THE MERGER LAW AND POLICY OF THE EUROPEAN COMMUNITY

by Alan Friend

Thesis submitted for the degree of Ph.D.

Research conducted at the University of Glasgow, Department of Public, International and European Law.

c Alan Friend 1992.

ProQuest Number: 13815412

All rights reserved

INFORMATION TO ALL USERS
The quality of this reproduction is dependent upon the quality of the copy submitted.

In the unlikely event that the author did not send a complete manuscript
and there are missing pages, these will be noted. Also, if material had to be removed,
a note will indicate the deletion.

ProQuest 13815412

Published by ProQuest LLC (2018). Copyright of the Dissertation is held by the Author.

All rights reserved.
This work is protected against unauthorized copying under Title 17, United States Code
Microform Edition © ProQuest LLC.

ProQuest LLC.
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106 – 1346

Thesis
9280
Copy 1

CONTENTS

	Page
Title Page	i
Contents	ii
Summary	iii
Table of Cases	v
Abbreviations	vii
Chapters	
1. The Firm, Motivations for Merger, and 1992	1
2. Competition Policy and Merger Policy	42
3. From Antitrust to Pro-Efficiency	91
4. Competition, Concentration, and 1992 - a New Economic Reality?	130
5. Merger Control in the EC: a History of Merger Policy under Articles 85 and 86	176
6. Levelling the Playing Field?	233
7. The Merger Control Regulation	283
8. Conjectures or Prophecies? Speculations on the Future Development of Merger Control	354
Bibliography	406
Appendices	
A) The Merger Control Regulation (EEC) No 4046/89	
B) Article 130 of the Maastricht Treaty.	

Summary

The subject matter of this thesis is the merger law and policy of the European Community in the context of the vital phase of dynamic integration that the EC is presently undergoing.

Chapter One deals with the large firm, its customary motivations with regard to merger and the additional merger pressures imposed upon the firm by dint of the single market project.

Chapter Two tackles the theory and practice of competition and merger policies of western states and the EC. It also formulates subjective hypotheses to explain the inconsistencies and incongruities between ideology and application.

Chapter Three tests these hypotheses upon the antitrust law and practice of the United States of America.

Chapter Four utilises the knowledge gained by dint of the previous chapters to tackle the fundamental question of EC merger policy. That is, whether or not industrial criteria ought to be used alongside competition tests by the Commission for merger appraisal.

Chapter Five evaluates the pre-Regulation system of merger control under Articles 85 and 86 EEC

Chapter Six digresses from the path of public law onto that of private law. It examines the problem of the level playing field with regard to cross-border mergers.

Chapter Seven discusses in detail the formulation of the Merger Control Regulation with regard to the fundamental issue of ending the double jeopardy hazard.

Chapter Eight speculates on the future of merger management. It sets out a best case scenario for the development of merger control and shows how this is inexorably linked to the broader question of the future supervision of European industry.

The law is stated as at 31st December 1991. However, for the sake of completeness, Article 130 of the Maastricht Treaty is included by way of appendix.

Table of Cases

Supreme Court of the United States of America

Brunswick Corporation v Poeblo Bowl - o - Mat Inc. 429 US 477, Lawyers Ed. 2d, 701 Supreme Court 690 (1977).

Cargill Inc., and Exel Corporation v Montford of Colorado Inc. 479 US 104, 93 Lawyers Ed. 2d, 427 107 Supreme Court 484 (1986).

Cargill Incorporated and Exel Corporation v Montfort of Colorado Incorporated 479 US 104, 93 Lawyers Ed 2d, 427, 107 Supreme Court 484 (1986).

Court of Justice of the European Community

48/69 Imperial Chemical Industries v Commission (1972) ECR 619. (Dyestuffs case)

6/72 Europemballage Corporation and Continental Can Company Inc. v Commission (1973) ECR 215.

8/72 Vereeniging van Cementhandalaren v Commission (1972) ECR 977.

6 and 7/73R Commercial Solvents v Commission ECR (1974) 223.

40-48, 50, 54-56, 111, 113, and 114/73 Cooperatieve Vereniging Sulker Unie and Others v Commission (1975) ECR 1663. (Sugar Cartel case)

26/76 Metro SB - Grossmarkte GmbH and Co. v Commission (1977) ECR 1875.

27/76 United Brands Company and United Brands Continental B.V. v Commission (1978) ECR 207.

77/77 BP v Commission (1987) ECR 1511.

22/78 Hugin v Commission (1979) ECR 1869.

85/76 Hoffman-La Roche & Company AG v Commission (1979) ECR 461.

792/79R Camera Care Ltd. v Commission (1980) ECR 119.

210/81 Demo Studio Schmidt v Commission (1983) ECR 3045.

322/81 Michelin v Commission (1983) ECR 3461.

142/84 and 156/84 British American Tobacco Company Limited and R.J. Reynolds Industries Inc. v Commission (1988) 4 CMLR 24

209-213/84 Ministere Public v Asjes et al (1986) ECR 1425.

89/85, 104/85, 116-7/85, and 125-29/85 A. Ahlstrom Oskeyhito v Commission (1988) 4 CMLR 901. (Woodpulp case)

66/86 Ahmed Saeed Flugreisen and Silver Line Reiseburo v Zentrale Zur Bekaempfung Unlautern Wettbewerbs (not yet reported).

247/86 Alstel v Novasam (1988) ECR 5987.

51/89 Tetra Pack Rausing v Commission (1991) 4CMLR 334.

Abbreviations

AJIL	American Journal of International Law
Am Ec Rev	American Economic Review
Antitrust L Ec Rev	American Law and Economics Review
Antitrust LJ	Antitrust Law Journal
AB	Antitrust Bulletin
AG	Advocate General
BACFI	Bar Association for Commerce, Finance and Industry
Bull	Bulletin of the European Communities
Bull Suppl	Supplement to the Bulletin
BB	British Business
Bell J Ec	Bell Journal of Economics
BLR	Business Law Review
CBI	Confederation of British Industry
Competition Report	Report on Competition Policy
CLP	Current Legal Problems
Col L Rev	Columbia Legal Review
Corn L Rev	Cornell Law Review
CMLR	Common Market Law Reports
CMLRev	Common Market Law Review
COREPER	Committee of Permanent Representatives
DG	Directorate-General
DTI	Department of Trade and Industry
EC	European Community/Communities
EcJ	Economic Journal
ECLR	European Competition Law Review
ECJ	European Court of Justice
ECOSOC	Economic and Social Committee
ECR	European Court Reports (official reports of the judgements of the European Court of Justice, English

	version)
ECSC	European Coal and Steel Community
EEC	European Economic Community
ELRev	European Law Review
FIJL	Fordham International Law Journal
FT	Financial Times
Harv L Rev	Harvard Law Review
HL	House of Lords
IBL	International Business Lawyer
ICLQ	International and Comparative Law Quarterly
IOD	Institute of Directors
IRLE	International Review of Law and Economics
JBL	Journal of Business Law
J Ind Ec	Journal of Industrial Economics
J L Ec	Journal of Law and Economics
J Pol Ec	Journal of Political Economy
JWT	Journal of World Trade
LQR	Law Quarterly Review
LSG	Law Society Gazette
LIEI	Legal Issues of European Integration
Mich L Rev	Michigan Law Review
MLR	Modern Law Review
MMC	Monopolies and Mergers Commission
MITI	Ministry of International Trade and Industry
NLJ	New Law Journal
OECD	Organisation for Economic Cooperation and Development
OEP	Oxford Economic Papers
OFT	Office of Fair Trading
OJ	Official Journal of the European Communities
OxJLS	Oxford Journal of Legal Studies

Ox Rev Ec P	Oxford Review of Economic Papers
Ox Y E L	Oxford Yearbook of International Law
Qu J Ec	Quarterly Journal of Economics
Rec	Recueil de la Jurisprudence de la Cour (official court reports)
Rev Ec Stud	Review of Economic Studies
SEA	Single European Act
Stan Law Rev	Stanford Law Review
Texas L R	Texas Law Review
UK	United Kingdom
J Ind Ec	Journal of Industrial Economics
UCLR	University of California Law Review
U Penn L R	University of Pennsylvania Law Review
USA	United States of America
Yale LJ	Yale Law Journal
YEL	Yearbook of European Law

1. THE FIRM, MOTIVATIONS FOR MERGER AND 1992

This chapter is concerned to give a view of a large western firm, its motivations for merger at any given time, and the actions of this type of firm under the exceptional circumstances of a merger wave.[1]

The firm

Traditional classical economic theory regarded the firm as a fixed concept, so that a single theoretical model sufficed to cover all cases. This model had its usefulness when the individual entrepreneur/single product firm was the norm. Growth in scale, the merger of corporate organisations and multiproduct conglomerates have made it increasingly irrelevant. Many attempts have been made to produce a theory which more closely corresponds to modern economic reality. One of these is that propounded by Galbraith who believes that there is no such thing as a firm. Rather, there are several kinds of firms linked only by the factor of their common legal framework.[2] An example of classification of firms is found in the United Kingdom Companies Act 1985 which, for accounting purposes, separates firms into small, medium and large.[3] The firm which is to be the subject of this text is a large firm.

There is no universally recognised definition of a large firm. The Companies Act, 1985, defines large firms as having an aggregate turnover of over £9.6 million, gross assets over £4.7 million and average weekly employees over two hundred and fifty.[4] A firm that satisfies two out of the three criteria is classed as a large firm under the Act. A more pertinent description of a large firm is any firm that is sizeable enough for its

potential merger activity to come within the scope of public law merger legislation, either national or supranational. Generally speaking, the public law appraisal criteria for merger activity take into account a factor not included in the above criteria, that of market share. The United Kingdom Monopolies and Mergers Commission, as part of its referral criteria, examines market share and gross assets. The merged entity must, "... supply or receive at least one quarter of the goods or services of a particular description supplied in the United Kingdom or a substantial part of it ..."[5]

While recognising fully that the description is an arbitrary one, for the purposes of this text a large firm is one whose merger activity would come within the scope of EC national or supranational authorities. It is worthwhile accepting such an imprecise standard as a large firm possesses several characteristics, any or all of which cannot be guaranteed to exist in a firm of lesser size.

The majority of large firms are run by a management structure rather than by an individual. Large tends to imply a wide variety of tasks and responsibilities. In many cases these tasks will be of a complex nature and the responsibilities weighty. If so, then no single individual can have the multiple expertise to take all necessary decisions.[6] A further, more prosaic, factor which militates against an individual running a large firm is the fact that one person can only perform a given number of tasks in a given time. An individual is therefore incapable of running a large firm in a proper manner.

However, the age of the high profile businessperson

is not over. Some people in positions of high responsibility do contribute more to their firms than others. To some extent, therefore, the value and reputation of the firm is correlated with that of the performance and reputation of a particular person.

Where the large firm is run by a management structure, rather than an individual, it can be described as a mature firm. The mature firm is one that has been in existence long enough for power to have passed from the individual to a management team. By contrast, the entrepreneurial firm is one where an individual is in charge.[7] The large entrepreneurial firm is most likely to be a firm which has experienced rapid growth but still retains its original management pattern. In most, though not all, cases the individual has a large, or a controlling, interest in the entrepreneurial firm.

The differences between the two are in their business aims. The mature firm, as will be shown, tends to have a different set of business aims from the entrepreneurial firm, which is more closely related to the theoretical model of the firm as a profit maximiser.[8] As Burningham noted, "... a large modern corporation may have several objectives rather than the single one of profit maximisation."[9] In terms of numbers the mature firm now dominates the industrial landscape.[10]

The aims of the large mature firm these should be distinguished from the business plan of the firm.[11] The business plan of the firm is that which is employed to keep the firm running on a continuing basis. It is instrumental rather than substantive and can thus be said to be on a lower level than the aims of the firm. Further, aims are common to most firms, whilst there are

a vast number of permutations possible amongst business plans.

The logical primary aim for the large mature firm is survival. This aim, while comprehensible as such, is capable of a more precise definition. The most fundamental meaning of survival is the continued existence of the firm. Both Drucker and Galbraith have written that this is the predominant aim of the firm.[12] Donaldson and Lorsch found the long term corporate survival of the firm to be a goal emphasised by the leaders of large firms.[13] Sloman noted, "Aiming for profits, sales, salaries, power, etc. will be useless if the firm does not survive!"[14] For a large mature firm, operating in a comparatively stable market, the accomplishment of this primary aim is relatively simple.

In general, the majority of large firms do not lose money.[15] If, therefore, firms are already large, they need not expend the greater part of their energy in evolving a strategy for dynamic growth to the point where they are large enough to affect the market. Instead, they will tend to follow a more passive course of action. This will consist of maintenance of the existing size of the firm coupled with a steady and sustainable rate of growth. Such objectives may seem contradictory but growth is, in fact, the best protection against shrinkage.[16] Growth beyond this target, however, is not a primary aim of the firm and thus will be undertaken only if it can be done at minimum risk.

A further definition of survival is survival as an independent entity. With business becoming ever more competitive and increasingly being conducted on a global scale there are very few firms for whom this is not a

real problem. A 1990 MORI survey of 200 senior managers drawn at random from a list of the top 1,000 United Kingdom companies found that more than a third listed fear of hostile takeover as one of their greatest concerns.[17] Strategies relating to fine-tuning the performance of the firm as a defence against potential (as opposed to actual) merger bids may thus form a continuous part of the planning of the firm.[18]

It is argued that a secure and consistent rise in earnings, that is, the constant achievement of an acceptable or satisfactory level of earnings, coupled with a progressive rise in the dividend rate is the best defence against the danger of a potential merger bid.[19] The problem is that, even with this optimum defence against potential merger, the attack may still come. If so, firms may try other defensive measures with regard to performance. One defence that might seem plausible is to try to increase profits radically. However, seeking the maximum possible level of earnings as a defence against possible merger is not a sound strategy to follow: the maximisation of revenue may increase the risk of loss.[20] Any attempt to raise profits appreciably in the short term may well have as its downside an increased possibility of loss if the strategy fails. As Scherer and Ross stated, "If risky decisions turn out badly stockholders lose their assets and managers their jobs."[21]

In fact, it may be questioned if any defence based on trying to improve the performance of the firm is worthwhile. If a firm has a poor growth rate with mediocre profits and low dividends it will almost certainly attract a bid from another firm. The attraction may be that bidders feel they could revitalise the ailing

firm. Alternatively, they may wish to break up the firm and sell off its assets. Whatever the intentions of bidders, the shareholders of the target firm may need very little persuasion to sell.

The firm with steady growth, rising earnings and progressive increases in dividends is, however, an even more alluring prize. The large size of the target firm and its consequent high price is not the deterrent it once was. In all probability, if the predator has the funds to offer the shareholders an attractive price, in money, shares, or a combination of both, then the bid should succeed. In the end the profit motive tends to outweigh all other considerations for the shareholders. As Hill Samuel noted, "Even the best prepared defence can sometimes face overwhelming odds. In the Rowntrees case, Nestle's chequebook was so large ... there was relatively little the management could do except attempt to raise the price."[22]

This viewpoint, that there is nothing to be done in the way of defence against possible merger by way of altering the performance of the firm, is, however, too pessimistic. In the majority of cases, the decision the shareholders have to make about whether or not to sell is less clearcut. There is still an element of judgement as regards their decision. In practice this means that the performance of the firm over the last several years will be subjected to the closest scrutiny.

Thus, the optimum defensive strategy previously outlined is worth adhering to. A secure, acceptable or satisfactory level of earnings coupled with a progressive rise in the dividend rate will not guarantee the firm continued independence, but it represents the best

practical chance of doing so where there is still an element of decision in the question facing the shareholders. Further, if there has been any marked deviation from this paramount defensive position, then the shareholders decision will be easier to make and will probably result in their resolving to sell their shares.

This raises two problems in particular for any firm which may see merger as a perennial threat. The first is that the optimum defensive posture is extremely difficult to achieve and to sustain in practice in a volatile business environment. Second, it may be that, for perfectly sound business reasons, a firm wishes to pursue a different strategy. An example of this second problem is where a firm wishes to enter foreign markets and embarks on a costly enterprise to establish its brands there. It may feel that the long term benefits outweigh any short term profit and dividend deficiencies Shareholders, particularly institutional shareholders, may take a more contemporary view.

The firm, of course, has other ambitions. Next in importance to actual survival is autonomy. This is the desire of the management to evolve its corporate strategy free, as far as possible, from all outside interference. Such interference may come from government, international organisations such as the EC, financial institutions that lend the firm money and its own shareholders.

An acceptable or satisfactory level of earnings is the best protection against the interference of financial institutions and shareholders. The phrase 'minimum level of earnings' is used by Galbraith to make clear the separation of this concept from that of profit

maximisation. Economic theory, however, uses the term 'profit satisficing' which Sloman defined as being, "Where decision makers in a firm aim for a target level of profit rather than the absolute maximum level."[23] A minimum or target level of earnings signifies earnings large enough to satisfy the reasonable expectations of shareholders and provide sufficient savings to keep capital borrowing to as low a level as practicable. Earnings above this minimum level add little, if anything, to the protection of autonomy.[24]

The claim that firms are best served by seeking, and actually do seek, a minimum level of earnings rather than profit maximisation does not accord with mainstream economic theory. There is, nonetheless, a case to be made for this claim. As Sloman noted, "The theory of profit maximisation came under increasing attack during the 1950s and 1960s, when a whole range of new and alternate theories were developed. The common element of those theories was the replacement of profit maximisation by profit constraint."[25] Nor has there been any let up in the counter-attack until the present day. Scherer and Ross wrote in 1990, "However, the profit maximisation assumption has been challenged vigorously on several fronts. The argument, in brief, is that profit maximisation is at best unappealing and at worst meaningless to business decision makers operating in an environment of uncertainty, organisational complexity and conflicting goals."[26]

There are, as yet, no definitive data as to the correctness of either viewpoint. As Scherer and Ross noted, the evidence, while voluminous, is inconclusive and the last word has yet to be uttered on the profit maximisation controversy.[27] However, the minimum level

of profit theory does seem to reflect economic fact. If even the majority of large firms were profit maximisers there would be little problem in predicting the behaviour of industry. As this is clearly not the case, then the actual behaviour of firms must follow a more complex pattern.

Irrespective of its correctness or otherwise, the view that the large mature firm is not a profit maximiser has been aired sufficiently often to become popular public knowledge, in that it is routinely stated in the press.[28] In fact, theory has come full circle as academics are now beginning to take note of press pronouncements on maximising profits. As Shliefer and Vishney stated, "While many academic papers teach us that shareholder and business pressure will still force managers to maximise value, the newspapers remind us that this is not always the case."[29]

On the basis that the major aims of the firm are survival followed by autonomy, other ambitions may be considered.

Growth is a perennial aim of the firm, not only because it is necessary for survival of the firm, but also because it is of benefit to the management. Drayton, Emerson, and Griswold, among others, have noted the attractions of growth for the management.[30] First, any contraction of the firm will, in most cases, mean a contraction of the management. Second, any growth of sales will have the positive effect of expanding the management, resulting in new jobs, promotions, increases in salaries and more power and responsibility.[31] For these reasons, growth is an important aim of the firm and the management. Growth can be seen as a continuing

temptation to the management and, therefore, as a perennially popular option. It will, however, still be subordinate to the aim of securing a minimum level of earnings.

Technical innovation and progress is a further goal of the firm. This aim is also of benefit to the management. It is of direct advantage to that part of the management engaged in technological research and development but also serves the rest of the management, in that technical innovation is a major factor in retaining existing customers and attracting new ones. Nevertheless, technical innovation, in view of its relatively high cost and uncertain success, is subordinate to the goal of achieving a minimum level of earnings.

This view is supported by Foster. With regard to firms heavily dependent on research and development he stated that, "All the evidence points in the same direction: innovation is becoming ruinously expensive, and increasingly difficult for all but the very clever and the very lucky to sustain."[32] Scherer and Ross have stated that, in the United States, "... the modal R&D project is more expensive in constant-dollar terms than its counterpart thirty years ago."[33] Thus, even for firms in industries such as pharmaceuticals or computers, where research and development is essential, it is carried out in an ever increasing spirit of desperation.[34]

For firms in industries where research is not an absolute need, Foster noted that, "Many companies away from the leading edge of technology have abandoned research altogether: it's more macho nowadays, and usually more commercially rewarding to confine yourself

to development."[35] The commercial aspect of research was also commented upon by Scherer and Ross who stated that high risk attached to many individual corporate research projects.[36] A survey commissioned by the Confederation of British Industry in 1991 noted British industry's investment in research and development had fallen markedly since 1988.[37]

The motivations for merger

A necessary preliminary to the examination of merger motivations is for basic terms to be defined. The term 'takeover' has been defined by Weinberg and Blank as "... a transaction or series of transactions whereby a person (individual, group of individuals or company) acquires control over the assets of a company, either directly by becoming the owner of these assets or indirectly by obtaining control of the management of the company."[38] The word 'takeover' is not the only word that describes the act of one firm obtaining control of another. Some authors prefer the term 'acquisition' which Chiplin and Wright use and define as, "... an act of mutual exchange whereby the current owners of a company accept cash, securities or some combination in return for their shares in the existing company."[39] A takeover or acquisition is not necessarily a hostile act. In fact, the majority of such deals are agreed.

Another term requiring definition is 'merger.' 'Merger' may have more than one meaning. First, it is, as Weinberg and Blank wrote, "... an arrangement whereby the assets of two companies become vested in, or under the control of, one company (which may or may not be one of the original two companies), which has as its shareholders all, or substantially all, the shareholders

of the two companies."[40] Second, the word 'merger' can also be used in a dual sense to cover both mergers and takeovers. In this text the word merger is used in preference to using two words 'merger or takeover.' Thus 'merger,' unless specifically exempted, will always be used in its dual sense of merger or takeover. The word 'takeover' will only be used to depict an actual or theoretical specific instance of takeover.

To describe the firms involved in merger the words 'predator' and 'target' will be used. A predator firm is the initiator of a merger and a target firm is the object of attention.

All the above definitions have no legal significance and are given only for explanatory purposes. In particular, the two definitions of takeover are given as they complement each other. Weinberg and Blank stressed the acquisitorial aspects of the transaction while Chiplin and Wright added a necessary balance by pointing out the gains to the owners of the target firm.

A further necessary preliminary is the classification of merger into specific types.

A horizontal merger takes place where two firms producing essentially the same product or services join together. A merger would also be classified as horizontal where the products or services of the two firms, though dissimilar, compete directly with each other.

A vertical merger occurs where one of the firms involved is an actual or potential supplier of goods and services to the other. In essence, the two firms are both producing the same services or goods but at different

stages in the supply chain. The end product, which can be either a good or a service, is dependent on both firms. The car industry, for example, relies upon distributors as well as manufacturers. A firm within the supply chain may move either forwards or backwards. If the car producing firm merged with a component supplier it would be moving backwards. Conversely, if it merged with a distributor, the firm would be moving forwards.

A conglomerate merger takes place when two firms not involved either horizontally or vertically merge. In practice, however, there is usually some overlap between the firms. This may relate to factors such as production, marketing, research and development or technology. As some form of overlap tends to be the norm, mergers outwith this norm are distinguished by the specific title, pure conglomerate mergers.

No list of individual grounds for seeking merger can be regarded as exhaustive.[41] On the basis of such evidence as exists, however, the following individual reasons may serve as a core for analysis. Drayton, Emerson, and Griswold have noted a total of twenty-six individual reasons for merger:

A. <u>Financial Reasons</u> 1. Exploit an opportunity 2. Avoid the risk of internal development programs 3. Use idle capital 4. Take advantage of a tax loss, i.e., secure one or apply an existing one 5. Increase market value of stock 6. Effect more rapid growth 7. Improve on profit level or trend in present business 8. Secure a source of capital 9. Spread the business risk 10. Provide a market for stock

B. <u>Operating Reasons</u> 1. Improve on volume level or trend in the present business 2. Offset seasonal or

cyclical fluctuations in the company's present line 3. Satisfy customer's demands for additional services or items 4. Reduce dependence on a single product 5. Broaden the customer base 6. Obtain business in a new territory 7. Acquire new customers and new markets 8. Take advantage of an existing reputation 9. Obscure the details of the primary area of activity from competitors through diversification and the publication of the consolidated statement 10. Obtain a research and development group 11. Strengthen the management 12. Acquire particular products 13. Increase utilisation of present resources-any or all types of resources which the company has at its disposal, including physical facilities, individual skills, surplus funds. Find opportunities to use raw materials whose source of supply it owns 14. Enhance power and prestige of the owner, president, or management of the company 15. Provide an outlet for frustrated interests or excess management capacity 16. Add glamour and greater interest to the company.[42]

Several further reasons given by Weinberg and Blank can be added to this list, though it may be argued that these could also be viewed as subcategories under the 'Exploit an opportunity' heading. They relate to specific weaknesses of the target company. The target company may have under-utilised its assets or its directors may be unaware of the true value of the assets. It may be that the capital structure of the firm is inefficient. It could be that the firm has pursued a policy of limited dividend distribution. Finally, it may be the case that the shares are undervalued on the stockmarket for no good reason.[43]

Another addition to the list should be synergy. This term is much favoured in current business usage. It is rooted in American business literature. Synergy is where the combination of two firms results in increased overall earnings due to cost savings and/or revenue increases - in effect getting something for nothing. This is the 2+2=5 equation.[44]

Motivations for seeking merger interact with the fundamental aims of the firm. The mature firm is essentially conservative in its aims. Survival, autonomy, growth and technical innovation in that order are the aims of the firm. In general, merger could be a vehicle to help achieve all these ambitions. The fact that so many specific reasons exist for merger allows the following observation to be made. The seeking of merger is a powerful perennial instrumental aim of the firm. This is so regardless of business trends.

Merger can also be analysed as to whether or not it fits in with the business plan of the firm. It may be that a merger is contemplated in that it is seen as being clearly related to the ongoing strategy of the firm. The firm normally operates by having some form of business plan. In this context merger may be considered because it is one option that will achieve an aim within this plan. For example, the firm may wish to expand abroad. Here merger would certainly be considered as a possible means of doing so.

However, there may arise occasions when the firm becomes involved in an opportunist merger. The chance may arise to purchase a firm at a relatively cheap price. Even though a merger had not been foreseen as a necessary part of the ongoing business plan, the firm may grasp the

opportunity to merge, in the hope of improving its business generally, or of making a quick profit by selling off the newly acquired assets.

Merger may also take place solely because the management, or individuals within the management at executive level, wish to merge for purely personal reasons such as empire building. Scherer and Ross noted that most managers derived considerable satisfaction from achieving personal prestige and power. Both tend to be correlated more closely with the size of the firm rather than with its profitability.[45]

The enumeration of specific reasons for merger is insufficient to deal fully with the topic of the motivations for merger. In fact, the profusion of reasons unearthed tends to obscure, rather than to clarify, the motivations for merger in that numerous reasons tend to be behind any given merger. An attempt to bring a sense of order and/or clarity to the reasons for seeking merger can be made by going beyond the specific grounds and finding the general principles behind them. Two general principles underlying the seeking of merger are, either individually or collectively, at the root of most mergers. These are saving time and easiest option.[46]

The predator firm may save time by acquiring good management, which is a valuable resource.[47] Management is a specific asset of the target firm and may constitute the primary reason for merger. A competent, experienced management team available off the shelf, so to speak, may well be a more attractive alternative than creating a team by headhunting or training a group of individuals. In buying management, therefore, the firm is actually buying time.

If a firm wishes to enter a different geographic market it may have to adapt its current product to the needs of the target market or indeed create a new product. Even where its standard product is thought to be acceptable to the target market, this leaves the still formidable task of setting up distribution and organising an advertising campaign. Again, merger with a firm possessing brandnames established in the target market will save time.

In most instances of merger the predator company is gaining nothing unique in any or all of the various resources acquired which collectively constitute the target company. Instead, the predator firm is buying time, a unique asset in itself.

In any business, when a decision is made, the final course of action will have been only one of a range of options considered. 'Easiest option' is meant to convey that the course of action chosen was seen as the simplest way to accomplish the given aim. In many cases it will have been merger that represented the easiest option. This is not to say, however, that such an action was necessarily the best choice.

There is a wealth of studies on the question of whether or not mergers are successful.[48] The studies come from several states, both European and non-European, use different methods of research and span a wide time period. Generally speaking, the studies utilised one of the three basic methods of assessing post merger performance: accounting rates of return, real cost per unit output, change in share prices. No one method, however, is free from flaws.

With regard to accounting rates of return, profitability can increase due to a reduction in real costs or a rise in prices relative to costs. Whilst it cannot be said that accounting data analysis is actually discredited, several academics have shown that, whatever method is used with regard to determining accounting rates of return, serious problems present themselves.[49] Real cost per unit of output seeks to analyse whether such costs fall due to merger. It is subject to much the same criticisms as accounting rates of return.[50] Finally, the effect of mergers on the stock market share price is also used to examine the effects of merger. This technique, however, as Scherer and Ross have shown, is also not immune from criticism.[51] They noted, for example, that "No one denies that the stock market makes mistakes about future values."[52] The great majority of studies using stock market share price are, to date, American.[53]

Whilst the methodology of research in general, and many points of detail regarding any individual study, are open to dispute, there exists a surprising consensus of opinion on the major point at issue. In general, merger does not make firms more successful.[54]

Mergers fail for many reasons, both in the sense of performing below expectation and also in the sense of reduced performance.[55] Human error, however, is one major cause of merger failure. In many instances the management fails to integrate the firms properly and thus causes the actual failure of a theoretically sound merger.[56] It may also be that the merger was intrinsically unsound. This occurs, in the main, due to inadequate pre-merger preparation and incorrect

evaluation of the consequences of the merger by the participants.[57]

If a frequent reason for merger failure is human error then merger is likely to retain its popularity. The individual firm will tend to have faith in itself to deal with all aspects of merger. Thus, the firm will probably be confident in its ability to carry through successfully the integration process. The management will also tend to believe in its own capabilities with regard to adequate preparation and evaluation.

Further arguments as to merger popularity take into consideration factors other than the profitability of the firm. If the firm, as was suggested previously, is not simply a profit maximiser, then it could possess motives for merger other than, or in addition to, increased profitability. If it believes these aims can be fulfilled by merger, then the firm will probably continue to view merger as an attractive option.

Finally, as regards merger, there exists a prevalent fallacy that elimination of competition is a primary reason for merger. The elimination of a competitor, however, even a major competitor, does not necessarily result in a lessening of competition in the market. Contestable market theory holds that intense competition may be maintained among a few, or even between two, major competitors.[58] Further, whether or not a competitor has been eliminated, a firm still faces potential competition from other firms that may be contemplating entry into the market. In addition, the firm is also under pressure from large customers, a situation Galbraith has termed 'countervailing power.'[59]

Generally speaking, then, no single motive for merger predominates. However, in the presence of powerful external events both the range of alternative options to merger may decrease and some reasons for seeking to merge increase in strength.[60] Merger may become an urgent practical necessity rather than one possible option within a strategic business plan. If so, it may be possible that actual mergers will conform to a theoretically predicted pattern of motivation.

This situation is being brought about in Europe with the so called 1992 project.

1992

For world industry 1992, or the project to create a single European market, is endowing the subject of mergers with an especial importance.[61] In general, 1992 can be seen as a catalyst for industry that is causing it to undergo a major re-evaluation of present merger policy. In fact, coupled with global trends, the actions of the EC in initiating and carrying out the single European market project have provoked a merger wave. Elland stated that, "Between June 1988 and June 1989 the EC monitored an all-time high level of 1122 mergers, joint ventures and acquisitions. This increase ... is attributed by the EC to restructuring in anticipation of the single market."[62]

It is also expected generally that this trend will continue. Lloyds Bank stated, "We are witnessing the beginnings of a large amount of restructuring by merger of European industry ... The number of mergers and joint ventures in Europe is likely to grow rapidly in the early 1990s."[63] A study by Booz Allen also suggested that the

growing trend in European cross-border mergers was likely to continue over the course of the decade.[64]

1992 is meant to increase competition among EC firms. This is a conscious policy of the Commission. The single European market project is also planned as a response to ever-increasing competition from firms outwith the EC, principally from the United States, Japan and the emerging Far East states. Merger is a likely strategy for EC firms to use to try to protect or regain their market share against any heightened threat from both EC and non-EC firms. Such a strategy can be related both to the business plan of the firm and also to its fundamental aims.

In particular, the objective of effecting rapid growth has been strengthened within the context of the business plan. The strategy of starting, or speedily increasing, corporate activity and growth within the EC, is a primary method of reacting to 1992 and global economic forces. In many instances these factors have resulted in an expansion of the market. In turn, a consequent expansion of the firm is necessitated.[65]

This strategy of growth can also be related to the fundamental aims of the firm in that it is a method of attempting to realise the aim of survival in the long term. While 1992 is creating opportunities for dynamic expansion for some firms, it is suggested that, in the majority of cases merger is being undertaken as a defensive reaction to actual and potential competition.[66]

Growth is also being employed in some instances purely as a defensive ploy against unwelcome attention from predators. Here the aim is that of survival in the

short term. Every predator must have a target. As a result of 1992 almost every EC firm must consider the threat to them to have increased appreciably. As de Jonquieres noted, "Several mergers and alliances have also been made primarily for defensive reasons. This has been particularly true in financial services, where medium sized banks in a number of European countries have got together for fear that they would otherwise be taken over."[67] As the aborted seven billion pound bid for GEC demonstrated, even the largest EC firm may become a potential target for EC and/or non-EC firms.[68]

The single European market project also provides merger motivation for non-EC firms. 1992 is meant by the Commission to increase the competitiveness of European industry, both in European and in world markets. If 1992 achieves this aim, then non-member states' firms will lose some of their share of present markets and face greater competition in new markets, both in the Community and the world. These non-EC firms will obviously react in some manner to negate this danger. Their counter actions may well involve merger with Community firms. In particular, firms from Sweden, the United States and Japan are beginning to pursue this strategy.[69]

1992, however, ought not to be seen as the predominant or sole cause of the present merger wave. Many industries are undergoing a process of rationalisation as a result of ever increasing global competition. This is happening on a global scale. The pattern seems to be one of increasing concentration to the point where, if the process is sustained, there could be only a few major firms in particular industries. 1992 is speeding up this process for some.[70]

Not all types of merger can be expected to increase as a result of 1992. In fact, the project to create the single European market may force firms to eschew future conglomerate mergers and break up existing conglomerates in order to concentrate, by dint of horizontal mergers, on the core part of the business.

Hill Samuel, commenting on the British scene, argue that the recession of the early 80s coupled with increasing competition from all sides, both European and non-European, has forced the management of a firm to concentrate on what it knows best. In consequence, the experimentation with conglomeracy, which was in vogue in the more relaxed competitive environment of the 60s became increasingly regarded as an expensive luxury by British firms in the competitive 80s.[71]

This is mirrored elsewhere. The Economist noted that, "The fashion in the 1960s was for diversification ... These often proved just over-expensive businesses ... There are still mavericks today (like Daimler Benz) that are still diversifying, but the new fashion is to try to be 'global' - to be big in a few things in all the world's markets."[72] A major aspect of this strategic plan is to build on strength by looking to expand the core part of the business. This can mean looking for opportunities abroad, as well as in the home state. Hill Samuel noted that "Companies that opt for a focused strategy can find themselves drawn towards expansion abroad, particularly the nearby markets of the EC."[73] If so, then the strategic plan of building on strength ought to produce a large number of horizontal mergers.

A further bout of horizontal merger activity may well arise from the ambition of firms to achieve

economies of scale. For any firm that fears merger or increased competition, attempting to achieve economies of scale by way of merger is a feasible strategy. As yet, merger activity in order to produce economies of scale is only in its formative stages throughout the Community, but it is expected to increase markedly. The scope for such actions is considerable in many industries. While this should also produce vertical mergers, Hill Samuel have noted, "More typically, economies of scale can be achieved through horizontal mergers, which are the classic form of industrial rationalisation."[74]

The preponderance of these horizontal mergers is most likely to be within the EC. For many EC firms their fiercest competitors in the market are not their fellow Europeans but firms based in the USA and the Far East. To counter this intensifying global competition, focussing on Europe as the home market may be the most viable strategy.[75]

Vertical mergers, however, can also be expected to increase. Davis has argued that, in particular, cross-border mergers within the Community lend themselves to vertical integration. He stated, "The typical synergy that can be expected from a continental merger, then, is not so much related to ... achieving scale economies, but to matching a firm with a good product in one market with a company that has good distribution skills in another."[76]

There are, of course, alternatives to merger, such as development of greenfield sites, joint ventures, trading relationships and the like. All of these, however, have their problems and costs and the merger may well remain the remain the chosen option in the majority

of cases. This view is acknowledged by various businesspeople and commentators. Both managers and analysts regard merger as the preferred tactic. Rosen, of the American investment banking firm, Wasserstein Perella, wrote, "Takeovers are gaining ground because people realise that they can build world class companies out of small ones much more rapidly than through internal growth."[77] Further, Parkes and Wood noted that, "Recent experience has shown that managers believe takeovers is the surest - and certainly the speediest- way into the new global marketplace."[78]

Given the above circumstances, mergers may still be subsumed under the general principles of saving time and easiest option. In fact, in the present merger wave the general principles become more transparent than under 'normal' circumstances. Global trends and 1992 seem to have increased the tempo of competition within markets necessitating an equally swift reaction from firms. Further, among all the possible alternatives open to a firms there seems to be no course of action that presents an easier option than that of merger.

Not all the potential effects of a merger wave are to be welcomed.

Where firms are, or will be, merging due to emotive reasons a sizeable proportion of these mergers might fail, resulting in a weakening of some sectors of European industry. Global economic trends and the 1992 project have resulted in a dynamic business climate in which important decisions may be taken in haste. Davis warned that motives for merger had to be evaluated carefully. He wrote, "While it is tempting to find a partner 'before all the pretty girls are taken' those who

rush on to the dance floor too quickly risk walking away with the wrong sweetheart."[79]

A Financial Times article put the point more sharply. The Lex Column was headlined, "Fear and Greed in Europe." It spoke of the pace of corporate activity being set largely by fear of the competition promised by the advent of the single market and warned that British business, among others, was, "... storing up takeovers to regret."[80]

The greater volume of mergers and, in particular, contested mergers, may result in merger battles becoming more acrimonious, with less attention being paid to the spirit, and possibly the substance, of the relevant rules. Zagorin noted that the availability of cash coupled with the need to merge due to 1992, "... is driving up demand for acquisition targets and making takeover struggles rougher than ever."[81] It may even be that this approach is becoming so well accepted as to amount to a normative view as to how merger actions ought to be conducted.

A further consequence of increased merger activity could be a worsening in relations among industrialists and firms. In reality, industry in general is but a convenient collective term for numerous specific industries. Despite the size of many of these individual industries, they can be likened to closed communities in which almost all of the community notables know each other. Merger, unless freely agreed between both parties, is, at the best of times, an acrimonious affair. 1992 and the merger wave it has set in motion could worsen relationships appreciably among industrialists and firms.

The merger wave means that defences to merger bids assume more importance. This situation is to be distinguished from that where merger is seen as a perennial threat that requires a strategic defence, that of regulation of company performance. Now merger is seen as an actual, rather than a potential threat, and thus the type of defence required is no longer strategic but tactical, strategic defence is insufficient to deter a merger bid. It may well be a crucial factor, however, in determining whether or not the bid is accepted or rejected by shareholders. Nonetheless, the target firm will now also employ tactics to fight the bid more directly.[82]

As more and more unwelcome merger bids are made new tactical defensive strategies are being evolved.[83] These are mainly of American origin and carry exotic names such as 'golden parachute,' and 'Suicide Pill,' among others. Chiplin and Wright noted that, "These devices have been given the generic name of 'Fake-Outs' which covers all classes of market mechanisms that allow management with little or no ownership interest to fend off unwanted suitors."[84] The actual purpose of any and of all these US style defences is twofold. Their aims are to make the firm an unattractive prospect for potential suitors or to fend off an actual merger bid. The developing merger situation in Europe may see a greater use of such defensive tactics.[85]

As the merger boom unfolds, the share values of target firms will probably rise. This situation is rife for speculation by potential investors in financial markets. The chance to make relatively quick profits from acquiring and disposing of shares should, and indeed

already has, attracted those individuals and firms known as corporate raiders. As Zagorin somewhat graphically wrote, "The proliferation of hostile bids by Europeans has attracted marauders to the feeding frenzy."[86]

A possible consequence of the proliferation of mergers could be an increase of insider trading. This occurs where those who are in privileged possession of information make use of such knowledge to deal in shares that may soon experience a sharp rise due to a coming merger bid.[87] The gathering momentum of the rush to acquire firms allows the speculation that an increase in insider trading is a probability rather than a possibility. However, the Community has acted to minimise such a prospect, in that it has adopted a directive on insider trading.[88]

Conclusions. Due to global trends coupled with 1992 almost all EC firms, irrespective of size, will be forced to give due consideration to merger, both as initiator and target.[89] In effect, a large number of Community firms will be put in the position of being both predator and prey in this new merger jungle. Such an invidious situation may require the formulation of a more complex, comprehensive, and possibly more flexible, plan of action than the firm follows at present, in order to ensure its continued survival.

1. The firm is not confined to a European firm as it is contended that European and American firms share a similar outlook and also much of the relevant literature on corporate behaviour is American in origin. The firm is not extended to a universal concept in that firms from the Far East have a different outlook from western firms. See, Chin-ning Chu, The Asian Mind Game (London: Maxwell Macmillan, 1991).

2. John Kenneth Galbraith, The New Industrial State , 4th ed. (Boston: Houghton Mifflin Company, 1985), 76. Others also differentiate between types of firm. See Paul A. Samuelson and William D. Nordhause, Economics, 13th ed. (New York: McGraw Hill, 1989), 473-482; William G. Shepherd, The Economics of Industrial Organisation, 3rd ed. (Englewood Cliffs, New Jersey.: Prentice Hall, 1990), 237-265.

3. Companies Act 1985, Sections 246-249.

4. Ibid, Section 249. The Commission and the European Investment Bank generally define an SME as a firm possessing a work force of not more than 500, net fixed assets of not more than 75 million ECU, and not more than a third of its capital held by a larger company.

5. Monopolies and Mergers Commission, The Role of the Commission, 3rd ed, (London: HMSO, 1990), 6.

6. Galbraith, op. cit in note (2), 63. See also, Donald G. Margotta, "The Separation of Ownership and Responsibility in the Modern Corporation," Business Horizons (January/February 1989): 74-77.

7. Galbraith, op. cit in note (2), 97.

8. See, John Sloman, Economics (London: Harvester Wheatsheaf, 1991), 247. Sloman noted that firms dominated by an individual are more prepared to take risks in order to maximise profits whereas firms with a management structure tend to have a more cautious approach.

9. David Burningham, ed, Economics (London: Hodder and Stoughton, 1987), 110. When speaking of profit maximisation, under traditional economic theory, this is assumed to be short-run rather than long-run. See, Sloman, op. cit in note (8), 248.

10. Humberto Barreto, The Entrepreneur in Microeconomic Theory, Disappearance and Explanation (London: Routledge, 1989).

11. Argenti defines the two elements as corporate objectives and corporate strategies, the task of the latter being to realise the former. See John Argenti, Practical Corporate Planning (London: George Allen and Unwin, 1980), 7. See also, Daniel Bendaniel and Arthur H. Rosenbloom, The Handbook of International Mergers and Acquisitions (Englewood Cliffs, New Jersey: Prentice Hall, 1990), 4. Bendaniel and Rosenbloom list both plans and aims under the heading of corporate strategy and emphasise that the plan exists to realise the aims.

12. Galbraith, op. cit in note (2), 175. Peter F. Drucker, "Business Objectives and Survival Needs: Notes on a Discipline of Business Enterprise," The Journal of Business 31 no. 2 (April 1958): 81-90.

13. Gordon Donaldson and Jay W. Lorsh, Decision Making at the Top (New York: Basic Books, 1983), 7-8.

14. Sloman, op. cit in note (8), 247. Sloman implied that most firms made survival their top priority, 247.

15. Galbraith, op. cit in note (2), 87; Shepherd, op. cit in note (2), 257; Samuelson and Nordhause, op. cit in note (2), 481. However, given the harsh economic climate of the nineties, this is no longer the truism it used to be.

16. Galbraith, op. cit in note (2), 181-182.

17. Survey for Securicor, see Robert M. Worcester, Chairman, MORI, Attitudes of British Businessmen to Risk Control: Presentation of Findings. (London: MORI/Securicor, 29 March 1990), 1-3.

18. Galbraith, op. cit in note (2), 86.

19. The words 'acceptable' or 'satisfactory' are not meant to be synonyms for 'maximum'. Their use is in conjunction with the concept of 'profit satisficing' which is discussed further on in this section along with that of profit maximisation.

20. Galbraith, op. cit in note (2), 176-177.

21. F. M. Scherer and David Ross, Industrial Market Structure and Economic Performance, 3rd ed. (Boston: Houghton Mifflin Company, 1990), 45. Sloman, op. cit in note (8), 247, also points out the risks inherent in going for maximum profits.

22. Hill Samuel and Co. Ltd, Mergers, Acquisitions and Alternative Corporate Strategies (London: Mercury Books, 1989), 62.

23. Sloman, op. cit in note (8), 246.

24. Galbraith, op. cit in note (2), 176.

25. Sloman, op. cit in note (8), 246.

26. Scherer and Ross, op. cit in note (21), 38.

27. Ibid, 52.

28. For example, James Levi, "Big Deals in Small Firms," Daily Record (29 September 1988), "Also smaller companies tend to be run by people with large personal stakes in the business. That gives them the drive to succeed, which may be lacking in a big corporation ..."

29. Andrei Shliefer and Robert W. Vishny, "Value Maximisation and the Acquisition Process," Journal of Economic Perspectives 2 no. 1 (Winter 1988): 7.

30. Clarence I. Drayton Jnr, Craig Emerson, and John D. Griswold, Mergers and Acquisitions: Planning and Action (London: Routledge and Kegan Paul, 1965), 41. See also, John K. Galbraith, American Capitalism The Concept of Countervailing Power (London: Hamish Hamilton, 1957), 25-26.

31. Galbraith, op. cit in note (2), 179-181; Scherer and Ross, op. cit in note (21), 46; Sloman, op. cit in note (8), 250. All agree that growth benefits the management of the firm.

32. Geoffrey Foster, "R and D: Risk and Dissolution," Management Today (January 1989): 53. See also, Paul Abrahams and Bernard Simon, "Nortel Leaps on STC Springboard to Europe," Financial Times (9 November 1990). Abrahams and Simon note that firms are being forced to become global organisations in order to ensure a return on their investment in research.

33. Scherer and Ross, op. cit in note (21), 620.

34. One solution has been for joint research programmes. These have taken place both in the EC and the United States. See, Guy de Jonquieres, "Innovation under Scrutiny," Financial Times (23 April 1991). The EC itself, by dint of its programmes such as ESPIRIT, also recognises this fact.

35. Foster, op. cit in note (32), 54.

36. Scherer and Ross, op. cit in note (21), 620.

37. Charles Leadbetter, "CBI Report Finds Big Fall in R&D," Financial Times (19 April 1991).

38. M.A.Weinberg, M.V.Blank and A.L.Greystoke, Weinberg and Blank on Takeovers and Mergers, 5th ed. (London: Sweet and Maxwell, 1989), Part 1, 1001. The concept of gaining control over a firm is defined at Part 1, 1015-7. This work will be cited in the text as Weinberg and Blank.

39. Brian Chiplin and Mike Wright, The Logic of Mergers Hobart Paper 107. (London: The Institute of Economic Affairs, 1987), 22.

40. Weinberg and Blank, op. cit in note (38), Part 1, 1001-2.

41. Although this is a subject that has generated much research. See for example, Jesse W. Markham, "Survey of the Evidence and Findings on Mergers," in the National Bureau of Economic Research, Business Concentration and Price Policy (Princeton: Princeton University Press, 1955), 141-82; Robin Marris, "A Model of the Managerial Enterprise," Quarterly Journal of Economics 77 (May 1963): 185-209; Henry G. Manne, "Mergers and the Market for Corporate Control," Journal of Political Economy 73

(April 1965): 110-120; Drayton, Emerson, and Griswold, op. cit in note (30), 39-41; Michael Gort, "An Economic Disturbance Theory of Mergers," Quarterly Journal of Economics 83 (November 1969): 624-42; Dennis C. Mueller, "A Theory of Conglomerate Mergers," Quarterly Journal of Economics 83 (November 1969): 643-59; Peter O. Steiner, Mergers, Motives, Effects, Policies (Michigan: University of Michigan, 1975), Chapters, 2-5; Scherer and Ross, op. cit in note (21) 41. 159-167; Walter H. Goldberg, Mergers, Modes, Methods (Aldershot: Gower Publishing Company, 1983) Chapter 1; Chiplin and Wright, op. cit in note (39), Chapter 3; David J. Ravenscraft and F.M. Scherer, Mergers, Sell-Offs and Economic Efficiency (Washington: The Brookings Institution, 1987), 2-4 and 129-132.

42. Drayton, Emerson, and Griswold, op. cit in note (30), 40-41.

43. Weinberg and Blank, op. cit in note (38), Part 1, 1025.

44. On synergy see, Weinberg and Blank, op. cit in note (38), Part 1; 1034-6. Evan Davis, "Synergies and the Motivations for Cross Border Merger," in Matthew Bishop et al, Continental Mergers are Different (London: London Business School, 1990), 50-52; Igor Ansoff, Corporate Strategy (London: Viking Penguin, revised edition 1987), 79-99.

45. Scherer and Ross, op. cit in note (21), 46.

46. Time is a valuable resource of the firm, both as regards fundamental aims and the business plan. See, George Stalk Jr., and Thomas M. Hout. Competing Against Time: How Time Based Competition is Reshaping Global Markets (London: The Free Press, 1990).

47. Galbraith, op. cit in note (2). See there, Chapters 5 and 6. Galbraith argued that the management was the factor hardest to obtain or replace and was therefore the single most valuable factor of production.

48. American studies are as follows. Gershon Mandelker, "Risk and Return: The Case of Merging Firms," Journal of Financial Economics 1 no.3 (1974): 324; Thomas J. Murray, "Do Mergers Make Sense?" Duns Business Month (October 1982): 88-93; M.C. Jensen and R.S. Ruback, "The Market for Corporate Control: The Scientific Evidence," Journal of Financial Economics (September 1983): 5-50; Ann B. Fisher, "The Decade's Worst Mergers," Fortune (30 April 1984): 263-70; Ravenscraft and Scherer, op. cit in note (41); Hal R. Varian, "Symposium on Takeovers," Journal of Economic Perspectives, 2 no. 1, (Winter 1988).

Studies from EC Member States (mainly the United Kingdom) are as follows. H.B. Rose and G.D. Newbould, "The 1967 Takeover Boom," Moorgate and Wall Street (1967): 5-24; G.D. Newbold, Management and Merger Activity (Liverpool: Guthstead Press, 1970); Ajit Singh, Takeovers (London: Cambridge University Press, 1971); A. Buckley, "A Profile of Industrial Acquisitions in 1971," Accounting and Business Research (Autumn 1972): 243-52; J. Tzanonnos and J.M. Samuels, "Mergers and Takeovers: The Financial Characteristics of Companies Involved," Journal of Business Finance (Autumn 1972): 5-16; M.A. Utton, "On Measuring the Effects of Industrial Mergers," Scottish Journal of Political Economy (February 1974): 13-28; Ajit Singh, "Takeovers, Economic Natural Selection and the Theory of the Firm: Evidence from the Postwar United Kingdom Experience," Economic Journal (September 1975): 497-515; G. Meeks, Disappointing Marriage: A Study of Gains from Merger (Cambridge: Cambridge University Press, 1977); M. Firth, "The Profitability of

Takeovers and Mergers," Quarterly Journal of Economics (1980): 94; Dennis C. Mueller., ed., The Determinants and Effects of Mergers: An International Comparison (Cambridge, Mass.: Oelgeschlager, Gunn and Hain, 1980); Keith Cowling et al. Mergers and Economic Performance (Cambridge: Cambridge University Press, 1980); P. Levine and S. Aaronovitch, "The Financial Characteristics of Firms and Theories of Merger Activity," Journal of Industrial Economics (December 1981): 149-173; Manmohan S. Kumar, Growth, Acquisition and Investment (London: Cambridge University Press, 1984); Paul A. Geroski and Alexis Jacquemin, "Large Firms in the European Corporate Economy and Industrial Policy in the 80s" in Alexis Jacquemin., ed., European Industry: Public Policy and Corporate Strategy (Oxford: Clarendon Press, 1984), 344-49; Department of Trade and Industry, Mergers Policy, A Department of Trade and Industry Paper on the Policy and Procedures of Merger Control (London: HMSO, 1988), Annex E, 36-38; Tom Lloyd, "In Business Nice Guys Finish First," Financial Weekly (21 April 1988): 12-15, Lloyd, "The Poverty of the Predator," Financial Weekly (28 April 1988): 17-19.

49. Chiplin and Wright, op. cit in note (39), 67. See also the critical article by G. Meeks and J. G. Meeks, "Profitability Measures as Indicators of Post-Merger Efficiency," Journal of Industrial Economics (June 1981): 335-44.

50. Chiplin and Wright, op. cit in note (39), 68 at note 1.

51. Ibid., 72-73. See also Scherer and Ross, op. cit in note (21), 167-170.

52. Scherer and Ross, op. cit in note (21), 169.

53. A comprehensive survey is given by Jensen and Ruback, op. cit in note (48), 5-50. See also Scherer and Ross, op. cit in note (21), 167-70.

54. Scherer and Ross, op. cit in note (21), 174. However, in view of the shortcomings inherent within the methods used to assess merger success, this conclusion cannot be accepted as definitive. For example, recent research on US mergers in the 1980s seems to indicate that a significant proportion of these have been successful. See Chapter Three endnote.

See also, H. W. de Jong, "Mergers and Competition Policies," in Alexis Jacquemin et al, Merger and Competition Policy in the European Community (Oxford: Basil Blackwell, 1991), 57-8. de Jong questions whether the correct inference is drawn from the failure rates of mergers. He concludes that the failure rate of mergers is not particularly high when judged against comparable high risk economic activities.

55. Goldberg, op. cit in note (41), 209, gave as possible reasons poor design of research, lack of economic rationality, and failure of the merging processes. He noted, however, that these reasons were, at best, speculative. See also, Phillipe C. Haspeslagh and David B. Jemison. Managing Acquisitions: Creating Value through Corporate Renewals. (London: Maxwell Macmillan International, 1991).

56. Lloyd, "In Business Nice Guys Finish First," op. cit in note (48), 12.

57. For example, "In Brief," Financial Times (28 November 1989), noted, "British companies made 181 acquisitions in continental Europe in the first half of 1989 though research has shown that up to half of the companies which

buy abroad subsequently wish they had been better prepared."

58. The theory of contestable markets is dealt with in Chapter 2.

59. Galbraith, op. cit in note (30), 111.

60. Such events create merger waves. Including the present one there have been four great merger waves in the world economy. See, John Kay, "Mergers in the European Community," in Bishop et al, op. cit in note (44), 2-4. Scherer and Ross, op. cit in note (21), 153-9.

61. The term '1992' is used throughout this thesis as shorthand for the phrase, 'the project to create the single European market'.

62. William Elland, "The Merger Control Regulation and its Effect on National Merger Controls and the Residual Application of Articles 85 and 86," 12 no. 1, European Competition Law Review (1991):19. 19th Competition Report Part 4.

63. Lloyds Bank Economic Bulletin (February 1991): 3.

64. Booz Allen Acquisition Services, Study on Obstacles to Takeover Bids in the European Community (Paris: Booz Allen, 1989), 5-6. The study was undertaken on behalf of DG XV of the Commission.

65. The section on 'The Firm,' noted that, generally speaking, firms did not feel compelled to make growth a primary aim as they were already large. The novel phenomena of 1992 and global economic trends have resulted in this assessment being challenged.

66. This theme is echoed in a survey in the Economist. It was stated, "Frightened by the prospect of what the Cecchini report called 'a new and pervasive competitive climate' in Europe, businessmen have thrown themselves into one merger or strategic alliance after another." See, "Business in Europe," The Economist (8th-15th June 1991):17.

67. Guy de Jonquieres, "Pressure on Companies to Strive for Size," Financial Times (2 July 1990).

68. See, for example, "Row Over Expected £7bn Bid for GEC," The Times (9 January 1989); Graham Searjeant, "Two Sets of Predators Stalk GEC," The Times (20 January 1989); David Brewerton, "Conflicts of Interest Sink Cuckney Bid for GEC," The Times (20 January 1989).

69. As to merger activity inside the EC by U.S. firms see Paul Geroski and Anastassios Vlassopopoulos, "European Merger Activity: A Response to 1992?", 39-44. in M. Bishop et al, op. cit in note (44). Robert Taylor, "Sweden Comes in From the Cold," Financial Times (14 June 1991) noted that major Swedish firms have made aggressive acquisitions inside the EC since 1988. Regarding Japanese activity within the EC see, Stephen Thomson and Phedon Nicolaides, Japanese Direct Investment in Europe: Death of a Transistor Salesman (Hemel Hempstead, Herts.: Harvester Wheatsheaf, 1991).

70. See for example, Richard Waters, " National Merger Wave Starts International Ripple," Financial Times (16 March 1989); Ian Hamilton Fazey, "Paints and Coatings. The War for World Markets," Financial Times (10 March 1989); Susana Antunes, "Fresh Food Wars Loom," The Independent (26 May 1988); Christopher Parkes and Lisa Wood, "Buying is Smarter than Building," Financial Times

(27 April 1988).

71. Hill Samuel, op. cit in note (22), 53-54.

72. "Incurable Mergeritis," The Economist (April 23-30 1988): 16. See also, Paul Auerbach, Competition. The Economics of Industrial Change (Oxford: Basil Blackwell, 1988), 226-229. Auerbach also charts the decline of conglomerates in the global marketplace.

73. Hill Samuel, op. cit in note (22), 54.

74. Ibid, 56.

75. de Jonquieres, op. cit in note (67).

76. Evan Davis, "Continental Mergers are Different," Newsletter: Centre for Business Strategy (Spring 1991): 2. See also generally, Davis, 47-64, in M. Bishop et al, op. cit in note (44).

77. Jeffrey Rosen, quoted in Adam Zagorin, "Weapons of Choice," Time (27 February 1989), 22.

78. Parkes and Wood, op. cit in note (70).

79. Davis, op. cit in note (76), 2.

80. The Lex Column, "Fear and Greed in Europe," Financial Times (3 May 1988).

81. Zagorin, op. cit in note (77), 22.

82. Some pertinent defensive tactics are suggested by Hill Samuel. See, Hill Samuel, op. cit in note (22), 60-63.

83. On this topic see, for example, Chiplin and Wright, op. cit in note (39), 48-50; A.M. Morrison, "Those Executive Bail-Out Deals," Fortune (December 13 1982): 82-87; Mark Hirshey, "Mergers, Buyouts and Fakeouts," American Economic Review Papers and Proceedings (May 1986); 317-22; C.R. Knobler, "Golden Parachutes, Shark Repellant and Hostile Tender Offers," American Economic Review (March 1986): 155-67.

84. Chiplin and Wright, op. cit in note (39), 48.

85. However, actual and forthcoming Community company law legislation may outlaw some such tactics.

86. Zagorin, op. cit in note (77), 22.

87. See for example, Chiplin and Wright, op. cit in note (39), 39-43.

88. See, Council Directive 89/592 of 13 Nov. 1989 co-ordinating regulations on insider dealing, O.J. 1989, L 334/30. See also, Klaus J. Hopt, "The European Insider Dealing Directive," Common Market Law Review 27 (1990): 51-82, Hopt and Eddy Wymeersch, European Insider Dealing (London: Butterworth, 1991); P.L. Davis, "The European Community Directive on Insider Dealing: From Company Law to Securities Market Regulation," Oxford Journal of Legal Studies 11 no. 2 (Spring 1991): 92-105.

89. Non-EC firms are more likely to adopt the role of predator with regard to merger.

2. COMPETITION POLICY AND MERGER POLICY

Competition Policy

In general, the western democratic nations, the capitalist democracies, have tended to choose a policy of competition in order to achieve certain goals.[1] These goals are well summarised by the Organisation for Economic Co-operation and Development, which has stated:

> Competition policy has as its central economic goal the preservation and promotion of the competitive process, a process which encourages efficiency in the production and allocation of goods and services, and over time, through its effects on innovation and adjustment to technological change, a dynamic process of sustained economic growth. In conditions of effective competition, rivals have equal opportunities to compete for business on the basis and quality of their outputs, and resource deployment follows market success in meeting consumers' demand at the lowest possible cost.[2]

Despite the wording of the statement, competition policy is not meant to be a goal in itself. It is instead, as Stigler has noted, a means of organising economic activity in order to achieve certain goals.[3] However, the various goals given above can be subsumed under the single heading of economic efficiency. The Organisation for Economic Co-operation and Development stated that "... economic efficiency as a result of competitive market structures can be seen as a central objective of competition policy, ..."[4] Waterson has noted that efficiency is seen as the prime goal to aim for. He wrote, "The great claim for perfect competition is that it leads to efficiency."[5] Economic efficiency is here

taken to mean the best balance of allocative and productive efficiency.[6]

Many theories of competition exist and attract varying degrees of support both from economists and politicians. However, perfect competition and workable competition are the major models in that they form the theoretical base of competition policy in the majority of western capitalist states.

The theoretical model of perfect competition requires the following assumptions - numerous participants each possessing a small share of the market, homogeneity and divisibility of product, freedom of entry and exit for firms to and from the market and perfect information for all.[7]

The benefits claimed for perfect competition are numerous. Neither the firm nor the consumer, as individuals, have any power over the market. Nor are collusive agreements by firms or individuals sufficiently strong so as to affect the price set by the market. If the assumption is also made that firms are profit maximisers then they will obey the commands of the market.[8] This will mean that the actions of the firm will correspond precisely with the needs of society. The market, an impersonal force, can be relied upon absolutely to recognise and respond to the changing needs of society. In essence, perfect competition represents the triumph of the individual over organised power groups.

The conditions required for the theoretical model are never actually met in practice. The benefits claimed by the model, however, continue to appeal, and attempts

have been made to formulate a more realistic model of workable competition, which was capable of being imposed on the real world. These generated a great deal of literature, a major review of which was carried out by Sosnic in the late fifties. Later writers such as Scherer and Ross noted that no major developments in the theory had taken place since.[9]

As Scherer and Ross point out, the nub of the problem with the theory of workable competition concerns the criteria by which it may be judged.[10] That is, the criteria allowing one to pronounce whether or not, in practice, workable competition actually works. Several difficulties are associated with these criteria.

The first such dilemma concerns the choice of a list of minimal assessment criteria. Even this basic starting point for analysis is the subject of dispute among economists. The work of Scherer and Ross illustrates this problem for, in producing a list of minimal criteria, they employed the criteria most frequently chosen by diverse authors.[11] This fact indicates that there is, as yet, no fixed number of minimal criteria.

The second difficulty concerns problems within the list of such generally agreed criteria as there are. Scherer and Ross believed that the list contained several flaws.[12] As the theory of workable competition is of importance to EC competition policy the list compiled by Scherer and Ross is given here.[13] It makes use of the classification system employed by Sosnick: structure, conduct and performance.

Structural criteria: The number of traders should be at least as large as scale economies permit. There should be no artificial inhibitions on mobility and

entry. There should be moderate and price sensitive quality differentials in the products offered.

Conduct criteria: Some uncertainty should exist in the minds of rivals as to whether price initiatives will be followed. Firms should strive to achieve their goals independently, without collusion. There should be no unfair exclusionary, predatory or coercive tactics. Inefficient suppliers and customers should not be shielded permanently. Sales promotion should be informative, or at least not be misleading. There should be no persistent, harmful price discrimination.

Performance criteria: Firms' production and distribution operations should be efficient and not wasteful of resources. Output level and product quality (i.e., variety, durability, safety, reliability, and so forth) should be responsive to consumer demands. Profits should be at levels just sufficient to reward investment, efficiency and innovation. Prices should encourage rational choice, guide markets towards equilibrium, and not intensify cyclical instability. Opportunities for introducing technically superior new products and processes should be exploited. Promotional expenses should not be excessive. Success should accrue to sellers who best serve consumer wants.[14]

The immediate difficulty is that the first two items on the list are little more than a restatement, in less absolute terms, of the requisites of perfect competition.[15] This further complicates the first problem of identifying minimal criteria.

Furthermore, many of the criteria may be flawed since they are, to a large degree, imprecise. Scherer and Ross noted the following examples: How price sensitive must quality differentials be? When are promotional expenses excessive? When does price discrimination become persistent? In fact, the entire list was riddled with such subjective evaluations, making both the deviant performance and the desired performance difficult to measure.[16]

The third and most fundamental difficulty with the concept of workable competition is how it can be properly evaluated if, as tends to be the norm, not all criteria are met. It does not appear to be possible to evaluate workable competition properly since there is no objective mode for doing so. Subjective value judgments must play some part in the process. Aspects of performance, for example, may have to be evaluated against elements of structure. This is the sticking point of the theory of workable competition. As Stigler wrote, "Two competent persons who study a particular industry can disagree on its workable competitiveness, and there exists no analytical basis for eliminating the disagreement."[17] Perhaps the flawed and uncertain state of workable competition theory was best summed up by Stigler when he wrote that the literature on workable competition, "... was not an ornament to the science of economics."[18]

Perfect competition and workable competition do not constitute the entire contribution of economics to competition theory. Other theories also have legitimate claims to attention. A brief survey of a number of these is now given so that a more complete picture of the state of competition theory _per se_, and its claim to validity as regards the real world, can emerge.

The origins of the Austrian School of Economics can be traced back to 'The Principles of Economics,' by Menger, published in 1871.[19] Menger attempted to show that it was possible for economics to be both truly theoretical or exact and also subjectivist. His book provoked many further views, some supportive but most of a derogatory nature. The name, 'The Austrian School' actually came into being as a term of derision used by those who opposed Menger's views, principally the German Historical School.[20]

The Austrian School is not of historical importance only. After a period of decline, Austrianism gradually regained its vigour and is now an active and flourishing theory of competition.[21] The basic position of the present day Austrian School can be summarised as follows. Competition is never perfect. The plans and expectations of the participants in the market are never in harmony. Unlike perfect competition where competition is viewed as a state, Austrianism sees competition as a dynamic process constantly evolving towards an ideal state. Further, market competition is held to confer real benefits which a centrally planned economy cannot match.

The Harvard theory was conceived during the 1930s and further developed in the 1950s. It can be summarised as the structure-conduct-performance paradigm.[22] As Vickers wrote, "This approach regards market structure (the number and sizes of firms in the industry, entry barriers, etc.), as determining the conduct of the firms (their policies regarding price, advertising, capacity, innovation etc), which in turn determines the performance of the industry (its allocative efficiency and technological progress, for example)."[23]

The Chicago School uses price theory as its principal analytical tool in the study of industrial economics. It tends towards a far stronger belief in the efficacy of the operation of market forces than does Harvard. Equally, Chicago considers that there is far less need for government intervention in the market than its Harvard counterpart and, indeed, questions the whole concept of the desirability of government intervention.[24] It asserts that government policy itself is a major source of restriction on free competition. The views of Chicago are conceptually similar to the emphasis of Austrianism upon dynamic competition by innovation and the threat of new entry.

The term, 'Contestable Market' was coined to describe the invention by Robert D. Willig of a new type of idealised economic market.[25] The perfectly contestable market has no entry barriers, thus making entry both easy and costless. The only deterrent to entry is where market prices are set at a level that makes entry unprofitable. The difference between the idealised market as envisaged by Willig and the standard concept of an idealised market, the perfectly competitive market, is that the perfectly contestable market may consist of only a few firms. A perfectly contestable market can function under oligopoly, duopoly or even monopoly. The standard market model has always assumed that a large number of firms inhabit the market.

Within the perfectly competitive market, it has always been assumed that firms are aware that their production decisions cannot affect the market price. By contrast, the inhabitants of the perfectly contestable market and also potential entrants have, and realise they

have, power over prices. If they sell more than is demanded by consumers at the given price a fall in the market price will result. The contestable market, therefore, need not be populated by a large number of firms and indeed will still function even under a situation of monopoly.

The theory of contestable markets, however, is just that, a theory. As Utton noted, "Baumol and his colleagues are at pains to emphasise that the purely formal result rests, as in all theories, on the initial assumptions. The world no more consists of perfectly contestable markets than perfectly competitive ones."[26] He also stated that, as with all new theoretical developments, time was needed for the full implications to be worked out. Further the theory, as it stands, has attracted criticism.[27] This is not to decry, however, either the plausibility of the theory of contestable markets or its practical application in specific areas of competition policy. Utton believed that it was an exciting development and concluded, "Although still very recent and, to an extent, controversial, it has already had a direct bearing on deregulation policy in the US and is likely to be of increasing importance in Europe."[28]

It is not suggested that any or all of the above theories is incorrect. None, however, has as yet established its absolute validity. If so, then economic theory cannot, at present, claim to show how best to achieve the goal of economic efficiency by the use of a policy of competition. However, if economic theory does not provide a fully reliable guide for the achievement of economic efficiency in the form of a viable competition theory, why then is competition policy predominantly the chosen tool of the western democratic capitalistic

nations? This is the fundamental question with regard to competition policy. An answer can be found by a reappraisal of the basic aim, economic efficiency, the means to that aim, competition policy, and the interrelationship between the two.

The aim is, as stated, economic efficiency. This economic aim is not, however, the primary aim of western society, which is, instead, the continuing survival of its democratic capitalist way of life. The preservation of the present political system is, and is likely to remain, the fundamental goal. All other aims, including the one under discussion, are subordinate. The goal can thus be reassessed and reclassified as the achievement of economic efficiency in a manner which does not threaten the stability of the political system or such other values as it espouses.

Although it may seem debatable that politics comes before an aim that is, on occasion, used as a synonym for consumer welfare, this notion has its adherents.[29] Swann, for example, when discussing the optimum allocation of resources stated, "We should, however, be under no illusion that the attainment of such an optimum has ever been a foremost consideration in the mind of practical politicians."[30] If so, then new light is cast on the fundamental question of why a policy of competition was chosen to achieve consumer welfare in the west. The answer is that it most closely corresponds to the democratic idea or ideal of how it ought to be done.[31] Competition policy is considered both as the politically correct way to achieve the stated goal and as the way of doing so which will best protect the political system.

This means that the choice is an instrumental rather

than a substantive one. It could be argued that society should, rather, pursue the policy most conducive to economic efficiency irrespective of other considerations. Even, however, if there were an objectively correct system, universally recognised as such, by which to achieve optimum efficiency, it is doubtful whether all states, regardless of political ideology, would choose to employ it. As such a system does not exist this is not an appropriate point to pursue. It can be demonstrated, however, that society does indeed make deliberate instrumental judgments. The pertinent question is whether states do choose the system they believe is the one best suited to achieving optimum economic efficiency and how far this is one of sustaining competition.

All societies are faced with the basic problem of finite economic resources. As Sloman noted, "They differ considerably, however, in the way they tackle the problem. One important difference between societies is in the degree of government control of the economy."[32] Economists use the examples of the free-market economy and the planned or command economy to illustrate this difference. The free-market economy has no government intervention at all while the planned or command economy has all the economic decisions taken by the government.

Neither example exists in reality. Their function is to act as opposite ends of a spectrum of behaviour of states and to put such behaviour into perspective. In fact, all states operate through some form of mixed economy where economic decisions are made partly by the government and partly through the market.[33] As to the free market economy, Utton noted that, "It is possible to argue that practically all industries in modern economies are regulated to some extent."[34]

Diagrams employed by Sloman and by Begg, Fisher and Dornbush respectively, classifying economic systems in the 1990s, show that the major state closest to the free-market end of the spectrum is the United States, which is generally regarded as the epitome of the capitalist democracy.[35] Sloman's diagram also reveals that, until recently, the strategy chosen by the east Europeans had placed them close to that end of the spectrum representing the totally planned economy. They had made this choice because, like the west, they believed it to be the way of doing things that most closely corresponded to their political ideals of the time.[36]

Recent events in eastern Europe might seem to indicate that relatively little government intervention in the economy has, after all, been shown to be the economically correct system.[37] However, this would be a superficial conclusion to reach. Plender, commenting on the happenings in eastern Europe, warned that it was only the scale of eastern policy failure that served to put western policy in a good light and that "... by any less dismal yardstick the economic policy failures in the west have been substantial."[38]

It could be argued that competition, for all its flaws, is, nonetheless, the best available system. However, an alternative policy to competition is being practised by a major trading nation outwith the western hemisphere. The Japanese employ neither a minimal economic intervention policy nor a system of rigid state control but a strategy of industrial policy. Moreover, Japan is a state that is enjoying conspicuous industrial success.[39]

van Wolferen believed that it is a fiction for Japan to be classed as a capitalist free-market economy. Equally, he held that it could not be categorised as a centrally controlled Soviet-type economy. He wrote, "The Japanese, Korean and Taiwanese experiences have shown that a third category of political economy can exist, beside the western and communist types. US political scientist, Chalmers Johnson, has isolated this category of industrial nations and labelled it 'capitalist development states'."[40] Further, Nester wrote, "Japan's success rests on rejection of both communist-style state ownership of the economy and the neoclassical belief that free markets and minimal state interference are the answer."[41]

Other and subsidiary reasons can also be found for the choice of competition policy by western democratic states. As yet, economics has failed to provide a theory of competition that would guarantee optimum economic efficiency. Nonetheless, even if economic theory has not provided the definitive answer, this does not mean that states should leave the allocation of goods and services totally unregulated. Further, economics has not provided conclusive evidence of the superiority of any other method of achieving this optimum. This implies that any choice of policy must be instrumental. Even the most objective choice to be made could only take the form of the statement: we believe we have chosen the policy best suited to achieve economic efficiency. If so, it is allowable for a society to be overtly instrumental and choose a system that accords with its political mode of life.

When speaking of 'the failure of economics' what is

meant is the failure of economics to deliver a fully worked out theory that has the validity of a natural science theory. While economics has claims to be a branch of positive science, expectations of it with regard to the problem under discussion may be too high.[42] Thus, we may be justified in accepting a theory of competition on the understanding that, despite what some economists may claim, it is a highly developed but still unfinished product. That is, competition does seem to be a good method for achieving the end, even though our understanding of its workings lacks precision. For example, questions such as how much competition is needed to achieve optimum economic performance continue to confound the theorists.[43] Perhaps Adam Smith was right after all not to have defined competition too rigidly.

Apart from the fundamental political advantages of competition policy cited previously, the individual political benefits expounded by perfect competition theory are sufficiently desirable that the theory is still worth adopting, if they can be obtained even in part. As Scherer and Ross stated, "... when all is said and done, they (the political arguments for competition) and not the economists' abstruse models have tipped the balance of social consensus toward competition."[44]

Having chosen a policy of competition the state will exercise constant supervision over it, monitoring and fine-tuning the process by means of legislation and/or administrative action.[45] It might appear that such monitoring and fine-tuning is necessary only to ensure effective competition, which has been defined by Shepherd as involving, "... a striving among comparable rivals, who exert a mutual pressure so strong that all competitors must apply maximum efforts. None of them is

able to raise price above costs by very much, or to remove rivals except by superior efficiency."[46] Thus, effective competition is closely equated with maximum efficiency. In other words, supervision is being exercised for purely economic motives. Such an understanding does not, however, fully explain the activities of the state with reference to overseeing competition policy.

In fact, the monitoring and regulation of competition policy by the state has twin aims. It is done to achieve both economic and political benefits. This adds to the complexity of the task of supervision of competition policy. Further, and more importantly, it admits the possibility of conflict between the two aims. It may be that both aims are satisfied by one and the same regulatory action on the part of the state authorities. However, a direct clash between economic and political goals cannot be ruled out.

<u>Economic Benefits</u> Supervision by the authorities can be seen from the viewpoint of achieving economic advantages. For western democracies economic theory speaks of monitoring in order to achieve effective competition. This is, as Piesch and Schmidt noted, "... defined and measured by reference to structural, behavioural and market performance characteristics; in most cases, a combination of structural and behavioural characteristics ..."[47] Behavioural characteristics are more widely known as conduct criteria. Structure and behavioural, or conduct, criteria are used by the majority of western nations, including the United States. Such criteria are also used by the EC with regard to its competition policy.[48]

The use of structure and conduct to monitor competition, or antitrust policy, was advocated by Kaysen and Turner, in what Piesch and Schmidt called their classic work on antitrust policy.[49] This book, which has greatly influenced both economic theorists and governments, noted that, "Antitrust policy, however, cannot operate directly either on performance or on processes: we cannot conceive of an effective order which says, be efficient or, be competitive. Rather, policy operates directly on market structure and on firm conduct in order to affect processes and performance."[50]

Market structure concerns the number of buyers and sellers and their market share. This relates to monopoly of the market. Market structure concerns also, according to Scherer and Ross:

> ... the degree of physical or subjective differentiation distinguishing competing sellers' products, the presence or absence of barriers to the entry of new firms, the shapes of cost curves, the degree to which firms are vertically integrated from raw material producers to retail distribution, and the extent of firms' product line diversification (conglomerateness).[51]

Behaviour or conduct criteria concern the actions of the firm. As examples of relevant conduct, Scherer and Ross listed pricing behaviour, product strategy and advertising, research and innovation, plant investment and legal tactics.[52]

Market performance is multidimensional in that good performance relates to several factors. Decisions as to what, how much, and how to produce should be efficient in two respects. Scarce resources must be conserved and

production decisions ought to be responsive qualitatively and quantitatively to consumer demand. Producers should progressively increase output per unit of input by utilising advances in science and technology. They should also provide consumers with superior new products. Operations of producers ought to facilitate stable employment of resources, especially human resources in as full a way as possible. Finally, as regards market performance the distribution of income should be equitable.[53]

Regarding market performance a number of tests are relevant. Such tests are concerned with which of the various parameters of action are applied and the extent that they are employed over time. Also pertinent is whether or not they are implemented individually or collectively at one and the same time. Finally, it must be considered if such competitive conduct actually presents buyers with alternatives.

Effective competition exists where there is an absence of unreasonable market power.[54] This phrase itself requires definition. This task may be undertaken by referring to structural and behavioural characteristics, such characteristics being investigated by market structure and market conduct tests. Market power is exercised where a firm or oligopoly has a dominant position, or has relative freedom of action irrespective of the actions of competing firms. The relevant tests identify the genesis of this situation and also when such a position can be considered unreasonable.[55]

The monitoring and regulation of competition policy by states and by the EC, even on a primarily economic

level, is also subject to political considerations. Piesch and Schmidt had stated that effective competition was defined and measured in theory by three criteria, structure, behaviour and performance. They noted, however, that in practice only structure and behavioural criteria were used. Market performance criteria were, and are, omitted. This is due to the fact that it is difficult in practice to make use of the somewhat nebulous standards which comprise performance criteria. However, subjective political considerations also came into play. Bain was of the opinion that market performance criteria were to be avoided because they were inconsistent with the democratic political system.[56] Pietsch and Schmidt stated that such criteria are not used for measuring effective competition because, "... measures that directly influence performance are not sufficiently consistent with the principles of a free economy and a free society."[57]

To sum up this point, the preceding paragraphs have shown that economic tests are both complex and not fully effective. It is thus difficult to gauge the actual benefits of monitoring in order to achieve economic aims.

Political Benefits Supervision is also undertaken to confer political benefits on the state. That is, certain actions by firms, irrespective of their potential economic effects, are deemed politically undesirable or unacceptable by the state and are thus controlled. In short, competition in business is monitored as it possesses aspects which the state finds politically repugnant. The starting point of this investigation is an evaluation of competition *per se*.

Competition is a natural phenomenon. It is in the

nature of mankind to compete in life in general and in business in particular. With regard to the actions of a large part of mankind, competition is not perennial in that it ceases once the objective has been achieved. We compete in order that we may be able to stop competing.[58] In life generally, competition may be for food, warmth, shelter and a mate. In purely human terms once these have been achieved by, for example, obtaining a job, buying a house and getting married, competition may cease in many cases.

As regards the business world, the same hypothesis applies, as one objective of competing is to ensure a comfortable business existence. In 1935 Hicks stated that "The best of all monopoly profits is a quiet life."[59] Swann wrote in 1979 that "Historically, experience suggests that businessmen do not like competing."[60] In 1990 Scherer and Ross noted that a possible objective of managers was the seeking a placid, comfortable, risk-free existence.[61] While global trends and 1992 are making this objective more difficult to achieve, it is suggested that it is still being pursued.[62]

In business, competition may take place in a variety of ways. A firm may compete with its rivals by attempting to offer better value, superior quality or other such attractions that set its products apart. There are, however, other forms of business practices less acceptable to the state that reflect the natural desire of businesses to stop competing. Firms may reach agreements that have the effect of lessening or eliminating competition among them.[63] Alternatively, competitors may wish to remove other firms in the market in order to achieve their aims. Here is where intervention is called for. As Swann has written,

competition would not last long without government intervention.[64]

There is, in fact, a divergence of need between states in general and industry in particular. States see benefits to themselves in ensuring perpetual competition. The firms may see competition as but one means among others to achieve their ends. States will impose restrictions on the freedom of firms to conduct business as they would wish in order to keep industry competitive, in the sense of internecine competition.

The objective of maintaining perpetual competition can thus be seen as a fundamental political aim of the state. By its achievement, the present mode of political and economic life is maintained and safeguarded. It is suggested, therefore, that the statement by the Organisation for Economic Co-operation and Development can be made to reflect actual state practice by omitting the word 'economic', and thus to read as follows. "Competition policy has as its central goal the preservation and promotion of the competitive process." If so, then the statement by Stigler that competition policy is but a means to an economic end or ends, does not accurately reflect state economic practice. It is, rather, merely a theoretical statement of how things ought to be.

Conclusions. It has been suggested that competition policy has two meanings. Firstly, it is a theoretical stance of the western state in that it underpins the free market/democratic capitalism mode of existence. Secondly, it is also a distinct form of intervention by the state in the market. While other forms of government intervention regulate the market, competition policy

intervenes in order to secure the continuing freedom of the market.

Competition policy has several goals. The primary goal is to ensure perpetual competition, even where this aim is contrary to economic efficiency, in order to uphold democratic capitalism. This is a political goal. Subordinate economic goals are to intervene in the markets to secure the continuing freedom of the market and to secure effective competition in order to gain the maximum economic advantage from the market. Subordinate political goals are to choose to promote one or more of the aims listed in the OECD statement on competition above the others. Equally, competition policy can be used to promote other political aims.

Due to the necessity of upholding the fundamental political goal competition policy is, generally speaking, applied with equal strength to all markets regardless of specific factors such as product or the size of the market. This may cause economic harm to some industries. Further, due to the entrenched position of competition policy within the state, other policies, possibly more attuned to the economic realities of the 1990s, such as industrial policy, are not given sufficient attention.

It has been argued that states do make deliberate instrumental choices as to how to serve the end of economic efficiency. It has been further contended that, having made this choice, they then monitor the system selected both in order to keep it running <u>per se</u> and to keep it functioning as smoothly as possible. In so doing, a choice is often being made between efficiency and other political ends. This task calls for a precise and balanced judgement on the part of the authorities. Where

too great an emphasis is placed on other political ends, economic damage may result. On the basis of the information examined, it is suggested that politics have tended to rank above economics in the minds of state authorities.[65] In general, the state promotes political aims above economic efficiency. This finding poses a fundamental question. Is the continuation of such behaviour by the state desirable given the harsh economic climate of the 1990s?

Merger policy

Competition policy may be split into its component parts, a major one of which is generally merger policy.[66] There exists the necessity of monitoring mergers between firms which will increase the level of concentration by an appreciable margin. In practice, this means that the relevant authorities of the state will have competition as either the sole or the primary test for allowing or refusing a merger.

Competition, as the chosen policy of the authorities, must be protected by them. The line of reasoning as to why merger is generally strictly regulated by the authorities is clearly laid out. Merger is a major contributory factor that leads to a greater degree of concentration both for a given industry and for industry in general. The continuance of concentration could lead to oligopoly and possibly to monopoly. This process is regarded as one that stifles and eventually, in the case of monopoly, smothers competition. The authorities, therefore, must exercise control over merger in order to stop concentration reaching the critical level where it will jeopardise the effectiveness of competition.[67]

The above paragraph identified three sets of circumstances which are worthy of special attention. They are concentration, oligopoly and monopoly. Concentration, oligopoly and monopoly have not been characterised by economists as undesirable per se, but pronouncements have been made on each, warning of potentially adverse effects on competition.

Concentration, according to mainstream economic theory has, in general, undesirable effects on competition. While a direct connection has not actually been proven, high levels of concentration tend to be linked with economic ills.[68] The Committee of Experts on Restrictive Business Practices, in a 1979 report for the Organisation for Economic Co-operation and Development, hereafter referred to as the OECD Report, stated, "Several types of adverse consequences are likely to emerge when concentration is at a high level."[69] These are summarised as follows:

The optimum allocation of resources among industries may not be achieved. Prices will tend to be higher and output lower than would be the case in a competitive industry. Firms would have relative freedom with regard to setting prices. This would result in prices being set at levels that allow survival of the least efficient firms, rather than at levels that favour the most efficient firms. The internal efficiency of firms will be adversely affected. Management will have freedom to set profit levels. There will be a reduction of incentive to improve continuously processes and products. Technical research and innovation will decline. International trade will be adversely affected. Managerial efficiency will decline. Costs and prices will rise. Further, this

weakening of the competitive process will result in a general reduction in economic welfare.[70]

Oligopoly has also been subjected to adverse comment by economists. Mann noted, "It is a fundamental proposition of economic theory that oligopolistically structured markets will produce noncompetitive price behaviour and thereby interfere with the attainment of allocative efficiency ..."[71]

A specific connection between oligopoly and merger was given by George, who wrote:

> Monopoly and Merger Policy is based on the theoretical proposition that there is an incentive, in the form of higher joint profits, for oligopolists to collude, and the practical proposition that the difficulty in achieving a collusive agreement decreases with the number of firms. Since collusion leads to higher prices and profits and lower output there is an expectation that the interests of consumers will not be well served in highly concentrated markets, and hence there is a justification for a policy which seeks to control monopoly behaviour and performance. It also follows that there should be a policy of preventing mergers which would lead to high levels of market concentration.[72]

For the purposes of understanding merger policy, the examination of concentration theory is the most relevant area of study. In general, the control of concentration is the first line of defence in dealing with any threat to competition. Responses to oligopoly and monopoly situations come within other areas of competition policy. This is not to say that oligopoly and monopoly theory are

irrelevant to merger policy. For example, if it could be shown that oligopoly, and even monopoly, are not anti-competitive then this new situation would obviously have a bearing on merger policy.

Two major aspects of concentration theory will now be examined. The first concerns the problems connected with the measurement of concentration. By outlining these major problem areas it can be shown that it is difficult to define at what level concentration will begin to affect competition adversely. The second aspect of concentration relates to the current evaluation of the concentration doctrine by economists.

Before tackling the problems inherent in the measurement of concentration, the type of concentration that is the subject of analysis is stated and defined. It is market concentration, which, as the OECD Report noted, "... is of primary importance in competition theory and for the enforcement of competition legislation."[73] Market concentration refers to the share of an individual market or industry held by a small number of the largest firms. It has both static and dynamic aspects. It is static in that it concerns the market share of firms at a specific point in time and dynamic in that it pertains to the manner in which this share increases or decreases over time.

Several problems exist concerning the measurement of concentration: definition of the market, imports and exports, establishment and enterprise, measures of the size of establishment, different concentration measurement techniques.

Regarding definition of the market, the explanation

by Brozen is succinct yet comprehensive. He wrote, "A market may be defined in terms of regional, national, or international extent and in terms of a single product or a group of products encompassing more or less close substitutes or a group of suppliers whose facilities can be readily used to supply each other's markets."[74] The lucidity of this statement should not mask the pragmatic difficulties of realising its definition in practical terms. The OECD Report noted two major problems: the determination of which products are close substitutes for each other and the collation techniques and publication restrictions of official statistics upon which concentration pronouncements are based.[75] The OECD Report concluded that these problems resulted in difficulties in making meaningful statements about concentration.

Concentration measures, in general, relate only to shares of domestic production. Thus, exclusion of import statistics can result in an overstatement of the degree of concentration in an industry. Further, the inclusion in the statistics of exports can lead to different measurements of the level of concentration.[76]

Where the enterprise owns one plant, the establishment, the official statistics will show an equal balance between enterprise and establishment concentration. Where, however, as is usually the case, an enterprise owns several establishments, then enterprise concentration will be shown as higher than establishment concentration. Official statistics usually use the establishment as the basic unit of enumeration and tabulation.[77]

There are four major variables used to analyse the size of different firms: sales or gross output, net

output or value added, employment, capital assets. The OECD Report suggested that, concentration being concerned with products, net output was the best variable to use. It noted, however, that the most commonly employed variables were sales and employment.[78]

Concentration can, in fact, be measured by a variety of techniques, each of which tends to focus on a particular aspect of concentration. The major techniques are the Concentration Ratio, the Herfindahl-Hirshman Index and the Gini Coefficient of Concentration.[79]

The Concentration Ratio is the proportion of a total industry variable accounted for by a fixed number of the largest firms in an industry, often the top three or four. It does not, therefore, take into account the total number of firms in an industry. Further, it gives no information on the relative size distribution within the largest firms. Nor is there any information about the size distribution between the largest firms and the rest of industry.[80]

The Herfindahl-Hirschman Index is given by the sum of the squares of each firm size, expressed as a ratio of total industry size. The OECD Report believed this index was a good indicator of the market situation, but noted, however, that there was a problem in its use due to the scarcity of data necessary for the calculations.[81]

The Gini Coefficient of Concentration, in essence, summarises the information on a Lorenz curve. The Lorenz curve is a diagram of a double cumulative percentage frequency curve. It portrays the cumulative percentages of any variable, such as output, accounted for by the cumulative percentages of establishments, by size, in an

industry. The OECD Report stated it was not an ideal measure of concentration where an industry was dominated by a few firms as it fails to provide specific information on these leading firms.[82]

As well as suffering from what may be termed internal problems (as shown above), the theory of concentration itself is currently under attack by economists. The basic position of the concentration theory was outlined by Armentano. He wrote, "Early empirical work in industrial organisation had appeared to discover a slight positive correlation between market concentration ... and the average profits earned by firms in such markets."[83] Recent work on several aspects of concentration, however, has brought the validity of the correlation into question.[84]

Brozen, who has been at the forefront of the new research, stated, "It has been suggested that substantial barriers to entry account for the high profitability of concentrated industries, but there is no reason to assume that the height of barriers to entry is correlated with concentration."[85] He also found that, "There is no relationship between profitability and concentration."[86] Littlechild noted, "There has been much research since the mid-70s which has yielded sometimes conflicting evidence and interpretations, but the balance of evidence now rejects the claim that higher concentration leads to higher profit."[87] Scherer and Ross stated, "However, recent work has demonstrated that most, if not all, of the correlation between profitability and concentration ... was almost surely spurious -"[88]

Because of such research some theorists now take the view that the concentration doctrine has fallen.

Armentano, for example, stated that "Another important reason for the change in antitrust attitudes has been the collapse of the concentration doctrine."[89]

In the light of this analysis, should those states that generally favour strict control of merger modify or even abandon their policy regarding merger?[90] Hay noted that "... merger policy which is based primarily or entirely on market shares and concentration ratios is likely to be misguided, normally erring in the direction of over protection against anti-competitive mergers."[91]

As has already been suggested, the state does not follow a policy of competition purely for reasons of economics. If so, then the state may also have non-economic reasons for controlling merger. In fact, the state does have political reasons for wishing to curb merger. Primarily, these concern the fear of alternative power groups. As the OECD Report stated:

> In the absence of conclusive evidence on concentration and its effects, there is another politically important point concerning the dangers of increased industry and aggregate concentration. Many competition laws are inspired by the belief that economic power should be decentralised and not left in the hands of a few enterprises.[92]

This fear must be seen in perspective. The state does not foresee any form of takeover, either direct or indirect, of political power by large firms. Indeed, the state and the large firm are interdependent. Galbraith wrote that "The planning system, in fact, is inextricably associated with the state. In notable respects, the mature corporation is an arm of the state."[93] This situation holds good, in the main,

irrespective of the political colour of the government of the state.[94] If so, then the state and the firm actually co-exist in relative peace, if not harmony.

Why then does the state fear the large firm? It can be argued that Galbraith overstates both the strength and the generality of the links between the state and industry. Major industries such as defence, aerospace and communications do interact with the state to a considerable extent. However, this type of industrial policy planning system is still in embryo form in the west.

Further, whether or not the firm is part of the planning system, the state may still retain an innate fear or distrust of the firm. Such fear is linked to the bias of the state against domination of an industry by a few firms. It is not so much that such firms do collude but that they *might* collude.

As the firm is independent it does not constitute an arm of government. Thus, with regard to economic policy and planning, it is still to be seen as a potential political opponent. This reason for the state to be anti-merger is perennial and persists no matter what is the current condition of economic theory regarding the economic justification of controlling merger strictly.

Economic theory is constantly evolving. The majority of economists would argue that theory is evolving towards an objective correctness. It is suggested, however, that economic theory is indeed constantly changing but, in the main, is no nearer to finding the right answer for specific economic problems. Economic evolution cannot be linked unquestioningly with real progress towards

economic truth.

McNulty felt that economics had not evolved significantly since the days of Adam Smith. He wrote, "Clearly the time has come to incorporate into the mainstream of economic theory ... a concept of competition closer to that occasionally suggested by Adam Smith ..."[95] Schumacher compared modern economic theory unfavourably against ancient Buddhist economic theory.[96] Nor has modern economic theory improved upon the work of Adam Smith on monopoly or Schumpeter on concentration. Armentano wrote that, "After almost 100 years of antitrust laws, Smith's insights on monopoly appear particularly incisive."[97] As to Schumpeter, his 1947 work, 'Capitalism, Socialism and Democracy,' is recommended as standard reading on the subject by modern economic textbooks.[98]

It cannot therefore be taken as fact that the concentration doctrine has indeed been broken. The doctrine may yet prove to be correct in absolute terms or, more probably, return to favour in economic circles.[99] For the latter possibility, this could mean that other economists will try to refute the papers that claim to break the concentration doctrine. In fact, the counter attack has already begun. Weiss wrote that, "In my opinion, the several studies that have seemed to weaken the concentration-profits relation in recent years have not done much damage."[100]

A further argument against abandoning the concentration doctrine is that to do so might necessitate adopting a new economic theory. Any new theory, irrespective of its correctness, is likely itself to possess flaws which will become apparent upon usage by

the state, a case in point being contestable market theory.

An additional difficulty as regards choosing a new theory relates to the problem of the interaction between economics and law. Even where a theory has been relied upon for decades by policymakers, its application in practice tends to be, at best, a simplified version of the theory.[101] The adoption of any new hypothesis would therefore require a major effort on the part of policymakers and administrators to comprehend it fully. As Hay wrote, "... the absorption of the recent research into policy has been slow and uneven. In part this is due to the formidable mathematical complexity of the research, making it difficult for those who make or influence policy to comprehend, ..."[102]

Equally however, arguments may be marshalled in support of a change of direction as regards merger policy. Modifying merger policy does not require the state to disregard concentration theory totally. Instead it may merely allow that some fine tuning of the theory is necessary. By taking such a stance, practical action on merger could be instigated while the adoption of a new theory would be avoided.

In reality, the state pays only lip service to economic theory. This is acknowledged by economists themselves. Hay, for example, noted that, "... frequently 'economic intuition', rather than any formal theory, is employed at the policy level."[103] If so, then a state could be receptive to the challenge of any event that seems to necessitate a departure from established economic policy. Where the underpinning economic theory itself is in some danger of being refuted, as may be the

case in this instance, the readiness of a state to depart from a policy based upon this theory should be greater.

The increase in global competition and resulting internationalisation of markets are events that together constitute a major ground for changing merger policy. These occurrences are of major import and demand a reaction from world, and in particular, EC industry. A response is also necessitated both from states and from international institutions. Irrespective of the theoretical state of the concentration doctrine, real economic events are forcing a reaction from states on merger policy.

Much of the reevaluation of concentration theory in particular and competition policy in general has been undertaken as a direct result of global economic occurrences, one such event being the oil price increases of the early 70s.[104] The current increase in global competition is, in turn, having a direct bearing on the theoretical basis of merger policy. The Institute of Directors stated:

> Government control of mergers in the western economies has traditionally been based on the assumption that, left to themselves, companies will combine to control markets against the interests of consumers ... This is the 'market failure' which is thought to justify government regulation to prevent mergers. The internationalisation of markets ... leads the IOD to believe that this presumption is increasingly out of date ...[105]

A comparison of the arguments against and for the state changing merger policy reveals a clear case in favour of the latter. In particular, the global economic

events heavily weight the arguments in favour of this conclusion. The increased competition faced by western states from the Far East, the opening up of markets to the global scale and the rationalisation of industries require a response from states with regard to merger policy.

Any policy change in respect of mergers must, however, be viewed in a wider context, as part of an overall response by states to global economic pressures. The global challenge of increased competition is so strong, and its threat to national industries so great, that the fundamental ideas of competition and the free market are being called into question. These basic concepts of western capitalism are now being contested by ideas that have been thought of as heresy in past decades. The new thinking is that government and industry should become a working partnership. As Reich stated, "Industrial policy is now the thing."[106] Utilising Japanese industrial strategy as a role model, a new era of cooperation between government and business is on the way. This will constitute the new capitalism of the 1990s and beyond.[107]

In the new economic order it is suggested that merger policy may be used for the purposes both of upholding economic efficiency and for the preservation of the political system favoured by that state. However, this latter task is best accomplished indirectly, by the successful achievement of the former. The function of merger policy should be directly related to economic efficiency and indirectly linked to political aims. Merger policy must strive primarily to perform an economic role. By so doing it will also succeed in achieving a political goal.

In order to perform these tasks, merger policy must function independently. That is to say, as a policy not linked permanently to any particular strategy such as competition policy. In times of economic stress it should operate to uphold economic efficiency by being separated from competition policy and linking up with, or gravitating towards, any other major strategy being mooted as the best response to current problems, such as industrial policy. In this, merger policy is also performing a political function. It is being used to solve immediate economic problems which may eventually affect, or be of potential hazard to, the political system of the state.

The economic circumstances for allowing or preventing a merger at any time are thus dynamic rather than static. They are attuned to the shifting currents of economic need rather than the still waters of political goals. By contrast, the state has tended to see merger policy as a tool to be used primarily for the purpose of achieving constant political aims. To this end the state has directed that merger policy functions, more or less permanently, as a part of competition policy. In consequence, it has become both moribund and static.

Conclusions. The natural reaction of most governments towards merger is to exercise strict control over it. The reasons for doing so are primarily a reliance upon concentration doctrine and the fear of alternative power groups. State merger policy, however, may be in the process of undergoing a profound change. This is due to the changing opinion of economists on the concentration doctrine and the threat to national industry of increasing global competition. The latter

incident, rather than the former event, is more likely to be decisive in changing the nature of merger policy.

To perform this new role properly, merger has to be viewed as an independent policy. When the economic situation is relatively stable, merger may function as part of competition policy. In times of economic crisis, however, it should be able to link up with, or function under, the umbrella of the major economic strategy currently being pursued.

1. See F.M. Scherer and David Ross, Industrial Market Structure and Economic Performance, 3nd ed. (Boston: Houghton Mifflin, 1990), 18-19; David Burningham, ed., Economics, 2nd ed. (Sevenoaks: Hodder and Stoughton Ltd, 1987), 3; Dennis Swann, Competition and Consumer Protection (Harmondsworth: Penguin Books, 1979), Chapter 1.

2. Organisation for Economic Co-operation and Development, Competition and Trade Policies: Their Interaction (Paris: OECD), 1984, 86.

3. George J. Stigler, The Organisation of Industry (Homewood, Illinois: Richard D. Irwin, 1968), 5.

4. OECD, op. cit in note (2), 86.

5. Michael Waterson, Regulation of the Firm and Natural Monopoly (Oxford: Basil Blackwell, 1988), 2.

6. Economic efficiency has been defined by Shepherd as a maximum value of outputs from any given total of inputs. Beyond that, efficiency may be divided into two main categories: internal or x-efficiency and allocative efficiency. See, William Shepherd, The Economics of Industrial Organisation, 3rd ed. (Englewood Cliffs, New Jersey: Prentice Hall, 1990), 27.

Begg, Fisher and Dornbush have stated that economic efficiency is the best the economy can do. It is the most efficient allocation of resources possible. See, David Begg, Stanley Fisher and Rudiger Dornbush, Economics 3rd ed. (London: McGraw Hill, 1991), 332. They also noted, at 332, that "An allocation is a complete description of the factors being used, the goods being produced and the way these goods are distributed to consumers. It answers all

three of the questions what, how, and for whom the economy is producing goods and services." See Chapters 15 and 17 for detailed expositions of efficiency criteria.

7. Perfect Competition is a well known concept and is dealt with by numerous authors. See Stigler, op. cit in note (3), 5-7; Richard G. Lipsey, An Introduction to Positive Economics, 7th ed. (London: Weidenfeld and Nicolson, 1989), 199-218; John Sloman, Economics (Hemel Hempstead, Herts.: Harvester Wheatsheaf, 1991), 193-201; Begg, Fisher, and Dornbush, op. cit in note (6), 133-56.

8. It was suggested in the previous chapter that there is a substantial body of opinion that challenges the view that firms can always be termed profit maximisers.

9. The seminal article on workable competition was by J. M. Clark, "Towards a Concept of Workable Competition", American Economic Review 30 (June 1940): 241-256. Stephen Sosnic," A Critique of Concepts of Workable Competition," Quarterly Journal of Economics 72 (August 1958): 380-423. Scherer and Ross, op. cit in note (1), 53.

10. Scherer and Ross, op. cit in note (1), 54.

11. Ibid, 53.

12. Ibid., 54.

13. Korah believes the Treaty of Rome is based on theories of workable competition current in the 1930s to 1950s. See Valentine Korah, EEC Competition Law and Practice 4th ed. (Oxford: ESC Publishing Ltd), 56.

14. Scherer and Ross, op. cit in note (1), 53-54.

15. Ibid.

16. Ibid.

17. Stigler, _op. cit_ in note (3), 12.

18. George J. Stigler, _The Economist as Preacher_ (Oxford: Basil Blackwell, 1982), 51. See also, Paul Auerbach, _Competition: The Economics of Industrial Change_ (Oxford: Basil Blackwell, 1988), 20-22. Auerbach classed the theory of workable competition as a failure.

19. Karl Menger, _Principles of Economics_ 1871.

20. Wolfgang Grassl and Barry Smith, eds., _Austrian Economics, Historical and Philosophic Background_ (London: Croom Helm, 1986), preface vii.

21. See for example, F.A. Hayek, _Individualism and Economic Order_ (Chicago: University of Chicago Press, 1948), Hayek, _The Constitution of Liberty_ (London: Routledge, 1976, Hayek, _Economic Freedom_ (Oxford: Basil Blackwell, 1991); Ludwig von Mises, _Human Action_ (London: William Hodge, 1949), von Mises, _Theory of Money and Credit_ (New Haven: Yale University Press, 1957); Israel Kirzner, _The Economic Point of View: An Essay in the History of Economic Thought_ (1960; reprint, Kansas City: Sheed and Ward, 1976), Kirzner, _An Essay on Capital_ (New York: Augustus M. Kelly, 1966), Kirzner, _Competition and Entrepreneurship_ (Chicago: University of Chicago Press, 1973), Kirzner, _Perception Opportunity and Profit_ (Chicago: University of Chicago Press, 1979); W. Duncan Reekie, _Industry, Prices and Markets_ (Oxford: Philip Allan, 1979), Reekie, _Markets, Entrepreneurs and Liberty: An Austrian View of Capitalism_ (Brighton: Wheatsheaf Books,1984).

22. John Vickers, "Strategic Competition Among the Few-Some Recent Developments in the Economics of Industry," Oxford Review of Economic Policy 1 No.3 (October 1985): 40. See also, E.S. Mason, "Price and Production Policies of Large Scale Enterprises," American Economic Review Supplement 29 (1939): 61-74; J.S. Bain, Barriers to New Competition (Harvard, Harvard University Press, 1956).

23. Vickers, op. cit in note (22), 40. However, Korah, op. cit in note (13), 69, pointed out that it has now been recognised with regard to structure, performance and conduct that, in fact, each of these may affect the other two.

24. See, for example, Milton Friedman, Capitalism and Freedom (Chicago: University of Chicago Press), 1962, Friedman, Essays in Positive Economics (Chicago: University of Chicago, 1974); Don Patinkin, Essays on and in the Chicago Tradition (New York: Durham N.C). 1981. For a critical analysis of the Chicago School see, Ingo L. O. Schmidt, and Jan B. Rittaler, A Critical Evaluation of the Chicago School of Antitrust Analysis (London: Kluwer, 1989); Jonathan B. Baker, "Recent Developments in Economics that Challenge Chicago School Views," Antitrust Law Journal 58 (1989): 645-55.

25. The primary work on this theory is William J. Baumol, John C. Panzar, and Robert D. Willig, Contestable Markets and the Theory of Industry Structure (New York: Harcourt Brace Jovanovich, 1982).

26. Michael A. Utton, The Likely Impact of Deregulation on Industrial Structures and Competition in the Community (Luxembourg: Office for Official Publications of the European Communities, 1987), 29.

27. Ibid, 30.

28. Ibid., 31.

29. Oakeshott was of the opinion that holding politics above economics was not only the done thing but indeed was the correct policy for governments to adopt. See Michael Oakeshott, Rationalism in Politics (London: Methuen, 1962 reprint 1984), 37-58. This was also the view of Simmons. See generally, Henry C. Simmons, Economic Policy for a Free Society (Chicago: University of Chicago Press, 1948).

30. Swann, op. cit in note (1), 22. See also, A.D. Neale and D.G. Goyder, The Antitrust Laws of the United States of America, 3rd ed. (London: Cambridge University Press, 1980), 441.

31. Locke also, has connected competition and politics. He wrote that economic requirements were linked with political values and noted that "Market freedom connects with political freedom, and market equality, meaning equality of access to the market, connects with political equality in the sense of equality of access to political power and decision making, in other words democracy. See, Don Locke, "Markets and Morals: A Response," in G.K.M. Hunt, Philosophy and Politics (Cambridge: Cambridge University Press, 1990), 41.

32. Sloman, op. cit in note (7), 16.

33. As to the reasons for, and types of, government intervention see Sloman, op. cit in note (7), 373-396; Begg, Fisher, and Dornbush, op. cit in note (6), 48-58.

34. Utton, op. cit in note (26), 1.

35. Sloman, op. cit in note (7), 17; Begg, Fisher, and Dornbush, op. cit in note (6), 9.

36. Oakeshott, op. cit in note (29) has written that, "...in every proposal of economic policy there lies an often undisclosed preference for a society integrated in one way rather than another."

37. It is suggested that competition policy coupled with a level of governmental intervention means that two differing types of intervention are taking place. The former is intervention in order to keep the market as free as possible while the latter function is performed in order to regulate the market in some way.

38. John Plender, "The Magic of Unfree Markets," Financial Times (18 December 1989).

39. To what extent this success can be put down to the employment of a comprehensive industrial policy is, of course, a valid question. A sound industrial policy is but one factor in Japan's industrial success.

40. Karl van Wolferen, The Enigma of Japanese Power (London: Macmillan, 1989), 6; Chalmers Johnson, MITI and the Japanese Miracle: The Growth of Industrial Policy, 1925-1975 (Stanford: Stanford University Press, 1982.) See also, William R. Nester, The Foundation of Japanese Power (New York: Macmillan, 1990), Nester, Japanese Industrial Targeting (New York: Macmillan, 1991). Nester held up industrial policy as a key feature of Japanese economic success.

41. Nester, Japanese Industrial Targeting op. cit in note (40), 4.

42. For example, Auerbach, op. cit in note (18), 2. Auerbach wrote, "Economics is usually claimed as a branch of positive science." See also, Burningham, ed., op. cit in note (1), 4-10.

43. Scherer and Ross, op. cit in note (1), 55, "The competitive norm does seem to serve as a good first approximation, but it is difficult to state in advance how much competition is needed to achieve desirable economic performance, nor can we formulate hard and fast rules for identifying cases in which a departure from competition is desirable."

44. Ibid, 18.

45. Thus competition policy, in addition to being seen as an economic and political philosophy, can also be viewed as another form of state intervention. See, Swann, op. cit in note (1), 21.

When speaking of 'the state' in this chapter, it is a theoretical model that is alluded to and not any specific western state.

46. Shepherd, op. cit in note (6), 16.

47. Walter Piesch and Ingo Schmidt, The Suitability of Concentration Measures for EEC Competition Policy (Luxembourg: Office for Official Publications of the European Communities, 1983), 3. The structure, conduct, performance paradigm is examined in many works dealing with industry organisation. See, Paul Geroski, "Competition Policy and the Structure-performance paradigm," in Stephen Davies et al, Economics of Industrial Organisation (Harlow, Essex: Longman, 1988), 166-186; Clement G. Krouse, Theory of Industrial Economics (Oxford: Basil Blackwell, 1990), 415-6; Scherer

and Ross, op. cit in note (1), 4-7, and generally.

48. Piesch and Schmidt, op. cit in note (47), 4.

49. Ibid., 3-4.

50. Carl Kaysen and Donald Turner, Antitrust Policy. An Economic and Legal Analysis (Cambridge, Mass.: Harvard University Press, 1959), 59.

51. Scherer and Ross, op. cit in note (1), 4.

52. Ibid, 5.

53. Ibid, 4. As Scherer and Ross noted, the goals may not be completely consistent with one another. Nor is their individual importance vis a vis each other objectively determined.

54. See Oliver Williamson, "Dominant Firms and the Monopoly Problem: Market Failure Considerations," Harvard Law Review 85 (1972): 1512-31.

55. Piesch and Schmidt, op. cit in note (47), 3-6.

56. Joe E. Bain, Industrial Organisation, 2nd ed.(New York: Wiley, 1968), 498-500.

57. Piesch and Schmidt, op. cit in note (47), 4.

58. Robert H. Bork, The Antitrust Paradox (New York: Basic Books, 1978), 59, noted that competition, or rivalry, was not an end it itself and that our society is, in fact, founded upon the elimination of rivalry.

59. J.R. Hicks, "Annual Survey of Economic Theory: The Theory of Monopoly," Econometrica 3 (January 1935): 8.

60. Swann, op. cit in note (1), 21.

61. Scherer and Ross, op. cit in note (1), 44. This view is also held outside purely economic circles. See, Locke, op. cit in note (31), 36, Locke wrote, "It seems more plausible that people prefer the easy life, and that the point of keeping the market free and open is precisely to make life less easy than they might like."

62. See Scherer and Ross op. cit in note (1), 44.

63. Locke, op. cit in note (31), 36, stated, "It seems clear, first of all, that markets do not reward competition. On the contrary, markets reward co-operation: ..."

64. Swann, op. cit in note (1), 22. This was also the view of Oakeshott, op. cit in note (29), 55, who wrote, "... if effective competition is to exist it can do so only by virtue of a legal system that promotes it, ..."

65. This was also the conclusion arrived at by Swann. See, Swann, op. cit in note (1), 22.

66. The segmentation of competition policy into specific parts is illustrated in Richard Whish, Competition Law, 2nd ed. (London: Butterworth, 1989), 15.

67. Piesch and Schmidt, op. cit in note (47), 87.

68. Organisation for Economic Co-operation and Development, (OECD), Concentration and Competition Policy (Paris: OECD, 1979), 15.

69. Ibid., 14.

70. However, this analysis of the adverse effects of concentration omits two important factors - the results depend not just on the degree of concentration, but on the trend of long-term costs and elasticity of demand for

output.

71. H. Michael Mann, "Advertising, Concentration and Profitability: The State of Knowledge and Directions for Public Policy," in Harvey J. Goldschmidt, H.Michael Mann and J. Fred Weston. Industrial Concentration: The New Learning (Boston: Little Brown, 1974), 137. On oligopoly generally, see William Fellner, Competition among the Few (New York: Knopf, 1949), which is generally acknowledged as a classic on the subject. See also, Huw Dixon, "Oligopoly Theory Made Simple," in Davies et al, op. cit in note (47), 127-165.

72. K.D. George, "Monopoly and Merger Policy," Fiscal Studies 6 no 1 (February 1985): 34.

73. OECD, op. cit in note (68), 12.

74. Yale Brozen, ed., The Competitive Economy: Selected Readings (Morristown, New Jersey: General Learning Press, 1975), Introduction, v, note 2. On the topic of definition of the market see also, OECD, op. cit in note (68), 17-19; Francis Fishwick, Definition of the Relevant Market in Community Competition Policy (Luxembourg: Office for Official Publications of the European Communities, 1986).

75. OECD, op. cit in note (68), 17-19.

76. See on the problems of imports and exports, Ibid., 19.

77. Ibid.

78. Ibid, 20. On employment research see, A. Armstrong and A. Silberson, "Size of Plant, Size of Enterprise and Concentration in British Manufacturing Industry, 1935-58," Journal of the Royal Statistical Society 128 (1965):

395-420.

79. All the techniques noted in the text are more fully elaborated in the Report of the OECD, op. cit in note (68), 20-24. See also, Swann, op. cit in note (1), 62-66; Piesch and Schmidt, op. cit in note (47); L. Hannah and J.A. Kay, Concentration in Modern Industry (London: Macmillan, 1977); P. Geroski, "Some Reflections on the Theory and Practice of Concentration Indices," International Journal of Industrial Organisation 1 (1983): 79-94; Kenneth M. Parzych, A Primer to Antitrust Law and Regulatory Policy (London: University Press of America, 1987), Chapter 2; Stephen Davis, "Concentration," in Davis et al, op. cit in note (47), 79-86.

80. OECD, op. cit in note (68), 21.

81. Ibid., 22.

82. Ibid., 23.

83. D.T. Armentano, Antitrust Policy. The Case for Repeal (Washington: The Cato Institute, 1986), 4. Examples of such early studies are Joe S. Bain, "Relation of Profit Rates to Industry Concentration: American Manufacturing, 1936-1940," Quarterly Journal of Economics 65 (August 1951): 293-324; H. Michael Mann, "Seller Concentration, Barriers to Entry, and Rates of Return in Thirty Industries: 1950-1960," Review of Economics and Statistics 48 (August 1966): 296-307.

84. See for example, Goldschmidt, Mann, and Weston, op. cit in note (71); Armentano, op. cit in note (83), Armentano, Antitrust and Monopoly, 2nd ed. (John Wiley, 1990), Armentano, "Battling the Real Sources of Monopoly Power," Financial Times (March 4 1987); Brozen, ed., op.

cit in note (74), Brozen, Concentration, Mergers and Public Policy (London: Macmillan, 1982); George A. Hay, "Competition Policy," Oxford Review of Economic Policy 1 no. 3 (Autumn 1985): 63-79; James Fairburn and John Kay, eds., Mergers and Merger Policy (Oxford: Oxford University Press, 1988).

85. Brozen, "Concentration and Structural Market Disequilibria, " in Brozen, ed., op. cit in note (74), 259.

86. Ibid., 260.

87. Stephen Littlechild, "Myths and Merger Policy," in Fairburn and Kay, eds., op. cit in note (84), 305.

88. Scherer and Ross, op. cit in note (1), 411.

89. Armentano, "Battling the Real Sources of Monopoly Power," op. cit in note (84).

90. It is accepted that not all western states do control merger strictly. Further, even among states that generally do exercise strict supervision, there are periods when merger controls are relaxed. United Kingdom merger policy during the 1960s is one such example.

91. Hay, op. cit in note (84), 68.

92. OECD, op. cit in note (68), 144.

93. John Kenneth Galbraith, The New Industrial State, 4th ed. (Boston: Houghton Mifflin Company, 1985), 307. See also Chapters 26 and 27.

94. Ibid., Chapter 9.

95. McNulty, "Economic Theory and the Meaning of Competition," in Brozen, ed., op. cit in note (74), 74.

96. E.F. Schumacher, Small is Beautiful, (1973. Reprint London: Abacus, 1978), Chapter 4. Also of interest is Morishima Michio, "Confucianism as a Basis for Capitalism," in Daniel I. Okimoto and Thomas P. Rohen. eds., Inside the Japanese System (Stanford, California: Stanford University Press, 1988). Michio argued modern Japanese capitalism is actually rooted in Confucianism.

97. Armentano, op. cit in note (83), 74.

98. Joseph A. Schumpeter, Capitalism, Socialism and Democracy, 5th ed. (London: Allen and Unwin, 1977). For example, it is recommended by Burningham, ed., op. cit in note (1), 153.

99. For example, the view held by economists on concentration has not been static in the past. Brozen, "Concentration and Profits: Does Concentration Matter?" in Brozen, ed., op. cit in note (74), 135, stated, "In the post-World War II period, the economics profession made a 180 degree turn from its pre-Great Depression position in its view of concentration."

100. Leonard W. Weiss, "The Concentration-Profits Relationship and Antitrust," in Goldschmidt et al, op. cit in note (71), 231.

101. George A. Hay, "Pigeonholes in Antitrust," Antitrust Bulletin 29 (1984): 133-45. Hay discussed the tendency of the American courts to use simple rule of thumb in evaluating antitrust issues.

102. Hay, op. cit in note (84), 64.

103. Ibid., 64.

104. Ibid., 63.

105. Institute of Directors, (IOD), Mergers Policy. A Submission by the Institute of Directors to the European Commission and the Secretary of State for Trade and Industry. (London: IOD Policy Unit, 1988), 5-6.

106. Robert Reich, Professor of Economics at Harvard University, speaking in "The Money Programme," BBC 2, 4.6.89. That programme featured a report on the changing nature of western capitalism.

107. "The Money Programme," op. cit in note (106). See, Nester, op. cit in note (40), 4-7 for an exposition of Japanese industrial policy. Nestor believes that extensive political and economic cooperation constitutes an important part of Japan's economic dynamism.

3. FROM ANTI-TRUST TO PRO-EFFICIENCY

The subject of Chapter Three is the antitrust law and policy of the United States of America.[1] There are several reasons that justify its inclusion in a work concerning the merger law and policy of the EC.

First, American antitrust law served as a model, though possibly not the definitive one, for the competition law of the EC.[2] This influence can most readily be seen in the parallels between Sections One and Two of the Sherman Act of 1890 and Articles 85 and 86 of the Treaty of Rome.[3] Further, the antitrust law and practice of the United States is still of relevance to this day.[4] As Fox stated, "I believe in essence that the American system and the Common Market system are struggling with similar problems in the context of values and concerns that are much more similar than dissimilar."[5]

In addition, the United States federal structure is of some interest to the EC as a role model for a future United States of Europe. Scharf noted, "When 'Europeanist' politicians and social scientists were considering processes of integration that might lead to a 'United Europe', what they had in mind was a federal system fashioned after the American model."[6] Boltho stated that a major objective of 1992 is to create a large, unified market, similar in many respects to that of the United States. He also observed that there was yet more to be gained from the United States model. "Indeed the appeal of the United States example goes beyond the creation of more open trading conditions. The United States is, after all, not only a customs union but also a common currency area and a federal state - all

things which many Europeans think the EEC should be moving to over the longer-run."[7]

The United States of America is the most powerful capitalist economy in the world. It is, in fact, the epitome of the capitalist democracy.[8] The saying is not totally without foundation that what America does today, Europe does tomorrow. Today America is undergoing a radical change in its antitrust and merger policy. The advent of 1992 is a sign that major change is also happening in Europe. Crucial decisions are being made on all aspects of economic life. Competition and merger policies are not excluded from this process. It is worth considering American antitrust policy in order to decide whether or not European competition and merger policies could benefit, either by following the American example, or possibly by avoiding her mistakes. If American antitrust policy has undergone revision, then both the reasons behind the change and the actual changes themselves, are worthy of close study.

United States antitrust law is also of direct concern to European firms. As Skitol and Ziff observed:

> A merger between two European firms, both of which compete within the US and at least one of which owns US assets employed in the field of competitive overlap, is as subject to the US anti-trust laws as a merger of two US-based competitors. Indeed for that matter, a merger between a European and an Asian firm, both of which compete in the US and one of which owns US assets in the overlap field, is fully subject to the US anti-trust laws.[9]

Antitrust policy

It has been argued that a policy of competition is chosen by states because it is politically advantageous rather than necessarily economically correct. In order to test this theory the economic and political content of United States antitrust law is analysed and contrasted.

Despite the influence of economists and economic theory on United States law it is suggested that economics is subordinated to politics. Neale and Goyder, who have engaged upon a comprehensive study of American antitrust law over a number of years, made a series of observations on this specific question.[10] They stated that economics and economists had unquestionably made an important contribution to the assumptions and motives underlying antitrust law. Neale and Goyder also noted that it was both easy, and seemingly logical, to assume that economic benefit was the sole purpose of antitrust law. They wrote, "It is tempting (and common) to regard the antitrust policy simply as a kind of economic engineering project. On this theory the success of antitrust is bound up with the efficiency of the economic system."[11]

That antitrust policy exists as the means to best realise optimum economic efficiency was argued in Chapter Two to be the way in which the United States, and to lessor or greater extent, other western capitalist democracies have represented the proper functioning of the competition system. This is not to say, however, that economic theory is the fundamental reason for following a policy of competition. Neale and Goyder also rejected this obvious conclusion. They made a deeper study of the motivations behind United States' antitrust and concluded that economics could not be regarded as determinative. They wrote, "Antitrust has a broader base than the

findings of economists as to the conditions required for optimum economic performance."[12]

There were two major reasons for this finding. First was the unsatisfactory state of economic theory. Neale and Goyder felt that theory was lacking in real relevance as to the causes of economic and industrial efficiency. Second, and more important, was the interpretation of the Sherman Act by the judiciary. The courts felt that, where such a conflict existed, the promotion of competition took precedence over the promotion of economic efficiency. Neale and Goyder stated, "... the courts have always been clear that the Sherman Act requires competition to be upheld, even though in particular contexts it might be shown to involve economic cost."[13]

Chapter Two argued that political considerations were the motivating force behind the competition policies of western states. Neale and Goyder take a similar view of United States competition policy.[14] They argue that there are two major political beliefs or dogmas behind American antitrust law. These are the fear of sources of power and the belief in the right of the individual to maximum freedom of action.

Of the first Neale and Goyder wrote "It seems likely that American distrust of all sources of unchecked power is a more deep-rooted and persistent motive behind the antitrust policy than any economic belief ..."[15] They justified this assertion by the observation that this distrust was not simply confined to being directed against industry but, in fact, permeated almost every aspect of American life.[16] If so, this fear of sources of power can be characterised as a basic creed of American life.

The belief in the right of the individual to maximum freedom of action is also a fundamental American creed. It may have its roots in American history. The individual, as well as the organisation, was responsible for opening up the country and laying the foundation for its economic wealth and power. This pioneering spirit of the individual was, and is, greatly admired by American society. In its time the pioneering spirit simultaneously served the interests both of the individual and of society in general.

Though America has since changed radically, in that it is now a highly developed industrial nation, the belief still persists both that it is, and ought to be, the American way to be a rugged individualist.[17] Thus, entry barriers to industry are generally unpopular, both with the public and the government. It is a deeply held opinion of most Americans that the individual ought to be able to enter into any form of commercial activity and be allowed the chance to succeed.

Where industry is heavily concentrated, the majority of economists have believed, at least until recently, that entry to the market is made more difficult. As Neale and Goyder noted, antitrust policy had, as a fundamental objective, the preservation of the right of the individual to engage in business activities of his or her own choice. A major theme of antitrust policy, therefore, was to avoid the build up of economic forces that would result in the creation of effective barriers to entry in the market.

With regard to the two fundamental political motivations discussed above, Neale and Goyder concluded,

"In large part antitrust is the projection of these traditional American beliefs into the economic sphere."[16] Their views thus support the proposition that competition is the chosen policy of the state primarily because it is in accord with political beliefs. It is the politically correct, rather than the economically correct, choice to allocate finite resources.

A number of conclusions can now be drawn. The United States has chosen to put politics above economics in its list of priorities as regards antitrust law. That is, it has used the antitrust law in order to promote certain political ends, where necessary, at the expense of economic efficiency. Further, this utilisation of the antitrust law by the authorities enjoyed a broad spectrum of popular support.[17] With regard to these two forces, economics and politics, a number of points should be noted.

World economic circumstances have produced a reversal of the theory of concentration. This new economic learning has been absorbed by the administration. It is motivating the authorities to amend their antitrust policy. Their goal is now to make use of antitrust policy primarily in order to promote economic efficiency.

The political motivations for upholding antitrust policy (or law), however, have not altered. Fear of excessive power in the hands of a group or individual and the belief in individual entrepreneurial freedom continue to receive both political and popular support. Even if the administration accepts that some tempering of fundamental political beliefs is economically necessary, the general public cannot be expected to share this view.

If so, then some opposition from the political establishment can also be expected.[20]

The hierarchical relationship of politics and economics compounds this problem. If the realisation of political aims is generally held in higher esteem than is economic efficiency, reform of antitrust policy (or law) *per se* becomes a complex and difficult undertaking to attempt. The chances of success may be higher, however, in specific areas of antitrust, such as merger. Here the economic problems of industry may be more clearly demonstrated. Further, it may be that the procedural practices governing merger make reform a more practical proposition.

Merger policy

The antitrust legislation dealing with merger, Section One of the 1890 Sherman Act and Section Seven of the 1914 Clayton Act, have not been revised for some considerable time.[21] This, however, does not mean that either antitrust policy or merger policy has remained static.[22] Commentators on the American scene believe that profound change has indeed taken place. Armentano, writing in 1986, stated that antitrust policy in general and merger policy in particular, had changed markedly over the last ten years.[23] Hay observed in 1988, "Merger policy in the United States has undergone radical transformation during the past decade."[24]

The practical effects of such change in merger policy has been that vertical and conglomerate mergers may now be undertaken by firms with little fear of challenge from the federal authorities. Such mergers are of far more limited concern to the antitrust authorities

then was previously the case.[25] Of more importance is the increase in horizontal mergers due to the fact that the relevant authorities now take a more benign view of them.[26] Hay wrote, in 1988, of, "... the large number of major horizontal acquisitions that have taken place in recent years, acquisitions that would have been regarded as unthinkable under the standards of the 1960s and 1970s ... "[27] In 1989 Hoover and Plant summed up the new policy as being designed to facilitate corporate mergers.[28] Melsheimer wrote in 1990, "... merger policy echoed the theme that bigger is typically better ..."[29]

From a procedural perspective, such major alterations in policy were effected with relative ease. This, possibly surprising, occurrence was due to the specific procedural practices relating to merger present within the larger body of antitrust practices. The enforcement of merger law differs markedly from that of antitrust law _per se_. This can be shown by contrasting antitrust in general with merger in particular.

Antitrust Enforcement American antitrust enforcement is conducted primarily within the judicial mode, with most cases being filed by private plaintiffs.[30] Such cases are tried before federal judges, frequently with a lay jury.[31] The majority of judges, due to the relative infrequency of antitrust cases, are not specialists in antitrust law. Hay noted that the typical judge heard an antitrust case once every three or four years.[32] Further, the jury is likely to have, at best, a limited comprehension both of antitrust and of economics. This situation has two adverse consequences for the implementation of a new antitrust policy.

The first concerns the reception of the new policy

by the courts. Hay observed that the latest thinking on antitrust takes an inordinate length of time to permeate case law.[33] Further, there was, and is, a non-uniform interpretation of the new philosophy. This first consequence leads directly on to the second ill, which concerns the extensive private litigation on antitrust matters. Even where antitrust policy is comparatively stable the relative inexperience of the judiciary on antitrust matters results in some inconsistency. As regards the present situation, the diversity of judicial opinion on the new antitrust policy means that the law is in a state of flux.

At the level of the judicial system the federal authorities themselves also fail to make a significant impact. The system, even in times of relatively stable antitrust policy, is primarily the forum of private plaintiffs. Cases brought by the federal authorities tend to account for less then 10% of all antitrust federal court cases.[34] To sum up, the process of introducing a new antitrust policy tends to show up the procedural difficulties inherent within the system.

Merger Policy in Practice A major distinctive feature of merger is that the bulk of mergers must be reported in advance to the Justice Department and the Federal Trade Commission. This is under the 1976 Hart-Scott-Rodino Antitrust Improvements Act which amended Section 7 of the Clayton Act of 1914.[35] Where a proposed merger is between one party with sales or assets of $100 million or more and a second party with sales or assets of $10 million or more and involves the acquisition of United States stock or assets of $15 million or more, notification in advance must be given.

This situation gives scope for a possible conflict of interest between the two departments. In practice, however, the Justice Department and the Federal Trade Commission have evolved an informal procedure that avoids overlapping investigations. A particular merger tends to be assigned to the agency that has greater experience of that particular industry or industries. Further, both departments, for the most part, make use of the same procedures and methods in analysing mergers.
The practice of the Justice Department will be dealt with from this point on, but what follows applies equally to the Federal Trade Commission.

In principle, the Justice Department cannot exercise the power of veto over a proposed merger. The method of attempting to prevent a merger is to file an antitrust case in the federal courts and go through the normal judicial process. In practice however, a statement by the Justice Department of intent to challenge a merger is mostly all that is needed to accomplish its aim. As Hay noted, "... in fact if the Justice Department announces its intention to challenge a proposed merger, in almost all cases the parties to the transaction will either call it off or restructure the transaction to obtain Justice Department blessing, ..."[36]

There are sound commercial reasons as to why firms adopt such an accommodating attitude to the Justice Department. It is generally impractical for the predator firm to hold an offer open during the full course of the litigation process.[37] Further, if the parties decided to ignore the statement of the Justice Department they would have two considerations to face. The Justice Department would almost certainly seek a preliminary injunction to prevent consummation of the merger until

the full trial. Even if this injunction was successfully contested, and the merger consummated, should the firms lose the full trial they would be forced to undo the merger.

Should the Justice Department decide not to challenge a proposed merger the parties could still find themselves facing a challenge from other quarters. Further challenges are permissible under the law. Both state authorities and private parties have certain rights concerning merger.[38]

With regard to state authorities, the attorneys-general of the states are empowered to seek preliminary injunctions against the transaction as parens patriae on behalf of citizens of the state.[39] Skitol and Ziff point out that such actions have enjoyed a measure of success. They noted that "In recent years, some attorneys-general have succeeded in stopping transactions involving significant competitive overlaps within their own state."[40]

As to private action, however, arguments can be advanced to back up the view that there is little threat of the proposed merger being blocked by private antitrust proceedings. Hay stated, "A firm being acquired in a tender offer normally has no interest in blocking the transaction since its shareholders are being paid a substantial premium for their shares."[41] Rival firms would not wish to halt the proposed merger if they believe, as was formerly thought by economists to be the general case, that the merger will result in higher prices and profits for the industry.

Further, where a private plaintiff did wish to bring

a case against a proposed merger the establishment of locus standi is not an easy matter. In Cargill Incorporated and Exel Corporation v Montfort of Colorado, Incorporated, the Supreme Court made the following statement.[42]

> ... in order to seek injunctive relief under Section 16, (of the Clayton Act) a private plaintiff must allege threatened loss or damage, of the type the antitrust laws were designed to prevent and that flows from that which makes defendants acts unlawful.[43]

Thus, the right to challenge a proposed merger is limited. Nonetheless, the threat to proposed mergers by private parties should not be underestimated. In the Time - Warner merger, both dissident Time shareholders and Paramount Communications, a rival predator firm, managed to apply to the courts to block the proposed merger.[44] Although that particular attempt did not succeed, such challenges are beginning to enjoy a measure of success. Skitol and Ziff noted that despite the strict standards laid down for locus standi in the Cargill opinion, "... some large transactions have nonetheless been successfully challenged by competitors ..."[45] They believe that recent Supreme Court decisions will serve to encourage further private actions.

It is also relevant to note the rights of state officials and private parties as regards actual, rather than proposed, mergers. As Riddell stated in May 1990, reporting the case of California v American Stores, "Until now states and other parties hurt by anti-trust violations have only been able to sue for damages or try to block a deal before it has been completed but not to seek subsequent divestiture."[46] However, "... the supreme court has now decided that states and private

parties can seek such break-ups on anti-competitive grounds."[47] It may be that this judgement by the Supreme Court will act as a catalyst to officials or individuals seeking judicial remedies for mergers that have already taken place.

Thus while, with regard to antitrust law in general, the branches of the federal government fail to make a major impact on antitrust enforcement, the situation differs significantly with regard to merger policy. Even given the Supreme Court ruling noted above, it can still be said that, for the most part, the judicial system, and all its associated problems, is bypassed successfully.[48] The Justice Department thus has the major role in regulating mergers. The key to merger policy lies within the administrative decisions of the Justice Department on whether or not to challenge a proposed merger. As these decisions are not subjected to judicial review, or indeed any other review procedures normally associated with administrative action, policy changes are relatively easy to accomplish. As Hay wrote, "... even radical changes in policy can be implemented very quickly."[49]

This means that the firm looking for guidance on the views of the authorities on merger turns, in the main, not to the case law, but to the pronouncements of the Justice Department.

The first set of Guidelines was issued by the Justice Department in 1968.[50] The purpose of the Guidelines was to state, in outline form, the enforcement policy of the Department on mergers subject to Section 7 of the Clayton Act, or to Section 1 of the Sherman Act. The 1968 Justice Department Guidelines followed the standard economic theory of the time. They were based on

the structure-conduct-performance paradigm. The Guidelines laid out a matrix of concentration-market share combinations and made it clear that potential mergers coming within these thresholds would not be subject to challenge. The overall effect of the 1968 Guidelines was restrictive of mergers.

The 1982 Guidelines showed five major differences: a more flexible approach in general, a new measure of market concentration, a different method of defining markets, specific mention of imports, an efficiency defence. The 1984 Guidelines, which are the latest, were issued to improve the effectiveness of the 1982 Guidelines by providing clarification of certain points within them. In particular, Attorney General French Smith mentioned flexibility, foreign competition and efficiency.[51] The effect of the 1982 Guidelines and their 1984 successor has been to allow greater freedom to firms with regard to all types of merger, particularly horizontal merger.

Attorney General French Smith, in announcing the 1984 Guidelines, made it clear that those who had interpreted the 1982 Guidelines as imposing some form of rigid merger test were mistaken. He wrote:

> We do not plug numbers into some magical formula and wait for a computer to decide whether to challenge a merger. We do not make important merger decisions on the basis of numbers alone. The final decision approving or disapproving a merger is made only after a thorough consideration of all the relevant legal facts, many of which cannot be quantified.[52]

This flexible approach was made more explicit in the 1984 Guidelines. They state:

> Because the specific standards set forth in the Guidelines must be applied to a broad range of possible factual circumstances, strict application of these standards may provide misleading answers to the economic questions raised under the antitrust laws. ... Therefore the Department will apply the standards of the Guidelines reasonably and flexibly to the particular facts and circumstances of each proposed merger.[53]

The 1982 Guidelines substituted the Herfindahl Hirshman Index for the 4-Firm Concentration Ratio of the 1968 Guidelines.[54] As Parzych noted, "... the concentration ratios are a measure of domestic industry and firm activity and thus exclude the competitive impact of foreign competition within the domestic market. Within many domestic industries, imports constitute a substantial and growing share of total market activity."[55] The substitution of the Herfindahl Hirshman Index for the Concentration Ratio overcame this problem. Its use is as follows. Where the pre-transaction Herfindahl Hirshman Index was between 1,000 and 1,800 points and the proposed transaction would raise it 100 or more points the transaction is suspect. Where the pre-transaction Index was over 1,800 and the proposed transaction would raise it 50 points or more the transaction is suspect.[56]

Further, after converting from one concentration measure to the other the threshold level of concentration for challenging mergers was also increased, though by a relatively modest amount. The 1984 Guidelines stated, "Notwithstanding these standards, the Department is likely to challenge the merger of any firm with a market share of at least one percent with the leading firm in

the market, provided the leading firm has a market share that is at least 35 percent."[57]

The method of the 1982 Guidelines for defining markets can be summarised as finding the answer to one key question. What would happen if there were only a single seller of product X in the geographic region and that seller attempted to raise price above the competitive level by 5%?[58] The search for an answer involves asking several further questions. To what extent would consumers switch to alternative products? Would other firms be able to produce product X and, if so, how many would they be likely to sell? Would foreign firms that produce product X be able to export it at a profit and, if so, how much would they be likely to sell? All such questions would be analysed by the Justice Department in order to help them make their decision.

The statement of the Justice Department on the 1984 Guidelines attempted to clarify definition of the market. They noted that the 5% test was not, as many had assumed, an inflexible standard to be applied regardless of the circumstances of a given case.[59] The 1984 revisions thus made this point more explicitly.[60]

As the Attorney General stated, the 1982 Guidelines made it clear for the first time that foreign competition frequently played an important role in merger analysis. They failed, however, to show in detail how imports and foreign capacity would be weighed in analysing individual mergers. This defect was remedied by the 1984 Guidelines. There it was indicated that the Justice Department would, in general, apply the same market definition principles to foreign competitors as were applied to domestic firms.[61]

The 1982 Guidelines did acknowledge efficiency as a defence but in a very limited way. It was to be considered only in extraordinary cases. This attitude underwent rapid revision. Attorney General French Smith stated that, notwithstanding, efficiency claims had not been ignored in analysing mergers up until 1984.[62] However, the 1984 Guidelines are more explicit in their recognition of efficiency as a valid defence in a wide variety of circumstances and they explained in some detail how alleged efficiencies are analysed.[63]

The above evidence suggests that a pronounced change has occurred in merger policy. The previous chapter proposed that fresh economic thinking on concentration and increased global competition would be the major motivators as to state action on merger policy. An overall appraisal of the new merger Guidelines shows that they incorporate this new economic learning and also that they are a response to increasing competition and the globalisation of markets.

An analysis of the Guidelines established that current economic views on merger have been taken into account. For example, the section of the 1984 Guidelines headed, "Purpose and Underlying Assumptions" has the following statement:

> Although they sometimes harm competition, mergers generally play an important role in a free enterprise economy. They can penalize ineffective management and facilitate the efficient flow of investment capital and the redeployment of existing productive assets. While challenging competitively harmful mergers, the Department seeks to avoid unnecessary interference with that larger universe

of mergers that are either competitively beneficial or neutral.[64]

Statements by the Justice Department and the Attorney General which accompanied the 1984 Guidelines were even more explicit. The Justice Department noted, "The 1982 Guidelines ... represented an important advance in merger analysis. The 1982 Guidelines recognised that most mergers do not threaten competition and that many are in fact procompetitive and benefit consumers."[65] The statement of the Attorney General followed the same line of thought. "The 1982 Guidelines represented an enormous advance in merger analysis. .... They incorporate the latest legal and economic learning-- recognising that most merger activity does not threaten competition but actually improves our economy's efficiency and thus benefits all consumers."[66]

Analysis indicates, too, that the Merger Guidelines also take account of global economic events. They can be said to represent a response to increased foreign competition and the globalisation of markets. A review of the 1984 Guidelines shows that the United States is no longer looking inward. For example, the sections on the method of definition of the market and on efficiency show an awareness of the threat from overseas competitors. Further, the Guidelines made specific mention of foreign competition.

It has been observed by academics that combatting foreign competition was indeed the intention of the administration. Fox appraised the attitude of the Assistant Attorney General in 1981, shortly before the release of the new Guidelines. She wrote, "Mr Baxter believes that there are world markets in some products,

such that no US submarket makes economic sense. He believes that there will be an increasing number of world markets as time goes on."[67] Armentano commented, "The administration has taken the position that strict antitrust regulation of mergers in the past has put American firms at a competitive disadvantage vis-a-vis foreign firms."[68] Hay noted:

> ... developments in international financial markets which lowered the effective price of most imports in the United States, combined with the growing industrialisation of many Far East nations, meant that whether or not foreign competition was properly regarded as generally inconsequential when the Guidelines were first implemented, that competition was a very significant reality by 1980.[69]

As well as noting the reasons behind the change, it is also relevant to establish whether what is actually happening with regard to merger policy results from economic and political necessity or whether it can be ascribed to some current economic or political fad or fashion. A departure from established merger policy due to economic and political necessity is likely to be relatively permanent whereas any change on the grounds of economic or political fashion is apt to be short lived. In the latter context a distinction can be drawn between political ideology and political radicalism. Political ideology can be defined as a coherent set of political beliefs consistently held by particular groups - for present purposes those wielding, or aiming to wield, governmental power.

One possible reason for a shift in policy is a change of administration. The original 1968 Merger

Guidelines were issued by Donald Turner, head of the Antitrust Division of the Justice Department under the Johnson Democratic Administration. The 1982 Merger Guidelines were the work of the newly installed Reagan Republican Administration and, in particular, the Assistant Attorney General for Antitrust, William Baxter. The shift in political ideology, however, was not a primary cause of the new approach to merger. Taking the 1950 Celler-Kefauver Amendment to the Clayton Act as the effective beginning of merger policy, it can be said that the history of United States merger policy is relatively stable.[70] It does not show marked swings and shifts that correlate with changes of administration. As Hay noted, to ascribe the present changes in merger policy primarily to politics is tempting but mistaken.[71]

This was also the view taken by Kingdon who pointed out that antitrust law has relied upon economic analysis for decades. He wrote, "Anti-trust lawyers did not suddenly discover economics when President Reagan was inaugurated in 1981."[72] Kingdon went on to state that the economic analysis in favour in the eighties, reflecting the influence of the Chicago School, was biased against over-enforcement of the antitrust law.[73] He also noted that "... the emphasis on economists and economic analysis is stronger than ever before."[74]

The primary cause of the changes in merger policy, however, is the occurrence of global economic events which are altering the structure of markets and which provided both United States government and industry with major challenges. In turn, certain strands of economic theory came into favour as they seem to provide possible practical solutions to the new economic conditions.

Political radicalism is a term that may be used to describe sectional and intermittent support for particular policies or causes. An example of political radicalism is the idea of small business being supported against large firms. It is sectional in that it is, of course, perennially favoured by a group or section, that of small businesses themselves. Sectional support may also come from some economists. It is intermittent in that the idea or cause attracts political and/or popular support at irregular intervals.

Does the current policy on merger emanate from the camp of political radicalism? For example, Skitol and Ziff described one of the major objectives of the new merger policy, the promotion of efficiency, as, "... a fashion of the day."[75] For the purposes of argumentation, this statement by Skitol and Ziff is taken as embracing the whole of the new merger policy. It is used to represent the viewpoint that the new merger policy is merely a passing fashion, or, in other words, political radicalism.

The shift in merger policy is more than a short lived fashion. It resulted from both economic theory and economic events. Were the new policy based exclusively or even primarily on economic theory then it could be argued that it was indeed political radicalism. That is, it receives sectional support from economists and intermittent support from politicians. The previous chapter suggested that economic theory is relatively unstable. If so, then the support of the majority of economists for the anti-concentration doctrine may wane. In turn, this may affect the present political support for the new merger policy. Even at the best of times political support for any cause other than the

protection of the capitalist system is relatively inconsistent. In the absence of other factors this lack of support by economists may be enough to overturn the present merger policy.

It can be argued, however, that economic theory was not the primary reason for economic change. Rapidly increasing global competitiveness has caused, and is continuing to cause, major restructuring of world markets. The resulting situation is an industrial upheaval of such proportions that it cannot be reversed. The global marketplace and all its implications is here to stay. As, therefore, industry and markets are undergoing profound and permanent change, a response from states is demanded. While the precise tactical manoeuvres of nations to deal with this situation may or may not be short lived, the necessity of strategic action remains a constant factor. The new merger policy is a part of this long term strategic reaction. It cannot, therefore, be termed political radicalism.

The United States has adopted a more liberal attitude towards merger, especially horizontal merger, primarily in order to allow the creation of firms large enough to challenge major foreign competitors. The success of the Japanese mega-corporations has been a convincing demonstration that efficiencies could be obtained beyond a scale thought possible by the antitrust authorities.[76] Thus, the attractions of the efficiency argument are paramount in the thinking of American antitrust officials. As Skitol and Ziff wrote, "The argument that a merger by making the combined firm more efficient will enhance the 'international competitiveness' of the firm has become a fashion of the day."[77]

This change of policy by the United States authorities has a further purpose. It is to help harmonise the responses of all sectors for whom the economic challenge from abroad is of concern. Previously a diversity of opinion existed between industry and government on merger. Industry, in general, was for merger while government was against. Now both parties are of the same opinion, that merger can be a good thing. Merger is now uniformly held to be more beneficial than not for industry. Further, to a certain extent, the administration now sees merger as being in the interests of the American political system.

This is not to say that industry was correct while government was mistaken. Previous analysis showed that industry favoured merger for reasons equally as subjective as those the state had for restricting merger. The point is that outside forces have produced a new harmony between government and industry as regards the desirability of merger. What is good for industry is now also good for the state. Economic theory has changed also so that it too shares the same kind of views of merger. There is thus a tripartite alliance to combat the economic problems of the United States.[78]

This new axis between government and industry, supported by the latest theories of economists, is not confined to merger. It is being followed, as far as possible, in many other areas of industrial life. In fact, cooperation between government and industry in general seems to be the major strategy by which the United States has chosen to meet the threat of foreign competition.[79]

The new coordination between government and industry in an area other than merger can be demonstrated by the following examples that show both the state and industry now favour cooperation among firms in certain strategic industries. Matthew May wrote of plans for the proposed formation of a consortium of leading firms to manufacture advanced computer chips, noting that "Government officials have made it clear that they believe concerted action is needed to meet foreign competition."[80]

Also, the National Advisory Committee on Semiconductors has outlined the beginnings of its strategy to "... assure US pre-eminence in world semiconductor markets through the year 2000."[81] Kehoe stated that "This appears to be the first step towards advancing a radical plan for broad industry-government collaboration in semiconductor research and development."[82] It was noted by Kehoe that:

> US chipmakers are now far more willing to co-operate among themselves and even the Bush administration's staunch supporters of hands off laisser faire industrial policy have come to recognise that government support for semiconductor technology development holds potential benefits for the entire US industrial base.[83]

Further evidence was noted by Skitol and Ziff. They wrote:

> ... Attorney General Thornburgh has signalled the Bush Administration's interest in reducing anti-trust inhibitions to formation of efficiency-generating production joint ventures as a means of enhancing the US firm's ability to compete with their international rivals, particularly in complex emerging technologies.[84]

A Report by the Office of Technology Assessment, a bipartisan congressional body, noted that US manufacturing was in trouble and, without government support, was likely to continue to decline. The Report recommended that a new federal agency be established to select and support, "... high risk but promising new technologies."[85]

The Council of Competitiveness, a private organisation of chief executives and academics published a blueprint, 'Gaining New Ground,' for recapturing America's technological edge.[86] Prowse noted that the report, "... clearly regards some form of partnership between government and industry as the only way of regaining lost ground."[87] Further, Rebuild America, a private group containing several leading academics has stated:

> America needs an 'industry-led policy' to commercialise new technologies, and an industry-led, business-government partnership which sees US industry take the lead in modernising our industrial base, enjoying as much support from its government as foreign companies enjoy from their leaders.[88]

Finally, Riddell observed that:

> Companies operating in the US will be able to engage in joint production ventures without fear of antitrust actions, under detailed legislation proposed by the Bush administration.
>
> The aim is to strengthen the competitive position of US manufacturing industry in bringing to the market new products with large development costs.

Riddell also noted that antitrust restrictions had

already been relaxed on joint research and development projects.[89]

Thus, America is instigating a new era of industrial policy in order to fight foreign, specifically Japanese, competition.[90]

Conclusions. Antitrust policy in general has undergone profound change within the last decade. Cooperation between industry and government, especially in certain key industries, is now the preferred overall strategy. The belief in the efficacy of the free market is waning. In short, a new era is beginning in which antitrust policy is being ousted by industrial policy.

The necessity of formulating a new policy did not arise overnight. The global events that constitute the primary reason for reform took place over many years. The emergence of the Far East as a major industrial force had its roots in the nineteen fifties. The EC also came into being in that period. It is only within the last decade however, that the United State's government and industry have begun to realise the full implications of these events.

The same criticism cannot be levelled at commentators. The need for antitrust law reform had been expounded at an earlier stage in the writings of various authors such as Galbraith, Bork, and Posner.[91] To a large extent also, the contents of the actual policy reform by the authorities were foreseen. Possibly the most succinct expression of the coming trend was given by Fox in the title of her 1981 article, "The New American Competition Policy - From Antitrust to Pro-Efficiency."[92]

Merger policy, as might be expected, has also undergone major revision. In fact, it is merger policy that has seen the greatest change. Merger is now not merely tolerated by the authorities, but actually encouraged. This new attitude has implications that are worthy of the closest study by Europeans, as well as Americans.

The new spirit of agreement between economists, industry and government on the need for a liberal merger policy means that large firms have become the recipient of government favour. The present economic revolution is not a peoples' revolution. Large firms are the chosen warriors in the struggle against foreign competition. If so, then the United States may be moving towards the realisation of the approach taken in 1953 by Charles E. Wilson before a Congressional Committee. He made the famous, or infamous, comment, "I thought what was good for the country was good for General Motors and vice versa."[93] In essence, what is happening can be summed up by utilising another phrase from the recent past, big is beautiful. In the new industrial state big, once again, is beautiful.

1. This chapter deals exclusively with the federal antitrust legislation and policy. The term 'antitrust laws' is traditional shorthand for the Sherman Act and the Clayton Act.

2. John Kallaugher, "The Influence of German Competition Law on the Development of the Competition Law of the European Communities," argues that German competition law has played the greatest single role in the development of EC competition law. The paper is unpublished, but is noted by D.G. Goyder, EEC Competition Law (Oxford: Clarendon Press, 1988), 22 note 10. However, it may be that German competition law was originally influenced by US antitrust law. See, Joel Davidow, "The Worldwide Influence of US Antitrust," Antitrust Bulletin 35 no. 3 (1990): 603.

3. Eleanor M. Fox, "Abuse of a Dominant Position of the Treaty of Rome-A Comparison With U.S. Law," in Barry E. Hawk, ed., Antitrust and Trade Policies of the European Economic Community (New York: Matthew Bender, 1983), 368.

4. This view is also taken by Lipton, who began his 1990 Denning Lecture by tracing the history of merger control in the United States. See, Sidney Lipton, "Development of Merger Control in the UK and the European Community," The Denning Lecture, The Bar Association for Commerce Finance and Industry, London, 5th June 1990, paras 1-18.

5. Fox, op. cit in note (3), 368-69. See also Barry E. Hawk, ed., United States, Common Market and International Antitrust: A Comparative Guide, 2nd ed. 4 vols, (New York: Prentice Hall, 1990).

6. Fritz W. Scharpf, "The Joint Decision Trap: Lessons from German Federalism and European Integration," Public Administration 66 no. 2 (Autumn 1988): 242. Scharpf believed that what has actually been created thus, far more closely resembles German federalism.

7. Andrea Boltho, "European and United States Regional Differentials: A Note," Oxford Review of Economic Policy 5 no. 2 (Summer 1989): 105.

8. Kenneth M. Parzych, A Primer to Antitrust Law and Regulatory Policy (London: University Press of America, 1987), 1.

9. Robert B. Skitol and Lloyd R. Ziff, "Transatlantic M & A: Springing the US Anti-trust Trap," International Financial Law Review (May 1989): 28.

10. A. D. Neale and D. G. Goyder, The Antitrust Laws of the United States of America, 3rd ed. (Cambridge: Cambridge University Press, 1980), 441-2. Dennis Swann, Competition and Consumer Protection (Harmondsworth, Middlesex: Penguin, 1979), 351 at note 2, spoke of their study of the antitrust laws as "superb".

11. Neale and Goyder, op. cit in note (10), 441.

12. Neale and Goyder, op. cit in note (10), 441. This was also the conclusion arrived at by Kingdon. See, John S. Kingdon, "Economic Argument in Anti-trust Cases: An American Litigator's Perspective," European Competition Law Review (1987): 370.

13. Neale and Goyder, op. cit in note (10), 441.This view is also shared by Kingdon, op. cit in note (12), 372.

14. This is also the view put forward by Fox and by Lipton. See Fox, op. cit in note (3), 370-71 and Lipton, op. cit in note (4), para, 3.

15. Neale and Goyder, op. cit in note (10), 442. See also, Kingdom, op. cit in note (12), 374.

16. For example, they note it exists at the highest levels of public life, where it is expressed in the theories of 'checks and balances' and 'separation of powers'. Neale and Goyder, op. cit in note (10), 442.

17. See James Fallows, More Like Us (Boston: Houghton Mifflin Company, 1989), for an example of this train of thought. Fallow's believed America could rejuvenate itself economically by removing restrictions on individual freedom of action in the economic field.

18. Neale and Goyder, op. cit in note (10), 442.

19. Robert H. Bork, The Antitrust Paradox (New York: Basic Books, 1978), 3, has reached a similar conclusion.

20. It is probable that politicians from both the Republican and Democratic parties will reflect the feelings of the general public and thus continue to support a strong antitrust policy.

21. Galbraith has argued that the majority of the legal profession, which forms a powerful lobby in Congress, is perennially opposed to antitrust reform. See John Kenneth Galbraith and Nicole Salinger, Almost Everyone's Guide to Economics (London: Andre Deutsch, 1979), 40, Galbraith, The New Industrial State, 4th ed. (Boston: Houghton Mifflin Company, 1985), 196.

The Reagan Administration had intended to revise the Clayton Act quite extensively. Further, it had

proposed to codify effectively the 1984 Guidelines as part of the Clayton Act. See, D.T. Armentano, Antitrust Policy. The Case for Repeal (Washington : Cato Institute, 1986), preface x; George Hay, "Merger Policy in the US," in James Fairburn and John Kay, eds., Mergers and Merger Policy (Oxford: Oxford University Press, 1988), 245. However, the Reagan Administration was badly beaten on merger reform in Congress. See F.M. Scherer, "Merger Policy in the 1970s and 1980s" in Robert J. Larner and James W. Meechan, eds., Economics and Antitrust Policy (New York: Quorum Books, 1989), 94-6, for an account of how the Reagan merger proposals died in Committee.

There is unlikely to be any legislative reform of merger in the near future. The present President has a non-combative attitude towards Congress. Barber noted, "Mr Bush prides himself on his ability to co-operate with, rather than confront, a Democratic majority in Congress."Lionel Barber, "Stealth Steals into Limelight," Financial Times (July 27 1989). The opinion that legislative reform is unlikely was also expressed by Armentano in personal correspondence with the author, 5 February 1989.

22. Melsheimer has stated that "The Sherman Act approaches its centennial having survived an intellectual evaluation and reevaluation (some would say war) in the last decade." See, Thomas M. Melsheimer, "Economics and Ideology: Antitrust in the 1980s," Stanford Law Review 42 (1990): 1319-20. At 1320, note 4, he listed a number of articles on this theme.

23. Armentano, op. cit in note (21), 1.

24. Hay, op. cit in note (21), 231. See also, Scherer, op. cit in note (21), 83-101.

25. Armentano, op. cit in note (21), 1.

26. This was especially the case during the Reagan administration.

27. Hay, op. cit in note (21), 231.

28. Kenneth Hoover and Raymond Plant, Conservative Capitalism in Britain and the United States (London: Routledge, 1989), 108-9. Stephen Fidler, "Applying US Muscle to Finance a UK Bid," Financial Times (12 July 1989) wrote, "... the success of the $25bn bid for RJR-Nabisco showed that no US company was safe from a predator." This fact illustrates the degree of liberalisation of United States merger policy. Further, Scherer, op. cit in note (21), 91, stated that, under the Reagan Administration, Department of Justice and Federal Trade Commission challenges to mergers dropped by 50% in comparison to average challenges in the years 1960 to 1980.

29. Melsheimer, op. cit in note (22), 1327.

30. Hay, op. cit in note (21), 232.

31. As the legislation is federal, enforcement is in the US Federal courts. This point was noted by Lipworth. See, Lipworth, op. cit in note (4), para, 13.

32. Hay, op. cit in note (21), 233.

33. Ibid.

34. Ibid, 232.

35. See Parzych, op. cit in note (8), 26. For an authoritative guide to merger law and policy in general see, American Bar Association, Horizontal Mergers: Law and Policy ABA Antitrust Section, Monograph No. 12, 1986.

36. Hay, op. cit in note (21), 233.

37. Robert A. Skitol and Lloyd R. Ziff, "All Eyes on the US Climate for Transatlantic Deals," Financial Times (13 July 1989).

38. Again, such actions would be conducted in the federal courts.

39. Attorneys general may also join in any action of the Justice Department where the rights of their state are affected. The same right is also available to private individuals who are affected. See Lipworth, op. cit in note (4), para, 15.

40. Skitol and Ziff, op. cit in note (9), 28.

41. Hay, op. cit in note (21), 233.

42. Cargill Incorporated and Exel Corporation v Montfort of Colorado Incorporated 479 US 104, 93 Lawyers Ed 2d, 427, 107 Supreme Court 484 (1986).

43. Ibid., 438.

44. Rodrick Oram, "Time, Warner Clear Court Hurdle," Financial Times (15 July 1989), Oram, "Delaware Tips the US Bid Balance," Financial Times (18 July 1989); Lorna Sullivan, "Paramount takes Time to Appeal," Observer (16 July 1989); Leo Herzel and Richard W. Shepro, "Time Beats Paramount in the Delaware Courts," Financial Times (3 August 1989).

45. Skitol and Ziff, op. cit in note (9), 28. See also, Skitol and Ziff, "US Courts Slow Down the Anti-trust Revolution, " Financial Times (5 October 1989), Skitol and Ziff, "US Courts slow down the Reagan-Bush Anti-trust

Revolution," Financial Times (12 October 1989).

46. Peter Riddell, "Scope widened for Takeover Challenges," Financial Times (2 May 1990).

47. Ibid. The ruling rose out of an attempt by the Attorney General of California to block the takeover of Lucky Stores by American Stores. The deal had been completed in mid-1988 and approved by the Federal Trade Commission. See, California v American Stores 58 USLW 4529 (1990).

48. However, the recent Supreme Court decision on the rights of state officials and private individuals to apply for divestiture of completed mergers may act to bring merger more into the judicial sphere.

49. Hay, op. cit in note (21), 234.

50. A National Committee to Study the Antitrust Laws had issued a set of guidelines for the courts and enforcement agencies in 1955. These early guidelines, however, lacked both precision and any formula for their application.

51. William French Smith, Statement of Attorney General William French Smith announcing the 1984 Department of Justice Antitrust Merger Guidelines. Department of Justice, 3-4.

52. Ibid., 3.

53. Department of Justice, 1984 Merger Guidelines, 1-2.

54. Ibid., 19-24.

55. Parzych, op. cit in note (8), 16.

56. Department of Justice, op. cit in note (53), 20-21. See also Parzych, op. cit in note (8), 86-87.

57. Department of Justice, op. cit in note (53), 24.

58. See George A. Hay and R. Reynolds, "Competition and Antitrust in the Petroleum Industry: An Application of the Merger Guidelines," in Franklin M. Fisher, ed,. Antitrust and Regulation: Essays in Honour of John J. McGowan (Cambridge, Mass.: M.I.T. Press, 1985). Hay and Reynolds explain the mechanics of the Guidelines and illustrate how they can be applied in an actual merger.

59. Department of Justice, Statement Accompanying Release of Revised Merger Guidelines 1984, 5.

60. Department of Justice, op. cit in note (53), 3-16.

61. Ibid., 16.

62. French Smith, op. cit in note (51), 4.

63. Department of Justice, op. cit in note (53), 35-6 and 42-43.

64. Ibid., 3.

65. Department of Justice, op. cit in note (59), 1.

66. French Smith, op. cit in note (51), 1.

67. Eleanor M. Fox, "The New American Competition Policy - From Anti-trust to Pro-Efficiency," European Community Law Review (1981): 449.

68. Armentano, op. cit in note (21), Preface, x.

69. Hay, op. cit in note (21), 238. See also on the problem of foreign competition, Lawrence G. Franko, The Threat of Japanese Multinationals - How the West Can Respond (Chichester: John Wiley, 1983).

70. See generally, Neale and Goyder, op. cit in note (10). See also Hay, op. cit in note (21), 234-38.

71. Hay, op. cit in note (21), 231.

72. Kingdon, op. cit in note (12), 371.

73. Ibid. The influence of the Chicago School is also noted by Scherer, op. cit in note (21), 90.

74. Kingdon, op. cit in note (12), 371. This might seem to contradict the view expressed in Chapter 2 that governments pay only lip service to economics. However, it is suggested states are being forced to take a different course of action by actual global economic events. Economics is also changing direction in order to account for these events and is thus utilised by practical politicians to provide academic backup for their actions.

75. Skitol and Ziff, op. cit in note (37).

76. See Hay, op. cit in note (21), 238; Franko, op. cit in note (69), Chapters 3-5.

77. Skitol and Ziff, op. cit in note (37). This could be termed an accusation of political radicalism.

78. It might be argued that this alliance is somewhat irrelevant given the collapse of the 'junk' bond financed merger and the (partially consequent) slowdown in US mergers generally. However, it is suggested that merger in the US will revive during the 1990s. The Economist

wrote of the US, "As economic growth returns, a new generation of financiers will once again start stalking poorly managed companies." See, The Economist, "They Will Return: Hostile Bidders are not Dead, Just Resting," The Economist (9-17th February 1991), 24. Further, Herzel and Shepro have noted, "Mergers and acquisitions have returned to business news headlines in the US." See, Leo Herzel and Richard Shepro, "The End of the Hostile Bidder," Financial Times (2 May 1990).

79. It could be asked, is the strategy working? While it is too soon to expect any definitive answers there does seem to be evidence of a revival in the United States economy. The Economist, op. cit in note (78), 23, stated, "America's Commerce Department has just published statistics (relevant to the years between and including 1979 and 1990) showing that the country's manufacturing, supposedly crippled by debt-driven takeovers, has achieved a mini-miracle of productivity growth." The article stated that academic studies have shown that, overall, mergers benefited both the firms involved in the actual mergers and also had an advantageous effect on industry generally.

There is also evidence that the United States is emerging from recession. See, Edward Balls and Jill Leyland, "The Improved Competitiveness of the US," Financial Times (7 May 1991); Michael Prowse, "Managers' Index Shows Upturn in US Economy," Financial Times (4 June 1991); Peter Norman, "Sharp Recovery Seen in OECD Area This Year," Financial Times (4 June 1991). Norman wrote that OECD economists noted a particularly pronounced turnaround in the United States as opposed to its other member states; Prowse, "US Employment Date Signal Start of Economic Turnaround," Financial Times (8 June 1991); Robin Goldwyn Blumenthal, "US 'Double Dip'

Recession is unlikely, Study Group Says," <u>Wall Street Journal</u> (16 December 1991).

80. Matthew May, "If You Can't Beat 'em..." <u>Observer</u> (29 June 1989).

81. Louise Kehoe, "US Semiconductor Industry Plans a New Era," <u>Financial Times</u> (17 May 1991).

82. Ibid.

83. Kehoe, "Loyal Fans but Mixed Reviews," <u>Financial Times</u> (21 May 1991).

84. Skitol and Ziff, <u>op. cit</u> in note (9), 26. See also, Nancy Dunne, "House Tries to Encourage Forming of Joint Ventures," <u>Financial Times</u> (21 June 1991).

85. The report was mentioned in, Peter Riddell, "Congress Says US Industry Needs Aid," <u>Financial Times</u> (1 March 1990).

86. See, Michael Prowse, "A Peace Dividend for Technology," <u>Financial Times</u> (25 March 1991).

87. Ibid.

88. Lester Thurlow, Fred Branfman, George Lodge, and Ed Miller, <u>Fiddling While US Industry Burns</u> (Washington: Rebuild America, 1991), 4. Thurlow is the present Dean of MIT Sloan School of Management, Lodge is a professor at Harvard Business School while Miller is the present President of the National Centre for Manufacturing Sciences.

89. Peter Riddell, "US Plans to Lift Anti-trust Threat from Joint Ventures," <u>Financial Times</u> (9 May 1990).

90. However, this change in direction is encountering resistance. The Financial Times reported that The Annual Economic Report of the President contained statements rejecting calls for industrial policy. Peter Riddell, "Washington Renews Free Market Pledge," Financial Times (7 February 1990). Further, Thurlow, Branfman, Lodge, and Miller, op. cit in note (88), point out that key government officials still favour an unfettered free-market policy.

Nevertheless, on the basis of American actions rather than words being relevant in deciding whether or not the USA is entering the era of American industrial policy, it is suggested that there is a marked shift in economic emphasis from competition policy to industrial policy.

91. See generally, Galbraith, American Capitalism (London: Hamish Hamilton, 1957), Galbraith, The New Industrial State, op. cit in note (21); Richard A. Posner, Antitrust Law (Chicago: University of Chicago Press, 1976); Bork, op. cit in note (19).

92. Fox, op. cit at note (67).

93. Charles Erwin Wilson. Statement to United States Congressional Committee, 23 January 1953. Quoted in, Robin Hyman, compiler, A Dictionary of Famous Quotations (Evans Brothers, 1962. Reprint.London: Pan, 1967), 407.

4. COMPETITION, CONCENTRATION AND 1992 - A NEW ECONOMIC REALITY?

This chapter begins the process of examining the law and practice of the EC with regard to merger. It lays a broad foundation for the discussion in the following chapters of why and how Community merger policy came into being, what it was, what it is, and last but not least, what it ought to be. It does so by examining the major question with regard to merger policy. That is, what criteria ought to be used to determine whether or not to approve a merger? This calls into question whether competition policy is an adequate tool with which to decide merger questions or whether industrial policy also has a valid claim in this regard. This is a key issue for the Community.

The present Community position on merger, that there should be only a competition test to decide whether or not a merger ought to be challenged, has long been felt to be an imperfect solution to fulfil the needs of all the various groups involved with, or affected by, mergers. This view has not been confined to academic circles but has also been freely expressed in the public domain. As long ago as 1973 the problem had been concisely summed up by an editorial in the Times:

> There is an inherent conflict between the argument that all mergers tend to reduce competition and, therefore, to work against the interests of the consumer: and the argument that European industry needs to concentrate into larger units in order to realise industrial advantages of scale and to withstand the market power of larger American and other companies.[1]

The problem with regard to merger criteria has been present but unresolved since the inception of a merger policy by DG 1V. The beginning of the project to complete the internal market did not, therefore, raise the matter for the first time. It has merely brought it into sharper focus. In order to realise the objectives of 1992 successfully, it now has to be properly confronted.

A major cause of the conflict between competition policy and industrial policy is that the two policies have not developed in tandem. Competition policy has flourished while industrial policy has floundered. As Allen noted, this led to unresolved tensions between the policies. He wrote, "As long as one exists without the other the dangers of conflicting objectives and internal tensions can only be magnified."[2]

This problem of dynamic imbalance between competition policy and industrial policy in the EC is now at crisis point. This might seem an over dramatic assessment of the situation, in that the Community approach does not differ significantly from that of many states, where merger control also functions purely as a part of competition policy. There are, however, compelling reasons for believing that the crisis point has arrived. Global competitive forces have strengthened to the point where, if European industry is to retain its independence and maintain and/or expand its share of European and world markets, the foundations for this must, realistically, be laid within the period overlapping the creation of the Single European Market.[3] 1992 is a major Community effort to strengthen European industry. Should the wrong decisions be taken within this period, the consequences may be that Japanese and American firms will hold dominant positions in the

majority of European and world markets in the next century.

It has been suggested that merger policy ought to be seen as an independent policy capable of fulfilling a variety of functions. In times of relative economic stability, merger policy generally operates essentially to help realise competition policy aims. Such aims have been argued to be primarily political rather than economic. Thus, when the economic position is solid, merger policy functions to help uphold the political basis of the state. A more fundamental function of merger policy, however, is to help resolve immediate problems that may arise if this economic position alters adversely. In consequence, it may now be an appropriate time for merger policy to be used by states and international institutions to help resolve the economic challenges that have resulted from the increase in global competition. The previous chapter showed how the leading capitalist nation, the United States, was beginning to put such ideas into practice.

1992

The view in the public domain is that the aim of 1992 is merely to facilitate interstate trade. However, 1992 is, in fact, a complex undertaking with profound political and economic implications. This can be inferred from an analysis of the major motivations behind the project.

The project to create a Single European Market is closely bound up with the ongoing process of integration within the Community. 1992 did not arise from any radical reappraisal of EC objectives. It is rather a pre-planned

part of the integration process, the specific aim of which is to take the Community further down the path towards union. As the Commission has stated: "The idea of creating a single European economy based on a common market is not a new one. The opening lines of the Treaty of Rome signed in 1957 spelled this goal out in specific terms."[4]

The President of the Commission, Jacques Delors, has characterised 1992 as, "... one of the main driving forces that will take us on to European Union."[5] Should Delors assumption prove correct, then 1992 may well prove an irrevocable step towards union. If so, then the political importance of the realisation of the single market cannot be overemphasised.

A further rationale behind 1992 is the need to counter foreign competition. As stated above, 1992 is a natural part of the ongoing development process of the EC. The actual timing of 1992, however, strikes a discordant note. The project was first envisaged during the latter part of the nineteen-fifties. Is there any specific reason why this venture actually began in the mid-eighties? Further, why has 1993 been designated as the year by which to achieve the objective of a single market? In view of the complexity of the project why was a more leisurely timetable not instigated?

As Helm and Smith have observed, "The history of European integration has been erratic with long periods of bureaucratic and political inertia punctuated by sudden bursts of activity."[6] This latest burst of activity has been prompted by internal economic weakness in the face of powerful external economic forces. This offers at least a partial explanation of the timing. The

global economic situation is such that, in order to protect and revitalise its ailing industry, urgent action is demanded from the Community.[7] It must attempt to halt the decline of European industry and help it to stand up to increasingly fierce external competition. Delors has emphasised the need for haste by the emotive metaphor of "... the world race against the clock which the countries of Europe have to win to survive ..."[8]

The second objective of 1992, then, is to provide a timely and effective response to the threat to European commerce from the industries of the Far East and the United States. This aim has been stated unequivocally by the Commission. They wrote, "At the heart of this renewed impetus is the recognition that, unless it can make full use of the potentially vast single market that the 12 Member States constitute, the Community will continue to lose ground and markets to its main competitors, the USA and Japan."[9]

Lord Cockfield has made it clear that 1992 is not an economic panacea. He wrote, "Clearly the creation of the internal market will not solve all the Community's economic problems."[10] Nor is 1992 the sum total of Community economic measures. It is, however, at the core of the total EC effort. The failure to create a single European market, whether by 1993 or later, would be an admission that European industry is no longer a major player in the global game.

It can therefore be concluded that 1992 has two major aims: first, the completion of the internal market as a predetermined component in the continuing process of integration; and second, the completion of the internal market as a method of bolstering EC industry against

foreign competition. Of the two objectives, the latter is of the greater immediate importance. Economic considerations are the driving force behind 1992. Had economic events not necessitated a response, the single market could easily have remained unrealised until the next century.

It may not be overstating the case to say that 1992 is the most important project undertaken since the inception of the Treaty of Rome. In view of the above arguments, economics, then, rather than politics ought to be the guiding force as regards the numerous hard decisions that must be made in the next few years to assure its success. One such decision concerns the respective merits of competition and concentration. The Community, therefore, must finally settle the dispute between competition and industrial policy on the grounds of which is best suited to aid in the fight against foreign competition.

Competition policy

As with the Member States, the EC has chosen, and continues to pursue, a policy of competition ostensibly in order to achieve, primarily, optimum economic efficiency.[11] As Kingdon has noted, "The Treaty of Rome has ... an 'economic' purpose - promoting competition."[12] Further, this is also the public interpretation that the Community has put upon its desire to maintain competition.[13] A comprehensive statement on competition by the Commission in its First Report on Competition Policy, illustrates ways in which competition may serve this end:

> Competition is the best stimulant of economic
> activity since it guarantees the widest possible

> freedom of action to all. An active competition policy pursued in accordance with the provisions of the Treaties establishing the Communities makes it easier for the supply and demand structures continually to adjust to technological development. Through the interplay of decentralised decision making machinery, competition enables enterprises to improve their efficiency which is the sine qua non for a steady improvement in living standards and employment prospects within the countries of the community. From this point of view, competition policy is an essential means for satisfying to a great extent the individual and collective needs of our society.[14]

This view of the Commission on the benefits and aims of competition has remained consistent. That is, the Commission appears to believe that the benefits and aims of competition policy have remained static over a period of time in which the EC itself has evolved both economically and politically. This can be shown by a comparison of the above Commission statement with that given by later Reports. The Fourteenth Report stated:

> When it operates satisfactorily, competition can be expected to perform three functions that help towards a harmonious development of economic activity throughout the Community: a resource allocation function, by encouraging better use of the available factors of production, so that the firms' technical efficiency is increased and consumers' wants better satisfied; an incentive function, by stimulating firms to better performance relative to their competitors; and an innovative function, by encouraging the introduction of new products in markets and the production of new

production processes and distribution techniques.[15]

Whilst not as fulsome as the earlier statements, in essence, the Seventeenth Report has put forward much the same point of view. "From the economic viewpoint, the Commission takes the view that an efficient competition policy is essential in order to ensure that the full benefits of the internal market can be realised. Effective competition undoubtedly leads to an optimal allocation of resources and creates the best possible climate for fostering innovation and technical progress."[16]

The Community's competition policy is based on the economic theory of workable competition.[17] Workable competition is concerned with arrangements that come as close to perfect competition as can be made to work in the real world. The premise that the competition policy of the Community is built on workable competition results from a study both of the competition provisions of the Treaty, Articles 3(f) and 85 to 94, and the various statements of the Commission which show the influence of the theory of perfect competition.

Allen has observed that the competition provisions of the Treaty of Rome reflect some of the tenets of perfect competition theory.[18] For example, he argued that Article 85 was created, "With the model of perfect competition in mind ..."[19] Nevin has written, "Competition policy ... is aimed at ensuring that business enterprises conduct their affairs in a manner as close as possible to that postulated by the textbook world of perfect competition."[20] Further, the above declarations by the Commission on the aims and benefits of competition policy bear close similarity to those

arising from the theory of perfect competition.

This is not to say, however, that the EC practices a pure theoretical form of workable competition. As has been demonstrated, the theory of workable competition has several flaws. Further, as has been shown, for various reasons, economic theory does not transpose smoothly into economic law and policy. Thus, in consequence, the Community pursues an individualistic and pragmatic competition policy based loosely on the economic theory of workable competition.

Along with this departure from economic theory, the Community also departs from the idealised aims listed in the First Report in order to pursue more pragmatic objectives. These may be uncovered by an examination of the reasons given by the Commission for the monitoring of Community competition policy. Like states, the EC follows the practice of monitoring and intervention as regards its competition policy.

The Commission has written, "Left entirely to the free play of market forces, competition can degenerate. Companies may try to cheat by entering into risk sharing agreements. Competition can destroy itself if economic concentration leads to the creation of monopolies."[21] The Commission also noted other evils of unrestrained competition, among them the hindrance of new technologies and the prevention of the rationalisation of struggling industries. Thus, as Nevin has noted, EC competition policy acknowledges that, "... left to themselves, markets cannot be assumed to operate freely and without restraint as a matter of course; ..."[22]

Thus the Community, as do states, upholds

competition for economic purposes. It has been argued, however, that it is also possible for the reasons for maintaining competition to be interpreted politically. As it is with states, monitoring of competition by the EC authorities is necessary in that the Community shares the same political reason for upholding competition, namely the maintenance of democratic capitalism.[23]

The EC wishes to use competition policy in order to promote democratic capitalism because the values of the Member States are incorporated within the Community structure. This view is a well established one.[24] As Davidson has written, "... it is simply absurd to imagine that social values and political ideology will remain enshrined in the nation state, whereas the Community can be ideologically neutral. In the process of building the Community the member states cannot avoid incorporating the values of their societies."[25] Since the Community is the embodiment of twelve democratic capitalistic states, it can be presumed they have projected this most basic of beliefs into the Community sphere. If so, then the principle of the maintenance of a democratic capitalist mode of existence is an aim of the Community and thus of its competition policy.

As the Community is not a state, however, the analysis must be continued beyond its conclusion that the Community shares the political aims of the state for its competition policy. This may be a correct conclusion but it is not a final one, since the Community has its own unique political aims. These unique aims are as follows: continued survival; economic and political integration, including transfer of power from the Member States to the institutions, transfer of power among the institutions, in particular from the Council to the

Commission, and, to a lesser extent, to the Parliament.[26] They can be summed up as the continuing consolidation and promotion of economic and political integration.[27]

The total political aims of the Community are more numerous and, indeed, more complex than those of the state. The aims of the states include, fundamentally, the preservation and continuation of the system of democratic capitalism. By contrast, the EC has several additional fundamental goals all of which are operational more or less simultaneously. Therefore, state competition policy, in the political sense, has but a single aim while EC competition policy possesses a double purpose. Allen noted:

> In the Member States competition or antitrust policy has the essentially negative task of policing and preserving economic systems. Yet one of the claims of the Commission has always been that the EC competition policy has the positive role of contributing towards the establishment of a new economic system.[28]

If this is so then Community competition policy faces a more difficult task than that of state competition policy in achieving its objectives. For the state, the preservation of perpetual competition by means of a strict competition policy suffices to uphold its political aims, possibly at the expense of (practically achievable) optimum economic efficiency. Even at state level, it is difficult to achieve both objectives simultaneously. The competition policy of the EC must not only balance upholding democratic capitalism against optimum economic efficiency, it must also help realise the unique objectives of the Community.

How successful has competition policy been in achieving the specific aim of promoting economic efficiency over the past decades? The complexity of the policy makes this is a difficult question to answer. Nonetheless, a solution is attempted by analysing the actions of DG IV with regard to competition policy in general.

It is suggested that the Commission has been relatively consistent in its use and interpretation of the Treaty rules over the past decades. Despite the multiplicity of its aims it has not sought to vary greatly its approach to the enforcement of competition policy in any specific situation at any given period of time.[29] An examination of the Treaty of Rome rules on competition show them to be relatively strict, the influence of United States antitrust law, as it was being implemented in the time of the Treaty's creation, being clearly apparent. Further, these rules have consistently been enforced with rigour by the Commission. Several commentators have taken an unequivocal view that this has been the case.

Nevin has stated that the Commission had been given far reaching powers to identify and remedy market imperfections. He wrote, "There can be no doubt that it has sought to exercise these powers with considerable energy and persistence."[30] Steiner noted when discussing competition policy that "EEC law has been criticised as excessively traditional and interventionist, both in its drafting and in its interpretation by the Commission and the Court."[31] Forrester wrote that "... the Commission has consistently adopted an absolutist and frankly extreme interpretation of its basic text."[32] Woolcock stated that "Indeed the main complaint directed against

the Commission has been that Directorate General IV, responsible for competition policy, has sought to implement the Treaty too rigidly ..."[33]

If, therefore, the competition rules are relatively strict and have in general been applied sternly, it is reasonable to ask if improved economic efficiency has been the result? Conventional economic wisdom would say that such a condition is the logical outcome. An analysis of Community industry, however, reveals that this has not transpired.

Curzon Price stated that, in the seventies and early eighties, "The Community ... above all experienced several years of unprecedented recession ... high rates of unemployment and inflation, and low growth."[34] Cecchini wrote, "Recent performance of EC firms in competing with their Japanese and American rivals for world and European markets is far from brilliant. Since the start of the 1980s, Community business has seen an erosion of its position on many world manufacturing markets, while its two major competitors have gained."[35] Buchan, Hill, and de Jonquieres, writing in 1991 of the present situation, spoke of slower economic growth, rising unemployment and flagging industrial performance coupled with a harsh economic climate and fierce and unremitting external competition.[36]

With regard to economic aims, analysis of competition theory and state competition practice has revealed that competition policy does not equate with economic efficiency. It has been argued that no economic theory, as yet, has demonstrated that its implementation by the state would produce maximum economic efficiency. It was also acknowledged, though, that competition policy

does have some economic merit. At the same time, it was suggested that concentration, rather than competition, was increasingly being shown to be a major factor in producing true economic efficiency.[37] Vigorous enforcement of strict competition rules produces negative economic results so as to make a strict antitrust policy a political luxury that only a flourishing economy can afford. Should the economic situation decline, the continuation of such a policy would result in damage to the industrial base.

This theory was then tested by analysing the example of the United States where the economy had altered adversely over the past decades. There it was found that under a strict antitrust policy the economy continued to decline to the point where a reaction against this policy had set in. As Green, Hartley and Usher wrote:

> During the 1970s and 80s economists in the United States commenced a re-evaluation of the function of competition rules. The imperative of securing integration between states diminished, and economists questioned the assumptions underlying the aggressively interventionist enforcement of the rules by government authorities and the courts. The result was a radical turn-around, anti-trust policy became minimalist not maximalist.[38]

A study of the competition law and practice of the Community, whose economic situation has also experienced a deterioration, furnishes an analogous judgment. Community competition policy has produced little, if any, genuine economic benefit for EC industry. Cecchini wrote that beneficial real world competition in oligopolistic industries actually required the authorities allowing somewhat more cooperation among firms than the textbook

version.[39] At best, therefore, the rigorous enforcement of a strict EC competition policy over a long period of time cannot be said to have been conducive to promoting real economic efficiency. At worst, it bears some responsibility for the decline of the European industrial base.

A similar conclusion was reached by Allen in his study of Community competition policy. He wrote,

> It can be argued that the Treaty of Rome is a 'fair weather' treaty designed to create and manage a flourishing and expanding economic system... While this vision, which competition policy is meant to enhance, may well have been consonant with the economic conditions of the late 1950s, it is arguably no longer appropriate. A competition policy so intimately linked with a time-bound treaty may well be of less relevance for the European economy of the 1970s and 1980s.[40]

The article by Allen was written in the early 1980s. Nonetheless, his deductions are equally relevant for the 1990s.

More recent evidence of the ineffectiveness of competition policy in producing a strong Community industrial base is available. The Economic and Social Committee, writing on competition policy, noted in 1987, that, "... the original frame of reference - the economic and social situation in the sixties - has changed radically ..."[41] The Committee went on to state that, in consequence:

> Competition policy cannot be governed by abstract or theoretical criteria but must take into account the real conditions and requirements of the various

countries and regions. The original frame of reference (setting in motion of an integration process in a high growth rate economy) which marked the initial period of implementation has now changed.[42]

Also, Green, Hartley and Usher, writing in 1991, outlined the radical changes that had occurred in EC and world trade over the past decades. However, they also noted that the Commission had (and has) rejected the approach of the Chicago School and continued upon their predetermined course of maximalist intervention.[43] While the EC is not a clone of the United States and thus was not obliged to adopt a similar solution for its problems, it can be said that the action taken by the Commission did not seem to further the cause of European industry. Nevin, also writing in 1991, noted the economic slowdown of the EC during the 1970s and 80s and pinpointed this as a major source of present problems, for which the 1992 project was conceived as a solution.[44]

The vigorous application of a rigid competition policy upon European industry does not appear, however, to have helped to make it more efficient. The Economic and Social Committee, among others, noted this situation. They recommended a more flexible approach which took account of the worsening economic circumstances of European industry.[45] As the economic situation is still much the same, it is difficult to see how the continuation of this present competition policy will aid 1992.

<u>Conclusions</u>. With regard to the promotion of economic efficiency, competition policy has been of little benefit to Community industry. Vigorous

enforcement of rigidly interpreted rules is suited, if at all, to an expanding and flourishing economy. This has not been the case with the EC economy since the early seventies, yet competition policy is still continued along the same lines. Several commentators have thus argued strongly for a more flexible approach that would take greater account of economic reality.

Competition policy performs a complex and many sided role in the Community. In fact, it may be trying to achieve too many, possibly contradictory, objectives. Its lack of success in promoting economic efficiency could be due, in part, to being thus overburdened. Korah believed that, in fact, economic efficiency was subordinated to other aims. She wrote, "In competition cases, however, integration has been elevated by the Commission and the Court to a goal in itself, more important than efficiency."[46] It may also be that the Commission preferred to uphold the ideals of democratic capitalism at the expense of the aim of economic efficiency. If so, then a re-assessment by the Commission of the relative importance of each of its aims may also be in order.

It seems that competition policy is not appropriate for use as the pre-eminent strategy for achieving and sustaining the internal market. As the Community is still under an economic cloud, a continuation of its present competition policy is of dubious aid to 1992. Rather, a reversal of the Commission's attitude to the new economic learning is needed. This, however, seems unlikely. Nevertheless, even if it were to happen, it would still be difficult to see even a revised competition policy as having sufficient advantages to be allowed to be the major policy base for achieving 1992. In consequence, it should not have sole rights as regards merger criteria.

Industrial policy

Industrial policy is a somewhat nebulous concept that does not easily lend itself to analysis. Ozaki wrote that, "... industrial policy has a broad scope and loose boundaries. It can mean different things to different people."[47] Hodges stated, "Industrial policy is more a state of mind than a self-explanatory prescription for action."[48] Such analysis of industrial policy as has taken place is the cause of great conflict among economists. Johnson characterised industrial policy as, "... a complex and controversial subject."[49] Philip noted, "A continuing debate among industrial experts, officials and academics surrounds the precise nature of an industrial policy."[50] Geroski stated, "Any random collection of six economists is sure to produce at least a dozen different opinions on the subject, ..."[51]

As well as the difficulties inherent within the concept itself there are other factors that contribute to making research into industrial policy a demanding task. Industrial policy theory is still, speaking of the modern Japanese-inspired concept, at an early stage of development.[52] Further, such research as has taken place has been done with a certain lack of conviction. Geroski has put the reluctance of western economists to pursue their research with the same vigour as, for example, when formulating theories of competition, down to the fact that, in his opinion, "... many economists have trouble reconciling their gut reaction that industrial policy should not exist with the obvious fact that it does."[53]

One explanation for this reaction is that to seek to formulate an industrial policy is to make a tacit

admission that the market is an imperfect mechanism. As Johnson noted, "At the very least it involves the understanding that in advanced industrial democracies, in which economies of scale alone dictate huge investments and the employment of thousands of individuals, changes of industrial structure are only poorly accomplished through the market mechanism."[54] In effect, it has to be acknowledged that the hand that guides the economy is visible after all.

Notwithstanding the difficulties inherent within the concept, in order to allow a discussion of industrial policy at the supranational level it is necessary to arrive at some understanding of industrial policy per se. This is done by concentrating on the essential elements of industrial policy, namely its definition, subjects, objectives, programmes, and prerequisites for success.

Economists have not shied away from attempting definitions. Geroski stated that, " 'Industrial policy' is the label that has come to describe a wide-ranging, ill-assorted collection of micro-based supply side initiatives which are designed to improve market performance in a variety of occasionally inconsistent ways."[55] Hodges wrote that "Industrial policy ... is concerned with the utilisation of human and material resources to develop industry in an efficient and harmonious manner."[56] Johnson has observed, "Industrial policy is a summary term for the activities of governments that are intended to develop or retrench various industries in a national economy in order to maintain global competitiveness."[57] Ozaki stated, "The most generally accepted definition today is that industrial policy is whatever the government does vis-a-

vis private industry or individual firms to achieve a variety of objectives."[58]

The majority of western economists and nations perceive industrial policy measures as being directed towards industry in general. However, industrial policy may be directed towards industry in particular, that is towards specific industries or sectors of industries. For example, industries such as micro-electronics may be perceived as vital to the economic health of the state and thus are targeted to receive special assistance. Equally, failing industries may be targeted to receive specific help for restructuring or running down.

Paradoxically, industrial policy measures need not be targeted exclusively at industry. Johnson wrote of industrial policy, "It involves the specific recognition that all government measures - taxes, licenses, prohibitions, regulations - have a significant impact on the well being or ill health of whole sectors, industries and enterprises in a market economy."[59] Geroski more succinctly noted that industrial policy need not be directed solely towards firms.[60]

Industrial policy, therefore, in its broadest sense, can affect almost all the citizens of the state through diverse programmes. The Commission, when studying Japanese industrial policy noted, "Japan therefore has a fully-fledged, comprehensive industrial and technological development strategy based on a concerted approach looking beyond specifically industrial policy measures and progressively including research, education and town and country planning."[61]

The definitions listed above have shown that there

is no specific single aim for industrial policy. Geroski classified aims as either macro-economic or micro-economic. He identified a macro aim as being, for example, the achievement of zero inflation, whilst a micro aim was the promotion of growth of industry exports.

It could be questioned whether or not the categorising of aims into macro or micro serves any real purpose since there are problems with such categorisation. A complication which blurs the seemingly clear line between macro and micro aims is that the achievement of a series of micro aims will, on a long term basis, allow the achievement of macro aims. In addition, not all aims fit neatly into this categorisation. For example, the objective of improving industrial competitiveness was the essential aim of several of the definitions listed above. Unless further explanation of this aim is given, it could be interpreted as either a macro or a micro one.

There is no definitive list of programmes that may be gathered under the heading of industrial policy. Geroski, for example, noted the following: regional support, research and development, employment, investment grants, selective assistance to specific industries, trade, redundancy, capital allowances and stock relief.[62] Various problems as regards compatibility and targeting exist with any group of programmes that may be assembled under the umbrella of industrial policy in that not all approaches are compatible. The effects of certain policies may harm other programmes. Further, as Geroski noted, plans may have different targets.[63] Either or both these difficulties make the selection of programmes for an individual policy an exacting task.

It might be thought that, due to these complexities, it is almost impossible to formulate a comprehensive industrial policy that works in practice.[64] The Japanese example, however, has shown that this feat can be achieved. As Nester noted, in Japan, "Strategic industries are targeted for development and declining industries for protection."[65] Industrial policies are implemented in a wide variety of ways including subsidies, technology infusions and export promotions. The end result is that, in many instances, the Japanese producer is able to offer a superior product, profitability, and lower price.[66]

Japan should not be thought of as a unique case but as an illustration of what any state or international institution can achieve, given several specific factors, the most important of which is political will.[67] Without the support of the government any attempt to create and sustain an industrial policy is doomed to failure. Political will should therefore be seen as the prime prerequisite for any industrial policy.

Political will has a deeper meaning than the desire to make use of industrial policy. Given the broad definitions of what constitutes industrial policy, it is suggested that most states do use industrial policy in some sense and that a few western states have made, and/or do make use of, industrial policy in a relatively comprehensive way.[68] The success of industrial policy is thus proportional to the degree of commitment of political will. As Nester noted, "... the issue is whether a government's industrial policy will be ad hoc, incoherent, and run by and for insiders or whether it will be consistent, long term, and run for the sake of

future generations."[69]

To create an effective industrial policy it is not enough to make use of a general theoretical model. Even if a perfect model existed there is no guarantee it could be adapted to practice. Nor is it of any real value to copy a successful policy from another state. For example, as Johnson noted, it is of little value for the United States to try to create a Japanese-style industrial policy.[70] The true lesson to be gained from Japan is for the United States to create an American style industrial policy. This major point is made clear by Ueno:

> ... industrial policy demonstrates no clear relationship between its objectives and the means of attaining them. Its conception, content and forms differ, reflecting the stage of development of an economy, its natural and historical circumstances, international conditions, and its political and economic situation, resulting in considerable differences from nation to nation and from era to era.[71]

The statement also makes clear that a successful policy must be adaptable in order to deal with changing internal and external economic circumstances.

It is a requirement of a successful industrial policy that there should exist, or be created, an institution that can successfully administer such a policy. The obvious example of such an institution is the Japanese Ministry of International Trade and Industry, hereinafter referred to as MITI.[72] In particular, MITI has four features worthy of study: a clear brief, adequate legal power, an efficient structure, and contact with all groups relevant to industry.

MITI has responsibility for shaping industry structure and dealing with industrial dislocations; guiding the development of specific industries and the production and distribution of their products; managing Japanese foreign trade and commercial relations with other nations; ensuring an adequate supply of energy and raw materials to industry and managing a variety of specific areas, for example, small business policy and regional developments.[73]

MITI is not all powerful.[74] In some of the areas it can only try to persuade, rather than command, industry. It does, however, have statutory authority as regards the majority of its tasks. On balance, MITI has the power to fulfil its functions without being open to the charge of being an omnipotent dictator.

MITI has a series of deliberations councils attached to it. The most important such council is the Industrial Structure Council. Its membership encompasses representatives of both large and small business, government, consumers, academia, mass media, labour and local interest groups. The role of these councils, and, in particular, the Industrial Structure Council is to deliberate on future industrial policy. These deliberations, which are published and made widely available, are known as 'visions'. Visions are suggestions rather than recommendations. However, they play an important role in Japanese industrial policy. Ozaki wrote:

> Vision-making is the Japanese version of indicative economic planning, intended to build a consensus among all segments of society concerning the country's industrial structure, to ensure continuity

and stability of industrial policy, to provide information useful for firms' long term strategic planning, and to contribute to the optimal allocation of resources for the good of everyone.[75]

A successful industrial policy does not require a great number of administrators. Rather, it is the quality of the individuals that are important. MITI's total staff is only, approximately, 2,500. Ozaki stressed the competence of the officials within MITI as a major factor in the success of Japanese industrial policy.[76]

Industrial policy does exist within the EC. It functions, however, in just a few areas, for example, shipbuilding, and only as a form of crisis control. There is no comprehensive industrial policy with either a macro aim or a series of micro aims. What would constitute a fully developed Community industrial policy with a macro aim can only be speculated upon. The macro objective for industrial policy might be the promotion of harmonious and efficient industrial development. As to its programmes, the 1970 Community document, The Community's Industrial Policy: Commission Memorandum to the Council, hereinafter referred to as the Colonna Report, proposed five major guidelines: the completion of the single market; unification of the legal, fiscal and financial framework; restructuring of firms; measures to organise change or adaptation; extension of Community solidarity in matters of external relations.[77]

Industrial policy has been a relatively undeveloped area of Community law and practice. There are four reasons for this state of affairs. These are, the technical difficulties inherent within the concept

itself, the absence of a base within treaty law, the political opposition to a Community industrial policy from Member States, and the inherent conflicts between industrial and competition policy and their respective directorates.

Even at the level of the state, industrial policy is by no means a fully developed concept. Ueno indicated that the creation of a successful policy meant developing something specifically tailored to the end user. At the state level, few nations appear to have succeeded in achieving this objective, the Japanese of course being among the obvious exceptions.[78] The task facing the EC is even more demanding - an industrial policy tailored to meet the needs of an economic union whose membership steadily increased, each accession requiring complex new factors to be taken into account. Further, not all the Member States are at the same stage of industrial development.

The Treaty of Rome does not deal with industrial policy. As Swann stated, "... the reader will search the Rome Treaty in vain to find provisions which call for, and provide the juridical basis of, a Community industrial policy."[79] By contrast competition policy is well provided for. Nonetheless, an industrial policy could still have been created. Lack of a treaty base, however, is a major factor to be taken into account in that it has undoubtedly delayed the establishment and development of such a policy.

The absence of Treaty provisions meant that no Commission directorate existed to develop and promote industrial policy until 1967 when DG III was created. Further, it is questioned if DG III has, as yet, been

given the economic and human resources required to create and administer an industrial policy. With all due respect, DG III is not MITI. Had the need for an industrial policy been recognised in the Treaty of Rome this situation might not have arisen.[80]

The opposition of Member States is probably the major factor in the failure of industrial policy to take root at the supranational level. Some Member States see a Community industrial policy as resulting in the loss of important sovereign powers. Equally, they have foreseen little compensation for pursuing such radical action as the creation of an industrial policy, in the form of economic benefits. As Hodges wrote, "The failure to develop a comprehensive policy for industrial development at the Community level can best be explained by the absence of a consensus among member governments that such an approach would bring them tangible benefits that would otherwise be unobtainable."[81] Until the 1990s, only France had made proposals for a European industrial policy in a Memorandum presented to the European Council in 1983.[82]

No counterweight to this opposition to an industrial policy from these Member States has been provided by interest groups.[83] DG III was therefore almost isolated in its position as the champion of industrial policy. Hodges commented on, "... the absence of any powerful allies for a campaign to introduce a comprehensive blueprint for industrial development in the Community."[84]

A consequence of perennial Member State opposition to industrial policy is that DG III has been inhibited from ever developing an explicit formulation for an

extensive industrial policy.[85] For example, of all the various documents produced on industrial policy by DG III, the Colonna Report is the most complete.[86] Yet even this text leaves much to be desired with regard to clarity of exposition as to the contents, aims and methods of a Community industrial policy.

Some theories of industrial policy class competition policy as a programme within industrial policy. A study of Community practice, however, reveals that competition and industrial policies are independent and competing policies. Hodges wrote that:

> The preliminary discussions of the Colonna Report in COREPER made it clear that the debate on industrial policy was shaping up to a general disagreement on the fundamental economic philosophy underpinning economic union. In particular there was a clash between the liberal philosophy of market economy based on competition ... and the predilection for direct intervention and planning.[87]

He also observed that while DG III was, by dint of the Colonna Report, approving Community-wide industrial concentration, DG IV was attempting to bring mergers under closer control.

This disagreement between the directorates is still extant at the present time. The previous section showed that DG IV is committed to an active competition policy. The 1987 Commission Document on Improving Competitiveness and Industrial Structures in the Community noted that Japanese industrial advantage was, in large part, due to its exceptionally high level of concentration.[88]

It can be argued that the <u>future</u> of the EC, though,

does lie with industrial policy. It is suggested that Member States will not be able to derive the full benefits from employment of individual industrial policies. Paradoxically, this is in part due to the fact that each state is a member of the Community and thus is limited in its freedom of individual economic action. The most logical solution, therefore, however difficult it may be, is to formulate an industrial strategy at the Community level.

The 1992 project should therefore be aided in the realisation of its aims by the Community devising an industrial policy programme relating specifically to merger. In essence, this policy should provide for merger to be governed by industrial policy criteria as well as competition criteria. This is in order to allow firms to fight foreign competition by taking advantages of economies of scale. Such a merger policy would also be concurrent with the avowed objectives of the Commission. As Begg observed, "It is worth noting that one of the European Commission's objectives in establishing the single market is to facilitate the development of pan-European companies which will be better placed to compete with large Japanese and American rivals perceived to have achieved dominant positions in many sectors."[89]

As regards the need for merger policy to take account of industrial criteria, the major argument revolves around the key question of markets and efficiency. If efficiency gains are realisable on a European scale both in niche markets and in the wider European markets then merger considerations ought to include industrial policy needs in order to realise these gains.[90]

The case against having a Community merger policy that takes account of industrial criteria has many adherents. It rests primarily on the supposition that there is no claim to be made for the existence, even after 1992, of many pan-European markets. The claim here is that, despite the legal fact of a single European market, local preferences will result in the continuance of a series of niche markets. It also assumes that no efficiency gains on the European scale are possible in these niche markets.

For example, Geroski has written, "It is also more than clear that tastes are not homogeneous across Europe, and that the wide diversity of preferences that exists means that the internal European market will never be more than a collection of distinct market niches."[91] Mesdag has stated, "The main thrust of marketing ... will need to continue to gear itself to 320m different people, each with its own quirks and foibles, most with increasing wealth, independence and choosiness."[92] Kay of the London Business School has described the idea of a single market of 320 million people as a cliche. He wrote, "The cliche is dangerous because it invites people to believe that the European market will be more homogeneous after 1992 than it is now ..."[93]

It is not disputed that there are niche markets and that such markets will continue to exist even after 1992. However, economies of scale are possible even in such markets.[94] These may be achieved primarily by vertical rather than horizontal integration - where a firm seeks efficiencies by moving up or down the chain of suppliers producing items that contribute to the end product. This was the central theme of an article by Lorenz. He wrote, "As a few pioneers of pan-European

acquisitions ... have demonstrated over the past few years, considerable scale benefits can be achieved higher up the value-added chain, in the production and sourcing of standard components and sub-assemblies."[75]

Further, it is also possible to promote efficiency gains in niche markets even at the end product level. This is achieved by the creation of a cross-border network of specialised factories. Merger is one means by which such factories can be obtained. Lorenz noted that this ought to produce better employee relations, fewer skill shortages and lower indirect overheads.

Also, with regard to niche markets, in some markets, it is the large efficient firms that are best placed to exploit them. For example, Feast wrote that "... Japan's well-established 'lean'production allows it to build cars in lower volume and still remain profitable. Japanese makers are thus capable of producing numerous niche vehicles - and to renew them frequently ..."[76]

Moreover, not all of the markets within the Community are niche markets. There clearly exist many larger markets. It is contended that studies may fail to identify such markets adequately. As Lorenz stated, "The London Business School catalogue of industries in which further scale-building can be justified is very short ..."[77] The catalogue was, in his opinion, unrealistically short.

Where there exist markets that are pan-European in scale the need for supranational industrial policy considerations in respect of mergers is even clearer. The Industrial Bank of Japan, in a comprehensive study of

European markets, believed that a major cause of European industrial weakness was due to uncoordinated national policies as regards firms in key industries. The 'Industrial Bank of Japan Review,' in its section on 'Industrial Policies,' stated:

> Most countries of the EC have been keen on nurturing at least one company in each of the key industries, even utilizing protectionism. The policy of 'one company in one country' led to monopolistic market structures, killing market forces in a country, while leading to an overcrowding of companies in the Community. This has resulted in segmented markets in the EC, where economy of scale is not achieved.[98]

Industrial policy considerations could be a vital ingredient in overcoming this handicap. Cecchini, noting merger as a method of external restructuring, stated that "Such operations can help companies attain a truly European dimension and thus escape from the narrow logic of the 'national champion'."[99]

If this analysis is correct then it is clear that merger is a necessity for many European firms. If so, a coherent European industrial policy should be in place to oversee and coordinate such ventures. At worst, the actual mergers themselves should be decided on industrial as well as competition grounds.

1992 notwithstanding, niche markets are continually becoming more pan-European. The creation of the Community itself, scientific improvements in all forms of communications technology and the increase in incomes of Europeans have resulted in greater mobility both of the European peoples and their products. Whilst it would be an exaggeration to claim that the Member States are

losing their individual identities and characteristics, a degree of Europeanisation is gradually but inexorably taking place.

To believe that 1992 will not accelerate the creation of more pan-European markets is to underestimate the power of the economic forces that the programme has unleashed. 1992 is not only about the actions of the Community, it is about the reactions of industry. 1992, along with the general upsurge in global competitiveness, has fuelled a merger wave. The reorganised industry that will come into being as a result is dynamic enough to breach the structure of niche markets.

The newly merged firms must sell their product in greater numbers in order to survive. Industry will therefore attempt to create a new market structure more conducive to its needs rather than continue to serve the present niche markets.[100] What might happen is that industry and the consumer may confront each other in battle. In such a confrontation the odds are in favour of industry. While this understanding is at variance with conventional economic theory, which holds that the customer is king and that industry exists to provide that which the customer desires, Galbraith has argued convincingly that the true situation is that industry has power over the market.[101]

A final ground for using industrial policy criteria for merger relates directly to the threat of foreign competition. Every merger between European firms means that the target firm has stayed in European hands. This, is an admitted strategy of some European firms. Dawkins reported that a major European car parts firm stated one reason for its acquisitions was to lock out the

Japanese.[102] Garnett noted that the purchase of Benati by Fiat was made in order to avoid that firm falling to Sumitomo of Japan.[103]

Conclusions. Industrial policy is admitted to be an extremely difficult concept, with regard both to theory and practice. Further, the difficulties are enhanced by the fact that it is a notion at odds with the favoured policy of western democracies, that of competition. Nevertheless, as shown by the Japanese example, the economic rewards of correctly adapting industrial policy theory to the needs of a state or an institution are considerable. This specific example of the successful implementation of industrial policy is neither unique nor impossible to replicate.

A study of EC practice with regard to industrial policy shows the concept has not, as yet, received a proper trial. A comprehensive industrial policy has many potential advantages. For example, it could enhance competition policy by aiding integration and helping to stop abuse of Articles 92-4 of the Treaty of Rome. It may still be an idea ahead of its time in that its general application remains too demanding to realise. Nonetheless, an argument can be advanced for initiating a specific micro policy of using industrial criteria as well as competition criteria for regulating merger.

1. Editorial, The Times (17 July 1973).

2. David Allen, "Managing the Common Market: The Community's Competition Policy," in Helen Wallace, William Wallace, and Carole Webb, eds., Policy Making in the European Community, 2nd ed. (Chichester: John Wiley, 1983), 228.

3. It is suggested that the most opportune time frame for instigating an EC industrial policy is until the end of the decade.

4. Commission, Europe Without Frontiers - Completing the Internal Market, 2nd ed. (Luxembourg: Office for Official Publications of the European Communities, 1988), 9.

5. Delors, quoted in Commission, op. cit in note (4), 5.

6. Dieter Helm and Stephen Smith, "The Assessment: European Integration and the Role of the European Community," Oxford Review of Economic Policy 5 no. 2 (Summer 1989): 1.

7. See Jacques Pelkmans and Alan Winters, Europe's Domestic Market (London: Routledge, 1988), 6. Pelkmans and Winters noted both the decline of the European economy and its waning competitiveness vis a vis the external world.

8. Delors, quoted in Commission, op. cit in note (4), 5.

9. Commission, op. cit in note (4), 10.

10. Lord Cockfield, quoted ibid., 7.

11. As Korah has stated, there is no agreement as to the objectives of competition policy. See Valentine Korah, "EEC Competition Policy - Legal Form or Economic Efficiency," Current Legal Problems (1986): 85. However, an analysis of EC publications shows they do seem to promote economic efficiency as the primary aim. See, for example, the Commission statement in, Commission, EEC Competition Policy in the Single Market 2nd ed. (Luxembourg: Office for Official Publication of the European Communities, 1989), 6. "An efficient competition policy ... leads to the optimal allocation of resources."

12. John S. Kingdon, "Economic Argument in Anti-trust Cases: An American Litigator's Perspective," European Competition Law Review (1987): 376.

13. See the statements by the Commission in its various publications. Commission, The European Community's Competition Policy (Luxembourg: Office for the Official Publications of the European Community, 1976), 3-5, Commission, European Competition Policy: European File (Luxembourg: Office for Official Publications of the European Community, 1985), 3-4, Commission, op. cit in note (11), 5-7. It is suggested that these statements stress, primarily, the economic benefits of competition policy.

14. First Report on Competition Policy, 11.

15. Fourteenth Report on Competition Policy, Introduction.

16. Seventeenth Report on Competition Policy, 51.

17. This conclusion has also been reached by several commentators. See Richard Whish, Competition Law, 2nd ed. (London: Butterworths, 1989), 15; D.G. Goyder, EEC

Competition Law, (Oxford: Clarendon Press, 1988),10; P.J.G. Kapteyn and P. Verloren Van Themaat, Introduction to the Law of the European Communities, 2nd ed. (London: Graham and Trotman, 1989), 558. Further, the ECJ has, on occasion, made use of the expression, 'workable competition.' See, for example, 26/76 Metro SB-Grossmarkte GmbH and Co v Commission (1977) ECR 1875 at 1904.

18. Allen, op. cit in note (2), 213-14. Allen wrote, at 213, "... the ideal of perfect competition remains frozen in the Treaty of Rome."

19. Ibid., 214. Kapteyn and Van Themaat, op. cit in note (17), 509, have formed a different opinion. They wrote, "It is decidedly not true that Articles 85 and 86 are intended to realise perfect or even maximum competition."

20. Edward Nevin, The Economics of Europe (London: Macmillan, 1990), 120.

21. Commission, European Competition Policy: European File, op. cit in note (13), 3.

22. Nevin, op. cit in note (20), 130.

23. This was propounded in Chapter 2. However, as Chapters 2 and 4 have attempted to demonstrate, political aims are now becoming less important than economic aims.

24. See, N. Green, T.C. Hartley, and J.A. Usher, The Legal Foundations of the Single European Market (Oxford: Oxford University Press, 1991), 198; Nevin, op. cit in note (20), 120.

25. Ian Davidson, "News of the End of History Fails to Reach Europe," *Financial Times* (19 October 1989).

26. Green, Hartley, and Usher, *op. cit* in note (24), 200, give the political aims of the EC as integration and equity. Kingdon *op. cit* in note (12), 376, gives the single aim of promoting the Single European Market. All authors, however, have noted that the EC has an economic purpose alongside its political aims.

27. The possible final aim of the majority of Community Member States is full economic and political union.

28. Allen, *op. cit* in note (2), 210.

29. This may be changing due to factors such as globalisation of markets and increasing world competition. However, the Commission is doing so reluctantly. See also Green, Hartley, Usher, *op. cit* in note (24), 203.

30. Nevin, *op. cit* in note (20), 130.

31. Josephine Steiner, *EEC Law*, 2nd ed. (London: Blackstone Press, 1990), 104.

32. This was part of the evidence given by Ian Forrester to a House of Lords Select Committee. See, House of Lords, Session 1988-9, 6th Report, Select Committee on the European Communities, *Merger Control: With Evidence* (London: HMSO, 1989), Minutes of Evidence, 100.

33. Stephen Woolcock, *European Mergers: National or Community Controls* (London: Royal Institute of International Affairs, 1989), 29.

34. Victoria Curzon Price, "Competition and Industrial Policies with the Emphasis on Industrial Policy," in A. M. El-Agraa, ed., The Economics of the European Community, 3rd ed. (London: Philip Allen, 1990), 168-9. It is argued that while the energy crisis of the early seventies contributed to this state of affairs it is not the sole cause, and that EC competition policy also had some effect.

35. Paulo Cecchini, The European Challenge 1992: The Benefits of a Single Market (Aldershot, Hants.: Wildwood House, 1988), 89.

36. David Buchan, Andrew Hill, and Guy de Jonquieres, "The Battle within Fortress Europe," Financial Times (17 June 1991).

37. See Yale Brozen, ed., The Competitive Economy: Selected Readings (Morristown, New Jersey: General Learning Press, 1975), Brozen, Concentration, Mergers and Public Policy (New York: Macmillan, 1982); Commission, Improving Competitiveness and Industrial Structures in the Community (Luxembourg: Office for Official Publications of the European Communities, 1987), 26-27. There the Commission stated that a major factor in the strength and international competitiveness of Japanese industry was its very high level of concentration.

38. Green, Hartley, and Usher, op. cit in note (24), 198.

39. Cecchini, op. cit in note (35), 86. Cecchini pointed out that this is especially the case in high technology industries.

40. Allen, op. cit in note (2), 231.

41. Economic and Social Committee, *Community Competition Policy* (Luxembourg: Office for Official Publications of the European Communities, 1987), 1.

42. Ibid., 5.

43. Green, Hartley, and Usher, *op. cit* in note (24), 199, and 204-5. This was also noted by Korah, *op. cit* in note (11), 85. Part of the reason for this rejection is that the EC placed greater emphasis on the goal of integration than the goal of efficiency.

44. Nevin, *op. cit* in note (20), 131. The decline of European industry and its consequences was also noted by Richonnier. See, Michel Richonnier, "Europe's Decline is not Irreversible." *Journal of Common Market Studies* 22 no. 3 (March 1984): 227-243.

45. Economic and Social Committee, *op. cit* in note (41), 20.

46. Korah, *op. cit* in note (11), 91. She still holds this opinion today. See Korah, *EEC Competition and Practice* (Oxford: ESC Publishing, 1990), 3-4.

47. Robert S. Ozaki, "How Japanese Industrial Policy Works,"in Chalmers Johnson, ed., *The Industrial Policy Debate* (San Francisco: Institute for Contemporary Studies Press, 1984), 48.

48. Michael Hodges, "Industrial Policy: Hard Times or Great Expectations?" in Wallace, Wallace, and Webb, eds., *op. cit* in note (2), 265.

49. Chalmers Johnson, "Introduction: The Idea of Industrial Policy," in Johnson, ed., *The Industrial Policy Debate*, *op. cit* in note (47), 11.

50. Alan Butt Philip, "Europe's Industrial Policies: An Overview," in Graham Hall, ed., European Industrial Policy (London: Croom Helm, 1985), 5-6.

51. P.A. Geroski, "European Industrial Policy and Industrial Policy in Europe," Oxford Review of Economic Policy 5 no. 2 (Summer 1989): 20.

52. Johnson, op. cit in note (49), 5. Johnson noted, "The contemporary idea of industrial policy is of Japanese origin ..."

53. Geroski, op. cit in note (51), 20.

54. Johnson, op. cit in note (49), 8.

55. Geroski, op. cit in note (51), 21.

56. Hodges, op. cit in note (48), 265.

57. Johnson, op. cit in note (49), 7.

58. Ozaki, op. cit in note (47), 48. For further definitions of industrial policy see also, B. T. Bayliss and A. M. El-Agraa, "Competition and Industrial Policy with the Emphasis on Competition Policy," op. cit in note (34), 137; Curzon Price, op. cit in note (34), 156-9; Nevin, op. cit in note (20), 132; Sharon Zukin, "Industrial Policy as Post Keynsian Politics: Basic Assumption in the United States and France," in Sharon Zukin, ed., Industrial Policy: Business and Politics in the United States and France (New York: Praeger, 1985), 3-5.

59. Johnson, op. cit in note (49), 7.

60. Geroski, op. cit in note (51), 21.

61. Commission, op. cit in note (37), 28.

62. Geroski, op. cit in note (51), 23. Curzon Price believes that competition policy can also be subsumed under industrial policy. See, Curzon Price, op. cit in note (34), 158.

63. Geroski, op. cit in note (51), 22.

64. A comprehensive industrial policy will also be referred to as a macro industrial policy throughout the course of this dissertation.

65. William R. Nester, Japanese Industrial Targeting: The Neomercantilist Path to Economic Superpower (London: Macmillan Academic and Professional Ltd, 1991), 4.

66. Nester, op. cit in note (65), 5.

67. This point is made by Chalmers Johnson, MITI and the Japanese Miracle: The Growth of Industrial Policy, 1925-1975 (Stanford, California: Stanford University Press, 1982), 311.

68. For example, the United Kingdom made extensive use of industrial policy in the 60s. Further, France, at present, pursues a comprehensive industrial strategy.

69. Nester, op. cit in note (65), 18.

70. Johnson, op. cit in note (49), 7.

71. Hiroya Ueno, "Industrial Policy - Its role and Limits - ," Journal of Japanese Trade and Industry (July-August 1983): 34.

72. For the definitive study of MITI see, Johnson, op. cit in note (67).

73. Ozaki, _op. cit_ in note (47), 54.

74. Ibid., 63-64.

75. Ibid., 55.

76. Ibid., 66.

77. _The Community's Industrial Policy: Commission Memorandum to the Council_. COM(70)100, Commission of the European Communities, Brussels, 18. March 1970, Part 1, 12. It is generally referred to as the Colonna Report as it had been prepared by Commissioner Guido Colonna di Paliano and his staff in DG III.

78. Is suggested that Germany has also accomplished this feat. See Hodges, _op. cit_ in note (48), 268.

79. Dennis Swann, _Competition and Consumer Protection_ (Harmondsworth, Middlesex: Penguin, 1979), 135. However, Article 130 of the Treaty, as introduced by the Single European Act, deals with aspects of industrial policy. Nevertheless, the Rome Treaty still falls short of providing a basis for the adoption by the Community of an industrial policy.

80. On reform of the Commission in general see, Barend Biesheuvel, Edmund Dell, and Robert Marjolin, _Report on European Institutions_ Presented by the Committee of Three to the European Council, October 1979; Dirk Spirenberg, _Proposals for Reform of the Commission of the European Communities and its Services_ Report made at the Request of the Commission by an Independent Review Body under the Chairmanship of Mr Dirk Spirenberg, September 1979. Frank Vibert, "Europes Constitutional Deficit," _Institute of Economic Affairs: Inquiry No 13_ (27 November 1989): 1-15.

81. Hodges, op. cit in note (48), 288. A similar point was made by Bayliss and El Agraa, op. cit in note (58), 139.

82. The text of the Memorandum is in Europe Documents, no. 1274 (16 September 1983). See also, Joan Pearce and John Sutton, Protection and Industrial Policy in Europe (London: Routledge and Kegan Paul, 1986), 6-7 and Chapter 11; Richonnier, op. cit in note (44), 227-43.

83. This situation may now be changing with regard to some sectors of industry. See Alan Cane, "EC Information Technology Strategy Urged," Financial Times (18 July 1990).

84. Hodges, op. cit in note (48), 271. The same point is also noted by Bayliss and El-Agraa, op. cit in note (58), 138-9.

85. The White Paper does not constitute such a document in that, while its contents do amount to industrial policy, it is presented in a somewhat disguised form.

86. Commission, The Colonna Report op. cit in note (77). See also, Commission, Memorandum from the Commission on the Technological and Industrial Policy Programme, SEC(73)3824 Final 1973; Commission, The European Community's Industrial Strategy European Documentation, 1982; European File, An Industrial Strategy for Europe (Luxembourg: Office for Official Publications of the European Communities, 1986; Commission, op. cit in note (37); Commission, Industrial Policy in an Open and Competitive Environment COM (90) 556 final; Commission, "European Industrial Policy for the 1990s" Bulletin Supplement 3/91.

87. Hodges, op. cit in note (48), 273.

88. Commission, <u>op. cit</u> in note (37), 26. The Commission does, in a footnote, add the rider that concentration does not necessarily equal efficiency and that the Japanese situation is not to be directly applied to the Community, 26 footnote 5.

89. Ian Begg, "European Integration and Regional Policy," <u>Oxford Review of Economic Policy</u> 5 no. 1 (Summer 1989): 99 footnote 12.

90. See, for a comprehensive treatment of this question, Alexis Jacquemin, Pierre Buigues, and Fabienne Ilzkovitz, "Horizontal Mergers and Competition Policy in the European Community," in <u>European Economy</u> no. 40 (May 1989): 1-98. The texts in <u>European Economy</u> are published under the responsibility of the DG for Economic and Financial Affairs.

91. Geroski, <u>op. cit</u> in note (51), 32.

92. Martin van Mestag, "1992: The Cant Dispelled," <u>Research Associates: International Marketing Digest</u> 13 no. 4 (1989): 51. See also, "The Myth of the Euro-Consumer," <u>The Economist</u> (4-10 November 1989): 107-8.

93. J. A. Kay, "Myths and Realities," in Evan Davis et al., <u>1992: Myths and Realities</u> (London: London Business School, 1989), 2.

94. See Cecchini, <u>op cit</u> in note (35), Chapter 7.

95. Christopher Lorenz, "Sometimes Bigger May be Better in Europe," <u>Financial Times</u> (6 February 1989).

96. Richard Feast, "Lean Rivals and Pollution Pressures," <u>Financial Times</u> (21 May 1991).

97. Lorenz, <u>op. cit</u> in note (95).

98. Industrial Bank of Japan, "EC 1992 and Japanese Corporations," Industrial Bank of Japan Review no. 8 (July 1989): 6.

99. Cecchini, op. cit in note (35), 87.

100. This is already beginning to happen. For example, the chief executive of Elders Brewing is quoted as being confident, despite difficulties, of internationalising the European drinks markets. See, Philip Rawstorne, "Taking on the World," Financial Times (28 November 1989). See also, Lisa Wood, "International Drinks Industry: Buying Less but Better," Financial Times (28 November 1989); Charles Leadbetter, "Toyota's Conundrum: Creating a Global car for niche markets," Financial Times (17 July 1991).

101. This is not a situation where the customer has countervailing power. See, Galbraith, The New Industrial State, 4th ed. (Boston: Houghton Mifflin, 1985), 28-33. See also Michael Skapinker and Robert Thomson, "A Cachophony of New Technologies," Financial Times (31 May 1991). As to the music industry and the decision on the next generation type and format of players, Skapinker and Thomson quote an industry official as stating, "The consumer decides nothing."

102. William Dawkins, "Easing off on the Accelerator," Financial Times (25 September 1989).

103. Nick Garnett, "Fiat Purchase Wards off Japan," Financial Times (12 February 1990).

5. MERGER CONTROL IN THE EC: A HISTORY OF MERGER POLICY UNDER ARTICLES 85 AND 86

The Treaty of Rome does not contain any particular rules concerning merger. Advokaterne Bredgade 3 et al, (Advokaterne), noted that there were three possible reasons as to why this is the case.[1] The Founding Fathers of the Community deliberately omitted it, unwittingly overlooked it, or intended it to be implicit within the provisions on competition.

At the time the Treaty of Rome was written, merger control by the state was not a feature of the economic law of any Member State. Even in those Member States which now employ the highest degree of merger control, the United Kingdom and Germany, the relevant legislation did not begin to appear until 1965 and 1973 respectively.[2] These facts indicate that merger control was simply overlooked by the Founding Fathers as it was not within the ambit of Member State practice at that time.

This, however, is not the most likely explanation for the omission of explicit merger controls. An examination of the travaux preparatoires, the Treaties of the Communities, relevant contemporary documents, and accounts by those involved in the creation of the Communities and by other observers, suggest that merger, and its possible effects on industry within the proposed EEC, did give rise to discussion within the circles of those concerned with its foundation.[3] Sir Leon Brittan noted that "... examination of the 1956 Spaak Report does indicate that the problem of the anti-competitive consequences of dominant positions and monopolisation was not ignored."[4] Furthermore, there is explicit provision

in the ECSC Treaty for merger so that it is unlikely that a decision to include a reference to mergers was overlooked.

If so, then merger control was either meant to be implicit within the Treaty of Rome or was deliberately omitted. An examination of the relevant evidence provides no support for the contention that the Founding Fathers intended merger control to be implicit within the Treaty of Rome. In fact, a study of the available data indicates that the decade in question was a period when the potential benefits arising from merger seemed relatively desirable. The Community was founded in an era when merger was seen as something to be promoted rather than discouraged. As Advokaterne wrote:

> At the time the Treaty was drafted the political and economic priority was not the control or restriction of concentrations but rather the reverse. Increased concentration between undertakings was seen as a process to be encouraged to build up the European economy which had been ravaged by war and to produce large undertakings capable of competing in world markets.[5]

If, therefore, the Founding Fathers were aware of merger as an economic force and the current of opinion at the time seemed to favour merger promotion, it appears unlikely that rules restricting merger activity were meant to be implicit in the Treaty of Rome. The absence of merger control thus seems a deliberate omission on the part of the Founding Fathers of the Community. However, this cannot be asserted too dogmatically, for, as Sir Leon Brittan has observed, "... the original intent of the authors of the Treaty is frequently unknown, because of the paucity of genuine <u>travaux preparatoires</u> ..."[6]

The debate on merger control originates from the 1966 Memorandum on the Concentration of Enterprises in the Common Market, hereinafter referred to as the 1966 Memorandum. In this it was felt, both by the Committee of Experts and by the Commission, that Article 86 was, under specific circumstances, applicable to mergers.[7] This Memorandum paved the way for the Commission eventually to test the waters by issuing a decision on merger. This led to the <u>Continental Can</u> case which related directly to the interpretation of Article 86.[8]

<u>Article 86</u> <u>Continental Can</u> is the foundation upon which the greater part of Community merger policy was built. As such, it deserves a detailed exposition and examination. The Continental Can Company Incorporated, (Continental Can) of New York was a firm manufacturing metal packages, packaging materials both paper and plastic, and machines for producing and using these packages. During 1969 Continental Can steadily increased its share in a West German company, Schmalbach-Lubeca-Werke AG (SLW) to 85.8% of the nominal capital.

In this same year, Continental Can considered forming a European holding company for packaging. The Metal Box Company Limited (MB), London, was to be its partner in the venture. The Dutch and French licensees of Continental Can, Thomassen and Drijver-Verblifa N.V. (TDV) and J.J. Carnaud Forges de Basse-Indre (Carnaud) were invited to participate. Carnaud declined the invitation but TDV accepted and an agreement was signed between Continental Can and TVD in 1970.

It was agreed that Continental Can would set up, in

the United States, a new firm, Europemballage, and transfer to that firm its interests in SLW. Continental Can would then induce Europemballage to make an offer for TVD shares to all TVD shareholders, except MB and Carnaud. This plan was subsequently carried out during the early months of 1970.

In March and April of 1970, the Commission informed the undertakings concerned about the possible incompatibility of the contemplated transaction with Article 86. The firms were also warned about the possible legal and financial consequences of the matter. MB then postponed its proposed agreement with Europemballage. Europemballage, however, purchased all TDV shares and debentures offered up to the 8th April 1970 bringing the initial share of Continental Can in TDV up to 91.07%

On 9th April 1970, the Commission started a procedure against Continental Can and its subsidiary Europemballage regarding the purchase by Europemballage of the TDV shares. This was in application of Article 3 (1) of Regulation 17/62. On completion of the procedure the Commission issued a decision under Article 86.[9] This was done on the 9th of December 1971. The decision found that Continental Can had abused its dominant position over a substantial part of the Common Market, held through its subsidiary SLW, by purchasing through Europemballage approximately 80% of the shares and convertible debentures of TDV. In the opinion of the Commission, this purchase effectively eliminated competition in the market for light metal packaging for preserved meat, fish and crustacea and in the market for metal caps for glass jars. Continental Can was therefore required to end this infringement of Article 86.

This decision was contested by Europemballage and Continental Can on several points before the Court of Justice. The major point of interest in the case, however, was the application of Article 86 to a specific form of merger activity. In particular, two questions required an answer. Could Article 86 be applied to merger at all? If so, did a merger, which caused a dominant position to be strengthened beyond a certain point, in itself constitute an abuse of that dominant position within the meaning of Article 86?

The first question to be examined was outlined by the Advocate General as follows. "... we are first of all concerned with the question of whether Article 86 can be applied at all to processes of concentration." The Advocate General believed that Article 86 could apply to mergers, albeit in a severely restricted fashion.[10] He felt that Article 86 could only take effect where a firm having a dominant position brought its market power into play and exercised pressure on a competitor, so as to force that competitor to merge with the dominant firm.

The second question was whether Article 86 was applicable to the particular case before the Court. The Advocate General believed that this latter question was the sole point of concern. He formulated the issue thus:

> The only question of interest in the present case ... is purely whether Article 86 also applies if an undertaking in a dominant position on the market, by means of the acquisition of another undertaking, reinforces its position on the market, to such an extent that 'in practice' nothing remains in the way of competition of economic significance.[11]

Before dealing with the fundamental question in the case, two preliminary issues may be disposed of. It is clear that circumstances such as those envisaged by the Commission were not directly covered by any of the four instances outlined in Article 86, paragraph two. Even a cursory examination of the instances of abuse given by Article 86 showed that the answer must be negative. It is equally clear, however, that the instances given in Article 86 are not exhaustive.

The Advocate General examined the first paragraph of Article 86 and concluded that the article could be applicable only under specific conditions. These were that, "... the position on the market is used as an instrument and is used in an objectionable manner; these criteria are therefore essential prerequisites of application of the law."[12] In other words, there must be a causal connection between the dominant position and its abuse. As the factual circumstances were that Continental Can did not use the market strength acquired through SLW as an instrument in connection with the acquisition of TDV shares, the Advocate General concluded that Article 86 was not relevant to the present case.

The view of the Commission on this key question differed substantially from that of the Advocate General.[13] The Commission conceded that market power is of relevance in examples (a), (c), and (d) of Article 86. Its relevance to (b), however, was arguably appreciably less. This provision treats as an abuse, the, "limiting of production, of markets or technical development to the prejudice of consumers." The Commission believed this allowed the consideration of internal events of a firm. Thus, the situation may be reached where the customer is harmed by means other than actual use of market strength.

The Commission was therefore arguing that abuse, the second criterion, could arise without the first criterion. That is, that an increase in market strength itself, rather than its actual use, could in itself be an abuse of market power. In other words, the Commission adopted the position that, under Article 86 (b), if the end result of an action comes within its bounds then the action was illegal.

The Commission did not base its line of reasoning on Article 86 solely on its interpretation of the Article itself. It referred to the preamble of the Treaty of Rome and to Articles, 3 (f) and 85 (3) (b). Thus, a further question was posed, which may be regarded as a necessary auxiliary to the core question concerning the pertinence of Article 86 to the present case. This is, to what extent are further aspects of Community law relevant to whether control of mergers can be said to be part of Community law under Article 86?

The words of the preamble to the Treaty, "Fair competition" and Article 3 (f), "... the institution of a system ensuring that competition is not distorted" were considered by the Commission to be both general principles and aims of the Treaty. Further, the statement in Article 85 (3) (b) regarding, "... the possibility of eliminating competition in respect of a substantial part of the market in question." was argued to be a general principle of Community competition law. In short, the Commission maintained that a perusal of the entire Treaty justified interpretation of Article 86.

The judgement of the Court of Justice annulled the actual decision of the Commission on the ground that the relevant markets had not been adequately analysed.[14] The

main import of the judgement, however, was that the Court upheld the view that Article 86 could apply to mergers and, in particular, it upheld the theoretical stance that the Commission had taken on Article 86 as regards what constituted abuse of a dominant position. The Court stated:

> The question is whether the word 'abuse' in Article 86 refers only to practices of undertakings which may directly affect the market and are detrimental to production or sales, to purchasers or consumers, or whether this word refers also to changes in the structure of an undertaking, which may lead to competition being seriously disturbed in a substantial part of the Common Market.

The Court held that the distinction between measures concerning structure, and practices affecting the market cannot be decisive, "... for any structural measure may influence market conditions if it increases the size and the economic power of the undertaking."[15]

In order to examine Article 86, the Court felt it necessary to refer to its spirit and general scheme as well as the actual wording. Also relevant were the systems and objectives of the Treaty. A comparison of Article 86 only with provisions in the ECSC Treaty was deemed inadequate. Article 86 was first placed properly within the context of Competition Policy. It was held to be, "part of the chapter devoted to the common rules on the Community's policy in the field of competition."[16]

The foundation of this policy was then stated. It was Article 3 (f). The aim of that Article was taken to be decisive in interpreting the relevant detailed Treaty provisions. Article 3 (f) provides for, "the institution of a system ensuring that competition in the common

market is not distorted." If so, this must imply that competition must not be eliminated. This also accorded with Article 2, which states that the Community should, "promote throughout the Community a harmonious development of economic activities." Thus, all legal restraints on competition within Community law are limited by the requirements of Articles 2 and 3.

The Court also discussed the specific provisions in Articles 85 to 90, noting that they had been enacted to safeguard the principles and attain the objectives of Articles 2 and 3. In brief, it was stated that Articles 85 and 86 were linked by common purpose. Thus, what was prohibited under Article 85 could not be permitted under Article 86. This was so despite the lack of explicit prohibition in Article 86. Finally on this point the Court stated that, "In any case Articles 85 and 86 cannot be interpreted in such a way that they contradict each other, because they serve to achieve the same aim."[17]

As regards Article 86, the Court noted that the list contained therein was not intended to be exhaustive. However, the examples in Article 86(c) and (d) showed that it was aimed at practices indirectly harmful to consumers, namely those which harm effective competition. The verdict of the Court, therefore, was that under Article 86, "Abuse may therefore occur if an undertaking in a dominant position strengthens such a position in such a way that the degree of dominance reached substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depends on the dominant one."[18]

The reasoning of the ECJ in <u>Continental Can</u>

reflected the current economic theory of the time which, generally speaking, saw a high degree of concentration as harmful to the competitive process. The existence of a dominant position meant that a high level of concentration already existed and thus, to some extent, competition was already weakened. A dominant position, whilst not illegal, was therefore viewed unfavourably by the Court. If the Court made use both of the conventional economic theory of the time and the structure/conduct/performance paradigm this would mean that the firm could be expected to conduct its affairs in such a manner that competition would be further weakened and consumers eventually suffer harm. Further, by so doing the firm would be acting inefficiently and, as a result, have its performance, and indeed that of other firms in the market, suffer. If so, all forms of conduct by the firm that further affected competition had to be kept under close scrutiny.

The predisposition of the Court against a dominant position was noted by Hermann. He wrote that in Continental Can, "... the Court made a series of rulings which, taken together, amount to a prohibition of monopolies and near monopolies and could even be taken as a prohibition of a dominant position."[19] Thus, any significant strengthening of such a position by the firm, even by means of a merger that did not make use of its power, was not to be allowed on the grounds that competition, such as it was, would be detrimentally affected. Specifically, actual and potential competitors and (indirectly) customers, would suffer an unacceptable degree of harm.

By use of Article 86 the Commission and the Court hoped to prevent further significant build up of

concentration and thus defend the competitive process. As Chapter Two showed, this way of thinking has now been challenged by the 'new economic learning'. In particular, some economists claim the height of entry barriers is not related to the degree of concentration. As Brozen noted, "... objective evidence does not support the view that higher entry barriers prevail in concentrated, than in dispersed industries."[20] They also maintain that there is no direct correlation between high profitability and high concentration. Brozen stated, "- the belief that high concentration ... leads to the establishment of monopoly prices - rests on unproven assumptions."[21]

If so, then the behaviour of the dominant firm in a highly concentrated market structure towards actual and potential rivals and towards customers is still constrained by competitive pressures. For example, any attempt to weaken or to eliminate rival firms could see new firms come into the market. Further, charging overly-high prices to customers could also attract new competitors. As Armentano stated, "But if the economic effect of monopolisation is to raise prices above costs - marginal and average - strong economic incentives then exist ... to encourage output by new firms."[22]

On this basis then, in contrast to the opinion of the Court and the Commission in Continental Can, it may be that an industry where a dominant firm has strengthened its position is still competitive and, in consequence, the firm is still constrained to operate efficiently. As Armentano has concluded, "In short, evidence from the so-called new learning undercut much of the rationale for the traditional antitrust regulation of market concentration and high market share."[23]

A full explanation of Continental Can, however, must take into account a further factor. In addition to law and economics, judicial policy was a factor in the case.

The Court saw its obligation to protect competition as tied in with its fundamental duty to safeguard the aims of the EC. This was not an unexpected position for the Court to adopt as the Rome Treaty is permeated with the precepts of competition. As Nevin noted, "The whole economic philosophy of the Treaty of Rome is in fact shot through with the concept of the superiority and supremacy of the operation of fully and freely competitive markets."[24] If so, it may be that the Court felt it had a duty to make good the omission from the Treaty of a major protective mechanism of effective competition, namely, a system of merger control.

Further, the Court may have believed that its action would precipitate the creation of a more formal system of merger control in the shape of a Merger Regulation. In fact, in 1973, the Commission did submit a proposal for a regulation on merger control to the Council.[25]

An examination of Continental Can suggests that it is an example of support by the Court for the Commission in that the Commission, at that time, seemed to be making a major attempt finally to bring merger control within its ambit. Goyder stated, "It was decided to attempt to obtain a ruling from the European Court, that Article 86 did enable the Commission to issue a decision prohibiting a merger ..."[26] The judgement did, in fact, give the Commission the power it had long desired. As Ramsey noted, "... the Court has, in fact, taken the initiative to apply Article 86 to merger control, a phenomenon which neither the Commission nor the Member States have been

able to accomplish, ..." [27] Indeed, the Court not only upheld the theoretical stance of the Commission but actually extended its scope with regard to the degree of competition needed to trigger an abuse of a dominant position under Article 86. The Commission had spoken of the 'virtual elimination' of competition. The Court, however, imposed the lesser test of 'substantial fettering' of competition.

Despite the majority opinion among commentators that merger policy was a deliberate omission on the part of the authors of the Treaty, this was not the major issue in the case. It was already taken for granted both by the Commission and the Advocate General that Article 86 did in some way apply to mergers. It was only the scope of its employment that was in dispute. Yet it was by no means the universally held view at that time that Article 86 applied to mergers at all. For example, Jacquemin wrote, "... mergers are in no way prohibited - as in a market which is not yet integrated, a merger is considered 'a priori' favourable to the public interest."[28] Joliet, in his comprehensive text on monopolisation and the abuse of dominant position, concluded that:

> Article 86 does not apply to the unilateral practices of independently acting single-firm monopolies which are designed to maintain or strengthen such firms' domination. Similarly it does not cover mergers by which domination is increased. ... whether they are peaceful or brought about by coercive tactics, mergers are beyond the reach of the Rome Treaty, no matter to what degree market control may be reinforced.[29]

Davidow, writing in 1991, was critical of a major

premiss behind the whole idea of EC merger control. He stated that, "It was never obvious that the EC had to have greater antitrust power just because it is a common market."[30] As regards Article 86, in particular, he commented:

> Article 86 was, by its terms and purpose, supposed to apply only to abuse of market power, not to the existence of market power itself. ... it should not be illegal for, say, a ninety percent firm to agree to acquire a ten percent firm. In fact, it would be more in keeping with the wording and intent of Article 86 to permit the acquisition and then monitor post-acquisition conduct to see whether there is any abuse.[31]

In Continental Can itself, there was a divergence of opinion between the Commission and the Advocate General. The Commission favoured a broad interpretation of Article 86 and the Advocate General a narrow one. It is suggested that the answer to the major question posed by the case was clear enough so as to render superfluous the somewhat tenuous reasoning employed by the Commission. A narrow legalistic interpretation would seem to have been sufficient to formulate a clear and comprehensive judgement on the question of abuse of a dominant position in the specific circumstances outlined. However, the Court chose to follow a line of argumentation similar to that of the Commission and issued a judgement which was a radical departure from the major technical and legal arguments that, it might reasonably have been presumed, would have decided the issue.

The Court, instead, made extensive use of general principles in a broadly based interpretation of the question at issue. As Fox observed, "The Court of Justice

chose to construe the words of Article 86 to give effect to the spirit of the Treaty of Rome, including the intent of the drafters expressed in Article 3(f) to ensure that competition is not distorted rather than to give unbending allegiance to technicalities ..."[32] She noted that for the Court to come to the decision it did on the position of Article 86 as regards mergers:

> ...required hurdling three large obstacles. First, the EC Treaty did not contain a provision for merger control, probably by design. Second, the Treaty requires an abuse ... Third, Article 86 prohibits only an 'abuse ... of a dominant position.' This implies ... There must be a causal connection between the dominant position and the abuse.
>
> While all of these arguments have technical merit, they all failed.[33]

Maitland-Walker put the point more bluntly when he stated, "Suffice it to say that many commentators have strongly criticized the judgement and the Advocate-General's arguments that Article 86 should have no general application to merger were certainly far more convincing than the judgement of the Court ..."[34]

To sum up, Continental Can raised issues that gave the judgement an importance beyond the settlement of the dispute between the Commission and the firms. The Court was aware of these larger issues and may have shaded its judgement so as to take account of them.

The merger policy of the Commission evolved markedly after Continental Can. This was made clear by the Commission in its Tenth Competition Report:

> Developments in Commission decision making and in the case law of the Court with regard to the abusive conduct of dominant undertakings provide an

indication of the scope for merger control afforded by the Continental Can doctrine, when re-examined in the light of more recent judgments (Sugar, United Brands, Hugin/Liptons and Hoffman-la Roche),[35]

ECJ competition cases and Commission investigations also serve to bring about a greater understanding of the legal meaning of the notions of dominance and abuse. Both dominance and abuse are capable of being defined in economic terms, which may not be on all fours with the legal meaning given to them by the Community authorities. It is the interpretation of these terms by the Commission and the Court, rather than economists, that is relevant for EC law.[36]

During the course of United Brands the Court defined a dominant position as, "... a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave independently of its competitors, customers and ultimately of its consumers."[37] This definition has become the standard one in subsequent ECJ cases applying Article 86.[38]

There are some further points to be made with regard to a dominant position. First, the definition of a dominant position given above is concerned solely with dominant sellers. However, a dominant position is equally applicable to abusive conduct by a dominant buyer.[39] Second, dominance needs to be established on all segments of the relevant market. Third, the dominant position may be a collective dominant position held by several firms rather than being held only by one firm.[40]

The foremost test for determining whether or not a firm holds a dominant position is to establish its market share. Market share, however, is not the sole criterion for determining dominance. The Commission and Court have taken into account further factors. Such additional factors are utilised most frequently where the market share of the firm is between 20 and 60 percent. As van Bael and Bellis noted, "Such additional factors have included a number of structural elements, amounting to barriers to entry, as well as certain performance factors."[41]

Sufficiently large market shares are accepted by both the Commission and the Court as, in themselves, evidence of the existence of a dominant position.[42] In Michelin the ECJ considered a market share of 57 to 65 per cent as sufficient evidence of a dominant position.[43] As regards lesser market shares, van Bael and Bellis have stated that "... according to the Commission, a dominant position cannot be ruled out in respect of market shares between 20 and 40 per cent."[44] Also, a study of ECJ cases and Commission investigations has revealed that a firm with less than a ten per cent market share is unlikely to be considered dominant.[45] The EC institutions may contrast the market share held by the firm under investigation with that held by its competitors. Where a significant gap in market share exists between the firm in question and its rivals then this is considered to confirm the existence of a dominant position.[46]

The firm must be dominant on the relevant market. In fact, the relevant market has three criteria, the product market, the geographic market, and the temporal market.

With regard to the relevant product market the key concept is that of demand or supply side interchangeability or substitutability. The ECJ in Continental Can used somewhat imprecise terminology when it stated that products that are reasonably interchangeable will be considered as part of the relevant market while products that were only to a limited extent interchangeable should not be so considered. There is, however, no mathematical formulae for determining market substitutes more precisely. In order to judge any given instance, the nature of the goods, their price, usage, and also the competitive conditions and the structure of supply and demand on the market must be taken into consideration. Examples of product markets defined by the Court and/or the Commission are the market for bananas as opposed to that of fresh fruit and the market for bulk vitamins with each specific vitamin forming an individual market.[47]

The relevant geographic market is the area within the EC where the allegedly dominant firm is actually facing competition in respect of the actions complained of. It is defined in terms of homogeneity of trading conditions. As Article 86 only applies in the case of an abuse of a dominant position in a substantial part of the market, an area within the Community must first be defined. Further, the area thus relevant to the proceedings in question must be considered important enough to be 'substantial' within the meaning of Article 86. As Wyatt and Dashwood stated, "The test of a 'substantial part' is not the geographic extent of the territory in question but the economic importance of the market situated there."[48]

At one end of the spectrum the relevant geographic

market might be the entire Community. At the other end of the spectrum the Commission has, on several occasions, taken one Member State as constituting the relevant geographical market.[49] It has tried to define the relevant geographical market more narrowly still, in that, in Alsatel v Novasam it singled out a region within a Member State. However, this Commission definition was not accepted by the Court.[50]

As Wyatt and Dashwood noted, market power will only afford a dominant position, "... if it is capable for enduring for a considerable time."[51] Thus, the temporal market comes into consideration. The market on which the firm operates may change from time to time as regards both the range of products and the geographic area. If substitutes are likely to become available in the short term then the firm is likely to consider the possibility of their customers defecting to these substitutes. Such a possibility limits its freedom of action. Among the cases where the temporal market was a factor were United Brands, B.P., Commercial Solvents and Michelin.[52]

Dominance, by itself, is not prohibited by Article 86. What is problematic is its abusive exploitation. In Hoffman-La Roche the Court stated, "The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market, where, as a result of the very presence of the undertaking in question, the degree of competition is weakened ..."[53] Her study of Hoffman-La Roche led Korah to the conclude that "Even a small reduction of competition may infringe Article 86."[54]

In the Tenth Report on Competition Policy the

Commission stated that:

> Strengthening by means of merger is likely to constitute an abuse if any distortion of the resulting market structure interferes with the maintenance of remaining competition (which has already been weakened by the very existence of this dominant position) or its development.

In the Twelfth Report on Competition Policy the Commission added that "... such an effect depends, in particular, on the change in the relevant strength of the participants after the merger, i.e. the position of the new unit in relation to remaining competitors."[55]

However, despite the above pronouncements, the position with regard to what degree of fettering of competition constitutes abuse of a dominant position by way of merger is still not totally clear, though it is now presumably stricter than the doctrine laid down in Continental Can.

A further development as regards interpretation of the concept of abuse of a dominant position was the extension of Article 86 to the possibility that the purchase by a dominant firm of minority shareholdings in independent firms, or other methods of gaining influence over such firm's commercial policies, may be deemed an abuse of the acquirer's dominant position. This was as a result of Philip Morris, though Siragusa noted that this development had been foreshadowed by the judgement of the ECJ in Hoffman-La Roche.[56] Fine stated that, since Continental Can, Philip Morris constituted, "...the single most important development in the Community's policy on the applicability of Article 86 to mergers ..."[57] The Court stated in Philip Morris, "An abuse of such a position can only arise where the shareholding in

question results in effective control of the other company or at least in some influence on its commercial policy."[58] Thus, it now appears that Article 86 applies to acquisitions of minority shareholdings by a firm in a position of dominance.

It is clear that the Commission has progressively refined the concept of dominance over the years by "... defining markets more narrowly and lowering the threshold of market shares ..."[59]

Throughout the course of its dealing with the component factors of dominant position the Commission has not adhered consistently to economic theory. The most striking example of this is United Brands. There it was clear that United Brands did not enjoy power over price but, in fact, was unsuccessfully fighting a price war with its main competitor. Nevertheless, the Court held that United Brands did occupy a dominant position.

With regard to the relevant product market Korah stated, "Whereas many economists consider that substitutes on both the supply and demand side of the market define it, some decisions in the EEC adopted in the late 1970s and 1980s, ... use an arbitrary test to define the market, ..."[60] As to the geographic market, economists argue that, for certain products, there is a worldwide market. As Korah has stated, "For some products, economists might say that the relevant market must be worldwide, as the sole producer of a substance in the common market would have no monopolistic discretion were the market liable to be swamped by imports."[61] It is only the abuse of a dominant position within the EC that can be challenged. However, the Commission does not always take account of competitive pressures outside the

EC.

The way additional criteria to market share are used by the Community institutions has been criticised. For example, the reasons as to why certain combinations of criteria established dominance have not always been clear.[62] As to entry barriers, the Court adopted an individualistic approach. As Korah commented, in the Michelin case, "... it assessed the alleged barriers to entry on a shorter time scale than would be used by economists, in Europe as well as America."[63]

Korah has concluded that "... both the Commission and the Court have failed to make clearly and cogently reasoned decisions."[64] On one level this can be explained by the fact that, as stated in previous chapters, economic theory does not transpose smoothly into law. Thus, even if the Court and Commission were attempting to adhere as closely as possible to favoured economic theories, some of the essence of pure economics would be lost in the practical application of law.

This, however, does not provide a full explanation of the activities of the EC institutions. An understanding of ECJ decisions and also Commission investigations requires an additional element. The policy of both the Commission and the Court must be understood in order to grasp what has been happening in EC competition law. The policy of the Court has already been explained. The policy of the Commission, in this case DG IV, is much the same as that of the Court. To reach a policy objective, both the Commission and the Court, it is suggested, feel free to depart from economic theory in order to arrive at a favoured conclusion where such conclusion would not accord with economic theory.

That this has been happening can be seen from the conclusions reached by Fine and Korah. Despite all the Commission investigations and Court judgments over the years since Continental Can, Fine stated that the concepts of both abuse and dominance were still 'nebulous.' More specifically Korah wrote, "On the basis of precedents it is not easy to advise what the relevant market may be. The Commission has considerable power in selecting it."[65] In short, the institutions, by departing from the constraints of economic theory on occasion, have given themselves considerable scope in deciding any potential instance relating to the abuse of a dominant position.

Article 85 Article 85 was brought into play with Philip Morris. In April 1981, the Rembrandt Group, (RG), a South African firm, transferred to Philip Morris, (PM), a United States firm, half the equity in one of its firms, Rothmans Tobacco Holdings, (RTH), a United Kingdom firm, for the sum of $350 million. RTH had a majority holding in Rothmans International, (RI), a United Kingdom firm. The agreement also included certain provisions relating to RTH which, in effect, created a partnership between PM and RG as regards RTH. RI was to be managed on a joint basis. Further, under the agreement the parties were to realise the potential gains in several areas, for example, joint research, manufacture and distribution.

In May 1981, R.J. Reynolds Industries Incorporated, (RJR) complained to the Commission about the above transaction. In November 1981, and January 1982, Reemtsma and British American Tobacco (BAT) respectively also lodged complaints to the Commission. In between these two actions, in May 1981, PM and RG notified the

Commission of their agreement. The substance of the complaints, backed with a detailed list of arguments, was that the agreement between PM and RG distorted competition. PM was an active competitor in the cigarette market in several Member States. By its acquisition of RTH, PM had a major interest in the profits of RTH. RTH in turn, was the controlling firm of RI, which was a major competitor to PM.

The Commission investigated the case and sent the parties a formal statement of objections. This expressed the view that the agreement between PM and RG infringed both Articles 85 and 86 and set out a list of reasons as to why this was so. With regard to Article 85, as Advokaterne noted, "... the Commission appeared to take the view that even a shareholding in a competitor which amounts only to a passive investment can have anti-competitive effects within article 85."[66]

The eventual outcome, after complex discussions between the firms and the Commission, was that PM transferred back its shares in RTI and instead became a direct shareholder in RI. Also, the partnership and co-operation clauses were removed, changes were made to the original agreement and a number of undertakings were given to the Commission by PM.

In view of this, the Commission wrote to the complainants in December 1983 informing them that it intended to reject their complaints. The Commission also asked them to submit their comments. BAT and RJR replied that the new agreement contained almost all the features that the Commission had originally perceived as contrary to the Treaty. However, the Commission wrote to BAT and RJR in March 1984, giving the final decision of the full

Commission, which was that their complaints were rejected and that the file was now closed. BAT and RJR began proceedings under Article 173 and requested the ECJ to annul the 1984 Commission decision which had formally rejected their complaint. The Court however, in its judgement of November 1987, dismissed that application in full. In particular, as regards the substance of the application, the Court upheld the Commission's view that no anti-competitive object or effect had been established with regard to the agreement between PM and RI.

The major import of Philip Morris concerns the relevance of Article 85 not so much to this case in particular, but, more importantly, to agreements such as were concluded between RG and PM in general. The Court stated. "The main issue in these cases is whether and in what circumstances the acquisition of a minority shareholding in a competing company may constitute an infringement of Articles 85 and 86 of the Treaty."[67]

The Court then went on to make broader statements of principle as follows:

> Although the acquisition by one company of an equity interest in a competitor does not in itself constitute conduct restricting competition, such an acquisition may nevertheless serve as an instrument for influencing the commercial conduct of the companies in question so as to restrict or distort competition on the market on which they carry on business.[68]

After elaborating on possible factual circumstances where this situation might occur, the Court concluded on this point.

> Finally, every agreement must be assessed in its economic context and ... the situation on the relevant market. Moreover, where the companies concerned are multinational corporations ... their relationships outside the Community cannot be ignored. It is necessary in particular to consider the possibility that the agreement in question may be part of a policy of global co-operation between the companies which are party to it.[69]

Philip Morris was subjected to extensive analysis.[70] The judgement was characterised as both complex and somewhat unclear. In essence, however, its main import was that Article 85 now definitely applied to partial mergers and possibly also to total mergers. It is this latter point that has provoked the greatest debate. As Siragusa wrote, "Most of the discussions following **Philip Morris** have centred on the issue of whether Article 85 could also apply to full mergers ..."[71]

Bellamy and Child, for example, recognised that this issue was moot.[72] The authors considered that Article 85(1) should not apply to full mergers but acknowledge that theirs is not a universally held view.[73] Downes and Ellison, commenting on a passage of the ECJ judgement relevant to the point at issue stated that "It seems clear, therefore, that this passage was intended as a broad statement of principle on the possible application of Article 85 to a range of mergers including full mergers.[74] Fine wrote, "... the European Court of Justice seems to have settled any lingering doubts that Article 85 applies to total and partial acquisitions of ownership in a competing company."[75]

Whether Article 85 is applicable to full mergers

turns on the contradictions between paragraph 31 of the judgement and later paragraphs. Paragraph 31 stated, "Since the acquisition of shares in Rothmans International was the subject-matter of agreements entered into by companies which have remained independent after the entry into force of the agreement, the issue must be examined first of all from the point of view of Article 85."

Paragraph 31, on the face of it, seems more restrictive as regards full mergers than later passages, and possibly rules out their consideration altogether. The key issue as to paragraph 31 revolves around the meaning of one specific word in the paragraph. As Fine stated, "The question arose, however, whether the Court intended the term 'independence' to mean economic independence (as a function of control) or formal independence (two firms at least in form remaining on the market)."[76] Siragusa has noted that the word 'independent' in paragraph 31 has been taken by some commentators to mean only legal, or formal, independence as opposed to legal and economic independence.[77] Legal independence is taken to be the case where the mergee becomes a subsidiary of the parent predator firm, while legal and formal independence is that the firms are not linked in any way. If the correct meaning is held to be that of legal independence only, then Article 85 may apply to full mergers.

Fine contrasted the paragraph in question with the rest of the judgement and accordingly concluded that, "... the contradiction of Paragraph 31 with the balance of the judgement is purely anomalous. Paragraph 31 must represent nothing more than token lip service to the 1966 Memorandum ..."[78] The Commission utilised a parallel

approach to this problem, and their conclusion was similarly robust. As Fine noted, "The Commission has stated that it rejects Paragraph 31 of the **Philip Morris** judgement."[79] Berwin stated, "The Commission's view is that Article 85 may apply to a 100 per cent acquisition if the market is one where competition will be substantially affected."[80]

An analysis of the judgement shows that Article 85 was meant to be applicable to full mergers. Paragraph 31 does not seem to rule out full mergers definitively. Further, an evaluation of the judgement as a whole gives rise to the view that a narrow interpretation of Paragraph 31 would be at odds with the overall tone of the judgement. Further, the interpretation of the Philip Morris judgement (in its entirety) by the Commission should also carry weight, if only because, over the years, there has been a good degree of consensus between the Court and the Commission in the interpretation of competition law. If the Commission believes that the judgement allows Article 85 to apply to full merger this may well be what the Court had, in fact, intended.

The scope and influence of both Article 85 in particular and EC competition law in general were significantly strengthened by Philip Morris. Since Continental Can the Commission, by making use of the investigations and cases relating to Article 86 discussed above, had attempted to prevent any further rise in levels of concentration that would result in substantially weakened competition. Yet, to use a cliche, this was locking the stable door after the horse had bolted. The fact that a dominant position already existed meant that, under conventional economic theory, the existing market structure was not fully conducive to

effective competition.

However, the existing high level of market concentration could not be dealt with under Article 86. The Commission had, in its Tenth Report, stated that the existence of a dominant position meant that competition was already weakened. Thus, there was a major gap in EC merger control. Philip Morris afforded an opportunity to fill this gap. The Court utilised this opportunity in that, by giving a judgement whose interpretation allowed Article 85 to be used for investigating full mergers, the control of mergers under the EC Treaty law was completed.

The case also presented an opportunity for an extension of the power of the Commission.[81] Significantly, Peter Sutherland wrote that "The unambiguous confirmation by the Court that Articles 85 and 86 apply to transactions relating to changes in corporate ownership will help the Commission to develop a merger policy based on sound legal principles and market analysis."[82]

Further, the judgement helped to increase the scope of Community law by serving to speed the process of the formulation and adoption of a Merger Control Regulation. While it cannot be stated in any absolute fashion that the Court acted with any such specific intentions in mind, it was undoubtedly worldly enough to realise that this case had implications beyond the settlement of the dispute in question and to perceive the probable interpretation of its judgement by the Community institutions and other relevant groups.

Advokaterne wrote, "However, the Commission has recently made renewed efforts to get the Council to agree

in principle to a regulation. This pressure on the Council has been sharply increased by the recent judgement of the Court in the Philip Morris/Rothmans case."[83] Brown stated, "... the judgement appears to have prompted the Member States to resuscitate discussions on the Commission's long-outstanding proposed regulation on the control of concentrations ..."[84] Korah wrote, "... the judgement in **Bat and Reynolds** was widely interpreted as an indication to the Council of Ministers that it should adopt the regulation or suffer the consequences of a wide interpretation of the precedent."[85]

An examination of Philip Morris gives rise to the opinion that the question of whether or not Article 85 applied to mergers was not directly in issue before the Court. Fine noted, "The stated parameters of the Court's review did not discourage the Court from reaching the broader issues of the case."[86] Advocaterne put the matter more bluntly, writing that "There was no need for the Court to include such broad statements of principle in its judgement in this case. It could very well have expressly left aside the issue of the applicability of Article 85 to concentrations, ..."[87]

The 1966 Memorandum had expressed the view of the Commission that Article 85 did not apply to mergers.[88] The Commission had not seen fit to depart from this stance for nearly two decades. When it did so in 1981 in its examination of the Philip Morris complaint, the new position it adopted was, at best, tentative. In addition, this stance was also temporary as it later reverted back to the view that Article 85 was not relevant.

This shifting of position was observed by Advokaterne who wrote:

> ...the position adopted by the Commission in relation to the 1984 agreements appeared to confirm that a mere shareholding in a competitor, without the institutional mechanism and ability to exercise control over it, was considered to fall outside Articles 85 and 86. This overrode the position adopted by the Commission in respect of the original 1981 arrangements between Philip Morris and Rembrandt.[89]

Several commentators pointed out that there would be major difficulties in applying Article 85 to merger in practice.[90] Article 85(2), renders void agreements coming under paragraph 1 of Article 85, seemingly making it unsuitable for agreements involving the acquisition of property. In particular, share transactions would be automatically void. Further, for Article 85 to apply there must be an agreement or concerted practice whereas the purchase by a firm of shares on the stock exchange in a major competitor is a unilateral action. Also, generally speaking, the provisions of Regulation 17/62 are not suited to the application of Article 85 to mergers.[91] Finally, the application of Article 85 to mergers could result in a mass of notifications to the Commission resulting in a possible disruption of the system. The Court addressed none of these difficulties. Nor, simply by the fact of its judgement, did it solve them. Indeed, the practical problems resulting from the judgement have sparked dark comparisons with the opening of Pandora's box.[92]

The position of the Commission on merger has undergone a considerable change since the days of Continental Can.[93] The liberal interpretation by the Commission of its powers as regards merger under Article

86 meant that a relatively large number of firms contemplating merger were potentially at risk. DG IV, however, has exercised considerable restraint. There were few instances of positive official action under Article 86 since Continental Can, only two of which led to a final decision in the formal sense.[94]

This is not to say that, despite making little use of its powers, DG IV was ineffective in achieving its aims. The knowledge that the Commission could have used the Article 86 prohibition, tended to make firms conform with the policy of the Commission. Further, as Whish pointed out, there are undoubtedly mergers which were contemplated but never actually took place due to the fear of infringement of Article 86.[95]

In practice many firms, possibly acting on advice from their lawyers, sought the opinion of the Commission for their merger plans and acted accordingly. In fact, this course of action was probably recommended to firms by the majority of advisors. Such counsel met with approbation from Temple Lang, who wrote that a prudent and well advised corporation would tend to seek informal approval from the Commission before carrying out a merger that it might later be compelled to unwind.[96]

Soon after Philip Morris, the Commission issued a press statement claiming that the judgement was, "... a breakthrough in Competition Policy."[97] With, it is suggested, an eye on the slow progress of the Merger Control Regulation negotiations, the Commission quickly utilised the potential of Philip Morris. In fact, the Commission intervened in a fair number of mergers agreements since Philip Morris, though none resulted in an actual decision.[98] The Commission also acted to

enlarge the scope of Article 85 from the somewhat restrictive confines of Philip Morris by taking the view that, as stated previously, Article 85 could apply to full mergers.[99]

Advokaterne noted the possible adverse effects of Article 85 on firms could be dramatic.[100] They therefore concluded that, "... parties may well choose in many cases to make advance notification, or at least informal approaches to the Commission in the hope of obtaining informal approval of their proposals."[101]

The Commission never published any summary of the general legal position vis a vis Articles 86 and 85 following Philip Morris, as it wished to see the merger Regulation adopted. However, a personal view was offered by Temple Lang, an official of DG IV, in October 1989.[102]

> A company already in a dominant position is prohibited by Article 86 from acquiring shares in a competitor if the shareholding results in effective control or at least some influence on the commercial policy of the company acquired ... and if the result is to strengthen its market power and to restrict competition appreciably more...[103]

In respect of firms occupying a joint dominant position Temple Lang noted that an abuse of this position may be committed if one oligopolist acquired another.[104]

Concerning firms not necessarily occupying a dominant position, Temple Lang considered that a firm, even if did not occupy a dominant position, may infringe Article 85 if, by agreement, it acquires even a minority shareholding in a competitor if that gives it an instrument for influencing the commercial policies of the firms, so as to restrict or distort competition on

the relevant market.[105]

Temple Lang went on to list specific instances of violation of Article 85:

> Article 85 is infringed in particular where ... the investing company obtains legal or de facto control of the other company, or where the agreement provides for commercial cooperation between the two companies or creates a structure likely to be used for such cooperation. ... where the agreement gives the investing company the possibility of reinforcing its position at a later stage and then taking control ...[106]

He also went on to indicate that, for the purpose of the Philip Morris principles, actual control was not necessary, influence was enough.[107] He did not elaborate on this statement. However, given the judgement in Philip Morris, the acquisition of a minority shareholding, coupled with a cooperation agreement, may be sufficient to constitute 'influence'.[108]

Scope of the Pre-Regulation Merger Policy: Jurisdiction The discussion of pre-Regulation EC merger policy cannot be complete without reference to its scope. This topic covers the important issue of the jurisdiction of the Commission with regard to mergers. It embraces all possible scenarios as to Commission jurisdiction, including the controversial issue of extraterritoriality and the 'effects' doctrine.

To what situations did the Commission consider that Community merger law applied? To avoid repetition, the question is discussed with regard to full merger though, as Advokaterne noted, since Philip Morris, the same

answers applied equally to partial merger. There are three broad categories of merger. The merger of two EC firms, merger between a non-EC firm and an EC firm, merger between two non-EC firms.

Concerning merger between two EC firms, the Commission potentially had jurisdiction with regard to any such arrangement where one firm held a dominant position. Kapteyn and Van Themaat stated, "... it is not only transnational mergers which may be caught by Article 86; purely national mergers involving one or more undertakings which already have a dominant position on the relevant national market may also be affected."[109]

The notion of merger between a non-EC firm and an EC firm is somewhat more complicated than it may appear. Advokaterne subdivided it into the following possible situations: 1) A non-EC firm with an EC subsidiary having a dominant position merges with an EC firm. 2) A non-EC firm not having an EC subsidiary but holding a dominant position through exports to the Community merges with an EC firm. 3) An EC firm in a dominant position merges with a foreign firm having a competing subsidiary within the EC. 4) An EC firm in a dominant position merges with a foreign firm not having a subsidiary within the Community but being a substantial exporter to the EC. 5) An EC firm in a dominant position merges with a foreign firm not having an EC subsidiary and not exporting to the EC.[110]

Advokaterne believed that, under Article 86 and also relying on the ruling in <u>Continental Can</u>, the Commission could have claimed jurisdiction in all the above cases. The only special case would be where a foreign firm without an EC subsidiary but holding a dominant position

by virtue of exports merged with an EC firm. Here the Commission could possibly have taken action under Article 86.[111]

Merger between two non-EC firms was subdivided by Advocaterne into 1) Merger between two foreign firms each having subsidiaries within the EC one of which holds a dominant position and 2) Merger between two non-EC firms neither of which has an EC subsidiary but each exporting to the Community and one or both holding a dominant position.[112]

Advokaterne were confident that the first situation came within EC jurisdiction. They wrote, "On the basis of the single enterprise theory ... the Commission would not regard the foreign status of the merger or the foreign ownership of the subsidiaries from preventing it from taking action against the merger under Article 86 in so far as it affects the EEC."[113] Temple Lang however, was less certain. He wrote "It is not clear how far the Commission could prevent a merger of subsidiaries or activities within the Community of the two merging parent companies both of which are based outside the Community."[114]

As the view of Temple Lang is possibly more authoritative than that of Advokaterne, it may be that the Commission found this to be more of a problem than commentators assumed. It is suggested, however, that whether or not the Commission felt itself inhibited in so doing the single enterprise theory ought to have given the Commission legislative jurisdiction.[115]

As to the second situation, the opinions of Advokaterne and Temple Lang coincided in that both felt

there was no clear answer.[116] Advocaterne, however, believed that the only way in which the Commission could have claimed jurisdiction would have been on the basis of the 'effects' doctrine - namely that the merger might produce severe anti-competitive effects in the EC.[117]

The 'effects' doctrine is an important concept that bears fuller explanation.[118] Ferry stated the basic concept thus, that a state embracing this doctrine, "... had jurisdiction over undertakings in reaching agreements in whole or in part abroad, but where the location of the effects of the agreement is the territory of the state."[119] It can be viewed as a doctrine in its own right or as a development of the public international law principle of territoriality. There is no rule of public international law that prevents any state, or international institution, from adopting an 'effects' doctrine. At the same time the 'effects doctrine'is not part of EC law _per se_.

The Commission has, over some considerable time, attempted to have such a doctrine, with necessary adaptations, brought into Community law.[120] However, the ECJ has always fought shy of expressly adopting this test. In _Woodpulp_ it again ignored the opportunity given to make a clear statement on this doctrine.[121] As Whish noted, "However the Court, no doubt keen to avoid the adoption of this controversial doctrine if possible, concluded that the case could be settled by reference to conventional public international law criteria."[122] In fact, the Court held in _Woodpulp_ that the Community has jurisdiction over a concerted practice or agreement having the object or effect of restricting competition within the EC so long as the practice or agreement is implemented within the EC.[123]

It is suggested that, by its judgement, the Court relied upon a narrow definition of the territoriality principle. Under the territoriality principle, some part of the agreement under examination is said to be located within the territory of the state claiming jurisdiction. Under the 'effects' doctrine, however, the agreements reached are in whole or in part abroad but their effects are located in the territory of the state claiming jurisdiction. In practical terms the difference between the territoriality principle and the effects doctrine may be minimal or even non-existent.

With regard to merger between two non-EC firms possibly the best solution is to conclude treaties between the EC non-member states, such as that concluded with the United States, in order to establish a single regulatory authority in such cases.[124]

Scope ... Powers Finally, the major powers that the Commission possessed with regard to merger control were interim measures and divestiture.[125] Temple Lang wrote that, "The Commission has power by interim measures to halt a merger ... which appears to infringe EC competition law (Camera Care, 1980 ECR 119)."[126] This was on the basis of Article 3(1) of Regulation 17/62. The Commission could also have ordered divestiture under the same part of that Article. As well as these measures the Commission was empowered, under Article 15(2) of Regulation 17/62, to impose a fine on firms in breach of Community law up to 10% of their turnover of the preceding business year.

Conclusions. It is suggested that the merger policy of the Community owes much to the expansionism of DG IV,

aided and abetted by the Court of Justice. By initiating a merger policy DG IV gained further power and autonomy. As Goyder noted, "Competition authorities tend to regard control over mergers ... as one of their most important concerns."[127] The lack of merger control in the EC was a gap in their powers that the Commission felt had to be filled. Quite what the benefit has been to the Community is less clear, for, as stated previously, the rigorous enforcement of a competition policy has not strengthened the Community's economic base. As merger was treated by the Commission as a pure subset of competition policy it is doubtful if the Commission has, in this way, aided the EC or its industry.

A study of ECJ cases and Commission investigations showed that the concept of dominant position was the pivotal point of EC merger control under the Treaty of Rome. It became so almost fortuitously, due to the fact that the Commission was forced to make do with such concepts as were already in existence under the Treaty. However, no matter its origins, the fact that dominance had reached this level of importance meant that it had also to become central to the Merger Control Regulation.

It is also clear from a study of EC merger policy that such policy has followed a different path from that of US competition policy. Following on from Continental Can EC merger policy gradually tightened up its control over mergers, culminating in Philip Morris which brought Article 85 into play. This is in direct contrast to the merger policy pursued in the US over the past decades where, as Chapter Four has shown, there has been a distinct loosening of control on the part of the federal authorities.

As Ponsoldt and Westerhausen wrote, "Congress' dominant concern, prompting the 1950 Celler-Kaufauver Amendment was the rising industrial concentration in the United States economy."[128] In brief, the United States government and congress feared that possible adverse economic effects would result from this situation and passed legislation in order to disperse economic power and to preserve market structure composed of numerous participants and protect their freedom of opportunity.[129] It is suggested that much the same economic rationale was behind the inception of EC merger policy under Article 86. As Fox commented, "The problem and its resolution in **Continental Can** find a strong parallel in the evolution of the (United States) antitrust laws many years before."[130] Further, subsequent EC institutional activity regarding merger using Articles 85 and 86 has continued to follow, and indeed strengthen, the economic philosophy embraced by the Court in Continental Can.

However, merger policy in the United States began to diverge from its previously chosen path in the 1970s, due to the shift in economic conditions. The United States federal authorities began to place greater importance on achieving economic efficiency. Fox wrote, "Since the mid-1970s, however, U.S. law has taken a different course, 'Efficiency' ascended and became the watchword of the 1980s."[131] As Ponsoldt and Westerhausen stated, "United States merger control policy ... regards increased autonomy of firms as a superior route to efficiencies. Non-intervention in the marketplace is preferred over measures which constrain concentration ..."[132]

This theoretical stance of the federal authorities

was translated into action, or rather inaction, in that there was an increased reluctance to challenge mergers. As Ponsoldt and Westerhausen noted, during the 1980s, "...the number and size of corporate mergers have risen astronomically."[133] Thus, the pioneer and principal exponent of antitrust law has seen fit to embark upon, and sustain, a radical change of direction over the same period of time that saw the Community advocate and pursue a policy primarily directed towards combating the so-called adverse effects of concentration. Kauper stated that EC decisions paid little attention to efficiency. He wrote:

> Whether the Community can continue to afford that sort of approach, or whether it will be almost inexorably driven to a consideration of efficiency, as the United States system has been driven, remains to be seen.[134]

Whatever the merits or demerits of EC merger policy until Philip Morris, it could be said that this policy was technically unsatisfactory but workable. After Philip Morris it became both technically unsatisfactory and, on a long term basis, unworkable. The expansion of Article 86 under Philip Morris coupled with the introduction of Article 85 and all its technical problems presaged the end of the ad hoc system of EC merger control. Elland asserted that the law was in a confused and uncertain state.[135] Extensive analysis by academics attempted, in the main unsuccessfully, to suggest possible solutions to many Article 85 problems over merger control. Also, the Commission itself has been equally unsuccessful in this regard. As Fine noted, "Recently the Commission has admitted that Article 85 could only be crudely adapted to mergers..."[136]

1. Advokaterne Bredgade 3 et al, Merger Control in the EEC (London: Kluwer Law and Taxation Publishers, 1988), 222.

2. Ibid.

3. See the Travaux Preparatoires and the EC Treaties. The relevant Treaties are the original EC Treaties. See also, William Diebold, Jr., The Schuman Plan: A Study in Economic Cooperation 1950-1959 (New York: Praeger, 1959); Commission, Europe - A Fresh Start: The Schuman Declaration 1950-90, European Documentation (Luxembourg: Office for Official Publications of the European Communities, 1990). This book also contains an English language version of the Schuman Declaration, see, 43-6.; A summarised translation of the Spaak Report, Part One, was published by Political and Economic Planning as Broadsheet no. 405 (17 December 1956); Jean Monnet, Memoirs (London: Collins, 1978); Walter Hallstein, United Europe: Challenge and Opportunity (London: Oxford University Press, 1962); Robert Marjolin Architect of European Unity: Memoirs 1911-1986, (London: Weidenfeld and Nicolson, 1989).

4. Sir Leon Brittan, "The Development of Merger Control in EEC Competition Law," Speech Given at the Hersch Lauterpact Memorial Lectures Cambridge, 9 February 1990.

5. Advokaterne Bredgade 3 et al, op. cit in note (1), 222-3. This is also the opinion of Woolcock. See S. Woolcock, European Mergers: National or Community Controls (London: Chatham House, The Royal Institute for International Affairs, 1989), 2.

6. Brittan, op. cit in note (4), 3.

7. Memorandum on the Concentration of Enterprises in the Common Market, Study no. 3 (Brussels: Office for Official Publications of the European Communities 1966), 164 and 166-9. An English language version is in Frank L. Fine, Mergers and Joint Ventures in Europe (London: Graham and Trotman, 1989), Annex G. It is from this latter source that references are taken in this text.

8. 6/72 Europemballage Corporation and Continental Can Company Inc. v Commission (1973) ECR 215. This case will henceforth be referred to as Continental Can.

9. O.J. L. 7/25(1972); 1972 Common Market Law Reports D11.

10. Continental Can, op. cit in note (8), 253.

11. Ibid., 254.

12. Ibid.

13. Ibid, 254-6.

14. See, Francis Fishwick, Definition of the Relevant Market in Community Competition Policy (Luxembourg: Office for Official Publications of the European Communities, 1986), 91-96. Fishwick discusses the arguments with regard to the relevant markets in Continental Can.

15. Ibid., 243.

16. Ibid., 244.

17. Ibid., 245.

18. Ibid., 244.

19. A.H. Hermann, "After the Continental Can Judgement," in Dennis Swann and Dennis Lees, Antitrust Policy in Europe (London: The Financial Times, undated), 101.

20. Yale Brozen, Concentration, Mergers, and Public Policy (New York: Macmillan, 1982), 131.

21. Brozen, op. cit in note (20), 131.

22. D.T. Armentano, Antitrust Policy: The Case for Repeal (Washington: Cato Institute, 1986), 21.

23. Armentano, op. cit in note (22), 4.

24. Edward Nevin, The Economics of Europe (London: Macmillan Education, 1990), 120.

25. OJ C 92/1 of 31. 10. 1973.

26. D.G. Goyder, EEC Competition Law (Oxford: Oxford University Press, 1988), 321.

27. Thomas J. Ramsey, "In Support of the Treaty's Fundamental Objectives: A Survey of Recent Developments Concerning the Interpretation of an Abuse of Dominant Position Under Article 86 of the Treaty of Rome," Legal Issues of European Integration (1975): 12.

28. A. P. Jacquemin, "The Criterion of Economic Performance in the Anti-trust Policies of the U.S. and the EEC," Common Market Law Review 7 (1970): 207.

29. Rene Joliet, Monopolisation and Abuse of Dominant Position (Liege: Martinus Nijhoff, 1970), 293.

30. Joel Davidow, "Competition Policy, Merger Control and the European Community's 1992 Program," Columbia Journal of Transnational Law 29 no. 1 (1991): 13.

31. Ibid, 24.

32. Eleanor Fox, "Abuse of a Dominant Position Under the Treaty of Rome - A Comparison with U.S. Law," in Hawk, ed., Antitrust and Trade Policies of the European Economic Community (New York: Matthew Bender, 1983), 376. Hermann, op. cit in note (19), 101, commented that the way the ECJ expressed its views on Article 86, by dint of Articles 2, 3(f) and 85 was 'rather unconventional.'

33. Fox, op. cit in note (32), 376.

34. Julian Maitland-Walker, "Mergers and Concentrations," in Barlo Beckerleg, ed., EEC Competition Law (Oxford: ESC Publishing , 1978), 100.

35. Tenth Report on Competition Policy, 1980, no. 21. 40-48, 50, 54-56, 111, 113, and 114/73 Cooperatieve Vereniging Suiker Unie UA and Others v Commission (Sugar Cartel Case) (1975) ECR 1663; 27/76 United Brands Company and United Brands Continental B.V. v Commission (1978) ECR 207; 22/78 Hugin v Commission (1979) ECR 1869; 85/76 Hoffman-La Roche & Company AG v Commission (1979) ECR 461.

36. Valentine Korah, EEC Competition Law and Practice, 4th ed. (Oxford: ESC Publishing, 1990), 57.

37. United Brands, op. cit in note (35), 277.

38. Ivo van Bael and Jean-Francis Bellis, Competition Law of the EEC, 2nd ed. (Bicester, Oxfordshire: CCH Editions Ltd, 1990), 67.

39. See for example, 298/83 CICCE v Commission 1985 ECR 1105.

40. van Bael and Bellis, op. cit in note (38), 67. See also their note 213 where they cite several Commission investigations as evidence for this opinion. Korah, op. cit in note (36), 67, stated that the Court has been wary of making a forthright statement on dominance.

41. van Bael and Bellis, op. cit in note (38), 69. They give a comprehensive list of such factors at 71-2.

42. See the Hoffman La Roche case, op. cit in note (35), 527-31. There, market shares of 65 per cent and upwards were considered by the Court as sufficient evidence of a dominant position.

43. 81/969 Michelin v Commission (1983) ECR 3461, at 3509-10.

44. van Bael and Bellis, op. cit in note (38), 70. As will be seen further on, with regard to market shares of between 20 and 60 per cent the authorities make use of additional factors to establish a dominant position.

45. 210/81 Demo Studio Schmidt v Commission (1983) ECR 3045; 243/83 Binon & Cie v Agence et Messageries de la Press (1985) ECR 2015; 26/76 Metro v Commission (1977) ECR 1875.

46. See, Michelin, op. cit in note (43), 3509-10; Hoffman-La Roche, op. cit in note (35), 529-31; Napier Brown, British Sugar, OJ 1988 L317/47, at 52.

47. United Brands, op. cit in note (35), 273 and Hoffman-La Roche, op. cit in note (35), 514-5, respectively. van Bael and Bellis, op. cit in note (38), 63-4 provide an extensive list of product markets defined by the Court and/or Commission.

48. Derrick Wyatt and Alan Dashwood, Substantive Law of the European Community, 2nd ed. (London: Sweet and Maxwell, 1987), 406. This point was also made clear by the Court in 40-48, 50, 54-56, 111, 113, and 114/73 Suiker Unie and Others v Commission (1975) ECR, 1977.

49. Flat Glass, (1989) 1 CEC 2077; OJ 1989 L33/44, 65; Napier Brown-British Sugar, op. cit in note (46), 50-52; London European-Sabena (1989) 1 CEC 2278; OJ 1988 L317/47.

50. 247/86 Alstel v Novasam (1988) ECR 5987.

51. Wyatt and dashwood, op. cit in note (48), 408.

52. United Brands, op. cit in note (35); 77/77 B.P. v Commission (1978) ECR 1511; 6 and 7/73R Commercial Solvents v Commission ECR (1974) 223.

53. Hoffman-La Roche, op. cit in note (35), 541.

54. Korah, op. cit in note (36), 73.

55. Tenth Report on Competition Policy, 1980, no. 150.

56. 142/84 and 156/84 British American Tobacco Company and R.J.Reynolds Industries Inc. v Commission (1987) 4 CMLR 24. This case will be hereinafter referred to as Philip Morris. Mario Siragusa, "Current Procedural and Litigation Aspects of Mergers and Takeovers," in Barry E. Hawk, ed., 1989 Fordham Corporate Law Institute: 1992 and EEC/US Competition and Trade Law (New York: Transnational Juris Publications, 1990), 514. Hoffman-La Roche, op. cit in note (35),

57. Fine, op. cit in note (7), 34.

58. Philip Morris, op. cit in note (56), 65.

59. Siragusa, _op. cit_ in note (56), 510-11.

60. Korah, _op. cit_ in note (36), 57.

61. Ibid, 59-60.

62. van Bael and Bellis, _op. cit_ in note (38), 72-4. More generally, Korah also takes the Commission and the Court to task for the sparsity of economic analysis. See Korah, _op. cit_ in note (36), Chapter 14.

63. Korah, _op. cit_ in note (36), 61.

64. Ibid, 57.

65. Ibid, 67.

66. Advokaterne Bredgade 3 et al, _op. cit_ in note (1), 250.

67. Philip Morris, _op. cit_ in note (56), 58.

68. Ibid.

69. Ibid.

70. William Elland, "Merger Control by the EEC Commission," _European Competition Law Review_ (1987): 168-172; Theodore L. Banks, "Mergers and Partial Mergers under EEC Law," _Fordham International Law Journal_ 11 (1988): 253; Frank L. Fine, "The Philip Morris Judgement: Does Article 85 Now Extend to Mergers?" _European Competition Law Review_ 8 (1988): 333-43, Fine, _op. cit_ in note (7), Chapters 2 and 4; Willem J.L. Calkoen and J.J. Feenstra, "Acquisition and Sales of Shares in Other Companies and EEC Competition Policy: The Philip Morris Decision," _International Business Lawyer_ 16 (April 1988): 167-170; Valentine Korah, "The Control of Mergers Under EEC Competition Law," _European Community Law Review_

(1987): 245-255, Korah and Paul Lasok, "Philip Morris and its Aftermath - Merger Control?" Common Market Law Review (1988): 333-368; William Brown, "The Philip Morris Case," Journal of Business Law (1988): 351-6, 432-6, and 514-17; Robert Strivens, "The Philip Morris Case: Share Acquisitions and Complainants Rights," European Intellectual Property Review 6 (1988): 163-171; Lynda Martin, "Merger Control by the Commission Under Article 85? The Philip Morris Case," Business Law Review 27 (1988): 27-29; Advokaterne Bredgade 3 et al, Merger Control in the EEC, 263-279; Richard Whish, Competition Law, 2nd ed. (Sweet and Maxwell), 1989), 740-747; S.J. Berwin & Co, Company Law and Competition (London: Mercury Books, 1989), Chapter 9; van Bael and Bellis, op. cit in note (38), 303-4; T. Anthony Downes and Julian Ellison, The Legal Control of Mergers in the EC (London: Blackstone Press, 1991), 18-25.

71. Siragusa, op. cit in note (56), 518.

72. Christopher Bellamy and Graham D. Child, Common Market Law of Competition: First Supplement to the Third Edition (London: Sweet and Maxwell, 1991), 91-2.

73. Ibid, 92. As will be seen further on in this chapter, the Commission takes the view Article 85 applies to full mergers.

74. Downes and Ellison, op. cit in note (70), 22.

75. Fine, op. cit in note (70), 333.

76. Fine, op. cit in note (7), 19.

77. Sirguisa, op. cit in note (56), 519.

78. Fine, op. cit in note (7), 21.

79. Ibid.

80. Berwin, <u>op. cit</u> in note (70), 121.

81. Korah, <u>op. cit</u> in note (36), 255

82. Sutherland is quoted in Martin, <u>op. cit</u> in note (70), 29

83. Advokaterne Bredgade 3 et al, <u>op. cit</u> in note (1), 221.

84. Brown, <u>op. cit</u> in note (70), 517.

85. Korah, <u>op. cit</u> in note (36), 212.

86. Fine, <u>op. cit</u> in note (7), 17.

87. Advokaterne Bredgade 3 et al, <u>op. cit</u> in note (1), 274.

88. Fine, <u>op. cit</u> in note (7), 164-166. The Commission summed up thus, 166, "... it is not possible to apply Article 85 to agreements whose purpose is the acquisition of total or partial ownership of firms (merger, acquisition of holdings, purchase of part of the assets).

89. Advokaterne Bredgade 3 et al, <u>op. cit</u> in note (1), 230.

90. Ibid, 224; John Temple Lang, "Notes for a Lecture on Concentration and Restructuring in the European Community - Mergers under European Community Antitrust Law," <u>Lecture Given to the International Bar Association, Strasbourg</u>, October 1989, 4; Fine, <u>op. cit</u> in note (7), 22-8.

91. This is the opinion of Temple Lang, <u>op. cit</u> in note (90).

92. See Korah, "The Control of Mergers under EEC Competition Law," op. cit in note (70), 248. Korah wrote that, "The Court is fingering Pandora's Box." See also, Advocaterne, op. cit in note (1), 224.

93. Advokaterne Bregade 3 et al, op. cit in note (1), 234.

94. Tetra Pak, O.J. (1988) L 272/27. This decision was appealed to the Court of Justice, T-51/89 Tetra Pak Rausing v Commission (1991) 4CMLR 334. The second case was that of Metaleurop O.J. (1990) L179/41. Here the Commission actually adopted a negative clearance but issued a decision, thus breaking its long tradition of closing 'clear' cases on an informal basis.

The cases which did not come to a final decision were, Pilkington/BSN-Gervais-Danone, Tenth Report on Competition Policy, no. 152; Amicon Corporation/Fortia AB and Wright Scientific Ltd, Eleventh Report on Competition Policy, no. 112. Not yet reported is Douwe Egberts and Van Nelle, where the Commission allowed the merger of these two Netherlands coffee firms to proceed, in spite of a recommendation to the contrary by Sir Leon Brittan. See, Lucy Kellaway, "Brittan Snubbed over Merger," Financial Times (27 November 1990); Robert Rice, "Storm in a Coffee Cup Highlights EC Contest over Competition." Financial Times (10 December 1990).

There are also instances where the Commission has examined a situation but decided that, for some reason, Article 86 did not apply. See, for example, Michelin & Cie S.A. and Michelin Netherland/Actor NV, Eighth Report on Competition Policy, no. 146; AVEBE/KSH, Eighth Report on Competition Policy, no. 147; Peugeot-Citroen/Chrysler Corporation, Eighth Report on Competition Policy, no. 149; Kaiser/Estel, Ninth Report on Competition Policy, no. 131; Coats Paton Ltd/Gutermann & Co, Ninth Report on

Competition Policy, no. 132; Fichtel & Sachs/Huret, Ninth Report on Competition Policy, no. 133; Michelin/Kleber-Colombes, Tenth Report on Competition Policy, no. 156; Baxter Travenol Laboratories/Smith Kline RIT, Tenth Report on Competition Policy, no. 157; Sheffield Forgemasters, Twelfth Report on Competition Policy, no. 100; Eagle Star Allianz Versicherung, Twelfth Report on Competition Policy, no. 103; British Sugar-Berisford, Twelfth Report on Competition Policy, no 104; British Bright Bar Limited, Thirteenth Report on Competition Policy, no. 160; Dilligen/Bergrohr, Thirteenth Report on Competition Policy, no. 162; British Steel Corporation-TI Group, Thirteenth Report on Competition Policy, no. 163; Fagersta-Sandvik Tube AB, Thirteenth Report on Competition Policy, no. 164; Berisford Napier/Brown Thirteenth Report on Competition Policy, no. 166; Klockner-Krupp, Fourteenth Report on Competition Policy, no. 106; Ashland Oil Incorporated-Cabot Company, Fourteenth Report on Competition Policy, no. 109: Pont-a-Mousson/Stanton & Stavely, Fourteenth Report on Competition Policy, no. 110. More recent Reports on Competition Policy contain few references to informal settlement practice. However, press reports show that the Commission had been fairly active in this area, especially since Philip Morris, op. cit in note (56).

95. Whish, op. cit in note (70), 750.

96. John Temple Lang, His views were quoted in Advocaterne Bredgade 3 et al, op. cit in note (1), 238. A contrary view was held by Paul Lasok. He said, "... having regard to the increasingly complex web of rules and provisions facing companies intending a merger, a company may favour the pragmatic option of consummating the merger at the earliest possible opportunity, because

the later in time the Commission becomes involved, the less it can do to prevent the merger, despite the theoretical possibility of divestiture." Solicitors' European Group North West Region, Seminar on Mergers and EEC Competition Law, 15 September 1988, 4.

97. Quoted in Clifford Chance, Takeovers and Mergers in Europe (London: Clifford Chance Publications, 1989), 96.

98. Carnaud/Sacilor, Commission Press Release IP (88) 14, (12 January 1988); British Airways/British Caledonian, Commission Press Release IP (88) 131, (9 March 1988); GC&C/Irish Distillers, Commission Press Release IP (88) 512, (17 August 1988);GEC/Siemens/Plessy, European Report, Part III, 2-3, (14 January 1989) and European Report, Part III, 6-7, (22 April 1989); Minorco/Consolidated Goldfields, Commission Press Release IP (89) 85, (17 February 1989) and European Report, Part III, 11 (4 February 1989). On these cases generally see, Fine, op. cit in note (7), 40-42. On GC&C/Irish Distillers, see the account by Berwin, op. cit in note (70), 158-162. Berwin acted in the UK for the Irish Distillers Group.

99. This is noted in Berwin, op. cit in note (70), 121.

100. Advokaterne Bredgade 3 et al, op. cit in note (1), 278-9.

101. Ibid., 278.

102. Temple Lang, op. cit in note (90), 5.

103. Ibid., 1.

104. Ibid., 2.

105. Ibid., 1.

106. Ibid., 2.

107. Ibid.

108. See Philip Morris, op. cit in note (56), 47, 61, 65. See also, Fine, op. cit in note (7), 36-7.

109. P.J.G. Kapteyn and P. Verloren van Themaat, Introduction to the Law of the European Communities after the Coming into Force of the Single European Act, 2nd ed. (London: Graham and Trotman, 1989), 562.

110. Advokaterne Bredgade 3 et al, op. cit in note (1), 247-9.

111. Ibid, 248.

112. See on this, Fine, op. cit in note (7), 96-103.

113. Advokaterne Bredgade 3 et al, op. cit in note (1), 249-50.

114. Temple Lang, op. cit in note (90), 5.

115. Enforcement jurisdiction, which was what Temple Lange was possibly doubtful over, was, however, more problematic.

116. Advocaterne Bredgade 3 et al, op. cit in note (1), 250; Temple Lang, op. cit in note (90), 5.

117. Advocaterne Bredgade 3 et al, op. cit in note (1), 250. It could be questioned if it was worthwhile to establish jurisdiction on such cases. However, given that there exist both legislative jurisdiction and enforcement jurisdiction the former, at least, is worth establishing.

118. With regard to the 'effects' doctrine and its relevance to the EC the following sources are of relevance. Fine, op. cit in note (7), 96-103; Whish, op. cit in note (70), 387-90; J.E. Ferry, "Towards Completing the Charm: The Woodpulp Judgement," European Competition Law Review 10 No. 1 (1989): 59-73; Dieter G.F. Lange and John Byron Sandage, "The Wood Pulp Decision and its Implications for the Scope of EC Competition Law," Common Market Law Review 26 (1989): 137-165; Walter van Gerven, "EC Jurisdiction in Antitrust Matters: The **WOOD PULP** Judgement," in Hawk, ed., op cit in note (56).

119. Ferry, op. cit in note (118), 63.

120. Lange and Sandage, op. cit in note (118), 143-5. See also, Ferry, op. cit in note (118), 59-60. Also of interest is the penultimate Considerant of the 'Dyestuffs' Decision of 24 July 1969: O.J. L195 of 1969; The 'Eastern Aluminum' Decision of 19th December 1984. O.J. L92 of 30 March 1985 at 1 at paragraphs 14.6; 48/69 Imperial Chemical Industries v Commission (1972) ECR 619, especially the opinion of Advocate General Mayras, 693-4.

121. 89/85, 104/85, 116-7/85, and 125-29/85 A. Ahlstrom Osakeyhtio v Commission (1988) 4 CMLR 901. Hereinafter, this case will be referred to as 'Woodpulp.'

122. Whish, op. cit in note (70), 389.

123. Woodpulp, op. cit in note (121). See judgement, paragraphs 11-23, at, 940-2.

124. This has already happened between the EC and the United States. The "Competition Laws Co-operation Agreement 1991 (EEC - USA)" entered into force on 23rd September 1991.

125. On the powers of the Commission see Advokaterne Bredgade 3 et al, <u>op. cit</u> in note (1), 250-262; Fine, <u>op. cit</u> in note (7), 93-95.

126. Temple Lang, <u>op. cit</u> in note (90), 2. 792/79 <u>Camera Care Limited</u> v <u>Commission</u> (1980) ECR 119. See also the Practice Note of the Commission, Practice Note-Applications to the EEC Commission for Interim Measures under Article 3 of Regulation 17, (1980) 2 CMLR 369.

127. Goyder, <u>op. cit</u> in note (26), 320.

128. J.F. Ponsoldt and F. Westerhausen, "Competition and/or Efficiency: A Review of West German Antimerger Law as a Model for the Proposed Treatment of Efficiency Promotion Under Section 7 of the Clayton Act," <u>Northwestern Journal of International Law and Business</u> 9 (1988): 302.

129. See Fox, <u>op. cit</u> in note (32), 370; Ponsoldt and Westerhausen, <u>op. cit</u> in note (128), 302.

130. Fox, <u>op. cit</u> in note (32), 379.

131. Ibid, 370.

132. Ponsoldt and Westerhausen, <u>op. cit</u> in note (128), 300.

133. Ibid, 296.

134. Thomas Kauper, "Dominant Positions and Their Abuse under Article 86," in Hawk, ed., <u>op. cit</u> in note (56), 689.

135. William Elland, "The Mergers Control Regulation (EEC) No. 4064/89," <u>European Competition Law Review</u> no. 3 (1990): 112. See also Siragusa, <u>op. cit</u> in note (56), 532-3.

136. Fine, op. cit in note (7), 28.

6. LEVELLING THE PLAYING FIELD

Chapter Six is a necessary digression from the main theme of this text, the merger policy of the EC at the level of the Commission and Member State authorities. In that context, the topic of mergers is being tackled on the public law level. Chapter Six, however, deals with mergers primarily on the private law level.

The actual subject of all the law and policy of the Community in this area is the firm and its activities with regard to merger. In particular, cross-border merger activity is of the keenest interest to the EC. Sir Leon Brittan has stated, "The scope of the Commission's activities is trade between member states. Any merger between companies whose operations are entirely within one and the same member state will not usually affect inter-state trade. On the other hand cross-border mergers do attract our attention when they fulfill certain criteria ..."[1] Yet such activity, where a cross-border merger is undertaken, is a two stage process. Before satisfying Community and/or national public law requirements, the firm may have had to surmount numerous private law obstacles to merger. This represents an aspect of the problem of the level playing field.

This problem, and its specific impact on cross-border mergers is, in fact, a subject that is receiving ever-increasing Community attention. Therefore, in order to produce a comprehensive analysis of Community policy on mergers, EC activity in the field of harmonisation of national company law must be studied. In this way, much valuable information may be gained which adds to the major arguments in the next chapter. Has the approach to formulating the Merger Control Regulation been consistent

with the treatment of national obstacles to merger? Should it be? That is, must the Merger Control Regulation fit in with the logic of what is happening at the ground level?

Barriers to cross-border merger

A major point made in this text has been that, due to the global economic situation and also to 1992, merger activity has been on the increase.[2] The majority of EC mergers that have taken place have been between firms registered in one state.[3] However, there has also been a significant increase in the number of cross-border mergers within the Community. The 19th Report on Competition Policy stated that "As regards the nationality of firms concerned, whilst the number of purely national operations continued to predominate, there was a significant shift towards operations between firms from different Member States."[4] Further, there is every indication that such actions will continue to increase.[5] As Scherer noted, "... more intensive efforts to create trans-European enterprises can be expected."[6]

This specific form of merger activity means that firms are having to face, and deal with, the problem of the level playing field. In general, this concerns the national company laws and customs of the Member States of the EC. Due to the lack of impact of harmonisation efforts in this area and to the constantly increasing number of Community members, national laws regarding firms and state attitudes towards business practices are still diverse in their nature. There is, therefore, a particular problem in that the Community harbours a bewildering variety of legal and cultural barriers to cross-border merger.[7] In consequence, the process of

merger between firms registered in different Member States is often, at best, a more lengthy and complex affair than the equivalent arrangement between firms registered in a single state. At worst, the merger simply does not take place.[8]

The breaking down of barriers to cross-border merger would also assist in the construction of the single market.[9] As stated previously, an ambition of the single market is to strengthen the industrial base of Europe and thus meet the challenge from non-EC firms. European firms are therefore at the forefront of this global industrial battle. Speaking generally, merger is a major weapon employed by industry in order to improve efficiency. As Taverne stated, "Takeovers, ... are the market's mechanism for rechannelling under-used resources to more profitable and productive use. ... the threat of takeovers acts as a spur to managers generally to manage companies more efficiently ..."[10]

There is also evidence to suggest that cross-border mergers, in particular, promote efficiency. An OECD report on international mergers concluded:

> The competitive effects of international mergers do not seem to differ greatly from those of wholly domestic mergers. However, the efficiency-enhancing potential of mergers may be increased across borders; ...[11]

The levelling of the playing field is in accordance with the fundamental general principles of the Community. The Commission has written, "The Community's aim in company law is to create a homogeneous legal area, which would operate to the benefit of all interested parties. This would help to realise the objectives of the

Treaty of Rome ..."[12] Thus, the harmonisation of company law is an ongoing part of Community integration. The same kind of action with regard to merger barriers must, therefore, also be in accordance with these ideas and principles. More specifically, removing barriers to takeovers would eliminate, or at least reduce, any unfair industrial advantages of Member States whose laws and customs render their own firms virtually immune from an unwelcome merger offer.

In order to decide whether or not merger is an attractive option for a firm, many decisions must be made. The initial part of this process is to gauge the current state of the market in general. Such analysis may help a firm to decide that a merger would be the best plan for the firm to adopt. Any firm should, of course, be aware of the state of the market in general terms at all times. However, where a merger is being considered as part of the strategic plan of the firm, a more complete analysis of the market situation ought to be undertaken. This strategy assumes even greater relevance where the firm has, until now, seen its market as existing primarily within the confines of the home state.

Having decided that a merger should be undertaken, a specific target must then be found. As a large number of firms may be operating in any particular industry within the Community market, this is a difficult task.[13] Once an individual firm has been identified and selected there follows a process of introduction and merger. First, the owners of the firm must be identified. Next, the managers of the firm should be contacted and, if possible, be persuaded to agree to a merger. In some cases the management may also be the owners of the firm. Should this procedure fail, a hostile bid must then be

considered. Where the management do not own the firm, an approach is directly to the owners over the heads of the management. The management, of course, may then also issue their own recommendations to shareholders.

Having successfully completed a merger procedure, the firm is then faced with possibly the most difficult of all its tasks to date. It must integrate the two firms into one cohesive unit while ensuring, as far as practicable, continuity of business in all markets.[14]

Barriers to Merger Process The availability of financial and commercial information is relevant to market and strategic analysis, and to identification and analysis of a target. It is also of significance in post merger integration, in that lack of such information can hinder the processes of shifting control between the firms and of exercising authority within the merged firm.

A major problem regarding financial and commercial information is that it is not uniformly available. The information needed by firms contemplating merger is not freely accessible within all Member States. That conclusion was reached by Coopers and Lybrand as the result of a comprehensive survey of the availability of information within Member States. The study employed a classification of larger and lesser economies.

As to the larger economies, the United Kingdom, France, Germany and the Netherlands all have a good record.[15] In particular, as Coopers and Lybrand stated, "The UK has an unusually extensive range of financial and commercial information available at modest cost, one that is underpinned by the long-established public availability of reliable records for most significant

businesses."[16] Of the remaining larger economies, both Spain and Italy were criticised for being markedly inferior to the above in extent, reliability or timeliness of information. As to the lesser economies, lack of market information was held to be a significant problem in Portugal and Greece.[17]

A further difficulty concerning financial and commercial information is the uneven quality of the material. This problem has particular regard to identification and analysis of a target. It is also of relevance for post merger integration, for much the same reasons as those given with regard to the availability, or otherwise, of information. Coopers and Lybrand singled out four specific features worthy of particular consideration by the firm when assessing financial and commercial information. Are filing requirements actually complied with? Is the filed information reliable? Is the filed information sufficiently comparable to be useful? Is there information on control and ownership? They concluded that, for a variety of reasons, the quality of the material is poor in one or more of these respects in most Member States.[18]

Structural barriers with regard to quoted firms may present a considerable obstacle to the approach to, and merger with, the target. In general, the term structural barriers covers the situation where the major shareholders of the firm are part of a small, tightly-knit group. Here, the effective power of ownership tends to lie, not with public institutions, but with parties who have a direct interest in the ongoing viability and growth of the firm.[19] Another factor often contributing to this type of barrier is that the identity or identities of many of these owners is outwith the

public domain. Coopers and Lybrand found significant evidence of such structural barriers in Spain, France and Italy.[20] However, Sir Leon Brittan considered Germany to have major structural barriers. He spoke of the extensive cross-holdings of banks and other institutions in that country.[21]

Technical barriers concern the legal make up of the firm. Like structural barriers, they are also a source of difficulties as regards approaching and merging with a quoted target firm. In addition they are relevant to post merger integration. The predator firm will often wish to install its own executives in the target firm, but, because of technical barriers, may find itself in difficulties. The particular composition of a firm may constitute an obstacle which could make merger a difficult process, or indeed prevent it altogether. Coopers and Lybrand noted that technical barriers were present primarily in Germany and the Netherlands. They believed the reason for the lack of such barriers in most other Member States was due to the fact that, where they were absent, structural barriers made them unnecessary.

Coopers and Lybrand outlined the major technical barriers in Germany and the Netherlands as follows.

(a) the two tier board structure, which leads to delay in changing the management board (Germany) or no power to change either board (Netherlands, if a Structuur Vennootschaps company);

(b) powers to issue non-voting shares for purposes of listing (Germany);

(c) powers to issue priority shares to safeguard the Articles, or to issue registered preferred shares during an offer, in either case to a nominally independent foundation (Netherlands);

(d) maximum limit to voting rights (Germany);
(e) lack of public access to shareholders, through use of bearer shares and no public access, except by existing shareholders, to a share register if one exists;
(f) the power of the depository institution for bearer to hold proxy for the related votes; and
g) the broader power of the three main German banks, in their roles as depositories (above), as shareholders and as members of supervisory boards.[22]

With regard to Germany, there is not universal agreement among academics as to whether or not technical barriers make merger a more difficult proposition. The majority view is that the barriers do constitute a formidable obstacle to merger. Raun noted that "... German firms, ... come armed with the toughest anti-takeover defences in the EEC."[23] Lutter and Lammers stated, "... there is almost universal agreement in the literature on this topic that Germany does not provide a suitable field of operation for company takeovers of the American type."[24] Otto, however, believes that the much vaunted obstacles to merger are nothing more than a myth. After an analysis of the technical barriers he concluded that "... the German market remains one of the most liberal and least regulated of the western world."[25]

As to Holland, there seems to be a generally agreed view among commentators that the Dutch defences are, at present, at least as formidable as their reputation.[26]

Cultural differences also pose obstacles to cross-border merger. Culture is akin to fundamental general principles in that, in many cases, it may be regarded as the reason behind rules and practices. Its influence on

barriers is both subtle and pervasive. Culture can be defined as a form of civilization. More specifically, culture is the interpretation by the majority of people within a state of aspects of life, based upon their identity as members of society/societies within that state. Thus, the individuals, and to a large extent also, the authorities of a state, tend to hold a particular view of business activities which is reflected both in the business practices and the commercial law of the state. With the multiplicity of states in the world, nations have evolved diverse views on specific business practices and law. This holds equally true for the Member States of the EC.

In a general sense all barriers to cross-border merger are the result of dissimilar cultures. More specifically, culture clearly lies behind barriers to the processes of approach to and merger with target and post merger integration in general and in part at least, is the reason behind those obstacles specifically erected by the state to control the merger activities of foreign firms within the state.

A majority of Member States do not feature either merger or contested merger as having any major part to play in their business culture.[27] Thus, where diverse cultural attitudes have produced both structural and/or technical barriers to merger within a Member State, a firm from a more open business culture will be faced with problems in attempting a cross-border merger. These are not just from the barriers themselves but also from the likelihood of businesses within that state not having familiarity with, and possibly having hostility to, an offer to merge which emanates from a foreign firm.

Integration within the firm may be hindered by a predator firm having to adapt to the specific business law and conventions of the Member State in which the target firm is located.[28] Dealwatch has stated, "... a clash of corporate or national cultures during post-acquisition integration can turn the ideal vehicle for international expansion into a trouble-prone embarrassment ..."[29]

A further, more subtle, difficulty facing the post-merger firm is that of establishing, or more probably, re-establishing, a good relationship with the suppliers and customers of the target firm. This may pose problems on two levels.

First, there are the problems of any new management gaining knowledge of, and adapting to, the methods of doing business with the legal or natural persons engaged in a commercial relationship with the target firm. There must be a period of transition where the new management gets to know all the external parties that the target firm dealt with and becomes accustomed to local business practices. Further, the management may wish to impose its own brand of business methods on external parties. Again this requires a period of explanation and adjustment.

Second, there may prove to be additional difficulties regarding the re-integration of the firm in any culture that sees the merger process in an unfavourable light. Thus, where the actual deal was a takeover, or even worse a hostile takeover, there may be lingering resentment among external parties.[30] Further, whether or not such feeling exists, there may be worries among those dealing with the firm that the takeover, perceived, of course, as a distasteful practice, has

upset the delicate balance of relationships with third parties. Where the predator firm was foreign, these feelings may be heightened. If so, the predator firm must recognise this fact and try to overcome this hostility.

Dissimilar barriers must also be considered at this point.[31] Other considerations apart from culture assist in the formulation of government barriers to cross-border merger. Economics is one example. Culture, however, plays its part in the decisions as to precisely which barriers a state chooses to erect, if any. For example, many Member States have no barriers to foreign investment at all.

A further interpretation of culture as the motivation behind dissimilar barriers is xenophobia. Barriers may occasionally be a method of keeping out investment from abroad, due primarily to a distrust or fear of foreigners. Even public law barriers such as rules on competition and restrictions in the national public interest which are applied by the Member State to home and foreign merger proposals alike may be put to such use. With regard to firms from Member States, however, dissimilar barriers (or barriers operated dissimilarly) should pose few problems in theory, due to the right of establishment.

Conclusions. The situation in the majority of Member States does not favour mergers in general and contested mergers in particular. This can be shown by the array of structural or technical barriers to merger that exist in many Member States. Nevertheless an examination of the barriers to merger gives the lie to the assertion that impediments to hostile merger are the only obstacles to merger that a firm needs to consider. As was shown, major

barriers exist in most Member States, at every stage of the merger process, whether or not the merger is agreed between the parties or is unwelcome to the target firm.

This point was emphasised by Coopers and Lybrand. They wrote, "In the course of our study many M&A advisors have put to us the view that, whilst contested bids may be effectively barred in most EC countries outside the UK, there are no such barriers to an agreed deal, whether public or private. We believe this to be a dangerous oversimplification, one only valid in respect of closely-controlled private companies."[32]

EC legislation

The major active force that may help to level the playing field as regards cross-border mergers is Community legislation. The general area of Community legislative effort of relevance here concerns the harmonisation of company law in general.[33] There is, however, a major undertaking by the Community with regard to legislation directed specifically at barriers to merger.

In 1989 Coopers and Lybrand identified twenty-nine directives and regulations as relevant to the acquisition process, of which thirteen had been adopted by the Community and were in the process of being implemented by the Member States.[34] Much legislation, however, is still proceeding through the draft stage. Further, there is, of course, an ongoing process regarding fresh initiatives for new merger legislation.

In order to gain a greater understanding of the law in this area it may be asked whether Community company

law was, and is, being harmonised with any specific objectives in mind? Are there any general principles which may be discerned from a study of the law?

The promotion of 'mobility' and 'fair competition' among firms are two general principles of law that form part of the foundations of the Community legal order. As such, they also underpin the programme of the harmonisation of company law. This point has been noted by various commentators. For example, Dine has written that "Company law harmonisation is aimed at the realisation of complete freedom of establishment."[35] Coopers and Lybrand stated, "... the promotion of mobility ... and fair competition amongst companies throughout the EC is inherent in all EC company legislation, ..."[36]

Other relevant general principles are 'transparency' and 'responsibility.' Both are more directly relevant to merger than mobility and fair competition. While lacking the universality, and indeed the prominence, of mobility and fair competition, transparency and responsibility are nevertheless present in much of the adopted or proposed Community legislation concerning barriers to merger. Many pieces of merger legislation, both adopted and proposed, explicitly seek to promote these goals.[37]

Transparency is where the firm is as open as possible to the public gaze. In particular, it relates to the disclosure of the financial position of the firm and its plans and activities, to employees, creditors and other interested third parties. The rationale behind the concept of transparency is that all the above mentioned parties have equal access to all relevant information needed by them in order that they may take informed

decisions concerning their future and well-being. Legislation on transparency concerns the regulation both of the degree and the quality of company information to be disclosed to the public, employees and shareholders. Examples of such legislative acts are the First, Fourth and Seventh Directives, which concern setting up company registers, publication and standardisation of accounts and consolidation of group accounts respectively.[38]

Responsibility is a term used to cover legislation that concerns the promotion of social dialogue on the spread of responsibility among various groups within, or having a direct interest in, the firm, in particular management, shareholders and employees. The legislation in this area is proposed rather than enacted. It concerns, primarily, the control of the responsibilities of management and directors.

With regard to EC merger legislation, both actual and proposed, there is no clearly decisive influence apparent from any particular Member State. German national laws were possibly the most influential role models for EC merger legislation in the early stages of its creation.[39] However, in the present dynamic process of shaping and reshaping directives for adoption, the situation is somewhat more fluid, with concerned Member States lobbying hard to try to protect and promote their individual viewpoints.[40] Thus, no particular national legislation holds undue sway with the Commission.

As to the latest thinking of the Commission, however, it may be that it wishes to follow the path of making mergers within the EC easier to accomplish. Martin Bangemann, the Commissioner responsible for DG XV's section on company law harmonisation presented, in May

1990, a memorandum 'Obstacles to Takeover Bids,' which Oudemans believed represented, "... a policy view, as of that time at least, of the entire Commission."[41] The Commission stated that "... in general, takeover bids may be viewed in a positive light in that they encourage the selection by market forces of the most competitive companies and the restructuring of European Companies, which is indispensable to meet international competition."[42]

Is Community law successful in bringing down barriers? The answer to this question is that Community legislation, both actual and proposed, does not and will not, to any great extent in the foreseeable future, succeed in levelling the playing field.[43]

Within the majority of states, company law, by its very nature, tends to be both difficult and intricate. Much of supranational company legislation follows this pattern. As Dine wrote, "It has been argued that the directives are too detailed ..."[44] As a natural consequence, the law-making process, in all its various stages, is relatively slow. This results in the adoption date of any final document being much delayed, even where the document is relatively uncontroversial.

This is also the case with legislation pertaining to mergers. Thus, a comprehensive body of Community law pertaining to mergers is still some way off. As the bulk of the proposed legislation is indeed relatively intricate it may be assumed that it will be some considerable time before the majority of directives are adopted.[45]

A good proportion of the proposed laws are highly

contentious and are the subject of fierce debate. In particular, some Member States resent, as they see it, the over-intrusion of the Community into domestic company law. As a result, controversial directive proposals may be significantly diluted prior to adoption. Further, the actual adoption itself may be delayed.

EC legislation in this area also suffers from problems of enforcement. This refers to difficulties in making the firms comply with the national measures that realise the directives rather than any problems over the Member State enacting legislation in order to follow the directive.[46] These difficulties may arise from firms not observing the letter of the law, rather than merely going against its spirit, and second, from the possibility of Member States being lax in seeing the law is implemented.[47] Coopers and Lybrand saw enforcement as the greatest practical problem faced by the Community in its attempt to level the playing field.

As to the first difficulty, they wrote, "The European Commission lacks the power and the resources to ensure that companies abide by the national measures that implement directives. This is within the jurisdiction of the Member State."[48] The second difficulty was of a similar nature. The ECJ has jurisdiction only over Member States, for failure to implement legislation. The Court has no jurisdiction over firms which fail to comply with national legislation. For example, the failure of a firm to file accounts on time could only be dealt with under national law.

Though it is not easy to suggest a more feasible alternative, the directive is not a perfect instrument with which to accomplish the levelling of the playing

field. Waller noted that the Commission was unhappy with accounting harmonisation. He reported that:

> The Commission believes that the Fourth and Seventh Company Law Directives, tackling basic areas of accounting have achieved a degree of harmonisation ... But the Commission's stance now is that directives take too long to implement, are not comprehensive and allow too much freedom to Member States.[49]

A study of EC activity in this field leads to the provisional conclusion that the Commission has lost its way somewhat. It either no longer has a clear objective it wishes to accomplish, or it has tacitly admitted failure in achieving its objective. In 1989 Buchan noted, "The European Commission admits that its earlier drive to harmonise member states' company law ... ran out of steam some time ago."[50] Coopers and Lybrand argued "While the European Commission's original policy in the development of company law directives was that of harmonisation of national laws there now appears to be a change in policy emphasis towards the 'adoption of a policy of mutual recognition of national laws rather than harmonisation'."[51]

With regard to barriers relevant to merger, however, it is premature to conclude that the Commission is a spent force. Kellaway had reported in November 1989 that the Commission was ready to launch a fresh initiative on harmonisation of law in this area.[52] The Department of Trade and Industry noted that "In May 1990 the Commission submitted proposals to the Council on the reduction and elimination of obstacles to takeovers and other general bids."[53]

The United Kingdom, which has the most open policy on cross-border mergers within the Community, is playing its part in keeping the Commission up to scratch.[54] The UK commissioned the Coopers and Lybrand report on takeover barriers primarily in order to provide evidence that would convince the Commission to step up its efforts to level the playing field.[55]

Structure and culture are the major obstacles to levelling the barriers. Due to their special nature, however, they cannot be dealt with effectively by legislation. This was recognised by Sir Leon Brittan, who stated, "It is easier to propose measures to reduce regulatory obstacles than it is to reduce structural obstacles."[56] He also allowed that regulations could not deal with, "... simple cultural resistance in some countries to the dilution of national ownership of important businesses."[57] Coopers and Lybrand also noted that structure and culture presented a problem for the Community:

> In addition there are the barriers to takeovers related to economic, cultural and ownership issues. Since these barriers are deeply ingrained in the cultural and economic infrastructure of each country, it is difficult for the Commission to attempt to resolve these issues through Community level legislation.[58]

Oudemans has concluded that this situation could result in a most uneven playing field within the Community.[59]

There are, however, various means of rendering EC legislation more effective. Legislation may be more productive if it is accurately targeted. With regard to Community law on the level playing field, it could be advantageous to work out some form of framework which

encompasses barriers to mergers. Coopers and Lybrand took this view, arguing "As a starting point for considering how to remove barriers to takeovers, we suggest that the barriers be grouped under some unifying concepts." They suggested the following concepts:

> a) shareholders rights of control in quoted companies; b) 'shareholder value', whether as direct investors or through institutions, to be the right of investors; c) full and free disclosure of ownership, without the intervention of management; d) ready access to reliable and timely information; e) equal treatment under legal or antitrust procedures;[60]

A further suggestion is to enact legislation to prevent the formation of new technical barriers. It will be argued later that global economic forces are beginning to affect structural barriers. Businesses are adapting to such forces more quickly than are Member States. If so, it would be an opportune moment for the Community to ensure that legislation was enacted to prevent Member States from attempting to retard its transformation by erecting new technical barriers to replace the structural ones.

Finally, it would be advantageous to persevere with the idea of the European Company.[61] For over two decades the Commission has been attempting to establish a new corporate vehicle - a European Company, or Societas Europea, (SE). The Commission has stated that the SE is designed to enable firms governed by their national laws to choose a structure for cooperation and restructuring more suited to the single market. The European Company Statute offers them an optional structure based on Community law and independent of national laws, in so

far as these have not been harmonised.[62] In particular, as Berwin stated, "The intended role of the SE is to facilitate cross-border co-operation by means of large scale mergers and associations ..."[63]

The SE is a potentially useful vehicle in aiding cross-border mergers, as it would cut through the problems of differing national requirements. Both Dine and Van Hulle thought that the SE could aid European industry. Dine wrote, "It would seem that the business community of Europe would greatly benefit from the availability of a European Company Statute ..."[64] Van Hulle said, "I believe that the possibility to set up companies subject to European Regulation remains a challenging idea which could do away with a lot of psychological problems linked to the unavoidable nationality of a company."[65]

However, the project has problem areas. Dine and Van Hulle both voiced reservations relating to the precise content of the statute. They felt that a minimalist approach rather than the maximalist ideas of the Commission was what was needed.[66] Further, the proposed tax treatment has not yet been agreed. For all these reasons neither Member States nor industry has as yet shown much interest in, or enthusiasm for, the SE. Maitland-Walker, writing in 1991, stated, "In its present form, there must be some doubt as to whether the SE will have any attraction for business as a choice of corporate vehicle."[67]

As stated above, there is, at present, no complete solution to the problems of the level playing field. Nor will the problem be solved in the near future. At best, Community action coupled with global economic forces has

begun, and is continuing, the process of erosion of barriers. It may therefore be asked whether or not the current situation is intolerable to firms seeking to merge across Community borders and to Member States which have an open market.

Despite the legal and cultural obstacles, can the barriers to cross-border merger be overcome in practice? The answer, in many cases, is yes, surprising though this might seem in view of the number of obstacles which have been outlined. There is sufficient statistical evidence to support the assertion.[68]

Given the urge to merge felt by many firms and the lack of success of EC legislation in levelling the barriers it is of interest to discover how firms that have succeeded in breaching the barriers have done so. To a large extent, the attainment of its aim is achieved most often by the firm that makes the best use of its human potential. Exercise by the management of the firm of qualities such as tolerance, persistence, and a willingness to understand and adapt to circumstances plays a major part in ensuring the completion of a merger.[69]

Also of importance is the utilisation of expert assistance. Analysis of the theory of cross-border merger, coupled with a study of actual merger cases, has shown the need to employ local experts at all stages of the merger process. An important proviso, however, is that the firm retain unwavering overall control of the merger process. Hill Samuel cautioned "Outside advisors complement the company's own deliberations: they are not a substitute for them. The company itself has at all times to be in the driving seat ..."[70]

Conclusions. The harmonisation of company law for the specific purpose of levelling the playing field is a major undertaking. Further, its importance cannot be questioned. Nor, despite various cavils, can the level of commitment of the Commission for this task be challenged. In particular, recent history gives rise to the opinion that, with strong encouragement from the United Kingdom, the Commission will be accelerating its efforts to identify the barriers more accurately and to level them.

However, the Commission's actual approach to tackling the problem of the level playing field is questionable. There is nothing wrong with the basic ideas of mobility, fair competition, transparency and responsibility as such. Nonetheless, there has been criticism that the Community is using company law directives, both adopted and proposed, as a form of social engineering, especially under the responsibility doctrine. For example, even the UK finds many proposals almost unacceptable, the Fifth Directive and the Thirteenth Directive being two such instances.[71] The Fifth Directive concerns the structure and management of Public Limited Companies while the Thirteenth Directive lays down minimum requirements for the conduct of takeover bids.[72] Nor is the fact that adopted Community directives are resulting in a massive increase in the company law of most Member States'a welcome by-product of harmonisation.[73]

Therefore, given the problems encountered by the harmonisation programme to date, even this renewed effort is unlikely to succeed in levelling the playing field. While, of course, the problem of overcoming the barriers is one that goes beyond a legislative solution,

it is still of importance that the legislative effort be properly managed so as to accomplish what it can in this major field of law. Whether the Commission will succeed in making the massive effort to get the legislation right, so to speak, is problematic.

Further, the Commission may have a falsely optimistic view as regards the urgency of overcoming the hurdles present in Member States, due to the somewhat paradoxical fact that, to some extent, business is successfully breaching the barriers in practice.[74] This, however, should not blind the Commission to the need for a speedy as well as a correct legislative response to the challenge. Encouragement of cross-border mergers is a key feature of 1992. Commission legislative practice is still a long way from achieving this while 1992 is coming ever nearer.

Global economic forces

Whilst the positive attempt to level the barriers by dint of legislative action has had only limited success, the problem ought not to be regarded as perennial; there is, in fact, a solution. The answer is to combine activity and passivity: to legislate while, at the same time, allowing the play of global economic forces to have an effect upon cultural values within Member States.

That legislation and global economic forces are the primary means by which barriers may be brought down was noted by Woolcock, who wrote: "A level playing field can be created in one of two ways: either through the impact of market forces; or, through regulation at an EC level."[75] It is suggested, however, that Woolcock was mistaken on two crucial points.

First, Woolcock believed that the level playing field could be achieved, if at all, either by legislation or by market forces. There seems no logical reason to insist upon this separation between the two. Global economic forces will not desist while legislative action is taken by the Community. In fact, legislation and market forces complement each other in that the former attacks legal and technical obstacles while the latter erodes cultural ones. It is only by allowing a combination of these two forces that the barriers may be fully breached.

Second, Woolcock considered that market forces have little prospect of producing changes that could result in a lowering of barriers. He wrote "But so far the evidence suggests that the prospects for market forces to produce rapid or significant convergence of the diverse national environments for takeover is not great."[76] However, global economic forces are of greater power than he allows and are rapidly bringing about definite changes in business practice in the Community.

The actual timing and planning of the single market, if not the conception, owes a great deal to global economic forces. If so, it should be a valid assumption that global economic forces have both considerable power and a widespread influence and that, consequently, they cannot be dismissed lightly.

The business community both within and outwith the EC is, in general, aware of and responsive to, the increasing competitiveness involved. Garnett noted that, as regards the UK engineering industry, "The challenge of the 1990s will be to build on the changes of the past

decade in a climate in which competition - particularly from abroad - will grow more intense." He also reported that, "... the changes in Britain have not happened in a vacuum. Many competitors in Europe and North America have become leaner and more focused than they were ..."[77] Further, a study by Ernst and Young concerning the food and drinks industry concluded, "... both retailers and manufacturers would have to take an increasingly global view, laying aside traditional parochial attitudes. The really big opportunities of the 1990s were likely to be European in scale."[78]

If global economic forces are as powerful and as pervasive as suggested, then it is reasonable to expect them to have an effect on many areas of life, including business culture. In particular, changes might be expected in relation to the prejudice of businesses and Member States against merger by national firms within a state and to the distaste of these parties for cross-border merger within the Community.

Bias against merger between national firms within a state is already decreasing. This fact, the necessary first step in breaking down cultural barriers to cross-border merger, may be illustrated both by statistics and by a study of diverse reports on individual states, both non-European states and Community Member States.

While statistical evidence, by its nature, can never present a totally accurate picture, it can still be relied upon for the purpose of discerning any recent trends as regards mergers within states. In general the trend throughout the 1980s has been of a strong growth in merger within all OECD states.[79] Within the second half of the 1980s there was an appreciable increase per

year in domestic mergers within EC Member States.[80]

As well as statistical evidence, information may be gained from a more general examination of various states, gleaned from examination of reports by commentators. From this method there emerges a greater 'feel' for the present trend than the study of statistical evidence alone may provide. Further, statistical information may be lacking in states such as Japan, where the Fair Trade Commission records only acquisitions of Japanese firms by foreign firms.[81]

Examination of diverse reports on states shows evidence of a change in attitude towards mergers. Perhaps the most striking illustration of this, as regards non-European states, is the Japanese market. Fearnley, Russell-Walling and Wynn, writing in early 1988, showed that Japanese business equated merger, even between Japanese firms, with corporate failure. Yet, less than two years later, Pell-Ilderton stated that, "... corporate Japan is now gripped by [M & A] mania." He concluded that "... [M & A] is starting to take root in the home market whereas until now it has been kept very much for export only."[82]

This is not to say, however, that global economic forces are of such recent origin. MITI had realised the need for mergers within Japan some years earlier. For example, Wagstyl reported that, within the Japanese motor industry, "Companies have for years resisted attempts by the Ministry of Trade and International Industry to encourage outright mergers, ..."[83] Only as the effects of global economic forces have become more apparent, have Japanese firms been constrained to consider taking action at home. Thus, economic actions within the United States

and the EC have necessitated industrial restructuring within Japan itself.

Some of the Member States within the Community that see merger as a somewhat abnormal practice are also being pressurised by external forces into accepting internal merger as an increasingly common part of business. Clifford Chance expected such a situation to arise. They wrote in 1989, "... all the predictions of increased takeover activity in Europe have come true. We have seen significant hostile takeover activity in Belgium, France, Spain and Italy ..."[84] Wooldridge stated in 1991 that, "... take-over bids are becoming increasingly important in other Member States (as well as in the UK), particularly in France."[85] Among other examples are recent business deals in Germany and Italy.[86]

Clifford Chance noted that, "Takeovers in the classical sense have not in any way been a significant part of securities activity in Germany."[87] Yet, in what the German Minister of Economics, Helmut Hausemann, characterised as "... the most important competition decision of the decade," Daimler Benz were permitted to take over Messerschmitt-Bolkow-Blohm.[88] The takeover was approved by the government against the advice of the Federal Cartel Office. That the veto of the powerful and influential Federal Cartel Office was overridden is an illustration of how economic pressures may take precedence over established business conventions and views on the nature of competition.[89]

As regards Italian business practice, takeover bids were normally infrequent.[90] However, Gilbert reported that Italy was experiencing a merger wave. The reasons were that, "- concern with size was spreading through

Italy."[91]

There is thus sufficient evidence to claim that, under the influence of global economic forces, several Member States and their firms are changing their attitudes towards merger. Thus, alteration of perceptions on the part of a growing part of the EC business sector, has resulted in the breach of a major cultural barrier to cross-border merger within the Community.

These same forces have thus also helped Community Member States and businesses take the next logical step, which is the recognition of cross-border mergers within the Community as a permissible business practice. This claim is borne out by statistical evidence. From the mid-1980s on there has been an appreciable increase in cross-border mergers within the EC.[92]

Further, there is reason to suppose that, as 1992 approaches, and the power of global economic forces increases, cross-border mergers may accelerate. Woolcock stated, "A more detailed look at recent developments in some individual countries suggests there was a marked increase in cross-border mergers within the EC in 1988. ... The 1988 increase ... coincides with the period when 1992 became a credible target."[93]

Global economic forces do not end at Europe. The Community and individual Member States must also adopt a position on cross-border mergers with non-EC firms. That is, they have to decide what is their stance on non-EC investment, by way of merger, within the Community.

For the EC to adopt any stance, however, implies

that this must be the policy of all or most Member States, since these retain considerable national powers in relation to the erection of barriers to non-EC investment. Thus, the outlook of both the Community and the Member States must be considered. The position of the Member States ought to be considered before that of the Community, because of the freedom they enjoy in this regard.

It is therefore relevant to consider whether a policy of openness is in the interests of individual Member States? If firms within them seek merger with firms outwith the EC on a large scale, then it seems somewhat unprincipled for that state to put up barriers to non-EC investment. A firm investing from outwith the EC would wish the process to be as free from restrictions of all kinds, and especially from state barriers, as possible.[94] Though it is, of course, not a legal principle, the creed of 'do unto others as you would have them do unto you' may be a sound formula for Member States to adhere to if they would wish to invest abroad.

Opportunities for EC firms to merge with non-EC firms are ever-increasing. The opening up of the eastern European markets due to political changes has created new merger possibilities for EC firms.[95] Further, there are valuable markets in East Asia, the fastest commercial growing region on earth.[96] Merger could help EC firms to gain a foothold in these potentially lucrative markets, before they are completely dominated by Japanese firms. As Wagstyl noted "Japanese businessmen are seizing opportunities which many of their western rivals are failing to grasp."[97]

Apart from these relatively new markets, there are

more traditional spheres of commerce. The United States is, and continues to be, a major area of economic investment for EC firms by way of merger. Further, many EC firms have long-standing links with countries which, formerly, were part of the empire, or within the range of influence, of their state. EC firms can be expected to continue to invest in these territories.

As well as outward investment the pros and cons of allowing foreign investment into a Member State must be considered. The Member State that has the most open market, and, consequently, the greatest experience of allowing foreign investment, is the UK. As de Jonquieres noted in 1989, "The UK was by far the most popular western European target country for foreign acquisitions ..."[98] There has been ample time for UK industry and government to assess the results, both good and ill, of its policy. Its open posture, however, is still strongly supported by both the government and the CBI.

In 1988, Lord Young made a speech on merger policy. He noted that, over the last decade, nearly 500 bids by foreign firms had been cleared by the UK authorities. He stated, "The nationality of the bidder is not in itself a factor in mergers policy. ... The Governments approach to investment from overseas in the UK economy is to welcome it, and to encourage the free flow of investment both inward and outward."[99] In 1989, Banham stated that, "... protectionism would not serve the UK's interest: an active market for the control of corporate assets promotes efficient use of them ..."[100]

France disagrees with the UK view. One extreme interpretation that has been offered of the French position is that France adopts the stance that a Member

State attracting non-EC investment is, in effect, attempting to export unemployment to other EC Member States.[101] Another approach was that of Coopers and Lybrand who stated "Although it is not possible to say that the French government is opposed to foreign investment, it is very concerned that there is industrial logic to a transaction."[102]

A further argument against a policy of openness is provided by a study of non-EC states. Many of these nations have some form of barrier to foreign investment. Japan is no nearer now to allowing foreign investment than it has been in previous years. The United States seems to be moving away from its open market policy. Riddell noted in 1990 that "Overseas investors and governments have been worried about the wide-ranging scope of the powers to block foreign takeovers of American companies under the Exon/Florio provisions of the 1988 Trade Act."[103] The Exon/Florio proposals having expired, however, the United States is now creating an equally restrictive set of proposals on this subject.[104]

The topics of investment coming into and leaving the Community can be linked. A Member State may feel that it should have a specific policy as regards investment by merger from a particular non-EC state where its own firms face barriers to entry. In fact, France insisted on the EC equipping the Merger Control Regulation with a clause on this matter.[105]

Nonetheless, an open posture on merger, akin to the British position, is the correct one for both Member States and the Community to adopt. This is because the development of the law generally tends to lag behind that of business. Business is now a global phenomenon. Mergers

are currently happening on a worldwide basis. There are indications that this trend will increase. If so, both the Member State and the Community authorities ought to try to create law that reflects economic reality, and remove regulations that perpetuate entrenched attitudes.

Such action would not be altruistic since it would contribute to both the individual welfare of the Member State and the collective good of the Community. This view is supported by Reich in a study relating to the American attitude to foreign investment. He concluded, "In a world of mobile capital, discrimination between companies simply on the dubious criterion of ownership leads to inefficient use of scarce resources and, ultimately, to self-impoverishment."[106] Further, United States Department of Commerce statistics showed that foreign investment has benefited the economy in several ways. Darby noted, "Without foreign capital inflows, gross investment in the US in the 80s would have been somewhat lower. This lower level of investment would have been reflected in the reduced level of GNP growth in the 1980s."[107] Also, foreign investment has enhanced expenditure on research and development and improved productivity.

With regard to the Community and the Member States, Dixon contended that the Community ought to recognise the merits of a free flow of capital among nations.[108] Both the Community and individual Member States would gain from a freer flow of capital between them and the world. Failing this recognition, Dixon cautioned that economic decisions could be susceptible to the influence of xenophobia. He also argued that retaliation by the Community or a Member State was not justified by the reciprocity argument. Instead it represented a slide

towards the lowest common denominator. These views were echoed in a speech by Sir Leon Brittan which warned against protectionism and welcomed Japanese investments in the EC.[109]

A closely related point is whether the Community ought to shape company law in accordance with the requirements of world business. Both the Community and the Member States should aim to be part of the process of internationalisation of trade law. In other words, the logical final step of the process of cultural harmonisation caused by market forces is the emergence of a lex mercatoria, to which the EC and the Member States should contribute.

This idea is not revolutionary. Among others, Hermann has already noted the need for such a law. He wrote of, "... the growing contradiction between truly transnational business and the multitude of widely divergent laws trying to control it."[110] Further, he also argued that harmonisation of laws, and of the economic policies which lie behind them, solely within the confines of the EC, was too narrow an approach.[111] In addition, the Assistant Attorney General for antitrust policy in the United States, James Rill, supported this concept. In a newspaper interview it was reported that, "With increasingly global markets, Mr Rill says there is 'a desire to bring as much harmony as we can to antitrust standards on a global basis. That would be beneficial to businesses of all nations.'"[112]

Thus, if the Community and its Member States are to play their part in this process of economic, legal and (ultimately perhaps) political, global harmonisation, they must show increasing awareness of international

business requirements.

Conclusions. Global economic forces are of major importance in helping to bring about cultural acceptance of merger within the Community. Mergers within Member States and cross-border mergers significantly increased in the second half of the 1980s. It would seem logical to attribute this increase solely to 1992. Yet this would be incorrect. 1992 is but a one area of the global picture. The single European market project was initiated as a direct reaction to external economic pressures upon the Community. If so, it is not enough to consider only mergers within the Community. The position of the Community and its Member States within the global marketplace must also be taken into account if 1992 is to succeed.

1. Sir Leon Brittan, "Acquisitions and Mergers in the European Communities," Speech to the Institute of Directors - Scotland 24 November 1989, 12. However, Sir Leon's view appears to differ from the views expressed by the ECJ and the Commission. His opinion may reflect the evolving attitude of the Commission towards mergers between firms in one and the same Member State. A possible expression of this attitude is the 'distinct market' concept in the Merger Control Regulation.

2. The latest EC statistics are contained in the Nineteenth Report on Competition Policy Part 4, 214-26. These show that between June 88 and June 89, 1122 mergers and joint ventures were monitored - an all time high. Regarding merger statistics, various sources of information are available. The annual Reports on Competition Policy, Part Four, list national, Community and international mergers within the Community, and provide a comprehensive analysis of merger trends and motivations. Other sources of merger statistics are as follows. The 1992 M & A Review; The European Deal Review; The British - American Deal Review; The World Deal Review; Deal Watch; Mergers and Acquisitions International; Acquisitions Monthly. Also available is a computer database on UK, USA, and European mergers, AMDATA, set up by Acquisitions Monthly and a similar service, PROFILE INFORMATION, from Mergers and Acquisitions International.

3. This is borne out by an analysis of Competition Reports statistics. See also, David Buchan, "Obstacles to the European Company," Financial Times (5 July 1989). Buchan reported, "However, there is clearly a rising trend of mergers and acquisitions, though, so far, resulting more in purely national concentrations than in

cross-frontier, pan-European companies."

4. Nineteenth Report on Competition Policy, 215.

5. The most recent statistical reports of cross-border merger activity, such as in The 1992 M & A Monthly for example, indicate a steady increase in this type of merger.

6. F.M. Scherer, "Lessons for the EC from the European Experience," Financial Times (24 January 1990). This is also the conclusion of the Nineteenth Report on Competition Policy, 226.

7. For a detailed and comprehensive analysis of the legal and cultural barriers to mergers within individual Member States, see, Coopers and Lybrand, Barriers to Takeovers in the European Community, 3 vols, (London: HMSO, 1989); Department of Trade and Industry, Barriers to Takeover in the European Community: A Consultative Document, January 1990; Commission, Study on Obstacles to Takeover Bids in the European Community: Executive Summary (Paris: Booz Allen Acquisition Services, 1989). This was a survey carried out on behalf of DG XV by Booz Allen Acquisition Services in December 1989; Advokaterne Bredgade 3 et al, Merger Control in the EEC (London: Kluwer Law and Taxation Publishers, 1988); Clifford Chance, Takeovers and Mergers in Europe (London: Clifford Chance Publications, 1989); Simmons and Simmons, A Practitioners Guide to European Take over Regulation and Practice (London: Westminster Management Consultants, 1990); P.F.C. Begg, ed. Corporate Mergers and Acquisitions, 2 vols. (London: Graham and Trotman, 1991); J.M.M. Maeijer and K. Geens, Defensive Measures Against Hostile Takeovers in the Common Market (London: Graham and Trotman, 1991).

Also of interest are Berwin, Company Law and Competition (London: Mercury Books, 1989), 166-182 and 198-202; Helen Framley, Edward Russell-Walling, and Jane Wynn, "Xenophobia - Keeping UK Companies Out," Financial Weekly (21 April 1988): 15-17.

8. For example, the proposed merger between the Belgian, Compagnie Generale de Banque and the Dutch, Amsterdam Rotterdam Bank fell through, due primarily to problems over the laws and cultures of Belgium and Holland. Tim Dickson, "European Banks Drop Merger Plan," The Financial Times (18 September 1989) wrote, "The collapse of the merger attempt will be seen as an illustration of the technical and cultural obstacles to full integration of the European market place by 1992."

9. Dick Taverne, "Financial Takeovers in the European Community," The International Investor 31 (October 1989): 1. Taverne wrote, "In the moves to create an effective single market, one kind of harmonisation which ought to command a high priority is that of the law and practice of takeovers."; Interview with John F. McDaniels, "The View from New York," The International Investor 31 (October 1989): 6. McDaniels, the Chairman of Bank Julius Baer, New York, stated, "A 'level playing field' for entering businesses within a country ... is an essential part of a Common Market."

10. Taverne, op. cit in note (9), 1.

11. OECD, International Mergers and Competition Policy (Paris: OECD, 1988), 40.

12. Commission, European File: Company Law in the European Community (Luxembourg: Office for Official Publications of the European Community, 1989), 11.

13. Charles Batchelor, "How to Smooth the Takeover Trail," Financial Times (13 February 1990), noted that, "Any thorough search for acquisition targets is likely to produce a long list of names."

14. See Philippe C. Haspeslagh and David B. Jemison, Managing Acquisitions (New York: Macmillan Free Press, 1991.

15. However, Taverne believed that Germany has a low level of public information about firms. See Taverne, op. cit in note (9), 4.

16. Coopers and Lybrand, op. cit in note (7), vol 1, 18.

17. Ibid.

18. Ibid., 18-19.

19. This situation is analogous to the system of 'corporate families' in Japan known as 'keiretsu.' See, Cris Benjamin, "Survival and the Corporate Families," The Guardian (18 February 1991); James P. Womack, Daniel T. Jones, and Daniel Roos, The Machine That Changed the World (New York: Rawson Associates, 1990).

20. Coopers and Lybrand, op. cit in note (7), vol 1, 18-19.

21. See, Brittan, op. cit in note (1), 9.

22. Coopers and Lybrand, op. cit in note (7), vol 1, 23-24.

23. Laura Raun, "Lowering the Corporate Defences," Financial Times (1 March 1990).

24. Marcus Lutter and Brigitte Lammers, "Hostile Takeovers: Possibilities and Limitations according to German Law," in Maeijer and Geens, eds, op. cit in note (7), 113.

25. Hans-Jochen Otto, "Obstacles to Foreigners are Nothing but a Myth," Financial Times (20 February 1991). See also Lutter and Lammers, op. cit in note (24), 142 note 1, where further opponents of the majority view are listed.

26. See, H.B. Buhl, Survey of Protective Options used by Dutch Companies Listed on the Amsterdam Stock Exchange (Wesselius & Co. B.V., 1989); J.M.M. Maeijer, "Dutch Law Relating to Hostile Takeovers and the Protection Against Them," in Maeijer and Geens, op. cit in note (7); Raun, op. cit in note (23); Pieter B. Oudemans, "Dutch Defences in Danger: The Changing European Environment and the Possible Consequences for Dutch Companies," Legal Issues of European Integration no. 1 (1991): 26-30. Oudemans fears that forthcoming EC directives could, if adopted as they stand at present, drastically reduce the protection enjoyed by Dutch firms.

27. Coopers and Lybrand, op. cit in note (7), vol 1, 21.

28. Ibid., vol 2, 21. See, for example, on this type of problem, Maggie Urry, "A Marriage Showing First Signs of Strain," Financial Times (15 May 1990).

29. KPMG Dealwatch, "Cultural Clashes," Dealwatch (1991): 21.

30. There may even be refusal by parties to deal with the firm at all in future. See, John Thornhill, "Hartwell Spurns Improved Offer," Financial Times (16 February 1990). Thornhill reported that, should Hartwell be taken

over, Mercedes Benz would not transfer their franchise to the new owners.

31. On dissimilar barriers see Coopers and Lybrand, op. cit in note (7), vols 2 and 3. Coopers and Lybrand list any such barriers within the individual report on each Member State. See also, DTI, op. cit in note (7), 6-7.

32. Coopers and Lybrand, op. cit in note (7), vol 1, 45.

33. For an account of the harmonisation of company law see, Berwin, op. cit in note (7), Chapter 3 and 192-4; Janet Dine, "The Community Company Law Harmonisation Programme," European Law Review 14 (October 1989): 322-332; L.S. Sealy, "British and European Company Law," in, Ralf Dahrendorf, John Hoskins, Victoria Curzon Price et al, Whose Europe: Competing Visions for 1992 (London: The Institute for Economic Affairs, 1989); Commission, Harmonisation of Company Law in the European Community (Luxembourg: Office for Office for Official Publications of the European Community, 1989); Commission, European File: Company Law in the European Community (Luxembourg: Office for Official Publications of the European Communities, 1989). Department of Trade and Industry (DTI), The Single Market: Company Law Harmonisation (London: HMSO, 1991); D.D. Prentice, EEC Directives on Company Law and Markets (Oxford: Oxford University Press, 1991); Frank Wooldridge, Company Law in the United Kingdom and the European Community: Its Harmonisation and Unification (London: The Athlone Press, 1991).

34. Coopers and Lybrand, op. cit in note (7), vol 1, 41. See also appendix D2, of Coopers and Lybrand which contains a list of this legislation, both adopted and proposed. See also, DTI, op. cit in note (33), 1. The DTI list those directives actually adopted or those where

common positions have been agreed in February 1991.

35. Dine, op. cit in note (33), 328.

36. Coopers and Lybrand, op. cit in note (7), vol 1, 39.

37. Ibid.

38. The First Directive is, "Directive of 9 March 1968 on co-ordination of safeguards required of companies," (68/151/EEC). O.J., Special Edition, 1968 (I), 41-45. The Fourth Directive is, "Directive of 5 July 1978 on the annual accounts of certain types of companies," (78/660/EEC). O.J., vol 21 L222, 14 August 1978, 11-31. Finally the Seventh Directive is "Consolidated accounts," (83/394/EEC). O.J., vol 26, L193, 18th July 1983, 1-17.

39. See Wooldridge, op. cit in note (33), 12-14, for an account of the contributions made by national systems of law.

40. See Oudemans, op. cit in note (26), who notes Dutch concerns over EC proposals. See also Wooldridge, op. cit in note (33), generally.

41. Oudemans, op. cit in note (26), 23.

42. Quoted in Oudemans, op. cit in note (26), 23. In spite of Oudemans opinion, it is suggested that this viewpoint seems somewhat at odds with that of DG IV.

43. This is also the opinion of Peter Kennerley, a former secretary of the UK Takeovers and Mergers Panel. See, Peter Kennerley, "Europe's Myriad Merger Rules," Financial Times (27 September 1990).

44. Dine, op. cit in note (33), 329.

45. See, for example, Andrew Hill, "Brussels Worried about Slow Passage of 1992 Laws," Financial Times (13 September 1991). Hill noted that the directives dealing with cross-border mergers and with takeovers were to be delayed, at least, until 1992.

46. See, on this problem, Marco C.E.J. Bronckers, "Private Enforcement of 1992: Do Trade and Industry Stand a Chance Against the Member States?" Common Market Law Review (1989): 513-533; Robert Mauthner, "Hurd Urges Reports on EC Rule Enforcement" Financial Times (11 May 1990).

47. Where the national authorities are responsible for enforcing the law and fail to do so, a possible, though not a perfect solution, to this problem is Article 169. See, Bronckers, op. cit in note (46), 520-24.

48. Coopers and Lybrand, op. cit in note (7), vol 1, 42.

49. David Waller, "EC Set to Announce Accounting Standards Harmonisation Plan," Financial Times (17 January 1990).

50. David Buchan, "Obstacles to the European Company," Financial Times (5 July 1989).

51. Coopers and Lybrand, op. cit in note (7), vol 1, 39.

52. Lucy Kellaway, "Brussels Faces Uphill Struggle to Remove Takeover Barriers," Financial Times (27 November 1989). The following, among others, have reported on new Commission initiatives in this field. Tim Dickson, "Brussels Plan for Shareholder Rights," Financial Times (8 May 1990); Peter Guilford, "EC Ban on Poison Pill Tactics," The Times (9 May 1990); Kellaway, "EC Toes Liberal UK Takeover Line," Financial Times (10 May 1990).

53. DTI, _op. cit_ in note (33), 15.

54. Ibid. The report noted that the UK attaches great importance to progress in this area. See also, Robert Rice, "Minister Appeals to EC for Fewer Takeover Barriers," _Financial Times_ (27 April 1990). Rice stated that the UK was keeping up pressure on the Commission to reduce or eliminate barriers to mergers.

55. "Mergers and Acquisitions," DTI Publication, _Single Market News_ no. 5 (Winter 1989).

56. Brittan, _op. cit_ in note (1), 9.

57. Ibid.

58. Coopers and Lybrand, _op. cit_ in note (7), vol 1, 41. See also, Oudemans, _op. cit_ in note (26), 43-4.

59. Oudemans, _op. cit_ in note (26), 43. He believes that Italy, Spain, the UK and France will remain substantially unaffected while Holland and Germany will lose their strongest barriers.

60. Coopers and Lybrand, _op. cit_ in note (7), vol 1, 41.

61. See, DTI, _Proposal for a European Company Statute: A Consultative Document_. December 1989.

62. Commission, _Background Report: The Statute for a European Company_, November 1989, ISEC/B27/1989, 1. See also, Department of Trade and Industry, _EC Memorandum Concerning Formal Proposals for a European Company Statute_, January 1990.

63. Berwin, _op. cit_ in note (7), 46-7.

64. Dine, _op. cit_ in note (33), 329.

65. K. Van Hulle, quoted in Dine, op. cit in note (33), 329.

66. Dine, op. cit in note (33), 329; Again, the opinion of Van Hulle is taken from Dine at 329.

67. Julian Maitland-Walker, "The Societas Europae: Useful Corporate Vehicle or Political Stalking Horse," European Competition Law Review (1990): 100.

68. It is provided in the following section.

69. Hill Samuel, Mergers Acquisitions and Alternative Corporate Strategies, (London: Mercury Books, 1989), 5.

70. Ibid., 45.

71. DTI, Amended Proposal for a Fifth Directive on the Harmonisation of Company Law in the European Community: A Consultative Document. January 1990, paragraph 4, "... the government has already made it clear that it has profound reservations on the particular provisions of the directive." See also, Robert Rice, "EC Proposal Raises Fears over Flexibility of Takeover Rules," Financial Times (7 January 1991), Rice, "CBI Warns against EC Directive on Takeovers," Financial Times (9 May 1991); Jeffrey Jowell, "Self-Regulation under Threat," Financial Times (9 May 1991).

72. As to the Fifth Directive see, OJ, Vol 26, C240, 9 September 1983, 2-38. See also Bulletin of the EC, Supplement 6/83. For amendments as to barriers to takeovers see, OJ 34, C7, 11 January 1991, 4-6. The amended proposal for a Thirteenth Directive, giving both original and amendments is in OJ, Vol 33, C240, 26 September 1990, 7-30.

73. Sealy, *op. cit* in note (33), 89. Sealy notes that UK companies legislation is over 1,600 pages long, due, in the main, to the Community.

74. Brittan, *op. cit* in note (1), 10.

75. S. Woolcock, *European Mergers: National or Community Controls?* (London: Royal Institute of International Affairs, Chatham House Paper, 1989), 35.

76. Ibid.

77. Nick Garnett, "Building on a Decade of Change," *Financial Times* (2 February 1990).

78. Ernst and Young, *Draft Press Release: The UK - An Attractive Location for Food and Drink Manufacturing*. 20 January 1990, 1.

79. Woolcock, *op. cit* in note (75), 6. See also, OECD, *op. cit* in note (11), 7-12.

80. This was the opinion of Woolcock, *op. cit* in note (75), 6 and 39. His conclusions were based on a study of the statistics given in the annual *Reports on Competition Policy*, up to the Seventeenth Report. An analysis of the *Eighteenth Report on Competition Policy* and the *Nineteenth Report on Competition Policy* shows that this trend is continuing to accelerate.

81. OECD, *op. cit* in note (11), 8.

82. Richard Pell-Ilderton, "Hijacking is Now Respectable in Japan," *Financial Times* (18 January 1990). Other commentators have also noted this trend. See, for example, Robert Thompson, "Mergers and Acquisitions Invigorate Japan," *Financial Times* (2 September 1989); Michiyo Nakamoto, "Japan to Relax Rules on Takeovers,"

Financial Times (16 November 1990), Nakamoto, "Firms Jostle for Position in M&A," Financial Times (4 January 1990); William Hall, "Mergers and Acquisitions: Less Shameful than it was," Financial Times (15 March 1990); Neil Weinberg, "M & A Boost as Japanese Look Homewards," Financial Times (13 August 1991).

83. Stefan Wagstyl, "Nissan to Consider Help for Subaru," Financial Times (24 January 1990).

84. Clifford Chance, op. cit in note (7), 1.

85. Wooldridge, op. cit in note (33), 147.

86. As to activity by German firms see, Andrew Fisher, "Time for a Pause in a Flurry of Activity," Financial Times (12 June 1991); William Dawkins, "Daimler Benz to Take Majority Control of Sogeti," Financial Times (24 July 1991). Further, a new source of merger activity in Germany has been created by the unification of East and West Germany. Regarding Italian firms see, Haig Simonian, "Third Leg Brings Balance to Sasib," Financial Times (8 August 1991).

87. Clifford Chance, op. cit in note (7), 31.

88. David Marsh, "Green Light for MMB Takeover by Daimler," Financial Times (9 September 1989). See also, Financial Times Correspondents, "Daimler Benz's Takeover of MBB," Financial Times (13 September 1989).

89. The particular business pressures in this case were connected with the European airbus project.

90. Clifford Chance, op. cit in note (7), 45.

91. Sari Gilbert, "Ambroveneto Strides Ahead," Financial Times (22 November 1989).

92. Woolcock, _op. cit_ in note (75), 6; OECD, _op. cit_ in note (11), 6-9: _Annual Reports on Competition Policy_, Part 4. See also, the _Nineteenth Report on Competition Policy_, 214-226.

93. Woolcock, _op. cit_ in note (75), 7. The _Nineteenth Report on Competition Policy_ expects cross-border mergers to increase. See, 215 and 226.

94. Sweden is lifting barriers that prevent foreigners from acquiring most of the country's key industrial concerns. A major reason for so doing is to allay the concerns of Swedish businesspeople that they could face increasing difficulties in acquiring EC companies. See, John Burton, "Sweden to Lower Barriers in Search of Investment," _Financial Times_ (13 February 1991); Robert Taylor, "Sweden to Ease Curbs on Foreign Ownership," _Financial Times_ (29 October 1991).

95. Both EC and non-EC firms, are actively considering the economic potentialities of eastern Europe. A survey showed that 70% of top European and American firms had re-thought their business plans in light of events in eastern Europe. See, Tim Dickson, "Companies Plans Affected by E. Europe," _Financial Times_ (9 May 1990).

96. See, Stefan Wagstyl, "Japan Sets its Stamp on East Asia," _Financial Times_ (30 January 1990).

97. Ibid.

98. Guy de Jonquieres, "UK Favoured for Foreign Takeovers," _Financial Times_ (5 February 1990).

99. Department of Trade and Industry, _DTI Merger Policy: An Address Presented to the Stock Exchange Conference for Industry at the QE II Centre on Thursday 27 October 1988_

by the Right Honourable Lord Young of Graffham Secretary of State for Trade and Industry. (London: HMSO, 1988), 10. However, the present trade and industry secretary, Mr Peter Lilley, attempted to control acquisitions by foreign state controlled companies. See, Robert Rice, "Struggling to Hold the Back Door Closed," Financial Times (7 May 1991); David Gardner, "Britain Challenged over State Group Purchases" Financial Times (11 June 1991); Andrew Hill, "UK Gives Way on Foreign Takeover Bids," Financial Times (31 October 1991).

This policy did not succeed. As Rice noted, "... state control is no longer a good enough reason on its own for launching a full-scale monopolies and mergers inquiry." Further, Gardner reported that the Commission has formally asked the UK to explain its policy as to foreign state-owned firms. Hill noted that this resulted in the UK accepting "significant limits on its freedom to scrutinise takeover bids by foreign state-owned companies."

100. John Banham, "British Industry Responds to the Bid-Proof Dilemma," The 1992 M & A Monthly (June 1989): 4.

101. See, for example, Ian Roger and Kevin Donne, "Peugeot Criticises UK's Japanese Car Policy," Financial Times (3 February 1990).

102. Coopers and Lybrand, op. cit in note (7), vol 2, 22. However, France may be adopting a more mellow attitude to foreign investment by way of merger. See, Mark Dixon, "Friendly France," The 1992 M & A Monthly (February 1990): 1 and 8. Dixon reported several reforms instigated by the French government designed to expedite the process of merger with French firms. He commented, 1. "Fortress France ... is crumbling."

103. Peter Riddell, "The Foreign Takeover Exception that Proves the Rule," Financial Times (6 February 1990). See also, Keith Eastin, "Exon-Florio: Bad Law Kills a Good Deal," The Wall Street Journal Europe (28 March 1990).

104. See, Peter Riddell, "US to Tighten Powers against Takeovers by Foreign Groups," Financial Times (8 August 1991). Riddell noted that the Congress had approved new legislation making permanent the presidential powers of review on security grounds of mergers with foreign firms.

105. Article 24 of the Merger Control Regulation deals with reciprocity. See also William Lee, "EC Victory on Merger Controls," Financial Times (4 January 1990), Lee noted, "France succeeded, over opposition from just about all of the Member States, in adding a reciprocity clause." In view of the decision by the Swedish government, op. cit in note (94), it may be that the French argument is not without merit.

106. Robert Reich, the quote is taken from Guy de Jonquieres, "Thinking Twice about Dirigisme," Financial Times (26 February 1990).

107. Michael Darby, economic under-secretary at Commerce. Darby is quoted in George Graham, "Foreign Investment 'good for America' - Official." Financial Times (24 September 1991).

108. Mark Dixon, "Setting an Example," The 1992 M & A Monthly (June 1989): 1.

109. This speech was reported in "Brittan Says He Welcomes Japanese Investment in EC," Wall Street Journal (15 November 1991).

110. A.H. Hermann, "Need of Trans-National Law for Trans-National Mergers," Financial Times (28 March 1989). See also Hermann, "Emergence of International Trade Law," Financial Times (30 March 1989).

111. Hermann, "Need of a Trans-National Law for Trans-National Mergers," op. cit in note (111). See also, Chai-Jui Cheng, ed., Clive M. Schmitthoff's Select Essays on International Law (London: Graham and Trotman, 1988). Part Two of this work calls for the unification of international trade law.

112. Peter Riddell, "Interview with James Rill: A Common Sense Approach to Business Conduct," Financial Times (2 January 1990).

7. THE MERGER CONTROL REGULATION

The necessity for a merger control regulation

It could be questioned whether a Merger Control Regulation was needed for the 1990s. In fact, the continuing progress of integration in the light of global economic forces, coupled with the effects of the existing system of decisions by the Court of Justice, made a Merger Control Regulation an urgent requisite. Merger constituted too important a part of EC economic life for the continuation of an ad hoc system in an era of increasing global competitiveness.

In the late 1980s the Confederation of British Industry (CBI) stated that "The CBI is in principle in favour of a European Merger Regulation. We recognise the need for some control of mergers at a European level as we move towards a truly single European Market."[1] The Union of Industrial and Employers' Confederations of Europe, stated "... UNICE considers that it is no longer appropriate, from the point of view of realising the internal market in 1992, to have merger operations controlled by the national authorities or by the European Commission on the basis of Articles 85 and 86 ..."[2] Further the CBI noted that: "A correctly framed Merger Regulation will also alleviate the uncertainty in Community competition law created by the recent judgement of the European Court of Justice in the Philip Morris Case."[3]

This does not imply, however, that any Regulation, no matter how ill-conceived, was universally seen as preferable to the ad hoc system of merger control. For example, the CBI had warned that their support for a

Regulation rested only on its achieving the result it desired.[4]

Although the inception of a Merger Control Regulation had been anticipated at the 1972 Paris Summit, the adoption of such a Regulation has taken the best part of two decades. The establishment of a Merger Control Regulation was thus seen as more than an uncontentious technical matter that could be left solely to the Commission. It was a subject of major concern to several important interest groups, in particular the Commission, industry, Member States, and the Community per se. In addition, legal certainty required the elimination of technical flaws or uncertainties for, while it could be argued that some, or indeed all, interest groups could, at times, benefit from ambiguities or imperfections in the law, it is in the long term interests of all that the law be as clear and precise as possible.

There were several weaknesses in the existing law that concerned both Article 85 and 86. Temple Lang stated, "... - these rules do not require the Commission to be given any advance notice of a merger. In practice this may mean that if the Commission objects to a merger, it must act after the merger has been carried out, which is difficult and unsatisfactory for all concerned."[5] There was also a difficulty over the scope of Community law to prevent a merger between subsidiaries or activities within the Community of two merging firms both of whom are based outwith the EC. Finally, unlike United States law, the Community provided no clear and specific guidelines for interested parties as to how the law on mergers ought to be interpreted. Firms were forced to make do with occasional extracts in the Competition Reports, laconic accounts of Commission interventions in

mergers, and ECJ case reports.

The technical problems of Article 85 were noted in Chapter Five. In brief, these were that the wording of the Article itself still posed difficulties as to its application to certain merger transactions and also that the provisions of Regulation 17/62 were not suited to the application of Article 85 to merger. The Commission accepted that Article 85 could only be crudely adapted to mergers.[6]

In relation to Article 86, Temple Lang commented that:

> There is said to be doubt if Article 86 applies when a dominant company is taken over by a non-dominant competitor. ... Article 86 (as distinct from Article 85) contains no provision allowing the Commission to authorise a merger which, although significantly restricting competition, is nevertheless desirable for some reason (whether a competition reason or some other kind).[7]

DG IV wished a merger Regulation to be drafted so as to allow it both to continue and to strengthen its control over the merger activities of firms and thus maintain an effective competition policy. Competition should remain as the sole criterion for mergers, assessment should be made on the ground of the creation of a dominant position, in addition to the strengthening of such a position. There should be compulsory notification of merger agreements.[8]

By contrast, much of industry favours or supports the act of merger between firms and wished such action to be made as easy and as simple as possible. Accordingly it

supported a Regulation that would take account of the fundamental requirements of legal certainty and of economic efficiency arguments.[9]

UNICE had called for competitiveness rather than competition to be considered since the real geographic market for many firms includes outwith the EC.[10]

The views of the CBI and UNICE showed a remarkable similarity regarding the criteria for a merger Regulation.[11] Merger was to be assessed solely on the basis of the creation or strengthening of a dominant position. All procedures should be speedy and efficient. There should be no overlap between the jurisdiction of the Commission and national authorities. The relationship between the Regulation and Articles 85 and 86 should be clearly defined in order to avoid the possibility of dual controls.

In general, the Member States already possessing merger legislation wished for the Regulation to allow them to retain as much control as possible of merger at national level.[12] Member States having little or no merger legislation generally wished the Commission to act in their place and, to this end, supported a comprehensive Merger Control Regulation.

The needs of the Community in the 1990s are primarily economic. In particular, European industry must be supported and strengthened. In the absence of any concerted European industrial policy, the Community must rely upon the efforts of industry itself. Due to the global challenge and to 1992, industry is attempting to strengthen its base. A major weapon in this effort is merger. Broadly speaking, therefore, the needs of the

Community and industry coincide at this particular time. In general, what is advantageous for European industry in the 1990s is also beneficial to the EC. For the good of the EC, therefore, the Regulation ought to have been drawn up so as to attempt to facilitate mergers.

Conclusions. Ideally, the Merger Control Regulation should have been formulated so as to enhance the prospects of European industry in the global battleground. The Regulation ought not to be simply the final consolidation of the power of DG IV in the area of merger policy, nor be based entirely on a commitment to, now questionable, theories of competition. However, given the diverse needs of the powerful and opposing interest groups that came together to formulate the Regulation, such an optimum appeared unlikely from the outset.

The core attribute of the Merger Control Regulation is the principle of the 'one stop shop.' The attempt to realise this key principle is discussed in detail in the following sections in order to illustrate how the considerations noted above shaped the Merger Control Regulation into its present form.

Too many cooks? the problem of double jeopardy

The previous chapter dealt with the subject of aiding cross-border mergers by levelling the playing field at the private law level. In tackling the topic of double jeopardy, this process is continued, as the ending of multiple barriers also levels the playing field at the public law level. This, of course, begs the question of whether or not the obstacles imposed simultaneously by Member States and the Community constituted a genuine hindrance to cross-border mergers.[13] In fact, double

jeopardy did present a significant obstacle to such mergers.

An analysis of the pre-Regulation, cross-border merger situation clearly brings out the difficulties that may be caused. Firms engaged upon or contemplating a cross-border merger may find that the agreement comes within the jurisdiction of more than one authority. Thus, the firms are, practically speaking, forced to consult all relevant authorities and to conform to their specific requirements in order to obtain their individual approval. Further, a single failure to gain such approbation will result in the merger falling through.

In any given instance, the authorities of the EC, Member States and even non-Member States may all have concurrent jurisdiction. In the merger case concerning Siemens-GEC and Plessy, the firms felt obliged to notify the British, German, French and Italian authorities as well as the Commission.[14] At best, therefore, the task of satisfying the possibly varying and distinctive requirements of more than one authority adds to the difficulties of a merger. At worst, it discourages firms from embarking on mergers.

European industry itself had always taken the position that such restrictions as may be applied by the authorities of both the EC and Member States constituted major obstacles to cross-border merger. The Institute of Directors noted, "The current difficulties facing companies ... may deter them from including 'cross border' mergers and acquisitions in their future strategies. The Regulation should therefore, it is argued, remove any inhibitions on corporate restructuring within the Community which may exist because of the

problems of Articles 85 and 86 and national controls."[15]

Double jeopardy did not only present a problem for cross-border mergers. As Borrie stated:

> As the integration of the EC market proceeds, it is to be expected that more and more mergers will take place having effects in more than one national market. To have such effects they need not necessarily be cross-border mergers: they may be between companies in the same Member State but whose sales are important in other Member States.[16]

Nonetheless, the double jeopardy hazard was regarded by both firms and the Community authorities as of more immediate relevance to cross-border mergers.

As the statement by Sir Leon Brittan in the previous chapter made clear, cross-border mergers are the primary focus of Community attention.[17] It is this specific type of merger that the Community had in mind when formulating the Merger Control Regulation in general and dealing with the problem of double jeopardy in particular.

It could be asked whether or not it is worth discussing the problem of double jeopardy in any detail, given that the Merger Control Regulation resolved it by establishing a clear separation of jurisdictions. The answer is that the settling of the matter itself, and equally, the manner and methods by which it was accomplished, have profound implications both for the future of the Community itself and for the major points raised in this text.

The issue of double jeopardy was a predominant concern, and a primary point of contention, as regards

the formulation of the Merger Control Regulation. It was possibly the most important single question within the Regulation. When speaking of the necessity for the removal of the double jeopardy barrier, Borrie stated, "This is indeed one of the main reasons, perhaps the central reason, for having any form of merger control system at the European level."[18]

Even if this is regarded as too extreme a view, at the very least double jeopardy was a core issue within the Regulation and was of relevance to all the other major considerations. For example, Maude believed the proposed Merger Control Regulation contained three main concerns to be resolved: the double jeopardy problem, the turnover level at which mergers would be affected by the Regulation; and the criteria by which mergers should be judged.[19]

The problem of overlapping jurisdictions was of great importance to the various groups mentioned throughout the course of this text, Member States, business, the Commission, and the Community _per se_. Thus, an examination of the question provides a chance to show the interaction between these groups which, in turn, may be taken as a microcosm of the interaction of the parties throughout the entire course of the evolution of the Merger Control Regulation.

In addition, it provides a clue to the relationship among these groups on the larger question of the future administration of European industry. The Merger Control Regulation does not exist in a vacuum, but is itself at the centre of larger questions as to how, and by whom, European industry ought to be monitored and directed once the single European market has been achieved.

An analysis of the double jeopardy problem can demonstrate that, both within the broad ambit of policy making and the narrower confines of enacting legislation, there may, in practice, exist a gulf between what ought to be done in theory and what can be accomplished in practice. Further, such analysis, by outlining all the various pressures that surrounded EC merger law and policy, can provide an indication as to what may happen in the future.

No control, dual control or a one stop shop?

Though it was not considered as a possibility by the Community, and indeed would have been politically untenable in any case, it is suggested that the removal of all merger controls was a serious economic option. Much of the thrust of the 1992 project seems to have been either aimed at, or has the effect of, encouraging firms to merge. Further, it was contended in earlier chapters that merger is of benefit both to European industry and the EC. It is therefore rational to make merger as easy a process as possible. One possible method of doing so would be to instigate legislation designed to remove all but essential national and Community controls.

This approach has its adherents at state level. Several Member States have no merger control legislation at all. It could, of course, be pointed out that the majority of these states have a relatively undeveloped industrial structure and therefore have no real need of such controls.[20] However, as was noted earlier, Armentano has proposed the abolition of antitrust legislation in the United States, the most highly developed industrial nation in the western world.[21]

One proposal that faced the EC legislative authorities was that of dual control. If implemented, it would have meant that the Commission and the national authorities would have concurrent jurisdiction with regard to merger proposals with a Community dimension. The main proponents of this option were Germany and the UK.[22]

This option was not, however, considered seriously for inclusion in the Regulation. Although it could be argued that the actual implementation of the Merger Control Regulation has produced something like dual control, it was clear that most parties intended it to embrace the concept of the one stop shop.

The term 'one stop shop' refers to a clear separation of jurisdiction between the Member States and the Commission. Below a certain predetermined point, the authorities of the Member States would have exclusive jurisdiction with regard to merger, so that only the national authorities need be consulted. Equally, firms contemplating a merger above the pre-determined threshold would only need to deal with the Commission.

However, the position is somewhat more complex where one or both parties contemplating merger are non-EC firms, or where one or both firms, even though EC firms, have substantial assets outwith the EC. It may then also be necessary to gain approval from national authorities outwith the EC. For example, the United States antitrust authorities have jurisdiction where the proposed merger involves firms, whether US or foreign, having business interests within that country above a pre-determined level.[23]

The notion of a single regulatory authority attracted a wide range of sponsorship. Three principal groups, in particular, were in favour of this solution: the Commission, industry, and the majority of Member States. As well as these major groupings, other parties favourable to it were the Bar Association for Commerce, Finance and Industry (BAFTI), and the House of Lords.[24]

The Commission The Commission is a Community institution and, as such, has a specific role to play in the formulation of Community legislation. It was the Commission that instigated the concept of a Merger Control Regulation and launched the final initiative that resulted in the adoption of the Regulation. The Commission was charged with a demanding role in the formulation of the Merger Control Regulation. It had to have a clear vision, both as to the model contents of the Regulation and as to its role within the single market plan. The Commission also needed to be aware of any possible adverse consequences that might result from the implementation of a Regulation containing any imperfections.

Further, as regards the actual discussion of the contents of the draft Regulation among the interested parties, the role of the Commission was to act with the overall good of the Community in mind, functioning as an honest broker between the various sectional interest groups. In short, the Commission was the pilot charged with steering the Merger Control Regulation to a safe harbour.

The congruity of the option of exclusive jurisdiction with the logic of the single market was

possibly the primary reason that lay behind the Commission's support for it.[25] That the idea of a single market dictates that there ought to be a single regulatory regime for merger, can be deduced from setting down a series of basic propositions. The national authorities of the Member States lack the power or competence to act on the supranational level. Competition is ever more frequently breaking out from the boundaries of national markets and emerging onto the European plane. The application of national policies to cross-border mergers is therefore inappropriate. A European policy is thus a necessity if the law is to reflect properly the real nature of competition in the 1990s.[26]

Woolcock wrote that the Commission preferred the option of a Regulation that clearly delineated national and Community areas of responsibility because it, "... enhances Community competence."[27] The Institute of Directors was somewhat more forthright when it noted that "The EC mergers proposal is seen by the Commission and others as an extension and refinement of the Community's current competition powers."[28] In short, the one stop shop option would strengthen the power of the Commission.

In fact, the Merger Control Regulation in general, and the one stop shop provisions within it in particular, represent a major achievement by and for the Commission, and of course DG IV. The granting of exclusive powers to the Commission for major mergers is the culmination, in this area, of a fundamental aim of the Community, namely, the irrevocable movement of economic, and in practice political, power from the Member States to the Commission.

<u>Industry</u> That the majority of European businesses

supported the idea of exclusive Community jurisdiction above a certain level may be deduced from a study of statements by the CBI, UNICE, the House of Lords, and commentators.

The CBI stipulated that its support was conditional on the Regulation achieving a one stop shop.[29] Various UNICE declarations stressed much the same point.[30] The House of Lords noted, "The Committee were impressed by the almost unanimous support from industry and their legal advisors for a single control at Community level of mergers."[31] Woolcock wrote, "European industrialists therefore want an EC regulation which will serve as the sole instrument for mergers with a European dimension."[32] The reasons for European industrialists being enthusiastic supporters of the exclusive jurisdiction option were relatively clear. In general, single control would help to clarify and simplify the law.[33]

In particular, it would allow firms greater independence from state control and thus permit them more freedom to expand at the European level. This would seem to be a major factor motivating firms in their support for the one stop shop. As Woolcock put it: "... the main objective of European business is to avoid multiple control. Exclusive powers for the Commission would mean that national governments could no longer stand in the way of merger and acquisition strategies of the companies seeking to establish a European-wide presence."[34]

Furthermore, the EC is part of the global business community. In this context, it is important for European industry to send a message to firms from non-EC states that it speaks with one voice as regards merger control. As the CBI stated, "One particular feature we note is

that the predatory companies have often been from outside the European Community. It is essential that a Community view is taken in relation to such bids."[35]

Member States The majority of Member States were in favour of the Commission having sole jurisdiction in the appraisal of mergers above the agreed threshold. There were several different grounds for such support. In general, Member States tended to favour the one stop option because it satisfied a specific national need or provided a solution to a problem caused by the absence of local measures.

Where national merger controls are non-existent the Member State may wish the Commission to act in its place. If so, then the option of exclusive Commission control is an attractive prospect. This was the case with, for example, Greece and Portugal.[36]

Whilst it is by no means a complete solution to the problem of restructuring EC industry on a European basis, a single control mechanism, preferably utilising more than a pure competition appraisal criterion, is a necessary part of this process. States that have argued the need for Community industry to be structured on a European basis, rather than on a national scale, thus favoured this option. Both France and Italy champion this viewpoint and therefore supported the notion of exclusive control over the agreed threshold.[37]

There was antagonism towards exclusive control emanating from two of the Member States having developed merger control laws of their own who sought to retain their existing powers, i.e. Germany and the UK.[38]

German opposition was voiced publicly, not by the government but, in the main, by the Federal Cartel Office.[39] Though this institution is not the official voice of the government it is a powerful and authoritative body and its arguments are taken as being, for all practical purposes, those of the state. There were two broad grounds for preferring the option of dual control: the relative strengths of national and Community controls; and the state policy of economic liberalism.

It was argued that the proposed Merger Control Regulation would be weaker than existing German controls. The Cartel Office gave as examples several instances where they feared the Merger Control Regulation would not match up to their own regulations. The law within Germany requires only the purchase of minority holdings for it to become relevant. By contrast, Community provisions were not to be triggered until a change of control occurred. German law does not permit dominant market positions to be established. The Cartel office believed the proposed Regulation proposals were weaker. A further problem with the Regulation proposals was that a gap in control would be created. Within this gap, market-dominating oligopolies could flourish, necessitating state intervention by dint of national regulations. It was also feared that regional pricing factors might be overlooked by the Commission when regarding the EC market as a whole, again necessitating parallel controls.

A further concern was over the interpretation of the Community's criterion 'a substantial part of the market,' in the draft Regulation of December 1988.[40] The Cartel Office believed this could have been taken by the Commission as applying within a part of the state, rather

than Germany as a whole. A possible situation could have been that mergers affecting Southern Germany, if above the threshold, would have come within the exclusive jurisdiction of the Commission. This was unacceptable. The Cartel office argued that such mergers had to remain within the exclusive ambit of the state authorities. It felt the proposed solution contained within Article 8 of the December 1988 draft was unsatisfactory. Article 8(2) stated:

> Where the Commission finds that a notified concentration fulfills the conditions of compatibility ... it shall issue a decision declaring the concentration compatible with the common market; ... In such a case the Commission may also empower Member States which are directly concerned by the concentration to apply their national legislation on competition in order to ensure conditions of effective competition in local markets within their respective territories.

The present policy of the German competition authorities is based on economic liberalism and free competition. Both the Cartel Office and the government felt that this policy was being put in some danger by dint of Article 2(3) of the December 1988 draft, which seemed to indicate that market dominating mergers would be permitted on industrial policy grounds.[41] The Article stated, "Concentrations which create or strengthen a position ... shall be declared inoperable with the Common Market unless authorised on the ground that their contribution to improving production and distribution, to promoting technical or economic progress, or to improving the competitive structure within the common market outweighs the damage to competition."

The nub of the problem was that, unlike the Cartel Office, the Commission is not an independent body. It is therefore susceptible to political pressures which may cause it to favour industrial criteria above competition criteria. The Cartel Office believed that, where the Commission has exclusive power with regard to certain mergers, national authorities have not sufficient countervailing power, remedies before the ECJ being judged insufficient. The Cartel Office and the German government proposed a two part solution. First, the discretionary powers of the Commission under Article 2(3) should be limited. Second, notwithstanding the first measure, the national authorities should be allowed to retain exceptional powers to block mergers they felt had been allowed by the Commission for political reasons.

The United Kingdom had three major fears over the Merger Control Regulation. These concerned the scope of Article 2(3) of the December 1988 draft; regions; and national public interest. The stance adopted by the UK was thus close to that of Germany and the first two reservations entertained by the UK can be directly linked to the German position.

The British government wished to limit the scope given to the Commission by Article 2(3). Despite the fact that British legislation allows reference to the Monopolies and Mergers Commission on the grounds of public interest, the policy of the present authorities is to make principal use of the ground of competition. As Borrie noted, "Government Ministers have stated on several occasions that the <u>primary</u> reason for making a reference to the Monopolies and Mergers Commission is that the merger appears to reduce competition significantly in some UK market."[42] For this reason the

United Kingdom was loathe to allow the EC Commission any wider scope.

Like the German, the British government felt that national authorities ought to have a greater say in regional matters than the proposed Regulation permitted. This was noted by Woolcock, who wrote, "There is also some concern that EC-level merger control would result in anti-competitive market structures in the member states."[43]

The British government was concerned to retain powers adequately to protect the national interest. A case in point was where the British government ordered disinvestment of a Kuwaiti stake in BP.[44] Her Majesty's Government wished to ensure they would have power to take similar action in comparable situations in the future. To this end, the government felt that the broad definition of legitimate interests contained in Article 20(3) of the December 1988 draft would be more appropriate than the latest Commission proposal of a list of named interests. Article 20(3) stated, "Member States may take appropriate measures where necessary to protect legitimate interests other than those pursued by this Regulation, provided that such interests are sufficiently defined and protected in domestic law and that such measures are compatible with other provisions of Community law."[45] The Commission proposal that had been put forward subsequent to Article 20(3), however, limited legitimate interests to public security, plurality of the media, and prudential rules.

Conclusions. There does now exist a system of exclusive jurisdiction for the control of, in the main, cross-border mergers. The points in favour of the one

stop shop presented an overwhelming case for this particular option to have been chosen. In particular, the specific argument for a single authority taking an overall view of mergers and the grounds suggested by industry carried great weight.

Nonetheless, two of the larger Member States, each of whom is a highly developed industrial power, had strong reservations against the one stop shop proposal. Even without the benefit of hindsight, this should have indicated that some degree of derogation from it would be found both within the final draft and within the Regulation itself.

The argument for the complete removal of controls had some economic merit. Additionally, it had the benefit of relative simplicity. However, as will be argued later on in this chapter, it would not have been the correct option, since it would have meant imposing a short term solution onto a long term problem.

The decision to institute a system of exclusive jurisdiction has a far wider relevance than the settlement of the problem to hand. The implications of the decision on double jeopardy are of major significance. It may point the way to the overall regulation and consequential future development of European industry. Further, the positions adopted by the various factional groups during the settlement of the issue highlight the problems which could affect such developments, with implications both for European industry and for the Community itself.

Galbraith argued that, despite appearances, business actually allies itself to the sources of power

within its environment.[46] In other words, the firm and the state exist not as protagonists but as partners. While deploring its effects, the Institute of Directors has recognised the truth of this hypothesis in relation to firms in the Community. It has noted that large firms are the 'social partners' of several Member States.[47] The implementation of the one stop shop concept may prove to be the final factor in the demise of such long-standing relationships.

The harmonisation of company law marked the beginning of the process in the private law field. In the public law sphere Continental Can was the starting point of the erosion of the power held by Member States over their firms.[48] With the creation of the one stop shop, power in this sphere, and indeed in general, has now shifted irrevocably and decisively from Member States to the Commission. Firms are now beginning to loosen their ties with national states and to transfer much of their attention and allegiance towards the new centre of power, the EC.

That they were aware of this process provides much of the explanation for the attitude of those advanced industrial states who were, and are, fighting against an industrial policy at the supranational level. In essence, Germany and the UK do not wish to lose their relationship with national industry. Part of the resultant strategy was to limit, as far as possible, any transfer of state power to the Commission with regard to the Merger Control Regulation. However, with the ceding of the principle of exclusive control, a major battle has been lost.

The implications of the one stop shop for the EC are considerable. The Community, and especially the

Commission, has undoubtedly achieved a major triumph. Its exclusive jurisdiction over mergers consolidates the relationship of the Commission with industry and provides that institution with the opportunity of helping to shape its future path. There is, however, a potential down side to this enhancement of the power and prestige of the Commission.

It could be questioned whether or not the Commission is properly aware of, and can cope with, the full implications of the change. If authority has been transferred, there exists the need for an organisation or institution capable of handling it. If the Commission is found lacking in expertise or structural and organisational ability then there will exist a vacuum of power at EC level with regard to the regulation of industry. This void would need to be filled, probably by the firms themselves, with the shift of power that this would entail.

The firm was never, and is never, likely to become an arm of the non-communist state. At best the partnership between industry and the state was always symbiotic. Industry is always seeking its own goals and these may be different from those of the state. In turn, the state has always feared and distrusted large power groups, whose purposes it cannot fully control. This lack of harmony was demonstrated in the present case by the fact that the majority of British and German firms allied with the rest of industry in supporting the idea of the one stop shop, while the respective Member States came out with strong reservations against the idea.

If so, then there is little reason to suppose that the relationship between the new source of power, the EC,

in particular the Commission, and industry, will be any more harmonious. At present, industry and the Commission share some of the same aims. But industry did not support the idea of the one stop shop because of its desire to aid the EC but because this concept best served its own ends. The Community, and in particular the Commission, will thus be under constant pressure from industry. In the short term, pressure will relate to the best method of achieving their joint aims. In the long term, once a divergence of ambitions occurs, there could be a clash of wills over the aims themselves. Unless the Community has an institution capable of absorbing such pressure, the future strategy of European industry could come to be dictated, in the main, by industry itself.

Creating the one stop shop

The decision to institute a one stop shop system within the Merger Control Regulation in turn gave rise to a new set of problems - those involved in the actual creation of the provision within the Merger Control Regulation. In particular, two major problems presented themselves: the resolution of technical difficulties and the settlement of factional arguments.

Five major technical issues had to be resolved before an effective one stop shop provision could be created. First, should the national authorities have the right to prohibit a merger covered by the Regulation but allowed by the Commission? Second, what scope ought Member States to have for jurisdiction within the Regulation? Third, could the difficulties with regard to Articles 85 and 86 be overcome? Fourth, at what threshold should the Commission exercise exclusive jurisdiction? Fifth, what criteria should the Commission

use for appraising a merger?

Even given the communal goodwill that would have allowed a concerted attempt to tackle these points, the task would not have been an easy one. Such goodwill was noticeable for its absence from the discussions and group interests were again evident. This had a dual effect. First, factional considerations affected each potential solution individually. Second, there was also a crossover effect. A group might agree to a specific resolution to one problem, only on condition that another issue was concluded to the satisfaction of that group.[49] For example, Buchan and Lambert reported that the UK had agreed to a five billion ecu threshold "... provided it was indexed to economic growth and that Brussels would judge mergers on competition grounds alone."[50]

Should the national authorities have the right to prohibit a merger which the Commission has allowed?

As Borrie noted, there was a feeling among some Member States that mergers on which no specific decision had been taken should fall back within the jurisdiction of Member States.[51] The rationale for this argument came from the situation regarding Articles 85 and 86 and their interaction with national law.[52] It was felt that, if there existed rights with regard to imposing national merger provisions upon firms in given instances, then such rights ought to be carried over to the Merger Control Regulation.

The state of Community law with regard to Article 86 was apparent. Advokaterne wrote, "... if the Commission decides for one reason or another not to apply Article 86, it would still be open for a national cartel authority to prohibit it if a violation of national

merger control law is established."[53] This seemed to be a correct interpretation of the situation, given the statement by the Commission in its Tenth Report on Competition Policy. "However, if the Commission rules that a merger did not infringe Article 86, it could not, in current circumstances of the law, raise objections to any prohibition of that merger by a national authority, based on stricter national law."[54]

The interpretation of national autonomy <u>vis a vis</u> Article 85 was less certain. Thus, for example, where the Commission took a decision to exempt or authorise an agreement, as could have been done under Article 85(3), there might have been some controversy if a Member State thereafter applied national provisions. The UK, however, apparently considered that it remained free to do so. As Borrie has stated, "... the UK believes that an exemption decision by the European Commission does not necessarily prevent a Member State from enforcing its own national law."[55]

For Member States who espoused this point of view it was a logical step to argue that this right should be carried over to the Merger Control Regulation.

This could have had the most damaging consequences for the one stop shop had it been seriously pursued by Member States. That it was not was noted by various commentators, who concluded, therefore, that there was to be little chance of the Regulation allowing this freedom to Member States. Borrie, himself, seemed to foresee this outcome when he wrote, "Even if the Regulation as eventually approved by the Council is against Member States having any jurisdiction over these cases ..."[56]

What scope should Member States have for authority within the Regulation? Even if it was accepted that the Community had exclusive jurisdiction in general terms, Member States could not be totally excluded from intervention in all instances. It was generally agreed that Member States should have a right to intervene when their legitimate national interests are at stake. For example, the House of Lords wrote, "There are undoubtedly some 'legitimate interests,' such as national security which the Member States must be entitled to protect by means of national merger control even in respect of mergers falling within the scope of the Regulation."[57]

The definition of such interests was a complex task. The provisions in Article 223 of the Treaty of Rome were not sufficient to cover this particular situation. The range of legitimate interests had to be widened. Among other considerations were national security and prudential rules. Member States were also seen to have a possible right to jurisdiction where there would be effects on a local market within a Member State. Further, some Member States wished to have more freedom than a specified register of interests.[58]

It was therefore a most delicate operation to draw up a provision that would satisfy Member States yet would not derogate more than strictly necessary from the principle of the one stop shop. As the House of Lords warned, "... any reservations of powers to the Member States to apply national controls to mergers falling within the scope of the Regulation should be viewed with caution."[59] The solution settled upon tried to combine the restricted options of a stated list with a clause allowing a controlled amount of freedom to Member States to intervene outwith the bounds of this register.[60]

Could the difficulties with regard to Articles 85 and 86 be overcome? There was a problem about how to dissapply these Articles for mergers within the Regulation. A similar problem existed for mergers outwith the Regulation. In both cases the draft Regulation could not amend the Treaty of Rome.[61]

The problem of the dissapplication of Articles 85 and 86 for mergers coming within the Merger Control Regulation had its roots in the pre-Regulation situation. Both the Commission and the national courts might be involved in applying Articles 85 and 86 to certain mergers. The granting of exclusive jurisdiction to the Commission for specific mergers would have been undermined if Articles 85 and 86 continued to be applied in national courts with regard to these same mergers falling within the ambit of the Regulation.

Yet it was a complex legal question as to how Articles 85 and 86 were to be dissapplied. In fact, it was not certain that this could be successfully accomplished. The House of Lords noted, "There was general agreement among witnesses that the objective in this context was to ensure that mergers within the scope of the Regulation would not be exposed to the possibility of conflicting legal controls, but some uncertainty as to how this could best be achieved."[62] Borrie was thus voicing the general pessimism when he stated, "There are continuing doubts whether a watertight way can be found."[63] The notion that was hit upon, was to attempt to disengage these Articles by dint of suspending the implementing rules of Regulation 17.[64]

Equally, there existed the problem of how to

dissapply Articles 85 and 86 in relation to mergers not coming within the ambit of the Regulation. Again this was generally felt to constitute a significant difficulty. The House of Lords stated, "There was also concern among witnesses about the position of mergers falling outside the scope of the Regulation, and in particular about the possibility that Articles 85 and 86 EEC might continue to be applied to them."[65] UNICE took a graver view. They wrote, "It would be intolerable for mergers that are not covered by the Regulation - being of lesser dimension- to be discriminated against by being subject to Articles 85 and 86 of the Treaty instead, while mergers of greater dimension are covered by the Regulation."[66]

This matter was seen to be even more intractable than of dissapplying Articles 85 and 86 from mergers coming under the Regulation. In fact, no action was taken. As Sutherland explained, "The draft Regulation could not amend the Treaties, and so there was no alternative to leaving mergers outwith its scope subject to the competition rules in Articles 85 and 86."[67]

There had been, however, attempts at a practical solution to both problems, as regards Articles 85 and 86 being invoked as a defence by firms within national courts. Sutherland explained to the House of Lords that the Court of Justice had, in several cases, now established that in the absence of an implementing Regulation, Article 85 could not be enforced by national courts in respect of mergers.[68] The position with regard to Article 86 was to be resolved by the Court's judgement in a case pending.[69] At best, however, these cases are but stopgaps.

Among the possible permanent solutions envisaged by

the Council were tackling the Article 85 dilemma by means of a Regulation granting a block exemption and also a similar Regulation as regards Article 86. Such resolutions to the difficulty were also envisaged by UNICE who suggested, as an alternative, the possibility of having a Commission communication state that the Commission did not intend to instigate proceedings under Articles 85 and 86 for mergers below the threshold.[70]

At what figure was the Commission to exercise exclusive jurisdiction? There were three main options as to where the threshold ought to be placed: ten, five or two billion ecu. The Commission had originally submitted a figure of one billion ecu in Article 1 of the draft Regulation of December 1988, but this was never regarded by any party, possibly including the Commission itself, as a serious possibility.[71] As the House of Lords wrote, "... nearly all argued that the threshold proposed by the Commission was too low."[72]

The ten billion ecu option would have had political advantages, in that it would have pleased both the United Kingdom and Germany. As developed industrial powers with comprehensive national merger control systems, they were in favour of restricting the ambit of the Commission and thus supported the idea of a ten billion ecu worldwide threshold. The Department of Trade and Industry noted, "The UK's view is that any Regulation should 'catch' only large mergers with a genuine Community dimension, and that the threshold should be high enough to ensure this is so."[73] Lord Young was more explicit, stating that the government would prefer thresholds in the order of ten billion ecu worldwide turnover.[74]

Although the Commission did not support the ten

billion ecu option, this threshold might have had advantages for it. Opting for such a high threshold would have lessened the risk of the Commission becoming overburdened with applications. This would have ensured that it was always in a position to devote the necessary time and expertise to the most important mergers.[75] In short, it would have been sacrificing quantity for quality.

The general opinion, though, was that ten billion was simply too high a figure. As Woolcock, for example, stated, "With a ten billion threshold, large parts of the national economies of smaller member states, and even of larger member states, could change hands."[76] Thus, several parties would have been unhappy. The Commission would have felt that it had, at best, a tenuous role in the control of mergers, as it would simply not be involved with the majority of mergers. Member States with little or no experience of merger control would have been forced to do without the expertise of the Commission. Firms would have felt that, to a great extent, the problems of double jeopardy would be unresolved. There would still have been, in the majority of instances, the necessity of going to several Member States, each with their separate requirements.

Two billion ecu was the option favoured by the Commission, after the rejection of its earlier suggestion. It was also the alternative promoted by Member States such as the Netherlands, Italy, Spain, Belgium and Portugal with little or no merger legislation of their own, as it afforded them some measure of Community protection for their industries.

The major problem with the two billion ecu threshold

was that it was too low. The adoption of this figure could have led, at least in the short term, to problems of too many cases coming before the Commission. Therefore, until DG IV gained both expertise in the new procedures and took on more qualified staff, it is difficult to see how the Commission could have coped with the number of cases resulting from a two billion threshold.

Five Billion ecu was finally agreed upon as the sensible compromise figure, as regards the aspirations of the Member States. Further, it appeared to be the threshold most capable of generating a viable caseload for the Commission.[77] In fact, the Commission itself, in a spirit of compromise, had finally suggested this figure. It added the proviso, however, that there was to be a review point after four years when this threshold could be revised.[78] The idea that this chosen threshold should be capable of being easily altered did receive some support, for example, from BAFTI.[79] This proviso, however, was the subject of objections from the UK, Germany and France.[80]

What criteria should the Commission use in deciding merger proposals? The major point of contention was whether competition criteria alone, or competition and industrial criteria, should be used to judge proposed mergers. This issue cannot be seen in isolation, but is connected to the wider question of whether the Community ought to pursue an industrial policy, a Merger Control Regulation being an integral part of such a strategy.

Some Member States, in particular the UK and Germany, were against taking into account any considerations other than those of competition.[81]

However, as was shown in Chapter Two, such considerations are employed, with apparent success, in capitalist development economies. Arguments against the use of industrial criteria were conducted by Member States on more than one level. Such contentions encompassed both the good of the Community and the individual Member State.

The first level of argumentation by Member States concerned the economic good of the Community. It was claimed that the use of industrial criteria would not produce any economic advantage for the Community.

To tackle this argument on its economic merits, evidence has been provided in this text to support the contention that, even in the absence of an industrial policy, it is still of value to allow industrial policy considerations to be used alongside competition criteria for appraising mergers. In other words, the factors mentioned by Borrie are not to be seen as 'doubtful arguments.' This is supported both by the opinion of business and by the success of Japanese industrial policy.

As to business opinion, Thomas reported that a dozen of the leading European technology firms had warned the Commission against a competition policy which hindered the formation of firms powerful enough to compete with the Japanese and the Americans. More specifically, he recounted that "The companies want all blocks on cross-border mergers and acquisitions removed. They say Japanese and US companies will provide sufficient competition even if one dominant European company or joint venture emerged in key areas of information technology."[82] Robert Hormats of Goldman Sachs wrote,

"Inevitably we are going to see mega-mergers in Europe. European enterprises must grow to achieve the economies of scale of their US and Japanese counterparts."[83] Martin Waldenstrom of Booz Allen stated that, "... if Europe did not significantly improve its mergers and acquisitions environment it would be impossible in certain industries, particularly services, to remain competitive with Japan and the US ..."[84]

Such views could be read as an argument for doing away with all controls on mergers. However, while the abolition of all merger controls might have a certain economic merit, retaining a degree of control would be more beneficial. The addition of industrial criteria to competition tests would have the advantage of giving more freedom for mergers but still allow a rational overview by the authorities. Industrialists wish, and should receive, some preferable treatment if they are to be the vanguard of the European fight against the Japanese.[85] They should not, however, be allowed to have all barriers removed. While, in a sense, they are battling for Europe, it is still their own interests and ambitions they are pursuing. If the Community removed all obstacles to merger it would abdicate all responsibility, and indeed all moral rights, as regards the task of securing the future of European industry as a whole.

The use of dual criteria is by no means the easiest option as regards actual administration, but it may be the alternative that yields the best results. Evidence for this supposition may be drawn from an illustration of Japanese practice. It is suggested the following example, while employed within Japan on a general basis, could be applied more narrowly (though admittedly more crudely) to Community mergers by the use of industrial criteria

alongside competition tests. Plender stated:

> The Japanese, in contrast, rig their markets very thoroughly. ... they confine competition to these sectors of the economy where they believe it to be beneficial and then ensure it is truly ferocious. The non-competitive elements of the system are designed to provide a stable climate in which Japanese business invests ever more productively in plant and machinery.
>
> And it works.[86]

The second level of Member State argumentation is political. Industrial policy criteria are to be discarded as they conflict with the individual political good of the Member State. It is suggested that even if the Member States could have been convinced that the economic arguments against industrial policy criteria do not stand up, they would still have argued against the use of such criteria. Indeed, there is some evidence that the Member States themselves do not believe in the economic truth of their own arguments, since both Germany and the UK reserve to themselves the right to use what are, in effect, industrial criteria.

Woolcock wrote that "It would be wrong to classify the German position as anything other than competition-based but on occasions even the Federal Ministry of Economics engages in industrial policy."[87] As to the UK, Woolcock stated, "The British complaint about discretionary powers for the Commission is even less convincing. ... one must ask why the UK has remained wedded to a public-interest-based system despite at least two major reviews of merger policy since 1979?"[88] In fact, even Borrie was forced to concede the illogicality of the British position. He wrote, "It may be suggested

that this view is inconsistent with the UK's own merger policy based on a broad public interest test ..."[69]

If so, then no good economic reason exists not to have employed such criteria at the supranational level. In brief, the UK and Germany were against the employment of other than competition considerations as they feared this would lead to the beginning of an EC industrial policy. As this had not been agreed among the Member States and, indeed, was actively opposed by the UK and Germany, it was not to be permitted. Further, allowing the employment of industrial criteria would have granted a greater transfer of power to the Commission than was strictly necessary at that time. As the House of Lords noted, "... powers once transferred to Community competence are not likely to be assigned again to the control of Member States."[70]

What was the position of the Commission on this central point? Logically, it would have seemed that the Commission ought to have supported the idea of using industrial as well as competition criteria. As has been stated, the Merger Control Regulation must be seen within the context of its helping to achieve the aims of 1992. One such ambition was to afford assistance to European industry. If so, then, as has been suggested, a Merger Control Regulation that incorporated industrial criteria would have been best suited to help European firms to reach the size needed to compete with their non-EC rivals.

Initially, the Commission did seem to take this stance, as Article 2(3) of the December 1988 draft clearly set out industrial policy criteria. In fact, Article 2(3) was explicit enough to cause a considerable

degree of alarm within the Federal Cartel Office.[91]

Yet, from that point on, the behaviour of the Commission appears somewhat erratic in that it revised its position. It became a strong proponent of pure competition criteria as the sole test for mergers. The natural assumption to make would be that the pressures on the Commission exercised by Germany and the UK forced a change of emphasis on its part. Buchan and Dawkins reported, "Britain, West Germany and the Commission, spurred on by Sir Leon Brittan, the competition commissioner, appear to have successfully held out for Brussels to judge mergers on competition grounds alone."[92]

Was it then these pressures that caused the change of heart on the part of the Commission? While no definitive answer is possible, the following additional suggestions are offered. First, it could be the case that the Commission, on the basis of a re-evaluation of the economic evidence, decided that whatever benefits industrial criteria conferred, these advantages were outweighed by the potential harm to competition. While this is possible, it seems unlikely. As has been demonstrated, the most recent trends in economic theory seem to indicate that increased concentration does not have an adverse affect on competition.

Second, if industrial criteria were used then the Commission might have lost its exclusive power over the Merger Control Regulation. For example, the House of Lords enquired, "If non-competition criteria were to be taken into account in assessing a merger, what would be the best process for such decisions? Would the Commission be the best body to decide, or would the

Council of Ministers be a better body to do the job? "[93]

The Merger Control Regulation necessitated an increase in personnel in DG IV.[94] If other than competition criteria were used, however, it is possible experts from DG III may have been drafted in instead. Even if this had not happened, allowing industrial criteria might have gained DG III more say in merger policy as DG IV procedures with regard to mergers were, in any case, under heavy criticism from a variety of parties.[95]

Finally, on this specific issue, the new head of DG IV may have been more competition minded than his predecessor. Certainly, speeches given by Sir Leon Brittan showed him to be dubious as to the benefits of economy of scale and related industrial policy criteria arguments.[96]

The merger control regulation: one stop shop provisions

There are three salient characteristics of the Merger Control Regulation with regard to the one stop shop. First, the Regulation makes it apparent that there is to be a clear separation of jurisdiction between the Member States and the Commission. Second, it lists some exceptions to this basic principle. Third, the Regulation deals with various technical problems.

As to the separation of jurisdiction, Recital 29 to the Regulation declares, "Whereas concentrations not referred to in this Regulation, come, in principle, within the jurisdiction of the Member States; ..." Further, Article 1 (1) sets out that, "... this Regulation shall apply to all concentrations with a

Community dimension ..." Article 21 (1) notes, "Subject to review by the Court of Justice, the Commission shall have sole competence to take the decisions provided for in this Regulation." Article 21(2) declares, "No Member State shall apply its national legislation on competition to any concentration that has a Community dimension."

Further, the Regulation has formalised the procedure as to mergers which do not pose serious competition problems. Article 6(1)(b) provides that, "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." Further, Article 10(1) states, "The decisions referred to in Article 6(1) must be taken within one month at most." As Downes and Ellison noted, "The Commission is required to make its determination in the form of a decision."[97] This prevents the problem of Member States claiming that, as no specific decision had been taken, the merger should fall back within the jurisdiction of Member States.

As regards a Member State making use of Articles 85 and/or 86 should the Commission not initiate a procedure, the Regulation also appears to have forestalled this possibility.[98] Bright stated, "The European Community Merger Regulation provides a compulsory notification procedure. On notification, the Commission is obliged to open a procedure, if only to give the Concentrations with a Community Dimension the equivalent of a negative clearance. Consequently ... there should never be cases which are within the scope of the Regulation and on which the Commission has not implemented a procedure ..."[99]

Nonetheless, a small area of doubt remains. Though it could have done, the Regulation does not say that the Commission has exclusive power to take decisions on the basis of Articles 85 and 86. Bright wrote that "The question remains, however, if the European Community Merger Regulation does not say that the Commission has the sole power to take decisions on the basis of Article 85 and 86, as would have been possible, are Member States left with rights (and obligations) in relation to concentrations under these Articles?[100] Thus, technically, it may still be open to question whether or not the merger authorities of Member States can use Articles 85 and/or 86 against a merger coming within the ambit of the Regulation.[101] Bright, however, concluded that these powers, "... have been extinguished in relation to Concentrations with a Community Dimension."[102] However, even if the theoretical correctness of this judgement were open to question, the national merger authorities are unlikely, in practice, to attempt use Articles 85 and/or 86 in this way. Such action would, in effect, constitute a fresh challenge to the hitherto agreed idea of exclusive EC merger control above the agreed thresholds.

The Merger Control Regulation features several exceptions to the one stop shop principle. These concern national interests, assistance by the Commission to Member States at their request, lack of effective competition within a national market (the distinct market problem), thresholds <u>per se</u>.

With regard to national interests, Recital 28 of the Merger Control Regulation states,

> Whereas, furthermore, the exclusive application of this Regulation to concentrations with a Community

> dimension is without prejudice to Article 223 of the Treaty, and does not prevent the Member States' taking appropriate measures to protect legitimate interests other than those pursued by this Regulation, provided that such measures are compatible with the general principles and other provisions of Community law;

Further, Article 21(3) asserts:

> 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 ...

Given the importance placed by Member States upon the necessity of the state having a final say over mergers in certain circumstances, it was to be expected that the Merger Control Regulation would contain both the Article 223 exception and some further form of state restriction over mergers with a Community dimension. In some views, too much has been ceded, the CBI, for example, stated that Recital 28 of the December 1988 draft giving the Member States the right to protect unnamed legitimate interests was, 'totally unacceptable.'[103] As the Recital 28 and Article 21(3) in the Regulation confer much the same rights for Member States, it is suggested the CBI might deliver a similar verdict on them. van Empel, also, believes that the provision in the Regulation is unlikely to find favour with the business community, having written:

> This provision may well eventually prove fairly devastating to the interests of parties involved in

> merger operations. ... here is the fully fledged 'double barrier' so feared by the international business community: indeed, whereas a merger which has been condemned by the Commission cannot be redeemed by virtue of national law, a merger which has been approved by the Commission can still be condemned at national level.[104]

The restrictions actually placed on the right of Member States to protect their legitimate interests, however, suggests that this is too strong a reaction. First, as stated in Article 21 (3), the ground in question must be assessed by the Commission as to compatibility with Community law. Second, even if the Commission allows the Member State this exception, its exercise is limited. While the Member State may prevent a merger or subject it to additional conditions and requirements, the Commission made it clear that a Member State may not, on those grounds, authorise a merger found to be unlawful by the Commission.[105]

Further, it was noted earlier that the United Kingdom wished the Regulation to contain a broad definition of legitimate interests in place of a list of named interests. This has not happened. Given all these factors it is suggested that the Regulation exceptions amount to a reasonable compromise between the needs of the state and the firm.

Concerning requests from Member States to the Commission for assistance, Recital 29 notes:

> Whereas concentrations not referred to in this Regulation come, in principle, within the jurisdiction of the Member States; whereas however, the Commission should have the power to act, at the

> request of the Member State concerned, in cases where effective competition would be significantly impeded within that Member State's territory;

And Article 22(3) stated:

> If the Commission finds, at the request of a Member State, that a concentration as defined in Article 3 that has no Community dimension within the meaning of Article 1 creates or strengthens a dominant position ... it may, insofar as the concentration affects trade between Member States, adopt the decisions provided for in Article 8 (2), second paragraph, (3) and (4).

This exception to a one stop shop is explicable. It is an added form of protection for Italy and the other Member States lacking adequate national competition provisions, these Member States having had serious misgivings over the plan to set the threshold at five billion ecu.

The solution to this problem was, following a proposal from the Netherlands, to amend the Regulation so as to include a proviso allowing the Commission to intervene, at the request of a Member State, with regard to mergers below the threshold if such mergers affected trade between Member States and threatened competition."[106]

This exception is not a serious breach of the principle of the one stop shop as Article 22 (6) states that "Paragraphs 3 to 5 shall continue to apply until the thresholds referred to in Article 1 (2) have been reviewed." Thus, if, as expected, the thresholds are revised downwards to two billion ecu within the next few years, the provision should cease to apply.

In the short term, the answer depends upon the actual use made of the provision by Member States. There seems little danger, however, of the Commission utilising this provision as a general means of exercising power below the thresholds.[107] The majority of commentators seem to regard this derogation from the one stop shop principle as unimportant.[108]

Lack of effective competition within a national market (the distinct market problem) is covered by Recital 27 and Article 9. Article 9 (2) stated, "... a Member State may inform the Commission ... that a concentration threatens to create or strengthen a dominant position as a result of which effective competition would be significantly impeded in a market within that Member State ..." If the Commission considers that there is such a distinct market, and that the threat is real then it may either deal with the case itself or refer it to the competent authorities of the Member State concerned. These authorities may then apply national competition law.

The existence of the above stipulation may be attributed to pressure from the government of Germany.[109] First, there were the general fears of the government, as voiced by the Federal Cartel Office, on a possible vacuum of power with regard to controlling mergers within a territory. Second, the government wished to placate the Federal Cartel Office, which had shown a certain coolness towards the government after being overruled in the matter of the Daimler-Benz, MMB takeover.[110]

The concept of a distinct market can be related to that of the relevant market in that, though the

Regulation addresses only the geographical market, logically, it must also encompass relevant products.[111] Further, as regards the geographic market, the first sentence of Article 9(7) bears a similarity to statements made by the ECJ in the context of Article 86.[112] However, as Bourgeois and Langeheine point out, the second sentence indicates that it is not overall comparison between areas that is fundamental but specific elements, consumer choice especially. These elements are the key factor in demonstrating that a distinct market may exist.[113] Overall, therefore, it is suggested that the definition of what constitutes a distinct market is a difficult problem for the Commission. As Bernini stated, "The truth is that this new entity - i.e. the distinct market ...- is very shadowy."[114]

Article 9 constitutes the most serious exception to the principle of exclusive Community jurisdiction over the agreed threshold. Other exceptions to the exclusive jurisdiction principle are either explicable or relatively innocuous. Article 9 is neither. It has not resulted from a reasonable, if difficult, demand from the German government. The inclusion of Article 9 in the Merger Control Regulation defies the logic of the principle of the one stop shop. Article 9 is more restrictive of the one stop shop principle than its December 1988 draft invocation, Article 8 (2). The draft spoke only of 'local markets within their respective territories,' whereas the Article itself extends the concept to a market consisting of the whole country. Article 9(2) speaks, without qualification, of a market within a Member State; nor does 9(7) impose any geographical limit.[115] Yet, the earlier provision was itself castigated by the House of Lords as, "... both unnecessary and unsatisfactory."[116]

Industry is disturbed over the possible effects of the clause. The CBI wrote, "Further, we remain concerned that Article 9 may dilute the principle of one stop control."[117] The Institute of Directors echoed much the same sentiments. It referred to Article 9 as "... the German Clause, which further blurs the issue between national and EC competence over merger control."[118]

There exists also the difficulty of enforcing the provision. Article 9 may cause problems with regard to its application. Due not only to its illogicality but also to its imprecise drafting, it leaves open many areas of doubt.[119] As Borrie has argued, "Article Nine bears all the marks of lawmaking by negotiation: its interpretation is far from easy. Any case in which it is invoked is bound to be immensely complicated for the parties."[120] In <u>Varta/Bosch,</u> Germany made an application under Article 9(2) but the Commission chose to initiate proceedings under Article 6(1)(c).[121] The provision will be reviewed before the end of the fourth year.

Whatever the merits or demerits of Article 9, its existence may provide a valuable pointer as to the thinking of the Commission with regard to merger. Sir Leon Brittan had been quoted in Chapter 6 as stating that the scope of the Commission's activities is trade between Member States and that merger within a state did not usually affect inter state trade. This opinion is somewhat at odds with the practice of the Commission and Court as regards cases and investigations under Articles 85 and 86 concerning merger. It may be that Article 9 is the manifestation of a shift in Commission practice in that it now targets, almost exclusively, cross-border merger as the object of its attention.

The final concern as regards exceptions to the basic principle of the one stop shop involved thresholds. This could result in firms 'playing safe' and approaching both the national and the Community authorities. That is, firms may be unsure whether or not their worldwide turnover exceeds five billion ecu.[122]

Further, as Borrie pointed out, firms could also suffer some degree of uncertainty as to whether or not their aggregate Community-wide turnover exceeds two hundred and fifty million ecu, or if both firms have more than two thirds of their Community wide turnover within a single Member State. The concluding worry of Borrie involved geographic location. He wrote, "There are also businesses in fields such as transport and communications for which the question where the turnover takes place is not unambiguous."[123]

The employment of the Regulation appears to demonstrate that the fears Borrie expressed were both justified and far sighted. As Lovell, White, Durrant noted in their review of the Regulation one year on, "The application of the turnover thresholds have given rise to an unexpected number of problems."[124]

Technical Problems in relation to the Regulation

Concerning Article 85 and 86 provisions, Article 22 (2) states, "Regulation No 17, (EEC) ... shall not apply to concentrations as defined in Article 3." Sir Leon Brittan has declared that, "The effect of this is that the Commission is denied the panoply of powers and procedures needed to apply the Treaty rules effectively."[125] He also noted, however, that the Commission still retained some residual powers under

Article 89 of the Treaty.

By dint of the provisions in the Regulation it seems clear the Commission itself will not invoke Articles 85 and 86 with regard to mergers above the threshold. Despite this provision, and the ECJ judgments mentioned previously, there is still confusion as to whether or not Articles 85 and 86 can be invoked in national courts as regards such mergers.[126] Sir Leon Brittan commented that the Merger Control Regulation provisions meant that, "... the national courts may not apply Article 85. They may, however, apply Article 86, which does not require any implementing legislation to be directly effective ..."[127] As Sir Leon Brittan concluded, "There is no way of completely ruling out litigation probing the Commission's policy, ..."

Recital 5 of the Merger Control Regulation sets out the basic position of the Regulation as to appraisal criteria for concentrations. It declares, "... however, it must be ensured that the process of re-organisation does not result in lasting damage to competition; whereas Community law must therefore include provisions governing those concentrations which may significantly impede effective competition in the Common Market or in a substantial part of it;"

Article 2 makes it clear that the test of a proposed merger will be whether or not it creates or strengthens a dominant position that impedes effective competition in the single market or a substantial part of it. If it does not do so, it will be declared compatible with the common market and authorised. Article 2 (1) a) states that the appraisal shall take into account, "the need to preserve and develop effective competition within

the common market ..." Among other things specified by Article 2 (b), was that the Commission should also consider the effect of the merger on "economic and technical progress provided that it is to consumers advantage and does not form an obstacle to competition" This latter passage constitutes the sole concession to industrial policy criteria.

Is the Merger Control Regulation, thus, in essence, a continuation of the merger control policy carried out until the 20th of September 1990? In fact, the wealth of analysis that has been built up as regards Article 86 is still of value to merger control. As Fine has stated, "... it is clear that the jurisprudence under Article 86 ... is highly relevant as to the existence of dominance and to the determination of the relevant product and geographic markets."[128] Further, Sir Leon Brittan has noted that "The substantive test of the Regulation is based on the notion of dominant position ... A dominant position analysis, along the lines of that carried out under Article 86, will be necessary in all cases ..."[129].

A finding of market dominance, however, is not, in itself, enough for the Commission to disallow a merger proposal. A dominant position, as such, is still not prohibited, though Sir Leon Brittan has stated that, in most cases, a dominant position that does not have the effect of impeding competition is not conceivable.[130] Thus, recourse must be had to the qualification in Article 2(3), "as a result of which competition would be significantly impeded."

The wording of Article 2(3) is clearly not meant to be a restatement of the ECJ definition of 'abuse' but is rather a separate test. Sir Leon Brittan has expressly

stated that this is a new test altogether. Fine has written that "The test of 'significant impediment' ... ensures that neither the creation nor reinforcement of a dominant position would result in a finding of incompatibility unless the accompanying effects on competition are quite substantial."[131] However, as Fine has noted, "This begs the question as to how the 'significant impediment' test is to be applied."[132]

Again, following on from previous Commission and ECJ practices, the definition of the relevant market will be a fundamental prerequisite to any finding of dominance. Sir Leon Brittan has stated, "Market definition is always crucial in competition cases and this is nowhere more true than when one is considering the market power of a merged company."[133]

Regarding the relevant product market the existing body of EC analysis is still of value here. Venit wrote, "Article 2(1)(b), which sets forth the criteria for assessing the existence of market power, does not provide any criteria for defining the relevant product market. It would appear reasonable to assume that the Commission will apply the analysis that has been developed in the case law ..."[134]

As to whether the global market will be given greater emphasis than was previously the case under Article 86, two speeches by Sir Leon Brittan may point to a changing trend of thought within DG IV. In his address to the Bar Council of May 1990, Sir Leon seemed to set his face against any emphasis on the geographic market outwith the Community. He stated:

> ... our only concern is for competition **within** the Community and I reject the argument that a

> competitive world market may justify a dominant position within the Community. There can be no trade-off between competition in the Community and competitiveness elsewhere. This would be economic nonsense and bad law.[135]

However, his speech at the Centre for European Policy Studies in September 1990 appeared to take a different line. Sir Leon stated:

> ... there are many sectors in which competition within the Community genuinely extends beyond the Community's borders. In such cases it is perfectly proper to look at competition brought to the Community from outside. If companies in third countries are competing or are capable of competing within the Community their market share or other manifestation of competitive pressure should of course be considered in any assessment of competition in the Community market.[136]

Thus, as Lovell, White, Durrant have noted, the Commission, "... is finding the definition of the relevant geographic market one of its more difficult tasks."[137]

The restriction of appraisal criteria to competition is possibly the most serious flaw of the Merger Control Regulation. It was argued earlier in this chapter that the clause came to be incorporated in the Regulation due to the firm stance taken on this issue by the UK and Germany, and the change of attitude of the Commission. Also of relevance was the fact that Member States supporting the industrial policy position gave way.

It is argued that, by confining appraisal criteria to competition considerations, the EC made the wrong

choice economically. By limiting the Merger Control Regulation to competition criteria the Community turned its back on the economies of scale and related arguments which favoured allowing certain mergers, despite their possible adverse affects on competition.[138] Thus, from the outset, it is suggested that the Merger Control Regulation was handicapped in playing its proper role in assisting the formation of the single market and in achieving the primary aim of the single market, the strengthening of European industry.

The EC, and in particular the Commission, has set a poor example of leadership in that it has been sending conflicting signals to industry. By its very actions of initiating the 1992 project the Commission started a merger wave.[139] In other words, irrespective of any policy of the Commission, industry decided the challenge of 1992 could best be met by merger. Far from acting to damp down such activity on the part of European firms, the Commission had seemed to indicate positive approval of the idea of merger. The project of achieving a level playing field with regard to cross-border mergers is rapidly becoming a major Commission activity. Further, its statements on the European Company Statute and its draft proposals for a Merger Control Regulation all sent an unambiguous signal to firms and commentators.

The Institute of Directors wrote, "The 'exception' clause in the draft EC merger Regulation is consistent with the Commission's policy expressed elsewhere positively to <u>encourage</u> cross border but-intra EC mergers. For instance, in the initiative to revive the European Company Statute ..."[140] Berwin, on the basis of the European Company Statute proposal, wrote that "The Commission's view is that increased cross-border

co-operation in the form of mergers and associations is imperative for the benefit of the Community, in order to enable European business to compete more efficiently in world markets against US and Japanese megaliths for example."[141]

It is possible that the Commission has always maintained a consistent view on merger but that it has been misinterpreted by various observers. It may be that the Commission favours mergers, but not ones with potential anti-competitive effects.[142] More probable, however, is that the Commission, being composed of individual directorates, more than one of which has an interest in mergers, has found it difficult to pursue a consistent policy on mergers. This was the view of Lintler and Mazey who stated that, "Sir Leon Brittan has striven to enforce competition vigorously ... Additionally, there is the paradox that the Community also seeks to encourage cross-border mergers in order to facilitate the free movement of capital and enable economies of scale to be enjoyed."[143] The authors went on to conclude that the attitude of the Commission to multinational firms was "... fundamentally two-edged - on the one hand encouraging multinational activity, while on the other trying to remedy the disadvantages caused by this very activity."[144]

The reaction of industry to the decision to limit appraisal criteria has been hostile. Speaking of the final draft of Articles 2 and 9 Hampton noted, "There are no doubt, many more changes of detail, but few are likely to strike at factors quite so central to industry's earlier acquiescence in the proposals."[145] Peter Cottis, a senior advisor to Lucas Industries stated at a conference that industry felt 'shopped' and was

'very upset.'[146]

Conclusions. The first section of this chapter showed that, while some consensus of opinion among the various parties with an interest in the proposed Merger Control Regulation was evident, there were, in the main, contrasting and contradictory needs. This situation was responsible for the lengthy and arduous negotiations that preceded the creation of the Regulation. Such bargaining was illustrated by examining in detail the most fundamental concept to be incorporated within the Regulation, that of the one stop shop.

Given this background, it is hardly surprising that there are flaws within the Merger Control Regulation. As Venit observed, "The Regulation is the product of a political compromise between the Commission and the Member States ..."[147] Cook and Kerse stated, "Few, if any, Community proposals ... have resulted in such transparent compromise of conflicting views."[148] With regard to securing the removal of double jeopardy, complex and difficult discussions resulted in the Regulation being endowed with several areas of potential concern. In particular, Articles 9, 21, and 22, stand out as potential sources of future problems. Further potential causes of discontent are the interpretation of thresholds, and the interaction of the Regulation with Articles 85 and 86.

An additional weakness of the Merger Control Regulation which deserves special mention is the reliance on competition as the means by which mergers are to be appraised. By removing industrial criteria from consideration, the Commission may have taken away much of the point of the Merger Control Regulation. It chose

to see the Regulation as an instrument to continue the dominance of competition policy.[147] The main thrust of 1992 seemed to indicate that some mergers, irrespective of their effects on competition, are desirable from the Community point of view. The Commission, however, by its action, seems intent on pursuing its strategy of promoting competition, undeterred by the conspicuous lack of success that this policy has had over the past decades.

The primary target of the Merger Control Regulation, European industry, did not seem to receive the Regulation with any marked enthusiasm. This was due, in particular, to the combined effects of Articles 2, 9 and 21. Industry had been expecting, so to speak, a 'double positive' Merger Control Regulation. That is, a Regulation that would end the double jeopardy hazard and also widen the range of mergers that would be in a position to enjoy the benefits of this one stop shop. What it has actually got is a halfway house in that only firms whose merger plans are not judged to be anticompetitive will get to receive the benefits of the one stop shop procedure. Further, Articles 9 and 21 have made even this latter advantage uncertain. If industry is unhappy with the Merger Control Regulation then a fundamental aim of 1992, the restructuring of business, could be in jeopardy.

The Commission must accept at least some responsibility for this state of affairs. It has committed sins of commission and omission. It acted to help remove industrial criteria yet failed to stop Article 9 being passed. This was but one of several instances where the Commission failed to give a lead to parties. As Hampton stated, "The changes to the draft are being moved by the member states, with the Commission

more or less standing by ..."[150]

Yet it cannot be said the situation is hopeless. The Regulation itself exists and the principle of the one stop shop exists. No matter the text of the Merger Control Regulation, its practical application by the Commission, and possible interpretation by the Court of Justice, may show the suggested flaws actually materialising in practice, thus possibly providing the stimulus for their eventual remedy. As Sir Leon Brittan pointed out, "The interpretation and application of the new Regulation will provide the next chapter."[151] Thus far, the majority of potential problem areas have not featured in the Commission investigations. However, as will be shown in the next chapter, there are signs that the period of calm before the storm is coming to an end.[152]

1. Confederation of British Industry, (CBI). The quote is from their evidence given to the House of Lords. See, House of Lords Select Committee on the European Communities, *Merger Control : With Evidence* Session 1988-89 6th Report. (London: HMSO, 1989). The Report is in two parts. Part One comprises the Report of the House of Lords, Part Two is the evidence presented to the Committee. The CBI quote is given in Part Two, 26. This Report will be cited as the 'House of Lords.'

2. Union of Industrial and Employers' Confederation of Europe, (UNICE), "Community Control of Mergers: Unice Declaration," (4 November 1988). See also, William Elland "The Mergers Control Regulation (EEC) No. 4064/89," *European Competition Law Review* no. 3 (1990): 112. Elland listed, "... seven pressing reasons for a Mergers Control Regulation."

3. CBI, *op. cit* in note (1), Part Two, 26.

4. Ibid.

5. John Temple Lang, "Notes for a Lecture on Concentration and Restructuring in the European Community - Mergers under European Community Antitrust Law," *Lecture Given to the International Bar Association, Strasbourg*, October 1989, 3.

6. European Report, Part III, 3-4, (18 June 1988). This had been foreshadowed in Commission Press Release IP(87) 282 July 1987. Further, such weaknesses were still present in late 1989. See Temple Lang, *op. cit* in note (5), 4.

7. Temple Lang, *op. cit* in note (5), 4.

8. Ibid. Temple Lang noted that Article 86 did not apply where two non-dominant firms merged even though the result was to create a firm with great market power.

9. However, these two aims are not always mutually compatible, in that an efficiency defence erodes legal certainty to some extent.

10. Letter (1 September 1989) from H. Kroger, Head of Company Affairs Department of (UNICE) to the author. The opinions contained in the letter are those of UNICE itself and not those of Mr Kroger in his personal capacity.

UNICE considers that their statements on criteria should be seen as coming under competition policy and not industrial policy. It is suggested, however, that this is a matter only of individual classification and that UNICE does favour a departure from pure competition criteria for merger.

11. See, CBI op. cit in note (1), Part Two, 26-32.; UNICE, "Amended Proposal for a Council Regulation on the Control of Concentrations between Undertakings: UNICE Position," (4 May 1988): 1-4, "Community Control of Mergers: UNICE Declaration," (4 November 1988): 1-2.

12. S. Woolcock, European Mergers: National or Community Controls? (London: Royal Institute of International Affairs, Chatham House Paper, 1989), 11. Woolcock wrote, "National governments and national competition authorities, ... are reluctant to cede control over merger policy."

13. Sir Gordon Borrie, "The Contents and Implication of the European Merger Control Regulation From the Perspective of the Office of Fair Trading," Speech given

at the Forum Institut fur Management Conference. The European Law of Competition and its Further Developments Following the Adoption of the European Community Regulation on Merger Control, Bonn 19th February 1990, 4. As Borrie noted, the firm can encounter worse than double jeopardy. That is, it can face more than two separate examinations by merger authorities. However, 'double jeopardy' is the accepted term for this hazard and is therefore used throughout this chapter.

14. Woolcock, op. cit in note (12), 1.

15. Institute of Directors, submission to the House of Lords, op. cit in note (1), Part 2, 104.

16. Borrie, op. cit in note (13), 4.

17. Sir Leon Brittan, "Acquisitions and Mergers in the European Community," Speech to the Institute of Directors - Scotland 24 November 1989, 12.

18. Borrie, op. cit in note (13), 4. However, he did qualify his opinion somewhat, by stating that the need to remove the double jeopardy hazard was only for the benefit of mergers that were not anticompetitive.

19. Francis Maude, minister for Corporate Affairs at the DTI. His views were reported in, Philip Coggan, "Getting Europe Ship-Shape to Compete in World Markets," Financial times (8 February 1989). See also, CBI, "Preparing for 1992: EC Competition Policy," 1992 - How it Affects You CBI Publication, Brief no. 4 (August 1988): 1; Solicitors' European Group North West Region, Seminar on Mergers and EEC Competition Law, 15 September 1988, 4, Speech by J.F. Verstrynge, official of DG IV.

The CBI wrote that the three basic questions as

regards the proposed Merger Control Regulation were, assessment of mergers on the basis of a European dimension, legal security, and the avoidance of double jeopardy. Verstrynge emphasised as the essential issues the following queries. The status of national controls in relation to the Community measures. Should there be a priori control? What should be the criteria for Commission involvement?

20. As will be seen, the smaller Member States wish the Commission to act in their place in order to avoid national firms being taken over by multinationals.

21. See generally, D.T. Armentano, Antitrust Policy: The Case for Repeal (Washington: Cato Institute, 1986).

22. Woolcock, op. cit in note (12), 23-24.

23. Sir Leon Brittan indicated treaties between the Community and non-member states may be a solution. In fact, the EC and the United States have now signed a treaty to cooperate on competition policy, "Competition Laws Co-operation Agreement 1991 (EEC - USA)." The text is in Common Market Law Reports no. 4 (1991): 823-31. George Graham, "US and EÇ to Co-operate Over Competition Policy," Financial Times (24 October 1991) wrote, "The agreement sets up ways for the Justice Department and the Federal Trade Commission ... to work with the European Commission on mergers and anti-competitive abuses."

24. House of Lords, op. cit in note (1). The House of Lords opinion was at Part 1, 26. The BAFTI recommendation is contained in the same report, Part 1, 10 and Part 2, 38-42.

25. Commission, Background Report: The Mergers Regulation 15 January 1990, 1.

26. See Woolcock, op. cit in note (12), 10.

27. Ibid, 4.

28. House of Lords, op. cit in note (1), Part 2, 104. The same point was also made by Joel Davidow, "Community Policy, Merger Control and the European Community's 1992 Program," Columbia Journal of Transnational Law 29 no. 1 (1991): 15-16.

29. CBI, The Business View on the European Merger Control Regulation For Members of the European Parliament. (Undated but sent to the author 18 December 1989 by the CBI)

30. UNICE, Community Control of Mergers: UNICE Declaration November 1988, 1. See also, the declaration of November 1987.

31. House of Lords, op. cit in note (1), Part 1, 20.

32. Woolcock, op. cit in note (12), 18.

33. See, for example, House of Lords, op. cit in note (1), Part 1, 20.

34. Woolcock, op. cit in note (12), 30.

35. House of Lords, op. cit in note (1), Part 2, 29.

36. Woolcock, op. cit in note (12), 20. David Buchan and Richard Lambert, "France Proposes EC Mergers Policy," Financial Times (19 September 1989).

37. Woolcock, op. cit in note (12), 20-21.

38. Lovell, White, Durrant, "The Merger Control Regulation," Lovell, White, Durrant, EEC Newsletter (February 1990): 1.

39. The bulk of material regarding the views of Germany are taken from Woolcock, op. cit in note (12), 21-24. In a letter to the author dated 4th January 1990, Mr Lehmann-Stanislowski of the Bundeskartellamt wrote that their position on this matter was well represented in Woolcock's work.

40. This was contained in Recital 14 and Article 2 (3) of the December 1988 draft. See, Amended Proposal for a Council Regulation (EEC) on the control of concentrations between undertakings, COM(88) 734 final - REVISED VERSION Brussels, 19 December 1988. From here on in, where the date of this draft regulation is given in the text no additional endnote will be given.

41. This particular complaint by the German authorities is dealt with in more detail in the following section. It is an example of the overlap of a technical complaint with the basic question of single or dual controls.

42. Sir Gordon Borrie, "National and EEC Merger Control- Conflict or Peaceful Coexistence?" 4. Speech given at the International Bar Association One Day Workshop, Berlin 19th June 1989.

43. Woolcock, op. cit in note (12), 24.

44. Ibid., 24-5; House of Lords, op. cit in note (1), Part 1, 8, and Part 2, 84-5.

45. However, the final text of this provision, Article 21 (3) of the Merger Control Regulation does contain a (non exclusive) list of named interests.

46. John Kenneth Galbraith, The New Industrial State, 4th ed. (Boston: Houghton Mifflin Company, 1985). See Chapters 26 and 27.

47. House of Lords, op. cit in note (1), Part 2, 103.

48. 6/72 Europemballage Corporation and Continental Can Company Inc. v Commission (1973) ECR 215.

49. It may also have been the case that a Member State had refused to accept the basic one stop shop idea unless a particular issue was settled to the satisfaction of that state.

50. Buchan and Lambert, op. cit in note (36).

51. Borrie, op. cit in note (42), 10.

52. See Advokaterne Bredgade 3 et al, Merger Control in the EEC (London: Kluwer Law and Taxation Publishers, 1988), 240-246.

53. Ibid., 241.

54. Tenth Report on Competition Policy, no. 110.

55. Borrie, op. cit in note (42), 9. Such an action by Member States might be given further credence after T-51/89 Tetra Pak Rausing v Commission (1991) 4CMLR 1991.

56. Borrie, op. cit in note (42), 10.

57. House of Lords, op. cit in note (1), Part 1, 25.

58. Ibid., Part 2, 29. The CBI believed that Member States who wished to retain a major element of control of their cartel office favoured such an option.

59. Ibid, Part 1, 24.

60. This is enacted in Article 21 (3). See also Recital 28 of the Merger Control Regulation. It is discussed in the following section.

61. This point was made clear by Sutherland in his evidence to the House of Lords and noted at the report stage. See, House of Lords, op. cit in note (1), Part 1, 18. It was also made by Borrie, op. cit in note (13), 7. See also Article 236 of the Treaty of Rome.

62. House of Lords, op. cit in note (1), Part 1, 18.

63. Borrie, op. cit in note (42), 11.

64. House of Lords, op. cit in note (1), Part 1, 18. The Regulation referred to is Council Regulation No 17 of 6.2.1962: first regulation implementing Articles 85 and 86 EEC. It was published in the OJ, vol 13, 21.2.1962, page 204; English Special Edition 1959-1962, page 86.

65. House of Lords, op. cit in note (1), Part 1, 18..

66. UNICE, Amended Proposal for a Council Regulation on the Control of Concentrations Between Undertakings: UNICE Position. 4 May 1988, 2.

67. House of Lords, op. cit in note (1), Part 1, 18.

68. Ibid. In particular, 209-213/84 Ministere Public v Asjes et al (1986) ECR 1425.

69. 66/86 Ahmed Saeed Flugreisen and Silver Line Reiseburo v Zentrale zur Bekaempfung Unlautern Wettbewerbs (1990) 4 CMLR 102.

70. UNICE, Amended Proposal for a Council Regulation on the Control of Concentrations Between Undertakings: UNICE Position, 2.

71. Article 1(2)(a).

72. House of Lords, op. cit in note (1), Part 1, 12.

73. DTI, <u>EC Merger Control Regulation: Background</u>. (London: DTI Publication, October 1989), 2.

74. Quoted in, House of Lords, <u>op. cit</u> in note (1), Part 1, 12, note 1. As to Germany, Elland, <u>op. cit</u> in note (2), 113, noted, "... Germany, which was arguing for a 10 billion ECU threshold."

75. For example, Celia Hampton, "Merger Draft Rule Upsets Industry," <u>Financial Times</u> (23 November 1989), expected that the Commission, with the five billion ecu threshold, would still have a fairly tight timetable.

76. Woolcock, <u>op. cit</u> in note (12), 31.

77. Ibid.

78. DTI, <u>op. cit</u> in note (73), 2. However, the Financial Times reported that it was France who suggested this figure. See, Buchan and Lambert, <u>op. cit</u> in note (36).

79. House of Lords, <u>op. cit</u> in note (1), Part 1, 12.

80. DTI, <u>op. cit</u> in note (73), 2.

81. The Economist noted that the Netherlands also favoured competition only criteria. Economist, "At last, a Merger Policy for Europe," <u>The Economist</u> (7-14 October 1989): 109.

82. David Thomas, "High Tech Companies Warn EC on Mergers," <u>Financial Times</u> (10 February 1988). This argument also echoes the views put forward in Chapter Two that competition would not be harmed by greater European concentration. That is, both global economic events and recent economic theory have shown that mergers do not harm competition.

83. Baily Morris, "Wall Street Looks Forward to 1992," The Times (16 February 1989).

84. Martin Waldenstrom, speech given at the Financial Times Conference on Competition, Mergers and Alliances in Europe, 13-14th March, 1990, London. Reported in, Robert Rice, "EC Takeover Directive Damaging to UK Mergers," Financial Times (14 March 1990).

85. Martin Wolf, "The Myth of the Chasse Gardee," Financial Times (10 August 1989).

86. John Plender, "The Magic of Unfree Markets," Financial Times (18 December 1989).

87. Woolcock, op. cit in note (12), 23.

88. Ibid., 29.

89. Borrie, op. cit in note (42), 16.

90. House of Lords, op. cit in note (1), Part 1, 20.

91. Woolcock, op. cit in note (12), 22.

92. David Buchan and William Dawkins, "EC States set for Advance on Vetting of Cross-Border Mergers," Financial Times (18 September 1989).

93. House of Lords, op. cit in note (1), Part 2, 114.

94. This point was noted by, for example, the House of Lords, op. cit in note (1), Part 1, 23.

95. For example, the House of Lords, op. cit in note (1), Part 1, 23, stated, "The serious criticism of the current working of the Commission's procedures in competition cases is a matter for concern."

96. Brittan, op. cit in note (17), 5-8. Sir Leon Brittan "The Development of Merger Control in EEC Competition Law," The Hersh Lauterpact Memorial Lectures, Cambridge 9 February 1990, 15. Andrew Marshall, "Pressure to Change EC Merger Rules," The Independent on Sunday (6 October 1991). Sir Leon's views will be examined in greater detail in the next chapter.

97. T. Anthony Downes and Julian Ellison, The Legal Control of Mergers in the European Communities (London: Blackstone, 1991), 73. See also Colin Overbury, "First Experiences of European Merger Control," European Law Review Competition Law Checklist (1991): 97-8, who quoted Cargill/Unilever (Commission Decision of 20 December 1990) as an example of an Article 6(b) clearance decision.

98. Regulation 17/62 provides that, so long as the Commission has not initiated a procedure under that Regulation, the Member States may apply Articles 85 and/or 86.

99. Christopher Bright, "The European Merger Control Regulation: Do Member States Still Have an Independent Role in Merger Control? Part II." European Competition Law Review no. 5 (1991): 192.

100. Ibid.

101. As Bright points out, given that this course of action is allowable, a Member State could only do so if it had an Article 88 authority. See Bright, op. cit in note (99), 192.

102. Ibid. However, Bright stated that the same does not hold true for concentrations below the thresholds.

103. House of Lords, op. cit in note (1), Part 2, 29.

104. Martijn van Empel, "Merger Control in the EEC," World Competition Law and Economics Review (1990): 20.

105. Commission, op. cit in note (25), 3.

106. Council, Press Release: Internal Market 8500/89 18 September 1989, 4.

107. Brittan, op. cit in note (96), 24.

108. See, Lovell, White, Durrant, op. cit in note (38), 3; Commission, op. cit in note (25), 3; William Lee, "EC Victory on Merger Controls," Financial Times (4 January 1990). The first two publications listed only two exclusions from the principle of sole Commission jurisdiction. Only Lee noted this exception was among those that, "further eroded the principle of the one stop shop."

109. It was also the view of most commentators that Article 9 was the direct result of German pressure. See, for example, Borrie, op. cit in note (13), 18; Lee, op. cit in note (108).

110. David Buchan and Richard Lambert, "EC Making Progress on Merger Control Powers," Financial Times (20 September 1989). There it was reported that Sir Leon Brittan said "This (the German demand) had to be seen in the light of the Bonn government's desire, 'to be seen to stand up for the Cartel Office in the wake of the Daimler-Benz takeover of MBB'." Sir Leon had also said that the provision was included as a direct result of German pressure. See Brittan, op. cit in note (96), 21.

111. Downes and Ellison, op. cit in note (97), 80. They point out that products and services will be determined by the criteria developed in the context of EC

competition law. John Cook and Chris Kerse, EEC Merger Control: Regulation 4064/89 (London: Sweet and Maxwell, 1991), 129, also state that a distinct market must be determined both by the product markets and the geographical market. Horst Satzky, "The Merger Control Regulation of the European Communities," The American Journal of Comparative Law 38 (1990): 943, stated that Article 9(3) implies that the distinct market shall consist of the same products and services as the relevant market.

112. See, for example, 27/76 United Brands v Commission (1978) ECR 207, point 11.

113. Jacques H.J. Bourgeois and Bernd Langeheine, "Jurisdictional Issues: EEC Merger Regulation. Member State Laws and Articles 85-86," in Barry Hawk, ed., International Mergers and Joint Ventures Ardsley on Hudson, New York: Transnational Juris Publications, 1991), 600.

114. Giogrio Bernini, "Jurisdictional Issues: EEC Merger Regulation, Member States and Articles 85-86," in Hawk, op cit in note (113), 619.

115. However, William Elland, "The Merger Control Regulation and its Effect on National Merger Controls and the Residual Application of Articles 85 and 86," European Competition Law Review no. 1 (1991): 22, believes that the Commission would wish to see the distinct market construed narrowly.

116. House of Lords, op. cit in note (1), Part 1, 24.

117. Letter to the author from Isobel Nicoll, Senior Policy Advisor, Company and Commercial Law, to the CBI, 16 January 1990. Ms Nicoll was stating the official reaction of the CBI to the Merger Control Regulation in general and Article 9 in particular.

118. Letter to the author from Caroline Hager, EC Policy Affairs Advisor to the Institute of Directors, 1 February 1990. Ms Hager was giving the official view of the Institute.

119. See Cook and Kerse, op. cit in note (111), 128-131; Christopher Bright, "The European Merger Control Regulation: Do Member States Still Have an Independent Role in Merger Control? Part 1," European Competition Law Review no. 4 (1991): 141-144; Elland, op. cit in note (115), 22-23.

120. Borrie, op. cit in note (13), 12.

121. Varta/Bosch, Case no. IV/M012.

122. Borrie, op. cit in note (13), 5.

123. Ibid.

124. Lovell, White, Durrant, "The Merger Control Regulation One Year On," Lovell, White, Durrant, EEC Newsletter (September 1991): 1.

125. Brittan, op. cit in note (96), 25.

126. See, for example, the statement by Borrie, op. cit in note (13), 7.

127. Brittan, op. cit in note (112), 25.

128. Frank L. Fine, "The Appraisal Criteria of the Merger Control Regulation," European Competition Law Review no. 4 (1991): 149.

129. Sir Leon Brittan, "The Law and Policy of Merger Control in the EEC," European Law Review 15 no. 5 (October 1990): 352. See also, James S. Venit, "The Evaluation of Concentrations Under the Merger Control Regulation: The Nature of the Beast," Fordham International Law Journal 14 no. 2 (1990-1991): 420-437. The major difference is that the Regulation may possibly see greater use made of the concept of collective dominance.

130. Brittan, op. cit in note (96), 354.

131. Fine, op. cit in note (144), 149.

132. Ibid.

133. Brittan, op. cit in note (96), 352.

134. James S. Venit, "The 'Merger' Control Regulation: Europe Comes of Age ... Or Caliban's Dinner," Common Market Law Review 27 (1990): 29.

135. Brittan, op. cit in note (96), 353.

136. Sir Leon Brittan, "The Principles and Practice of Merger Policy in the European Community," Speech by Sir Leon Brittan at the Centre for European Policy Studies, Brussels September 1990, 13.

137. Lovell White Durrant, op. cit in note (124), 3. Much the same opinion is voiced by Venit, op. cit in note (129), 450.

138. As shown in Chapter Two, even this assumption of the Community may be mistaken. It is not proven that mergers harm competition.

139. At the least, such action accelerated the merger wave caused by global economic forces.

140. House of Lords, op. cit in note (1), Part 2, 105.

141. S. J. Berwin and Co, Company Law and Competition, (London: Mercury Books, 1989), 47.

142. If so, then the definition of what constitutes a dominant position becomes crucial.

143. Valerio Lintner and Sonia Mazey, The European Community: Economic and Political Aspects (London: McGraw-Hill, 1991), 51.

144. Ibid, 136.

145. Hampton, op. cit in note (75).

146. Quoted Ibid.

147. Venit, op. cit in note (134), 8.

148. Cook and Kerse, op. cit in note (111), 1.

149. For example Sir Leon Brittan asserted, "The signal from Europe to the rest of the world is clear: the Community re-affirms its faith in competition ..." Brittan, op. cit in note (96), 26.

150. Hampton, op. cit in note (75).

151. Brittan, op. cit in note (96), 29.

152. In particular, the de Havilland case. See, Commission, "Takeover Blocked," <u>The Week in Europe</u> (3 October 1991).

8. CONJECTURES OR PROPHECIES? SPECULATIONS UPON THE FUTURE OF MERGER CONTROL

Chapter Eight performs a dual task. It maps out a best case scenario for merger control and also undertakes this function as regards the overall regulation of European industry. Using the analysis of previous chapters as a background, it suggests what, given the best of all possible worlds, ought to happen in these areas. It then considers whether or not sufficient evidence is available to suggest that there is a reasonable chance of both these primary options actually being realised within the foreseeable future.[1]

The merger control regulation and the management of European industry: best case scenarios

The Merger Control Regulation In order for the Merger Control Regulation to make a proper contribution to achieving and sustaining the aims of 1992, two major changes are needed. First, use should be made of industrial policy appraisal criteria alongside the existing competition tests. Second, the supervision of the Regulation ought to be transferred to a new body independent of the Commission, specifically created for this purpose.

Mergers, in themselves, are neither good nor bad for any specific industry. In the global economic circumstances of the 1990s, however, mergers are necessary for the greater good of the majority of European industries. At present, looking at the situation from a global perspective, rather than from a purely European viewpoint, European industry is not sufficiently concentrated. Therefore, use ought to be made of

industrial criteria in order to allow a greater number of mergers to go ahead.

This is not to be taken as an argument for abolishing all merger controls. The merger wave will not last indefinitely, although Booz Allen appeared to estimate that, within the EC, the process of restructuring by merger will continue at least until the next century.[2] If this is an accurate forecast the wave will probably peak around the last quarter of this decade. Once it has begun to decline and the restructuring of industry is nearing completion, it may well be of benefit to the Community to introduce a shift of emphasis. It could then be the turn of competition criteria to come, once again, to the fore.[3]

This is not to say that competition criteria ought to play little or no part in the interim. Mergers will not always be of benefit to their respective industries.[4] A careful appraisal of each specific industry is therefore needed in order to make a judgement as to whether or not any particular merger proposal would aid it. Certain industries may well gain from having competition kept at its present level. Further, as an added bonus, some negative evaluations by the Community may save firms from themselves, given that, due to the general panic among firms sparked off by 1992, many merger ventures may have been ill-conceived.

The correct balance of industrial and competition criteria is thus one part of a best case scenario as to the development of Community merger control. The second pre-requisite of a successful Merger Control Regulation is the creation of a new and independent body to supervise its application.[5] The proper administration of

the Regulation requires the services of a body that possesses recognised expertise in the field, follows a proper mergers procedure, and is endowed with a functional organisational structure.[6] It is only by the creation of a new body within the EC that all these necessary requirements can be fulfilled.

Despite almost two decades of experience in the merger field, the Commission is still lacking in real experience in the handling of merger cases.

The fact that the Commission has had at least some experience is a major plank in any defence of the status quo. The House of Lords concluded, primarily on this basis, that the Commission was the most appropriate body to appraise mergers.[7] It stated, "Directorate General IV has the requisite experience of assessing from a Community standpoint market shares and competitive structure in the major sectors of the economy."[8] However, such a judgement is premature. Even if the belief that the Commission has painstakingly built up a wealth of merger background and presumed expertise were not misplaced, there might be little advantage in persisting with the present system. The Commission has always dealt with merger cases solely on the basis of competition tests. If industrial criteria come to be employed within the Merger Control Regulation, in addition to competition criteria, such background as the Commission has accumulated will be of little or no significance in relation to the proper use of these new standards.

An analysis of the cases that have been dealt with by the Commission gives rise to doubts about its technical competence to deal with the complex economic

problems involved in merger. Its handling of these questions seems at times to have been faulty and/or uncertain. The most prominent example was Continental Can.[9] The judgment in that case went against the Commission because the Court found its reasoning as to what constituted the relevant market defective.[10]

A further merger decision of importance was that of Philip Morris. In pronouncements preceding its decision on the matter, the approach of the Commission seemed somewhat tentative and lacking in confidence.[11]
In respect of the original 1981 agreement between Philip Morris and Rembrandt, Advokaterne observed, "... the Commission appeared to take the view that even a shareholding in a competitor which amounts only to a passive investment can have anti-competitive effects within Article 85."[12] Yet the position adopted by the Commission in relation to the 1984 agreement, as Advokaterne noted, "... appeared to confirm that a mere shareholding in a competitor, without the institutional mechanism and ability to exercise control over it, was considered to fall outside Articles 85 and 86."[13]

These pronouncements by the Commission concerned a major theoretical issue. Having adopted a position, presumably after much thought, one might have expected the Commission to have maintained it consistently. That it appears to have changed its mind calls its expertise into question. It also seems to show a lack of confidence by the Commission in its own powers of judgement.

Indeed, a hesitancy of approach has been a consistent feature of the manner in which the Commission has dealt with the majority of merger cases. It is

possible to infer a lack of faith in its ability to judge economic issues from the dearth of actual decisions by the Commission. However, due to the deficiency of published material as to the reasons behind its actions or inactions, this inference cannot be fully tested.

A source of anxiety concerns the structure of the Commission. Its makeup is such that inconsistent decisions may result. Though DG IV has responsibility for competition, and thus for mergers, the Commission is collegiate.[14] Given the importance of merger as a means of aiding the 1992 plan, DG IV may, however, increasingly come under pressure from other directorates to modify its strongly held views in some instances.[15] This problem was alluded to by Vaughan. He stated "It is a function of DG IV to pursue competition-related policy. The collegiate body of the Commission in the course of taking a decision could be an appropriate forum for consideration of other policies."[16]

The problem of friction between DG IV and DGIII has never been properly resolved by the respective directorates. The administration of the Merger Control Regulation may exacerbate it. A further complicating factor could arise from the study on barriers to merger commissioned by DG XV. This work concluded "In summary, enabling EC companies to build the necessary scale in their new 'home market' is, in many industries, essential to assure EC industry competitiveness in an increasingly global environment."[17] In addition, DG I may come to take an interest in merger control. As Messerlin wrote, "The emerging merger control rules may be at loggerheads with the current rules of anti-dumping procedures."[18]

While the EC is not a state, examples from state

practice can nonetheless be of value. Several states have given the job of administering the main part of merger control to a specific independent institution. For example, the German government assigns the task to the Federal Cartel Office. By and large, the performance of such organisations has been more than adequate. If so, it would seem a logical step to employ a similar system within the EC.

The conclusion is that while it would be possible to attempt to remedy most of the defects relating to the Commission without taking the drastic step of creating a new organisation, an overview of the situation suggests that this would be the best course of action for the EC to take.

At one level the two recommendations are separate and independent of each other. They are intended to overcome two major weaknesses of the Merger Control Regulation, inadequate appraisal criteria and a flawed administrative authority. They are specific remedies to definite problems. Either suggestion would benefit merger control even if the other were not instituted. Nonetheless, there is a link between them in that the use of industrial criteria alongside competition criteria is a difficult task. It necessitates a precise judgement on the part of the administering body in any particular instance. An independent merger control body is more likely to fulfill this requirement. Being newly created, it would be free from the inbuilt bias towards competition that exists within the Commission. Further, it could be structured so as to reach its decisions by methods that avoid the direct conflicts that can occur between Commission directorates.

<u>The Management of European Industry</u> If merger control is thus tied in with the broader question of the management of EC industry, then any recommendations as to the future administration of the Regulation will not carry conviction if they are not compatible with an appropriate resolution of it. In relation to the broader question, it is argued that, in order to achieve and maintain a strong industrial base, a macro, or comprehensive, industrial policy should be established. This policy ought to be administered by an EC equivalent of MITI, a new supervisory body established for this express purpose. This is not to say it that would be structured like, or pursue exactly the same policies as, the Japanese version, but would rather take on a form or role or fulfill functions appropriate to a European industrial policy.

A comprehensive industrial policy would not be the easiest or simplest alternative for the EC to choose and put into practice. Further, it is an option that seems to be politically unpalatable to several Member States. There are grounds, however, for suggesting that it is the scheme that would, over the long term, achieve the best results, from the economic point of view, for the Community.[19]

Both competition policy and industrial policy, in its modern sense, are tried and tested systems. The EC and Japan have championed competition policy and industrial policy respectively. Each programme has been rigorously applied by the relevant authorities, by DG IV in the EC and by MITI in Japan. In essence, the results have been a failure by the EC to strengthen the Community industrial base while Japan has demonstrably been successful in achieving goals which other states envy,

and seek to emulate. Whatever the final assessment of the exact amount of credit that a strong and efficient macro industrial policy may claim for this success, at the least it has played a major role. Okimoto and Rohlen observed, "Some attribute Japan's phenomenal economic growth to the government, especially to the effectiveness of its industrial policy; ..."[20]

The employment of a system of competition was considered by the Japanese authorities in the early sixties. Their conclusion was that it would not be economically effective. Morozumi Yoshihiko, a former vice-minister of MITI assessed competition as follows:

> The classic belief that public welfare will be promoted by the invisible hand of free competition is held even today, but actually it is something else. Free competition provides neither the most suitable scale nor a guarantee of proper prices. Free competition means excessive equipment and low profits ...
>
> We must conclude that a policy of moderate concentration is a desirable thing which will eliminate excessive competition and improve economies of scale. Increased concentration results in greater technical specialisation and eliminates inefficient enterprises.[21]

While the above arguments make out a case for the superiority of industrial policy, this is not to say that competition has no part to play within the EC. Rather, it is being suggested that its role ought to be reassessed by the EC. It should not remain the principal economic policy - that role ought to go to macro industrial policy.[22] Competition policy would then serve Community needs as a programme within a macro industrial

policy.

Some might argue that industrial policy is a system suited to Japan, since it appears to be in accordance with Japanese culture. The same would not apply to the EC. As Johnson has written, however, "This form of government - business relationship is not peculiarly or uniquely Japanese; the Japanese have merely worked harder at perfecting it and have employed it in more sectors than other capitalist nations."[23] Japanese success is due, not to luck, but to planning. MITI evolved a type of industrial policy that fitted both the economic needs and the culture of Japan. Industrial policy is a flexible tool capable of numerous adaptations. There is no reason as to why the EC could not evolve a system specifically tailored to European wants and tastes, given sufficient convergence of views as to the aims and objectives of the EC.

Industrial policy has already received a degree of acceptance and success within several European states, most notably France. Given the fact that Europe shares a common cultural heritage, the possibility must exist that the EC could evolve an industrial policy broadly acceptable to the cultural values, as well as the economic needs, of the majority of Member States.

The establishment of a macro industrial policy is of vital importance to the EC. Nonetheless, the correct employment of such a policy is an extremely difficult task. As Ueno stated, "In recent years industrial policy has attracted the attention of various countries and become a focus of international confrontation over how it is and should be implemented."[24]

The task can be made easier, however, by the fact that, notwithstanding its nebulous nature, industrial policy is based on certain fundamental general principles. Despite the variations within the specific programmes of different states, these principles are at the core of every successful policy application. Thus, their incorporation into an EC macro industrial policy would provide the firm base needed to give that scheme its chance to prosper.

The quintessence of a macro industrial policy is cooperation, in the true sense of the word, between the state and industry. Industrial policy is not the rigid control, or coercion, of industry by the authorities of the state. Rather, the fundamental general principles behind a macro industrial policy are collaboration, mutual respect between the state and industry, and a recognition by both sides of the interdependence between the parties. The axioms of concurrence and collaboration can be clearly seen in both Japanese and German industrial policy practices.

Ozaki wrote, "Japan offers an alternative version of economic planning. It is not a dictatorial, coercive sort, but rather is meant to indicate or anticipate the forthcoming major developments that will affect the nation's economy and to help make necessary adjustments as soon and as smoothly as possible."[25] Despite the wide differences in culture, German economic practice shows a marked similarity of outlook. Hodges noted, "... one of the most remarkable developments in the post-war German economy has been the movement away from traditional liberal patterns of economic activity towards increasing cooperation and communication between the German government and industrialists ..."[26]

The second major feature of the best case scenario for industry management is the creation of a new institution to administer a macro industrial policy, an 'EC MITI'. However, the establishment of an 'EC MITI' would seem to be an herculean task for the Community to attempt. Should not the Commission itself take up this burden instead, possibly through enlarging and strengthening DG III? It is submitted that there are convincing reasons why this would not be the best choice for the Community to make.

It has been asserted that an independent merger control body is a necessity. On general principles, therefore, it can be argued that a macro industrial policy would have, at the least, an equally pressing requirement for an independent administrative organisation. More specific grounds are as follows.

A macro policy must, by its very nature, incorporate several diverse programmes and subordinate them to the achievement of a specified aim, in this instance, the strengthening of industry. The coordination of programmes requires a high degree of management skill, as does the conduct of the vital consultation procedures with industry. Further, the internal and external circumstances of the Community must be continuously monitored so as to detect or anticipate any changes which may necessitate an adjustment in the programmes or, indeed, even a change as to the overall aim. The Commission is unsuited to regulate industrial policy on most of these counts.

It is suggested that the goal that industrial policy aims to achieve, the strengthening of industry,

requires the needs of industry being given preference above the needs of others. As Prowse has noted of Japan, "The state plays a large, if often subtle, role in influencing the distribution of resources. ... It champions producers rather than consumers' interests."[27] Further, Sakaiya, a former MITI official, when making a comparison between the west and Japan wrote that, in Japan, "... consumers' rights have a far lower niche in the hierarchy of values."[28] It requires a clear vision not to weaken and deviate from this path. The Commission is unclear as to whether industry or consumers ought to be the primary recipient of 1992 benefits. It is therefore difficult to be confident that the Commission would follow this path unswervingly. For example, Sir Leon Brittan has stated that competition policy is there to serve the interests of consumer and industry alike.[29]

The Commission has structural weaknesses that would negate the attempt to pursue a multidimensional policy under its auspices. That that institution has had difficulty in coordinating its multifarious directorates with regard to the aims it has pursued to date is widely known.

Due to the central importance of industrial policy to the Community, any organisation dealing with it will be placed in a position of great responsibility. In effect, it will be the engine that drives the Community economic train. The fact that the Commission did not give a proper lead to the Community during the development of the Merger Control Regulation suggests that it would be unable to cope with this heavy burden of economic leadership. Even though this failure was in respect of only one aspect of its remit, nonetheless it was of such a nature so as to reflect on its qualities of command in

general.

This lack of leadership has been noted in other contexts. As Dahrendorf wrote, "Roy Jenkins' 1977-1981 diary ... shows clearly that during his entire presidency no one quite knew where the Community was or should be going."[30] Since that period, however, the Community has rediscovered its purpose by dint of the instigation of the single market project. Further, the Commission has become rather more dynamic since the inception of that plan. Even so, the worries are still persistent ones. Nugent wrote in 1989, "A major weakness of the Community is that there is no clear and central focus of creative, consistent and authoritative leadership."[31]

The two recommendations within this best case option are, therefore, mutually interdependent. A macro industrial policy cannot properly be administered within the bounds of the Commission. The correct implementation of an industrial policy is of vital importance to its success. The improper administration of one may actually be counter productive. The creation of an 'EC MITI' is thus inseparably linked with the recommendation to institute a macro industrial policy.

Conclusions. While merger control is the primary subject of this text, a proper evaluation of merger supervision cannot be made without an examination of the related topic of the management of industry. Linking these together, it is suggested that merger control ought to be removed from competition policy. Instead, it should be instituted as an individual programme and administered by an independent body utilising both industrial and competition appraisal criteria. Further, this programme

ought to come under the general umbrella of an EC industrial policy, itself supervised by an 'EC MITI'.

An independent mergers agency and an 'EC MITI'

No matter how strong a case is made for some development, it does not necessarily follow that it will happen. Even if a best case scenario were accepted by all as objectively correct as regards the greater good of the Community, it might not correspond with factional interests. These cause, and probably always will cause, a gulf between 'ought' and 'is' in Community law and structure. To argue, therefore, that something could be done requires, for the most part, a different set of reasons from those establishing that it should be so. That such different reasons do exist is not, of course, enough to prove that any outcome will actually be realised. All that they can do is to furnish evidence to show, at best, that there exists a solid foundation for supposing that it could and might be.

There are two distinct types of evidence relevant to showing that any specific proposal in either of the scenarios may be adopted. First, whether any individual recommendation has gained, or is likely to gain, enough support among groups to allow it a reasonable chance of being transformed into fact. Second, whether conditions or circumstances favouring the adoption of any specific recommendation are being created.

<u>An Independent Mergers Agency</u> There already exists some measure of support for the creation of an independent merger management body. In particular, those Member States with well-developed national merger control systems are in favour of this reform.

Sidney Lipworth, the chairman of the Monopolies and Mergers Commission, stated that both France and Germany supported this option.[32] Dawkins reported that the president of the German Federal Cartel Office, Wolfgang Karte, had called for the establishment of such an institution in the course of negotiations leading to the adoption of the Merger Control Regulation.[33] As to the attitude of the UK, the Monopolies and Mergers Commission came out strongly in favour of an independent body to administer mergers.[34]

Further, Lipworth himself also has a long standing preference for this option - a stance he has maintained following the adoption of the Regulation. He wrote in 1990, "... I hope there will be scope for a more independent investigatory body to emerge ..."[35]

As well as this solid and long standing body of support, the proposition is gaining new adherents. Lloyds Bank February 1991 Review carried the following statement, "... control of the majority of mergers should be centralised in a new European body staffed from national regulatory bodies."[36] The Economist wrote, in October 1991, that "... the EC will never have a coherent competition policy without an independent agency, similar to Germany's Federal Cartel Office."[37] Sir Gordon Borrie stated, in November 1991, that "Perhaps now is the time to reconsider whether a 'European Competition Agency' would be better able than the Commission to apply competition principles to mergers."[38] Further, it was reported, in November 1991, that David Williamson, secretary-general of the Commission, "... spoke recently about devolving the Commission's functions to agencies."[39]

There was, and is, a feeling of dissatisfaction with the methods used by DG IV to deal with merger. The House of Lords noted that, though criticism of the Commission's mergers procedure was not universal, such concern as had been expressed was of a most serious nature and had been, "... expressed by some very distinguished practitioners in the competition field."[40]

Lever believed that the reorganisation of DG IV had removed the safeguard previously afforded by the separation of the functions of investigation and adjudication. He maintained, "... the Commission's procedures do not begin to satisfy a requirement that justice should not only be done but be seen to be done."[41] He concluded that "... the price for obtaining a system of merger control at the Community level, should, in my view, be a through reform of DG IV's procedures, ..."[42]

A closely related worry is a fear of power over mergers being concentrated in the hands of the Commission. The House of Lords heard testimony from several parties as to their misgivings in this respect. They noted, "But other evidence raised the more fundamental institutional issue of whether the Commission was the right body to carry out the disparate functions of fact finding, economic analysis, political balancing, legal decision and enforcement which were needed under the proposed Community regime for mergers."[43]

The Monopolies and Mergers Commission posed the question, "Is it appropriate for the one body to be simultaneously the detective, the prosecutor, the negotiator and the decision maker?"[44] Their own answer

was, "If the EC is to widen its powers to include proposed mergers it is for consideration whether something akin to the MMC should be created for this purpose, ..."[45]

It would be difficult to put the suggested proposal for an independent merger body into effect. Sir Leon Brittan has observed that it would necessitate a treaty amendment.[46] Further, the House of Lords noted, "There is no obvious way in which an independent body could be created ... Moreover, experience shows that negotiations within the Council intended to establish a new Community body are invariably fraught with great difficulty and delay."[47]

On its own, therefore, the pressure from interest groups might prove insufficient. However, if the drive for change from various parties happened to coincide with a willingness on the part of the Commission, and the Community in general, to entertain the notion of institutional reform, then the chances of a merger control body being created would greatly increase.

There is, in fact, an air of reform about the Community at present. Delors has made sweeping proposals, calling for, "... a radical shake up in the EC's institutional structures."[48]

It is suggested that there is sufficient opinion in favour to make the creation of an independent mergers body a possibility. A good part of this opinion had already being formed prior to the creation of the Regulation. However, it is the implementation of the Merger Control Regulation by the Commission that constitutes the real test. Should the fears that have

been expounded here come to be realised in whole or in part then the momentum for reform that exists at present may begin to gather overwhelming pace. Given the growth of support for an independent mergers body over 1991 the future creation of an independent mergers body is, at the least, feasible.

<u>An 'EC MITI'</u> Any establishment of an 'EC MITI' would be simultaneous with, or consequent upon, the origination of a macro industrial policy. As no decision by the Community authorities to institute such a policy has been taken, and indeed as no general consensus on the need for such a policy exists, it would be difficult to find direct evidence of pressure to create a new administrative structure.[47] However, indirect evidence for the projected establishment of an 'EC MITI' can be discovered.

It was noted above that a spirit of institutional reform is abroad in the Community at present. The indications are that the EC will be experiencing change at an ever increasing rate within the foreseeable future. This spirit is likely still to be extant when the time comes for the Community to give serious consideration to instituting a macro industrial policy.

Should it come about, the existence of an independent merger control organisation could act as a catalyst for the creation of an 'EC MITI'. The establishment of an 'EC MITI' would involve a substantial loss of power for the Commission. Merger control has been recognised by all parties as a subject of major importance. If the Commission came to cede power over merger then it would not be impossible to denude it of the authority needed for the new institution. In

addition, where a merger control body existed, and proved to be successful, it might be seen by the Community authorities, and also other groups, as a model to be followed with regard to the administration of industrial policy.

A further argument for the possibility of building an 'EC MITI' is that it is not a project pursued for its own sake but is an option within the macro industrial policy plan. Under such conditions institutional revision may be less difficult to accomplish. As Dehousse has stated, "... institutional reform is easier to arrive at when it is not pursued for its own sake, but emerges as a logical implication of other political choices."[50]

Conclusions. There are two major factors that make possible the creation of an independent merger control agency within the medium term. These are pressure from parties for a new organisation and the spirit of institutional reform presently abroad within the Community. The option of creating a new merger body has a strong lobby. In particular, all the Member States with developed merger controls have favoured this suggestion. Further, industry and its legal advisors may well decide to pursue this solution, as the Commission does face numerous problems in implementing the Regulation.

Nonetheless, it is the spirit of reform which is the key to securing new supervision of the Merger Control Regulation. Past experience has shown that even where a strong lobby, or indeed the Community authorities themselves, were convinced of the fact that something ought to be done, political problems and/or bureaucratic inertia tended to ensure that little or nothing was done. However, events both within and outwith the EC seem to be

bringing about a new willingness to contemplate, and indeed instigate, major institutional changes inside the Community.

The prediction that an 'EC MITI' will come into being is rather less certain. This is because it is linked to industrial policy, a subject which is only now beginning to become a topic of profound Community debate. Further, even if the idea of industrial policy began to receive serious consideration, the Commission will undoubtedly resist any call for the creation of an 'EC MITI' and fight instead to have its own DGs take on the extra burden of responsibility. All that can be said at present is that a merger control body, if created, may act as a catalyst for an 'EC MITI'. In the end, it may sway the balance on what is likely to be a major battle among the institutions and interest groups. At this juncture a clearer vision does not exist. An 'EC MITI' is thus, at best, no more than a possibility.

Industrial criteria and industrial policy

Are there indications to suggest that industrial criteria may come to be incorporated in the Merger Control Regulation? There is a preliminary question as to whether the Merger Control Regulation is capable of being interpreted by the Commission so as to take account of them.[51]

Kellaway believed that the Regulation was not able to support such an interpretation. She stated,
"However, as the Regulation explicitly says that competition must not be tampered with, the Commission will be unable to use the rule as a tool of industrial policy."[52] Borrie also asserted that competition was the

sole test to be employed by the Regulation:

> Other objectives of the Treaty are not contemplated as justifying merger. ... There does remain a reference to 'the development of economic and technical progress' but it is made crystal clear that this cannot be prayed in aid if it forms an obstacle to competition, and in no way qualifies the Commission's express duty to prohibit any anticompetitive merger, whatever benefits may be claimed for it by interested parties.[53]

Further, Overbury, the Director of the Merger Task Force within DG IV, considers that the text of the Regulation makes it clear that competition is the only allowable test. He wrote:

> There has been much speculation whether the test is based on competition, industrial policy, or both. ... the answer to this is clear from the text of Article 2(3); which states that if the operation creates a dominant position which significantly impedes competition it shall be declared incompatible with the common market.[54]

Overbury believes that the use of the word 'shall' permits no discretion to the Commission to make use of industrial criteria.

The issue is, however, not quite as clear cut as these views suggest. Past experience shows that the most obvious meaning of the wording of any rule has not always been that taken up by the Commission. In fact, a notable feature of the administration of the Community has been the broad interpretation of both primary and secondary law by the relevant authorities. If so, then the possibility of industrial criteria being applied by the Commission, should it wish to do so, cannot be ruled

out.[55] Kellaway acknowledged that, "... lawyers remain concerned that the Regulation will allow the Commission to take other factors into account such as the Community's 'technical and economic progress.'"[56] Also, Overbury conceded that "A number of commentators have suggested that irrespective of the text of the Regulation, the Commission, being a political body, will inevitably be tempted in its analysis to include considerations other than those based on competition."[57]

It is suggested that Article 2 (1)(a) could possibly be interpreted so as to allow the use of industrial criteria. The Article speaks of:

> 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;

As Elland has stated:

> This provision makes it clear that the competitiveness of Community industries in the context of international competition will be an important factor in determining whether or not the merger will be allowed. Clearly the Council had in mind the ability of Community industry to compete with the American and Japanese multinationals.[58]

Further, the recitals of the Regulation can also be looked at in order to evaluate whether or not competition is the sole criterion. As Weinberger and Blank stated,

> ... under Community law, one must also have regard to the recitals to a measure; and in the present instance the recitals create doubts as to whether the appraisal of concentrations is intended to

> proceed in precisely the manner described above (exclusive use of pure competition criteria). The genesis of these doubts springs in the first instance from the second sentence of the 13th recital ...[59]

That sentence states, "... the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty, including that of strengthening the Community's economic and social cohesion, referred to in Article 130a." Weinberger and Blank concluded, after an analysis of this recital, and also recitals 14 and 15, that there existed the possibility for use of criteria other than competition.[60]

As to the main issue, there are powerful interest groups that have consistently favoured the use of industrial criteria for mergers. The majority of European industrialists and firms, some Member States, and probably also DG III and DG XV, all supported the adoption of such tests within the Merger Control Regulation. The fact that the Regulation has been enacted with competition as the primary consideration does not mean that such groups will relent in their efforts to persuade the Commission to make use of industrial criteria for merger.[61]

Despite the strength of the parties who wish to see industrial policy being used to help appraise mergers, on the face of it, it would appear unlikely that DG IV can be, in the near future at least, deflected from the particular path it has chosen. DG IV appears to have a relatively strong power base within the Commission that allows it to uphold its principles. As regards past conduct, in 1989 Woolcock noted, "Nor have there been any

examples of DG IV being outvoted by the rest of the Commission seeking to pursue industrial policy objectives, in spite of often strong pressures from DG III."[62]

The speculation that it is unlikely that DG IV will capitulate to such pressures on many occasions in the near future is borne out by examination of the interpretation to date of the Merger Control Regulation. Of the first 51 decisions, only five raised sufficient competition concerns to merit a detailed four month inquiry, one such enquiry resulting in a veto. As Chappatte noted, however, "This statistic underestimates the EC Commission's willingness to take tough decisions since only one of the five cases went through without conditions attached." Chappatte concluded that "There is no doubt that Mr Brittan is committed to competition based regulation ..."[63] Further, Overbury has stated, "... the first decisions taken under the Regulation show clearly that the Commission's analysis rests entirely on a competition based test."[64]

The primary determinant, then, as to the possibility of industrial criteria being used in the short term, would seem to be the attitude of DG IV itself. It may be that it will adopt a more liberal manner of dealing with mergers and, in consequence, espouse a more benign attitude towards industrial criteria. However, this is unlikely since, on balance, Sir Leon Brittan seems to view industrial policy with distaste. His personal views on merger, which may possibly reflect those of DG IV, seem to indicate that he favours small and medium size mergers but has set his face against large, or mega-mergers.[65]

In speaking to the British Institute of Directors in November 1989, Sir Leon made out a case against the contention that mergers could provide possible advantages of scale. He noted problems as regards the fusion of production technologies for the merged firms. Further, Sir Leon spoke of the development of new technologies which allowed firms greater flexibility in production runs, and of the relative ease of producing a new Euro-product in some fields, either or both considerations obviating the need for external merger.[66] His conclusion was that,

"Due to these factors, the 'economies-of-scale-by-acquisition' argument has less force than it used to."[67]

With regard to industrial policy, Sir Leon stated in 1990 that, at the time of the discussions on the Merger Control Regulation, he was heartened by what he described as, "positive features of the debate."[68] These, he reported, were that, "... it was increasingly accepted that merger control must be rooted in competition policy. There was much less belief in old-fashioned industrial policy where politicians and bureaucrats sat in their offices playing with industrial structures such as children do with their Lego sets."[69]

The previous conduct of the Commission is also of relevance. While past conduct does not always function as a sure indicator of future action, it can be of value in helping to formulate a prediction concerning it. The Commission has consistently, over a long period of time, adopted a positive attitude towards the implementation of competition policy. In particular, DG IV has felt the need to be extremely active as to the promotion of the concept of free competition. Further, as shown in Chapter Four, the interpretation by DG IV, and thus the

Commission, of the notion of competition has been fairly rigid.[70]

There are, however, growing indications that DG IV may bend to the will of other directorates on occasion. In 1990, prior to the Regulation coming into effect, the Commission decided to allow the merger of two Dutch firms in spite of a recommendation against it by Sir Leon Brittan.[71] Further, Buchan, Hill, and de Jonquieres have written, "Sir Leon faces growing pressure on mergers. He wants these judged strictly on competition grounds. But even some of his usual free market allies such as Mr Bangemann, are urging him to allow the creation of 'Euro-champions' in industries such as airlines and electronics."[72]

A recent Commission decision appears to have brought such pressures to a head. The Commission blocked a proposed takeover of de Havilland, a Canadian aircraft maker, by Aerospatiale of France and Alenia of Italy.[73] This was the first instance where the Commission blocked a merger under the Regulation. Internally, the case provoked a fierce debate, the decision to block being approved by only nine out of the seventeen Commissioners.[74] Externally, this action resulted in a storm of protest. The ruling also led to renewed calls for the inclusion of industrial policy criteria when considering mergers. Borrie noted that the European Parliament, "... has called for the regulation to be revised to take account of industrial, social, regional and environmental interests."[75] Wolf reported Bangemann as suggesting, "... that procedures be changed to take into account industrial policy considerations."[76]

A debate within the Commission on such a reform is

to take place early in 1992. However, even if this debate goes in favour of DG IV, there may still be opportunities for reform in the short term. Sir Leon may be replaced by a more flexible successor in 1992. And, no matter which individual is in charge of DG IV, the economic logic of allowing certain mergers might be so great, and so clear, as to overcome its present dogmatic, pro-competition stance within the Commission. If the pressures of global economic forces on the EC are increasing, then the Commission could be constrained to take greater account of economic reality.[77]

However, even if, for some reason, reform does not come about in the short term, there are prospects for a change in the medium to long term. The debate between the merits of industrial criteria and competition tests that took place prior to the adoption of the Merger Control Regulation is but a part of a fundamental argument within the EC concerning the merits of industrial and competition policies.

If there were found to be a general and growing pressure within the EC to make use of industrial policy, the industrial criteria/competition tests issue would be a natural outlet for this tension. This additional force could be sufficient, either to swing the balance of power from DG IV as regards final decisions in a greater number of cases, or to make that directorate reconsider its stance on this issue. More formally, it could also result in a change of procedure so as to require DG IV to seek approval from the respective industrial policy departments before submitting a merger to prolonged scrutiny. Thus, if and when a macro industrial policy comes to be instituted, industrial criteria would almost certainly be established in some permanent fashion within

the Merger Control Regulation.[78]

Is there any justification for the suggestion that the Community will eventually come to institute a macro industrial policy? There seems to be growing support for this option among the Community Member States. Willy Claes, the Deputy Prime Minister of Belgium has argued strongly for the adoption of an industrial policy by the Community and for this policy to be included in a revised Treaty of Rome. In a personal letter to the author he wrote, "... the UK, Germany and the Netherlands are strongly opposed against any mention in the Treaty of a European Industrial Policy. However, France, Italy and Spain, agree with my views."[79] Further, Karte has stated that this interventionist approach is broadly supported by Italy, Greece, Spain and Portugal.[80] Also, the Prime Minister of France, Edith Cresson, has publicly stated her support for an EC industrial policy.[81]

There is also support within the EC institutions for this option.[82] Claes noted that the European Parliament voted a resolution (on the 14th of March 1991) which supported the Belgian proposal.[83] Delors, in a newspaper interview, also made his backing for an EC industrial policy clear. Buchan wrote, "It is industrial, rather than social policy that agitates him these days. ... He says he is not advocating pouring cash into companies, but an industrial policy that relies on 'promotional standards' ... For him competitiveness rather than competition policy is clearly the key word, and he would like it written firmly into the new EC treaty."[84]

Industrial policy may incorporate programmes as diverse as transport and education. Reviewing all possible topics within Community law and practice for

signs of industrial policy micro programmes and conditions would result in an over-complex, and consequentially superficial, examination. By contrast, limiting the review to the Merger Control Regulation and its direct antecedents will allow an in depth examination of a subject matter which is, it is suggested, at the core of what constitutes industrial policy. If the Merger Control Regulation, 1992, and global economic events provide little or no evidence for the present or future existence of industrial policy then it can be concluded that this strategy will not become part of EC law in the foreseeable future.

Before starting this analysis an important preliminary issue must be dealt with. There exist a wide range of possible definitions as what could constitute either a macro industrial policy or any specific programme within that policy. It could therefore be argued that any particular subjective definition to be used in this section may not correspond with what the EC itself would classify either as a comprehensive industrial policy, or as a particular programme. To overcome this problem, the 1970 Commission Memorandum on Industrial Policy, generally known as the Colonna Report, is used as an additional check.[85]

In brief, the Colonna Report suggested five general guidelines, collective implementation of which would have created an EC macro industrial policy.[86] It also proposed fundamental purposes or aims for this policy. The Memorandum stated:

> A common industrial development policy encouraging the creation of a European industrial 'fabric' is indispensable if three vital objectives are to be achieved: the establishment of firm foundations for

> the economic - and soon to be political - unity of Europe, the maintenance of economic growth, and a reasonable degree of technological independence of major world powers.[87]

The use made of the Colonna Report will be to compare present or future Community activities against its general guidelines. If any present Community project matches the guidelines, either in quality of importance and/or in a sufficient quantity, then it may be that, even by the standards of the Commission, a macro industrial policy of sorts is emerging. This, however, begs the question of whether any particular importance ought to be assigned to the Colonna Report. It is neither the most recent EC document on this subject, nor is it free of weaknesses or deficiencies as regards its contents.

Despite having been produced in 1970 the Report is still of value. Indeed, given its aims, the state of the EC then and now, and the dynamic nature of its Memorandum, the Colonna Report could have been written specifically for the EC of the 1990s.[88] The present ambitions of the Community - for example, the aim of 1992 to strengthen the industrial base - bear a remarkable similarity to those espoused by the Colonna Report.

In addition, the economic and political state of the Community still corresponds to that existing at the time the Memorandum was written. Colonna, himself, justifying the necessity of the Report, stated in 1970:

> At a time when the integration process is moving towards the qualitative transition from the level of a customs union to that of an economic and monetary union, the Commission has deemed it essential to

define a structural policy directed essentially to an integrated industrial network.[89]

The Colonna Report was a dynamic instrument that looked forward and outward. It was directed towards aiding solidly based firms to expand and become more competitive rather than to easing the plight of declining industries. The Memorandum stated this point explicitly:

> The industrial policy recommended in this Memorandum is deliberately directed towards the future, i.e. to expansion and progress in the broadest sense. Too often the term industrial policy has been used to refer to measures designed to keep alive activities that no longer have any prospect of competing in a modern world.[90]

The Colonna Report is, of course, open to criticism. As Hodges commented, "The Memorandum ... muted its evangelism for an industrial policy with tentative and almost lacklustre overtones, ..."[91] Such deficiencies can, however, largely be explained by the political considerations of the time. Additionally, its faults are mostly of style as opposed to content. An examination of the report reveals many observations of deep insight into the true need for, and nature of, an EC industrial policy, most of which are still valid for the present day.[92]

Finally, as regards the question of pertinence, whatever the definitive judgement as to its merits or demerits, the Colonna Report is the most comprehensive Community document currently available on the subject of a macro industrial policy. This is due to its having been drafted before the idea of a comprehensive industrial policy for the EC was subjected to sustained

attack by certain Member States and Community institutions, and thereafter cast into abeyance.

By the adoption of a Merger Control Regulation, the EC has instigated an important industrial policy programme. Even though the significant feature of industrial criteria was discarded in the final discussions before its adoption, the Regulation has incorporated the fundamental principle of the one stop merger shop. It is thus a major step towards centralised control of merger and may, on this ground alone, be classified as a micro industrial policy.

In its third guideline, on 'The Restructuring of Firms.' the Colonna Report declared, "There is no doubt that in certain cases a higher degree of concentration is needed to ensure optimum development, provided workable competition can be maintained."[93] This guideline was summed up by Hodges as concerned with, "Merger promotion on a transnational basis, particularly in advanced technological industries, to create Community firms capable of being internationally competitive."[94]

The same ideas lie at the heart of the objectives of the present Merger Control Regulation. The fact that the actual Regulation lacks industrial criteria can be attributed to transitory political considerations. Further, this deficiency may be corrected in the future. If so, then it can be said that a distinctive industrial policy programme has been enacted.

That the Merger Control Regulation came into being during 1989/90 was not fortuitous.[95] It was created, primarily, to aid in the completion of the 1992 project and assist in the realisation of its aims. It can also

be argued, however, that 1992 also serves as a precursor of the coming macro industrial policy.

It is generally agreed that industrial policy is a form of central planning. In the case of a state, the government is the body with the power required to institute an industrial policy. The situation in the EC is rather different, in that power over the range of pertinent economic matters is divided between the Member States and the Community institutions. Therefore, as a prerequisite for an EC industrial policy, this power must come to reside fully within the Community institutions.

The single market is acting as a major centralising force within the Community. The realisation of 1992 could constitute the decisive step towards the achievement of the long-term political aim of the Commission, the definitive shift of powers to the EC from the Member States.

Further, the momentum towards centralisation provided by the 1992 project should increase in force after the completion of the single market project. This is also the view of the Commission. In 1988 Delors proclaimed, in a widely reported speech to the European Parliament, "In ten years time eighty percent of economic, and perhaps even fiscal, legislation will originate in the Community."[96]

The project to unify the EC market was a major recommendation within the Colonna Report. Its first basic guideline was headed 'Completion of the single market'and this was clearly regarded as the key element in the creation of an EC industrial policy: "The first objective of any Community industrial policy must be to

enable all firms and all industries to avail themselves to the full of the benefits of a large market without internal frontiers."[97] That this still holds true in the 1990s is supported by Curzon Price. She stated that, given a wide definition of industrial policy, "... the entire single-market programme, ... is a grand (positive) industrial policy in its own right - "[98] Further, she has also noted that "The driving force behind this rapid development of EC industrial policy is the single-market project."[99]

A large part of the present drive to complete the single market is also encompassed by the second guideline in the Report on, "Unification of the legal, taxation and financial framework."[100] In particular, the Report noted that "There is much to be done before firms wishing to do business in all Community countries can enjoy the benefits of a genuine domestic market."[101]

Global economic forces constitute the anchor at the end of the chain of events appraised here. They are the final, and the most important, item to be considered in the sequence which began with merger policy. Global economic forces were, and are, the ultimate generator of the events that could, finally, bring about an EC macro industrial policy.

As previously stated, global economic forces were responsible for the timing of the single market plan, which, in turn, played a principal role in the adoption of the Merger Control Regulation. Both these events, in themselves, may be categorised as major programmes which would be vital component parts of any EC macro industrial policy. Further, and especially in regard to the 1992 project, they contain elements that lay additional

foundations for the adoption of this policy.

Moreover, global forces are still active and are currently generating repercussions that, in turn, may produce other events which could culminate in an EC macro industrial policy. In brief, world economic pressures are currently acting as a means of natural selection with regard to all economic ideologies. This situation was summed up by Rogaly who commented, "The argument about the limits of Communism is over. Communism lost. The argument about the limits of capitalism is just beginning."[102]

In fact capitalism, as practised within the EC, is facing twin pressures. First, world economic forces were, and are, testing the strength of EC capitalism. The response to these pressures has been an increasing determination to make a success of the 1992 project. Second, political and economic changes in eastern Europe have placed an additional burden on the EC. Speaking of these events and the response that the Community ought to make provided a major theme in Delors' address to the European Parliament:

> Strengthening the Community means pressing ahead with implementation of the Single Act. ... But this alone is no longer enough. ...
>
> We need to make progress on two fronts: economic and monetary union and political cooperation.[103]

This has now happened. The Commission noted that "The European Community Summit at Maastricht reached ... agreements on new Treaties creating European Political Union and Economic and Monetary Union."[104]

Uffe Ellermann-Jensen, the foreign minister of Denmark has stated, "The days are gone when it really made sense to talk about autonomy and sovereignty."[105] However, a more succinct appraisal of the probable ultimate consequences of global economic events for western Europe is the statement by Otto Pohl, former president of the German Bundesbank. He said, simply, "I think the time for nation states is over."[106] More pertinently, all of these events greatly increase the chances of an EC industrial policy becoming reality, since they remove major economic, political and ideological obstacles to an EC macro industrial policy.

Despite the wide ambit of the 1992 project there still remain major areas of economic activity firmly ensconced within the control of the Member States. The fact that progress on economic and monetary union, and indeed in other fields also, has and is being made, acts as a counter to the argument that the EC economic base is too fragmented for a macro industrial policy to be created.

The political barriers to an EC industrial policy relate, in the main, to the issue of sovereignty. Agreeing to such a policy within the EC would mean a major loss of sovereignty, both real and symbolic, for the Member States.[107] As, however, some form of political unity is being considered in the long term, it cannot be argued that, for the majority of Member States, the lesser loss of sovereignty consequent upon agreeing an industrial policy would be too great for this idea to be considered.

Ideological obstacles are possibly the greatest barrier an industrial policy has to overcome. To agree to

the creation of an EC macro industrial policy is consciously to overturn decades of belief in the political, if not economic, efficacy of competition policy. Yet even this barrier may eventually fall. The pressures resulting from the events in east Europe may encourage a spirit of economic rationality. That is to say, the urgent need to strengthen the EC economically may force the Community to re-assess the respective benefits of competition and industrial policy primarily on their economic merits. These, it is suggested, clearly favour industrial policy.

Economics and politics, however, are inseparable. Fortuitously, industrial policy may now also be of greater political consequence to the EC. The fall of the east European Communist governments was due primarily to the failure of their economic systems.[108] Such a fate is unlikely to befall the Member States of the EC, as their economic strategies are more efficient. However, free-market capitalism also suffers from serious deficiencies which must be remedied in order to avoid political, as well as economic, damage.

To all intents and purposes the EC (and not the individual Member States) is now the vehicle of western European capitalism. If so, in order to safeguard both individual and collective democratic capitalism, it is the EC that must be the target for reform. Thus, in order to avoid economic damage, the EC must bend to economic forces. In practical terms, this means the EC consciously and overtly adopting a macro industrial policy. In addition to the economic benefits, a change to the present system is also necessary for political reasons. For, if the adoption of industrial policy will help ensure the continuation of democratic capitalism,

this will constitute the most potent argument in its favour.

Conclusions. In the short to medium term, recourse to industrial criteria for mergers is, at the least, possible. Due to its past success in resisting the lobbying power of other directorates, the crucial factor in this respect was, and possibly still is, the attitude of DG IV. However, given the outcry, both within and without the Commission, over the de Havilland case, the position of DG IV within the Commission may have been weakened. Further, the economic factors, both theoretical and practical, that make the case for use of industrial criteria are omnipresent and steadily gaining in strength. Thus, the near exclusive use of competition criteria may come to be breached in the short to medium term.

Even if this does not come to pass within that time period, however, pressures on the Community to instigate a macro industrial policy may provide the necessary impetus for the use of industrial criteria in the Merger Control Regulation in the medium to long term. The growing drive for industrial policy could result in the Community coming to use industrial criteria. These might, for example, be introduced as a way of diffusing the build up of pressures to establish an industrial policy, being regarded by the EC as the lesser of two evils. Alternatively, they may be introduced as an experiment to test the efficacy of industrial policy in an important area of law and practice. A successful trial run here may result in a full macro industrial policy following soon after.

The analysis of the Merger Control Regulation, 1992,

and the influence of global economic forces gave rise to the possibly surprising inference that, in fact, a great deal of progress was, and is, being made on almost every aspect of macro industrial policy. This allows a preliminary conclusion to be drawn. It is that once the single market has come into effect, the EC will be, whether consciously or unconsciously, running a macro industrial policy.

This is not as startling a revelation as it may appear. As Ueno pointed out, at the national level, similar incidents have happened regularly in the previous decade. He noted that many western states have not yet fully grasped the concept of industrial policy but have nonetheless adopted measures which may be classified as such. Ueno wrote, "In recent years, however, many policy measures have appeared which may be regarded as verging on industrial policy in all industrialised countries with a mixed economic system."[109] If so, then for this occurrence to have gravitated to the supranational level seems a perfectly logical step.

The EC will thus instigate a form of macro industrial policy. However, as things stand, the action on the part of the EC will be either unconscious or covert. It cannot therefore be categorised as a genuine macro industrial policy. A true EC macro industrial policy calls for the Community to take a conscious decision to create one and to make this known to the public. Further, it is vital that such a policy is developed properly, so as to have a realistic chance of achieving its ends. This demands detailed and ongoing consultations with European firms. In addition, the aims of the policy ought to be more sharply focused than at

present. The Commission is still ambivalent as to whether the primary beneficiary of 1992 ought to be industry or the consumer.

It is, however, entirely possible the Community will breach these last barriers to an overt and genuine macro industrial policy. Events stemming from global economic forces may give the necessary final push to the Community that enables it to overcome these obstacles. In particular, the arguments of economic rationality and the protection of the political system are both powerful motives for the EC to add the required refinements to its industrial policy.

1. Within the course of this chapter references to a time frame will be made. In particular, the descriptions, foreseeable future, short, medium and long term will be used. The foreseeable future is taken to be a period of approximately nine years. It ends with the close of the present decade. The decade itself is divided into thirds. Short term refers to an interval of time ending around Spring/Summer 1993. Medium term is from then on, until Summer/Autumn 1996. Long term is meant to be from that juncture forward, until the end of the year 2000.

2. Commission, Study on Obstacles to Takeover Bids in the European Community: Executive Summary (Paris: Booz Allen, 1989) 6. The study was undertaken by Booz Allen for DG XV - B - 2.

3. There may also be an argument for extending the criteria within the Merger Control Regulation at that point in time. For example, factors such as regional policy may come into play. However, it could equally be contended that such criteria are already subsumed under industrial policy.

4. It is not, of course, the case, that mergers that may be of benefit to firms will automatically be for the good of industry.

5. By independent it is meant that the new body will be able to take decisions and not be accountable to the Commission. However, it would most probably be the case that the Commission would be entitled to overrule any such decisions. See, Sir Leon Brittan, "The Development of Merger Control in EEC Law," The Hersh Lauterpact Memorial Lectures, Cambridge 9 February 1990, 12.

6. As regards the mergers procedure of the Commission, this is discussed in the following section.

7. House of Lords, Merger Control: With Evidence Session 1988-9, Sixth Report, (London: HMSO, 1989), Part 1, 26. This Report is in two parts. Part One Comprises the Report of the House of Lords. Part Two is the evidence presented to the Committee.

8. Ibid., Part 1, 22.

9. The Commission decision was contested before the Court of Justice in, 6/72 Europemballage Corporation and Continental Can Company Inc. v Commission (1973) ECR 215.

10. Ibid, 246-249. See, also, the specialist studies on this point in the case. Francis Fishwick, Definition of the Relevant Market in Community Competition Policy (Luxembourg : Office for Official Publications of the European Communities, 1986), 91-96; Walter Piesch and Ingo Schmidt, The Suitability of Concentration Measures for EEC Competition Policy (Luxembourg: Office for Official Publications of the European Communities, 1983), 43-47.

11. 142/84 and 156/84 British American Tobacco Company Limited and R.J. Reynolds Inc. v Commission 4 CMLR 24.

12. Advokaterne Bredgade 3 et al, Merger Control in the EEC (London: Kluwer Law and Taxation Publishers, 1988), 230.

13. Ibid.

14. This point is made, for example, in Commission, The European Commission and the Administration of the Community (Luxembourg: Office for Official Publications of the European Communities, 1989), 16.

15. See Lucy Kellaway, "Brittan Snubbed over Merger," <u>Financial Times</u> (27 November 1990); Robert Rice, "Storm in a Coffee Cup Highlights EC Contest over Merger," <u>Financial Times</u> (10 December 1990); David Buchan, Andrew Hill, Guy de Jonquieres, "The Battle Within Fortress Europe," <u>Financial Times</u> (17 June 1991); Julian Maitland-Walker, "The Unacceptable Face of Politics in Competition Cases," <u>European Competition Law Review</u> (1990): 3-5.

16. House of Lords, <u>op. cit</u> in note (7), Part 2, 62.

17. Commission, <u>op. cit</u> in note (2), 12.

18. Patrick Messerlin, "EC Competition Policy: Community Rules on a Collision Course," <u>Financial Times</u> (28 February 1990).

19. An industrial policy is also the best option to ensure the economic good of industry.

20. Daniel I. Okimoto and Thomas P. Rohlen. eds., <u>Inside the Japanese System</u> (Stanford, California: Stanford University Press, 1988), preface vii.

21. Morozumi Yoshihiko. The quote is taken from, Okimoto and Rohlen, <u>op. cit</u> in note (20), 80.

22. This would also mean a reassessment of the political importance of competition as a means of upholding capitalism.

23. Chalmers Johnson, <u>MITI and the Japanese Miracle: The Growth of Industrial Policy, 1925-1975</u> (Stanford, California,: Stanford University Press, 1982), 311.

24. Hiroya Ueno, "Industrial Policy - Its Role and Limits -," _Journal of Japanese Trade and Industry_ (July August 1983), 37.

25. Robert S. Ozaki, "How Japanese Industrial Policy Works," in Chalmers Johnson, ed., _The Industrial Policy Debate_, (San Francisco: Institute for Contemporary Studies Press, 1984), 67. See also, Karl van Wolferen, _The Enigma of Japanese Power_ (London: Macmillan, 1989), 7; Johnson, _op. cit_ in note (23), generally.

26. Michael Hodges, "Industrial Policy: Hard Times or Great Expectations?" in Helen Wallace, William Wallace, and Carol Webb, eds., _Policy Making in the European Community_ 2nd ed. (Chichester: John Wiley, 1983), 268. See also Georg H. Kuster, "Germany" in Raymond Vernon, ed., _Big Business and the State: Changing Relations Western Europe_ (Macmillan: London, 1974), 64; Heidrun Abromeit, "Government-Industry Relations in West Germany," in Martin Chick, ed., _Governments, Industries and Markets_ (Aldershot, Hants.: Edward Elgar, 1990). Kuster and Abromeit have also recognised this phenomenon. More generally see, Alan Peacock, ed., _Germany's Social Market Economy_, 2 vols. (London: Macmillan, 1989).

27. Michael Prowse, "Japan Deserves a Little Respect," _Financial Times_ (7 May 1991).

28. Taichi Sakaiya, "While Japanese Consumers Pay the Price," _Wall Street Journal_ (3 October 1991). This may seem harsh. However, a strong industry is to the benefit of society.

29. Sir Leon is quoted in Colin Overbury, "First Experiences of Merger Control," _European Law Review: Competition Law Checklist_ (1991): 83. However, if both

society and industry were to be joint beneficiaries, neither would be best served in the long term.

30. Ralf Dahrendorf, "The Future of Europe?" in Dahrendorf et al, Whose Europe? Competing Visions for 1992 (London: The Institute of Economic Affairs, 1989), 3.

31. Neil Nugent, The Government and Politics of the European Community (London: Macmillan, 1989), 326.

32. House of Lords, op. cit in note (7), Part 2, 10.

33. William Dawkins, "Independent Anti-trust Body Urged For Europe," Financial Times (19 April 1989).

34. House of Lords, op. cit in note (7) Part 2, 3.

35. Sidney Lipworth, Monopolies and Mergers Commission: 1990 Review (London: HMSO, 1990), 8.

36. LLoyds Bank Economic Bulletin (February 1991): 3.

37. The Economist, "War by Competition Policy," The Economist (12th-19th October 1991) See also, Andrew Marshall, "Pressure to Change EC Merger Rules," The Independent on Sunday (6 October 1991).

38. Sir Gordon Borrie, "Time for a Euro-MMC," Financial Times (11 November 1991).

39. Ibid.

40. House of Lords, op. cit in note (7), Part 1, 23.

41. Ibid., Part 1, 16.

42. Ibid., Part 2, 113.

43. Ibid., Part 1, 14.

44. Ibid. See also, Part 2, 3.

45. Ibid., Part 2, 3.

46. Brittan, op. cit in note (5), 29.

47. House of Lords, op. cit in note (7), Part 2, 22.

48. Tim Dickson, "Delors Makes his Boldest Pitch Yet for EC Political Union." Financial Times (8 January 1990).

49. However, Edith Cresson, the French Prime Minister has called for the establishment of an EC MITI. See, Ian Davidson, George Graham, and Will Dawkins, "France Names Woman as New Prime Minister," Financial Times (16 May 1991); Ian Davidson, "Cresson Seeks EC Policy on Industry," Financial Times (23 May 1991).

50. Renaud Dehousse, "1992 and Beyond: The Institutional Dimension of the Internal Market Programme," Legal Issues of European Integration (1989): 134.

51. The Court of Justice, of course, is the body that gives a definitive interpretation of all primary and secondary EEC legislation, Article 164 EEC. The object of this section is to determine subjectively, whether or not the Commission could attempt to use industrial criteria.

52. Lucy Kellaway, "Old Game, New Referee: Procedures under the New EC Merger Regulation," Financial Times (26 March 1990).

53. Sir Gordon Borrie, "The Contents and Implication of the European Merger Control Regulation From the Perspective of the Office of Fair Trading," Speech given at the Forum Institut fur Management Conference. The European Law of Competition and its Further Developments

Following the Adoption of the European Community Regulation on Merger Control Bonn 19th February 1990, 18.

54. Overbury, op. cit in note (29), 83.

55. Such an action by the Commission could result in the ECJ being given the opportunity to deliver its own verdict on this question. However, the point being made in the text is that the Regulation Article in question seems broad enough to allow the Commission to venture such an explanation, if they wished, with a fair degree of confidence in its opinion being upheld.

56. Kellaway, op. cit in note (52).

57. Overbury, op.cit in note (29), 83.

58. William Elland, "The Mergers Control Regulation (EEC) No. 4064/89," European Competition Law Review (1990): 116

59. Weinberg, M.A., ed., Weinberg and Blank on Takeovers and Mergers, 5th ed. (London: Sweet and Maxwell, 1989), Section 3 Chapter 2, 3049.

60. Ibid, Section 3 Chapter 2, 3049-50.

61. For example, Philippe Chappatte, "EC Merger Control: Competition or Politics?" Wall Street Journal (7 November 1991), noted that "... a number of countries (that supported the use of industrial criteria) are fighting a rearguard action."

62. S. Woolcock, European Mergers: National or Community Controls? (London: Royal Institute of International Affairs, Chatham House Paper, 1989), 31.

63. Chappatte, op. cit in note (61).

64. Overbury, op. cit in note (29), 84.

65. Sir Leon Brittan, "Acquisitions and Mergers in the European Community," Speech to the Institute of Directors - Scotland 24 November 1989, 5-7.

66. Ibid, 5-6.

67. Ibid., 6.

68. Brittan, op. cit in note (5), 15.

69. Ibid.

70. See Chapter 4, Section 2.

71. See, Kellaway, op. cit in note (15); Rice, op. cit in note (15).

72. Buchan, Hill, de Jonquieres, op. cit in note (15).

73. This was reported in Commission, "Takeover Blocked," The Week in Europe (3 October 1991).

74. This was reported in the Economist, op. cit in note (37).

75. Borrie, op. cit in note (38).

76. Julie Wolf, "EEC Commission Delays Debating Competition Rules," Wall Street Journal (28 October 1991). A Commission debate on this matter will take place in early 1992.

77. This argument is linked to that given later in this section as regards global economic pressures forcing the EC to adopt the 'economic rationality' approach with regard to macro industrial policy.

78. This may be achieved either by an amendment in the attitude of the Commission or by the legislative reform of Article 2 of the Merger Control Regulation.

79. Willy Claes, Letter to the author dated 1st May 1991.

80. Karte's views were reported in the article by Andrew Fisher, "German Attack on Wider Industrial Powers for Community," Financial Times (14 November 1991).

81. Davidson, op. cit in note (49). See also, Fisher, op. cit in note (80). Fisher wrote that France is leading the battle to give the EC more industrial powers.

82. See, Commission, Industrial Policy in an open and Competitive Environment: Guidelines for a Community Approach COM(90) 556 final, Brussels 16 November 1990. While still some way short of a macro industrial policy having competition as but one sub-policy, this document shows, at the least, that the basic idea of an EC-wide industrial policy is now being openly debated.

83. Claes, op. cit in note (79).

84. David Buchan, "The EC's very own Visionary," Financial Times (5 August 1991).

85. Commission, The Community's Industrial Policy: Commission Memorandum to the Council Brussels, 18th March 1970. COM(70)100. The Report comprises two documents. Unless specific reference is made to the contrary, all citations are assumed to be from the first document. This Memorandum will be cited as the Colonna Report in the endnotes.

86. Ibid, 12. The five guidelines were as follows. Completion of the single market. Unification of the legal, taxation and financial framework. Restructuring of firms. Measures to organise change or adaption. Extension of Community Solidarity in matters of external relations.

87. Ibid, 4.

88. It is suggested a direct comparison of the Colonna Report with the Cecchini Report bears out this contention. See generally, Paulo Cecchini, Michael Catinat, and Alexis Jacquemin, The European Challenge 1992: The Benefits of a Single Market (Aldershot: Wildewood House, 1988). This publication is generally referred to as the Cecchini Report.

89. H.E. Guido Colonna di Paliano, "The Case for a Common Industrial Policy," Bulletin of the European Communities 3 no. 5 (May 1970): 7.

90. Colonna Report, op. cit in note (85), 6.

91. Hodges, op. cit in note (26), 272.

92. Many of the observations contained in the Colonna Report are echoed in the Cecchini Report. See generally, Cecchini, Catinat, and Jacquemin, op. cit in note (88).

93. Colonna Report, op. cit in note (85), 16. Again, this was also a theme of the Cecchini Report. See, for example, Cecchini, Catinat, and Jacquemin, op. cit in note (88), 21. They stated, "At present in many key sectors, companies are operating without the specialization and size necessary to compete globally."

94. Hodges, op. cit in note (26), 273.

95. That is, it was adopted on 21st December 1989 and came into effect on 21 September 1990.

96. Delors is quoted in, among others, Nugent, op. cit in note (31), 326.

97. Colonna Report, op. cit in note (85), 12.

98. V. Curzon-Price, "Competition and Industrial Policies with the Emphasis on Industrial Policy," 174, in A. M. El-Agraa, ed., Economics of the European Community, 3rd ed. (London: Philip Allen, 1990).

99. Ibid, 184.

100. Colonna Report, op. cit in note (85), 12.

101. Ibid., 15.

102. Joe Rogaly, "Towards the Limits of Capitalism," Financial Times (2 March 1990).

103. Jacques Delors, "Commission's Programme for 1990. Address by Jacques Delors, President of the Commission to the European Parliament," Bulletin of the European Communities, Supplement 1/90, 11. Lucy Kellaway, "Political Union: The Wrong Label," Financial Times (13 July 1990), disagreed with Delors. She believed that economic and political union do not go together.

104. Commission, "Historic Agreement at Maastrict," The Week in Europe (12 December 1991). European and Monetary agreement has made progress much as planned while some headway had been made regarding political union.

105. Uffe Ellemann-Jensen, "New World Order Requires Wider and Deeper EC," Financial Times (25 April 1991).

106. Otto Pohl, quoted in, Peter Norman, "Britain as a Monetary Tortoise," _Financial Times_ (27 December 1989).

107. Given the speed of progress in all the fields mentioned, the loss of sovereignty will be more symbolic than real.

108. It is not being asserted that economic systems near to the command economy end of the spectrum (see Chapter Two) are inherently flawed, merely that they were implemented in an over rigid manner by the authorities. As with the west, this faulty implementation was the result of seeking primarily political goals from an economic policy.

109. Ueno, _op. cit_ in note (24), 34.

BIBLIOGRAPHY

Books

Advokaterne Bredgade 3; Allen and Overy; Gide Loyrette Nouel; Gomez - Acebo and Pombo; Magrone, Gorla, Pasinetti, Brosio and Casati; Nauta Van Haersolte; and Schon and Pfluger. Merger Control in the EEC. London: Kluwer Law and Taxation Publishers, 1988.

American Bar Association, Antitrust Section. Horizontal Mergers: Law and Policy. Monograph 12, 1986.

Ansoff, Igor. Corporate Strategy. London: Viking Penguin, revised edition 1987.

Argenti, John. Practical Corporate Planning. London: George Allen and Unwin, 1980.

Armentano, D.T. Antitrust and Monopoly. 2nd ed. New York: Holmes and Meyer, 1990.

-------- Antitrust Policy: The Case for Repeal. Washington: Cato Institute, 1986.

Ashley, Kevin D. Modelling Legal Argument. Cambridge Mass.: MIT Press, 1990.

Ashurst, Morris, Crisp. European Joint Ventures. London: Butterworth, 1991.

Auerbach, Paul. The Economics of Industrial Change. Oxford: Basil Blackwell, 1988.

Backhouse, Roger. A History of Modern Economic Analysis. Oxford: Basil Blackwell, 1985.

Badaracco, Joseph L. The Knowledge Link. Boston, Mass,: Harvard Business School, 1991.

Bael, Ivo van., and Jean Francois Bellis. Competition Law of the European Community. 2nd ed. Bicester, Oxfordshire: CCH Editions, 1990.

Bain, Joe S. Barriers to New Competition: Their Character and Consequences in Manufacturing Industries. Cambridge, Mass.: Harvard University Press, 1956.

---- Industrial Organisation. New York: John Wiley, 1959.

Barreto, Humberto. The Enterpreneuer in Micronomic Theory. London: Routledge, 1989.

Bartlett, Christopher., and Sumantra Ghoshal. Managing

Across Borders. London: Hutchison Business Books, 1989.

Baumol, William J., John C. Panzar, and Robert D. Willig. Contestable Markets and the Theory of Industry Structure. New York: Harcourt Brace Jovanovich, 1982.
------, and Alan S. Blinder. Economics: Principles and Policies. 5th ed. New York: Harcourt Brace Jovanovich, 1991.

Begg, David., Stanley Fisher, and Rudiger Dornbush. Economics. 3rd ed. London: McGraw Hill, 1991.

Begg, P.F.C. Corporate Mergers and Acquisitions. 2 vols. London: Graham and Trotman, 1991.

Bellamy, C.W., and G.D. Child. Common Market Law of Competition. 3rd ed. London: Sweet and Maxwell, 1987 with 1991 supplement.

Belmont European Policy Centre. The New Treaty on European Union. 2 vols. Belmont European Policy Centre: Brussels, 1992.

Bendaniel, David J., and Arthur H. Rosenbloom. The Handbook of International Mergers and Acquisitions. Englewood Cliffs, New Jersey, 1990.

Berle Jr., Adolf A., and Gardiner C. Means. The Modern Corporation and Private Property. New York: Macmillan, 1932. Revised Edition, New York: Harcourt Brace and World, 1968.
----- The American Economic Republic. New York: Harcourt Brace and World, 1965.

Berwin, S.J., and Company. Company Law and Competition. London: Mercury Books, 1989.

Matthew Bishop et al Continental Mergers are Different. London: London Business School, 1990.

Bork, Robert H. The Antitrust Paradox. New York: Basic Books, 1978.

Bos and Stuyck. Concentration Control in the EC. London: Graham and Trotman, 1992. (forthcoming)

Booz-Allen Acquisition Services. Study on Obstacles to Takeover Bids in the European Community. Study on behalf of the Commission of the European Communities. Paris: Booz-Allen, 1989.

Brittan, Sir Leon. Competition Policy and Merger Control

in the Single European Market. Cambridge: Grotius Publications, 1991.

Brown, Michael Barrett. European Union: Fortress or Democracy. Nottingham: Spokesman, 1991.

Brozen, Yale. Concentration, Mergers and Public Policy. New York: Macmillan, 1982.
------ Mergers in Perspective. American Enterprise Institute, 1982.
------, ed. The Competitive Economy: Selected Readings. Morristown, New Jersey: General Learning Press, 1975.

Buhl, H.B. Survey of Protective Options Used by Dutch Companies Listed on the Amsterdam Stock Exchange. Wesselius and Co, B.V., 1989.

Burningham, David., ed. Teach Yourself Economics. 2nd ed, 3rd impression with amendments. Sevenoaks, Kent: Teach Yourself Books/Hodder and Stoughten, 1987.

Burrough, Brian., and John Helyar. Barbarians at the Gate. London: Johnathan Cape, 1990.

Burt, Steven. The Internationalisation of European Food Retailers. University of Stirling: Institute for Retail Studies, Working Paper 9005, 1990.

Cantwell, John. Technological Innovation and Multinational Corporations. Oxford: Basil Blackwell, 1989.

Cartwright, Sue., and Cary L. Cooper. Mergers and Acquisitions: The Human Factor London: Butterworths, 1992.

Cecchini, Paulo., Michel Catinat, and Alexis Jacquemin. The European Challenge 1992: The Benefits of a Single Market. Aldershot: Wildewood House, 1988.

Centre for Business Strategy. 1992: Myths and Realities. London: London Business School, 1989. (also listed under author as E. Davis et al)
--------------------------- Continental Mergers are Different. London: London Business School, 1990. (also listed under author as M. Bishop et al)

Cheng, Chai-Jui. Clive M. Schmitthoff's Select Essays on International Trade Law. London: Graham and Trotman, 1988.

Chick, Martin. ed. Government, Industries and Markets. Aldershot, Hants.: Edward Elgar, 1990.

Chin-ning Chu. The Asian Mind Game. London: Maxwell Macmillan, 1991.

Chiplin, Brian., and Mike Wright. The Logic of Mergers. Hobart Paper 107. London: The Institute of Economic Affairs, 1987.

Clifford Chance International Law Firm. Takeovers and Mergers in Europe. London: Clifford Chance, 1989.
-- The New Merger Control of the European Community. 2nd ed. London: Clifford Chance, 1990.

Clark, John Maurice. Competition as a Dynamic Process. Washington: The Brookings Institution, 1961.

Cole, Ken., John Cameron, and Cris Edwards. Why Economists Disagree. 2nd ed. London: Longman, 1991.

Competitiveness Policy Council. Building a Competitive America Dupont Circle, Washington DC, 1992.

Confederation of British Industry. 1992 - How it Affects You. August 1988.
---------------------------------- The Business View on the European Merger Control Regulation for Members of the European Parliament. Winter, 1989.

Cook, John., and Kerse, Chris. EEC Merger Control: Regulation 4064/89. London: Sweet and Maxwell, 1991.

Cool, Karel. ed. European Industrial Restructuring in the 1990s. London: Macmillan, 1991.

Coopers and Lybrand, Barriers to Takeovers in the European Community. 3 vols. London: HMSO, 1990. (study commissioned by the DTI, see DTI Publications)

Cowling, Keith., et al. Mergers and Economic Performance Cambridge: Cambridge University Press, 1980.

Curzon-Price, Victoria. Industrial Policies in the European Community. London: Meuthen, 1981.

Dahrendorf, Ralf., John Hoskyns, Victoria Curzon Price, Ben Roberts, Geoffrey E. Wood, Evan Davis, L.S. Sealy. Whose Europe: Competing Visions for 1992. London: The Institute of Economic Affairs, 1989.

Davis, Evan., P.A. Geroski, J.A. Kay, Alan Manning, Carol Smales, S.R. Smith, and Stefan Szymanski. 1992: Myths and Realities. London: London Business School, 1989.

Davis, Stephen., Bruce Lyons, Hugh Dixon, and Paul Geroski. Economics of Industrial Organisation. Harlow, Essex: Longman, 1988.

Demsetz, Harold. The Organisation of Economic Activity. 2 vols. Oxford: Basil Blackwell, 1989.

Department of Trade and Industry. Merger Policy: A Department of Trade and Industry Paper on the Policy and Procedures of Merger Control. London: HMSO, 1988.

------------------------------ Merger Policy. An Address Presented to the Stock Exchange Conference for Industry at the QEII Centre on Thursday 27 October 1988 by the Right Honourable Lord Young of Graffam Secretary of State for Trade and Industry. London: HMSO, 1988.

------------------------------ Competition Policy: How It Works. London: HMSO, 1988.

------------------------------ EC Proposal for a Thirteenth Company Law Directive Concerning Takeovers. August 1989.

------------------------------ EC Memorandum Concerning Formal Proposals for a European Company Statute: A Consultative Document. (undated)

------------------------------ Proposals for a European Company Statute: A Consultative Document. December 1989.

------------------------------ Barriers to Takeovers in the European Community. 3 vols. London: HMSO, 1989.

------------------------------ Press Notice: EC Merger Control Regulation. 15 January 1990.

------------------------------ Barriers to Takeovers in the European Community: A Consultative Document. January 1990

------------------------------ Amended Proposal for a Fifth Directive on the Harmonisation of Company Law in the European Community: A Consultative Document. January 1990.

------------------------------ Merger Control in Europe. London: HMSO, 1991.

------------------------------ The Single Market: Company Law Harmonisation. London:HMSO, 1991.

------------------------------ Competition Policy: How it Works. London: HMSO, 1991.

Diebold Jnr. William. The Shuman Plan: A Study in Economic Cooperation, 1950-1959. New York: Fredrick A. Praeger, 1959.

Dine, Janet. EC Company Law London: Chancery's European Practice Library, Chancery Law Publishing, 1991.

Dolan, Edwin G., ed. The Foundations of Modern Austrian Economics. Kansas City: Institute for Humane Studies/Sheed and Ward, 1976.

Donaldson, Gordon., and Jay W. Lorsh. Decision Making at the Top. New York: Basic Books, 1983.

Downes, T. Antony., and Julian Ellison. The Legal Control of Mergers in the European Communities. London: Blackstone Press, 1991.

Drayton Jr., Clarence I., Craig Emerson, and John D. Griswold. Mergers and Acquisitions, Planning and Action. A Research Study and Report Prepared for Financial and Executives Research Foundation. London: Routledge and Kegan Paul, 1965.

El-Agraa, A.M. The Economics of the European Community. 3rd ed. London: Philip Allen, 1989.

Eli, Max. Japan Inc.: Global Strategies of Japanese Trading Corporations.
Emerson, Michael, Michel Aujean, Michael Catinat,

Ernst and Young. Locating for the New Europe. London: Ernst and Young, 1990.
-------------- Draft Press Release: The UK - An Attractive Location for Food and Drink Manufacturing. 29 January 1990.
------------- Executive Summary: Overview of the Food and Drink Industry. Ernst and Young: London, 1990.

European Communities Publications. Publications by Institutions per se. Luxembourg: Office for Official Publications of the European Communities.
Commission. Annual Reports on Competition Policy.
---------- Le Probleme de la Concentration dans le Marche Commun. Studies Collection no 3, 1966.
---------- The Community's Industrial Policy: Commission's Memorandum to the Council. Brussels, 18th March 1970. COM(70) 100, (The Colonna Report)
---------- Memorandum from the Commission on the Technological and Industrial Policy Programme. May 1973. SEC (73) 1090 Final.
---------- The European Community's Competition Policy. European Documentation 1976.
---------- The European Community's Industrial Strategy. European Documentation 1982.
---------- Dossiers: The Competitiveness of the Community Industry. 1982.
---------- EEC Competition Rules. European

Documentation 1983/4.

---------- *European Competition Policy*. European File 1985.

---------- *The European Commission's Powers of Investigation in the Enforcement of Competition Law*. European Documentation 1985.

---------- *Completing the Internal Market White Paper from the Commission to the Council*, 1985.

---------- *An Industrial Strategy for Europe*. European File 1986.

---------- *Treaties Establishing the European Communities*, 1987.

---------- *Improving Competitiveness and Industrial Structures in the Community*. 1987.

---------- *Internal Market and Industrial Cooperation-Statute for the European Company - Internal Market White Paper, Point 137*. Memorandum fron the Commission to Parliament, the Council and the Two Sides of Industry COM(88) 320 final Brussels, 15th July 1988.

---------- *Recent Trends of Concentration in Selected Industries of the European Community, Japan and the United States*. 1988.

---------- *EEC Competition Policy in the Single Market*. European Documentation, 1989.

---------- *Horizontal Mergers and Competition Policy*. European Economy 40, 1989.

---------- *Europe Without Frontiers - Completing the Internal Market*. European Documentation 3rd ed,1989.

---------- *The European Commission and the Administration of the Community*. European Documentation, 1989.

---------- *Takeover and Other General Bids: Proposal for a 13th Company Law Directive* Bulletin Supplement 3/89.

---------- *Harmonisation of Company Law in the European Community*. 1989.

---------- *European File: Company Law in the European Community*. October 1989.

---------- *First Survey on State Aids in the European Community*, 1989.

---------- *Background Report: The Statute for a European Company*. November 1989.

---------- *Study on Obstacles to Takeover Bids in the European Community: Executive Summary*. December 1989.

---------- *Background Report: The Mergers Regulation*. ISEC/B3/90, 15 January 1990.

---------- *European Unification: The Origins and Growth of the European Community*. January 1990.

---------- *Europe - A Fresh Start: The Schuman Decloration 1950-90*. European Documentation, 1990.

---------- *Strategic Study on EC Machine Tool Sector: Executuve Summary*. (carried out by W.S. Atkins Management Consultants) May 1990

---------- Inventory of EC Businesses July 1990
---------- Commission Adopts Implementing Regulation and Guidelines for the Council Regulation on Concentrations. Press Release, IP (90)645, 25 July 1990.
-------- Deadline 1992: Putting Europe to Work 1990.
-------- Industrial Policy in an Open and Competitive Enviroment: Guidelines for a Community Approach. COM(90) 556 Final Brussels, 16 November 1990.
-------- European Industrial Policy for the 1990s Bulletin Supplement 3/91.
Committee of Three, Barend Biesheuvel, Edmund Dell, and Robert Marjolin. Report on European Institutions. Presented by the Committee of Three to the European Council, 1979.
Committee for the Study of Economic and Monetary Union. Report on Economic and Monetary Union in the European Community. (undated)
Council Press Release: Internal Market 8500/89 18th September 1989.
Economic and Social Committee. Community Competition Policy. 1987.
---------------------------- Opinion on the Implementing Provisions for a European Regulation on the Control of Concentrations between Undertakings. (90/C 225/21).
European Parliament. Session Documents: Report of the Committee on Economic and Monetary Affairs and Industrial Policy. 23 May 1991 A3-0140/91.

Evans, D.S., and S.J. Grossman. Breaking up Bell: Essays on Industrial Organisation and Regulation. New York: North Holland, 1983.

Fairburn, James., and John Kay., eds. Mergers and Merger Policy. Oxford: Oxford University Press, 1988.

Fallows, James. More Like Us. Boston: Houghton Mifflin, 1989.

Ferguson, C.E. A Macroeconomic Theory of Workable Competition. Durham N.C. Duke University Press, 1964.

Financial Times Conferences. Competition, Mergers, Acquisitions and Alliances in Europe, London, 13th and 14th March 1990: Speakers Papers. London: Financial Times Conferences, 1990.

Fine, Frank L. Mergers and Joint Ventures in Europe: The Law and Policy of the EEC. London: Graham and Trotman, 1989.

Fisher, Franklin M. ed., Antitrust and Regulation: Essays

in Honour of John J. McGowan. Cambridge, Mass.: M.I.T. Press, 1985.

Fishwick, Francis. Definition of the Relevant Market in Community Competition Policy. Luxembourg: Office for Official Publications of the European Communities, 1986.

Franco, Lawrence G. The Threat of Japanese Multinationals - How the West Can Respond. Chichester: John Wiley, 1983.

Frazer, T. Monopoly, Competition and the Law and Regulation of Business Activity in Great Britain, Europe and the United States. Brighton: Wheatsheaf, 1987.

Friedman, David. The Misunderstood Miracle: Industrial Development and Political Change in Japan. London: Cornell University Press, 1989.

Galbraith, John Kenneth. American Capitalism. The Concept of Countervailing Power. London: Hamish Hamilton, 1957.

--------- and Nicole Salinger. Almost Everyone's Guide to Economics. London: Andre Deutsch, 1978.

--------- The New Industrial State 4th ed. Boston: Houghton Mifflin Company, 1985.

Gardner, Nick. A Guide to United Kingdom and European Comunity Competition Policy. London: Macmillan, 1990.

Geroski, P.A., and J. Scwalbach. Barriers to Entry and Intensity of Competition in European Markets. Luxembourg: Office for Official Publications of the European Communities, 1989.

------------------------------ eds. Entry and Market Contestability. Oxford: Basil Blackwell, 1991.

Geroski, P.A. Market Dynamics and Entry. Oxford: Basil Blackwell, 1991.

Goldberg, Walter H. Mergers, Modes, Methods. Aldershot: Gower Publishing Co., 1983.

Goldenberg, Susan. International Joint Ventures in Action. London: Hutchison, 1989.

Goldschmid, H.J., M. Mann, and F. Weston., eds. Industrial Concentration: The New Learning. Boston: Little Brown, 1974.

Goybet, Phillippe., and Alexis Jacquemin. The Economics of 1992 Oxford: Oxford University Press, 1988.

Goyder, D.G. EEC Competition Law. Oxford: Clarendon Press, 1988.

Grassl, Wolfgang., and Barry Smith., eds. Austrian Economics, Historical and Philosophical Background. London: Croom Helm, 1986.

Griffin, Joseph P. US International Antitrust Enforcement - A Practical Guide to the Justice Department Guidelines. 53 Corporate Practice Series, The Bureau of National Affairs Incorporated, 1989.

Hadley, Eleanor M. Antitrust in Japan. Princeton, New Jersey: Princeton University Press, 1970.

Hall, Grahme., ed. European Industrial Policy. London: Croom Helm, 1986.

Hallstein, Walter. United Europe: Challenge and Opportunity. London: Oxford University Press, 1962.
--------- Europe in the Making. London: Allen and Unwin, 1972.

Hannah, L. The Rise of the Corporate Economy. 2nd ed. London: Methuen, 1983.
------, and J.A. Kay. Concentration in Modern Industry. London: Macmillan,1977.

Haspeslagh, Philippe C., and David B. Jemison. Managing Acquisitions: Creating Value through Corporate Renewal. London: Maxwell Macmillan International, 1991.

Hartley, T.C. The Foundations of European Community Law. 2nd ed. Oxford: Clarendon Press, 1988.

Harvey, Jack. Modern Economics. 5th ed. London: Macmillan, 1988.

Hawk, Barry., ed. Annual Proceedings of the Fordham Corporate Law Institute 1983: Antitrust and Trade Policies of the European Economic Community. New York: Matthew Bender, 1984.
---- ed. Annual Proceedings of the Fordham Corporate Law Institute 1988: North American and Common Market Anti-trust and Trade Laws. New York: Matthew Bender, 1989.
---- ed. Annual Proceedings of the Fordham Corporate Law Institute 1989: 1992 and EEC/US Competition and Trade Law. Ardsley on Hudson, New York: Transnational Juris Publications Inc, 1990.
---- ed. United States, Common Market and International Antitrust: A Comparative Guide. 4 vols. 3nd ed. New York: Harcourt Brace Jovanovich, 1990.
---- ed. Annual Proceedings of the Fordham Corporate Law Institute 1990: International Mergers and

Joint Ventures. Ardsley on Hudson, New York: Transnational Juris Publications, 1991.

Hay, Donald A., and Dereck J. Morris. Industrial Economics Oxford: Oxford University Press, 1991.

Hayek, F.A. Individualism and Economic Order. Chicago: University of Chicago Press, 1948.

----- The Constitution of Liberty. London: Routledge and Kegan Paul, 1976.

----- The Fatal Conceit. The Errors of Socialism. London: Routledge, 1988.

----- Economic Freedom. London: Basil Blackwell, 1991.

Hill Samuel Bank Ltd. Acquisitions, Mergers and Alternative Corporate Strategies. London: Mercury Books, 1989.

Hoover, Kenneth., and Raymond Plant. Conservative Capitalism in Britain and the United States. London: Routledge, 1989.

House of Commons, Trade and Industry Committee. Takeovers and Mergers: Memoranda of Evidence. Session 1990-91, HC Paper 226 - i. London: HMSO, 1991.

House of Lords. Merger Control: 6th Report of the Select Committee on the European Communities. (HL 31), 7 March 1989. London: HMSO, 1989.

Hunt, G.M.K. ed. Philosophy and Politics. Cambridge: Cambridge University Press, 1990.

Hyman, Robin. A Dictionary of Famous Quotations. Evans Brothers, 1962. Reprint. London: Pan, 1967.

Institute of Directors. Competition Policy. A Submission to the Department of Trade and Industry in answer to its Letter of 6 June 1986. London: IOD Policy Unit, 1986.

-------------------- Mergers Policy. Discussion Paper for the Institute of Directors Colloquium 29th September 1988. London: IOD Policy Unit, 1988.

-------------------- Colloquium on Mergers Policy Held on 29th September 1988. London: IOD Policy Unit, 1988.

-------------------- Merger Policy. A Submission by the Institute of Directors to the European Commission and the Secretary of State for Trade and Industry. London: IOD Policy Unit, 1988.

Ito, Takatoshi. The Japanese Economy. Cambridge, Mass.: MIT, 1992.

Jacquemin, Alexis P. ed. European Industry: Public Policy and Corporate Strategy. (Oxford: Clarendon Press, 1984.
--------- The New Industrial Organisation. Clarendon Press, Oxford, 1987.
-----------------, and Andre Sapir. Competition and Imports in the European Market. London: Centre for Economic Policy Research, Discussion Paper No. 474, 1990.
---------, H.W. de Jong, K.D. George, and E. Kantzenbach. Merger and Competition Policy in the European Community. London: Basil Blackwell, 1990.

Jenkins, Roy. European Diary 1977-1981. London: Collins, 1989.

Johnson, Chalmers. ed., The Industrial Policy Debate. San Francisco: Institute for Contemporary Studies Press, 1984.
------- MITI and the Japanese Miracle: The Growth of Industrial Policy, 1925-1975. Stanford, California: Stanford University Press, 1982.

Joilet, Rene. Monopolisation and Abuse of a Dominant Position. La Haye: Martinus Nijhoff, 1970.

Kapteyn, P.J.G., and P. Verloren van Themaat. Introduction to the Law of the European Communities After the Coming into Force of the Single European Act. 2nd ed. London: Kluwer Law and Taxation Publishers/ Graham and Trotman, 1989.

Kayson, Karl., and Donald F. Turner. Antitrust Policy. Cambridge, Mass.: Harvard University Press, 1959.

Kennedy, Paul. The Rise and Fall of the Great Powers. London: Unwin Hyman, 1988.

Kerse, Christopher., and John Cook. EEC Merger Control Regulation 4086/89. London: Sweet and Maxwell, 1991.

Kester, Carl. Japanese Takeovers: The Global Contest for Corporate Control. Cambridge, Mass.: Harvard Business School Press, 1990.

Kirzner, Israel. The Economic Point of View: An Essay in the History of Economic Thought. 1960. Reprint. Kansas City: Sheed and Ward, 1976.
------- An Essay on Capital. New York: Augustus M. Kelly, 1966.
------- Competition and Enterpreneurship. Chicago: University of Chicago Press, 1973.
------- Perception, Opportunity and Profit.

Chicago: University of Chicago Press, 1979.

Korah, Valentine. An Introductory Guide to EEC Competition and Practice. 4th ed. London: Sweet and Maxwell, 1990.

Krouse, Clement G. Theory of Industrial Economics. Oxford: Basil Blackwell, 1990.

Kumar. M.S. Growth Acquisition and Investment. (London: Cambridge University Press, 1984.

Larner, Robert J., and James W. Meechan. Economics and Antitrust Policy. New York: Quorum Books, 1989.

Linter, Valerio., and Sonia Mazey. The European Community: Economic and Political Aspects. Maidenhead, Berkshire: McGraw Hill, 1991.

Lipsey, Richard G. An Introduction to Positive Economics. 7th ed. London: Weidenfield and Nicolson, 1989.

List, Friedrich. The Natural System of Political Economy 1837. London: Frank Cass and Company, 1983.

Lodge, Juliet. ed., The European Community and the Challenge of the Future. London: Pinter Publishers, 1989.

Lord Mackenzie Stuart. The European Communities and the Rule of Law. London: Stevens and Sons, 1977.

Machan, Tibor R. Capitalism and Individualism. London: Harvester Wheatsheaf, 1990.

Maeijer, J.M.M. Defensive Measures Against Takeovers in the Common Market. London: Graham and Trotman, 1991.

Marjolin, Robert. Architect of European Unity: Memoirs 1911-1986. London: Weidenfeld and Nicolson, 1989.

Martin, Stephen. Industrial Economics. New York: Macmillan Publishing Co, 1988.

Marquand, David. The Unprincipled Society. London: Jonathan Cape, 1988.

Mathijsen, P.S.R.J. A Guide to European Community Law. 5th ed. London: Sweet and Maxwell, 1990.

Mayes, David G. The European Challenge: Industry's Response to the 1992 Programme. London: Harvester Wheatsheaf, 1991.

Meeks, G. Dissapointing Marriage: A Study in Gains from Merger. Cambridge: Cambridge University Press, 1977.

Menger, Karl. Principles of Economics. 1871.

Mintzberg, Henry. Minzberg on Management: Inside Our Strange World of Organisations. London: Collier Macmillan Publishers, 1989.

Mises, Ludwig von. Human Action: A Treatise on Economics. London: William Hodge, 1949.

----- Theory of Money and Credit. New Haven: Yale University Press, 1953.

Mole, John. Mind Your Manners: Culture Clash in the European Single Market. London: Industrial Society Press, 1990.

Monnet, Jean. Memoirs. London: Collins, 1978.

Monopolies and Mergers Commission. 1989 Review. London: HMSO, 1990.

---------------------------------- 1990 Review. London: HMSO, 1991.

---------------------------------- 1991 Review. London: HMSO, 1992.

---------------------------------- The Role of the Commission 3rd ed. London: HMSO, 1990.

Montagon, Peter. ed. European Competition Policy. London: The Royal Institute of International Affairs/Pinter Publishers, 1990.

MORI Survey. Attitudes of British Businessmen to Risk Control. London: Securicor/MORI, 29 March 1990.

Moussis, Nicholas. Access to Europe. Brussels: Edit-Eur, 1991.

Mueller, Dennis C., ed. The Determinants and Effects of Mergers. Cambridge Mass.: Oelgeschlager, Gunn and Hain, 1980.

Myrdal, Gunnar. The Political Element in the Development of Economic Theory. London: Routledge and Kegan Paul, 1953.

------ An International Economy. Problems and Prospects. London: Routledge and Kegan Paul, 1956.

National Bureau of Economic Research. Business Concentration and Price Policy. Princeton: Princeton University Press, 1955.

Neale, A.D., and D.G. Goyder. The Antitrust Laws of the United States of America. 3rd ed. Cambridge: Cambridge University Press, 1980.

Nester, William R. The Foundation of Japanese Power: Continuities, Changes Challenges. London: Macmillan, 1990.
------ Japanese Industrial Targeting: The Neomercantilist Path to Economic Superpower. London: Macmillan, 1991.

Nevin, Edward. The Economics of Europe. London: Macmillan, 1990.

Newbould, Gerald D. Management and Merger Activity. Liverpool: Guthstead Press, 1970.

Nugent, Neil. The Government and Politics of the European Community. 2nd ed. London: Macmillan, 1991.

C. Norall., and M. Renouf. EC Merger Control. London: Butterworth, 1992. (forthcoming)

Novak, M. Spirit of Democratic Capitalism. London: The IEA Health and Welfare Unit, 1991.

Office of Fair Trading. Press Release: Borrie on the New European Merger Controls 19th February 1990.

Oakeshott, Michael. The Social and Political Doctrines of Contemporary Europe. Cambridge: Cambrige University Press, 1939.
-------- Rationalism in Politics and Other Essays. London: Methuen, 1962.

Ohmae, Kenichi. The Borderless World. London: Collins, 1990.

Okimoto, Daniel I. Between MITI and the Market: Japanese Industrial Policy and High Technology. Stanford, California: Stanford University Press, 1989.
-------, and Thomas P. Rohlen, eds. Inside the Japanese System. Stanford, California: Stanford University Press, 1988.

Olsen, Mancur. The Rise and Decline of Nations. London: Yale University Press, 1982.

Organisation for Economic Cooperation and Development. The Aims and Instruments of Industrial Policy: A Comparative Study Paris: OECD, 1975.

Concentration and Competition Policy Paris: OECD, 1979.

Merger Policies and Recent Trends in Mergers. Paris: OECD, 1984.

Competition and Trade Policies: Their Interaction. Paris: OECD, 1984.

International Mergers and Competition Policy. Paris: OECD,1988.

Competition Policy in the OECD Countries. Paris: OECD, 1989.

Strategic Industries in a Global Economy: Policy Issues for the 1990s. Paris:OECD 1991.

Padoa-Schioppa, T. Efficiency, Stability and Equity - A Strategy for the Evolution of the Economic System of the European Community. Oxford: Oxford University Press, 1987.

Parzych, Kenneth M. A Primer to Antitrust Law and Regulatory Policy. London: University Press of America, 1987.

Pascale, Richard Tanner. Management on the Edge. London: Viking Penguin, 1990.

Patinkin, Don. Essay on and in the Chicago Tradition. Durham N.C.: Duke University Press, 1981.

Peacock, Alan. ed. Germany's Social Market Economy. London: Macmillan, 1989.

Pearce, Joan., John Sutton, and Roy Batchelor. Protection and Industrial Policy in Europe. London: Routledge and Kegan Paul, 1986.

Pelkmans, Jacques., and Alan Winters. Europe's Domestic Market. London: Routledge, 1988.

Pennington, Robert R. Report on Takeover and Other Bids. Luxembourg: Office for Official Publications of the European Communities, 1974.

Piesch, Walter., and Ingo Schmidt. The Suitability of Concentration Measures for EEC Competition Policy. Luxembourg: Office for Official Publications of the European Communities, 1983.

Porter, Michael. ed. Competition in Global Industries.

Cambridge Mass.: Harvard Business School Press, 1986.
------ The Competitive Advantage of Nations. London: Macmillan, 1990.

Posner, R.A. Antitrust Law. Chicago: University of Chicago Press, 1976.

Prais, S.J. Productivity and Industrial Structure. Cambridge: Cambridge University Press, 1982.
----- The Evolution of Giant Firms in Britain. Cambridge: Cambridge University Press, 1976.

Prentice, D.D. ed. EEC Directives on Company Law and Financial Markets. Oxford: Oxford University Press, 1991.

Ravenscraft, David J., and F.M. Scherer. Mergers, Sell-Offs and Economic Efficiency. Washington: The Brookings Institution, 1987.

Raybould, D.M. Comparative Law of Monopolies. London: Graham and Trotman, 1989 (with supplements).

Reekie, W.Duncan. Give Us This Day. London: Hobart Paper, 1978.
------ Industry, Prices and Markets. Oxford: Phillip Allen, 1979.
------ Markets, Entrepreneurs of Liberty: An Austrian View of Capitalism. Brighton: Wheatsheaf, 1984.

Reich, Robert. The Next American Frontier. Harmonsworth, Middlesex: Penguin, 1984.

Ritter, L., W.D. Brown, and F. Rawlinson. EEC Competition Law. London: Kluwer, 1991.

Robertson, Joan. The Economics of Imperfect Competition. 2nd ed. London: Macmillan, 1960.

Rowley, J William., and Donald I. Baker. International Mergers - Antitrust Procedure. London: Sweet and Maxwell, 1991.

Scherer, F.M., and David Ross, Industrial Market Structure and Economic Performance. 3nd ed. Boston: Houghton Mifflyn Company, 1990.

Schmalensee, Richard., and Robert D. Willig. Handbook of Industrial Organisation. 2 vols. Amsterdam: Elsevier Science Publishers, 1989.

Schmidt, Ingo L O., and Jan B. Rittaler. A Critical Evaluation of the Chicago School of Antitrust Analysis.

London: Graham and Trotman, 1989.

Schumacher, E.F. Small is Beautiful. 1973. Reprint. London: Abacus, 1978.

Schumpeter, Joseph A. Capitalism, Socialism and Democracy. 5th ed. London: Allen and Unwin, 1977.

Seldon, Arthur. Capitalism. Oxford: Basil Blackwell, 1990.

Shand, Alexander H. Free Market Morality. London: Routledge, 1990.

Sharp, Margaret., and William Walker. Technology and the Future of Europe London: Pinter Publications, 1991.

Shepherd, William G. The Economics of Industrial Organisation. 2nd ed. Englewood Cliffs, New Jersey: Prentice Hall, 1985.

Shone, Ronald. Open Economy Macroeconomics. London: Harvester Wheatsheaf, 1989.

Simmons and Simons. A Practitioner's Guide to European Take-Over Regulation and Practice. London: Westminster Management Consultants Ltd, 1990.

Simmons, Henry C. Economic Policy for a Free Society. Chicago: University of Chicago Press, 1948.

Singh, Ajit. Takeovers London: Cambridge University Press, 1971.

Sloman, John. Economics. Hemel Hempstead: Harvester Wheatsheaf, 1991.

Snyder, Francis. New Directions in European Community Law. London: Weidenfeld and Nicolson, 1990.

Spierenburg, D. Proposals for Reform of the Commission of the European Communities and its Services. Brussels: Office for Official Publications of the European Communities, 1979.

Stalk, George., and Thomas Hout. Competing Against Time: How Time Based Competition is Reshaping Global Markets. London: The Free Press, 1990.

Steiner, Josephine. Textbook on EEC Law. 2nd ed. London: Blackstone Press, 1990.

Steiner, Peter O. Mergers, Motives, Effects, Policies. Ann Arbour, Michican: University of Michigan Press, 1975.

Stigler, George J.,ed. Business Concentration and Price Policy. New York: National Bureau of Economic Research, 1955.
------- The Organisation of Industry. Homewood, Illinois: Richard D. Irwin, 1968.
------- The Economist as Preacher. Oxford: Basil Blackwell, 1982.

Swann, Dennis. Competition and Consumer Protection. Harmondsworth, Middlesex: Penguin, 1979.
----- Competition and Industrial Policy in the European Community. London: Methuen, 1983.
-----, and Dennis Lees. Antitrust Policy in Europe. London: Financial Times Publications, 1973.

Tasker, Peter, Inside Japan. London: Sidgwick and Jackson, 1987.
Thompson, jnr. A.A., and A. J. Strickland. Strategic Management: Concepts and Cases. 5th ed. Homewood, Il.: Irwin, 1990.

Thomsen, Stephen., and Phedon Nicolaides. The Evolution of Japanese Direct Investment in Europe: Death of a Transistor Salesman. Hemel Hempstead, Herts.: Harvester Wheatsheaf, 1991.

Thurlow, Lester., Fred Branfman, George Lodge, and Ed Miller. Fiddling While U.S. Industry Burns. Washington: A Rebuild America White Paper, 1990.

Tirole, Jean. The Theory of Industrial Organisation. London: The MIT Press, 1988.

Translink International Group, The World Deal Review: Report on the Year Ended 1989. New York: Translink International Group, 1990.

Union of Industrial and Employers Confederations of Europe (UNICE), UNICE Declaration on Merger Control at Community Level UNICE Publication, 10th November 1987.

Amended Proposal for a Council Regulation on the Control of Concentrations Between Undertakings UNICE Publication, 4th May, 1988.

Comunity Control of Mergers: UNICE Declaration UNICE Publication, 4th November, 1988.

Draft Regulation on Concentration Control: Draft Unice Position Unice Publication, 17th November, 1989.

Unice Position on Concentration Control Unice Publication, 14th December 1989.

UNICE Observations on the Definition of Concentration and Cooperation under Regulation 4064/89 and the Guidelines Relative to Ancillary Restrictions UNICE Publication, 15 May 1990.

Letter to C.D. Ehlerman concerning Implementing Instruments for Regulation 4064/89. 2 July 1990.

UNICE Comments on the Notification Form of Regulation 4064/89 UNICE Publication, 2 July 1990.

United States Department of Justice. 1984 Antitrust Merger Guidelines. 1984.

van Bael, Ivo., and Jan Francis Belis. Competition Law of the EEC. 2nd ed. Bichester: CCH Editions, 1991.

van Wolferen, Karl. The Enigma of Japanese Power: People and Politics in a Stateless Nation. London: Macmillan, 1989.

Vernon, Raymond., ed. Big Business and the State: Changing Relations in Western Europe. Macmillan: London, 1974.

Vibert, Frank. Europe's Constitutional Deficit. London: Institute of Economic Affairs, 1989.

Wachter, B., K. van Hulle., W. Landau., J. Schaafsma., M. Raaijmackers. Harmonisation of Companies and Securities Law. Tilburg: Tilburg University Press, 1898.

Wallace, Helen., William Wallace, and Carole Webb., eds. Policy Making in the European Communities. 2nd ed. Chichester: John Wiley, 1983.

Wallace, William. ed. The Dynamics of European Integration. London: Pinter Publications, 1990.

Waterson, Michael. Regulation of the Firm and Natural Monopoly. London: Basil Blackwell, 1988.

Weinberg, M.A., ed. Weinberg and Blank on Takeovers and Mergers. 5th ed. London: Sweet and Maxwell, 1989.

Whish, R.P. Competition Law. 2nd ed. London:

Butterworths, 1989.

Womack, James, Daniel Jones and Daniel Roos. The Machine that Changed the World. London: Maxwell Macmillan, 1990.

Woolcock, S. European Mergers: National or Community Controls? London: Royal Institute of International Affairs, Chatham House Paper, 1989.

Wooldridge, Frank. Company Law in the United Kingdom and the European Community: Its Harmonisation and Unification. London: The Athlone Press, 1991.

Wyatt, Derrick., and Alan Dashwood. Substantive Law of the European Community. 2nd ed. London: Sweet and Maxwell, 1987.

Zukin, Sharon. ed. Industrial Policy: Business and Politics in the United States and France. Eastbourne: Praeger, 1985.

Articles

Adams, Walter., and James W. Brock. "The Bigness Mystique and the Merger Policy Debate: An International Perspective." Northwestern Journal of International Law and Business 9 no. 1 (Spring 1988): 2-48.

Adams, William James. "Does Exposure to International Trade Justify Relaxed Treatment of Mergers?" Northwestern Journal of International Law and Business 9 no. 3 (Winter 1989): 589-98.

Armstrong, A., and A. Silberstein. "Size of Plant, Size of Enterprise in British Manufacturing Industry, 1935-1958." Journal of the Royal Statistical Society 128 Series A 3 (1965): 395-420.

Baker, Jonothan B. "Recent Developments in Economics that Challenge the Chicago School." Antitrust Law Journal 58 (1989): 645-55.

Bain, Joe E. "Relation of Profit Rate to Industry Concentration: American Manufacturing, 1936-1940." Quarterly Journal of Economics 65 (1951): 293-324.
---- "Workable Competition in Oligopoly: Theoretical Considerations and Some Empirical Evidence." American Economic Review 40 no. 2 (May 1950): 35-47.

Baumol, William J. "Contestable Markets: An Uprising in the Theory of Industry Structure." American Economic Review 72 (1982): 1-15.
------, and R. Willig. "Contestability: Developments Since the Book." Oxford Economic Papers, Supplement 38 (November 1986): 9-36.

Begg, Ian. "European Integration and Regional Policy." Oxford Review of Economic Policy 5 no. 2 (Summer 1989): 20-36.

Bleeke, Joel., James Isono, David Ernst, and Douglas Weinberg. "The Shape of Cross-Border M&A." The McKinsey Quarterly no. 2 (1990): 15-26.
--- ------- "Succeeding at Cross-Border M&A". The McKinsey Quarterly no. 3 (1990): 46-55.

Boltho, Andrea. "European and United States Regional Differentials: A Note." Oxford Review of Economic Policy 5 no. 2 (Summer 1989): 105-115.

Bolzer, Jean-Marc Le. "The New EEC Merger Control Policy After the Adoption of Regulation 4064/89." World

Competition Law and Economics Review (1990): 31-47.

Borrie, Sir Gordon. "Merger Policy - Current Policy Concerns." Paper Given at the Institute of Fiscal Studies Conference on Merger Policy, London (16 July 1986).
------ "National and EEC Merger Control-Conflict or Peaceful Coexistence?" Paper Given at the International Bar Association Workshop, Berlin (19 June 1989).
------ "The Contents and Implication of the European Merger Control Regulation from the Perspective of the Office of Fair Trading." Paper Given at the Forum Institut fur Management Conference on the The European Law of Competition and its Further Developments following the Adoption of the European Community Regulation on Merger Control, Bonn (19th February 1990).
------ "European Community - Changing Corporate Structures in a Competitive Enviroment-Developments from a UK Perspective." Paper Given at the Richards Butler Seminar, London (8th June 1990).
------ "Completion of the Single Market: Stimulant or Threat to Free World Trade." Fifth International Cartel Conference, Berlin (18th June 1990).

Bourgeois, Jacques H.J., and Bernd Langeheine. "Jurisdictional Issues: The EEC Merger Control Regulation, Member State Laws, and Articles 85 and 86." Fordham International Law Journal: 5th Annual Issue on European Community Law 14 no. 2 (1990/1991): 387-411.

Bradley, Caroline. "Corporate Control: Markets and Rules." Modern Law Review 53 no. 2 (March 1990): 170-187.

Bright, Christopher. "The European Merger Control Regulation: Do Member States Still Have an Independent Role in Merger Control? Part 1." European Competition Law Review no. 4 (1991): 139-147.
------ "The European Merger Control Regulation: Do Member States Still Have an Independent Role? Part II." European Competition Law Review no. 5 (1991): 184-193.

Brittan, Sir Leon. "Acquisitions and Mergers in the European Community." Speech to the Institute of Directors - Scotland (24 November 1989).
------- "The Development of Merger Control in the EEC Competition Law" Speech given for the Hersch Lauterpact Memorial Lectures, Cambridge (9 February 1990).
------- "Competition Policy in the European Community: The New Merger Regulation." Speech given to the EC Chamber of Commerce, New York (26 March 1990).

------- "Mergers and Acquisitions in the European Community." Speech given at Wimslow, UK (27 April 1990).
------- "The Law and Policy of Merger Control in the EEC." Address to the Bar European Group, London (3 May 1990).
------- "The Principles and Practice of Merger Policy in the European Community." Address to the Centre for European Policy Studies, Brussels (24 September 1990).
------- "The Law and Policy of Merger Control in the EEC." European Law Review 15 no. 5 (October 1990): 351-7.
------- "Competition Policy and Mergers." Address to the Centre for European Policy Studies, Brussels (28 October 1991).
------- "Questions Asked and Answers Given at the Commissioner's Centre for European Policy Studies Speech." (28 October 1991)
------- "Competition Policy in the Light of the Agreement Creating the European Economic Area." Address to the Walras Conference, Switzerland (8 November 1991).
------- "The Application of Competition Policy to Get the Best out of European Industry." Address to the Irish Institute of European Affairs, Leuven (3 December 1991).
------- "Competition in Financial Services." Address to the Centre for European Policy Studies, Brussels (16 January 1992).

Bronckers, Marco C.E.J. "Private Enforcements of 1992: Do Trade and Industry Stand a Chance Against the Member States." Common Market Law Review 26 (1989): 513-33.

Brown, William. "The Philip Morris Case." Journal of Business Law (1988): 351-6, 432-36, and 514-17.

Buckley, A. "A Profile of Industrial Acquisitions in 1971." Accounting and Business Research (Autumn 1972): 243-52.

Buigues, Pierre., and Alexis Jacquemin. "Strategies of Firms and Structural Enviroments in the Large Internal Market." Journal of Common Market Studies 28 no. 2 (September 1989): 53-67.

Burke, Arthur. "The Hidden Trauma of Merger Mania." Business Week (6 December 1982): 14.

Burnside, Alec. "Merger Control with a European Dimension - The Draft Regulation." International Business Lawyer

(September 1988): 348-54.

Calkoen, Willem J.L., and J.J. Feenstra. "Acquisition and Sale of Shares in Other Companies and EEC Competition Policy: The Philip Morris Decision." International Business Lawyer 16 (April 1988): 167-170.

Callister, P. "The December 1989 EC Merger Control Regulation: A Non-EC Perspective." Cornell International Law Journal 24 (1991): 97-134.

Cartwright, Sue., and Cary L. Cooper. "The Psycological Impact of Merger and Acquisition on the Individual." Paper Presented at the Annual Conference of the British Psycological Society, Liverpool, January 1992.

Carreau, Dominique., and William L. Lee. "Towards a European Company Law." Northwestern Journal of International Law and Business Studies 9 no. 3 (Winter 1989): 501-12.

Clark, J.M. "Towards a Concept of Workable Competition." American Economic Review 30 (June 1940): 241-56.
----- "Competition: Static Models and Dynamic Aspects." American Economic Review 45 (May 1955): 450-62.

Cobb, William., and Gary Garrett, "The Urge to Merge: Smart Strategy or Suicidal Leap." Legal Administrator (January/February 1988).

Colonna di Palmiano, Guido. "The Case for a Common Industrial Policy." Bulletin of the European Communities 3 no. 5 (May 1970): 7-9.

Cowling, Keith. "Merger Policy and Industrial Policy." Northwestern Journal of International Law and Business 9 no. 3 (Winter 1989): 599-604.

Davidow, Joel. "The Worldwide Influence of US Antitrust." The Antitrust Bulletin (Fall 1990): 603-30.
------- "Competition Policy, Merger Control and the European Community's 1992 Program." Columbia Journal of Transnational Law 29 no. 1 (1991): 11-40.

Davies, P.L. "The European Community Directive on Insdider Dealing: From Company Law to Securities Market Regulation?" Oxford Journal of Legal Studies 11 no. 1 (Spring 1991): 91-105.

de Jong, H.W. "The Problem of Mergers." Northwestern Journal of International Law and Business 9 no. 3 (Winter 1989): 605-11.

Dehousse, Renaud. "1992 and Beyond: The Institutional Dimension of the Internal Market Programme." Legal Issues of European Integration (1989): 109-136.

Delors, Jacques. "Address by Jacques Delors, President of the Commission to the European Parliament, Strasbourg 17th January 1990." Bulletin of the European Communities, Supplement 1/90 (1990): 6-16.

Demsetz, H. "Barriers to Entry." American Economic Review 72 (March 1982): 47-57.

Dine, Janet. "The Community Company Law Harmonisation Programme." European Law Review 14 (October 1989): 322-332.

Dixon, Mark. "Setting an Example," The 1992 M & A Monthly (June 1989): 1.
----- "Friendly France," The 1992 M & A Monthly (February 1990): 1 and 8.

Drucker, Peter. "Business Objectives and Survival Needs: Notes on a Dicipline of Business Enterprise," The Journal of Business 31 no. 2 (April 1958): 81-90.
------- "Why Some Mergers Work and Many Don't." Forbes (January 18 1982): 36.

Ecbo, B.Espen. "Mergers and the Market for Corporate Control: The Canadian Evidence." Canadian Journal of Economics (1986): 263-60.

The Economist.
"Survey of Europe's Single Market." The Economist (July 1988).
------------ "Wanted: A New Referee for European Fair Play." The Economist (5-12 November 1988): 103-4.
------------ "At Last a Merger Policy for Europe." The Economist (7-14 October 1989):
------------ "The Myth of the Euro-Consumer." The Economist (4-10 November 1989): 107-109.
------------ "They Will Return: Hostile Bidders are note Dead, Just Resting." The Economist (9-17 February 1991): 92.
------------ "Business in Europe." The Economist (8-15 June 1991): Supplement, 1-34.
----------- "Steering the EC's Industry." The Economist (25-31 January 1992): 16-17.
---------- "Europe's Industrial Tug of War." The Economist (25-31 January 1992): 79-80, 86.

Elland, William. "Merger Control by the EC Commission,"

European Competition Law Review 8 (1987): 163-172.
------ "The Mergers Control Regulation (EEC) No. 4064/89." European Competition Law Review 11 no.3 (1990): 111-118.
------ "The Merger Control Regulation and its Effect on National Merger Controls and the Residual Application of Articles 85 and 86." 12 no.1 European Competition Law Review (1991): 19-28.

Evans, Andrew., and Stephen Martin. "Socially Acceptable Distortion of Competition: Community Policy on State Aid." European Law Review 16 no.2 (April 1991): 79-111.

Falkner, R.P. "European Competition Policy and Financial Services: An Overview." 12 no. 3 European Competition Law Review (1991): 113-121.

Ferry, J.E. "Towards Completing the Charm: The Woodpulp Judgement." European Competition Law Review (1989): 58-73.

Fine, Frank L. "The Phillip Morris Judgement: Does Article 85 Now Extend to Mergers?" European Competition Law Review 8 (1987): 333-343.
---- "EC Merger Control in the 1990s: An Overview of the Draft Regulation." Northwestern Journal of International Law and Business 9 no. 3 (Winter 1989): 513-24.
---- "EC Merger Control: An Analysis of the New Regulation." European Competition Law Review 11 no. 2 (1990): 47-51.
---- "The Appraisal Criteria of the EC Merger Control Regulation." European Competition Law Review (1991): 148-160.

Firth, M. "The Profitability of Takeovers and Mergers." Quarterly Journal of Economics (1980): 94.

Fisher, Ann B. "The Decade's Worst Mergers." Fortune (30 April 1984): 263-70.

Foster, Geoffrey. "R and D: Risk and Dissolution." Management Today (January 1989): 50-55.

Fox, Eleanor M. "The Modernisation of Antitrust: A New Equilibrum." Cornell Law Review 66 (1981): 1140.
--- "The New American Competition Policy-From Antitrust to Pro-Efficiency." European Community Law Review 2 (1981): 439-51.

Franks, J., and R. Harris. "Shareholder Wealth Effects of Corporate Takeovers: The UK Experience, 1955-1985."

London Business School and University of North Carolina Working Paper, 1986.

George, K.D. "Monopoly and Merger Policy." Fiscal Studies 6 (February 1985): 34-48.

Geroski, P.A. "European Industrial Policy and Industrial Policy in Europe." Oxford Review of Economic Policy 5 no. 2 (Summer 1989): 20-36.

Glynn Jr, Edward F. "An American Enforcer Looks at the EEC Merger Proposal." Antitrust Law Journal 59 no. 1 (1990): 237-43.

Gort, Michael. "An Economic Disturbance Theory of Mergers." Quarterly Journal of Economics 83 (November 1969): 624-42.

Hawk, Barry E. "The American (Anti-trust) Revolution: Lessons for the EEC?" European Competition Law Review 9 no. 1 (1988): 53-87.

---- "The EEC Merger Regulation: The First Step towards One-Stop Merger Control." Antitrust Law Journal 59 no. 1 (1990): 195-235.

---- "European Economic Community Merger Regulation." Antitrust Law Journal 59 no. 2 (1990): 457-63.

Hay, George A. "Pigeonholes in Antitrust." Antitrust Bullitin 29 (1984): 133-45.

--- "Anti-trust and Economic Theory: Some Observations from the US Experience." Fiscal Studies 6 no. 1 (February 1985): 61-69.

--- "Competition Policy." Oxford Review of Economic Policy (Autumn 1985): 63-79.

Hirshey, Mark. "Mergers, Buyouts and Fakeouts." American Economic Review. Papers and Proceedings 76 (May 1986): 317-22.

Helm, Dieter, and Stephen Smith. "The Assessment: Economic Integration and the Role of the European Community." Oxford Review of Economic Policy 5 no. 2 (Summer 1989): 1-19.

Holl, P., and J.F. Pickering. "The Determinants and Effects of Actual, Abandoned and Contested Mergers." University of Manchester Institute of Science and Technology, mimeo.

Hopt, Klaus J. "The European Insider Dealing Directive." Common Market Law Review 27 (1990): 51-82.

Hornsby, Stephen. "National and Community Control of Concentrations in a Single Market. Should Member States be allowed to Impose Stricter Standards?" European Law Review (1988): 295-315.

Hyden, John S. "The Demise of the ECSC Treaty: Some Competition Law Implications." European Competition Law Review (1991): 160-6.

Industrial Bank of Japan. "EC, 1992 and Japanese Corporations." Industrial Bank of Japan Review no. 8 (12 July 1989): 1-28.

Jacquemin, A. P., Pierre Buigues, and Fabienne Ilzkovitz. "Horizontal Mergers and Competition Policy in the European Community." European Economy no. 40 (May 1989): 4-95.

Jensen, Michael C. "Takeovers: Their Causes and Consequences." Journal of Economic Perspectives 2 no. 1 (Winter 1988): 21-48.
------, and R.S. Ruback. "The Market for Corporate Control: The Scientific Evidence." Journal of Financial Economics 11 (April 1983): 5-50.

Jones, Christopher. "The Scope of Application of the Merger Control Regulation." Fordham International Law Journal: Fifth Annual Issue on European Community Law 14 no. 2 (1990/1991): 359-386.

Kaske. "Siemen Head Justifies His Hostile Takeover of Plessy." 1992 M & A Monthly (January 1990): 4.

Kingdom, John S. "Economic Argument in Anti-trust Cases: An American Litigator's Perspective". European Competition Law Review (1987): 371-385.

Kitching, J. "Why do Mergers Miscarry?" Harvard Business Review 45 (November-December 1967): 84-101.
-------- "Why Acquisitions are Abortive." Management Today (November 1974): 52-7, 148.

Knoeber, C.R. "Golden Parachutes, Shark Repellents and Hostile Tender Offers." American Economic Review 76 (March 1986): 155-67.

Korah, Valentine. "EEC Competition Policy - Legal Form or Economic Efficiency." Current Legal Problems (1986): 85-109.
----- "The Control of Mergers under the EEC Competition Law," European Competition Law Review 8

(1987): 239-255.
-----, and Paul Lasok. "Philip Morris and its Aftermath-Merger Control?" Common Market Law Review 25 (1988): 333-368.

KPMG. "Hidden Dangers - Smaller and Non-EC Companies May be Caught up in the New EC Merger Regulations." KPMG Dealwatch No. 3 (1990): 28-9.

Lange, Dieter G.F., and John Byron Sandage. "The Wood Pulp Decision and its Implications for the Scope of EC Competition Law." Common Market Law Review 26 (1989): 137-165.

Levine, P., and S. Aaronovitch. "The Financial Characteristics of Firms and Merger Activity." Journal of Industrial Economics (December 1981): 149-73.

Liberstein, H. "Allocative Efficiency vs X-Efficiency." American Economic Review 56 (June 1966): 392-415.

Liesner, Jeremy., and Dermot Glynn. "Does Anti-trust Make Economic Sense?" European Competition Law Review 8 (1987):344-370.

Lipworth, Sidney. "Development of Merger Control in the UK and the European Community." The Bar Association for Commerce Finance and Industry: The Denning Lecture 1990 Given by Mr Sidney Lipworth, Chairman of the Monopolies and Mergers Commission on 5 June 1990 in the Old Hall, Lincoln's Inn, London.

Lloyd, Tom. "In Business Nice Guys Finish First." Financial Weekly (April 21-27 1988): 12-14.
----- "Exenophobia - Keeping U.K. Companies Out." Financial Weekly (April 21-27 1988): 14-17.
----- "The Poverty of the Predator." Financial Weekly (April 28-May 4 1988): 17-19.
Louis, Arthur M. "The Bottom Line on Ten Big Mergers." Fortune (3 May 1982).

Lovell, White, Durrant, Solicitors. "The Merger Control Regulation." Lovell, White, Durrant, Solicitors: EEC Newsletter (February 1990): 1-5.
-------------------------------- "The Merger Control Regulation: One Year On." (): 1-5.

Maitland-Walker, Julian. "The Unacceptable Face of Politics in Competition Cases." 12 no. 1 European Competition Law Review (1991): 3-4.
-------------- "The Societas Europae: Useful Corporate Vehicle or Political Stalking Horse." 12 no. 1

European Competition Law Review (1991): 97-100.
-------------- "Why a Merger Issue?" European Competition Law Review (1991) 131-2.

Mandelker, Gershon. "Risk and Return: The Case of Merging Firms." Journal of Financial Economics 1 (December 1974): 303-335.

Mann, Michael H. "Seller Concentration, Barriers to Entry and Rates of Return in Thirty Industries, 1950-1960." Review of Economics and Statistics 48 (1966): 296-307.

Manne, Henry G. "Mergers and the Market for Corporate Control." Journal of Political Economy 73 (April 1965): 110-20.

Margotta, D.G. "The Separation of Ownership and Responsibility." Business Horizons 32 no. 1 (January/February 1989): 74-77.

Markham, Jessie. "An Alternative Approach to the Concept of Workable Competition." American Economic Review 40 (June 1950): 349-61.

Marris, Robin. "A Model of the Managerial Enterprise." Quarterly Journal of Economics 77 (May 1963): 185-209.

Martin, Lynda. "Merger Control by the Commission under Article 85? The Philip Morris Case." Business Law Review (1988): 27-29.

Mason, E.S. "Price and Production Policies of Large Scale Enterprise." American Economic Review: Supplement (1939): 61-74.

Meeks, G., and J.G. Meeks. "Profitability Measures as Indicators of Post-Merger Efficiency." Journal of Industrial Economics (June 1981): 335-44.

Melsheimer, Thomas W. "Economics and Ideology: Antitrust in the 1980's." Stanford Law Review 42 (May 1990): 1319-35.

Mestag, M van. "1992 - The Cant dispelled." Industrial Marketing Digest (UK) 13 no. 4 (1989): 88-95.
Morrison, A.M. "These Executive Bail-Out Deals." Fortune (December 13 1984): 82-87.

McNulty, P.J. "A Note on the History of Perfect Competition." Journal of Political Economy 75 (1967): 395-9.
------- "Economic Theory and the Meaning of

Competition." Quarterly Journal of Economics 82 (1968): 639-56.

Mueller, Dennis C. "A Theory of Conglomerate Mergers." Quarterly Journal of Economics 83 (November 1969): 643-59.

Murray, Thomas J. "Do Mergers Make Sense?" Dun's Business Month (October 1982): 88-93.

Odagiri, Hiroyuki, and Tatsuo Hase. "Are Mergers and Acquisitions Going to be Popular in Japan Too? An Empirical Study." International Journal of Industrial Organisation 7 no.1 (March 1989): 49-72.

Oudemans, Pieter B. "Dutch Defences in Danger: The Changing European Environment and the Possible Consequences for Dutch Companies." Legal Issues of European Integration no. 1 (1991): 19-48.

Overbury, Colin. "First Experiences of European Merger Control." European Law Review Competition Law Checklist (1991): 79-98.

Pathak, Anand S. "EEC Concentration Control: The Forseeable Uncertainties." European Competition Law Review 11 no. 3 (1990): 119-125.

Ponsoldt, James F., and Christian Westerhausen. "Competition and/or Efficiency: A Review of West German Antimerger Law as a Model for the Proposed Treatment of Efficiency Promotion under Section 7 of the Clayton Act." Northwest Journal of International Law and Business 9 (1988): 296-332.

Posner, Richard A. "Interview with William F. Baxter." Antitrust Law Journal 50 (1981): 151.

------ "The Social Costs of Monopoly and Regulation." Journal of Political Economy 83 (1975): 807-27.

------ "The Chicago School of Antitrust Analysis." University of Pennsylvania Law Review 127 (April 1979): 925-48.

Ramsey, Thomas J. "In Support of the Treaty's "Fundamental Objectives": A Survey of Recent Developments Concerning the Interpretation of an Abuse of Dominant Position under Article 86 of the Treaty of Rome." Legal Issues of European Integration (1975/1): 1-21.

Reich, Robert. "Who is Us," Harvard Business Review no. 1 (January/February 1990).

Reynolds, Michael J. "Merger Control in the EEC" Journal of World Trade Law 17 (September-October 1983): 407-26.

Richonnier, M. "Europe's Decline is not Irreversible." Journal of Common Market Studies 22 no. 3 (March 1984): 227-243.

Ridyard, Derek. "An Economic Perspective on the EC Merger Regulation." European Competition Law Review no.6 (1990): 247-54.

H.B. Rose., and G.D. Newbould. "The 1967 Takeover Boom." Moorgate and Wall Street (1967): 5-24.
Satsky, Horst. American Journal of Comparative Law 38 no. 4 (1990): 923-949.

F.M. Rowe, "The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics." Georgetown Law Journal 72 (1984): 1511.

Saxonhouse, Gary R. "Japan and the Bigness Mystique." Northwestern Journal of International Law and Business 9 no.3 (Winter 1989): 612-7.

Scharf, Fritz W. "The Joint Decision Trap: Lessons from German Federalism and European Integration." Public Administration 66 no. 2 (Autumn 1988):239-278.

Scherer, F.M. "Corporate Takeovers: The Efficiency Arguments." Journal of Economic Perspectives 2 no. 1 (Winter 1988): 69-82.

Shleifer, Andrei., and Robert W.Vishny. "Value Maximization and the Takeover Process." Journal of Economic Perspectives 2 no. 1 (Winter 1988): 7-20.

Schmalensee, R. "Another Look at Market Power." Harvard Law Review (1982): 1798-1816.
----------- "Horizontal Merger Policy: Problems and Changes." Journal of Economic Perspectives 2 (1988): 41-54.

Schmidt, Ingo L.O. "The Bigness Mystique and the Merger Policy Debate: A Comment from West Germany." Northwestern Journal of International Law and Business (Winter 1989): 618-32.

Schodermeier, Martin. "Collective Dominance Revisited: An Analysis of the EC Commission's New Concepts of Oligopoly Control." European Competition Law Review 11 no. 1 (1990): 28-34.

Sheffman, D.T., and P.T. Spiller. "Geographic Market Definition under the US Department of Justice Merger Guidelines." Journal of Law and Economics (April 1987): 123-147.

Shepherd, W.G. "Contestability vs Competition." American Economic Review 74 (September 1984): 572-87.

Singh, Ajit. "Takeovers, Economic Natural Selection and the Theory of the Firm: Evidence from the Postwar United Kingdom Experience." Economic Journal (September 1975): 497-515.

Siragusa, Mario., and Romano Subiotto. "The EEC Merger Control Regulation: The Commission's Evolving Case Law." Common Market Law Review 28 no. 4 (1991): 877-934.

Skitol, Robert A., and LLoyd R. Ziff. "Transatlantic M & A: Springing the US Antitrust Trap." International Financial Law Review (May 1989): 25-28.

Snyder, F. "Ideologies of Competition in European Community Law." Modern Law Review (1989): 149.

Soames, Trevor. "The Community Dimension in the EEC Merger Regulation: The Calculation of the Turnover Criteria." European Competition Law Review (1990): 213-225.

------ "Merger Policy: As Clear as Mud?" 12 no, 2 European Competition Law Review (1991): 53-70.

Sosnic, Stephen. "A Critique of Concepts of Workable Competition." Quarterly Journal of Economics 72 (August 1958): 380-432.

------ "Towards a Concrete Concept of Effective Competition." American Journal of Agricultural Economics 50 (November 1968): 827-53.

Spence, M. "Contestable Markets and the Theory of Industry Structure: A Review Article." Journal of Economic Literature 21(3) (1983): 981-90.

Stewart, Terence P., and Delphine A. Abellard. "Merger Control in the European Community: The EC Regulation 'On the Control of Concentrations Between Undertakings' and Implementing Guidelines." Northwestern Journal of International Law and Business 11 (1990): 293-351.

Stigler, George J. "The Xistence of X-efficiency." American Economic Review 66 (1976): 213-16.

-------, and R.A. Sherwin. "The Extent of the Market."

Journal of Law and Economics 28 (October 1985).

Strivens, Robert. "The Philip Morris' Case: Share Acquisitions and Complainants Rights." European Intellectual Property Review 6 (1988): 163-171.

Sturgess, B., and P. Wheale. "Merger Performance Evaluation: An Empirical Analysis of a Sample of UK Firms." Journal of Economic Studies 11 no. 4.

Taverne, Richard. "Financial Takeovers in the European Community." The International Investor 31 (October 1989): 1-4.

Taylor, Dan C. "The Battle for the Global Marketplace." The Plain Truth (March 1990): 3-8.

Richard Taylor. "UK Merger Control and State Controlled Companies." European Competition Law Review (1991): 133-8.

Temple Lang, John. "Concentration and Restructuring in the European Community - Mergers under European Community Antitrust Law." Notes for a Lecture to the International Bar Association, Strasbourg, October 1989.

Turpin, Dominique. "Gambare: Never Say Die! why Japanese Companies Won't Give Up." IMD International: Perspectives for Managers no. 3 (1991): 1-3

Tzanonnos, J., and J.M. Samuels. "Mergers and Takeovers: The Financial Characteristics of the Companies involved." Journal of Business Finance (Autumn 1972): 5-16.

Ueno, Hiroya. "Industrial Policy - Its Role and Limits ." Journal of Japanese Trade and Industry (July-August 1893): 34-37.

Utton, M.A. "On Measuring the Effects of Industrial Mergers." Scottish Journal of Political Economy (February 1974): 13-28.

van Empel, Martin. "Merger Control in the EEC." World Competition Law and Economics Review 13 no. 3 (1990): 5-22.

Varian, Hal R. "Symposium on Takeovers." Journal of Economic Perspectives 2 no. 1 (Winter 1988).

Vickers, J. "Strategic Competition Among the Few - Some Recent Developments in the Economics of Industry." Oxford Review of Economic Policy 1 no. 3 (October 1985): 39-62.

Venit, James S. "The Merger Control Regulation: Europe Comes of Age ... or Caliban's Dinner." Common Market Law Review 27 (1990): 7-50.
----- "The Evaluation of Concentrations Under the Merger Control Regulation: The Nature of the Beast." Fordham International Law Journal 14 no. 2 (1990/1991): 412-54.

Weedon, Lord Alexander of. "Takeover Regulation in the Single European Market." European Competition Law Review (1990): 201-203.

D.F. Williamson, Secretary General of the European Communities, Redcliffe-Maude Memorial Lecture, Royal Institute of Public Affairs, London, 10 October 1991.

Williamson, Oliver. "Dominant Firms and the Monopoly Problem: Market Failure Considerations." Harvard Law Review 85 (1972): 1512-31.

Yamey, B.S. "Deconcentration as Antitrust Policy: the Rise and Fall of the Concentration Ratio." International Review of Economics and Business 32 no. 2 (1985): 119-14.

Appendix A

CORRIGENDA

Corrigendum to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings

(Official Journal of the European Communities No L 395 of 30 December 1990)

Given that certain errors appear in the various language versions of the abovementioned Regulation, the entire text shall be published as below in the form of a corrected version replacing the version of the Regulation published in *Official Journal of the European Communities* No L 395 of 30 December 1989, page 1.

COUNCIL REGULATION (EEC) No 4064/89

of 21 December 1989

on the control of concentrations between undertakings

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 87 and 235 thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the European Parliament (2),

Having regard to the opinion of the Economic and Social Committee (3),

(1) Whereas, for the achievement of the aims of the Treaty establishing the European Economic Community, Article 3 (f) gives the Community the objective of instituting 'a system ensuring that competition in the common market is not distorted';

(2) Whereas this system is essential for the achievement of the internal market by 1992 and its further development;

(3) Whereas the dismantling of internal frontiers is resulting and will continue to result in major corporate reorganizations in the Community, particularly in the form of concentrations;

(4) Whereas such a development must be welcomed as being in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community;

(5) Whereas, however, it must be ensured that the process of reorganization does not result in lasting damage to competition; whereas Community law must therefore include provisions governing those concentrations which may significantly impede effective competition in the common market or in a substantial part of it;

(6) Whereas Articles 85 and 86, while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not, however, sufficient to control all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty;

(7) Whereas a new legal instrument should therefore be created in the form of a Regulation to permit effective control of all concentrations from the point of view of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations;

(8) Whereas this Regulation should therefore be based not only on Article 87 but, principally, on Article 235 of the Treaty, under which the Community may give itself the additional powers of action necessary for the attainment of its objectives, including with regard to concentrations on the markets for agricultural products listed in Annex II to the Treaty;

(9) Whereas the provisions to be adopted in this Regulation should apply to significant structural changes the impact of which on the market goes beyond the national borders of any one Member State;

(10) Whereas the scope of application of this Regulation should therefore be defined according to the geographical area of activity of the undertakings concerned and be limited by quantitative thresholds in order to cover those concentrations which have a Community dimension; whereas, at the end of an initial phase of the application of this Regulation, these thresholds should be reviewed in the light of the experience gained;

(11) Whereas a concentration with a Community dimension exists where the combined aggregate turnover of the undertakings concerned exceeds given levels worldwide and within the Community and where at least two of the undertakings concerned have their sole or main fields of activities in different Member States or where, although the undertakings in question act mainly in one and the same Member State, at least one of them has substantial operations in at least one other Member State; whereas that is also the case where the concentrations are effected by undertakings which do not have their principal fields of activities in the Community but which have substantial operations there;

(12) Whereas the arrangements to be introduced for the control of concentrations should, without prejudice to Article 90 (2) of the Treaty, respect the principle of non-discrimination between the public and the

(1) OJ No C 130, 19. 5. 1988, p. 4.
(2) OJ No C 309, 5. 12. 1988, p. 55.
(3) OJ No C 208, 8. 8. 1988, p. 11.

private sectors; whereas, in the public sector, calculation of the turnover of an undertaking concerned in a concentration needs, therefore, to take account of undertakings making up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them;

Whereas it is necessary to establish whether concentrations with a Community dimension are compatible or not with the common market from the point of view of the need to maintain and develop effective competition in the common market; whereas, in so doing, the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty, including that of strengthening the Community's economic and social cohesion, referred to in Article 130a;

Whereas this Regulation should establish the principle that a concentration with a Community dimension which creates or strengthens a position as a result of which effective competition in the common market or in a substantial part of it is significantly impeded is to be declared incompatible with the common market;

Whereas concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the common market; whereas, without prejudice to Articles 85 and 86 of the Treaty, an indication to this effect exists, in particular, where the market share of the undertakings concerned does not exceed 25 % either in the common market or in a substantial part of it;

Whereas the Commission should have the task of taking all the decisions necessary to establish whether or not concentrations with a Community dimension are compatible with the common market, as well as decisions designed to restore effective competition;

Whereas to ensure effective control undertakings should be obliged to give prior notification of concentrations with a Community dimension and provision should be made for the suspension of concentrations for a limited period, and for the possibility of extending or waiving a suspension where necessary; whereas in the interests of legal certainty the validity of transactions must nevertheless be protected as much as necessary;

(18) Whereas a period within which the Commission must initiate proceedings in respect of a notified concentration and periods within which it must give a final decision on the compatibility or incompatibility with the common market of a notified concentration should be laid down;

(19) Whereas the undertakings concerned must be afforded the right to be heard by the Commission when proceedings have been initiated; whereas the members of the management and supervisory bodies and the recognized representatives of the employees of the undertakings concerned, and third parties showing a legitimate interest, must also be given the opportunity to be heard;

(20) Whereas the Commission should act in close and constant liaison with the competent authorities of the Member States from which it obtains comments and information;

(21) Whereas, for the purposes of this Regulation, and in accordance with the case-law of the Court of Justice, the Commission must be afforded the assistance of the Member States and must also be empowered to require information to be given and to carry out the necessary investigations in order to appraise concentrations;

(22) Whereas compliance with this Regulation must be enforceable by means of fines and periodic penalty payments; whereas the Court of Justice should be given unlimited jurisdiction in that regard pursuant to Article 172 of the Treaty;

(23) Whereas it is appropriate to define the concept of concentration in such a manner as to cover only operations bringing about a lasting change in the structure of the undertakings concerned; whereas it is therefore necessary to exclude from the scope of this Regulation those operations which have as their object or effect the coordination of the competitive behaviour of undertakings which remain independent, since such operations fall to be examined under the appropriate provisions of the Regulations implementing Articles 85 and 86 of the Treaty; whereas it is appropriate to make this distinction specifically in the case of the creation of joint ventures;

(24) Whereas there is no coordination of competitive behaviour within the meaning of this Regulation where two or more undertakings agree to acquire jointly control of one or more other undertakings with the object and effect of sharing amongst themselves such undertakings or their assets;

(25) Whereas this Regulation should still apply where the undertakings concerned accept restrictions directly related and necessary to the implementation of the concentration;

(26) Whereas the Commission should be given exclusive competence to apply this Regulation, subject to review by the Court of Justice;

(27) Whereas the Member States may not apply their national legislation on competition to concentrations with a Community dimension, unless this Regulation makes provision therefor; whereas the relevant powers of national authorities should be limited to cases where, failing intervention by the Commission, effective competition is likely to be significantly impeded within the territory of a Member State and where the competition interests of that Member State cannot be sufficiently protected otherwise by this Regulation; whereas the Member States concerned must act promptly in such cases; whereas this Regulation cannot, because of the diversity of national law, fix a single deadline for the adoption of remedies;

(28) Whereas, furthermore, the exclusive application of this Regulation to concentrations with a Community dimension is without prejudice to Article 223 of the Treaty, and does not prevent the Member States from taking appropriate measures to protect legitimate interests other than those pursued by this Regulation, provided that such measures are compatible with the general principles and other provisions of Community law;

(29) Whereas concentrations not covered by this Regulation come, in principle, within the jurisdiction of the Member States; whereas, however, the Commission should have the power to act, at the request of a Member State concerned, in cases where effective competition could be significantly impeded within that Member State's territory;

(30) Whereas the conditions in which concentrations involving Community undertakings are carried out in non-member countries should be observed, and provision should be made for the possibility of the Council giving the Commission an appropriate mandate for negotiation with a view to obtaining non-discriminatory treatment for Community undertakings;

Whereas this Regulation in no way detracts from the collective rights of employees as recognized in the undertakings concerned,

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 paragraph 2.

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.

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.

A concentration which does not create or strengthen minant position as a result of which effective compe- n would be significantly impeded in the common ket or in a substantial part of it shall be declared patible with the common market.

A concentration which creates or strengthens a inant position as a result of which effective competi- would be significantly impeded in the common ket or in a substantial part of it shall be declared mpatible with the common market.

Article 3

Definition of concentration

A concentration shall be deemed to arise where:

wo or more previously independent undertakings nerge, or

— one or more persons already controlling at least one undertaking, or

— one or more undertakings

iire, whether by purchase of securities or assets, by ract or by any other means, direct or indirect control e whole or parts of one or more other undertakings.

An operation, including the creation of a joint ure, which has as its object or effect the coordination he competitive behaviour of undertakings which ain independent shall not constitute a concentration in the meaning of paragraph 1 (b).

creation of a joint venture performing on a lasting s all the functions of an autonomous economic entity, ch does not give rise to coordination of the competi- behaviour of the parties amongst themselves or een them and the joint venture, shall constitute a centration within the meaning of paragraph 1 (b).

For the purposes of this Regulation, control shall be stituted by rights, contracts or any other means which, er separately or in combination and having regard to considerations of fact or law involved, confer the ibility of exercising decisive influence on an underta- , in particular by:

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

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

Control is acquired by persons or undertakings ch:

re 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 companies [1], as last amended by Directive 84/569/EEC [2], 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.

(1) OJ No L 222, 14. 8. 1978, p. 11.
(2) OJ No L 314, 4. 12. 1984, p. 28.

3. Where the Commission finds that a notified concentration falls within the scope of this Regulation, it shall publish the fact of the notification, at the same time indicating the names of the parties, the nature of the concentration and the economic sectors involved. The Commission shall take account of the legitimate interest of undertakings in the protection of their business secrets.

Article 5

Calculation of turnover

1. Aggregate turnover within the meaning of Article 1 (2) shall comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of sales rebates and of value added tax and other taxes directly related to turnover. The aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in paragraph 4.

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

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

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

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

(a) for credit institutions and other financial institutions, as regards Article 1 (2) (a), one-tenth of their total assets.

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

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

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

4. Without prejudice to paragraph 2, the aggregate turnover of an undertaking concerned within the meaning of Article 1 (2) 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 the 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):

(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

nation of the notification and initiation of proceedings

he Commission shall examine the notification as s it is received.

ere it concludes that the concentration notified s not fall within the scope of this Regulation, it ll record that finding by means of a decision.

ere it finds that the concentration notified, ough falling within the scope of this Regulation, s not raise serious doubts as to its compatibility h the common market, it shall decide not to ose it and shall declare that it is compatible with common market.

on the other hand, it finds that the concentration tified falls within the scope of this Regulation and ses serious doubts as to its compatibility with the mmon market, it shall decide to initiate procee- gs.

he Commission shall notify its decision to the akings concerned and the competent authorities of ember States without delay.

Article 7

Suspension of concentrations

For the purposes of paragraph 2 a concentration as d in Article 1 shall not be put into effect either its notification or within the first three weeks follo- its notification.

Where the Commission, following a preliminary nation of the notification within the period led for in paragraph 1, finds it necessary in order to the full effectiveness of any decision taken later ant to Article 8 (3) and (4), it may decide on its own ive to continue the suspension of a concentration in or in part until it takes a final decision, or to take interim measures to that effect.

Paragraphs 1 and 2 shall not prevent the implemen- of a public bid which has been notified to the nission in accordance with Article 4 (1), provided the acquirer does not exercise the voting rights ed to the securities in question or does so only to ain the full value of those investments and on the of a derogation granted by the Commission under raph 4.

The Commission may, on request, grant a deroga- rom the obligations imposed in paragraphs 1, 2 or 3 in order to prevent serious damage to one or more undertakings concerned by a concentration or to a third party. That derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition. A derogation may be applied for and granted at any time, even before notification or after the transaction.

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

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

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

3. Where the Commission finds that a concentration fulfils the criterion laid down in Article 2 (3), it shall issue a decision declaring that the concentration is incompatible with the common market.

4. Where a concentration has already been implemented, the Commission may, in a decision pursuant to paragraph 3 or by 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 under paragraph 3, without being bound by the deadline referred to in Article 10 (3).

Article 9

Referral to the competent authorities of the Member States

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

2. Within three weeks of the date of receipt of the copy of the notification a Member State may inform the Commission, which shall inform the undertakings concerned, that a concentration threatens to create or to strengthen a dominant position as a result of which effective competition would be significantly impeded on a market, within that Member State, which presents all the characteristics of a destinct market, be it a substantial part of the common market or not.

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

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

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

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

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

(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 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 of 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.

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.

period shall be increased to six weeks if the ission receives a request from a Member State in ance with Article 9 (2).

ecisions taken pursuant to Article 8 (2) concerning d concentrations must be taken as soon as it s that the serious doubts referred to in Article 6 (1) e been removed, particularly as a result of modifica- made by the undertakings concerned, and at the by the deadline laid down in paragraph 3.

Vithout prejudice to Article 8 (6), decisions taken nt to Article 8 (3) concerning notified concentra- nust be taken within not more than four months of te on which proceedings are initiated.

he period set by paragraph 3 shall exceptionally be ded where, owing to circumstances for which one undertakings involved in the concentration is sible, the Commission has had to request informa- y decision pursuant to Article 11 or to order an gation by decision pursuant to Article 13.

Vhere the Court of Justice gives a Judgement annuls the whole or part of a Commission decision under this Regulation, the periods laid down in this tion shall start again from the date of the Judge-

Vhere the Commission has not taken a decision in ance with Article 6 (1) (b) or (c) or Article 8 (2) or hin the deadlines set in paragraphs 1 and 3 respec- the concentration shall be deemed to have been d compatible with the common market, without ice to Article 9.

Article 11

Requests for information

n carrying out the duties assigned to it by this tion, the Commission may obtain all necessary ation from the Governments and comptent autho- f the Member States, from the persons referred to icle 3 (1) (b), and from undertakings and associa- f undertakings.

Vhen sending a request for information to a person, dertaking or an association of undertakings, the ission shall at the same time send a copy of the t to the competent authority of the Member State the territory of which the residence of the person seat of the undertaking or association of underta- is situated.

ı its request the Commission shall state the legal nd the purpose of the request and also the penalties d for in Article 14 (1) (c) for supplying incorrect ation.

he information requested shall be provided, in the undertakings, by their owners or their representa- ıd, 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.

he Commission may be decision impose on the s referred to in Article 3 (1) (b) or on undertakings c penalty payments of up to ECU 100 000 for each delay calculated from the date set in the decision, er to compel them:

comply with an obligation imposed by decision suant to Article 7 (4) or Article 8 (2), second sub- agraph, or

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

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

Article 16

Review by the Court of Justice

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

Article 17

Professional secrecy

nformation acquired as a result of the application of : 11, 12, 13 and 18 shall be used only for the ses of the relevant request, investigation or hearing.

Without prejudice to Articles 4 (3), 18 and 20, the nission and the competent authorities of the er States, their officials and other servants shall not se information they have acquired through the ation of this Regulation of the kind covered by the tion of professional secrecy.

'aragraphs 1 and 2 shall not prevent publication of il information or of surveys which do not contain nation relating to particular undertakings or associa- of undertakings.

Article 18

aring of the parties and of third persons

Before taking any decision provided for in Articles 7 1 (4), Article 8 (2), second subparagraph, and (3) to l Articles 14 and 15, the Commission shall give the s, undertakings and associations of undertakings ned the opportunity, at every stage of the procedure 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. In so far 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.

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 Article 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 consideration that has a Community dimension.

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

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

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

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

Article 22

Application of the Regulation

1. This Regulation alone shall apply to concentrations as defined in Article 3.

2. Regulations No 17 [1], (EEC) No 1017/68 [2], (EEC) No 4056/86 [3] and (EEC) No 3975/87 [4] shall not apply to concentrations as defined in Article 3.

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

4. Articles 2 (1) (a) and (b), 5, 6, 8 and 10 to 20 shall apply. The period within which proceedings may be initiated pursuant to Article 10 (1) shall begin on the date of the receipt of the request from the Member State. The request must be made within one month at most of the date on which the concentration was made known to the Member State or effected. This period shall begin on the date of the first of those events.

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

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

(1) OJ No 13, 21. 2. 1962, p. 204/62.
(2) OJ No L 175, 23. 7. 1968, p. 1.
(3) OJ No L 378, 31. 12. 1986, p. 4.
(4) OJ No L 374, 31. 12. 1987, p. 1.

Article 23

Implementing provisions

ommission shall have the power to adopt imple-
g provisions concerning the form, content and
letails of notifications pursuant to Article 4, time
pursuant to Article 10, and hearings pursuant to
18.

Article 24

Relations with non-member countries

he Member States shall inform the Commission of
neral difficulties encountered by their undertakings
oncentrations as defined in Article 3 in a non-
er country.

nitially not more than one year after the entry into
of this Regulation and thereafter periodically the
ission shall draw up a report examining the treat-
ccorded to Community undertakings, in the terms
d to in paragraphs 3 and 4, as regards concentra-
n non-member countries. The Commission shall
those reports to the Council, together with any
nendations.

Whenever it appears to the Commission, either on
sis 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.

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

Done at Brussels, 21 December 1989.

For the Council

The President

E. CRESSON

Appendix B

The source of the following material is The New Treaty on European Union, Belmont European Policy Centre: Brussels, 1992, vol 1, 197-8 and vol 2, 71-2 respectively.

TITLE XIII - Industry

Article 130

1. The Community and the Member States shall ensure that the conditions necessary for the competitiveness of the Community's industry exist.

For that purpose, in accordance with a system of open and competitive markets, their action shall be aimed at:

- speeding up the adjustment of industry to structural changes;
- encouraging an environment favourable to initiative and to the development of undertakings throughout the Community, particularly small and medium-sized undertakings;
- encouraging an environment favourable to co-operation between undertakings;
- fostering better exploitation of the industrial potential of policies of innovation, research and technological development.

2. The Member States shall consult each other in liaison with the Commission and, where necessary, shall co-ordinate their action. The Commission may take any useful initiative to promote such co-ordination.

3. The Community shall contribute to the achievement of the objectives set out in paragraph 1 through the policies and activities it pursues under other provisions of this Treaty. The Council, acting unanimously on a proposal from the Commission, after consulting the European Parliament and the Economic and Social Committee, may decide on specific measures in support of action taken in the Member States to achieve the objectives set out in paragraph 1.

This Title shall not provide a basis for the introduction of any measure which could lead to a distortion of competition.

INDUSTRY (Article 130)

80. Like the new provisions on culture, public health and consumer protection, the new provisions, contained in Article 130, on industry, are ambiguous. There was some pressure during the negotiations on the EU Treaty for the incorporation of provisions amounting to an 'industrial policy'. This is, as the Commission has found in the past, and as many Member States have come to realise (particularly when trying to find something for their government departments responsible for industry to do) somewhat elusive. Japan's MITI is the envy of many competing countries; but its role is largely concerned with international trade. This very fact has a bearing on an ambiguity in the industry provisions in Article 130; that is, whether the "conditions necessary for the competitiveness of the Community's industry" are those governing competitiveness within the Community or outside it. An industrial corporation holding a dominant position in the Community may be a doughty competitor against similar corporations in Japan or the United States. The rules on competition may argue in favour of tempering that corporation's market power; international competitiveness may argue in favour of strengthening it.

The recent agreement between the Community and the United States indicates that increasingly anti-trust policy needs to be viewed from a world, rather than a regional viewpoint. All four of the criteria set out in Article 130(1) could be called in aid to justify intervention in industrial affairs; and many Community politicians, as well as several Commissioners, may be expected to use the reference to competitiveness in support of industries fighting for a place in world markets. The last sentence of Article 130 echoes the first, but almost certainly refers to competitiveness within the Community; the reference to 'distortions' has a domestic, rather than an international, connotation (see, for example, Article 3(g)). Its inclusion is therefore salutary. But the article as a whole is an unknown quality; and its utility will have to be judged by the kind of

measures introduced in accordance with its provisions.