists of 24 DGs and ten horizontal service-units. The Directorate-Generals could be compared with national government departments and they are responsible for either a political area or an administrative function.⁵⁸

4.3 LEGAL SERVICE (LS) AND THE SECRETARIAT-GENERAL (SG)

Competition is the area that is highly integrated in many other DG's and therefore disputes between the DG's arose. As mentioned above, the horizontal services are of great importance for DG on Competition. These are the Secretariat-General (SG) and the Legal Service (LS). The SG is the co-ordination body of the Commission but also the formal actor between the Commission and other European institutions. The inter-institutional role of the SG also includes the mission to solve disputes in the Commission, co-ordinate activities and ensuring consistency in the policy of the Commission. This will create one common identity of the institution. The SG is the department that transfers the notifications to the right authority. The other actor is the LS that scrutinises all drafts sent from DG on Competition, making sure that they are compatible with the EEC Treaty. If there will be a legal case towards the Commission, the LS are the ones defending the Commission in court. As a result, LS is very cautious in its approach, which have created many disputes between them and the DG on Competition that are always solved within the institution.⁵⁹

4.4 ADVISORY COMMITTEE

The Advisory Committee consists of one or two representatives from each Member State and is chaired by a Commission official. At least one of the appointed should have competence within the area of competition policies. The Committee must be consulted before the Commission make their decision. They shall deliver an opinion to the Commission's draft, which is published in the

⁵⁸ Cini & McGowan, 1998, p.102

⁵⁹ Cini & McGowan, 1998, p.44

Official Journal. Important to note is that the Commission is not legally bound by the Advisory Committee's opinion.⁶⁰

4.5 ECONOMIC AND SOCIAL COMMITTEE (ESC)

The ESC consists of organisations representing employers, farmers, workers, unions, cooperatives, consumers etc, in total there are 222 members. The Economic and Social Committee has a consultative role and tries to create a forum where debates on both Member State level and at a European level can take place. In the area of Competition Policy the ESC have a advisory role concerning new regulations, taken by the Council. Hence, on the list of modernisation, the ESC aim at strengthen its relation with the Commission and all its Directorate in order to make the gap between the Commission and the civil society smaller.⁶¹

4.6 EUROPEAN COURT OF JUSTICE (ECJ) AND THE EUROPEAN COURT OF FIRST INSTANCE (CFI)

The clarity of the European Court of Justice (ECJ) came in 1986 when the Single European Act (SEA) was signed. It consists of fifteen judges, one from each Member State, and they must show complete neutrality with no favour for its home country. The ECJ has a huge impact on Competition Policy. ECJ have always been willing to interpret the legislation in a broad manner, which also gave the Commission the freedom to manoeuvre freely. According to Cini and McGowan, ECJ's most important contribution to Competition Policy has been the large emphasis on market integration as main argument in competition judgements. Issues such as consumer protection and efficiency have had lower priority. By taking this direction, ECJ makes competition legislation as one of the fundamental pillars in the European integration process. Power lies within the hands of the ECJ and the Commission.⁶²

When the number of cases increased tremendously and the Single European Act in 1986 gave the ECJ a free hand to make necessary reforms, the outcome was a back-up system that could reduce the burden for ECJ, which resulted in the European Court of First Instance (CFI). It was established in 1988 and started to

⁶⁰ Article 19 (4) Regulation no 4064/89

⁶¹http://www.ces.eu.int/en/org/fr_org_default.htm, November 27, 2000

⁶²Cini, & McGowan, 1998, p.55

work in 1989. At an early stage, CFI dealt with staff cases, certain coal and steel cases, and competition action cases. Nowadays, they deal a lot with anti-trust cases and similar to ECJ they have fifteen judges, one from each Member State. Decisions in competition cases are mainly taken by five judges in secret and reached by majority voting, which is similar to the process of the ECJ. The reputation of the CFI is that they are very thorough and have high requirements for quality from both the Commission as well as the companies. Criticism has occurred to this institution concerning waiting time but has not yet decreased.⁶³

4.7 EUROPEAN PARLIAMENT AND COUNCIL OF MINISTERS⁶⁴

The European Parliament (EP) has very limited influence over Competition Policy. The Committee on Economic, Monetary Affairs and Industrial Policy is the unit responsible for influencing competition and industrial policy. The Committee has in the respect a *rapporteur* exclusively dealing with competition issues. The EP did put pressure on the Commission in order to open up the regulatory process, which resulted in the annual report on Competition Policy. There are two formal ways that the EP can influence in the area of competition. First it is the resolution of the annual report that is taken very seriously in DG on competition. Discussions in the EP within this area are highly appreciated by the Commissioner of Competition. In 1996 the EP requested a separate chapter on future policy initiatives, which was applied by the Commission. A second alternative to influence the Commission is through oral and written questions. This may be of strategic importance if certain issues need to be dealt with between the annual reports. Altogether, the EP has very limited power over Competition Policy. During recent years the EP has demanded the Commissioner to involve the EP in more issues within the area of Competition Policy.

The Council of Ministers holds the legislative power. There has been very little demand for changing any articles during the recent years that resulted in a passive role with only few occasional legislative changes. The Council adopts these regulations under qualified majority voting (QMV) under Article 83 (87) in the EEC Treaty after EP consulting. The Council is not involved in day-to-day tasks,

⁶³Ibid. p.58

⁶⁴Ibid. p.39-41

which could lead to that Member States have little power of competition development in comparison with the Commission. The Commission has turned to the Council recently to get Members approval, which was an attempt to decentralise parts of the process to national authorities. This will not result in more influence from the Council, but the Member State will take a more active part in cases that lies within the field of competition. The EP and the Council will represent national institutions that the Commission wants to involve in European Competition Policy. At the desk of the Council is a proposal to modernise Regulation 17 that will lead to the decentralisation to national authorities, regarding anti-trust and dominant position.

ANALYSIS



5. ANALYSIS

This chapter is divided into three sub-chapters highlighting all parts of the sub-problem, mentioned in Chapter 1. We will start off by analysing the merger procedures. The second analysis consists of four cases that moved through the procedures in the Commission. The final part is an analysis of the actual power among actors connected to these procedures. The structure of the analysis follows the model presented in 2.9.2.

5.1 PROCEDURES⁶⁵

In this section a presentation of the procedures, formal as well as informal is made. The purpose is to outline the actual activities and events carried out by actors within the EU and the involved parties. An important tool to explain the procedure is the Merger Regulation (EEC) no 4064/89 including the amendments within regulation (EC) no 1310/97 are used. Accordingly, we refer to the “adjusted” Merger Regulation (EEC) no 4064/89⁶⁶, which is regulation (EEC) no 4064/89 and regulation no 1310/97 in combination.

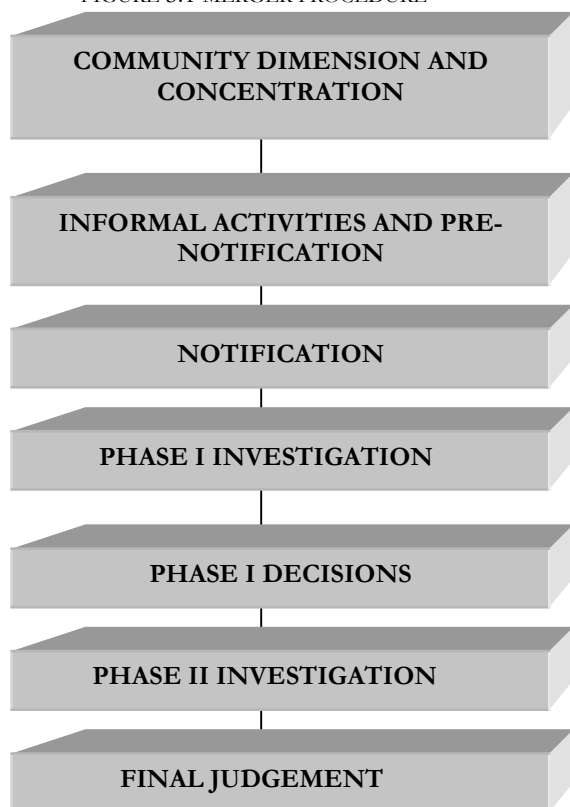
In addition, Commission regulation no (EC) 447/98⁶⁷, is mentioned when needed. The primary objective is to explain the regulation and present practical manners around it. It is an attempt to provide an understanding to a company planning a merger. The reader should also be aware that the regulations are not presented article by article. Thus, some articles are excluded along with some exemptions, since they contain details of less relevance for the reader. Finally, the reader should know that presented data is interviews if otherwise indicated. Other data is specifically footnoted.

⁶⁵Interviews unless otherwise indicated, mainly September to November, 2000

⁶⁶See Appendix 7

The chapter is outlined below (sub-headings not included).

FIGURE 5.1 MERGER PROCEDURE



The chapter is structured according to the timetable a company and other involved actors' need to follow. The first step is to define whether the intended merger has a community dimension. If not, the European Authorities should not handle the case. Informal activities together with pre-notification meetings are unofficial activities carried out before the actual notification. The notification is the official document submitted to the Commission. Following the notification phase I investigation is initiated by the Commission.

Within 30 days a decision must be taken if the case should proceed to a second phase for further investigation or accepted. If initiated a second phase investigation, a deadline of four months starts to run, in which the Commission needs to make its final judgement.

At this point we have reached to the second sub-problem definition:

What are the formal and informal merger procedures within the European Union?

5.1.1 COMMUNITY DIMENSION AND CONCENTRATION

Article one in Merger Regulation (EEC) no 4064/89 deals with the basic requirement for directly notifying the Commission when two companies are about to merge. The question is if the entity has what the Commission defines as a "Community dimension". In the Amended Regulation the new threshold is fixed to include companies having "a combined aggregated world-wide turnover of more than € 2.500 million of all undertaking's concerned" and in each of, at least three Member States, "the combined aggregate turnover of all the undertakings

⁶⁷ See Appendix 8

concerned is more than € 100 million”. Also, in each of at least three of the above-mentioned Member States, the “aggregate turnover of each of at least two of the undertakings concerned is more than 25 million Euro”. The last criteria is that “the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than 100 million Euro; unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State”.⁶⁸ The purpose with this is facilitating for the company through the so called “one-stop-shop”. If the company falls within the frame the case could be handled by the Commission directly instead of contacting several national authorities.

5.1.1.1 Calculation of turnover

The aggregated turnover must be calculated in order to analyse whether it has “Community dimension” or not. The calculation is handled differently depending on what kind of company it is. Another factor that will determine how to calculate is whether one should make a world-wide turnover or one that is actual in the Member States. Numbers needed to be included in this calculation is specified in Article 5 (1). If a party is acquiring a specific part of another company, the calculation of turnover should only refer to these parts.⁶⁹ The Commission’s guidelines to the calculation could be found on their homepage⁷⁰.

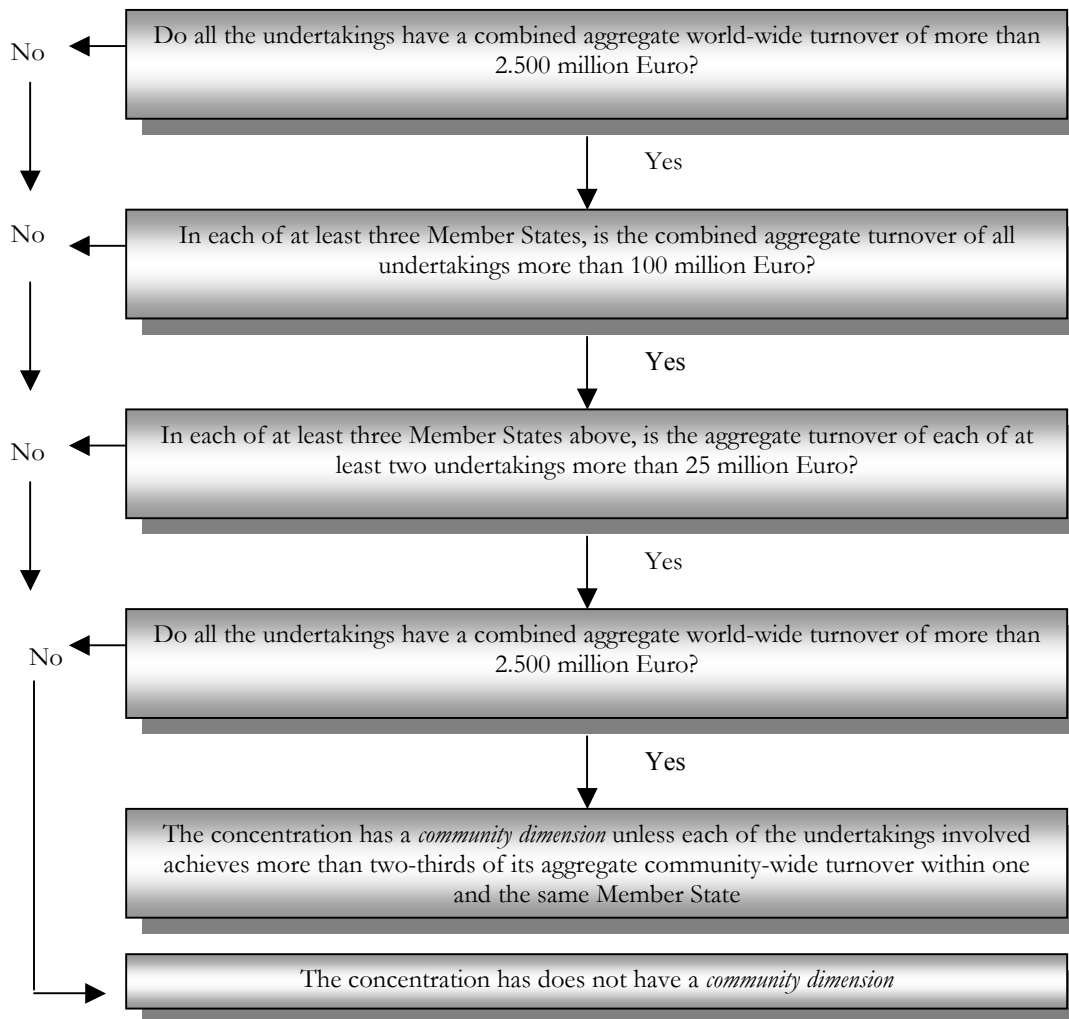
⁶⁸ Article 1(3) Regulation no 4064/89

⁶⁹ Article 5 (1) Regulation no 4064/89

⁷⁰ <http://europa.eu.int/comm>

Rivas (1999) illustrates the question of Community dimension together with how to calculate turnover:

FIGURE 5.2 COMMUNITY DIMENSION



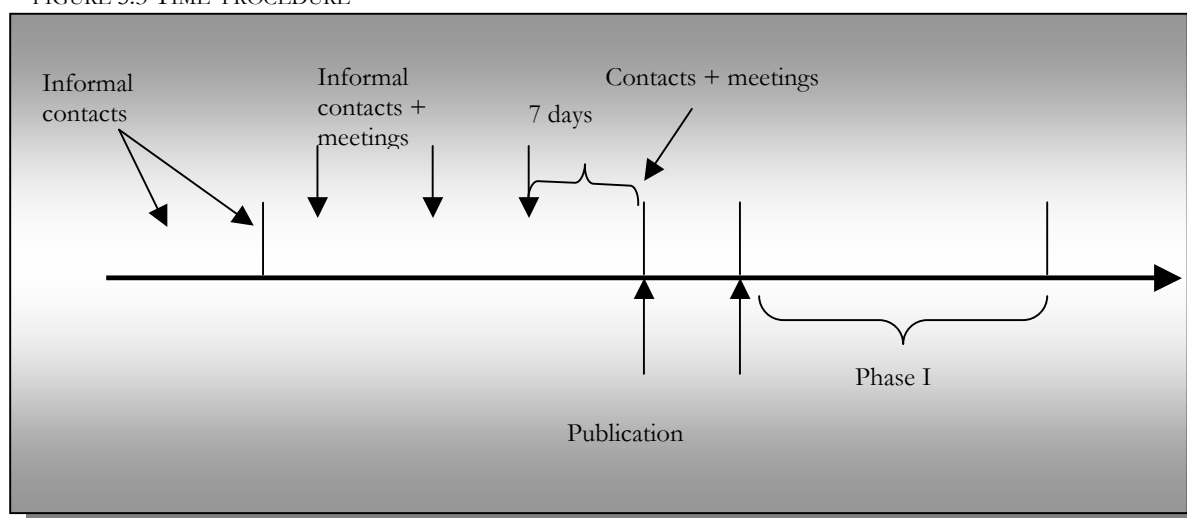
Source: Rivas, 1999, p. 6

5.1.2 INFORMAL ACTIVITIES

The respondents reveal that it is crucial to start preparations early with informal contacts with the MTF. In that respect the company should give briefings about the intention with the merger, how and when the company intend to continue with the merger etc. If the company already here starts an open dialogue with the MTF and assures that all relevant information will be sent, the risks of misunderstandings are reduced. The interviews furthermore imply that the contacts definitely do not include contacts aiming to “*build friendship with the MTF, in order to be treated more favourable*”. It is rather a question about professional contacts, where high level of management from the involved parties combined with professional advisors are having the dialogue. The initiating dialogue is crucial

for later stages to easier obtain signals on how MTF discusses in particular matters. One of the respondents illustrates the informal contacts with the MTF in the time line below.

FIGURE 5.3 TIME PROCEDURE



Source: Our respondents

It is the forthcoming CEO, or similar level, who knows what the company intends to achieve with the merger. The advisors around the management are naturally also of vital importance. However, before the pre-notification meetings, management should have the dialogue. According to one of the respondents, when initiating the communication, contacts should be searched for at senior level within the Commission. The person in charge is the one choosing the officials who will be included in the case team. A person at a “junior level” is not interested of this type of dialogue, this early.

Authors' analysis

Since juridical matters are an essential part of the MTF's activities, the need for providing the commercial perspective is understandable. As we will see in the case analysis (5.2), the experience of different markets varies and could indeed be very complex. We argue that the ultimate experts are the companies operating in their particular business. Consequently, there might be a gap between MTF's perspective, which ultimately is the consumers', and the business perspective. Therefore, there is also a need for this mutual exchange in order to teach MTF about the specific business as well as achieve knowledge about MTF's viewpoint and minds.

A reason for contacts starting at a senior level within the Commission could be that the formal process has not yet been initiated, and therefore the case team is not yet chosen. Of note is that senior level does not necessarily mean the Commissioner. The purpose with this contact is to inform the MTF that something is going to happen later on. It is also notable that the informal contacts should not stop here; hence the dialogue should be a continuous process throughout all the stages.

5.1.3 PRE-NOTIFICATION

Following the initial scanning of relevant people to communicate with, a pre-notification meeting should be prepared. This is also an informal procedure Rivas (1999) states but the importance of it is often stressed in Mario Monti's speeches. In this context, a briefing paper should be submitted followed by a first draft including all information about the transaction, for example corporate governance documentation, joint venture agreements with the parent company, supply and distribution agreements with the parent company etc.⁷¹ This is necessary to allow MTF to obtain a preliminary view of the planned transaction. The pre-notification meeting should be held some weeks before the date of notification.

The Commission stresses pre-notification contacts, since it could facilitate the completion of the necessary forms and lead to a speedier outcome.⁷² The pre-notification meeting serves the companies concerned to obtain a preliminary sense of how MTF is thinking and possible approaches to treat the case. These meetings could determine whether the Merger Regulation applies and if the operation needs to be co-ordinated with relevant Directorates with the DG on Competition. Particularly, in cases, involving difficult assessments of relevant markets or the concerned sector is rapidly dynamic, the pre-notification assure a complete notification. Also, the draft should include calculations of future market shares following the intended merger and proposals to erase possible dominant positions. The MTF could thus, from the beginning, appraise the impact of the market in the light of the proposal without the parties yet being bound by it.⁷³

⁷¹ Rivas, 1999, p. 17

⁷² <http://europa.eu.int/comm/competition/publications>, November 2, 2000

⁷³ Rivas, 1999, p. 19

The respondents reveal that representatives to attend meetings should be a team of people who have full understanding for competition law and the commercial realities. This means that high-level management in combination with specialist competition lawyers should be the most appropriate ones for facilitating the communication. The respondents highly stress this need and say that “*the problem is not simply technical and juridical, it is the management who knows what they want with the merger and therefore their view is mostly important*”.

Furthermore, the respondents state that it is vital to start the mutual “learning curve” early, between the parties involved and people within MTF. Particularly the management are important since they need to provide MTF with input from the commercial point of view. At the same time the parties learn about MTF’s thinking and might feel at this point already attitudes and opinions.

Rivas (1999) highlights certain topics, which could be included in the agenda in a pre-notification meeting:

BOX 5.1 AGENDA PRE-NOTIFICATION

- Confirmation as to whether the Merger Regulation applies to the transaction;
- If the Merger Regulation does apply, whether Article 85 of the EC Treaty issues also may be involved;
- A request for exemption from the obligation to suspend the transaction;
- The extent of documentation required by MTF. Hence, identify current available data and required additional information;
- Potentially affected product and geographic markets.

Source: Rivas, 1999, p.21

At this stage, the respondents reveal, that the case team is chosen involving relevant members with a responsible *rapporteur*. The person selecting the case team is one of the persons responsible for the four sub-units in MTF. The *rapporteur* holds great power and therefore the dialogue are conducted at this level. At this point, the respondents declare that contact with the case team is essential before talking with the senior level, since the senior level always talks with the case team before statements. These meetings could last for several months or even a year.

Thus, all the question marks should be erased here. It is up to the company to analyse what activities needed to be done to eliminate possible doubts. Hence, already at this point the company will obtain signals if there are problems and in that case where. The company should start to think about offering undertakings to the intended merger.

Authors' analysis

From this discussion we understand that the pre-notification meetings are extremely important. The notification procedure itself requires an enormous amount of effort, in order to satisfy all the conditions. It is also a way of realising what exact information needed and data that might be unnecessary. Therefore, the teamwork with the MTF is essential, since the requests may look different dependent on the case. It would be disastrous to realise that the notification is incomplete.

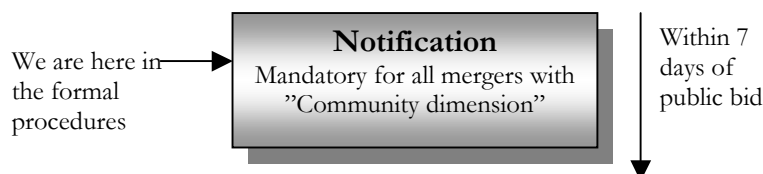
The first impression may also impact attitudes of the staff and the willingness to co-operate later in the process. Hence, mistakes made here could probably jeopardise the coming dialogue. It also implies that the meetings need to be planned and organised very thoroughly. One should remember that MTF has a relatively little amount of time to study the commercial aspects of the particular transaction. Therefore, the earlier a lot of relevant input is provided, the better for allowing an understanding of the issues. Also, the workload of MTF suggests that a well-prepared meeting is crucial in order to get most out of it. Of note is that at this point, the case team is the point for negotiation. As we saw in the first section, the very starting point was at the senior level already before the case team was selected. We argue that it would probably facilitate the dialogue and attitudes of both the case team and the person in charge if interest has been shown in a very early stage.

Reasons for why efforts should be highly allocated to these types of activities are that deadlines have not yet set. Allocating time to clear out misunderstandings when the deadlines have been introduced could thus be avoided. The company might come to the conclusion that it is too expensive to for example divest activities in order for the Commission to clear the merger. Thus, the company

may find that this is a poor alternative and chooses not to proceed with the intended merger. The earlier this is realised the sooner a search for alternative partners can be carried out.

5.1.4 NOTIFICATION

FIGURE 5.4 NOTIFICATION



Source: Own construction based on Wallace and Wallace, 2000, p 139

Within seven days from creating the relevant agreement or acquisition of a controlling interest or the announcement of a public bid, notification has to be made to the MTF.⁷⁴ Notification must be either delivered to the Commission by hand at the address on Form CO or posted by registered letter to that same address⁷⁵.⁷⁶ Once it arrives at the address, a copy is submitted to the MTF, the Member States, the Legal Service of the Commission, the Directorate A in DG on Competition, the relevant sectoral unit within DG on Competition, and the Associated Directorates General.

The one-week deadline starts to run when a legally binding agreement is made. To be able to complete this legal obligation, it must have as purpose to create a legally binding agreement on which each party can rely. The seven days include “working days”, which is all days other than Saturdays, Sundays, public holidays and other holidays as settled by the Commission. If the last day of the seven-day deadline is a “non-working day” in the country of dispatch, the deadline is determined to be the following working day. August is generally the big holiday period for the European Institutions. Officially, notifications could be done during this month, however it is advisable not to notify during this time.⁷⁷

⁷⁴ Article 4 (1), Regulation 4064/89

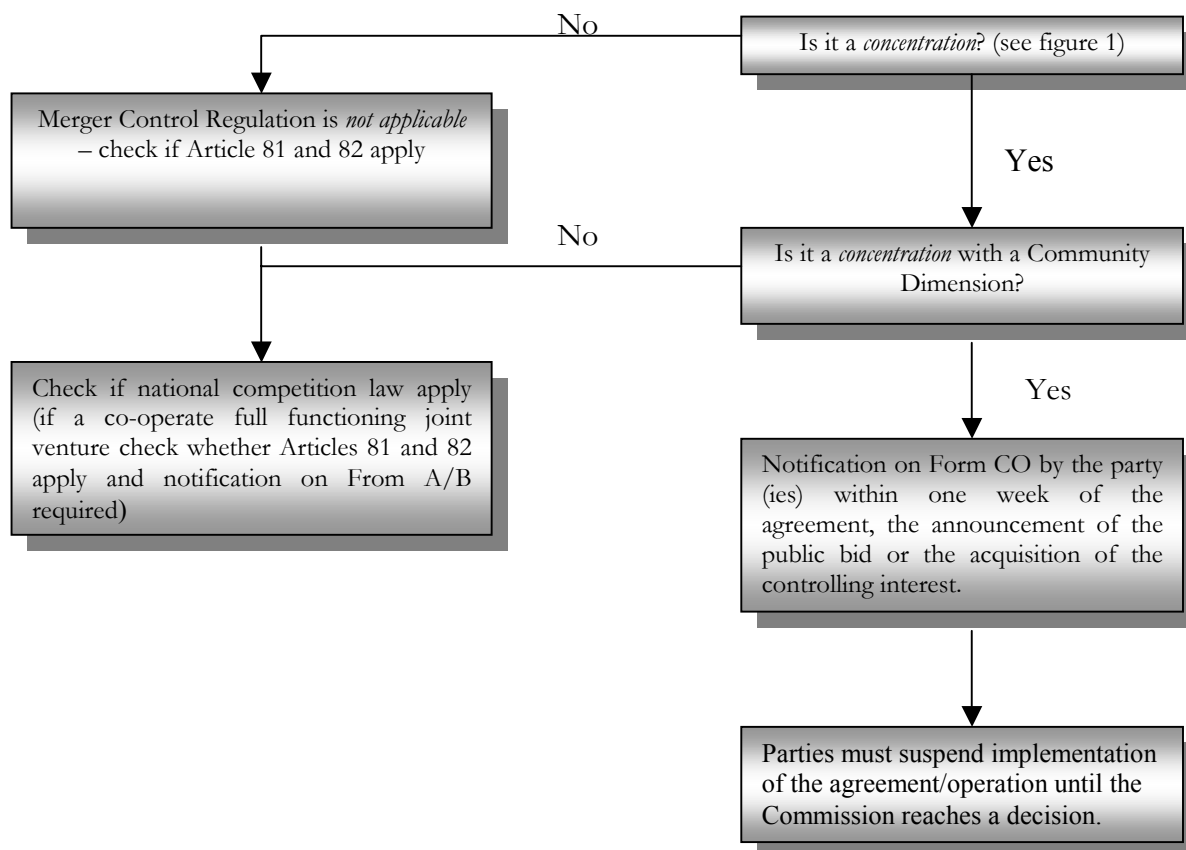
⁷⁵ The address is found on <http://europa.eu.int/comm/competition>

⁷⁶ Article 3 (2), Regulation 447/98

⁷⁷ Rivas, 1999, p.22f

Below the notification procedures are outlined:

FIGURE 5.5 NOTIFICATION PROCEDURE



Source: Rivas, 1999, p.22

At the actual date of publication of this agreement, the respondents say that it is advisable for the coming CEO to call or fax the Director of the MTF to say: *“today we go public with this and we will send you all information”*. This is important in order to maintain an open dialogue with the MTF. The respondents also express that the company should always inform the MTF continuously about any changes. It might be changes do not affect the process. Nevertheless, it is wise to inform the MTF whatever the issue may be. The respondents reveal that sometimes the MTF obtains a notification without any pre-notification contacts. *“In those cases you could be pretty sure that it will be problematic if the case not happens to be crystal-clear”*. Furthermore, the respondents remark that there have been occasions where the management have taken a vacation just after the notification has been made. When the notification has arrived at the MTF, it takes two or three working days to ensure that the notification is complete.

Authors' analysis

These statements announce that if the MTF happens to read about the publication in the papers, without being informed that a notification is in process, it will most likely have a negative effect on the staff within MTF. The forthcoming dialogue could therefore be harmed bearing in mind that the deadlines have started and thus the timetable is very tight. As stated above, if the preparations are not done properly there will most likely be problems especially if the case turns out to be complex. It is of course rather nonchalant to take off for a holiday, after the notification since the MTF might need further information. Obviously, it will irritate the staff and obtaining a somewhat arrogant attitude from the MTF's personnel later in the process would not be surprising. On the other hand, if adequate contacts, have been conducted as discussed above, signals for where the MTF might have doubts will be apparent at this point.

5.1.4.1 Notifying parties

The person or company acquiring the whole or part of one or more undertakings should make the notification.⁷⁸ This means that the acquiring company has to also provide information from the target company. If the concentration consists of a merger or in the acquisitions of joint control, both parties are under an obligation to notify. A joint notification is also obligatory if joint control arises from the acquisition of a significant minority shareholding in another undertaking by a new investor. Practically, an authorised joint representative of concerned companies' should submit the joint notification.⁷⁹

Authors' analysis

As shown above, in cases where the acquiring undertaking is obliged to conduct the notification, the responsibility lies on this party to submit information regarding the target company. This information might be difficult to obtain, in the middle of processing the intended merger. Again, it shows that it is vital that the responsible party has a large amount of time allocated for preparations. The dialogue with the MTF will announce which information is needed, and could therefore increase efficiency in search of information.

⁷⁸Articles 4 (2) and 3(1) (b), Regulation 4064/89

⁷⁹Rivas, 1999, p.23

5.1.4.2 Form CO

Form CO⁸⁰ is the form, used in relation to the notification. It has been changed many times, and the last version is based on the Amended Regulation in 1998⁸¹. Form CO is divided into two parts where the first part basically handles how to fill in the form correctly. The second part is divided into 12 sections and requires a complex collection of information regarding the parties, the nature of the transaction and affected markets. The 12 sections are illustrated below. This information needs to be supported by substantial economic analysis including not only information of general conditions in the potentially affected markets, but also information of potential economic effects following the proposed concentration. Notification on Form CO should be submitted in the intended language of the proceedings. Information in a non-official EU language needs translation and must be accomplished into the tight timetable. A crucial task is that the MTF's official exchange rate tables, which need to be used to calculate turnover. The Directorate General on competitions' website holds this information⁸².

BOX 5.2 FORM CO 1-5

1. Provide information about the notifying party (parties);
2. Providing details of the concentration such as the legal nature of the concentration, turnover figures for the last financial year;
3. Describe ownership and control issues with respect to the concerned undertakings;
4. Provide information on facts and figures concerning personal and financial links and previous acquisitions;
5. Provide the MTF with supporting documentation that should accompany the Form CO.

The above-mentioned information determines the legal question, whether it is a concentration under the Merger Regulation or not. The next coming sections is the economic analysis of the potential merger:

BOX 5.3 FORM CO 6-9

6. Identify the relevant and geographic markets and the markets affected by the concentration;
7. Provide information on product markets affected for each of the last three financial years;
8. Provide information on the structure of supply and demand, details of market entry, the importance of research and development, the available systems of distribution and servicing, details of major customers and suppliers, the relevance of co-operation agreements, the trade associations presently active in the market;
9. Provide information on any conglomerate aspects of the proposed concentration where any of the parties holds a market share of 25 percent or more in any product market in which there is no horizontal or vertical relationship, the worldwide context in which the concentration is taking place, justification and identification of any ancillary restraints.

⁸⁰ Form Co is found on <http://europa.eu.int/comm/competition>

⁸¹ Rivas, 1999, p.23

⁸² <http://europa.eu.int/comm/competition>

With this information the Commission will assess whether the concentration is compatible with the Common Market and whether or not impede with effective competition.

BOX 5.4 FORM CO 10

10. This section lists the additional grounds brought in by the Amending Regulation and can be said to be the grounds on which the Commission will assess the compatibility with the Common Market of full function joint ventures, which have co-operative aspects.

BOX 5.5 FORM CO 11

11. In this section the parties must explain any ancillary restraints, which are related to the implementation of the concentration. They should also decide whether the operation should be treated as an application either for negative clearance or for individual exemption under Article 81 of the EC Treaty in the event that the MTF finds that the transaction does not constitute a concentration.

BOX 5.6 FORM CO 12

12. In this section the parties must declare that the information given to the Commission is correct to the best knowledge and belief of those who sign the notification. Furthermore, ensure that all estimates are identified as such and are the best estimates of the underlying facts and that all opinions are expressed sincere.

If making assumptions, this clearly must be identified as assumptions. Also, if certain information is not available the parties must argue for why, and replace missing information with estimations. The nature of the transaction is the factor determining which Form CO to use. If the concentration is a joint control acquired by two or more undertakings, a short-form Form CO is needed.

The notification itself is published in the Official Journal of the European Communities. This is done when the Commission has defined that the concentration falls under the Merger Regulation. The publication consists of a summary of the notification, the date of the concentration as well as a presentation of all parties involved. Third parties could submit their observations to the MTF no longer than 10 days after the notification.⁸³

The enormous amount of preparations needed to complete a Form Co could only be done with assistance of specialist competition lawyers. Their advice, together with skilled advises from economists, is an essential part of the procedures under

⁸³Rivas, 1999, p.27-29

the Merger Regulation.⁸⁴ The respondents stress the dialogue with high-level management, regarding business/market specific issues. Furthermore, the Commission wants to maintain close contact with involved firms, in order to discuss practical and legal problems arising from the notification documents, and seek a resolution of any such problems by mutual agreement⁸⁵.

Authors' analysis

Regarding the above, we could state that the value of early preparations and pre-notification contacts should not be underestimated. Consequently, planning with lawyers and economists should start as the idea rises about the merger. This is also essential for the management in order to increase their knowledge for forthcoming negotiations with MTF. It is risky to leave the sole responsibility for negotiating with the MTF to the advisors without having the management involved in the process. We also viewed that the Commission stresses the need for maintaining a close relationship with the parties to find jointly solutions. Thus, the dialogue should be maintained during the whole process.

As we saw in point 9 above in the Form CO, it is mentioned that a market share of 25 % or more in a product market should be identified. The interviews have provided a general picture over how market shares are calculated, in order to locate possible dominant market positions. A simplified example is shown in the figure below where the markets are considered to be national.

⁸⁴Ibid. p.24

⁸⁵ <http://europa.eu.int/comm/competition/publications>, November 2, 2000

FIGURE 5.6 MARKET SHARE DEFINITION

Product	Market area				
	Fiw	Sw	UK	It	Etc
A			30 %	Exceeding 25%	
B	8%				
C					12%
D				25%	
Etc					

Source: Our respondents

The respondents say that relevant geographical markets considered to be wider than national are for example oil, aluminium and IT and telecommunication sectors. A general rule of estimating geographical market is that higher standardisation of a product means wider geographical market. Furthermore, the relevant geographical market could also be determined to smaller areas such as a region or a city. Sometimes the estimations could be very complex, and in those cases external consultants might be employed for this task. The interviews also reveal that the MTF has become very skilled and are highly competent as a result of the increasing activity and the fact of 10 years experience of merger regulation. Nevertheless, the respondents say that the actors involved are the ultimate experts of the industry.

Authors' analysis

Companies want wider market scope, for the obvious reason; to reduce the scope of estimated market shares. In contrast, the Commission has the consumers perspective. Therefore, the Commission does not want to risk harming the consumers by defining the market too wide. Further discussions' will be made in the case analysis (5.2), we therefore save the details to the next chapter.

5.1.4.3 Scope of information

One original and 23 copies of Form CO and supporting documentation must be submitted to the MTF. Specifically what "supporting information" includes is

dealt with in section 5 of Form CO previously pointed out in section 5.1.6. It includes annual reports and accounts, the proposed document in the case of a public bid and “any other documents concerning the concentration”. Moreover, where at least one affected market is identified, the completed notification must also contain supporting documentation copies of analyses, reports, studies and surveys prepared for the purpose of assessing or analysing the concentration with respect to competitive conditions.⁸⁶ To note is if incorrect or misleading information is submitted intentionally or negligently, a party is responsible to a fine of up to € 50.000⁸⁷.

It is important to realise exactly what documentation the Commission requires. If the content of the information is incorrect or the number of copies submitted is not right, the notification will be considered to be incomplete.⁸⁸ This in turn might delay the date for the notification to come into force. Furthermore, Form CO might be returned for a number of reasons. For example the industry sector may be so complex that a party in good faith have failed to refer to a relevant sector. In those cases it is preferable for the Form CO to return incomplete, and for saving time, than to proceed to Phase II due to lack of information. Moreover, an incomplete Form CO could also have indirect negative effects due to harmful press coverage.⁸⁹

The interviews reveal that if for example the parties have conducted a survey, the MTF will realise if the results are manipulated in order to adjust them to a favourable picture. As pointed out by the respondents: *“Be honest in your data submission, do not hope that the MTF not will find out facts! And do definitely not hope that your problems will be solved by political lobbying!”*

Author’s analysis

The reader should be aware of that there is more information to know, besides this “short” presentation, to be able to succeed in completing a Form Co. Thus, we are not presenting all details in this analyse. The most crucial issue is to

⁸⁶ OJ L 61, March 2, 1998

⁸⁷ Article 14 (1) (b), Regulation 4064/89

⁸⁸ Article 4(4), Regulation 447/98

⁸⁹ Rivas, 1999, p.27-28

apprehend that the notification only becomes effective if complete and correct information is submitted to the Commission. Hence, thorough examination of regulations and Form Co in combination with close co-operation with the MTF is crucial. Personal contacts with the MTF are vital since explanations about the underlying assumptions behind, for example a survey or other methodological factors, might have to be clarified to highlight the substance of the investigation. If the MTF is sceptical or doubtful about the numbers or other question marks, personal meetings with the MTF will reveal this. It might be so that further market tests needs to be conducted and the sooner these operations could start the better. A prerequisite is naturally to be honest in the data, since the MTF will most likely see if the information is “modified” to reach favourable results.

5.1.4.4 Confidentiality

The MTF is well known and trusted for keeping business secrets. According to the instructions in the Form Co, confidential information should be submitted separately with each page clearly marked as “Business secrets”. Reasons why this information not should be published need to be noted as well. To keep in mind is that access to the Commission’s non-confidential files may be given to third parties if they have an interest in the case.⁹⁰

The respondents say that there is an enormous amount of confidential information circulating within DG on Competition. Therefore, companies must be able to rely upon that no such information leaves the house. All employees are thus working under strict agreements in order to guarantee absolute secrecy. However, under certain circumstances there may be some material that has to circulate among many other Directorate Generals. Sometimes, information has leaked during such occasions. Though, that information is never of the character risking harming an individual actor subject in a case process. The only way media could obtain information is by the parties themselves or competitors. Other respondents reveal that it is more difficult to speak to the MTF, relative to other Directorates. *“They have a very special style... approaching the MTF is much more difficult than others, since they have to work behind closed doors...”*

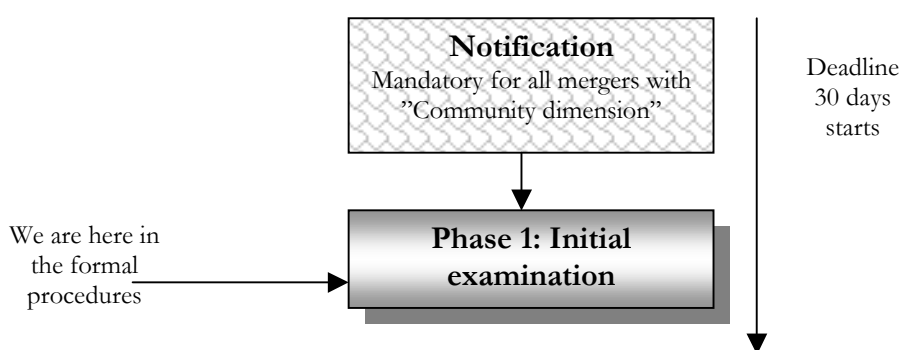
⁹⁰ OJ L 61, March 2, 1998

Authors' analysis

Since, the respondents are absolutely certain that no information leaves the DG on competition, we could assume that material written in the media comes from other sources concerning cases in process. Companies must and should rely on this fact. The fact that third parties are able to see non-confidential information during case-processes makes it even more important for the company to clearly mark confidential material.

5.1.5 PHASE I INVESTIGATION

FIGURE 5.7 PHASE I INVESTIGATION



Source: Own construction based on Wallace and Wallace, 2000, p 139

There is a one-month deadline from date of notification in which the Commission have to adopt its decision. The one-month starts to run the day when the notification is put into effect.⁹¹ The sixth Article presents the process of examination of the notification and initiation of proceedings. The Commission shall examine the notification as soon as it is received and decide whether or not it is a concentration that distorts competition. When this is decided, the Commission will notify all parties in the undertaking as well as authorities of Member States. The period is normally called “phase I-investigation”.⁹² Once the “phase I-investigation” starts, the parties must strictly follow the procedural rules and obligations. Before the Commission has decided if the concentration distorts competition, the merger cannot be put into effect, neither before the notification nor within the first three weeks following its notification. Under this article, the Commission has the power to derogate this rule if they can be sure that it will

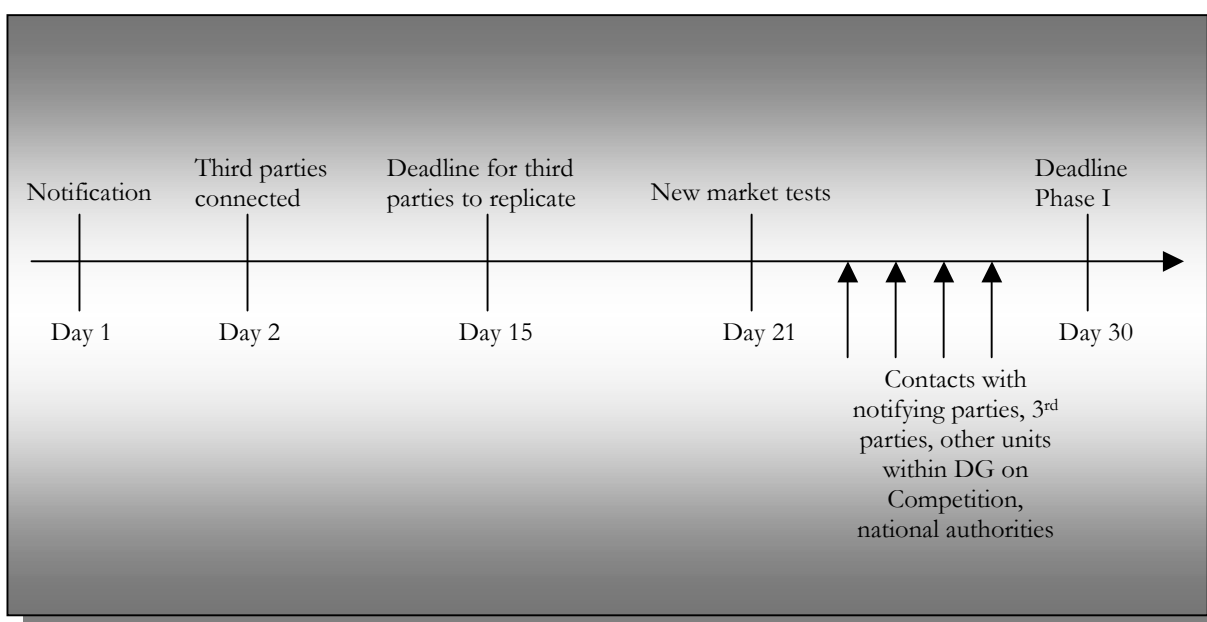
⁹¹Article 10 (1), Regulation 4064/89

⁹²Article 6 (1), Regulation 4064/89

not distort competition, which can also result in that they can set certain conditions before they permit this exemption.⁹³

The respondents reveal that it takes normally two or three days for the officials to ensure that the notification is complete. The fifth or sixth day, 3rd parties are contacted and they have ten days to replicate. Third parties might be customers, competitors, suppliers or other parties that might have interest in the case. Day 15 the MTF should have an overview over all the information connected to the case. Day 21 a new market test might be conducted, including possible offered undertakings by the parties. Finally, after one month the decision is ready. During this short period of time the respondents reveal that the case team are extremely busy, including contacts with notifying parties, third parties, other units within DG on competition, national authorities etc. This is illustrated in the timeline beneath:

FIGURE 5.8 MTF'S ACTIVITIES, I-PHASE INVESTIGATION



Source: Own construction

Authors' analysis

Obviously the case team will be extremely occupied as soon as the notification has arrived. It might thus be advisable to allow them to concentrate on the material about two weeks. If the early preparations are done properly the signals would be crystal-clear at this point. However, the parties and their advisors should be

⁹³ Article 7, Regulation 4064/89

available if the MTF have any questions. On the other hand when pre-notification contacts have been neglected, there is definitely a need for contacts at this point. But again, since MTF is working under tough time pressure, it is even more important that the meetings are well prepared for what the MTF might question. It is definitely useless to waste MTF's valuable time with inadequate information, particularly at this time.

5.1.5.1 Undertakings⁹⁴

The Amending Regulation provides a notified concentration to be modified in accordance with undertakings submitted by the notifying parties during Phase I.⁹⁵ This means that MTF could clear the case during the first phase. To note is that undertakings never actively asked for by the MTF. Furthermore, a proposal of undertakings allows the Commission to extend the deadline to six weeks, if the intention is to allow the Commission to adopt a decision based on this proposal.⁹⁶

The respondents mention that the reason for that undertakings need to be worked out by the parties, is because they are the experts in their business area and know which alternatives being relevant to offer. The undertakings offered must remove all identified competition concerns. Furthermore, the respondents give an example of a case, where a lengthy process of negotiations before the notification was submitted. Since the parties realised that the Commission would have raised serious doubts on several markets, the parties put a lot of efforts to propose reasonable undertakings. The case in question was extremely complex and commitments from the company were the only way for avoiding a second phase investigation. Despite the high complexity of the case, the honest and open dialogue between the MTF and the parties made the Commission to clear the merger within six weeks. Observe also, in complicated cases the Commissioner, is currently Mr Mario Monti always is briefed several times during the discussions.

⁹⁴ Undertakings here means commitments from the parties

⁹⁵ Article 6 (2), Regulation 4064/89

⁹⁶ Article 10 (1), Regulation 4064/89

Authors' analysis

As we saw in the above procedure, Day 21 a new market test is conducted. This means that within three weeks, undertakings must be submitted. It may be so that during the pre-notification meetings, the parties have already discussed possible undertakings. Thus, the earlier the company could feel if the MTF have doubts in certain markets, the earlier the company could start to investigate possible solutions. In the above discussion, it is revealed that close co-operation between the MTF and the parties could result in that the parties could offer undertakings already in phase I and know that it will be accepted. The fact that the ultimate decision maker, Mario Monti, is informed during the whole process of complex cases, allows us to assume that the involved actors would know if his opinion might conflict with the case team's view on the case. This fact avoids surprises.

5.1.5.2 MTF's Relationship with National Authorities

Copies of the notification are sent to concerned individuals and companies. Copies must also be sent by the MTF to the competent authorities of the Member State, within three working days after the notification.⁹⁷ The authority of the Member State then have three weeks to inform the MTF if the concentration distorts competition on their domestic market. If the Member State finds the concentration to distort competition the MTF's examination could be extended from 30 days to six weeks.⁹⁸

The MTF have to be in close and constant contact with the competent authorities of the Member States⁹⁹, who may express their opinions throughout the procedures. Thus, the MTF allows the national authority access to all information. During a Phase I investigation and prior to a Phase I decision being taken, there is no obligation for the MTF consulting the Advisory Committee. The respondents reveal that the national authorities are involved in the process formally as well as informally. Often, who talks to whom during this information exchange, is decided by the officials' nationality, holding the same nationality as the particular national authority.

⁹⁷ Article 11 (2), Regulation 4064/89

⁹⁸ Article 9, Regulation 4064/89

⁹⁹ Article 19 (2) (a), Regulation 4064/89

Another possibility to extend the one-month time limit to six weeks could be when the case should be transferred to national authorities¹⁰⁰. The respondents declare that this normally applies when the Commission achieves a request, within three weeks from the date of notification, from a Member State emphasising that national authorities should handle the case. National authorities must then motivate for why the case should be considered to only affect the national market. Those cases fall under the so-called “distinct market exception”, meaning that the intended merger risk to seriously damage the particular national market. The national authorities are then authorised the power that the Commission normally has to conduct necessary investigations and in the end make the final decision. Hence, the roles shift where the Commission has the consultative character. The respondents say that this happens approximately 10 times per year. The respondents furthermore emphasise that reasons for national authorities seeking to handle the case are rather to “tighten” the conditions for the company than vice versa.

Authors’ analysis

The above announce another important contact for the company to approach: Persons responsible for contacts with the Commission within national competition authorities. They are obviously up-dated about what happens in the Commission. Also, they are representatives in the Advisory Committee and could therefore influence the final verdict, if the case happens to proceed to a second phase investigation. Since national authorities are involved during the whole process, it might be advisable to contact them as early as possible, for example in connection to the preparations for pre-notification meetings or earlier.

5.1.5.3 MTF’s relationship with 3rd parties

Third parties are invited to submit any observation on the proposed concentration, which they may normally have no later than ten days following the date of the publication in the Official Journal of the European Communities. They could therefore approach the MTF and comment on the proposal and intervene in the proceedings.¹⁰¹ The respondents reveal that a lot of information is submitted from third parties. Therefore, the officials need to select carefully which

¹⁰⁰ Article 10 (1), Regulation 4064/89

¹⁰¹ Article 4 (3), Regulation 4064/89

information to regard. Customers and suppliers are given particular attention. Third parties are also interested in meeting the MTF in person. This is accepted to a certain extent, but they must have something valuable to add to the investigation.

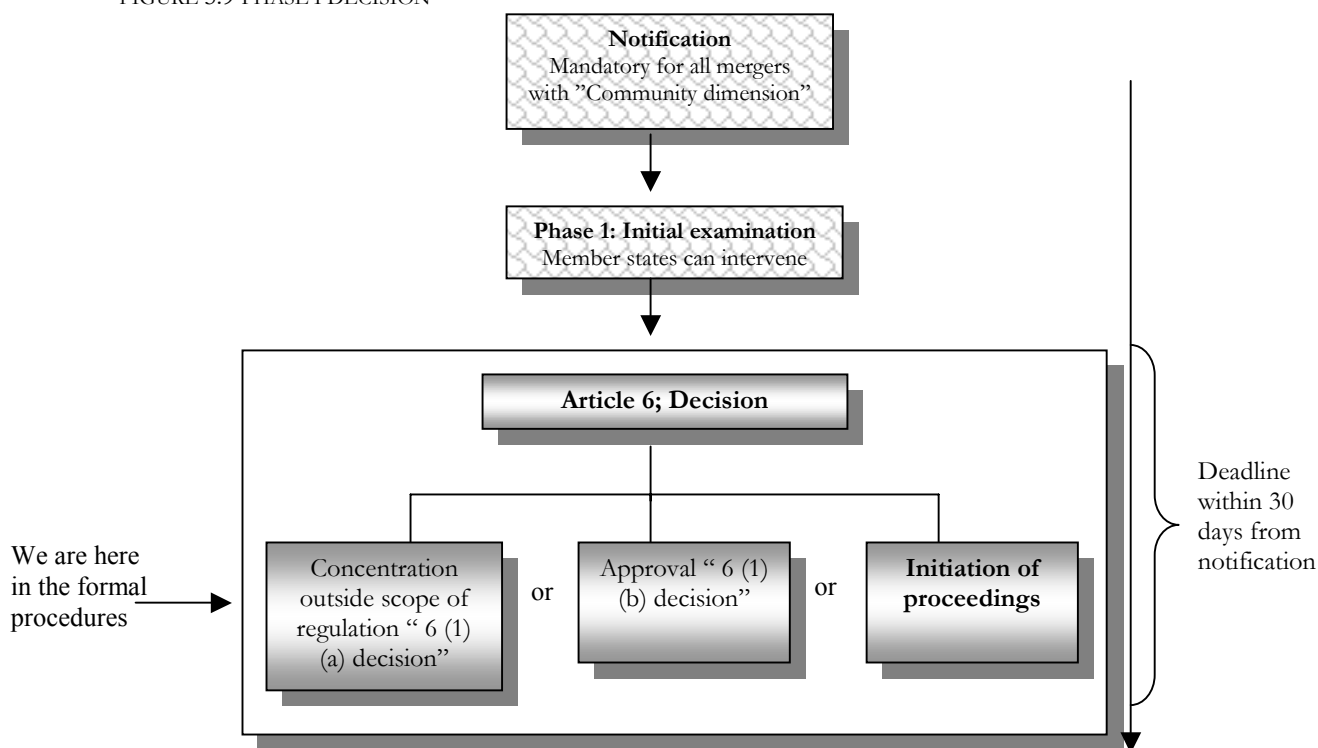
Authors' analysis

Accordingly, the Commission has many sources of information except from data submitted from the parties. They seem to evaluate the material offered by third parties carefully and the competitors are of course eager to state their opinion. When the company makes its preparations, it is therefore even more important to give as clear and substantial information as possible. A great deal of secrecy in the preparations would furthermore be an objective to strive for.

5.1.5.4 Phase I decisions

One of the following decisions must be taken within the first phase investigation period.

FIGURE 5.9 PHASE I DECISION



Source: Own construction based on Wallace and Wallace, 2000, p 139

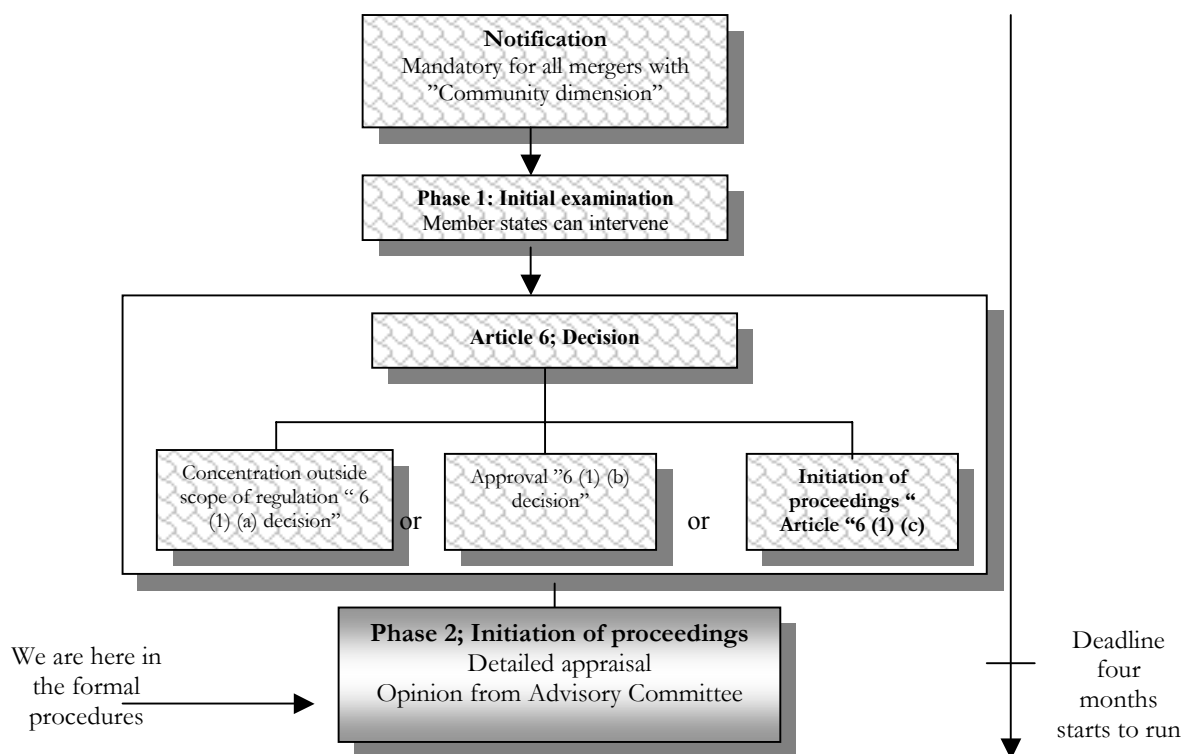
The Commission may find the concentration falling outside the scope of the merger regulation.

Where the Commission decides, a notified concentration to no longer raise serious doubts as to its compatibility, it decides to declare the concentration compatible with the Common Market. However, if the Commission finds this decision to be based on inaccurate information for which the parties are responsible, the decision might be revoked. The third option is when the Commission concludes that the notified concentration raises serious doubts as to its compatibility with the Common Market; the decision will be to initiate proceedings in the form of an initiation of a phase II Investigation.

5.1.6 PHASE II INVESTIGATION

It is the Competition Commissioner, who is presently Mario Monti, responsible for deciding whether to clear the merger at the end of Phase 1. A decision to open a Phase II investigation is taken by the Competition Commissioner in conjunction with the President of the Commission, currently Romano Prodi. The deadline for the final verdict in the phase II is four months of the date of initiating proceedings.

FIGURE 5.10 PHASE II INVESTIGATION



Source: Own construction based on Wallace and Wallace, 2000, p 139

5.1.6.1 Powers of the Commission

The ability for the Commission to require information is described in Article 11 in the Merger Regulation. Requests for information should be sent to either the owners or representatives of the parties or persons authorised to represent the company by law. Copies of requests are also sent to national authorities affected by the intended merger. Within this request the purpose should be stated as well as legal basis and penalties if providing incorrect information.¹⁰²

Furthermore, the Commission's power includes carrying out all necessary investigation into undertakings and associations of undertakings such as:

- Examining the books and other business records;
- Taking or demanding copies of or extracts from the books and business records;
- Asking for an oral explanation on the spot: and
- Entering any premises, land and means of transport of undertakings.

A failure by the parties to co-operate could result in the payment of fines from € 1.000 to € 50.000 if the failure is intentional or negligent.¹⁰³

If the Commission uses its power to its absolute extreme, it would conduct a so-called "dawn raid" in order to collect information. The respondents tell us that it is unusual. When the Commission does "dawn raids", the Commission has asked for information several times without receiving it, or obtained wrong data. However, most often it concerns cases when the Commission suspects cartels. A quote illustrates this procedure from one of the respondents: *"Seven men, dressed in black knocked on the company's door, 8 o'clock in the morning with plastic bags in their hands, with the purpose of collecting proofs. The management turned into panic of course"*.

The respondents reveal the co-operation between MTF and national authorities could be important at this stage. They could help with conducting surveys on their national markets. Besides that the national authorities on the Commission's command are obligated to do this¹⁰⁴, the advantage is being closeness to the

¹⁰² Article, 11, Regulation 4064/89

¹⁰³ Article 13, Regulation 4064/89

¹⁰⁴ Article, 12, Regulation 4064/89

markets. The respondents reveal that when national authorities determine market conditions, they use similar manners as the Commission.

Authors' analysis

This tells us that the company needs full attention towards the Commission when a full investigation has been initiated. Statistics in 3.7 revealed that very few have left phase II without conditions throughout the years. To note also by the statistics is that very few prohibitions have been made. Hence, well worked out proposals in order to restore effective competition with acceptable arguments, will most likely give positive results. At this stage the feeling if the case has the possibility to be compatible will be crystal-clear. If the MTF reveals aversion, despite a considerable package of conditions, the company should consider withdrawing the intended merger. Finally, the intensity of the activities carried out by the company earlier in the process will show how busy it must be in this phase.

5.1.6.2 Statement of Objections

The Commission must inform the notifying parties concerned in writing of its objections concerning the proposed concentration¹⁰⁵. This document is commonly called "Statement of Objections". It is the framework for the decision and certain documents will be attached to this document. The respondents say that the Commission, about eight weeks after the initiation of Phase II, delivers the document. The deadline is then fixed to 2-3 weeks, within which all involved parties (including third parties and national authorities) must reply. Furthermore, almost all cases involve a request from the parties for an oral hearing.

When the parties have received the Commission's Statement of Objections, they could ask for access to the case file. This is the first time the parties are granted this opportunity. In addition, a list of a short description for each document in the file, together with the Statement of Objections is provided. The parties are granted to see the originals of the documents directly and obtain photocopies. However, confidential business information together with documents between the Commission and other authorities are not included in the file.¹⁰⁶

¹⁰⁵ Article 18 (1), Regulation 4064/89

¹⁰⁶ Rivas, 1999, p.40

In the written response the parties could set out all relevant issues to their case and might attach any appropriate documents as proof to the stated facts. The parties could also suggest that the Commission listen to persons verifying this data. 29 copies together with one original of their response should be sent to the Commission.¹⁰⁷ The respondents moreover say that the Commission has to make a quick reply on the statement of objection, normally within one week.

5.1.6.3 Oral Hearings

The Commission *must* allow a formal hearing to the notifying parties. Other involved parties *might* be granted to attend a hearing, if they request to be heard in their written comments and if showing a sufficient interest. To note is that third parties, granted the right to be heard are not automatically entitled to see objection sent to the parties concerned or learn of the Commission's intentions regarding the proposed concentration.¹⁰⁸ The Commission calls together persons to the hearing on a fixed date. Normally the hearings are conducted shortly after the fixed date for delivering the reply to the Statement of Objections.¹⁰⁹ The hearings are not public and persons are heard separately or in attendance of other persons invited.

The respondents reveal the reason for why parties want a hearing, is perhaps because all issues not yet have been highlighted. However, the Commission is not allowed to present new information beyond the Statements of Objection. A Hearing Officer leads the procedure and this person ensures that arguments "*...does not come from nowhere, and that all persons are allowed to get their statements examined*". The parties should let the Hearing Officer know in advance if and when business secrets are to be presented. Thus, arrangements could be made for the party to be heard separately for part of, or the entire hearing.

The respondents say that national competition authorities most often attend the hearings, however this is not obligatory. Furthermore, the Commission makes a quick reply to the information submitted by the parties within approximately one week after the hearing. The respondents reveal that the Commission has made its

¹⁰⁷ Article 13 (4), Regulation 447/98

¹⁰⁸ Articles 14, 15, 16, Regulation 447/98

¹⁰⁹ Article 15 (2), Regulation 447/98

standpoint and the changes that could occur in a hearing might be small corrections on certain points. Another respondent say that *“in general the staff has made up its mind at this point although it is still possible to convince them if you have strong facts”*. A third respondent states *“Since the conclusion of the Commission is well established among the Directorates, only an earthquake would change its mind at this stage”*. The respondents state that the Advisory Committee should replicate within two weeks concerning the oral hearing.

Authors’ analysis

The above implicates that the Commission’s opinion is very clear at this point. The fact that more than three months of investigations have been conducted and the deadline are near offer little time to consider additional arguments. Even if new revolutionary arguments would arise, time is still short for taking them into account. However, it should be noted that normally, national authorities attend the oral hearing. They are participants of the Advisory Committee. Thus, obtaining the power of influencing the final verdict might suggest that an oral hearing would not be a complete waste of time and resources. It is therefore important to have all possible arguments included already in the reply to the Statement of Objection. It is the (only?) opportunity to question the Commission’s facts and the legal and economic basis of the Commission’s investigations. Thus, consulting the advisors at this stage is crucially important.

5.1.6.4 Consultation of the Advisory Committee

The Advisory Committee consists of representatives of the national authorities of the Member States. At least one of those representatives should be competent in matters of restrictive practices and dominant positions. During such meeting the Advisory Committee deliver a joint opinion on the Commission’s draft. The opinion of the Committee could be stated even if not all states are represented and formulated in written form. The meeting takes place not less than 14 days after the invitation has been sent although the Commission might in exceptional cases shorten that period as appropriate in order to avoid serious harm to the parties.¹¹⁰

¹¹⁰ Article 19, Regulation 4064/89

With the invitation, a summary of the case, together with the most important documents and a preliminary draft of the Commission's standpoint are submitted. The respondents reveal that at the meeting, the Commission summarises its proposal for a decision through highlighting the most important points. The Advisory Committee then delivers an opinion on this draft by voting even if some members are absent. The opinion presented is collective, even if the participants disagree within the Advisory Committee. The respondents reveal that even if the Commission is not legally bound by the opinion, the Commission takes the opinion seriously into consideration. Furthermore, the respondents say that when the Advisory Committee meets they are very prepared concerning the case in question.

Authors' analysis

We have not been able to find the exact timing when the Commission actually invites the Advisory Committee. We know that it is very late in the process but yet it is uncertain *how* late. As the timeline will reveal in the next chapter (5.2) concerning the Volvo/Scania case, the Advisory Committee came into the process about a week before the final verdict in phase II. We could assume that it might vary since it is not regulated. We saw that there are close co-operations throughout the process with national authorities, and particular those Member States in which the merger concerns. If this is true, it might imply that a rather common standpoint is reached earlier in the process, or at least with the member states consulted earlier in the process. Hence, it implies that national authorities are guiding/influencing the Commission's view much earlier. Accordingly, roughly spoken, a vote against the Commission within the Advisory Committee would ultimately be a vote against themselves (at least votes submitted from Member States involved earlier in the process) as they are participants within the Advisory Committee. Nevertheless, as mentioned earlier, companies should speak to the National Authorities anyway as early as possible in the process.

5.1.6.5 Kinds of commitments

Often, the Commission has accepted commitments varying from divestitures to packages included structural as well as behavioural commitments. Examples of structural are divestitures changing the competitive structure on the market.

Behavioural remedies could for example be to charge adequate prices to competitors, which have been granted access to a network. These commitments on the other hand need future monitoring.¹¹¹

Authors' analysis

The issue of what undertakings to offer the Commission is a study in itself. Also, since it is very individual what such a remedies-package should include it is inadequate to draw general conclusions about the matter, other than it is difficult. Hence, we can only conclude that a highly complex case means obviously more complicated operations. Thus, a deeper examination of this particular issue must be considered to be beyond the scope of this thesis. Again, a general advice is to commence a close teamwork with the MTF as early as possible with the help of highly competent advisors.

5.1.7 FINAL JUDGEMENT

A full Commission could only make a final decision at this point. The possibilities are:

- 1) The concentration does not create or strengthen a dominant position. Where modifications have been made to achieve this result, the Commission might impose conditions and obligations ensuring fulfilment of the parties' undertakings.¹¹² Failure of a party to comply with an obligation demanded by the Commission results that the party is liable to a fine¹¹³ and revocation of the declaration of compatibility¹¹⁴.
- 2) Prohibition. Effecting such decision renders the parties liable to a fine to 10 percent of the aggregated turnover and exposes the risk of having the transaction declared null and void.¹¹⁵
- 3) Divestment decision, if the concentration has already been executed. Hence, the Commission could order the sale of shares or divestitures of assets to

¹¹¹ Canenbley, p.5-7, September 14 and 15, 2000

¹¹² Article 8 (2), Regulation 4064/89

¹¹³ Article 14 (2), Regulation 4064/89

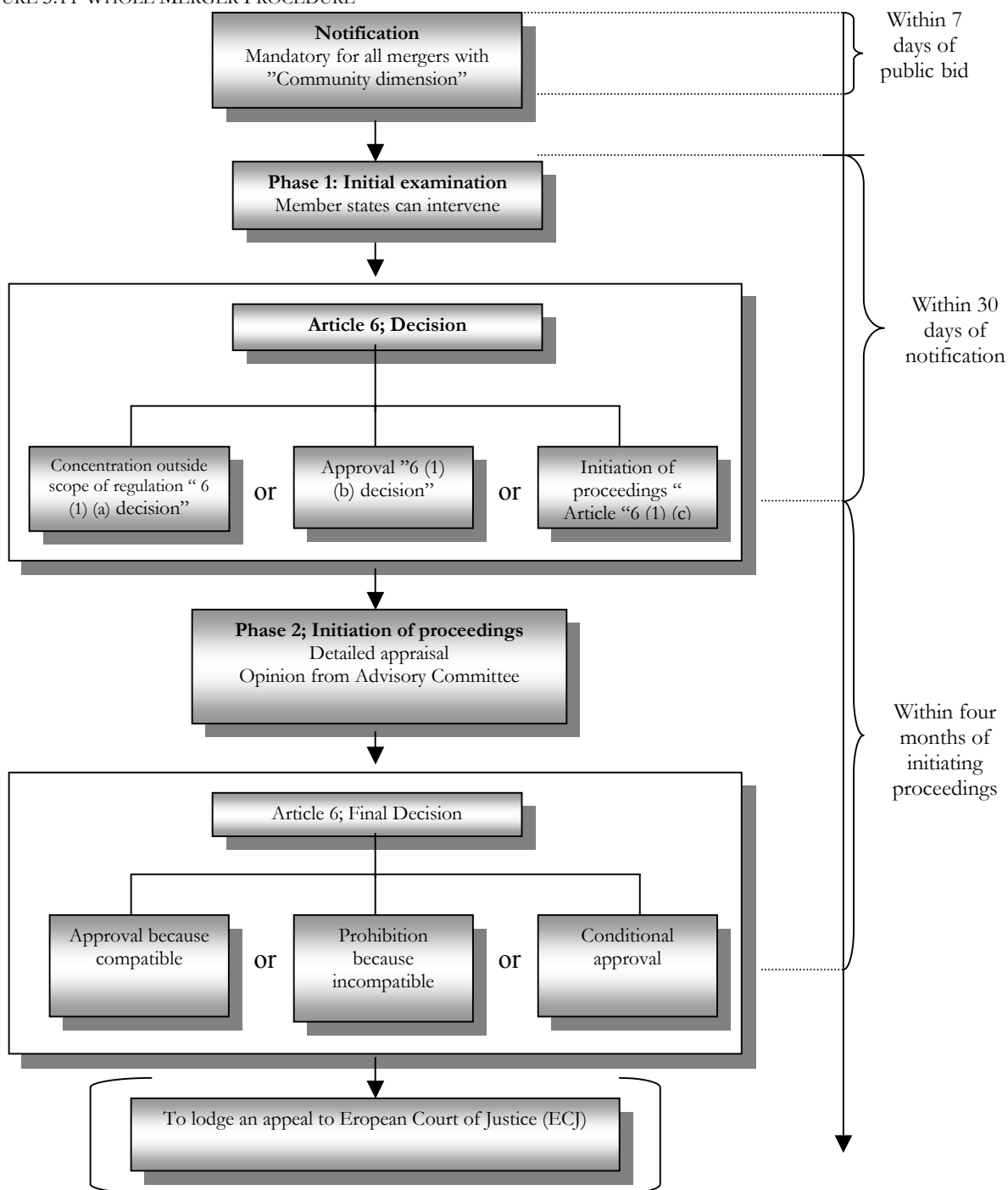
¹¹⁴ Article 8 (5) (b), Regulation 4064/89

¹¹⁵ Article 8 (3), Regulation 4064/89

replace the former conditions.¹¹⁶ To note is that the four-month time limit applying to Phase II decisions does not apply to a decision requiring divestment.

At this point, the whole process is presented. However, the last box “appealing to the Courts” is beyond the scope of the paper.

FIGURE 5.11 WHOLE MERGER PROCEDURE



Source: Own construction based on Wallace and Wallace, 2000, p 139

¹¹⁶ Article 8 (4), Regulation 4064/89

Concluding remarks

When reading these procedures, we could conclude that there is a lot of information needed to know in order to understand this phenomenon. It is an enormous amount of paperwork within the European organisation as well as for the companies. Although, we could conclude that efficiency has increased a lot within the MTF. The reason is the growing workload, without adding staff to the same extent. The tight deadlines require continuously increasing the efficiency.

5.2 CASE ANALYSIS

The purpose of this section is to analyse the selected cases examined by the Commission and thus an attempt to answer our first sub-problem. In contrast to the previous analysis we do not focus upon the procedures *per se*, rather the argumentation in the investigations. To note is that data in this section is based on the Commission's officially published case material if otherwise indicated.

How does the Commission argue in merger cases falling under Merger regulation (EEC) no 4064/89?

Firstly, a summary of the most important parts in the procedures in the Volvo/Scania case is outlined. We have chosen to raise the question of relevant geographical market, market structure and relevance of previous cases. Adding to this, points from three other cases will be highlighted in an attempt to find valuable input to understand how the Commission argues regarding these specific matters. However, as the companies involved operate in different industries the cases cannot be compared directly. Also, dependent on the nature of the case and problems raised, the Commission's attention shifts focus in its case presentation. Therefore, it may be adequate to present additional information or highlight issues not mentioned in other cases to be able to understand the sense of the case. Consequently, the emphasis in the analysis may differ. This might be fruitful in order to grasp upon the complexity of the Commission's operations. As the Volvo/Scania was our starting point, it will be given more space than the following cases.

The most important definitions from 1.5, some in a simplified version, are outlined below along with some additional concepts.

- *Community Dimension* involves cases that give the European Commission the powers to handle them.¹¹⁷
- *Entry barriers* are obstacles remaining for actors wanting to enter markets. It could be a question of tangible, e.g. licenses; as well as

¹¹⁷ For further explanation see 5.1.1, Community dimension and concentration

intangible barriers such as access to distribution networks. It is sign of that markets do not function as one single market in reality.

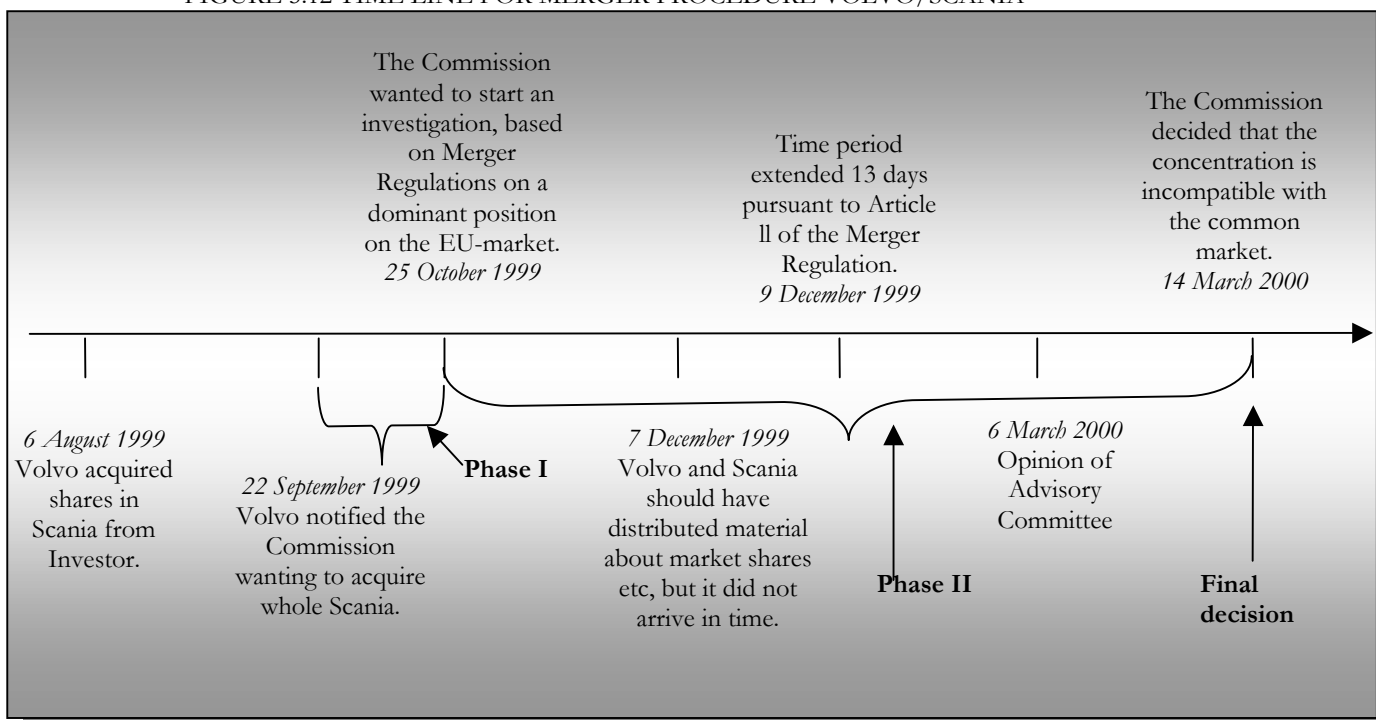
- *Parties* are the company notifying the merger and consequently the ones that the Commission negotiates with.
- *Relevant Product Markets* are products and/or services, which are regarded as substitutable by the consumer.
- *Relevant Geographical Markets* consist of the areas in which the companies concerned are involved in, in which the conditions of competition are homogeneous and could be distinguished from neighbouring geographical domains.
- *Third parties* include customers, competitors and suppliers or other parties having a particular interest directly connected to the intended merger.
- *Undertakings* are commitments submitted by the company in order to have the merger approved by the Commission.¹¹⁸

5.2.1 VOLVO/SCANIA

To connect to the previous chapter (5.1), an illustration of the timetable in the Volvo/Scania case is illustrated below. It is a practical example, which travelled through all previously discussed stages. The formal starting point was 6 August 1999 when Volvo acquired shares in Scania and the notification was made 22 September the same year.

¹¹⁸ For further explanation see 5.1.6.5, Kinds of commitments

FIGURE 5.12 TIME LINE FOR MERGER PROCEDURE VOLVO/SCANIA



Source: Own construction

5.2.1.1 Presentation of Volvo

Volvo is a Swedish company focusing on transport solutions for commercial use and have five business areas: Trucks (manufacture heavy trucks weighing more than 16 tonnes, but also medium heavy trucks weighing between 7 and 16 tonnes, adding to that related services and financing), Buses (Volvo manufacture buses and bus chassis for city, inter-city and tourist purposes), Construction Equipment (manufacturing and sales of a variety of construction equipment, Marine and Industrial Power Systems (through a wholly owned subsidiary, Volvo Penta, Volvo develops, manufactures and markets drive systems for marine and industrial applications) and Aero (development, production and maintenance of military aircraft as well as production of components). Volvo was founded in 1927 and have today approximately 55 000 employees in more than 30 countries around the world, and in 1999 the Volvo Groups' total sale amounted to SEK 125 billion.¹¹⁹

5.2.1.2 Presentation of Scania

Scania is a Swedish company that manufactures and sells heavy trucks (with particular focus on heavy trucks weighing more than 16 tonnes), buses, and marine and industrial engines. Services such as financing and maintenance are also

¹¹⁹ www.volvo.com, September 19, 2000

an increasing part of Scania's core business. The company was founded in 1891 and has today 23 500 employees in more than 100 countries. Scania has been the representative for Swedish Volkswagen AB for approximately 60 years, to distribute passenger cars and light commercial vehicles in Sweden. Net sales in 1999 was approximately SEK 47 000 million.¹²⁰

5.2.1.3 Why merging¹²¹

Volvo's main argument for acquiring all Scania's shares from Investor was that they wanted put increased focus on their buses, trucks and engines. This merge would also strengthen Volvo's ability to become more competitive on the emerging markets for heavy trucks in Eastern Europe, Asia, former Soviet Union and South America. Volvo argued that investments of this kind were necessary in order to enter these markets and to become competitive not only on a European level but also on the global market, on which they compete. The two areas affected by the merger would be trucks (mainly heavy trucks), and buses (inter-city buses, city buses and touring coaches). As a result, the effects would also be in the engine-sector. The intended merger would create Volvo/Scania the Europe's largest manufacturer of heavy trucks.

How was the relevant geographical markets defined?

This evaluation is crucial, since the differences are of decisive importance. Hence, if the relevant geographical market rests upon national scope, the merger between these two companies would reach 92 percent market share in Sweden, and well over 70 percent in the rest of the Nordic Countries. On the other hand if the relevant geographical market would be considered to be worldwide or at least within EEA, the competition pictures obviously become different. The Commission considered the relevant geographical markets to be national and countries subject for investigation was Sweden, Norway, Finland, Denmark, U.K. and Ireland. The reasons for this definition were:

¹²⁰ www.scania.com, September 19, 2000

¹²¹Case No Comp IV/M.1672 Volvo/Scania, March 15, 2000

Purchasing is largely done on a national level for following reasons:

- Price variations between Member States and even neighbouring countries.
- Customer preferences; models and technical configurations in the Member States reflect considerable variations.
- Technical requirements vary between Member states.
- Purchasing is done on a national basis due to after-sales service support, risk of reduced second-hand value of privately imported trucks etc.
- Distribution and service network; after sale services, second-hand value and warranty conditions which furthermore is reflected in the brand name. These factors are moreover considered to be high barriers to enter in each of the countries for potential competitors.

How was the market structure defined?

Following the definition of relevant geographical market, the examination continued by evaluating current market structure. Points highlighted were market shares, power of brand name, brand loyalty and service network in country by country. Both Volvo and the Commission conducted market research about these issues. The aim of the econometric study conducted by the Commission was to directly measure the effects of the merger on the prices charged by producers in various national markets. The calculations are based on a “*nested logit model*”¹²² where certain parameters relating to pricing decisions of firms and to buying decisions of customers. These factors are estimated from prices, market shares and other variables. The results from this estimation were used to simulate the price effects of the merger of the combined entity and its competitors. However, the Commission disregarded both reports and concludes “*the shrinkage effect of the market might be of a much smaller size than that claimed by Volvo*”.

Authors’ analysis

Interesting to note was that also the econometric study done by the Commission itself was ignored due to Volvo’s objections of validity. Thus, the decision was not based on the econometric study conducted by the Commission nor Volvo. Nevertheless, the Commission estimated that competition would be distorted in

¹²² Case No Comp IV/M.1672 Volvo/Scania, March 15, 2000

the examined countries. We assume that if two studies of this kind are conducted with different data and assumptions as input, gives different results. Also, bearing in mind that the issue was future predictions, where no actual valid data is available.

Did previously decisions apply?

An interesting case is the Mercedes-Benz/Kässbohrer¹²³, which the Commission claimed was incomparable to Volvo/Scania. Nevertheless, the Commission found that there were intangible barriers to entry as well as tangible similar to those found in the investigation in the Volvo/Scania merge. The Commission concluded in that the potential competition together with the present actors were sufficient for not creating a dominant position, since the tangible entry barriers could be overcome and the intangible barriers were expected to lose significance. However, the main argument to clear the case was based on a so-called “*failing doctrine*”¹²⁴ meaning that Kässbohrer was on its way to bankruptcy.

Another case, which was referred by Volvo, was the Renault/Iveco¹²⁵ case. The Commission in this case found that the relevant geographical market was EEA-wide in scope. The Commission considered levels of import penetration of non-national manufacturers to be relatively high in France and in Italy, between 65-70 percent. In the Volvo/Scania case, the import levels were 40 percent in the United Kingdom and in Finland 10 percent, which thus were significantly lower. Accordingly, the Commission did not accept the market definitions as comparable.

Authors’ analysis

Entry barriers were found in the Mercedes Benz/Kässbohrer case but the *estimation* of their importance varied compared to Volvo/Scania. This implies very subjective guesses. There are a lot of factors that the Commission needs to take into consideration. Therefore, even if the Commission “guesses” in one issue, one should remember that it is only one aspect of the case. Mercedes/Kässbohrer was

¹²³ OJ L211, 6.9.95

¹²⁴ Respondents

¹²⁵ Case No Comp IV/M.1202 Renault/Iveco, October, 1998

cleared because Kässbohrer needed a partner to survive. Concluding this fact, the rest of the arguments were probably less relevant.

In the Renault/Iveco case, the import level was stressed. Low import levels indicate low trade and are indications of that entry barriers for actors exists.

The conclusion must be that if companies should were to rely on previous decisions, they should scrutinise the details. Besides, one needs to know how much weight the Commission put in every factor of consideration for the actual decision. This would most likely vary dependent on the nature of the case in subject and is therefore very difficult to predict. Consequently, in the Volvo/Scania case, previous cases did not apply or could not be comparable. Finally, the Commission did not accept any arguments at all that the parties submitted.

5.2.2 INTRODUCING THREE OTHER CASES

Except the Volvo/Scania case above, we have chosen three randomly picked cases, where the Commission opened full investigation. These cases are all approved with undertakings. Thus, the parties made a proposal in order to maintain the competition conditions after the merger. The aim is to capture indications of the Commission's way of conducting analysis concerning specific matters outlined under the headings in the Volvo/Scania case. The first case is Monsanto/Pharmacia Upjohn active in the pharmaceutical industry. Secondly, a merger in the telecommunication industry is examined, namely Vodafone Airtouch/Mannesmann. Finally, Sara Lee/Courtaulds active in the textile market.

5.2.2.1 Monsanto/Pharmacia Upjohn¹²⁶

The actors are U.S. companies active in world-wide manufacturing in the pharmaceutical industry. Pharmacia Upjohn was created in November 1995 through the formation of Pharmacia Aktiebolag and the Upjohn Company.

How was the relevant geographical markets defined?

Before defining the geographical market, a prerequisite is to divide the product market first, which also could be subject for disagreements between the parties

¹²⁶Case No Comp IV/M.1835 Monsanto/Pharmacia Upjohn, March 30, 2000

and the Commission as in the Volvo/Scania case. However in this case, this issue was not a problem. The Commission refers to 15 previous examined cases, where the relevant product markets in the pharmaceutical industry have been divided into pharmaceutical specialities, active substances and future products. Thus, this was also the definition here.

Pharmaceutic specialities

Entry barriers were found because of 1) sales influenced by administrative procedures or purchasing policies, which national authorities have introduced in different Member States. 2) Price differences, 3) Brand and pack-size strategies, 4) Distribution systems

Moreover, the Commission stated that it previously defined the markets as *national* and therefore the relevant geographical should be the same in this case.

Active substances

The Commission refers to two previously case decisions where the relevant geographical market is defined as at least *EEA-wide*.

Future products

National restrictions do not have the same degree of effectiveness than for existing pharmaceuticals. Due to the fact that these products are not yet registered because R & D is normally global, the consideration of future markets should therefore at least focus on the territory of community and possible *worldwide*.

The important topic was to place the large amount of products under the above-mentioned product groups. Concerning this issue the Commission accepts the parties' arguments of classifications referring to the Commission's market investigation, previously decisions and third parties. The Commission accepts the actors' arguments except for one occasion when they argue that low barriers to enter exist in some countries. The Commission disagrees concerning this issue and therefore, as previously mentioned, considers that relevant geographical market should be considered *national* for the first product group. As a result, the parties

were found to dominate this product group in a few countries. Consequently, the parties offered undertakings, which the Commission accepted and could approve the merger. Third parties in the replies to the Commission's market tests also accepted this undertaking.

How was the market structure defined?

In this case, the Commission left the current market shares to be defined by the parties, and where it was found that the merger would be dominant, the undertaking cleared the doubts. Hence, the Commission did not refer to any new market investigations.

Did previously decisions apply?

The Commission refers to 15 cases in total of defining the relevant product and geographical markets. Hence, former considerations assisted to evaluate relevant product and geographical markets.

Authors' analysis

In this case we can conclude that the Commission is very experienced in the area, due to the enormous amount of merger cases that have been executed in this industry. The Commission is able to support its decisions with previously evaluations, which the parties involved accept as well as third parties. The more opportunities for the Commission to investigate certain industries the more convincing and clearer are the arguments. It is therefore advisable to examine previous decision, but again scrutinise the details.

Moreover, throughout the whole investigation, the arguments are accepted by the Commission and vice versa, in contrast to Volvo/Scania, where the parties disagreed about all issues raised. Thus, we could determine in this case, a rather smooth dialogue between the parties and the Commission was present. An example is that the parties submit market investigations and accepted by the Commission, and overall accepts most of the arguments and reports presented by the parties.

Another remark is that entry barriers were found again and the relevant geographical market was thus considered to be national in scope. An assumption from this case may be that if the company could show the same definition of relevant product markets as the Commission has used frequently in previous decisions, the company may argue for a larger market. Another issue is the question of industry maturity. If products are subject for research and development and thus not yet launched the relevant geographical market could be considered to be world-wide. The same goes for immature industries such as the telecommunication sector as we will see in the following case.

5.2.2.2 Vodafone Airtouch/Mannesmann¹²⁷

Vodafone Airtouch is an UK-based company involved in the operation of mobile telecommunication networks and related telecommunication services. Mannesmann is a German-based engineering and telecommunication company and the core activities are in the telecommunications sector related to mobile and fixed line telephony.

How was the relevant geographical markets defined?

The service markets in this case was divided into: 1) Mobile Telephone services 2) Advanced mobile telecommunication services to internationally mobile customers 3) Mobile telephone headsets and network equipment.

The parties and the Commission in conjunction with third parties are defining the first category to be national in scope due to that licenses are regulated on a national level, which therefore is considered to be a barrier to enter. Regarding this definition, the Commission in addition referred to a previous case. In the second grouping, the Commission indicated that the market is national in scope. However, third parties argue the market to be at least pan-European. The Commission leaves in this group the definition of relevant geographical market open, due to that the assessment would not change either way. Considering the final product group, third parties argue that the scope of the market would be global, however, the Commission leaves this open as well.

¹²⁷ Case No Comp IV/M.1795 Vodafone Airtouch/Mannesmann, April 12, 2000

How was the market structure defined?

Following the definition of relevant geographical market in mobile telephone services, which was found to be national, the Commission found that the merger would be dominant in two countries. The parties consequently offered undertakings that were sufficient to clear the merger. In the other service categories, the Commission found that the merger would not create dominated position on the global market and states “even if the market would be considered to be Pan-European, it would not change the decision”.

The future market structure after the merger is estimated in different arguments put forward by third parties, the Commission and Vodafone. The estimation is though not presented in numbers. Regarding this matter, third parties are often referred to e.g. *“third parties estimates that it is likely to take on average 3-5 years for the merged entity’s competitors to replicate, if at all”*. The Commission, comments that third parties could try to achieve the same, by means of mergers and acquisitions. Although, the market investigation has shown that a number of problems arise. Examples were that it would be time consuming, regulatory delays and the need for divestments due to anti-competitive overlaps would arise. Moreover, the merged entity would be the only mobile operator to capture future growth through new customers since new customers would be attracted by the services offered by the entity.

Another question highlighted about future market structure was the question about the merged entity’s purchasing power, suggested by third parties. They argue that the services in the 3rd grouping may be dominant in the markets for acquiring mobile handsets and network equipment. The Commission replies the market investigation to reveal that the suppliers in general believe that the merged entity would face strong competition from other mobile operators and consequently would not enjoy a dominant purchasing power. Therefore, the conclusion was that the advantages for the merged entity seemed to be limited for obtaining higher rebates when purchasing larger quantities of handsets. However, the market investigation showed that the entity would be a strong buyer in future, but the large number of powerful buyers in the market compensated these

worries. Hence, the entity would not achieve necessary buying power to become dominant for purchasing.

The conclusion was that no creation of dominant position was found globally, even if the market would be looked upon as pan-European, it would be the same end result.

Did previous decisions apply?

In this case, the Commission does not refer to former cases.

Other remarks

An observation not discussed in the above presentation but is interesting: The parties submitted that a single interconnected Pan-European network not was likely to develop imminently. The Commission replies with an article where the CEO of Vodafone states that: *“The merged entity will be able to provide a global platform by mid-2000 that will provide messaging services, location based content and mobile e-commerce in a uniform manner on a global bases”*. In the next paragraph Vodafone declares that other competitors will be in a position to provide services on the same scope in the near future. However, the Commission once again replicates with an article in Fortune in which the CEO again states, *“that the merged entity will have an unrivalled power to sell seamless pan-European services with pan-European rates”*.

Authors’ analysis

The above statements reveal that companies need to be very careful what they communicate to media before the Commission has given its blessings. It seems to be dangerous to make visionary statements about the future merger implying market dominance, because it could always be used against you.

In this case we could conclude that the Commission does not exactly define the relevant geographical markets. However, again, the Commission leans towards a narrower market definition than the parties as well as third parties. The issue is left open, partly due to that arguments provided by third parties and the Commission’s’ underlying opinion does not synchronise. But, the conclusive reason was that most likely that the industry still was immature and thus not

necessary to define exactly. Furthermore, the Commission discusses the future structure a lot even though it seems that they are relatively inexperienced within the area, shown by the absence of references to previously case decisions. These speculations are not based on, at least visible data, again subjective estimations. We could conclude that when the markets are immature, the need for advanced market estimations backed up with many arguments is less.

5.2.2.3 Sara Lee/Courtaulds¹²⁸

Sara Lee was established in the U.S. They are engaged in the production and marketing of consumer-packaged goods, including foods and beverages, personal apparel and household/body care products. Courtaulds was established in the U.K and engaged in manufacturing of personal clothing, household furnishings and fabrics. The parties have reported an overlap in the production and sale of hosiery and intimate apparel goods.

How was the relevant geographical markets defined?

The Commission consider the relevant geographical markets to be *national* based on entry barriers consisting of 1) Brand loyalty 2) Consumer preferences 3) Suppliers' market shares differs between member states 4) Distribution centres 5) barriers for actors due to high costs e.g. advertising.

How was the market structure defined?

The Commission's analysis of the competitive situation is based on "*the retailers market shares with the sale of private label products being attributed to the retailers and not to the producers*". According to the Commission, this definition is in line with an analysis used in a previous decision.

The parties argue that barriers to entry into the hosiery market are low. This is due to 1) cross-border expansion by existing manufacturers 2) retailers entering and expanding aggressively in the promotion and sale of private label merchandise 3) total costs are low due to readily available raw materials, distribution facilities may be leased in conjunction with the products being easy to handle. Moreover, unique facilities or other requirements for the distribution are not needed.

¹²⁸ Case No Comp IV/M.1892 Sara Lee/Courtaulds, August 5, 2000

The Commission opposes by stating that stagnation of the retail hosiery sales combined with over capacity of production does not attract potential entrants, as expected profits are low. Furthermore, high cost of marketing and promotion necessary to enter into the market makes entry less likely.

In this case, the Commission allowed the current market shares to be defined by the parties measured within range. Within this range the Commission based the estimation on “worst-case basis”, consequently the highest market shares were used. The Commission explained that market shares for wholesale data often are kept confidential; therefore it concluded that the parties provided the best estimation of market shares. The Commission notes that the data was presented by Taylor Nielsen and HM Customs and Excise and Product Sales and Trade; UK Markets.

The parties offered undertakings, which were accepted by the Commission. The Commission stated that a divestment by a well-known brand name could allow a new entrant to develop its position immediately.

Did previous decisions apply?

In this case, the Commission does not refer to former cases.

Authors’ analysis

We could view that the parties had external consultants to provide valid data. Using external independent consultants is a way of strengthening the arguments behind.

Concluding thoughts

We could conclude that when estimating market shares, it might be advisable to use external independent consultants that could provide substantial information. Nevertheless, many issues discussed are very subjective. Therefore, companies need to rely on that the Commission is highly competent and wants to learn more from the company. The company must stress the business perspective. At the same time, they need to understand that the Commission has a consumer perspective in combination with rule-based activities.

We could view that the Commission seem to do its utmost in order to solve the problems raised. There is no answer of as to the kinds of undertakings companies should offer to satisfy the Commission. Firstly, it depends on the specific market conditions. Secondly, it is a negotiation process where the company needs to argue well for its case. We could say that the company needs to be “creative” to find which undertakings to provide combined with good arguments. A well-prepared case will most likely give positive results.

5.3 POWER OF THE ACTORS¹²⁹

Besides the internal actors, we have identified five external groups that we found appropriate to highlight. These actors do directly or indirectly influence the procedures; national authorities, interest groups, third parties, media and external countries outside EU, such as the US. Important to note is that when describing these actors, we basically refer to their relationship with the MTF. The internal actors have already been introduced in the theoretical framework. Therefore, we start off by briefly introducing the external actors discovered in the research and why these are relevant for the procedures. This is followed by an attempt to answer the beneath stated sub-problem.

What power do internal and external actors have in the merger procedures within the European Union?

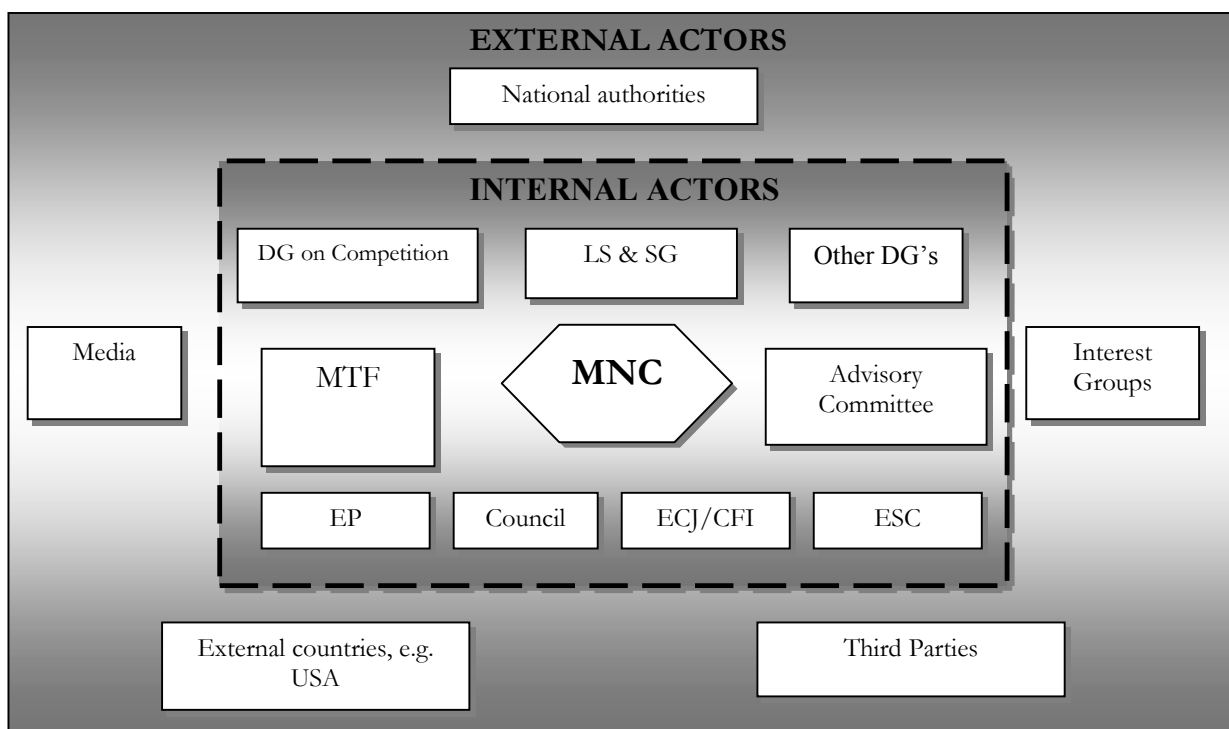
In the problem we have stated the word “power”. However, sometimes it might be more adequate to discuss the “role” or “influence” of particular actors. We will therefore use the different words depended on which find most appropriate.

The power of the actors might change during the procedures. We therefore make the analysis in a time perspective following the procedural stages. All actors that are of relevance in that particular part of the process are discussed. It is an attempt to show how the power shifts/varies among the actors in different stages. We do not state whether the actor influences the procedures directly or indirectly.

We will also identify persons currently in charge within the MTF. The actors involved during the different stages will be highlighted in the models beneath the text in every step. If a particular actor’s power does not change as we travel through the procedure, it will not be presented in text once again but in the figure as transparent. All data in this part is from our respondents unless otherwise indicated. We begin by illustrating the model as whole.

¹²⁹ Interviews or previous analysis unless otherwise indicated

FIGURE 5.13 ACTORS WITHIN THE MERGER PROCEDURE



Source: Own construction

5.3.1 IDENTIFYING EXTERNAL ACTORS

The respondents say that *national authorities* are normally Competition Authorities in the different Member States, or “Competent Authorities” as the Merger Regulation defines it¹³⁰. Accordingly, they assure that competition is not distorted on the domestic market in each Member State. How national legislation is compared with EU regulation varies all over the Union. The respondents reveal that historically, many countries have favoured their own national champions, which may create uncertainty between national legislation and EU legislation.¹³¹

We have placed lobbying companies and interest associations within the actor *interest groups*. According to the respondents they are actively working with stressing areas in the Competition Policy of particular interest to businesses. These actors are thus influencing the procedures in a long-term perspective. *Third parties* are customers, competitors and suppliers or other parties having a particular interest directly connected to the case in question¹³².

¹³⁰ Article 9 (1), Regulation 4064/89

¹³¹ For theoretical support see 4.7 European Parliament and Council of Ministers

¹³² For support see 1.5 Definitions

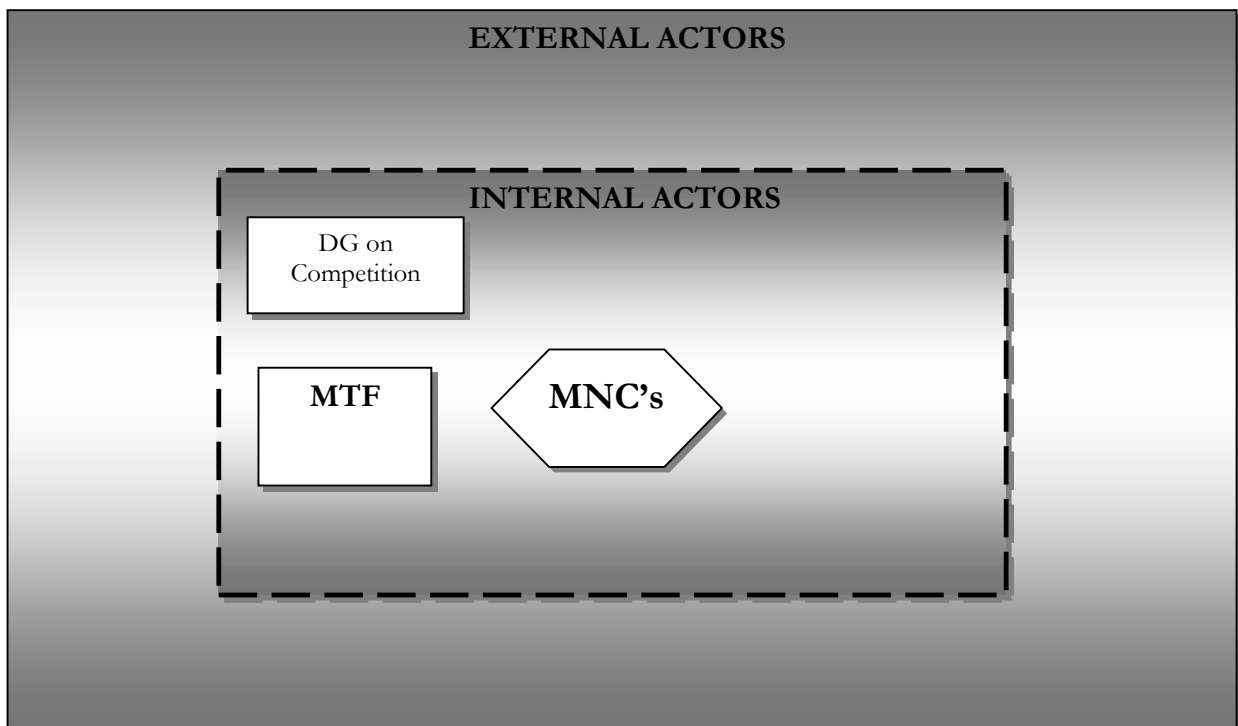
External countries' competition authorities are chosen based on the respondents' remarks, where it is revealed that competition authorities within these countries are exchanging information, so called "wavers", with the DG on Competition. This means data particularly about cases where affected markets concern other countries outside the Union.

We have recognised that *media* has a role by the respondents statements but also by own observations. Competition authorities within the EU are debated, as previously mentioned in the beginning of this thesis. In addition, we have noticed that Mr Mario Monti is rather generous with providing public information about the activities within the area of Competition. One example is announcements of the immense workload within the Commission¹³³.

5.3.2 PRE-NOTIFICATION MEETINGS

Few actors are active in this process based on the secrecy needed for the sake of the companies. At this stage it is only DG on Competition and MTF involved in the process together with the company.

FIGURE 5.14 PRE-NOTIFICATION MEETINGS



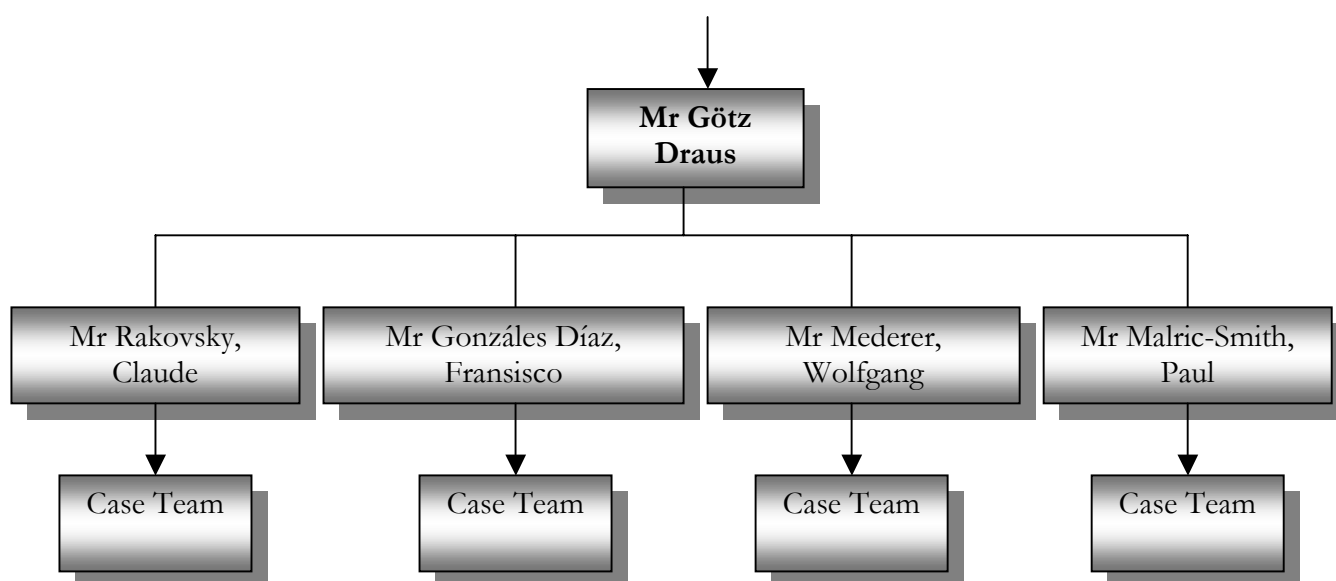
Source: Own construction

¹³³ Financial Times, Hargreaves, September 18, 2000

5.3.2.1 DG on Competition and MTF

The role of the Director for MTF, currently named Mr Götz Drauz distributes the case in his organisation. The next actors to appear in the hierarchy are four heads of units, each responsible for one sub-unit illustrated below. The head of the unit decides who will be in the case-team including a responsible *rapporteur*¹³⁴. Cini, and Mc Gowan state that the *rapporteur* might have more power than other members in the team. However, our interviews did not indicate this.

FIGURE 5.15 ORGANISATION IN MERGER TASK FORCE



Source: http://europa.eu.int/comm/dgs/competition/directory/organi_fr.pdf, November 21, 2000

Authors' analysis

This implies that the actual power lies within the senior level as also indicated in the previous analysis. As soon as the case team is settled, a lot of power is transferred in the hands of the officials. We assume the case-team is settled as soon as the company is ready for pre-notification meeting. We have the same opinion as Cini, Mc Gowan that the *rapporteur* most likely are the one holding more power than the rest of the members of in the case team. The reason for this is that the *rapporteur* monitors who will be included in the case team and why.

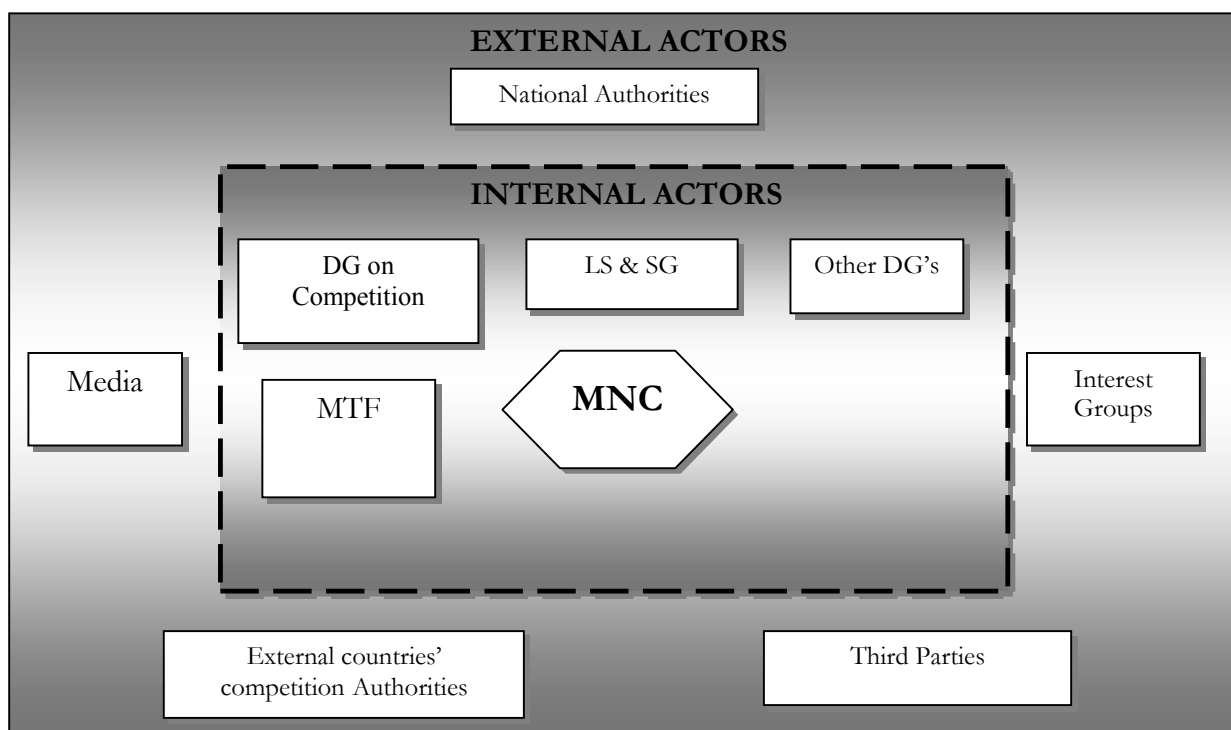
As the respondents revealed the case team has the central role in performing the analysis including whom to consult. Thus, once the case team is settled a great deal of power lies here throughout the whole process.

¹³⁴ For theoretical support see 4.1.1 Organisation of DG on Competition

5.3.3 PHASE I INVESTIGATION

Once the notification is submitted, the case automatically enters phase I investigation and should be examined as soon as it is received.

FIGURE 5.16 PHASE I INVESTIGATION



Source: Own construction

5.3.3.1 DG on Competition and MTF

The *rapporteur* is given a central role co-ordinating the case-team that should conduct the actual analysis. The *rapporteur* also decides whom within the DG on Competition to consult. This is in order to get expertise input, which normally other DG possesses. In addition, Mr Monti is continuously informed in all cases. In complex cases he could receive several notes per week. Therefore, he does not discuss a case with the parties without being well briefed by the *rapporteur*. To note is, if he meets with the parties, it is done together with the head of units and Directors inside the DG on Competition. Furthermore, revealed by the respondents, Mr Monti very seldom opposes the draft decision from the case teams.

Authors' analysis

This implies that Mr Monti influences the case team continuously in the process if needed, so when the final decision is on the table, the case team together with Mr

Monti have already reached a common standpoint and cleared possible disagreements. It could be interpreted as the reason for why Mr Monti seldom challenges the case team on the final day, when he signs the decision. Therefore, we argue that the most important actor for the company in the Phase I investigation is the rapporteur with its the case team within the MTF. The Commissioner functions accordingly as the supervisor throughout the process including the pre-notification meetings.

5.3.3.2 Legal Service and Secretariat-General

As illustrated in the picture above, the Legal Services' role is the background player who always plays a supervisory role in the Commission's activities. They are the independent actor investigating all decisions taken in the Commission to ensure its compatibility with the EEC Treaty¹³⁵. The respondents say that the Legal Service attends the DG on Competition's weekly meetings, Thursday afternoons, and everything takes place in written form "*which obviously differs from the Swedish governments' handling of cases.*" The respondent's reveal that Legal Service has the right to use a veto if the decision taken by the Commission does not fulfil the above-mentioned requirement. The power of this actor is highlighted by our respondents, who stated "*The Commission must not fail.... look what happened with the former Commission, they were suspended!*" The Secretariat-General also performs in the background with only co-ordinating functions¹³⁶.

Authors' analysis

The role of the Legal Service could be defined as the most effective sparring partner towards the Commission. It will also defend the legality of any Commission decision in Court. This indicates that they need to actually defend their own work.

The weekly meetings seem to be a possibility for the Legal Service to be up-dated by the DG on Competitions' activities. Also, it implies that security for the companies is provided through this actor, ensuring the decision to be taken correctly based on the Merger Regulation. The Legal Service cannot influence the decision directly in the ongoing process. However, we could argue that the

¹³⁵ For theoretical support see 4.3 Legal Service and The Secretariat-General

¹³⁶ Ibid

meetings with the Legal Service might affect the Commission if they are on the “wrong track”. Furthermore, if their veto is used on a final decision, it naturally results in consequences for the company’s strategy. Yet, one could assume that the power executed concerning particular case decisions, is used with caution since it could result in devastating consequences for all actors involved.

5.3.3.4 Other Directorate-Generals

According to our respondents, dependent on the nature of the case, the intensity of relations with other DG’s differs. Once the company made its notification, exchanging of information starts. For example, the notification itself is sent to DG’s outside DG on Competition. Also, they have an expertise within specific areas that the MTF do not possess. Also, DG’s within DG on Competition are important partners concerning exchange of information.

According to Cini and McGowan, DG II (Economic Affairs) and DG III (Industry) have a close relation with DGIV (Competition) and have taken a serious interest in merger cases and often offer advises to the MTF. Furthermore, as stressed by the same authors, DG III sometimes has different opinions since they might favour “European Champions”, which is a different perspective than the MTF. If these disagreements appear the Commissioner could take help from other colleges in the Commission.¹³⁷

Authors’ analysis

We assume that primarily DG’s inside DG on Competition have a close relation during this phase. As we saw in the analysis of the procedures 5.1, it might be for example that national authorities should handle the case. This is discovered in the first phase. Furthermore, MTF obviously turn to other DG’s outside DG on Competition if they lack expertise. This suggests that other DG’s could influence the MTF particularly in big merger cases. Where the company’s markets cross several areas, they could play a strong role. Therefore, they could influence the MTF on for example how the market should be defined. To sum up, the role is to provide the MTF with expertise knowledge that they lack. Once this is provided their actual power might be limited.

¹³⁷ For theoretical support see 4.1 The Commission’s DG on Competition and the MTF

5.3.3.5 National authorities

According to the Merger Regulation, national authorities play the role of notifying the Commission whether the merge distorts competition or not on the national market. Furthermore, the Regulation states that a case could be delegated to National Authorities if the market is “distinct”. According to the respondents, the reason for National Authorities to demand that it be delegated to them is when they want stricter judgements, never the other way around. An example is Germany, who argues that their legislation is more rigorous than the EU’s. Moreover, the respondents’ state the role of national authorities is mainly to be informed and provide important information, concerning e.g. market structure. Nevertheless, as a decision maker on the “home turf” they should be included as an important actor according to our respondents.

Authors’ analysis

From the above said, we observed that National Authorities play an advisory role in the procedures, except from when cases are delegated to them. In those cases, the relationship between the Commission and National Authorities is reversed. Hence, the Commission has the advisory role.

5.3.3.6 Third Parties

Third parties include, as previously mentioned competitors, customers and suppliers. The stress respondents especially that customers are given particular attention, which also is stressed in the TEEC¹³⁸. However, third parties could also include other parties that might have particular interest in the intended merger. As mentioned in the previous analysis, they are allowed to state their view already in the first phase investigation. Their role is to provide the MTF with relevant data.

¹³⁸ For support see 3.1 The purpose of free Competition

Authors' analysis

This implies that third parties could be important influences for the direction of the case. If highly relevant data is submitted and having strength in their arguments, they might play a very strong role. Thus, as previously mentioned, the company should not underestimate efforts made by particularly competitors, who might be most eager to provide information.

5.3.3.7 Media

Once the notification is made, it is published in the Official Journal. This could lead to attention in the media. There is always a risk/opportunity that companies active in the merger procedures use media as a tool to argue for their case. The Commission's policy is not to discuss any case in the middle of a process. The respondents reveal that Mr Mario Monti is having a great deal of media contacts himself in comparison with other Commissioners. His statements are diplomatic, and are of a general opinion, and not in specific matters. The respondents state that the previous Commissioner Karl Van Miert used the press of arguing his case in public. One example is the controversial decision in the Boeing/Mc Donnell Douglas case. The Commission gave daily information to Financial Times while the parties talked with Washington Post.

In addition, Mr Mario Monti has two spokesmen, whose role is to satisfy the hunger for information on cases. Other respondents imply that the press is often able to obtain remarkably good information on cases in process. Third parties could also use media in order to highlight issues they find relevant in order to obtain the attention from the Commission.

Authors' analysis

If a case turns out to be controversial we assume that the Commission might use media to replicate to critics and defend the decision taken afterwards. The Article at the beginning of this chapter could be interpreted as that the Commission uses media to encourage the general public to submit reports about ongoing cartels. As we have understood it, the Commission definitely do not have enough resources to fight these problems themselves. Moreover, as we saw in the case analysis, statements made by the company itself to the media could be used against them.

We could conclude that media does play a role in the ongoing process if the company (ies) make statements (during or ahead of the procedures) that the Commission might use against them. Therefore, we argue that if the Commission were influenced by actions taken by the parties, it would only be negative since prestige might be included. In summary, the role of media should not be underestimated, given the number of people that have information; Commission officials, national authorities of 15 member states and third parties.

5.3.3.7 External countries

According to our respondents, the Commission have good relations with countries such as the US. It is revealed that overall US have the same practices as the EU merger control. Once the notification is made, the US competition authorities and the Commission try to find a united attitude to the merger. This applies when the merger affects a global market or when it concerns markets outside EU. To note is that the information exchange never include confidential information. The respondents exemplified this co-operation with the Boeing/McDonnell Douglas case: *“In this case Karel van Miert and the Merger Task Force stopped the merger without hesitation, it resulted in that Boeing had to make certain undertakings. This shows how important it is with a central Authority that could block these kinds of huge projects.”* Furthermore, the respondents say that reasons for why this co-operation is running so well is: 1) Nobody question each others’ legislation 2) Nobody questions each others’ competence to execute the legislation 3) Nobody question each others’ results.

Authors’ analysis

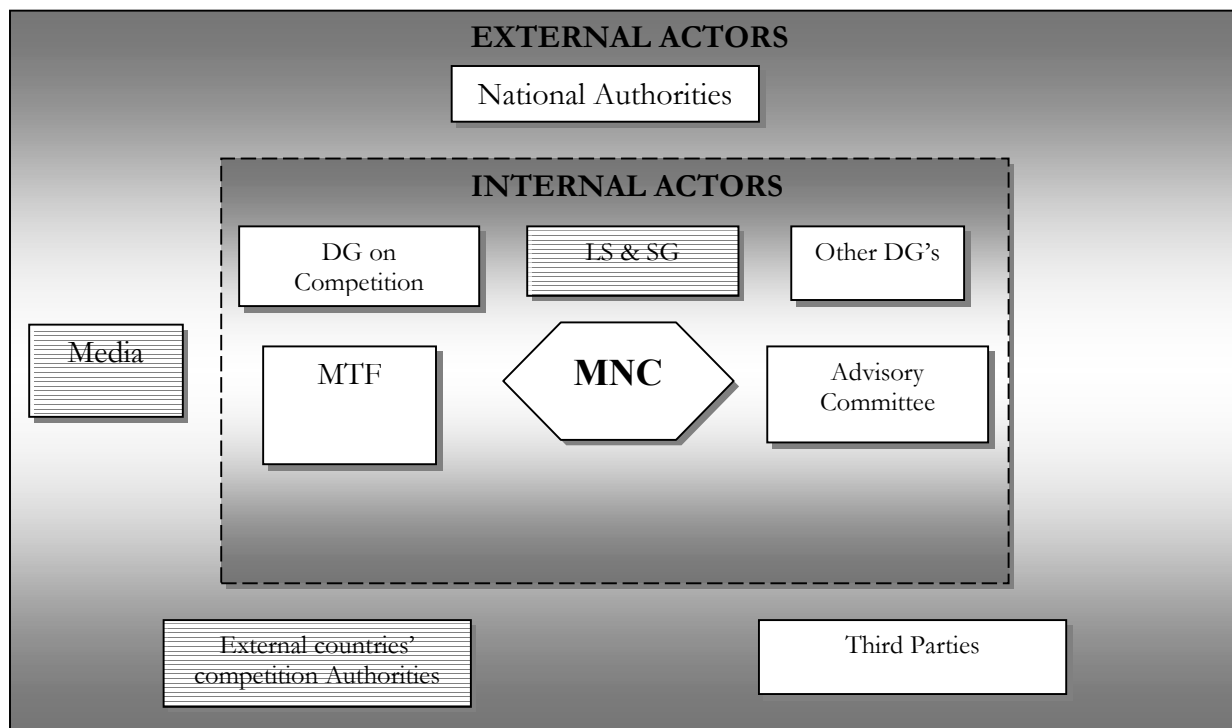
From this above discussion we argue that external countries play a role when the merger affects external countries’ markets¹³⁹. However, the actual power regarding the European markets lies with the MTF.

¹³⁹ For support, see 3.6.4 News in annual report on Competition Policy, 1998

5.3.4 PHASE II INVESTIGATION

If the Commission comes to the conclusion that the case raises serious doubts on some markets, the case might proceed to a second phase investigation.

FIGURE 5.17 PHASE II INVESTIGATION



Source: Own construction

5.3.4.1 DG on Competition and MTF

The MTF have an enormous power to undertake all investigations they find necessary. The role is to examine all information collected from the companies as well as third parties and national authorities. As discussed in the previous analysis, the MTF also has the power to make “dawn raids”.¹⁴⁰ They could thus enter the company and collect all information they find relevant, if they believe that the company has provided misleading information. According to our respondents, currently, there are discussions about if the MTF should have the power to approach individual persons’ “... if the Commission seriously suspects that important evidence to the investigation might be hidden in peoples homes...”

Also as revealed in the previous analysis, the company could ask for an oral hearing¹⁴¹. The hearing is lead by a *hearing officer*. The respondents reveal that the role of this actor is to co-ordinate the hearing. This means that this person is

¹⁴⁰ For support see 5.1.6.1 Powers of the Commission

¹⁴¹ For support see 5.1.6.3 Oral hearing

giving an impression on the crucial issues, preparing the final report and commenting on the Commission's draft decision. The selection of the hearing officer is done by the DG on Competition, who picks one of its senior officials.

Authors' analysis

This implies that the power of MTF is to a greater extent executed in the second phase. Plainly speaking, in the end it is Mr Monti with the case team making the decision who have the role as prosecutors, judges and jury. However, we should not forget that the Legal Service is there to guard the activities performed by the Commission.

Regarding the hearing officer, we could argue that the power to change the decision by this person is limited. Also, bearing in mind that the hearing officer normally represents the Commission. As we saw in the previous analysis, the hearing occurs late in the second phase investigation. At this stage the Commission have made an in depth investigation. If new evidence was to appear there is hardly any time to consider it. Things that might change in the Commission's draft decision are perhaps minor changes. Thus, the influence of the hearing officer upon the final decision is limited just as the meeting with the Advisory Committee.

5.3.4.2 Other Directorates-General

The actual role of other DG's is similar in Phase II as in Phase I. However, a few remarks might be appropriate.

Authors' analysis

We assume that the importance of other DG's will increase in Phase II, since the demand for expertise becomes greater. It also depends on the particular industry and branch that is in focus. As previously discussed, during the different stages in the process various DG's tries to make their voices heard and influence DG on Competition. The power they possess is limited since the final decision lies in the hands of the Commissioner of competition. Nevertheless, it might create disputes and turbulence could take off in the Colleges of Commissioners.

5.3.4.3 Advisory Committee

Representatives from the National Authorities do, in this phase, appear in the role of the Advisory Committee. Formally they have a consultative role in the second phase and before the Commission takes its decision, they should hear the Advisory Committee.¹⁴² The respondents imply that the Advisory Committee might be able to stop a concentration if anonymous voting supports the outcome. Furthermore, the respondents stress the need for support from the Advisory Committee. The members of the Advisory Committee are often very well prepared, the respondents moreover note.

Authors' analysis

The Advisory Committee formally has a consultative role and the meeting with the Commission occurs very late in the merger procedures. Sometimes the meetings take place as late as one week before the final decision in the second phase investigation¹⁴³. These facts imply that their actual power is very limited. It might be certain adjustments to the Commission's draft decision. Nevertheless, despite their lack of formal power to, for example, stop a concentration, the Commission obviously stresses the need for support from the Advisory Committee. However, we should remember that two representatives from each competent authority of the Member States make the constellation of the Advisory Committee. Hence, their actual power/influence before this formal meeting is in the appearance of national authorities, which is discussed below.

5.3.4.4 National Authorities

The informal contacts remain in the Phase II investigation between the Commission and national authorities. According to the respondents and the Merger Regulation, the Commission must inform, in advance, when and if they shall perform a so-called "dawn raid" in a company. This co-operation is for the purpose that they do not collide with each other's processes. However, as previously mentioned¹⁴⁴, this happens very seldom. An additional role that they might have in this phase is to conduct market investigation if the particular national market is affected, when requested by the Commission. Another is,

¹⁴² For theoretical support see 4.4 Advisory Committee

¹⁴³ For support see 5.1.6.4 Consultation of the Advisory Committee

¹⁴⁴ For support see 5.1.6.1 Powers of the Commission

according to the respondents, during the hearings in which most often all national authorities attend.

Authors' analysis

We could conclude that the fact that national authorities are present throughout the process makes them well-informed for the meeting within the Advisory Committee. As implied above the actual power of the Advisory Committee might be earlier in the process as the appearance of national authorities. If we assume that certain national authorities might be strong actors in the procedures, these would most likely not oppose the Commission's decision, since they in that case would vote against themselves. National authorities' market investigations might influence the direction of the case.

5.3.4.5 Third Parties

If the third party has a particular interest in the case, they could also attend hearings, located in Phase II. They do always have the right to make statements if fearing the proposed concentration would distort competition on the market. As we learnt from the previous analysis¹⁴⁵ the Commission distributes a document called "Statement of Objections" which third parties should replicate to.

Authors' analysis

In a second phase investigation, third parties might be more powerful if submitting relevant data. They have more time to work out appropriate documents and arguments, further strengthen this assumption. As we saw in the previous analysis¹⁴⁶, if the company manage to keep the secret of the intended merger to the actual date of notification, there is hardly any time for third parties to replicate compared to if the case turns into the second phase.

5.3.5 ACTORS INFLUENCING IN LONG-TERM

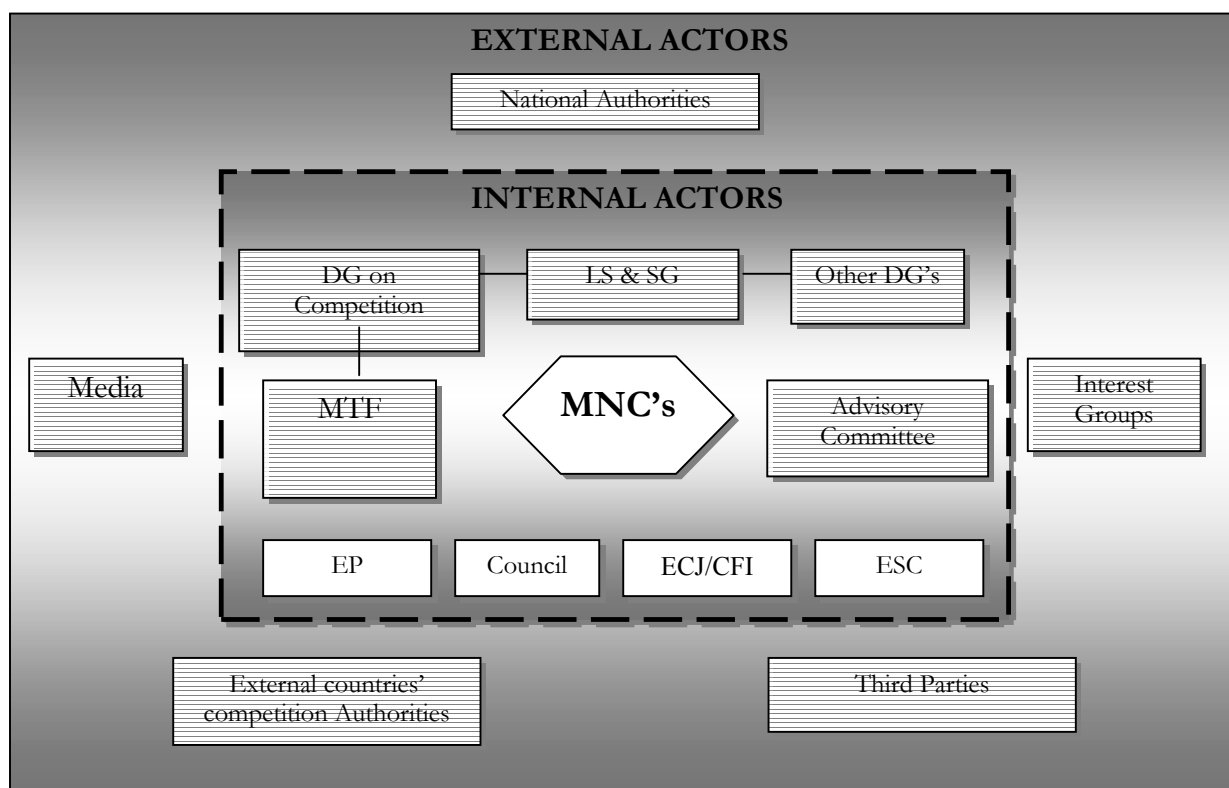
These actors are influential in the long-term perspective. We could thus argue that they might be indirectly influential on the merger procedures. However, we chose to treat them separately since, we believe that the connection directly into the

¹⁴⁵ For support see 5.1.6.2 Statement of Objections

¹⁴⁶ For support see 5.1.4 Notification

merger procedures are rather vague. Also, we believe it would give the reader a distorted picture to include them in the procedures as such.

FIGURE 5.18 PHASE II DECISION



Source: Own construction

5.3.5.1 ECJ and CFI (The Courts)

If a company appeal a decision it ends up in the Courts. They have the power to annul the decision of the Commission. The courts have the jurisdiction to review Commission's decision and impose fines or penalty payments if the Commission has failed in its attempt to comply with the Merger Regulation.¹⁴⁷ As previously mentioned¹⁴⁸, the Legal Service is the legal representative on behalf of the Commission.

Authors' analysis

Companies do not have time to wait for appraisal, therefore they seldom use this as an option. This means that the role and power corresponds with theory. In practice, however, we argue that the power they possess does not function as efficient protection for the parties due to lengthy processes if appealing to Court.

¹⁴⁷ For theoretical support see 4.2 Other DG's and its horizontal services

¹⁴⁸ For support see 5.3.2.2 Legal service and Secretariat-General

Nevertheless, we could conclude that the Courts are the most powerful bodies and decisions taken will directly affect legislation and accordingly the Commission's activities.

5.3.5.2 Council of Ministers

The role of the Council of Minister's actual role is what is revealed in theory namely, the legislative power to decide new regulations based on the Commission's draft¹⁴⁹.

5.3.5.3 European Parliament (EP)

According to our respondents, the role of the Parliament is to give opinions on the regulations drafted by the Council¹⁵⁰. The respondents say that the Commissioner of Competition, once a month visits the Parliament for discussing with ECON. Furthermore, the respondents reveal that the Parliament currently argues for increasing its power by having the right to decide upon legislation together with the Council when qualified majority voting is required. In that way, the Parliament could act as a balance to the Council in this area. On the other hand it is said by the respondents that there are no political willingness to give the Parliament this power. Nevertheless, the Parliament is stressed to be an important actor.

Authors' analysis

From the above statement, we could conclude that the Parliament's actual power is limited within this area. Whether this power will be increased is determined by the political motivation to change it. As shown by the statements above, currently, this willingness among the Member States seems to be absent. Yet, it seems as if an important actor such as the DG on Competition provides continuous information of the activities, also the Commission can use their approval of Green Papers that are not approved by the Council¹⁵¹. A sufficient dialogue with the Parliament might also be essential from the Commission's point of view, in order to maintain current power.

¹⁴⁹ For theoretical support see 4.3 Legal Service and the Secretariat-General

¹⁵⁰ For theoretical support see 4.3 Legal Service and the Secretariat-General

¹⁵¹ For support 3.6.2 News in annual report on Competition Policy 1996

5.3.5.4 Economic and Social Affairs (ESC)

The role of this actor is actually what is revealed in theory namely to give opinions in order to influence the Commission¹⁵².

Authors' analysis

We could draw the conclusion that this actor's role is basically the same as the Parliament. We assume that it also is an actor important to pay attention to for the Commission. In the same way as the Parliament they also represents the citizens and the welfare of the consumers. As the Competition Policy stresses, the protection and welfare of the consumers¹⁵³ is important in DG on Competition's activities.

5.3.5.5 Interest Groups

Interest associations

Interest associations' representing business, work within a European Organisation named UNICE in which most countries in Europe attend, the respondents reveal. Sometimes the Commission asks for opinions from European Business and then the Commission expects response from UNICE. In the meetings with UNICE people from the Commission often attend and give information and try new ideas. A continuous dialogue is present between DG on Competition and UNICE, where the Competition Policy is discussed.

Authors' analysis

This reveals that the role of UNICE is to give opinions on the Competition Policy, influencing on long- term similar to the Parliament's and the ESC's roles. The actual power is thus limited in short-term and directly in the merger procedures.

Lobbying companies

The respondents reveal that DG on Competition is unaffected by political lobbying, compared to other Directorates where the environment is more open.

¹⁵² For theoretical support see 4.5 Economic and Social Committee (ESC)

¹⁵³ For support see e.g. 3.6.1 News in annual report on competition policy 1995

The respondents argue that close relation with the people in the “corridors of power”, have the ability to change issues in a long-term perspective.

Authors’ analysis

This implies that political lobbying to change the verdict in cases in process has limited affects on the outcome of the case. However, we argue that lobbying companies might function as a guide for the company to know how to start the contacts with the MTF. Nevertheless, it is up to the company to provide valid information and having the dialogue with the MTF themselves. In a long-term perspective they might play a stronger role as they try to influence those actors that have the power to change actual legislation, e.g. the Commission and the Council.

CONCLUSIONS & GUIDELINES



6. CONCLUSIONS & GUIDELINES

In this section we conclude with an attempt to answer the three sub-problems, which consequently leads to our solution of the main problem. The purpose is thus to give an understanding of what is required by the company in order to prepare for a merger when facing the Authorities in EU. The reader should be aware that this section is not focusing on the legislative requirements. The legislation is something that the company have to follow. Our intention is rather to present other practical advise around it.

What are the formal and informal merger procedures within the European Union?

1) Planning phase and pre-notification meetings

- We conclude that the most essential step is to start preparations *early*. This means that as soon as the idea arises within a company about intending a merger, a dialogue should begin with the MTF. Essential to know is that the acquiring company is responsible for the notification, including submitting information from the target company.
- The information should be complete before the actual notification takes place. Therefore, pre-notification meetings are essential. It helps to be able to complete the Form Co and specify what information that is needed and what data that might be unnecessary. The objective should be to roughly know what the decision from the MTF would be already before the notification. When the deadlines start off, the company and MTF struggle with tight time lines.
- When necessary preparations are made, a date for the first pre-notification meeting should be settled. Dependent on the nature of the case and possible problems that arise, the number of pre-notification meetings may vary. If the merger turns out to be complicated, it would be advisable to contact the MTF even as early as a year in advance in order to erase all question marks before the notification. A complicated

case is if the entity might reach large market shares in a particular country, region or a town.

- Organising a team including top-management, specialist competition lawyers and economists should be carried out. In this respect, the company should make sure that top-management (forthcoming CEO or similar level) attend the meetings. They should be able to answer questions regarding the business situation. This is very important since it is the top-management that could give the most truthful information. If given accurate information, the MTF gives early signals about where possible problems are located.

2) Notification process

- It might be advisable to contact national competition authorities during this process in order to express the business view of the intended merger. They might influence the decision in the Advisory Committee if the case reaches a second phase investigation. The national competition authorities are also part of the whole process. It makes them well informed about the case in the Commission.
- When the notification is published, the time schedule is pressured; therefore a good relationship with the Commission on Competition should already have been established. If both parties understand each other's view the notification process will run smoothly.

3) Submitting information

- Most important is to provide the MTF with all information requested. Submitting correct and honest information based on facts is essential. The continuous dialogue with the MTF should be present throughout the process, for example informing the MTF if any changes occur during the process.
- If MTF has given signs of problems the company should begin to evaluate remedies that could be offered in order to maintain the

competitive situation on the market. These negotiations could start already in pre-notification meetings if problems arise. This is important for avoiding a second phase investigation. When evaluating possible remedies the company could evaluate if the merger will cost more than it returns.

4) If the case proceeds to a second phase investigation

- If the case proceeds into a second investigation, the company could be quite certain that it has to make a well-argued proposal including remedies. The official deadline is four months in the second phase investigation is, in reality, three months since the last month is dedicated to formulate the decision.
- The Company could ask for a hearing in the second phase investigation. If so, make sure that new data or facts do not turn up as a surprise for the MTF. Remember that there is very little time to examine completely new information. A hearing in reality means to adjust certain points of the Commission's decision.

How does the Commission argue in merger cases falling under regulation no 4064/89?

1) Relevant geographical market

- From the case analysis we conclude that in reality, the European Market most often does not function as one single internal market. There are entry barriers remaining in many markets, driving the Commission to define the relevant geographical markets as narrower than European. When third parties or the company or other sources do not correspond with the Commission's opinion, the Commission's definition will be the narrower definition.

2) Consistency

- We could conclude that the Commission has several factors that must be taken into consideration and therefore conduct a “judgement of the whole”. It is therefore impossible to know how much influence every factor has on the total evaluation. The evaluation is scrutinised issue by issue, where the Commission regularly refers to previous cases when possible. Therefore, it is advisable that a case should never be compared if not scrutinised in detail.

3) Communicating with media

- We could also conclude that is dangerous for the company to make statements about the intended merger such as “implying to be the only dominant actor on the market”. The Commission could use it against the company.

What role do internal and external actors have in the merger procedures within the European Union?

- The *MTF* holds most of the power, more specifically the case- team within *MTF*. They have the power to conduct all necessary investigations, which will most likely to be executed in a second phase investigation. The Commissioner of Competition has the final say in the case. However, when he makes the signature on the final decision, the case team together with the Commissioner have reached a common standpoint.
- *Other units within DG on Competition* has co-operative roles with the *MTF*. These departments possess a branch expertise that *DG on Competition* might not have. They might influence the direction of the case through the data they submit, but the actual power is limited.

- *Other DG's outside DG on Competition* have the same role as other units within DG on Competition, providing the MTF with information. Although, it seems like their role becomes more important during a second phase investigation.
- The actual power of the *Advisory Committee* is actually advisory. The power of this body might be to make minor changes in the Commission's draft decision.
- *The Legal Service* has a supervisory role. If the decision taken by the Commission violates the Treaty, they could revoke it. This fact makes them very powerful.
- *National Authorities* has the role of providing information to the Commission if needed. When the merger concerns a market within the domain of a particular country, this national authority has a more important role to play. The case might be transferred to national authorities. If so, the power that the Commission possess is transferred to the Commission. The role of the Commission is then an advisory role.
- The role of the *Council of Ministers* is to legislate upon the Commission's draft of new regulations. They have no power to influence a case in process.
- The *ECJ* and *EFI* have the powers to reverse a case decision from the Commission. They can also decide if national authorities should handle a case. They are therefore the most powerful body. However, in practice they do not serve as sufficient protection for the company, due to the lengthy processes.
- The powers of *third parties* depend on the nature of the case and how important the case is for them. Therefore, sometimes they are very powerful and sometimes they only play minor roles. Important to note

is that the consumers are included in this group and they are always put in focus.

- The influence of *media* should not be underestimated. If the company chooses to argue for the case in public, it could affect the Commission negatively. The Commission might also take advantage of statements made by the company long before the notification. The advice is therefore to be careful with public statements concerning the merger.

- The role of the *External countries' competition authorities* is of co-operative nature, when external countries are affected. EU competition authorities and External countries' competition authorities try to reach a common standpoint in the case.

- Finally, the EP, *the ESC* and *Interest groups* have the role of influencing legislation and policies in a long-term perspective. Thus, they are not directly connected to procedures regarding particular cases as such.

HOW TO AVOID UNNECESSARY TRAPS!



7. HOW TO AVOID UNNECESSARY TRAPS!

As the guidelines are intertwined with the conclusion above, we would like to sum up this thesis with some general advice stressed from our respondents. We believe these quotes give a good picture of how to avoid unnecessary traps that could save a great deal of time and resources for the company.

FIGURE 7.1 RECOMMENDATIONS

- **“Prepare every contact thoroughly!”**
- **“Find out how DG on Competition is organised so you reach the right person!”**
- **“Show that you are interested ”**
- **“Approach the MTF early!”**
- **“Start the mutual learning-curve early!”**
- **“Give the MTF briefings of what is happening, informal regular contacts and feel the temperature early!”**
- **“Nurture the relations and the goodwill you have!”**
- **“Remember that the staff have a lot of power. The superiors have not always most power, since it is based on legislation!”**
- **“Employ skilled and experienced advisors who knows the rules of the game!”**
- **“Assure you fight for something really worth fighting for!”**
- **“Do not bluff, there are others wanting to give valid information to the Commission!”**
- **“Be honest in your data submission!”**
- **“The larger corporation, the more the MTF expects from the top-management!”**
- **“If you have a meeting with the Director General, make sure you have something to say!”**
- **“Do not hope for political lobbying!”**
- **“Do not hope the MTF will not find problems!”**
- **“Keep a dialogue with the MTF so the MTF does not be surprised via media!”**
- **“You must have an understanding, just as when you make another strategic decision!”**
- **“Have realistic expectations!”**

QUESTION IN DEBATE



8. QUESTIONS IN DEBATE

In this section we highlight two debated topics. The question about (1) Europe as one internal market or many dispersed markets (2) the Commission's function as prosecutor, judge and jury in the merger procedure. The two issues are widely debated; we therefore chose to draw some attention to them, despite the fact that it is beyond our problem definition. We will in this section show arguments from the business point of views vs. the Commission's perspective concerning these two issues. The chapter will contain new information in order to clarify the discussion. When we believe that we could provide information based on our research we will comment upon the discussion.

1) WHY IS IT NECESSARY TO DEFINE RELEVANT GEOGRAPHICAL MARKET?

As revealed from our case analysis¹⁵⁴, the Commission normally defines the geographical market narrow. Very seldom, the relevant market is treated as EU wide or global. This question was raised when we attended a EU-conference in Gothenburg¹⁵⁵.

Businesses argue:

The market definitions are old-fashioned; we have reached a new era!

The narrow market definitions risk having severe constraints on EU companies, which seek to invest and compete on a global market. The plain fact is that European companies have to achieve same scale and efficiency as their global rivals in order to be competitive. In mature industries this is highly important, where companies need to survive in the competitive environment. Therefore, it is suggested that the Commission should take a more balanced approach to the possibility of larger geographical market definitions. Globalisation continuously improves competition in many EU markets. Barriers of entry in many EU markets are much lower than 10 years ago and competition is therefore now determined by actual as well as potential competition from other regions in the world.

¹⁵⁴ For support see chapter 5.2

¹⁵⁵ EU-Conference, SAS Radisson Park Avenue Hotel, November 20, 2000

Accordingly, it is therefore suggested that the Commission should check that its instruments and criteria properly reflect these new, fast-developing changes in the world economy.¹⁵⁶

The Commission argues:

We are only doing our job according to the Treaties, protecting the consumers!¹⁵⁷

How the Commission defines the relevant geographical market is based on the basic Treaty where protecting the consumers are the main purpose for merger control. The Commission highly stresses the benefits of the consumers on the basic principle of substitutability. It is about the question if the consumer shift supplier if the price increases; the single internal market needs to be evaluated of the actual efficiency of the market. Hence, where entry barriers are present to enter markets, it should not be treated as one internal market.

A comparison is the US practises, which are in fact the same as the European Merger Control, the Commission argues. The relevant geographic market do not necessarily mean national distinctions, it could be taken down to a region or a town. One recent example is a case¹⁵⁸ in the U.S, where the intended merger would result in higher prices for branded butter. The relevant geographical market in the case was defined narrow equally to the EU Commission practices. The market definitions were New York and the Philadelphia metropolitan areas.

Furthermore, the European Member States has agreed to the system as such and there is no willingness from national governments to change it in the nearest future. The Commission must not make any mistakes and Legal Service serves as protection. The reason why the Commission is consistent and refuses to be flexible in its practises is that businesses need to know that the Commission is consistent, in order to reduce uncertainty.

¹⁵⁶ Tabaksblat, p. 3, September 14 and 15, 2000

¹⁵⁷ EU-Conference, SAS Radisson Park Avenue Hotel, November 20, 2000

¹⁵⁸ www.usdoj.gov/atr/public/press_releases/2000/4781.htm, October 9 2000

2) IS THIS A GOOD SYSTEM?

We addressed in the beginning of this thesis that businesses are concerned about the Commission's roles as prosecutor and judge as well as jury.¹⁵⁹

Authors' remarks

We could agree upon that in practice, as we concluded in our analysis, there is not much protection for the company. If their view does not correspond with the Commission's decision, it takes too much time to appeal to the Courts. Today, companies need to rely on the Commission's competence. Bearing in mind the continuously growing workload of the Commission does imply that there are risks of errors.

On the other hand, fast procedures are something that companies need. Currently, the procedures have the advantage of being speedy. Building another independent body within the EU would most likely create more bureaucracy and slow down the speed in the procedures. There might be arguments that this would *not* happen if looking upon for example the US system.

What are the options?

As the previous "question in debate" showed, US' practices and EU's practices actually are corresponding with each other. One example above was the discussion about the definition of relevant geographical market.

However, the EU and U.S merger systems are based on different philosophies. EU's Commission has the direct power to prohibit or approve a merger significantly changing the "original" notification. The U.S agencies have to sue the merging parties. An independent judge will then make the decision about prohibition or approval.¹⁶⁰

It is argued that both systems have their advantages and drawbacks. It is well known that filing a notification to the European Commission requires significantly

¹⁵⁹ For support see 1.1 Background and Problem discussion

¹⁶⁰ Siragusa, Mario, p. 8f, September 14-15, 2000

more information than in the US. The first phase in the U.S therefore is more effective, regarding uncomplicated cases.

However, the EU second-stage investigation does normally not need the scope of information requested by U.S second phase. The EU system therefore often facilitates a less burdensome decision of more complicated cases, compared to the U.S. A recent proceeding, involved the production of close to 20.000 boxes of data. During several months, hundreds of lawyers were involved in the collection and filing of documents.¹⁶¹

What are in the pipelines?

Material from the EC Merger Control, 10th Anniversary Conference, revealed that in the debate ideas have arisen in order to balance the roles of the Commission:

Strengthening the role of the Hearing Officer

- It is argued that extending the powers of the Hearing Officer would improve the situation. In this respect, the reports from the Hearing Officer could be made public. Also, Commissioner Mr Mario Monti have indicated the importance of strengthening the HO's role.
- Instead of DG Competition selecting one of its senior officials to be HO, the European Courts could make the nomination.

Strengthening the role of Legal Service

- Enhancing the Legal Service role might provide useful additional safeguards. It could for example be consulted on key steps in the procedures, such as declaration of incompleteness or the negotiation of remedies.
- Another solution would be to involve certain "fast-track" review before the decision reaches Court of First Instance.

¹⁶¹ Ibid

Concluding thoughts

We could conclude that the definition of relevant geographical market might be an obstacle for small Member States. However, it is a result of history. Historically, companies have chosen to grow on their home turf, since it has been ruff competing on other geographical areas. In addition, national authorities' have defended large companies to protect their own domestic economy.

In Europe today, many nationalities and historical bonds connect people. Their values are deeply rooted in people's minds. Large cultural differences exist, which makes the situation even more complicated. In the US there are many cultural differences with many ethnic groups, but they have one thing in common, they consider themselves as "Americans". Europe is different. As long as people consider themselves as citizens of countries and not as "Europeans", barriers will remain. When countries within the Union strive for national advantages instead of compromising on the behalf of the Union, the complete internal market will not become a reality. The Commission's objectives are to protect the customer and they are continuing to integrate the markets. Companies have to live with the fact that competition is a major pillar in this process.

“Now this is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning”

- Winston Churchill (November 10, 1942)

AREAS FOR FUTURE RESEARCH

Our thesis has dealt with how MNC's, aiming at undertaking mergers or acquisitions in the European Union, could predict the forthcoming decision proposed by the EU Commission. The study has included a description of informal and formal merger procedures as well as analysing the power of actors connected to them.

Currently, the biggest mission for the European Union is the enlargement. One recommendation for further research is how will the entrance of new Member States affect Competition Policy? How is the Merger Task Force going to adapt to these new conditions? Is there enough competence among the national authorities to provide the EU Commission with appropriate information?

One issue that we briefly touched upon is the question of undertakings. A second phase investigation in EU Commission means that the company need to propose undertakings (commitments). It is difficult and costly. What are reasonable undertakings? What kinds of undertakings does the EU Commission accept? How does these operations affect the industrial structure?

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APPENDICES



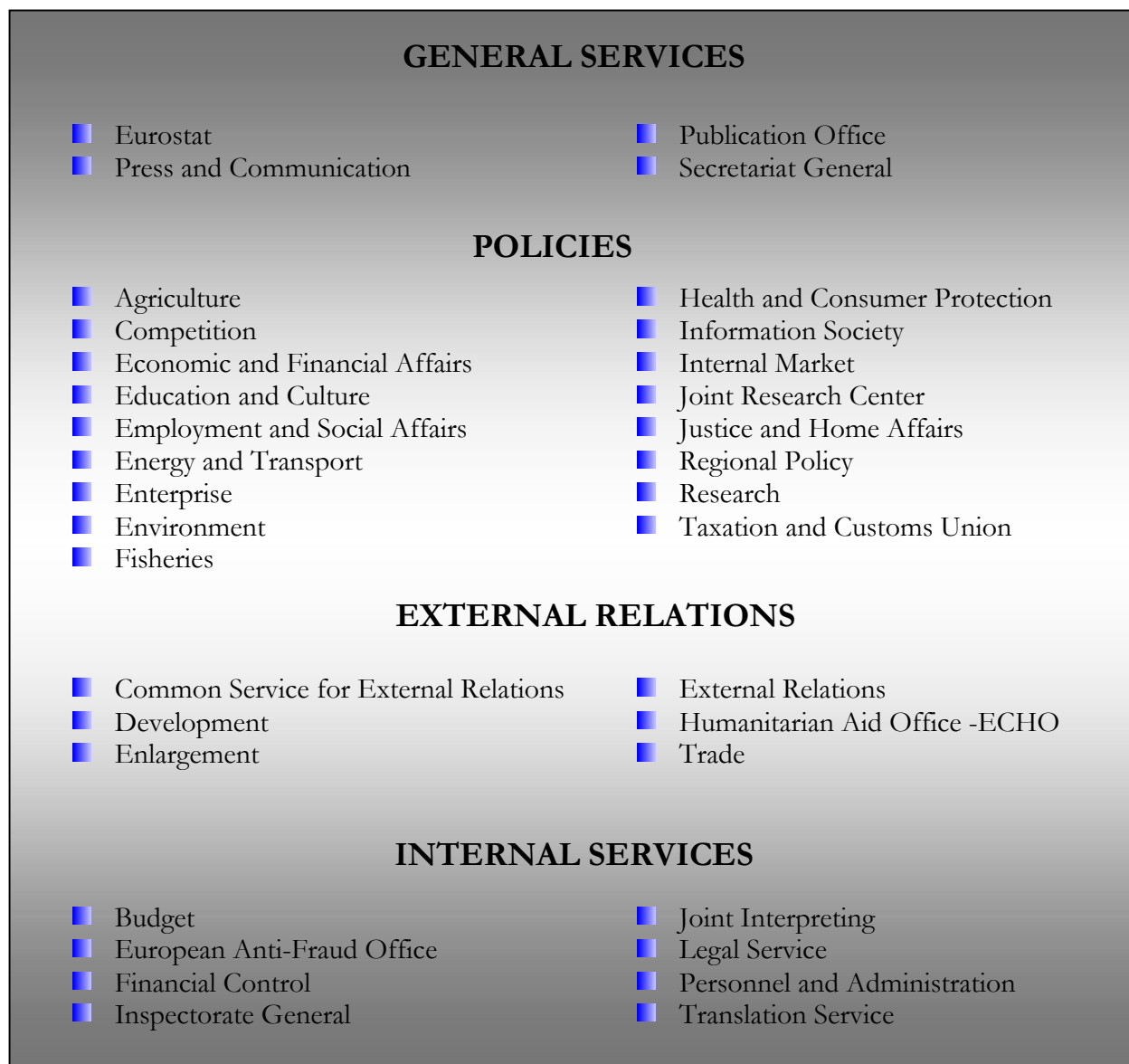
APPENDICES

APPENDIX 1. List of Abbreviations

CFI	European Court of First Instance
DG	Directorate-General
DGIII	Directorate-General III (Industry)
DGIV	Directorate-General IV (Competition)
EC	European Community
ECJ	European Court of Justice, the legal power within the Union
ECON	Committee on Economic and Monetary Affairs
ECS	Economic and Social Committee
ECSC	European Coal and Steel Community
EEC	European Economic Community
EFTA	European Free Trade Area
EP	European Parliament
EU	European Union
GATT	General Agreement on Tariff and Trade
MTF	Merger Task Force
OJ	Official Journal
SEA	Single European Act
SG	Secretariat-General
TEEC	Treaty of Rome
TEU	Treaty of European Union
UK	United Kingdom
UNICE	European Employers Association
US	United States (of America)

APPENDIX 2. Structure of the Commission

BOX A 2.1 STRUCTURE OF THE COMMISSION



Source: www.europa.eu.int/comm, 2000-12-06

APPENDIX 3. List of Competition Commissioners

BOX A 3.1 LIST OF COMPETITION COMMISSIONERS

THE COMPETITION COMMISSIONERS

Hans van der Groeben (Germany), 1958-66

Emanuel Sassen (Netherlands), 1966-70

Albert Borchette (Luxembourg), 1970-76

Raymond Vouel (Luxembourg), 1977-80

Frans Andriessen (Netherlands), 1980-84

Peter Sutherland (Ireland), 1985-1989

Leon Brittan (United Kingdom), 1989-93

Karl van Miert (Belgium), 1993-1998

Mario Monti (Italy), 1999-

Source: Cini, Mc Gowan, 1998, p. 44

APPENDIX 5. Interview Guide

Informal Procedure

- 1) What kind of informal contacts occur between actors during the merger procedure?

Formal Procedure

- 2) What is your specific task, concerning Merger Regulation?
- 3) How are you organised?
- 4) Who conduct the economic models and research in the procedure?
- 5) When in the process is the Advisory Committee invited to a meeting with the Commission?
- 6) Is the Advisory Committee or the National Authorities involved at an early stage in the process?
- 7) How much time do the Advisory Committee have to make comments to the Statement of Objections?
- 8) How often does the Advisory Committee take a standpoint different than the Commission?
- 9) If a company require a hearing in the phase II investigation, is it common that the Commission changes its opinions after this event?
- 10) How is the power balance in the Commission?
- 11) Are there certain periods where it is less favourable to merge? (Taking the Commission in consideration)
- 12) In what way do DG on Competition co-operate with other parts of the organisation in the Commission?
- 13) In what way can media affect the work in DG on Competition during a merger procedure?
- 14) It says that sometimes media is extremely well informed, is this the case and if so, what is the purpose?

Market definitions

- 15) How is market share defined? And what economic models are used?
- 16) What first hand sources are used in order to measure e.g. market shares?
What second-hand are used?
- 17) The vision is that the European Union should be defined as one market. In cases, relevant geographic market is most often seen as national. In what industries can a market be defined as European?
- 18) The small Nordic countries often argue that the implementation of relevant geographic market does not favour them? Is this the case, and if so, is it taken seriously and how is it will be dealt with in the future?
- 19) What are the threats and/or opportunities of the decentralisation of the Competition Policy?

National authorities

- 20) Are there any activities that are delegated to National Authorities?
- 21) When a company is about to merge, and the turnover has exceeded threshold for Community dimension, how is it related to National Authorities?
- 22) What role should National Authorities have in the future?
- 23) It is stated in Merger Regulation (EEC) no 4064/89 that the Commission is in close co-operation with National Authorities? How is it conducted?
- 24) How do National Authorities conduct the merger procedure if the Commission delegate the case to them? How much power do they possess?
- 25) What information do National Authorities receive once the notification is published? Do they receive classified information?
- 26) Is it common that National Authorities appeal to the Court of Justice if they want to apply national law?
- 27) How do National Authorities conduct the research? Do National Authorities get directives on what to investigate? Do National Authorities add their own opinions or is it pure facts?
- 28) How much power do National Authorities really have on the decision?

Third parties

- 29) When the Commission refers to a “third party”, who might that be and what role do they have?
- 30) How can third parties make their voice heard in the process, and how is that information analysed?

Future issues

- 31) What issues are most important to set up on the agenda when new countries will enter the Union, with particular focus on Competition Policy?
- 32) How is the relation between the European Union and other countries, with focus on Competition Policy?
- 33) In what way does the European Union co-operate with competition authorities in Japan and the United States in particular cases?
- 34) What is the best advice you can give to a company that is about to enter a merger procedure within the European Union?

APPENDIX 6. Background of the experts

Olof Allgårdh

Olof Allgårdh, Director and head of the Brussels office of SAF and Industriförbundet since 1995, Legal advisor to first an American and then a Swedish law firm in Brussels 1990-1995, Swedish Foreign Service 1966 to 1989 (i.a. as Economic Counselor in Washington and Deputy head of The Swedish EU Delegation in Brussels and head of the West European Integration office in Stockholm). Mr Allgård is also the co-author of the book EU och EG-rätten, 3rd Ed1999.

Lars Anell

Lars Anell is a Senior Vice-President of Corporate Affairs at Volvo. He was Swedish ambassador in Geneva to UN and GATT from 1990-1992. He then became Swedish EU-ambassador between 1992-1994, until he began at Volvo.

Georg Danell

Mr Danell is the director of Kreab's office in Brussels. He is the Managing Partner and Scania's representative in Brussels. Kreab deals with strategic corporate communication.

He has been a Member of the Swedish Parliament, representing the conservative party in Sweden. He has also been the Information Director at Nordstjernen. Mr Danell has also been a delegate of the Bank of Sweden and a member of the board at the Swedish Television.

Karl Isaksson

Mr Isaksson is a Political Advisor to Gunilla Carlsson, Head of the Swedish EPP-ED Delegation in the European Parliament. The responsibilities are the Committee on Monetary and Economic Affairs (that have the responsibility for competition issues in the parliament), Committee on Employment and Social Affairs and the Committee on Women's Rights and Equal Opportunities.

He had been a trainee at the Embassy of Sweden in Singapore and he has a Master in Political Science and Economics at Lund University.

Helena Larsson-Haug

Helena Larsson-Haug is a case-handler at the Directorate B, Merger Task Force. After her master degree in law, worked as a trainee judge. After that she started to work at the Directorate-General for Competition at the European Union, where continued at the unit for telecommunication and Information.

Sven Norberg

Sven Norberg is Director at the Competition Directorate-General of the European Commission in charge of Competition DG; Directorate F – Application of the anti-trust rules to the sector capital and consumer goods industries. Mr Norberg has been permanent secretary in the Ministry of Commerce in Stockholm and Justice of Appeal at the Svea Hovrätt in Stockholm. He has also been the Director of Legal Affairs of the EFTA secretariat and judge in the EFTA court.

Anders Ohlander

Mr Anders Ohlander is the Director for the Internal Market in the General Secretariat of the EU Council since 1997. Before that Mr Ohlander was the Ambassador in the Swedish Foreign Ministry with responsibility for EU coordination.

Dan Sjöblom

Dan Sjöblom is a case-handler within the Directorate B, the Merger Task Force, in the Commission.

Monica Widegren

Monica Widegren is the Director, Head of the International Secretariat of the Swedish Competition Authority (since its establishment in 1992) Permanent representative of the five Advisory Committees for Competition matters of the European Commission and responsible for the Authority's cooperation with the Commission. She is also a delegate to the OECD Committee on Competition Law and Policy and vice-chairman of the joint trade and competition group.

APPENDIX 7. Unofficial consolidated text of Council Regulation 4064/89

CONSOLIDATED TEXT OF COUNCIL REGULATION (EEC) NO 4064/89 OF 21 DECEMBER 1989 ON THE CONTROL OF CONCENTRATIONS BETWEEN UNDERTAKINGS (PUBLISHED IN THE OFFICIAL JOURNAL. ONLY THE PUBLISHED TEXT IS AUTHENTIC: OJ L395 30 DECEMBER 1989, OJ L257, 21 SEPTEMBER 1990) WITH AMENDMENTS INTRODUCED BY COUNCIL REGULATION (EC) NO. 1310/97 OF 30 JUNE 1997, OJ L180, p.1, 09 JULY 1997

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

.....

Recitals

.....

HAS ADOPTED THIS REGULATION:

Article 1

Scope

1. Without prejudice to Article 22, this Regulation shall apply to all concentrations with a Community dimension as defined in **paragraphs 2 and 3**.
2. For the purposes of this Regulation, a concentration has a Community dimension where:
 - (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than ECU 5 000 million; and
 - (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same

Member State.

~~3. The thresholds laid down in paragraph 2 will be reviewed before the end of the fourth year following that of the adoption of this Regulation by the Council acting by a qualified majority on a proposal from the Commission.~~

3. For the purposes of this Regulation, a concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:

- (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than ECU 2 500 million;**
- (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than ECU 100 million;**
- (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than ECU 25 million; and**

(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 100 million; unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

4. Before 1 July 2000 the Commission shall report to the Council on the operation of the thresholds and criteria set out in paragraphs 2 and 3.

5. Following the report referred to in paragraph 4 and on a proposal from the Commission, the Council, acting by a qualified majority, may revise the thresholds and criteria mentioned in paragraph 3.

Article 2

Appraisal of concentrations

1. Concentrations within the scope of this Regulation shall be appraised in accordance with the following provisions with a view to establishing whether or not they are compatible with the common market. In making this appraisal, the Commission shall take into account:

(a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community;

(b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

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

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

4. To the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the coordination of the competitive behavior of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 85(1) and (3) of the Treaty, with a view to establishing whether or not the operation is compatible with the common market.

In making this appraisal, the Commission shall take into account in particular:

- whether two or more parent companies retain to a significant extent activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighboring market closely related to this market;

-whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.

Article 3

Definition of concentration

1. A concentration shall be deemed to arise where:

(a) two or more previously independent undertakings merge, or

(b) - one or more persons already controlling at least one undertaking, or

- one or more undertakings acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings.

~~2. An operation, including the creation of a joint venture, which has as its object or effect the coordination of the competitive behaviour of undertakings which remain independent shall not constitute a concentration within the meaning of paragraph 1 (b).~~

~~The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity, which does not give rise to coordination of the competitive behaviour of the parties amongst themselves or between them and the joint venture, shall constitute a concentration within the meaning of paragraph 1 (b).~~

3. For the purposes of this Regulation, control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

(a) ownership or the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

4. Control is acquired by persons or undertakings which:

(a) are holders of the rights or entitled to rights under the contracts concerned, or

(b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.

5. A concentration shall not be deemed to arise where:

(a) credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the disposal of those securities and that any such disposal

takes place within one year of the date of acquisition; that period may be extended by the Commission on request where such institutions or companies can show that the disposal was not reasonably possible within the period set;

(b) control is acquired by an office-holder according to the law of a Member State relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings;

(c) the operations referred to in paragraph 1 (b) are carried out by the financial holding companies referred to in Article 5 (3) of the Fourth Council Directive 78/660/EEC of 25 July 1978 on the annual accounts of certain types of companies¹⁶², as last amended by Directive 84/569/EEC¹⁶³, provided however that the voting rights in respect of the holding are exercised, in particular in relation to the appointment of members of the management and supervisory bodies of the undertakings in which they have holdings, only to maintain the full value of those investments and not to determine directly or indirectly the competitive conduct of those undertakings.

Article 4

Prior notification of concentrations

1. Concentrations with a Community dimension defined in this Regulation shall be notified to the Commission not more than one week after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest. That week shall begin when the first of those events occurs.
2. A concentration which consists of a merger within the meaning of Article 3 (1) (a) or in the acquisition of joint control within the meaning of Article 3 (1) (b) shall be notified jointly by the parties to the merger or by those acquiring joint control as the case may be. In all other cases, the notification shall be effected by the person or undertaking acquiring control of the whole or parts of one or more undertakings.
3. Where the Commission finds that a notified concentration falls within the scope of this Regulation, it shall publish the fact of the notification, at the same time indicating the names of the parties, the nature of the concentration and the economic sectors involved. The Commission shall take account of the legitimate interest of undertakings in the protection of their business secrets.

Article 5

Calculation of turnover

1. Aggregate turnover within the meaning of Article 1 (2) shall comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of sales

¹⁶² OJ No L 222, 14.8.1978, p. 11.

¹⁶³ OJ No L 314, 4.12.1984, p.28.

rebates and of value added tax and other taxes directly related to turnover. The aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in paragraph 4.

Turnover, in the Community or in a Member State, shall comprise products sold and services provided to undertakings or consumers, in the Community or in that Member State as the case may be.

2. By way of derogation from paragraph 1, where the concentration consists in the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts which are the subject of the transaction shall be taken into account with regard to the seller or sellers.

However, two or more transactions within the meaning of the first subparagraph which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the last transaction.

3. In place of turnover the following shall be used:

~~for credit institutions and other financial institutions, as regards Article 1 (2) (a), one-tenth of their total assets. As regards Article 1 (2) (b) and the final part of Article 1 (2), total Community-wide turnover shall be replaced by one-tenth of total assets multiplied by the ratio between loans and advances to credit institutions and customers in transactions with Community residents and the total sum of those loans and advances.~~

~~As regards the final part of Article 1 (2), total turnover within one Member State shall be replaced by one-tenth of total assets multiplied by the ratio between loans and advances to credit institutions and customers in transactions with residents of that Member State and the total sum of those loans and advances;~~

(a) for credit institutions and other financial institutions, as regards Article 1(2) and (3), the sum of the following income items as defined in Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions¹⁶⁴, after deduction of value added tax and other taxes directly related to those items, where appropriate:

(i) interest income and similar income;

(ii) income from securities:

- income from shares and other variable yield securities,

- income from participating interests,

- income from shares in affiliated undertakings;

(iii) commissions receivable;

(iv) net profit on financial operations;

(v) other operating income.

¹⁶⁴ OJ No L 372, 31. 12. 1986, p.1.

The turnover of a credit or financial institution in the Community or in a Member State shall comprise the income items, as defined above, which are received by the branch or division of that institution established in the Community or in the Member State in question, as the case may be.

(b) for insurance undertakings, the value of gross premiums written which shall comprise all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurance undertakings, including also outgoing reinsurance premiums, and after deduction of taxes and parafiscal contributions or levies charged by reference to the amounts of individual premiums or the total volume of premiums; as regards Article 1(2)(b) **and (3)(b), (c) and(d)** and the final part of Article 1(2) **and (3)**, gross premiums received from Community residents and from residents of one Member State respectively shall be taken into account.

4. Without prejudice to paragraph 2, the aggregate turnover of an undertaking concerned within the meaning of Article 1 (2) **and 3** shall be calculated by adding together the respective turnovers of the following:

(a) the undertaking concerned;

(b) those undertakings in which the undertaking concerned, directly or indirectly;

- owns more than half the capital or business assets, or

- has the power to exercise more than half the voting rights, or

- has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or

- has the right to manage the undertakings' affairs;

(c) those undertakings which have in an undertaking concerned the rights or powers listed in (b);

(d) those undertakings in which an undertaking as referred to in (c) has the rights or powers listed in (b);

(e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or powers listed in (b).

5. Where undertakings concerned by the concentration jointly have the rights or powers listed in paragraph 4 (b), in calculating the aggregate turnover of the undertakings concerned for the purposes of Article 1 (2) **and (3)**:

(a) no account shall be taken of the turnover resulting from the sale of products or the provision of services between the joint undertaking and each of the undertakings concerned or any other undertaking connected with any one of them, as set out in paragraph 4 (b) to (e);

(b) account shall be taken of the turnover resulting from the sale of products and the provision of services between the joint undertaking and any third undertakings. This turnover shall be apportioned equally amongst the undertakings concerned.

Article 6

Examination of the notification and initiation of proceedings

1. The Commission shall examine the notification as soon as it is received.

(a) Where it concludes that the concentration notified does not fall within the scope of this Regulation, it shall record that finding by means of a decision.

(b) Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market.

The decision declaring the concentration compatible shall also cover restrictions directly related and necessary to the implementation of the concentration.

(c) ~~If, on the other hand, it~~ **Without prejudice to paragraph 2, where the Commission** finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to its compatibility with the common market, it shall decide to initiate proceedings.

2. Where the Commission finds that, following modification by the undertakings concerned, a notified concentration no longer raises serious doubts within the meaning of paragraph 1(c), it may decide to declare the concentration compatible with the common market pursuant to paragraph 1(b).

The Commission may attach to its decision under paragraph 1(b) conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

3. The Commission may revoke the decision it has taken pursuant to paragraph 1(a) or (b) where:

(a) the decision is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit, or

(b) the undertakings concerned commit a breach of an obligation attached to the decision.

4. In the cases referred to in paragraph 3, the Commission may take a decision under paragraph 1, without being bound by the deadlines referred to in Article 10(1).

2. 5. The Commission shall notify its decision to the undertakings concerned and the competent authorities of the Member States without delay.

Article 7

Suspension of concentrations

~~1. For the purposes of paragraph 2 a~~ **A concentration as defined in Article 1 shall not be put into effect either before its notification or within the first three weeks following its notification until it has been declared compatible with the common market pursuant to a decision under Article 6(1)(b) or Article 8(2) or on the basis of a presumption according to Article 10(6).**

~~2. Where the Commission, following a preliminary examination of the notification within the period provided for in paragraph 1, finds it necessary in order to ensure the full effectiveness of any decision taken later pursuant to Article 8 (3) and (4), it may decide on its own initiative to~~

~~continue the suspension of a concentration in whole or in part until it takes a final decision, or to take other interim measures to that effect.~~

3. Paragraphs 1 ~~and 2~~ shall not prevent the implementation of a public bid which has been notified to the Commission in accordance with Article 4 (1), provided that the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of those investments and on the basis of a derogation granted by the Commission under paragraph 4.

4. The Commission may, on request, grant a derogation from the obligations imposed in paragraphs 1 , 2 ~~or 3~~ **or 3** ~~in order to prevent serious damage to one or more undertakings concerned by a concentration or to a third party.~~ **The request to grant a derogation must be reasoned. In deciding on the request, the Commission shall take into account inter alia the effects of the suspension on one or more undertakings concerned by a concentration or on a third party and the threat to competition posed by the concentration.** That derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition. A derogation may be applied for and granted at any time, even before notification or after the transaction.

5. The validity of any transaction carried out in contravention of paragraph 1 ~~or 2~~ shall be dependent on a decision pursuant to Article 6 (1) (b) or 8 (2) or (3) or on a presumption pursuant to Article 10 (6).

This Article shall, however, have no effect on the validity of transactions in securities including those convertible into other securities admitted to trading on a market which is regulated and supervised by authorities recognized by public bodies, operates regularly and is accessible directly or indirectly to the public, unless the buyer and seller knew or ought to have known that the transaction was carried out in contravention of paragraph 1 ~~or 2~~.

Article 8

Powers of decision of the Commission

1. Without prejudice to Article 9, all proceedings initiated pursuant to Article 6 (1) (c) shall be closed by means of a decision as provided for in paragraphs 2 to 5.

2. Where the Commission finds that, following modification by the undertakings concerned if necessary, a notified concentration fulfils the criterion laid down in Article 2 (2) **and, in the cases referred to in Article 2(4), the criteria laid down in Article 85(3) of the Treaty**, it shall issue a decision declaring the concentration compatible with the common market.

It may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into *vis-à-vis* the Commission with a view to ~~modifying the original concentration plan~~ **rendering the concentration compatible with the common market.** The decision declaring the concentration compatible **with the common market** shall also cover restrictions directly related and necessary to the implementation of the concentration.

3. Where the Commission finds that a concentration fulfils the criterion laid down **defined** in Article 2 (3) **or, in the cases referred to in Article 2(4), does not fulfil the criteria laid down in Article 85(3) of the Treaty**, it shall issue a decision declaring that the concentration is incompatible with the common market.

4. Where a concentration has already been implemented, the Commission may, in a decision pursuant to paragraph 3 or by separate decision, require the undertakings or assets brought together to be separated or the cessation of joint control or any other action that may be appropriate in order to restore conditions of effective competition.

5. The Commission may revoke the decision it has taken pursuant to paragraph 2 where:

(a) the declaration of compatibility is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit, or

(b) the undertakings concerned commit a breach of an obligation attached to the decision.

6. In the cases referred to in paragraph 5, the Commission may take a decision pursuant to paragraph 3, without being bound by the deadline referred to in Article 10 (3).

Article 9

Referral to the competent authorities of the Member States

1. The Commission may, by means of a decision notified without delay to the undertakings concerned and the competent authorities of the other Member States, refer a notified concentration to the competent authorities of the Member State concerned in the following circumstances.

2. Within three weeks of the date of receipt of the copy of the notification a Member State may inform the Commission, which shall inform the undertakings concerned, that:

(a) a concentration threatens to create or to strengthen a dominant position as a result of which effective competition ~~would~~ **will** be significantly impeded on a market within that Member State, which presents all the characteristics of a distinct market, ~~be it a substantial part of the common market~~ or

(b) a concentration affects competition on a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market. ~~not.~~

3. If the Commission considers that, having regard to the market for the products or services in question and the geographical reference market within the meaning of paragraph 7, there is such a distinct market and that such a threat exists, either:

(a) it shall itself deal with the case in order to maintain or restore effective competition on the market concerned, or

(b) it shall refer **the whole or part of** the case to the competent authorities of the Member State concerned with a view to the application of that State's national competition law.

If, however, the Commission considers that such a distinct market or threat does not exist it shall adopt a decision to that effect which it shall address to the Member State concerned.

In cases where a Member State informs the Commission that a concentration

affects competition in a distinct market within its territory that does not form a substantial part of the common market, the Commission shall refer the whole or part of the case relating to the distinct market concerned, if it considers that such a distinct market is affected.

4. A decision to refer or not to refer pursuant to paragraph 3 shall be taken where:

(a) as a general rule within the six-week period provided for in Article 10 (1), second subparagraph, where the Commission, pursuant to Article 6 (1) (b), has not initiated proceedings, or

(b) within three months at most of the notification of the concentration concerned where the Commission has initiated proceedings under Article 6 (1) (c), without taking the preparatory steps in order to adopt the necessary measures under to Article 8 (2), second subparagraph, (3) or (4) to maintain or restore effective competition on the market concerned.

5. If within the three months referred to in paragraph 4 (b) the Commission, despite a reminder from the Member State concerned, has not taken a decision on referral in accordance with paragraph 3 nor has taken the preparatory steps referred to in paragraph 4 (b), it shall be deemed to have taken a decision to refer the case to the Member State concerned in accordance with paragraph 3 (b).

6. The publication of any report or the announcement of the findings of the examination of the concentration by the competent authority of the Member State concerned shall be effected not more than four months after the Commission's referral.

7. The geographical reference market shall consist of the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because, in particular, conditions of competition are appreciably different in those areas. This assessment should take account in particular of the nature and characteristics of the products or services concerned, of the existence of entry barriers or of consumer preferences, of appreciable differences of the undertakings' market shares between the area concerned and neighbouring areas or of substantial price differences.

8. In applying the provisions of this Article, the Member State concerned may take only the measures strictly necessary to safeguard or restore effective competition on the market concerned.

9. In accordance with the relevant provisions of the Treaty, any Member State may appeal to the Court of Justice, and in particular request the application of Article 186, for the purpose of applying its national competition law.

10. ~~This Article will be reviewed before the end of the fourth year following that of the adoption of this Regulation.~~ **This Article may be re-examined at the same time as the thresholds referred to in Article 1.**

Article 10

Time limits for initiating proceedings and for decisions

1. The decisions referred to in Article 6 (1) must be taken within one month at most. That period shall begin on the day following that of the receipt of a notification or, if the information to be supplied with the notification is incomplete, on the day following that of the receipt of the complete information.

That period shall be increased to six weeks if the Commission receives a request from a Member State in accordance with Article 9 (2), **or where, after notification of a concentration, the undertakings concerned submit commitments pursuant to Article 6(2), which are intended by the parties to form the basis for a decision pursuant to Article 6(1)(b).**

2. Decisions taken pursuant to Article 8 (2) concerning notified concentrations must be taken as soon as it appears that the serious doubts referred to in Article 6 (1) (c) have been removed, particularly as a result of modifications made by the undertakings concerned, and at the latest by the deadline laid down in paragraph 3.

3. Without prejudice to Article 8 (6), decisions taken pursuant to Article 8 (3) concerning notified concentrations must be taken within not more than four months of the date on which proceedings are initiated.

4. The periods set by paragraphs 1 and 3 shall exceptionally be suspended where, owing to circumstances for which one of the undertakings involved in the concentration is responsible, the Commission has had to request information by decision pursuant to Article 11 or to order an investigation by decision pursuant to Article 13.

5. Where the Court of Justice gives a Judgement which annuls the whole or part of a Commission decision taken under this Regulation, the periods laid down in this Regulation shall start again from the date of the Judgement.

6. Where the Commission has not taken a decision in accordance with Article 6 (1) (b) or (c) or Article 8 (2) or (3) within the deadlines set in paragraphs 1 and 3 respectively, the concentration shall be deemed to have been declared compatible with the common market, without prejudice to Article 9.

Article 11

Requests for information

1. In carrying out the duties assigned to it by this Regulation, the Commission may obtain all necessary information from the Governments and competent authorities of the Member States, from the persons referred to in Article 3 (1) (b), and from undertakings and associations of undertakings.

2. When sending a request for information to a person, an undertaking or an association of undertakings, the Commission shall at the same time send a copy of the request to the

competent authority of the Member State within the territory of which the residence of the person or the seat of the undertaking or association of undertakings is situated.

3. In its request the Commission shall state the legal basis and the purpose of the request and also the penalties provided for in Article 14 (1) (c) for supplying incorrect information.

4. The information requested shall be provided, in the case of undertakings, by their owners or their representatives and, in the case of legal persons, companies or firms, or of associations having no legal personality, by the persons authorized to represent them by law or by their statutes.

5. Where a person, an undertaking or an association of undertakings does not provide the information requested within the period fixed by the Commission or provides incomplete information, the Commission shall by decision require the information to be provided. The decision shall specify what information is required, fix an appropriate period within which it is to be supplied and state the penalties provided for in Articles 14 (1) (c) and 15 (1) (a) and the right to have the decision reviewed by the Court of Justice.

6. The Commission shall at the same time send a copy of its decision to the competent authority of the Member State within the territory of which the residence of the person or the seat of the undertaking or association of undertakings is situated.

Article 12

Investigations by the authorities of the Member States

1. At the request of the Commission, the competent authorities of the Member States shall undertake the investigations which the Commission considers to be necessary under Article 13 (1), or which it has ordered by decision pursuant to Article 13 (3). The officials of the competent authorities of the Member States responsible for conducting those investigations shall exercise their powers upon production of an authorization in writing issued by the competent authority of the Member State within the territory of which the investigation is to be carried out. Such authorization shall specify the subject matter and purpose of the investigation.

2. If so requested by the Commission or by the competent authority of the Member State within the territory of which the investigation is to be carried out, officials of the Commission may assist the officials of that authority in carrying out their duties.

Article 13

Investigative powers of the Commission

1. In carrying out the duties assigned to it by this Regulation, the Commission may undertake all necessary investigations into undertakings and associations of undertakings. To that end the officials authorized by the Commission shall be empowered:

- (a) to examine the books and other business records;
- (b) to take or demand copies of or extracts from the books and business records;
- (c) to ask for oral explanations on the spot;
- (d) to enter any premises, land and means of transport of undertakings.

2. The officials of the Commission authorized to carry out the investigations shall exercise their powers on production of an authorization in writing specifying the subject matter and purpose of the investigation and the penalties provided for in Article 14 (1) (d) in cases where production of the required books or other business records is incomplete. In good time before the investigation, the Commission shall inform, in writing, the competent authority of the Member State within the territory of which the investigation is to be carried out of the investigation and of the identities of the authorized officials.
3. Undertakings and associations of undertakings shall submit to investigations ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the investigation, appoint the date on which it shall begin and state the penalties provided for in Articles 14 (1) (d) and 15 (1) (b) and the right to have the decision reviewed by the Court of Justice.
4. The Commission shall in good time and in writing inform the competent authority of the Member State within the territory of which the investigation is to be carried out of its intention of taking a decision pursuant to paragraph 3. It shall hear the competent authority before taking its decision.
5. Officials of the competent authority of the Member State within the territory of which the investigation is to be carried out may, at the request of that authority or of the Commission, assist the officials of the Commission in carrying out their duties.
6. Where an undertaking or association of undertakings opposes an investigation ordered pursuant to this Article, the Member State concerned shall afford the necessary assistance to the officials authorized by the Commission to enable them to carry out their investigation. To this end the Member States shall, after consulting the Commission, take the necessary measures within one year of the entry into force of this Regulation.

Article 14

Fines

1. The Commission may by decision impose on the persons referred to in Article 3 (1) (b), undertakings or associations of undertakings fines of from ECU 1 000 to 50 000 where intentionally or negligently:
 - (a) they fail to notify a concentration in accordance with Article 4;
 - (b) they supply incorrect or misleading information in a notification pursuant to Article 4;
 - (c) they supply incorrect information in response to a request made pursuant to Article 11 or fail to supply information within the period fixed by a decision taken pursuant to Article 11;
 - (d) they produce the required books or other business records in incomplete form during investigations under Article 12 or 13, or refuse to submit to an investigation ordered by decision taken pursuant to Article 13.

2. The Commission may by decision impose fines not exceeding 10 % of the aggregate turnover of the undertakings concerned within the meaning of Article 5 on the persons or undertakings concerned where, either intentionally or negligently, they;

(a) fail to comply with an obligation imposed by decision pursuant to Article 7 (4) or 8 (2), second subparagraph;

(b) put into effect a concentration in breach of Article 7 (1) or disregard a decision taken pursuant to Article 7 (2);

(c) put into effect a concentration declared incompatible with the common market by decision pursuant to Article 8 (3) or do not take the measures ordered by decision pursuant to Article 8 (4).

3. In setting the amount of a fine, regard shall be had to the nature and gravity of the infringement.

4. Decisions taken pursuant to paragraphs 1 and 2 shall not be of criminal law nature.

Article 15

Periodic penalty payments

1. The Commission may by decision impose on the persons referred to in Article 3 (1) (b), undertakings or associations of undertakings concerned periodic penalty payments of up to ECU 25 000 for each day of delay calculated from the date set in the decision, in order to compel them:

(a) to supply complete and correct information which it has requested by decision pursuant to Article 11;

(b) to submit to an investigation which it has ordered by decision pursuant to Article 13.

2. The Commission may by decision impose on the persons referred to in Article 3 (1) (b) or on undertakings periodic penalty payments of up to ECU 100 000 for each day of delay calculated from the date set in the decision, in order to compel them:

(a) to comply with an obligation imposed by decision pursuant to Article 7 (4) or Article 8 (2), second subparagraph, or

(b) to apply the measures ordered by decision pursuant to Article 8 (4).

3. Where the persons referred to in Article 3 (1) (b), undertakings or associations of undertakings have satisfied the obligation which it was the purpose of the periodic penalty payment to enforce, the Commission may set the total amount of the periodic penalty payments at a lower figure than that which would arise under the original decision.

Article 16

Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction within the meaning of Article 172 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payments; it may cancel, reduce or increase the fine or periodic penalty payments imposed.

Article 17

Professional secrecy

1. Information acquired as a result of the application of Articles 11, 12, 13 and 18 shall be used only for the purposes of the relevant request, investigation or hearing.
2. Without prejudice to Articles 4 (3), 18 and 20, the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information they have acquired through the application of this Regulation of the kind covered by the obligation of professional secrecy.
3. Paragraphs 1 and 2 shall not prevent publication of general information or of surveys which do not contain information relating to particular undertakings or associations of undertakings.

Article 18

Hearing of the parties and of third persons

1. Before taking any decision provided for in Article 7 (2) and (4), Article 8 (2), second subparagraph, and (3) to (5), and Articles 14 and 15, the Commission shall give the persons, undertakings and associations of undertakings concerned the opportunity, at every stage of the procedure up to the consultation of the Advisory Committee, of making known their views on the objections against them.
2. By way of derogation from paragraph 1, a decision ~~to continue the suspension of a concentration or~~ to grant a derogation from suspension as referred to in Article 7 (2) or (4) may be taken provisionally, without the persons, undertakings or associations of undertakings concerned being given the opportunity to make known their views beforehand, provided that the Commission gives them that opportunity as soon as possible after having taken its decision.
3. The Commission shall base its decision only on objections on which the parties have been able to submit their observations. The rights of the defence shall be fully respected in the proceedings. Access to the file shall be open at least to the parties directly involved, subject to the legitimate interest of undertakings in the protection of their business secrets.
4. Insofar as the Commission or the competent authorities of the Member States deem it necessary, they may also hear other natural or legal persons. Natural or legal persons showing a sufficient interest and especially members of the administrative or management bodies of the undertakings concerned or the recognized representatives of their employees shall be entitled, upon application, to be heard.

Article 19

Liaison with the authorities of the Member States

1. The Commission shall transmit to the competent authorities of the Member States copies of notifications within three working days and, as soon as possible, copies of the most important documents lodged with or issued by the Commission pursuant to this Regulation. **Such**

documents shall include commitments which are intended by the parties to form the basis for a decision pursuant to Articles 6(1)(b) or 8(2).

2. The Commission shall carry out the procedures set out in this Regulation in close and constant liaison with the competent authorities of the Member States, which may express their views upon those procedures. For the purposes of Article 9 it shall obtain information from the competent authority of the Member State as referred to in paragraph 2 of that Article and give it the opportunity to make known its views at every stage of the procedure up to the adoption of a decision pursuant to paragraph 3 of that Article; to that end it shall give it access to the file.

3. An Advisory Committee on concentrations shall be consulted before any decision is taken pursuant to Articles 8 (2) to (5), 14 or 15, or any provisions are adopted pursuant to Article 23.

4. The Advisory Committee shall consist of representatives of the authorities of the Member States. Each Member State shall appoint one or two representatives; if unable to attend, they may be replaced by other representatives. At least one of the representatives of a Member State shall be competent in matters of restrictive practices and dominant positions.

5. Consultation shall take place at a joint meeting convened at the invitation of and chaired by the Commission. A summary of the case, together with an indication of the most important documents and a preliminary draft of the decision to be taken for each case considered, shall be sent with the invitation. The meeting shall take place not less than 14 days after the invitation has been sent. The Commission may in exceptional cases shorten that period as appropriate in order to avoid serious harm to one or more of the undertakings concerned by a concentration.

6. The Advisory Committee shall deliver an opinion on the Commission's draft decision, if necessary by taking a vote. The Advisory Committee may deliver an opinion even if some members are absent and unrepresented. The opinion shall be delivered in writing and appended to the draft decision. The Commission shall take the utmost account of the opinion delivered by the Committee. It shall inform the Committee of the manner in which its opinion has been taken into account.

7. The Advisory Committee may recommend publication of the opinion. The Commission may carry out such publication. The decision to publish shall take due account of the legitimate interest of undertakings in the protection of their business secrets and of the interest of the undertakings concerned in such publication's taking place.

Article 20

Publication of decisions

1 . The Commission shall publish the decisions which it takes pursuant to Article 8 (2) to (5) in the *Official Journal of the European Communities*.

2. The publication shall state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 21

Jurisdiction

1. Subject to review by the Court of Justice, the Commission shall have sole jurisdiction to take the decisions provided for in this Regulation.
2. No Member State shall apply its national legislation on competition to any concentration that has a Community dimension.

The first subparagraph shall be without prejudice to any Member State's power to carry out any enquiries necessary for the application of Article 9 (2) or after referral, pursuant to Article 9 (3), first subparagraph, indent (b), or (5), to take the measures strictly necessary for the application of Article 9 (8).

3. Notwithstanding paragraphs 1 and 2, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law.

Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph.

Any other public interest must be communicated to the Commission by the Member State concerned and shall be recognized by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law before the measures referred to above may be taken. The Commission shall inform the Member State concerned of its decision within one month of that communication.

Article 22

Application of the Regulation

1. This Regulation alone shall apply to concentrations as defined in Article 3, **and** Regulations No 17¹⁶⁵, (EEC) No 1017/68¹⁶⁶, (EEC) No 4056/86¹⁶⁷ and (EEC) No 3975/87¹⁶⁸ shall not apply to concentrations as defined in Article 3, **except in relation to joint ventures that do not have a Community dimension and which have as their object or effect the coordination of the competitive behaviour of undertakings that remain independent.**

3. If the Commission finds, at the request of a Member State **or at the joint request of two or more Member States**, that a concentration as defined in Article 3 that has no Community dimension within the meaning of Article 1 creates or strengthens a dominant position as a result of which effective competition would be significantly impeded within the territory of the Member State ~~concerned~~ **or States making the joint request**, it may, ~~in so far as~~ **insofar as the that** concentration affects trade between Member States, adopt the decisions provided for in Article 8 (2), second subparagraph, (3) and (4).

¹⁶⁵OJ No 13, 21. 2. 1962, p. 204/62

¹⁶⁶OJ No L 175, 23. 7. 1968, p. 1.

¹⁶⁷ OJ No L 378, 31. 12. 1986, p. 4.

¹⁶⁸ OJ No L 374. 31. 12. 1987, p. 1.

4. Articles 2 (1) (a) and (b), 5, 6, 8 and 10 to 20 shall apply **to a request made pursuant to paragraph 3. Article 7 shall apply to the extent that the concentration has not been put into effect on the date on which the Commission informs the parties that a request has been made.** The period within which proceedings may be initiated pursuant to Article 10 (1) shall begin on the ~~date~~ **day following that** of the receipt of the request from the Member State **or States concerned.** The request must be made within one month at most of the date on which the concentration was made known to the Member State **or to all Member States making a joint request** or effected. This period shall begin on the date of the first of those events.

5. Pursuant to paragraph 3 the Commission shall take only the measures strictly necessary to maintain or restore effective competition within the territory of the Member State **or States** at the request of which it intervenes.

~~6. Paragraphs 3 to 5 shall continue to apply until the thresholds referred to in Article 1 (2) have been reviewed.~~

Article 23

Implementing provisions

The Commission shall have the power to adopt implementing provisions concerning the form, content and other details of notifications pursuant to Article 4, time limits pursuant to Articles **7, 9, 10 and 22** and hearings pursuant to Article 18. **The Commission shall have the power to lay down the procedure and time limits for the submission of commitments pursuant to Articles 6(2) and 8(2).**

Article 24

Relations with non-member countries

1. The Member States shall inform the Commission of any general difficulties encountered by their undertakings with concentrations as defined in Article 3 in a non-member country.

2. Initially not more than one year after the entry into force of this Regulation and thereafter periodically the Commission shall draw up a report examining the treatment accorded to Community undertakings, in the terms referred to in paragraphs 3 and 4, as regards concentrations in non-member countries. The Commission shall submit those reports to the Council, together with any recommendations.

3. Whenever it appears to the Commission, either on the basis of the reports referred to in paragraph 2 or on the basis of other information, that a non-member country does not grant Community undertakings treatment comparable to that granted by the Community to undertakings from that non-member country, the Commission may submit proposals to the Council for an appropriate mandate for negotiation with a view to obtaining comparable treatment for Community undertakings.

4. Measures taken under this Article shall comply with the obligations of the Community or of the Member States, without prejudice to Article 234 of the Treaty, under international agreements, whether bilateral or multilateral.

Article 25

Entry into force

1. This Regulation shall enter into force on 21 September 1990.

2. This Regulation shall not apply to any concentration which was the subject of an agreement or announcement or where control was acquired within the meaning of Article 4 (1) before the date of this Regulation's entry into force and it shall not in any circumstances apply to any concentration in respect of which proceedings were initiated before that date by a Member State's authority with responsibility for competition.

3. As regards concentrations to which this Regulation applies by virtue of accession, the date of accession shall be substituted for the date of entry into force of this Regulation. The provision of paragraph 2, second alternative, applies in the same way to proceedings initiated by a competition authority of the new Member States or by the EFTA Surveillance Authority.¹⁶⁹

This Regulation shall be binding in its entirety and directly applicable in all Member States.

APPENDIX 8. Unofficial Commission Regulation 447/98

¹⁶⁹ Introduced by the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, ANNEX I - List referred to in Article 29 of the Act of Accession - III. COMPETITION - B. PROCEDURAL REGULATIONS; OJ No. C 241, 29/08/94 P. 0057.

COMMISSION REGULATION (EC) NO 447/98 OF 1 MARCH 1998 ON THE NOTIFICATIONS, TIME LIMITS AND HEARINGS PROVIDED FOR IN COUNCIL REGULATION (EEC) NO 4064/89 ON THE CONTROL OF CONCENTRATIONS BETWEEN UNDERTAKINGS (TEXT WITH EEA RELEVANCE)
OFFICIAL JOURNAL L 061 , 02/03/1998 p. 0001 - 0028

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings¹⁷⁰, as last amended by Regulation (EC) No 1310/97¹⁷¹, and in particular Article 23 thereof,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty¹⁷², as last amended by the Act of Accession of Austria, Finland and Sweden, and in particular Article 24 thereof,

Having regard to Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway¹⁷³, as last amended by the Act of Accession of Austria, Finland and Sweden, and in particular Article 29 thereof,

Having regard to Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport¹⁷⁴, as amended by the Act of Accession of Austria, Finland and Sweden, and in particular Article 26 thereof,

Having regard to Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector¹⁷⁵, as last amended by Regulation (EEC) No 2410/92¹⁷⁶, and in particular Article 19 thereof,

Having consulted the Advisory Committee on Concentrations,

¹⁷⁰ OJ L 395, 30.12.1989, p. 1; corrected version, OJ L 257, 21.9.1990, p. 13.

¹⁷¹ OJ L 180, 9.7.1997, p. 1.

¹⁷² OJ 13, 21.2.1962, p. 204/62

¹⁷³ OJ L 175, 23.7.1968, p. 1.

¹⁷⁴ OJ L 378, 31.12.1986, p. 4.

¹⁷⁵ OJ L 374, 31.12.1987, p. 1.

- (1) Whereas Regulation (EEC) No 4064/89 and in particular Article 23 thereof has been amended by Regulation (EC) No 1310/97;
- (2) Whereas Commission Regulation (EC) No 3384/94¹⁷⁷, implementing Regulation (EEC) No 4064/89, must be modified in order to take account of those amendments; whereas experience in the application of Regulation (EC) No 3384/94 has revealed the need to improve certain procedural aspects thereof; whereas for the sake of clarity it should therefore be replaced by a new regulation;
- (3) Whereas the Commission has adopted Decision 94/810/ECSC, EC of 12 December 1994 on the terms of reference of hearing officers in competition procedures before the Commission¹⁷⁸;
- (4) Whereas Regulation (EEC) No 4064/89 is based on the principle of compulsory notification of concentrations before they are put into effect; whereas, on the one hand, a notification has important legal consequences which are favourable to the parties to the concentration plan, while, on the other hand, failure to comply with the obligation to notify renders the parties liable to a fine and may also entail civil law disadvantages for them; whereas it is therefore necessary in the interests of legal certainty to define precisely the subject matter and content of the information to be provided in the notification;
- (5) Whereas it is for the notifying parties to make full and honest disclosure to the Commission of the facts and circumstances which are relevant for taking a decision on the notified concentration;
- (6) Whereas in order to simplify and expedite examination of the notification, it is desirable to prescribe that a form be used;
- (7) Whereas since notification sets in motion legal time limits pursuant to Regulation (EEC) No 4064/89, the conditions governing such time-limits and the time when they become effective must also be determined;
- (8) Whereas rules must be laid down in the interests of legal certainty for calculating the time limits provided for in Regulation (EEC) No 4064/89; whereas in particular, the beginning and end of the period and the circumstances suspending the running of the period must be determined, with due regard to the requirements resulting from the exceptionally short legal time-limits referred to above; whereas in the absence of specific provisions the determination of rules applicable to periods, dates and time-limits should be based on the principles of Council Regulation (EEC, Euratom) No 1182/71¹⁷⁹;
- (9) Whereas the provisions relating to the Commission's procedure must be framed in such a way as to safeguard fully the right to be heard and the rights of defence; whereas for these purposes the Commission should distinguish between the parties who notify the

¹⁷⁶ OJ L 240, 24.8.1992, p. 18.

¹⁷⁷ OJ L 377, 31.12.1994, p. 1.

¹⁷⁸ OJ L 330, 21.12.1994, p. 67.

¹⁷⁹ OJ L 124, 8.6.1971, p. 1.

concentration, other parties involved in the concentration plan, third parties and parties regarding whom the Commission intends to take a decision imposing a fine or periodic penalty payments;

- (10) Whereas the Commission should give the notifying parties and other parties involved, if they so request, an opportunity before notification to discuss the intended concentration informally and in strict confidence; whereas in addition it should, after notification, maintain close contact with those parties to the extent necessary to discuss with them any practical or legal problems which it discovers on a first examination of the case and if possible to remove such problems by mutual agreement;
- (11) Whereas in accordance with the principle of the rights of defence, the notifying parties must be given the opportunity to submit their comments on all the objections which the Commission proposes to take into account in its decisions; whereas the other parties involved should also be informed of the Commission's objections and granted the opportunity to express their views;
- (12) Whereas third parties having sufficient interest must also be given the opportunity of expressing their views where they make a written application;
- (13) Whereas the various persons entitled to submit comments should do so in writing, both in their own interest and in the interest of good administration, without prejudice to their right to request a formal oral hearing where appropriate to supplement the written procedure; whereas in urgent cases, however, the Commission must be able to proceed immediately to formal oral hearings of the notifying parties, other parties involved or third parties;
- (14) Whereas it is necessary to define the rights of persons who are to be heard, to what extent they should be granted access to the Commission's file and on what conditions they may be represented or assisted;
- (15) Whereas the Commission must respect the legitimate interest of undertakings in the protection of their business secrets and other confidential information;
- (16) Whereas, in order to enable the Commission to carry out a proper assessment of commitments that have the purpose of rendering the concentration compatible with the common market, and to ensure due consultation with other parties involved, third parties and the authorities of the Member States as provided for in Regulation (EEC) No 4064/89, in particular Article 18(1) and (4) thereof, the procedure and time-limits for submitting such commitments as provided for in Article 6(2) and Article 8(2) of Regulation (EEC) No 4064/89 must be laid down;
- (17) Whereas it is also necessary to define the rules for fixing and calculating the time limits for reply fixed by the Commission;
- (18) Whereas the Advisory Committee on Concentrations must deliver its opinion on the basis of a preliminary draft decision; whereas it must therefore be consulted on a case after the inquiry into that case has been completed; whereas such consultation does not, however, prevent the Commission from reopening an inquiry if need be,

HAS ADOPTED THIS REGULATION:

CHAPTER I NOTIFICATIONS

Article 1.

Persons entitled to submit notifications

1. Notifications shall be submitted by the persons or undertakings referred to in Article 4(2) of Regulation (EEC) No 4064/89.
2. Where notifications are signed by representatives of persons or of undertakings, such representatives shall produce written proof that they are authorised to act.
3. Joint notifications should be submitted by a joint representative who is authorised to transmit and to receive documents on behalf of all notifying parties.

Article 2.

Submission of notifications

1. Notifications shall be submitted in the manner prescribed by form CO as shown in the Annex. Joint notifications shall be submitted on a single form.
2. One original and 23 copies of the form CO and the supporting documents shall be submitted to the Commission at the address indicated in form CO.
3. The supporting documents shall be either originals or copies of the originals; in the latter case the notifying parties shall confirm that they are true and complete.
4. Notifications shall be in one of the official languages of the Community. This language shall also be the language of the proceeding for the notifying parties. Supporting documents shall be submitted in their original language. Where the original language is not one of the official languages of the Community, a translation into the language of the proceeding shall be attached.
5. Where notifications are made pursuant to Article 57 of the EEA Agreement, they may also be in one of the official languages of the EFTA States or the working language of the EFTA Surveillance Authority. If the language chosen for the notifications is not an official language of the Community, the notifying parties shall simultaneously supplement all documentation with a translation into an official language of the Community. The language which is chosen for the translation shall determine the language used by the Commission as the language of the proceedings for the notifying parties.

Article 3.

Information and documents to be provided

1. Notifications shall contain the information, including documents, requested by form CO. The

information must be correct and complete.

2. The Commission may dispense with the obligation to provide any particular information, including documents, requested by form CO where the Commission considers that such information is not necessary for the examination of the case.

3. The Commission shall without delay acknowledge in writing to the notifying parties or their representatives receipt of the notification and of any reply to a letter sent by the Commission pursuant to Article 4(2) and (4).

Article 4.

Effective date of notification

1. Subject to paragraphs 2, 3 and 4, notifications shall become effective on the date on which they are received by the Commission.

2. Where the information, including documents, contained in the notification is incomplete in a material respect, the Commission shall inform the notifying parties or their representatives in writing without delay and shall set an appropriate time-limit for the completion of the information. In such cases, the notification shall become effective on the date on which the complete information is received by the Commission.

3. Material changes in the facts contained in the notification which the notifying parties know or ought to have known must be communicated to the Commission without delay. In such cases, when these material changes could have a significant effect on the appraisal of the concentration, the notification may be considered by the Commission as becoming effective on the date on which the information on the material changes is received by the Commission; the Commission shall inform the notifying parties or their representatives of this in writing and without delay.

4. Incorrect or misleading information shall be considered to be incomplete information.

5. When the Commission publishes the fact of the notification pursuant to Article 4(3) of Regulation (EEC) No 4064/89, it shall specify the date upon which the notification has been received. Where, further to the application of paragraphs 2, 3 and 4, the effective date of notification is later than the date specified in this publication, the Commission shall issue a further publication in which it will state the later date.

Article 5.

Conversion of notifications

1. Where the Commission finds that the operation notified does not constitute a concentration within the meaning of Article 3 of Regulation (EEC) No 4064/89, it shall inform the notifying parties or their representatives in writing. In such a case, the Commission shall, if requested by the notifying parties, as appropriate and subject to paragraph 2 of this Article, treat the notification as an application within the meaning of Article 2 or a notification within the meaning of Article 4 of Regulation No 17, as an application within the meaning of Article 12 or a notification within the meaning of Article 14 of Regulation (EEC) No 1017/68, as an

application within the meaning of Article 12 of Regulation (EEC) No 4056/86 or as an application within the meaning of Article 3(2) or of Article 5 of Regulation (EEC) No 3975/87.

2. In cases referred to in paragraph 1, second sentence, the Commission may require that the information given in the notification be supplemented within an appropriate time-limit fixed by it in so far as this is necessary for assessing the operation on the basis of the Regulations referred to in that sentence. The application or notification shall be deemed to fulfil the requirements of such Regulations from the date of the original notification where the additional information is received by the Commission within the time-limit fixed.

CHAPTER II TIME-LIMITS

Article 6.

Beginning of periods

1. The period referred to in Article 9(2) of Regulation (EEC) No 4064/89 shall start at the beginning of the working day following the date of the receipt of the copy of the notification by the Member State.
2. The period referred to in Article 9(4)(b) of Regulation (EEC) No 4064/89 shall start at the beginning of the working day following the effective date of the notification, within the meaning of Article 4 of this Regulation.
3. The period referred to in Article 9(6) of Regulation (EEC) No 4064/89 shall start at the beginning of the working day following the date of the Commission's referral.
4. The periods referred to in Article 10(1) of Regulation (EEC) No 4064/89 shall start at the beginning of the working day following the effective date of the notification, within the meaning of Article 4 of this Regulation.
5. The period referred to in Article 10(3) of Regulation (EEC) No 4064/89 shall start at the beginning of the working day following the day on which proceedings were initiated.
6. The period referred to in Article 22(4), second subparagraph, second sentence, of Regulation (EEC) No 4064/89 shall start at the beginning of the working day following the date of the first of the events referred to.

Article 7.

End of periods

1. The period referred to in Article 9(2) of Regulation (EEC) No 4064/89 shall end with the expiry of the day which in the third week following that in which the period began is the same day of the week as the day from which the period runs.
2. The period referred to in Article 9(4)(b) of Regulation (EEC) No 4064/89 shall end with the expiry of the day which in the third month following that in which the period began falls on the same date as the day from which the period runs. Where such a day does not occur in that month, the period shall end with the expiry of the last day of that month.
3. The period referred to in Article 9(6) of Regulation (EEC) No 4064/89 shall end with the

expiry of the day which in the fourth month following that in which the period began falls on the same date as the day from which the period runs. Where such a day does not occur in that month, the period shall end with the expiry of the last day of that month.

4. The period referred to in Article 10(1), first subparagraph, of Regulation (EEC) No 4064/89 shall end with the expiry of the day which in the month following that in which the period began falls on the same date as the day from which the period runs. Where such a day does not occur in that month, the period shall end with the expiry of the last day of that month.

5. The period referred to in Article 10(1), second subparagraph, of Regulation (EEC) No 4064/89 shall end with the expiry of the day which in the sixth week following that in which the period began is the same day of the week as the day from which the period runs.

6. The period referred to in Article 10(3) of Regulation (EEC) No 4064/89 shall end with the expiry of the day which in the fourth month following that in which the period began falls on the same date as the day from which the period runs. Where such a day does not occur in that month, the period shall end with the expiry of the last day of that month.

7. The period referred to in Article 22(4), second subparagraph, second sentence, of Regulation (EEC) No 4064/89 shall end with the expiry of the day which in the month following that in which the period began falls on the same date as the day from which the period runs. Where such a day does not occur in that month, the period shall end with the expiry of the last day of that month.

8. Where the last day of the period is not a working day, the period shall end with the expiry of the following working day.

Article 8.

Recovery of holidays

Once the end of the period has been determined in accordance with Article 7, if public holidays or other holidays of the Commission referred to in Article 23 fall within the periods referred to in Articles 9, 10 and 22 of Regulation (EEC) No 4064/89, a corresponding number of working days shall be added to those periods.

Article 9.

Suspension of time limit

1. The periods referred to in Article 10(1) and (3) of Regulation (EEC) No 4064/89 shall be suspended where the Commission, pursuant to Article 11(5) and Article 13(3) of that Regulation, has to take a decision because:

(a) information which the Commission has requested pursuant to Article 11(1) of Regulation (EEC) No 4064/89 from one of the notifying parties or another involved party, as defined in Article 11 of this Regulation, is not provided or not provided in full within the time limit fixed by the Commission;

(b) information which the Commission has requested pursuant to Article 11(1) of Regulation (EEC) No 4064/89 from a third party, as defined in Article 11 of this Regulation, is not

provided or not provided in full within the time limit fixed by the Commission owing to circumstances for which one of the notifying parties or another involved party, as defined in Article 11 of this Regulation, is responsible;

(c) one of the notifying parties or another involved party, as defined in Article 11 of this Regulation, has refused to submit to an investigation deemed necessary by the Commission on the basis of Article 13(1) of Regulation (EEC) No 4064/89 or to cooperate in the carrying out of such an investigation in accordance with that provision;

(d) the notifying parties have failed to inform the Commission of material changes in the facts contained in the notification.

2. The periods referred to in Article 10(1) and (3) of Regulation (EEC) No 4064/89 shall be suspended:

(a) in the cases referred to in paragraph 1(a) and (b), for the period between the end of the time limit fixed in the request for information and the receipt of the complete and correct information required by decision;

(b) in the cases referred to in paragraph 1(c), for the period between the unsuccessful attempt to carry out the investigation and the completion of the investigation ordered by decision;

(c) in the cases referred to in paragraph 1(d), for the period between the occurrence of the change in the facts referred to therein and the receipt of the complete and correct information requested by decision or the completion of the investigation ordered by decision.

3. The suspension of the time limit shall begin on the day following that on which the event causing the suspension occurred. It shall end with the expiry of the day on which the reason for suspension is removed. Where such a day is not a working day, the suspension of the time-limit shall end with the expiry of the following working day.

Article 10.

Compliance with the time-limits

1. The time limits referred to in Article 9(4) and (5), and Article 10(1) and (3) of Regulation (EEC) No 4064/89 shall be met where the Commission has taken the relevant decision before the end of the period.

2. The time limit referred to in Article 9(2) of Regulation (EEC) No 4064/89 shall be met where a Member State informs the Commission before the end of the period in writing.

3. The time limit referred to in Article 9(6) of Regulation (EEC) No 4064/89 shall be met where the competent authority of the Member State concerned publishes any report or announces the findings of the examination of the concentration before the end of the period.

4. The time limit referred to in Article 22(4), second subparagraph, second sentence, of Regulation (EEC) No 4064/89 shall be met where the request made by the Member State or the Member States is received by the Commission before the end of the period.

CHAPTER III HEARING OF THE PARTIES AND OF THIRD PARTIES

Article 11.

Parties to be heard

For the purposes of the rights to be heard pursuant to Article 18 of Regulation (EEC) No 4064/89, the following parties are distinguished:

- (a) notifying parties, that is, persons or undertakings submitting a notification pursuant to Article 4(2) of Regulation (EEC) No 4064/89;
- (b) other involved parties, that is, parties to the concentration plan other than the notifying parties, such as the seller and the undertaking which is the target of the concentration;
- (c) third parties, that is, natural or legal persons showing a sufficient interest, including customers, suppliers and competitors, and especially members of the administration or management organs of the undertakings concerned or recognised workers' representatives of those undertakings;
- (d) parties regarding whom the Commission intends to take a decision pursuant to Article 14 or 15 of Regulation (EEC) No 4064/89.

Article 12.

Decisions on the suspension of concentrations

1. Where the Commission intends to take a decision pursuant to Article 7(4) of Regulation (EEC) No 4064/89 which adversely affects one or more of the parties, it shall, pursuant to Article 18(1) of that Regulation, inform the notifying parties and other involved parties in writing of its objections and shall fix a time limit within which they may make known their views.

2. Where the Commission, pursuant to Article 18(2) of Regulation (EEC) No 4064/89, has taken a decision referred to in paragraph 1 of this Article provisionally without having given the notifying parties and other involved parties the opportunity to make known their views, it shall without delay send them the text of the provisional decision and shall fix a time limit within which they may make known their views.

Once the notifying parties and other involved parties have made known their views, the Commission shall take a final decision annulling, amending or confirming the provisional decision. Where they have not made known their views within the time limit fixed, the Commission's provisional decision shall become final with the expiry of that period.

3. The notifying parties and other involved parties shall make known their views in writing or orally within the time limit fixed. They may confirm their oral statements in writing.

Article 13.

Decisions on the substance of the case

1. Where the Commission intends to take a decision pursuant to Article 8(2), second

subparagraph, or Article 8(3), (4) or (5) of Regulation (EEC) No 4064/89, it shall, before consulting the Advisory Committee on Concentrations, hear the parties pursuant to Article 18(1) and (3) of that Regulation.

2. The Commission shall address its objections in writing to the notifying parties.

The Commission shall, when giving notice of objections, set a time limit within which the notifying parties may inform the Commission of their views in writing.

The Commission shall inform other involved parties in writing of these objections.

The Commission shall also set a time limit within which those other involved parties may inform the Commission of their views in writing.

3. After having addressed its objections to the notifying parties, the Commission shall, upon request, give them access to the file for the purpose of enabling them to exercise their rights of defence.

The Commission shall, upon request, also give the other involved parties who have been informed of the objections access to the file in so far as this is necessary for the purposes of preparing their observations.

4. The parties to whom the Commission's objections have been addressed or who have been informed of those objections shall, within the time limit fixed, make known in writing their views on the objections. In their written comments, they may set out all matters relevant to the case and may attach any relevant documents in proof of the facts set out. They may also propose that the Commission hear persons who may corroborate those facts. They shall submit one original and 29 copies of their response to the Commission at the address indicated in form CO.

5. Where the Commission intends to take a decision pursuant to Article 14 or 15 of Regulation (EEC) No 4064/89 it shall, before consulting the Advisory Committee on Concentrations, hear pursuant to Article 18(1) and (3) of that Regulation the parties regarding whom the Commission intends to take such a decision.

The procedure provided for in paragraph 2, first and second subparagraphs, paragraph 3, first subparagraph, and paragraph 4 is applicable, *mutatis mutandis*.

Article 14.

Oral hearings

1. The Commission shall afford the notifying parties who have so requested in their written comments the opportunity to put forward their arguments orally in a formal hearing if such parties show a sufficient interest. It may also in other cases afford such parties the opportunity of expressing their views orally.

2. The Commission shall afford other involved parties who have so requested in their written comments the opportunity to express their views orally in a formal hearing if they show a sufficient interest. It may also in other cases afford such parties the opportunity of expressing their views orally.

3. The Commission shall afford parties on whom it proposes to impose a fine or periodic

penalty payment who have so requested in their written comments the opportunity to put forward their arguments orally in a formal hearing. It may also in other cases afford such parties the opportunity of expressing their views orally.

4. The Commission shall invite the persons to be heard to attend on such date as it shall appoint.

5. The Commission shall invite the competent authorities of the Member States, to take part in the hearing.

Article 15.

Conduct of formal oral hearings

1. Hearings shall be conducted by the Hearing Officer.

2. Persons invited to attend shall either appear in person or be represented by legal representatives or by representatives authorised by their constitution as appropriate.

Undertakings and associations of undertakings may be represented by a duly authorised agent appointed from among their permanent staff.

3. Persons heard by the Commission may be assisted by their legal adviser or other qualified persons admitted by the Hearing Officer.

4. Hearings shall not be public. Each person shall be heard separately or in the presence of other persons invited to attend. In the latter case, regard shall be had to the legitimate interest of the undertakings in the protection of their business secrets and other confidential information.

5. The statements made by each person heard shall be recorded.

Article 16.

Hearing of third parties

1. If third parties apply in writing to be heard pursuant to Article 18(4), second sentence, of Regulation (EEC) No 4064/89, the Commission shall inform them in writing of the nature and subject matter of the procedure and shall fix a time limit within which they may make known their views.

2. The third parties referred to in paragraph 1 shall make known their views in writing within the time limit fixed. The Commission may, where appropriate, afford the parties who have so requested in their written comments the opportunity to participate in a formal hearing. It may also in other cases afford such parties the opportunity of expressing their views orally.

3. The Commission may likewise afford to any other third parties the opportunity of expressing their views.

Article 17.

Confidential information

1. Information, including documents, shall not be communicated or made accessible in so far as

it contains business secrets of any person or undertaking, including the notifying parties, other involved parties or of third parties, or other confidential information the disclosure of which is not considered necessary by the Commission for the purpose of the procedure, or where internal documents of the authorities are concerned.

2. Any party which makes known its views under the provisions of this Chapter shall clearly identify any material which it considers to be confidential, giving reasons, and provide a separate non-confidential version within the time limit fixed by the Commission.

CHAPTER IV COMMITMENTS RENDERING THE CONCENTRATION COMPATIBLE

Article 18.

Time limits for commitments

1. Commitments proposed to the Commission by the undertakings concerned pursuant to Article 6(2) of Regulation (EEC) No 4064/89 which are intended by the parties to form the basis for a decision pursuant to Article 6(1)(b) of that Regulation shall be submitted to the Commission within not more than three weeks from the date of receipt of the notification.

2. Commitments proposed to the Commission by the undertakings concerned pursuant to Article 8(2) of Regulation (EEC) No 4064/89 which are intended by the parties to form the basis for a decision pursuant to that Article shall be submitted to the Commission within not more than three months from the date on which proceedings were initiated. The Commission may in exceptional circumstances extend this period.

3. Articles 6 to 9 shall apply mutatis mutandis to paragraphs 1 and 2 of this Article.

Article 19.

Procedure for commitments

1. One original and 29 copies of commitments proposed to the Commission by the undertakings concerned pursuant to Article 6(2) or Article 8(2) of Regulation (EEC) No 4064/89 shall be submitted to the Commission at the address indicated in form CO.

2. Any party proposing commitments to the Commission pursuant to Articles 6(2) or Article 8(2) of Regulation (EEC) No 4064/89 shall clearly identify any material which it considers to be confidential, giving reasons, and provide a separate non-confidential version within the time limit fixed by the Commission.

CHAPTER V MISCELLANEOUS PROVISIONS

Article 20.

Transmission of documents

1. Transmission of documents and invitations from the Commission to the addressees may be

effected in any of the following ways:

- (a) delivery by hand against receipt;
- (b) registered letter with acknowledgement of receipt;
- (c) fax with a request for acknowledgement of receipt;
- (d) telex;
- (e) electronic mail with a request for acknowledgement of receipt.

2. Unless otherwise provided in this Regulation, paragraph 1 also applies to the transmission of documents from the notifying parties, from other involved parties or from third parties to the Commission.

3. Where a document is sent by telex, by fax or by electronic mail, it shall be presumed that it has been received by the addressee on the day on which it was sent.

Article 21.

Setting of time limits

In fixing the time limits provided for pursuant to Article 4(2), Article 5(2), Article 12(1) and (2), Article 13(2) and Article 16(1), the Commission shall have regard to the time required for preparation of statements and to the urgency of the case. It shall also take account of working days as well as public holidays in the country of receipt of the Commission's communication. These time limits shall be set in terms of a precise calendar date.

Article 22.

Receipt of documents by the Commission

1. In accordance with the provisions of Article 4(1) of this Regulation, notifications must be delivered to the Commission at the address indicated in form CO or have been dispatched by registered letter to the address indicated in form CO before the expiry of the period referred to in Article 4(1) of Regulation (EEC) No 4064/89.

Additional information requested to complete notifications pursuant to Article 4(2) and (4) or to supplement notifications pursuant to Article 5(2) must reach the Commission at the aforesaid address or have been dispatched by registered letter before the expiry of the time limit fixed in each case.

Written comments on Commission communications pursuant to Article 12(1) and (2), Article 13(2) and Article 16(1) must have reached the Commission at the aforesaid address before the expiry of the time limit fixed in each case.

2. Time limits referred to in subparagraphs two and three of paragraph 1 shall be determined in accordance with Article 21.

3. Should the last day of a time limit fall on a day which is not a working day or which is a public holiday in the country of dispatch, the time limit shall expire on the following working day.

Article 23.

Definition of working days

The expression 'working days` in this Regulation means all days other than Saturdays, Sundays, public holidays and other holidays as determined by the Commission and published in the Official Journal of the European Communities before the beginning of each year.

Article 24.

Repeal

Regulation (EEC) No 3384/94 is repealed.

Article 25.

Entry into force

This Regulation shall enter into force on 21 March 1998.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 1 March 1998.

For the Commission

Karel VAN MIERT