FRENCH AND BRITISH CORPORATE POLITICAL STRATEGIES IN THE CASE OF THE EUROPEAN MERGER CONTROL REGIME: NATIONAL OR EUROPEAN?

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List of Abbreviations

AFEI	Association Française des Entreprises d'Investissement
ARFA	Association des Responsables de Fusions et Acquisitions
BBA	British Bankers' Association
BdB	Bundesverband Deutscher Banken (German Banking Association)
BNL	Banca Nazionale del Lavoro
BNP	Banque Nationale de Paris
CCIP	Chambre de Commerce et d'Industrie de Paris
CEBS	Committee of European Banking Supervisors
CEIOPS	Committee of European Insurance and Occupational Pensions Supervisors
CEO	Chief Executive Officer
CEPS	Centre for European Policy Studies
CERVM	le Comité Européen des Régulateurs des marches de Valeurs Mobilières.
CESR	Committee of European Securities Regulators
CFI	Court of First Instance
CNCE	Caisse Nationale des Caisses d'Epargne
COREPER	Committee of Permanent Representatives
CP	Consultation Paper
DGCCRF	Direction Générale de la Concurrence, de la Consommation, et de la Répression des Fraudes
DG Comp	Director General in charge of competition policy
DGIV	Director General in charge of competition policy (former DG Comp)
DG Markt	Director General in charge of internal market and services
DP	Discussion Paper
EACB	European Association of Cooperative Banks
EBF	European Banking Federation
ECJ	European Court of Justice
ECN	European Competition Network
ECOFIN	The Economic and Financial Affairs Council
ECSC	European Coal and Steel Community
EFR	European Financial Services Roundtable
EMCR	European Merger Control Regulation
EPC	European Policy Centre
ERT	European Roundtable of Industrialists
ESBG	European Savings Banks Group
ESC	Economics and Social Committee
EU	European Union
FBF	Fédération Bancaire Française
FSA	Financial Services Authority (based in London)
FSAP	Financial Services Action Plan
ICMA	International Capital Market Association
IGC	Intergovernmental Conference
LBO	Leveraged Buyout
LIBA	London Investment Banking Association
MiFID	Markets in financial instruments Directive

MTF	The Merger Task Force (disbanded in 2002).
NCA	National Competition Authority
NRE	Nouvelles Régulations Economiques
OFT	Office of Fair Trading
PDG	Président Directeur Général
RBS	Royal Bank of Scotland
SAV	Staging, Arena and Vehicle – the core elements of the framework for analysis
SEPA	The Single Euro Payments Area
SIEC (test)	Significantly Impede Effective Competition (test)
SLC (test)	Substantial Lessening of Competition (test)
SMART	Specific, Measurable, Achievable, Relevant and Time Bound
TEC	Treaty of the European Community (Treaty of Rome)
UNICE	Union of Industrial and Employers' Confederations of Europe (since 23.1.2007 Business Europe)

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A Papy et Mamy,

Abstract

Has the construction of a European level playing field in terms of policy solutions in the merger control field led to a *de facto* standardisation of European corporate modes of representation? This study challenges scholars who have predicted the development of a European mode of representation that would accompany the shift of competences from the national to the European level of governance.

Following the establishment of a generic framework of design of corporate political strategies – based on the management literature – and adapted to the European merger control regime context, French and British firms' corporate political strategies are thoroughly analysed. The comparison refines the original analytical framework. Moreover the conclusions of the comparative study show differences in corporate political strategies along national lines, although a certain degree of convergence can be identified. There are traditional tendencies in choosing strategies – although the efficiency of strategies can be assessed case-by-case.

These conclusions are, in turn, analysed in terms of Europeanization. The latter concept is defined as a horizontal and vertical process related to the existence of the European level of governance. Unlike current conclusions of the Europeanization literature this research project highlights five main themes of differences between French and British corporate political strategies. In light of these themes the extent to which the Europeanization process affects interest intermediation needs to be qualified. Both the horizontal and vertical flows have an impact on corporate political activity. However, this impact should not be over stated. National constructs and traditions still matter in the design of corporate political strategies.

Introduction

By comparing the design of corporate political strategies of large French and British firms in the financial services sector, this research investigates the role of interest intermediation in European policy-making, notably in the development of the European merger control regime. Conclusions will be drawn as to the impact of the EU level of governance on corporate political behaviours.

Although many scholars interested in corporate political activities have claimed to explain the strategic behaviours of firms, most have described specific tools that tend to draw narrow, piecemeal conceptions of strategy. The broader view of the design of corporate political strategies is comprised of different elements: message, staging, arenas and vehicles, and their articulation. Literature in the field of European interest representation has defined 'messages' as information or expertise. However my own analysis also focuses on the format in which 'messages' are conveyed. The SAV structure (staging, arenas and vehicles) composes the core of my framework of analysis, as defined in Chapter 1. Each element of which has been studied independently by the literature as reviewed in Chapter 1.

In this project the behaviours of French and British firms in each element of corporate political strategy design will be compared. What type of relationship do French and British firms establish with the European Commission? At which hierarchical level of the European body do firms interact? Do national governments interfere in the European merger control regime and when? Preliminary answers to these questions in Chapter 4 will be further examined in Chapter 5. This will assess the extent to which national modes of interest representation are converging to a European mode of representation.

Indeed a central and common theme of investigation, in the field of EU corporate interest representation, has recently been the impact of a European level of

governance on political strategies of interest representatives. Coen (2007) explained that '*the gradual transfer of regulatory functions from Member States to the EU institutions in areas such as […] competition law has contributed to the Europeanization of interest groups'*. This has yet to be assessed in the context of European competition law.

Whereas much interest intermediation literature has focused on collective action issues, my own research looks at the whole concept of the design of corporate political strategies. Association membership, for instance, represents one possible type of actions among different choices available to firms. Secondly I have used qualitative research tools – namely semi-structured interviews, participant observation, and a comparative case study – when the literature on European corporate political activity is largely based upon surveys and quantitative data gathering, sometimes combined with interviews (Coen 1998, 2007, Markussen et al. 2005, Bouwen 2002, 2004a, 2004b, Eising 2004, Broscheid et al. 2003).

This introduction follows the development of the five chapters of my thesis. Firstly I will consider the background to my study: the design of corporate political strategies in the case of the European merger control regime, in Chapters 1 and 2 of my thesis. These two chapters will help to set the *décor,* establishing a framework of corporate political strategy – in Chapter 1 –, adapted to the contextual elements of the European merger control regime – in Chapter 2. The specific framework will be used in the analysis of my data. The second section, Chapter 3 of my thesis, consists of a comprehensive discussion of qualitative research methods used throughout this project. The two main methods used in the construction of my research are ethnographic and case study, the latter of which is supplemented by semi-structured interviews. Chapter 4 of my study is the analysis of data collected according to my framework and a comparison of French and British firms in the financial services sector. The comparison will provide elements to assess the degree of Europeanization and contribute to the current academic literature.

1. Background of this project

The European merger control regulation is embedded in a multi-level governance structure. European and national levels of governance constantly interact to formulate the European merger control *regime*. The competences of the two levels of governance are primarily defined by the turnover thresholds of the merged entity.

Mergers and acquisitions are critical to corporate strategies. Indeed resource limitations do not seem to apply in merger cases. Firms have, for instance, sued the Commission at high fees[1], even though they were legally advised that their chance of winning such a case would be slim[2]. Moreover, similar legal requirements of merger regimes affect all sectors of the European economy. Conclusions regarding corporate political strategies may be drawn on a cross-sectoral basis; a clear gap in the interest intermediation literature.

1.1. Designing corporate political strategies and the establishment of an analytical framework.

I will be using the term *corporate political strategy* rather than *corporate lobbying* in this project due to it being a more encompassing concept. Indeed lobbying, as defined by Van Schedelen (1993) as '*the informal exchange of information between private actors and the public authorities which [the former] try to influence'*, is understood as one part of the corporate political activity. This project is looking at the whole process from issue identification to representation of interests by firms. Referring to corporate political strategy as a term, suggests the integration of this element in the overall corporate strategy – understood in more economic and business terms.

Individual firms and the analysis of their political behaviours, in the European context, have been looked at infrequently by scholars, although there has recently

[1] My Travel has filed a GBP 518m damages claim against the European Commission for blocking its deal to acquire rival First Choice – the amount also takes into account the damages resulting from the failure to merge (T-403/05, My Travel Group plc. v Commission). Schneider sued for EUR 1.66bn and won the appeal – albeit not for the full amount (T-351/03, Schneider Electric SA v Commission, 11 July 2007).
[2] Interview with London-based lawyer regarding the *Airtours* case

been a noticeable surge in academic literature in this field. This bias towards collective interest intermediation is understandable. European institutions, notably the Commission, have favoured the emergence of collective actors that would provide an overview of an industry position, instead of a patchwork of conflicting individual positions – *'and perform one of the traditional functions of interest groups, the aggregation of demands'* (Mazey et al. 1996). Indeed the European Commission has been interested in aggregated knowledge at the European level and has, as a result, promoted the establishment of European federations.

European interest representation literature on corporate political behaviours has focused on different elements of their political strategies. The management literature, on the other hand, suggests different conceptualisations of strategy. By considering both academic and practitioners' literatures in the field of interest representation, three elements emerged as the core of the development of political strategies; staging, arenas, and vehicles (SAV). These elements are preceded by the identification of the message which the company is seeking to convey. Therefore the SAV core inserts itself in a wider corporate political strategy design. This framework and its establishment constitute the first Chapter of my thesis, and will be further developed in the context of the European merger control regime in my second and fourth Chapters.

I will also introduce the concept of Europeanization. Indeed the ultimate research questions posed by this study are focused on the comparison of national and European corporate political strategies, and whether these are affected by the existence of an EU level of governance – the assessment of the degree of Europeanization in the European merger control regime.

1.2. The European merger control regime

The economic and legal literatures have always been fully engaged in the debate of regulating mergers – employing theories of perfect competition or maximization of social welfare, for instance. This debate is key for firms and the design of their corporate political strategies. Legal and economic theories are at the heart of the Commission's merger control decision-making system with a more recent

emphasis on economic reasoning – as shown by the appointment in 2003 of a Chief Economist[3]. Political scientists, on the other hand, have only recently considered analysing competition policy, and more specifically merger control regimes (Bulmer 1994, McGowan and Wilks 1995, McGowan and Cini 1999). Are merger transactions purely the preserve of an analytical legal and economic framework or are there also political considerations to be taken into account? These considerations relate to the problematic relations that exist between industrial policy and competition policy. Far from being straight forward, positions regarding both policies have evolved in the European Union.

A classic example of political interference is recognised in the *Mannesmann/Vallourec/Ilva* case[4]. This was considered a controversial decision for the collegiate Commission. Indeed the decision went against the recommendation of the Advisory Committee – made up of representatives of Member States – and Competition Commissioner Karel Van Miert was outvoted at the College meeting. *Mannesmann/Vallourec/Ilva*[5] shows that non-competition factors, in the form of industrial goals for instance, can affect the background of decisions. The joint venture intended to strengthen the competitiveness of the European steel industry against Japanese and East European producers. As a result of this transaction many commentators called for an independent competition authority (Schmidt 2001). More recently, the Commission threatened to sue both Italy[6] and Spain[7] for interfering in merger proceedings in the financial services and the energy sectors respectively. France struggled to push through the *GDF/Suez* merger at the European level and completed it domestically. This merger was perceived as a governmental effort to

[3] The role of the Chief Economist and its Cabinet is explained by the first Chief Economist in Roeller, L-H., Buigues, P.A. (2005), The office of the Chief Competition Economist at the European Commission, available at http://ec.europa.eu/dgs/competition/officechiefecon_ec.pdf

[4] Case IV/M.315.

[5] *'The Commissioner for competition, Karel van Miert, was outvoted by 8:8:1 result (…). The case shows impressively, that European merger control procedure needs an improvement in its institutional conditions. This is demonstrated by the result of the voting procedure by the commissioners. Primary non-competition factors in the form of industrial goals were in the background of this decision. The joint venture was meant to strengthen the competitiveness of the European steel industry against Japanese and East-European producers. Under aspects of an effective competition this decision was doubtful'*, in Schmidt, A. (2001), *'Non-competition factors in the European competition policy: the necessity of institutional reforms'*, CeGE Discussion Paper no.13

[6] The Bank of Italy had delayed the ABN Amro bid for an Italian bank, Antoveneta, in March 2005.

[7] The Spanish government placed conditions on the acquisition of energy company Endesa SA by rival companies E.ON. The Commission considered that the Spanish government violated European law (November 2006).

create a national champion preventing Enel gaining a foothold in the French energy market.

Many cases scrutinised at the European level have therefore caused political discomfort at the domestic level. The 2006 merger boom has been particularly eventful. Nationally sensitive sectors, such as financial services and energy, are currently consolidating, and as a result governments are calling for 'economic nationalism'. Over the last decade the European energy markets have experienced deregulation and privatisation leading to the break-up of monopolies and vertically integrated companies. In many cases these companies controlled the entire supply chain, i.e. from gas production to consumer electricity bills. More competition has been difficult to introduce at the national level. Even the UK, reputed for its liberalism, has been tempted to change its policy approach towards mergers in order to protect its energy sector[8].

The consequences of the existence of a European merger control regime are crucial to firms and the future business landscape. It is worth noting, however, that the European merger regime only applies to certain transactions as defined by the thresholds set in the first Articles of the Regulation (Chapter 2). The Regulation is attached in Annex 1. Transactions outside the scope are under the responsibility of national competition authorities that have their own merger regimes. The European merger control regime is firmly built as a multi-level governance structure.

The Commission has prohibited 20 cases out of around 4000 cases[9], and the majority of mergers (85%) are actually approved unconditionally in phase I of the merger proceedings[10]. At the European level, notification of mergers under scrutiny of the

[8] In April 2006, the UK government considered changing its domestic merger control regime to block a potential takeover of Centrica, the UK's biggest gas supplier, by Gazprom – a Russian state-controlled company. Alan Johnson, the then trade and industry Secretary, had been a vocal critic of protectionism in the U.S. and Europe. The Financial Times (in April 2006) reported that he was briefed on the legal changes required to allow them to block the rumoured bid by Gazprom.
[9] A distribution of the different decisions taken by the Commission can be found in Annex 3, ending May 2008.
[10] Figures are available at http://ec.europa.eu/comm/competition/mergers/statistics.pdf.

European Commission is compulsory[11]. So how and when do firms interact with the Brussels competition authority? What elements matter when interacting with the European body? Who will, within the firm, interact with the European merger case team? And, why do some firms and not others succeed in pushing through problematic mergers?

1.3. The role of firms in the development of the European merger control regime.

Stone Sweet and Sandholtz (1997) explained that cross-border activities are of increasing importance, '*[cross-border corporations] expect to find the creation and growth of supranational governance (…), rising levels of cross-border transactions generate demand for EC rules and dispute resolution'*. The need for a European merger control regime has rapidly been identified by the European Commission, but has failed to generate enough political momentum on its own. Following European Court of Justice (ECJ) judgements such as Continental Can[12] and Philip Morris[13], which created a *de facto* European merger control regime, firms pushed for a European level-playing field. Undoubtedly, as will be explained in more detail in the second chapter of my thesis, the role of firms has been critical to the institutionalisation[14] of a European merger control regime by the Council in 1989 in the form of a Regulation[15].

Questions regarding the interactions between firms and the European Commission in the context of the European merger control regulation are therefore legitimate. However such questions cannot be answered by relying solely on economics or legalistic views. Indeed, the economic and legal literatures fail to account for the whole of the European merger control regime – its emergence and evolution. The

[11] See Recital 4 of Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, '*Regulation (EC) No 139/2004 is based on the principle of compulsory notification of concentrations before they are put into effect. On the one hand, a notification has important legal consequences which are favourable to the parties to the proposed concentration, while on the other hand, failure to comply with the obligation to notify renders the parties liable to fines and may also entail civil law disadvantages for them. It is therefore necessary in the interests of legal certainty to define precisely the subject matter and content of the information to be provided in the notification'*.

[12] Europemballage Corporation and Continental Can Co. Inc. v EC Commission (Case 6/72), OJ C68, ECR 215, 21.09.73.

[13] 1987 Cases 142 and 156/84 1987 ECR 4487.

[14] A weaker regime existed on the basis of Articles 81 and 82.

[15] Council Regulation (EEC) No 4084/89 on the control of concentrations between undertakings.

latter literatures are not interested in analysing the intricacies of the relations between firms and the competition authority, and their impact on decision-making processes. For instance, Newscorp successfully secured a quasi-monopoly – Sky Italia – in Italy following the merger between Stream, NewsCorp's pay-TV firm, with Telepiù[16]. From an economic point of view this may seem to be difficult to defend, and yet the European Commission cleared the merger[17].

However the literature related to interest intermediation explains only partially the polymorphic nature of the relationship between the Commission and firms. Although some aspects of European Merger Control Regulation, such as the insertion of 'legitimate interests' and Article 9 allowing for the possibility of referrals to national competition competent authorities, are remarkable they do not account for the whole of corporate interactions with the Commission, and may actually present a distorted vision. Indeed micro-analyses of both organisations – the Commission as a bureaucracy headed by a political College and firms as multi-layered entities – will provide deeper understanding of the interactions. Other scholars have highlighted the importance to consider the Commission from an anthropological viewpoint (Abélès 1993, Bellier 1995, 1997) – as in *'in terms of the character of the individuals and not just its structure or role'*[18]. Historical institutionalism, one of the strands of new institutionalism, has placed the role of institutions in a prominent position in European studies. Indeed new institutionalism is usually introduced by the affirmation that 'institutions matter' (Thelen 1999). Accordingly, institutions have an impact on the design of corporate political strategies and represent an independent or intervening variable that influence political outcomes (Steinmo et al. 1992). Institutions are viewed as the critical variable in any analysis of policy making in that they structure the input of social, economic and political forces, and thus influence policy results (Bulmer 1998). The impact of the approach will be clearly perceived in the design of a framework for studying corporate political strategies as explained in my first chapter.

[16] Merger Decision IV/M.2876
[17] The clearance – subject to undertakings – allows a merger that created a monopoly and therefore provides a permanent example of traditional antitrust policy. This was justified by a weak environment in the Italian market for satellite pay-TV that has pushed competitors out of the market and increased concentration.
[18] Bellier 1997, p.91

As a result my study considers the European merger control regulation as a much broader subject of analysis and indeed as a European regime rather than merely a Regulation. Chapter 2 reviews these different viewpoints with regards to the development of European merger control regime. Some companies interact with the Commission at the drafting stages of the regulation or notices, some companies sue the Commission following a merger decision, and some prefer staying away from DG Comp – the Directorate General in charge of competition policy. All these elements will need inserting into the analysis of corporate political strategy, as explained in Chapter 2.

2. The Research Methodology

Scholarly work has become increasingly advanced in defining units of analysis and choosing methods of research. The management literature, for instance, has proved helpful in providing frameworks to analyse political activities (in the European literature, Fairbrass (2003) based her paper on the strategic decision-making analysis – SDM – a management studies tool, and Dahan (2003) for management literature applications). Indeed 'strategies' have been a key theme in the management literature – a term that political scientists have attempted to adapt to interest representation. This project belongs to this stream of work, and is thus partly influenced by the management literature to establish a framework for corporate political strategies.

Although a framework has been built prior to the data collection phase – as explained in Chapter 1 – this research project follows inductive reasoning. The ethnographic approach and the use of a geographical comparative case study explained in Chapter 3 are natural choices for such an inductive project. Throughout the data collection phase of the project, I was thus able to collect first-hand data and get involved in the corporate political strategies' community. Indeed the ethnographic approach is based upon the process of describing a culture or way of life as found in their settings (Van Maanen 1983). This research method requires close field observation, and therefore participant observation as a tool for collecting data that is difficult to access. I worked in the European public affairs department of a French

bank (BNP Paribas) from February 2006 to July 2006, in Paris. This placement was followed by one in the 'wholesale' department[19] of a British association well-positioned in the financial services sphere (the British Bankers' Association) – from July 2006 to December 2006. Although these two placements were organised with my PhD study in mind, I was also able to join the government affairs department of a Dutch bank (ABN Amro) on a part-time basis – from March 2007 to June 2007. This string of placements has culminated in my current position within a trade association, ICMA – the International Capital Market Association, based in London. This level of access to the community has enhanced my process of data collection, notably in a context as secretive as that of merger control.

In fact two transactions occurred during my placements. As I joined BNP Paribas, the bank was in the process of notifying[20] the BNL (Banca Nazionale del Lavoro) in Italy to European Commission. Whilst at ABN Amro, two suitors were battling for control over the Dutch bank: a consortium of banks – Royal Bank of Scotland, Fortis and Santander – and Barclays[21].

My data has primarily been collected in the field of financial services, using both ethnographic and case study research strategies. The financial industry is under close scrutiny from both the European competition authority[22] and national authorities[23]. The role of competition policy has become crucial to the financial services industry as it allows firms to compete on a European level-playing field. The economic literature has been keen to try and assess the impact of merger regulation on the aggregate value of mergers. However, the political science literature has comparatively remained quiet about the dynamics of the interactions between competition authorities and financial institutions (Grossman 2004 does provide some insights in state aid and the financial services). Some authors have nevertheless been

[19] The department is more focused on issues affecting major investment banks. It is generally separated from the retail banking side.
[20] The transaction M.4155 was formally notified to the European Commission on February 27, 2006. I started my placement in the beginning of February.
[21] The consortium finally acquired the Dutch bank on October 2007.
[22] The European Commission has launched some sectoral inquiries in the banking industry on retail banking on payment cards and current accounts (the final report was published in January 2007).
[23] The OFT launched in March 2007 an inquiry on bank charges for instance.

writing about interest representation in financial services (Josselin 1996, Bouwen 2002, Grossman 2004, Quaglia 2005).

The comparative study of French and British corporate political activities in the context of the European merger control regime will, through semi-structured interviews, allow the collection of fresh new data. This will be explored in Chapter 4. Comparative studies are essential to highlight differences and similarities and also identify variables that may influence observed discrepancies. Chapter 5 of my thesis will attempt to identify either national patterns or European patterns of corporate political behaviours in the context of merger control. The extent of influence of European policy processes on corporate political activities will be analysed in this Chapter. Comparative analysis is essential to analyse the degree of Europeanization of corporate political strategies.

3. The Europeanization of corporate political strategies

The Europeanization literature, in the field of interest intermediation, is concerned with the extent to which interest representation modes are detaching themselves from the developing relationship between firms and the national state. This project contributes to the interest representation literature by accounting for the role and importance of national policy processes in the design of European corporate political strategies.

Based on my definition of Europeanization established in Chapter 1, and building upon the research methods explained in Chapter 3, two analytical stages will follow. Firstly, analysis of French and British firms, in the context of the European merger control regime, will identify the main distinctive features of corporate political strategies. Three main elements are identified in the comparative analysis. They touch upon all the different elements of the analytical framework established in Chapter 1. This analysis looks at the impact of another level of governance in the case of the European Merger Control regime. The second stage, Chapter 5 of this project, is the explanation of the degree of convergence and divergence of corporate political

activities as outlined in Chapter 4. This final chapter will also present rationales for questioning the degree of Europeanization of corporate political strategies.

In summary, this project focuses on the current debate of Europeanization in European interest intermediation literature. This is a central issue. Much of the literature assumes the presence of external forces to explain the Europeanization concept. My research methods, and specifically the level of access permitted by my ethnographic approach, has generated fresh, interesting data in this field. The analysis of the collected data will allow the establishment of a model qualifying corporate political strategies. My study compares these strategies of British and French financial service firms. The EU merger control regime provides a context to examine whether national differences persist or not.

Chapter 1

Corporate Political Strategies in a Europeanized Context

A range of scholars from a wide range of fields have been interested in the study of the European merger control regime. Some authors – especially political scientists (Bulmer 1994, Cini and McGowan 1998, McGowan 2000) – noted the underlying corporate political influence, but no project has analysed systematically, the interaction between firms and European institutions in this context. This project examines the design of French and British firms' corporate political strategies along four elements (described in the Introduction), henceforth highlighting the position of interest intermediation in the European merger control regime. Preliminary analysis of the comparison will be further examined in terms of Europeanization, in order to assess the degree to which national modes of interest representation are in fact converging to a European mode of representation.

Clearly, other pieces of academic work have been concerned with European firms' corporate political activities (Bouwen 2004, Coen 1997, Dahan 2003, Fairbrass 2003, Saurruger 2003, Van Schendelen 2005, Woll 2006). Scholars seem to be in agreement over the fact that corporate interests are, in general, much better represented in comparison to other societal interests in the European arena (Mazey et al. 1999, Bouwen 2003). Greenwood (2007) suggests that a relative decline in the proportion of business associations among the total population of groups, and a corresponding increase in the proportion of citizen groups should also be taken into account. Yet it remains that numerically the majority of the national and European interest representatives in Brussels are business groups. Europe's evolving governance architecture and competencies raises important questions about the development of interest representation in a multi-tiered environment, presenting sub-national, national and supranational access points.

The latter governance structure characterises the European Union as '*a system of continuous negotiation among nested governments at several territorial tiers'*[24] and explains that '*supranational, national, regional, and local governments are enmeshed in territorially overarching policy networks'*[25] . The multi-level governance theoretical approach takes into consideration the intricacies between the different levels of national and European governance and their respective importance in the governance of the European Union. As a result, although multi-level governance was first developed from a study of EU policy the theory is now being applied to EU decision-making processes. Indeed the multi-level governance approach stems from a reflection on the existence of overlapping responsibilities between the different levels of the European polity. Decision-making processes and policy-making competencies are distributed amongst the different levels of the European governance system, rather than resting in the hands of one institution. The number of access points is multiplied in such a system. Competition policy, and the European merger control regime, as will be explained notably in Chapter 2, represent a prime example of multi-level architecture.

The European system indeed displays many access points which different corporate political strategies can use. Firms, from this point of view, have a clear advantage as they can follow a variety of strategies to represent their interests to the institutions, without necessarily resorting to collective action - whose shortcomings have been widely discussed in the literature. At a basic level Bennett (1999) identified three main channels available. Firstly, he discusses: 1) the direct route, i.e. developing an individual 'Brussels Strategy'. The 2) national association route can be used to lobby either European institutions directly as a 'Brussels strategy' or their national governments in order to interact with the different European technical committees, national officials, and ministers. Thirdly, 3) the European association route remains open to businesses. They can either join European business associations directly

[24] Marks, G. (1993), 'Structural policy and Multi-level governance in the EC', in Cafurny, A. et al.(eds.) *The State of the European Community: The Maastricht Debate and Beyond*, pp.391-411
[25] Bache, I. (2005), *Europeanization and Britain: Towards Multi-level governance?*, Paper prepared for the EUSA 9th Biennal Conference in Austin, Texas, March 31 - 2 April.

(ERT[26] or EFR[27] for instance) and/or work collectively with national business associations, merging to form 'Euro-groups' or join European federations of associations (EBF[28] for example) - by far the most common phenomenon. Another form of 'associational' route is that of coalitions. Although recognising the difficulties to define coalitions, Pijnenburg (98) explained that *'every form of collective action, including business associations, is some sort of coalition'*.

Analysing the interface between European merger control regime's institutions and the interest representation agents meant coming across many books and articles looking at this policy based on other specific analytical considerations such as legal or economic ones, rather than political ones. Although one article seemed promising in its title *'Discretion and Politicization in EU Competition Policy: the case of merger control'*[29], it failed to propose a thorough study of the interactions of firms and European institutions. My thesis contributes to both the literature on corporate political strategies and that on the development of a European merger control regime, from a political science perspective, but drawing upon insights from other disciplines.

Sandholtz and Stone Sweet (1997, 1998), in an effort to reconceptualise the "spill-over" concept central to neo-functionalism highlight that cross-border activities and communications generate a social demand for further integration at the European level. Mazey and Richardson (1996) explained,

> *'There is increasing evidence that economic interests (the multinational companies are probably the best example) are increasingly active in pressing for standardisation, harmonisation, and for a level playing field within Europe'* (p.249).

The emergence of a European merger control regime, as will be analysed in the following chapter of this thesis, reflects these academic conclusions – a system generated, partly, by '*social demands'* in order to establish a European level playing

[26] European Roundtable
[27] European Financial Roundtable
[28] European Banking Federation
[29] McGowan, L., Cini, M. (1999)

field, as will be explained in Chapter 2. However, can one conclude that calls for, and the subsequent construction of, a European level playing field from firms in terms of policy solutions in the merger control field have led to a *de facto* standardisation of European corporate modes of representation? This is a question that will be addressed in Chapter 5.

Still, as a first step, the study of corporate political behaviours remains key to this project. This chapter is primarily concerned with the strategies endorsed by firms to interact with the European level of governance, and it also calls for a holistic view of the European merger control regime. This research project will attempt to explain corporate political strategies in a holistic manner, based upon insights both from available literature and from practice. After a review of the corporate political strategies – and their integration to corporate activities, I will be explaining basic components essential to the design of a corporate political strategy according to a model of strategy, inspired by both the political science and management literature, ahead of the presentation of differences and similarities of corporate political behaviours based on my data collection.

1. Integrating political strategies within corporate activities

The integration of corporate political strategies into corporate activities is a recurrent theme in American literature, although is less prominent in the literature published in Europe. Although the literature, based on accounts of Commission officials (Mazey et al. 2003, Van Schendelen 2005, Coen 2007), points to the sophistication of corporate political activities, the hierarchical position of internal departments dedicated to European affairs is inconsistent, and therefore limits the systematic analysis of such integration. Some departments belong to the Marketing department, others in the Communications one, and some are directly attached to the Chairman's office. In addition the relative importance of the department in an organisation seems to be directly related to the personalities and 'European' experiences of top managers. The study of corporate political strategies as an activity of the firm needs to take into account American literature conclusions.

Porter's (1980) seminal work introduced the argument that differences between firms open opportunities for them to exert competitive advantage over rivals. Although governmental influence was acknowledged, active corporate political involvement failed to appear in the model (Vining et al. 2005). Applying Porter's model to the political arena, Leone (1986) argued that differential effects of government policies, both within and across industries, also provide opportunities for the development of competitive advantage – '*the indirect and unintended competitive consequences of [governments] are an important and poorly understood part of the [public policy] process*'[30]. Authors have, as a result, proceeded to integrate and position a 'political' dimension to corporate activities. Tullock (1967) and Krueger (1974) conceptualised an additional dimension to corporate activity as 'corporate rent-seeking' – the pursuit of competitive advantage through political advantage. The rent-seeking concept emanates from Adam Smith's original typology of income: profits, wages, and rents. Rent-seeking behaviour, the *capture* of wealth, contrasts from profit-seeking behaviour, the *creation* of wealth.

Baron's work favoured a dual corporate activity encompassing a corporate political strategy (what he terms 'non-market' strategy) and economic 'market' strategies (1995, 1997, 1999). Aggarwal (2001) builds upon Baron's ideas when proposing an integration of the 'market position' of the firm referring to external opportunities and threats, and the 'firm position' referring to a firm's internal strengths, weaknesses and distinctive competencies and the firm's 'non-market position'. A merger or acquisition transaction echoes this dichotomy. Indeed the choice of the target and the financial structure behind the transaction resemble the market strategy of the firm, whereas seeking the approval from authorities constitutes the 'non-market' element of the corporate strategy.

After exploring definitions and concepts of strategy proposed by leading authors in the field, Hofer and Schendel[31] developed a corporate strategy definition on

[30] Leone, R.A. (1981), p. 117
[31] Hofer, C.W. & Schendel, D.E. (1978), *Strategy Formulation: Analytical Concepts*, St Paul, Minnesota: West Publishing Co.

three levels - corporate[32], business[33] and functional[34]. A fourth level - enterprise strategy – was later[35] added in order to account for certain environmental aspects, not explicitly covered within the other levels. The addition of this level illustrated the increasing importance which the firm was having to place on issues generally falling in the public policy arena. The issues raised by questions of governance, legitimacy, and corporate public policy activities tended to force a re-examination of strategy in terms of integrating the firm with its broader uncontrollable environment. Even though an organisation may not be able to control its environment, this does not mean it cannot influence it. Many of the questions and issues described in the context of enterprise level strategic considerations have long been part of the strategy formulation process. However, the increasing concern with these broadly based, hard-to-define issues has forced firms to respond by increasing their importance in the planning process (Ryan et al. 1987).

Corporate political strategy will be understood, in this project, as a sequence of corporate decisions that represent an integrated set. This concept will be further detailed later in this chapter. Its primary aim is to attempt to produce public policy outcomes favourable to the firm's economic survival and continued success (Schuler 1996). Epstein (1969) argued, moreover, that corporate political activity was not an end in itself but a means to contribute to the overall strategy of the firm.

Unsurprisingly many political scientists have attempted to investigate how corporate political strategies have 'developed' in line with the evolving relationship with politics. The insider/outsider differentiation (Grant 1989, 1990) is one of the first attempts at modelling corporate behaviours in political environments – characterising systems of interest representation. Grant's typology of groups is based upon the degree of intimacy pressure groups enjoys within the policy-making process. Grant identifies three kinds of insider groups, all of which are constrained to some extent by the 'rules of the game': prisoner groups dependent upon government support and low-profile and high-profile groups. Outsider groups are less constrained. There are three

[32] is concerned primarily with answering the question of what business the organisation should be in.
[33] is principally focused on how to compete in a particular industry or product/market segment.
[34] is generally concerned with the maximisation of resource productivity.
[35] Hofer, C.W. & Schendel, D.E. (1979), *op.cit.*

types: potential insider groups will strive to establish credibility through media campaigns, meetings with ministers and civil servants. Outsider groups represent those lacking the political skills to become insiders. Ideological outsider groups deliberately place themselves beyond institutions because they wish to challenge their values and authorities. Beyers (2004) distinguished between 'voice' and 'access' strategies – this distinction focused on the representation of interests and the transmission of information to institutions, making it a more advanced versions of this insider/outside dichotomy. Bouwen and McCown (2007) added legal strategies to these two main political strategies. Legal strategies *'seek to have a court rule on the unconstitutionality or otherwise improper nature of legislative provisions in order to change policies'*.

Looking at the interaction between the public sphere and firms, some authors have argued that business can constitute a rival system of public policy making, one in partial competition with the governmental system (Lindblom & Woodhouse 1983). Although the influence may not have been perceived as political *per se*, the position of business in economic matters means that corporate executives should be accounted for in policy making processes – even though the business sector may not always be satisfied. Governmental bodies pay business executives special attention, attention reserved for no other group in society, *via* privileged communication channels. Large companies exploit strategically this economic competitive advantage in the political marketplace. By their very size, the largest companies enjoy a privileged position in the economy, compared with smaller companies for instance. Their performance has the most impact on the economy (Lindblom 1977).

The privileged position of business in policy-making is in fact a recurrent theme in the literature. Many scholars before this project have argued for business not to be described as a traditional interest group. Greenwood (2007) explained that business interests had a naturally privileged position in policy-making considered as generators of resources – such as market information – which governments need to survive. Very large companies can make leverage on the importance of their negotiating position to some extent from their size alone, because they possess a structural power and

visibility that leads to a routine consideration by policy-makers (Cawson 1997, Meznar & Nigh 1995). On the other hand government activity is also pervasive throughout economic life. Indeed, as Jackson and Van Schendelen explained, the relationship between business and government is to be understood as one of interdependency and interpenetration (Van Schendelen et al. 1987). Scholars have indeed argued for separating business interest representation from other interest intermediation, and such a distinction does seem adequate. In market-oriented economies, the business sector plays a key role in order to attain fundamental economic goals, such as employment and the growth of national income. At the firm-level, governmental activities are a key factor to current and future profit generation. As a consequence, business firms and trade associations play a justifiable role in the development of government policies (Lindblom 1977). The rationale behind firms' involvement, as well the attention they excite in public spheres once they get involved, the false dilemma regarding their participation, their economic and financial competitive advantage and the expertise they can provide, are convincing arguments to distinguish them from other interest groups.

This section argued that political strategies should be an integrated part of the overall corporate political strategies. The literature also provides information regarding the rationale behind firms' involvement in the political scene, and the limits to this involvement. The next section will give a review of the scholarly work studying the field.

2. Explaining the involvement of firms in public policy.

2.1. Why firms get involved at the European level?

As aforementioned there is a substantial interdependence between a firm's economic or competitive environment and government policy (Lenway & Murtha 1994). Many firms are therefore expanding their efforts to affect public policy decisions (Hillman & Hitt 1999) typified by the efforts of integrating corporate political activities into corporate activities. Indeed the effects of government policy on the competitive position of business represent important determinants of a firm's

performance (Shaffer 1995). The government – and government policies – can prove to be a source of uncertainty for firms. The legal uncertainty linked to the fact that there was no European merger control regime before 1990 had been a concern raised by trade associations such as UNICE[36] or ERT[37]. In June 1988 the ERT, representing *'the leading European industrialists, […] expressed [its] strong concern about the need to clarify and simplify the control of mergers within the Community'*[38] and based its proposals on three main points: a one-stop-shop, a clear substantive test, and appropriate procedural thresholds.

Government decisions can potentially impact upon market size through government purchases and regulations affecting substitute and/or complementary products. Governmental decisions can alter the structure of markets through entry and exit barriers by enacting antitrust legislation or alter the cost structure of firms through various types of legislation affecting various factors, such as employment practices and pollution (Hillman & Hitt 1999). As early as 1969, Epstein argued that '*political competition [had] followed in the wake of economic competition'* and that the government may be viewed as a competitive tool to create the environment most favourable to a firm's competitive efforts[39]. Therefore it seems logical that firms develop an interest in influencing the way markets are regulated.

Since national legislation increasingly originates at the European level, European institutions have become more important as a target of political activities (see Grant 1991, Coen 1997). The chronological description around three main phases of the establishment of the European lobby given by Coen (1997) has some merit in showing the growing consideration given to the European governance level in the view of firms. Coen (1997) identified the first phase as the establishment of the European lobby – constructed on a traditional corporatist model. The first phase ended with the Single European Act, when a boom in interest group activity, leading to an overload of the European political arena, occurred. The final phase introduced by the 1992 Commission communication on *'an open and structured dialogue*

[36] Union of Industrial and Employers' Confederations of Europe (since 23.1.2007 Business Europe)
[37] European Roundtable of Industrialists
[38] European Roundtable (1988), *Merger Regulation*, Press Statement, 15 June 1988, emphasis added.
[39] Epstein, E. (1969), *The corporation in American politics,* Englewood Cliffs, NJ: Prentice-Hall, p. 142 as quoted in Hillman, A.J. and Hitt, M.A. (1999) p. 826

between the Commission and special interests'[40] has been coined as the 'forum politics' phase – with a more focused and elitist structure. Firms regard Brussels today as an unavoidable point of access to influencing policy-making.

The literature has identified a variety of rationale explaining firms' involvement in spheres outside their business activities. I have identified three main factors that drive large firms to engage in corporate political activities. Firstly, large firms attract too much attention from other stakeholders to remain out of such activities. As a result, secondly, participating in the 'political' arena may not be an actual choice for economic agents. Finally firms provide expertise and legitimacy to institutions, and consequently represent key contributors to the public policy process.

2.1.1. Too much attention

All corporate activities are subject to public scrutiny from one group or another. This has brought an increasing number of public policy issues to the attention of management. This constant strain places corporations in the position of having to design an extensive strategic programme towards the public policy process. The sheer diversity of concerns directed at most businesses make determining how, when, and whether to deal with specific issues a difficult question to answer (Ryan et al. 1987).

Compared with their smaller counterparts, or other interest groups, large firms have a higher degree of visibility *vis-à-vis* public opinion. Their activities in the public policy process are more likely to be related in the press and to rapidly become public property. In the context of merger transactions going through European proceedings, Heim (2003) explained,

> '*Unlike many other jurisdictions, there is an unprecedented level of media scrutiny of EU competition cases, which rarely focus on the commercial merits of the transaction alone. Press coverage is often more subtle and much more deeply informed, going beyond company statements to scrutinising the truthfulness of companies' submission and speculating about the outcome, possible remedies and policy considerations influencing the EU regulatory decisions. The press has successfully drawn in the active involvement of the parties and regulator'*.

[40] European Commission (1993).

Large firms are as a result more vulnerable to adverse media exposure. This degree of exposure could lead to political inactivity, thereby depriving corporate critics and other interest groups of further opportunities to accuse large corporations of dominating society and the public policy process. Regardless is there really such a strategy available to firms? The next section will look at this question.

2.1.2. Participation or non-participation, a real choice?

Participation versus non-participation represents the original dilemma for large firms as far as political activity is concerned. The section above provides elements to explain why firms may not have a choice regarding their participation in political arenas. Meznar & Nigh (1995) and Blumentritt (2003) conceptualised this dilemma according to two fundamental corporate political behaviours: buffering and bridging. Political 'buffering' behaviours are understood as acting proactively by, for instance, informing government officials on implementation issues, directly or through trade associations. Earlier versions of buffering activities were 'public policy shaping' *à la* Weidenbaum (1980) and 'bargaining behaviour' *à la* Boddewyn and Brewer (1994). 'Bridging' on the other hand, corresponds to a more reactive form of behaviour, for instance monitoring the development of legislation/regulation in order to implement adequate compliance devices when passed. This strategy clearly echoes Weidenbaum's (1980) 'passive reaction' and 'positive anticipation' categories, and Boddewyn and Brewer's (1994) 'non-bargaining' behaviour. Ultimately, either proactively or reactively, firms are necessarily participating in the public policy process.

Larger firms also appear to be more convinced of the interrelationship between their corporate economic activities and the external public policy environment when assessing risk of participation. This has been illustrated by the establishment and operation in Europe of the European Round Table (ERT), which is a general business association reported to have fundamentally shaped the debate leading to the 1992 Programme and its implementation (Green Cowles 1995). The recent establishment of a European Financial Services Roundtable (EFR) springs from similar concerns. The

Roundtables' success is attributed to the direct involvement of CEOs in chairing task forces and sitting on policy committees. It is not surprising that these same CEOs would insist that their companies should also be actively involved in the public policy process, if for no other reason than to be supportive of Roundtable's activities. This model resembles that of the political entrepreneur, as described by Yoffie and Bergenstein (1985)[41].

In efforts to address public policy problems, corporations have been confronted not only by a greater number of issues but also by questions as to the legitimacy of their participation in the process. The Corporate European Observatory, '*a European-based research and campaign group targeting the threats to democracy, equity, social justice and the environment posed by the economic and political power of corporations and their lobby groups'* based in Amsterdam, is systematically investigating the role of firms in different European regulatory initiatives. As an example, BMW, Daimler, and Porsche won the 2007 'worst EU lobby award'. Erik Wesselius explained at the award ceremony:[42] '*When the Commission proposed compulsory CO2 targets, the car companies reacted immediately with a lobby campaign full of misinformation and scaremongering. Decision-makers were manipulated with grossly exaggerated threats of factory closures and job losses'*. Seemingly, corporations are not entitled in the minds of some to have the same rights and privileges as other groups and organisations to present and champion their views on issues with which they are concerned (Ryan et al. 1987). Yet the economic power of large corporations can in some cases be transferred into political power, as abovementioned. In turn, this affects their decision-making processes. Moreover, above the public scrutiny and because of the potential effect public policy has on their economic position, firms can also offer expertise and legitimacy to the European institutions.

[41] Accordingly, the goal of the political entrepreneur is like the goal of all politically active companies in national politics: to secure access to key decision makers, influence policy, and enhance the profitability of business operations.
[42] See http://www.worstlobby.eu/2007/winners_en

2.1.3. The needed expertise and legitimacy

Arguments in favour of corporate political participation contend that such participation is inevitable given the highly diverse and complex nature of issues that require collective extensive consultation for them to be successfully resolved. The involvement of governments has indeed changed[43]. There are clear signs of a move towards a regulatory form of governance, similar to the 'American-style regulation' (Majone 1996). Indeed after 1945 the concept of industrial policy was prevalent in Europe – the notions of 'intervention' and 'regulation' were almost interchangeable then (Majone 1994), when the United States was already using the concept of 'regulation'. The concept of regulatory state has been clearly defined[44] (Jordana & Levi-Faur 2004) and so have its aims – the correction of market failures; and the provision of rights. Regarding the former purpose, governments are concerned with market power, information asymmetries, and externalities. The latter objective is directed at correcting past discrimination and geared to questions of equity (McGowan & Wallace, 1996). The European polity has been defined as a regulator (Majone 1996). Yet knowledge, rather than resources, is central to regulators' policy-making processes. As a result expertise plays a prime role, and the Commission, the fundamental regulatory body, is in need of this resource. In its 2002 communication on the collection and use of expertise, the European Commission explained,

> *'Expertise forms an integral part of a dynamic knowledge-based society. Specialist know-how and skills help create new opportunities that can boost competitiveness and enhance our quality of life.*
>
> *It is the task of policy-makers to set up a regulatory environment in which these opportunities can be exploited in a sustainable manner for the common good. As a condition for success it is crucial that policy choices are based and updated on the best available knowledge. This requires access to the right expertise at the right time.*

[43] see Coen & Thatcher 2005

[44] The regulatory state has been defined as a rule-making state, attached to the rule of law and, normally, preferring judicial or quasi-judicial solutions. Still one cannot conclude that a regulatory state is a minimal or a mere 'night-watchman' state. Indeed the breadth of its involvement can be quite large. Moreover regulation and intervention are not mutually exclusive. All states intervene in their economy; what is of interest is rather the modus operandi of governments and for the purposes for intervention. Still the regulatory state favours a support role rather than being a substitute to markets.

> *The European Commission, with its pivotal role in proposing and overseeing the execution of European policies, maintains a high level of in-house expertise, but also frequently calls on external experts'.*[45]

Therefore the European institutions in general, the Commission in particular, are constantly seeking expertise. In contrast to the legislative and executive bodies, regulators' appointment rather than election shapes their behaviours. Bonardi et al. (2006) identified different regulators' objectives: the maximisation of offices' budget, increase in the number of staff, and enhancement of career prospects or political reputation. Ensuring institutional legitimacy is perceived to enable regulators to achieve these objectives. As a result regulators aim to increase or preserve their legitimacy (Majone, 1996) – and therefore design and implement policies accordingly. McCubbins et al. (1987, 1989) explained that as a result, regulatory decisions should be relying on an *informational* base in order to be justified. The interest representatives, the affected parties in this process, have at their disposal such informational competencies, and are therefore in a favourable position to establish a fruitful dialogue with European institutions.

Corporations have a legitimate role to play, as they are as much affected as any other actor by such issues and can provide valuable expertise in 'issues' resolution. Indeed there are many public issues either on the current public policy agenda or that will make their way onto that agenda which will affect business one way or another. The resolution of these issues needs business participation. Business input is crucial because of the technical and managerial expertise that business possesses. Theoretical approaches to EU 'lobbying' have as a result increasingly conceptualised 'lobbying' as a political exchange (Bouwen 2002, 2003, Michalowitz 2004). Accordingly 'lobbying' activities, referring to the relationship between private and public actors, are envisaged as an exchange relation between two groups of interdependent organizations – *de facto* acknowledging the bi-directional attribute of the activity. Indeed private actors seek access – and in fine influence – over public organisations, and the latter expect information essential to their functioning.

[45] European Commission (2002), *Communication from the Commission on the collection and use of expertise by the Commission: principles and guideline : 'improving the knowledge base for better policies'*, COM (2002) 713 final.

The Commission's position is well known to be that of a long-standing understaffed bureaucracy in need of outside input. The Commission is considered as an open and accessible body, and this directly relates to its working capacities (From 2002). A Commission's policy document (1993) corroborates,

> *'The Commission has always been an institution open to outside input. The Commission believes this process to be fundamental to the development of its policies. This dialogue has proved valuable to both the Commission and to interested outside parties. Commission officials acknowledge the need for such outside input and welcome it'.*

Firstly, the comparatively small bureaucratic Commission staff (Nugent et al. 2002) is not able to inform itself sufficiently without external sources. The expertise of trade associations, for instance, is seen as a necessary help to reaching decisions that are closely oriented at market practice and can be therefore practically implemented. Secondly, external input enables the Commission to bypass national governments and reach a consensus among those that are affected (Héritier 1999). The Commission has institutionalised this practice through its White Paper on European Governance (Commission 2001) and the proposed minimum standards for the consultation with interest groups (Commission 2002). External input permits the Commission to legitimate its role – the participation of external groups in decision-making processes allows for a certain degree of consent to be reached. In its White Paper on governance (2001) the Commission explains in its '*participation*' section,

> *'The quality, relevance and effectiveness of EU policies depend on ensuring wide participation throughout the policy chain – from conception to implementation. Improved participation is likely to create more confidence in the end result and in the institutions which deliver policies'*[46].

Scholars interested in the questions regarding the accountability of the European polity have conceptualised *inter alia* as the enhancement of legitimacy in terms of input and output legitimacy. A solution debated currently by the academic literature to the perceived legitimacy deficit of the supranational level of governance is the

[46] European Commission (2001), p.10.

enhancement of input legitimacy[47]. The concept of input legitimacy – or the participatory rhetoric (Scharpf 1999) – explains that a democratic governmental system achieves its legitimacy by the way decisions are made. In contrast output legitimacy relies on the results of the European Union that mirrors the reference of 'end result' in the previous quote; the concept has been notably developed and favoured by Scharpf (1999). The basis for legitimacy from input or output-oriented governance is different. As Thomassen and Schmitt (2004) explained,

> *'In terms of Lincoln's famous description of the main elements of democracy input-oriented legitimisation refers to government by the people, whereas output-oriented legitimisation refers to government for the people' (p.3).*

In addition Coen (1997, 1998) further explains that European institutions establish a dialogue with firms in order to reinforce another form of legitimacy. The latter form is based on using these firms to establish a preferential contact with national governments, and this is what he called '*improved input into national policy processes'* and *'could be used as a Commission intermediary in intergovernmental negotiations'*. The relationship between the European Commission and large firms is clearly interdependent.

Firms are often solicited to provide information in relation to merger cases, outside the information provided in the notification *dossier*. In addition to providing information in the context of sectoral investigations conducted by DG Comp, one of my interviewees also had to decide whether or not to contribute to the Commission's gathering of information process regarding a merger case. As she explained,

> 'I*t is a tactical choice how much you want to contribute to the case as a third party. [Your company] may be in a similar position some time soon. It is a case of gauging how much information you are willing to disclose'*[48].

The first section has looked at the rationale behind firms' involvement in the public policy sphere. This review answers the question of why firms choose to interact – and

[47] See Rihackova, V. (2007) for further discussion on solutions discussed by the literature regarding the legitimacy issue of the European level of governance.
[48] Interview with author, 08.03.2006, '*Là tout est question de tactique dans le sens où nous pouvons nous retrouver dans une situation similaire à la leur dans un futur proche. Il convient de doser les informations données'*.

therefore, I will be looking at a general level, the degree of rationality with which firms enter the public policy sphere – and with which financial means.

2.2. Business, a rational actor?

The literature has taken a clear stance towards rationality of corporate actors. Moe (1980) identifies three distinctive assumptions that are central to the notion of rational choice: the assumption that each individual is rational; the assumption that his decisions are premised on specified types of information; and the assumption that he evaluates his alternatives on the basis of specified kinds of values. These assumptions are mutually reinforcing, constructing a meaning for an individual to make a rational choice in any situation.

Rational choice behaviours are, in their basic forms, choices the benefits of which will outweigh the cost. In general, corporate political behaviour is described as an attempt to use the power of the government to advance private ends (Mitnick 1993). The overall objective is therefore to produce public policy outcomes favourable to the firm's economic survival and success (Baysinger 1984, Keim & Baysinger 1988). The decision of a company's management to direct corporate resources toward political activities represents an important one, firstly, as such activity is expensive, but also because corporate political strategies are becoming more complex and controversial than previously. Thirdly, the public nature of political activities still poses a degree of risk to a company. A firm market position or reputation can be affected when advocating certain ideas in the policy arena (Schuler 1996).

Empirical observations indicate that lobbying could also be irrational, reactive and *ad hoc* and not necessarily well-planned, and at least strongly dependent on the individual issue or situation. Interestingly, in merger regulation, some companies have contested a Commission prohibition – willing to invest time and money notwithstanding the fact that the deal could not be revived, as a '*matter of principle'*[49]. However what can be perceived as 'emotional' behaviour may be a long-

[49] '[Airtours] considered that the processes undertaken by the Commission and the conclusions reached by the Commission were so bad that almost as a matter of principle they should seek to have this decision reversed', Barrister, London, interviewed on 2nd June 2005.

term rational strategy. Following the prohibition of its merger with a competitor, one firm explained,

> *'The problem [with the prohibition] is that we were very disappointed… but it was also a very dangerous precedent for the market. The Board took a very long time to decide whether or not appealing against the prohibition decision was a good or a bad thing, and we decided that although the chances for success may be slim – it was unchartered territory – it was worth doing, spending the money and launching the appeal because of the sort of dead end that would be left for future consolidation.*
>
> *As I said the Board got that right because we were excluded from the process of further consolidation, the different purchases etc. […]*
>
> *So it was not sort of vindictive. We had to do this to get some clarity for the industry. And this decision was likely to impair our future strategic progresses'.*

A vast number of associations, interest representatives and their clients or employers seem to do the same work simultaneously and thereby contradict each other, standing in each other's way, not creating solutions or complementing each other (Michalowitz 2004). Is this behaviour in fact rational? Moe (1980) explains that all too often in social science there is confusion about what the concept of rationality implies. For him, the problem arises from a tendency on the part of some writers to overlook the distinctive contributions with separate assumptions and to lump them together indiscriminately under the title 'rationality'. It is not uncommon, for instance, to find the concept of a rational man equated with the classical notion of a 'rational economic man' – an omniscient decision maker motivated purely by economic gain. Moe puts a special emphasis on the influence of the value system in choice processes.

However, evaluations of corporate political strategies and inherent strategic elements have been recently explicitly conceptualised in terms of rational choice (Bouwen 2002). Corporate political strategies follow rational strategies and can therefore be easily pictured in formal models (Broscheid et al. 2003).

Yet this section questions the degree of rationality of firms. Corporations can be perceived as rational actors, to a certain extent. Because of the nature of their activities, firms can be expected to reach corporate decisions following a rather

rational pattern not unlike that put in place for other economic decisions. Already talking about strategy ascribes to large firms, acting as political actors, a certain degree of rationality. However in political decisions other factors, such as legitimacy issues, affect the strategy followed and the business decisions taken with regards to political activities. Political matters remain fundamentally different from economic matters, and are not the primary activity of large firms'. This distinction refers to the typology of income used by Adam Smith between profit, wage, and rent. Entering the political arena is primarily a rent-seeking behaviour that does not create value as would a profit-making behaviour. Many corporate lobbyists talk of misunderstanding from the mother company regarding European affairs, and the fact that they do not generate money – in Moe's terminology a 'specific kind of value' that will affect the rationality of the economic agent.

2.2.1. A financial investment issue

Larger companies are more politically active than smaller ones because of their capacity of capitalising on more resources, both human and financial, and directing them to public policy issues. Larger firms can easily appoint individuals within the corporations to public affairs duties or use external consultancies, doing so without major disruptions of its core activities. In fact, larger firms are more likely to have a top-level executive in charge of the company's public affairs who has direct access to the CEO and other high management decision makers. Costs incurred in political participation may be easier to account for when reporting to a broader corporate shareholder constituency.

Yet, investment in public policy differs from other types of strategic investments, such as investment in a new plant and new equipments, in that the benefits are seldom fully appropriated by the investing firm, but spill over to other firms. These benefits are thus 'collective goods'. Politics is a *'non-proprietary setting where individual agents do not always see the full benefit and cost of their decisions'*[50]. Many conflicting factors intervene in the corporate political decision-making process. It can

[50] Tollison, R..D.(1982), 'Rent Seeking : A Survey', in *Kyklos*, 35 p. 589 as quoted in Schuler, D.A. (1996), 'Corporate Political Strategy and Foreign Competition: the case of the steel industry', in *Academy of Management Journal*, 39(3), p.721.

be seen as rational to be a proactive participant as it is to be a reactive participant. This issue is complex and probably analysed by each firm when considering public policy issues.

My first section explained the position corporate political activity may have in different firms, encouraging firms to include political strategies in their overall corporate strategies. The second part of this chapter demonstrated the rationale behind corporate political involvement and the different parameters against which firms' political activity rational and political are constrained. Both the external environment and the institutions impact upon corporate political involvement to a certain extent. The next section of this chapter will describe the model around the corporate political strategy I will be using for the rest of my research.

3. Review of the EU interest representation literature, a strategic view.

In 1995, Andersen and Eliassen highlight in their research agenda of EU lobbying, '*the heterogeneity of studies concerning interest articulation*' at the EU level. Some papers have tried to comprehensively review the EU literature (Andersen and Eliassen 1995, Getz, 2002, Greenwood 2003, Woll 2006), yet, they fail to truly account for the strategic element that many authors mention. The American academic literature is more advanced with international business literature clearly contributing to the corporate political activity corpus. Strategies are key to European interest representation, as the latter field becomes more professionalised. The academic work on EU corporate lobbying is now rich of both qualitative (Greenwood 2007) and quantitative (Coen 1997, 1998, 2007) analyses and provides invaluable insights, but generally focuses on one element of a strategy (commercial consultancies, Lahusen 2003; ad hoc coalitions, Pijnenburg 1998, Sabatier 1988; European interest associations, Beyers 2004; European Parliament, Bouwen 2004; Council of Ministers, Fouilleux et al. 2005; AmCham, Green Cowles 1996).

In order to palliate this gap in the European literature, my review will take root in the work of management scholars, building upon a framework for strategy design originally devised by Hambrick and Frederickson (2005). According to the authors, a

strategy encompasses five elements, namely arenas, vehicles, differentiators, staging, and economic logic. My study focuses on strategic behaviours of firms and therefore each element needs careful consideration. The academic literature has analysed each element in detail– as will be explained in this section – and is useful to either develop hypotheses or give a description of the EU interest representation landscape – a description that may be more detailed than mine in some instances. My own research is thus more holistic.

Moreover, once again referring to Andersen and Eliassen's research agenda, my thesis contributes to an area less covered by empirical studies - that of the role of interest groups in policy-making. Andersen and Eliassen regret in their paper a lack of studies that specifically deal with policy-making rather than decision-making. My research, and in particular this chapter, develops a framework of analysis adapting strategies to the development of a policy, the European merger control regulation. This will provide a basis to analyse corporate political strategies in this context. This study attempts to fill these gaps in the literature by primarily building upon the political science and the management literature.

3.1. A definition of strategy

In almost any commercial environment the term 'strategy' is sure to be heard on a regular basis. Unfortunately, the term is frequently ill-defined. The term 'strategy' has a range of related meanings and authors have generally felt quite free to use it idiosyncratically. One of the first business management definitions was that of Chandler (1962): *'the determination of the basic, long-term goals and objectives of an enterprise, and the adoption of courses of action and the allocation of resources necessary for those goals'* (p.13). The many definitions of strategy found in the literature fall into one of four categories: plan, pattern, position, and perspective[51]. According to these views, strategy is: 1) a plan, a 'how', a means of getting from A to B; 2) a pattern in actions over time – for example a company that regularly markets very expensive goods is using a 'high end' strategy; 3) a position, it reflects decisions to offer particular products or services in particular markets; 4) a perspective, a vision

[51] Nicklos, F. (2000), 'Three forms of strategy', available at http://home.att.net/~nickols/strategy_forms.htm

and direction, a view of what the company or organisation is to become. In his 'S*trategy as a political process section'*, White (2004) explained,

> *'Here the emphasis is on the exercise of power, whether within the enterprise or outside it, specifically as it relates to the making of strategy. (…) Strategy results from bargaining, compromise and the exercise of power by relevant groups. This school is unashamedly processual' (p.18).*

Corporate political strategies are understood in this section of the chapter as a 'plan' – a means of getting from A to B. As a result the framework that will be used is one of the set of decisions. Corporate political strategy implies the integration of this element in the overall corporate strategy – understood in more economic and business terms.

3.2. A five-element management model

Hambrick and Frederickson's framework for strategy design tries to give a detailed answer to questions related to the process firms undertake to engage with their environment. This question can easily be adapted to interest representation research. Their framework, based around arenas, vehicles, differentiators, staging, and economic logic, will constitute the basis of my own model. The context of my study is the development of merger control regulation. Within this context and its characteristics – institutionally for instance – I questioned at a basic level how large firms interact with European institutions, notably the Commission, and what can one therefore infer with regards to corporate political strategies? Although many scholars focusing on corporate political activities (Tenbuecken, 2002) have claimed to explain strategic behaviours of firms, as with the management literature, most writers have described specific tools that tend to draw narrow, piecemeal conceptions of strategy. As a first step I will match the different elements of Hambrick et al.'s model with the European literature on corporate political strategies.

3.2.1. The 'arenas' element

The first element mentioned by Hambrick and Frederickson are the *'arenas'*. A dichotomy has been established, for instance, between political and legal spheres

(Bouwen et al. 2007). Van Schendelen (2005) dedicated a chapter to arenas in *'Machiavelli in Brussels'*. In his section, Van Schendelen advocates for a comprehensive analysis of 'arenas', *'an arena is not a physical place, but the virtual collection of all stakeholders, including the officials, together with their issues regarding a specific dossier at a specific moment. Taken as a whole, it means 'the situation' on which the answer to the question 'what is best thing to do?' depends'*. In my own analysis 'arenas' focuses on the institutional context – the choice of the institution as well as the choices related to the internal dynamics and hierarchy of that institution. This definition relates to the fact that the object of study is firms and by association their relationships with institutions.

Much of the academic work has focused on the interaction of interest representation organisations with the different political institutions. The role of the Commission – as a target of interest organisations - has attracted the most attention (Broscheid and Coen 2003, Staniland 1997 for the study of air transport regulation). According to Coen's data (1997), the Commission is indeed regarded as the best means of influencing the European policy process. More importantly to corporate political strategies, Bouwen's (2002) work shows that large individual firms have a higher degree of access to the Commission than do EU level associations.

Although the Commission's role is important, following the introduction of firstly consultation and co-operation, and then the co-decision procedure (Corbett 1989), the European Parliament has become an integral part of policy-making decisions. Unsurprisingly it has been more heavily lobbied, and academics have started to be interested in the interest represented at the 'co-legislative' body's level (Kohler-Koch, et al.1999, Kohler-Koch 1994, Crombez 2002, Bouwen 2004). The role of the *rapporteur* has especially been scrutinised (Kaeding 2004). However, as Chapter 2 of my thesis will show, in the European merger control regime the European Parliament plays a minor role, and will not be thoroughly studied in this thesis.

Intergovernmentalism has repositioned the role of the Council in policy-making processes – especially during Treaty negotiations (Moravcisk 1993). However interactions with national governments are not confined to 'grand bargains' and 'high politics'. The role of COREPER has already been highlighted by scholars (Hayes-

Renshaw and Wallace 1997). The papers of Council working parties, unavailable in the public domain, are circulated by national representations to some interest representation organisations. In the case of merger control some interviewees also identify their national merger control authorities as helpful hands in some cases. Moreover the 'secondment system' whereby a national official is delegated to the European authority allows for the diffusion of information cross-border and ultimately the creation of an epistemic community.

Although the interaction between European political institutions and interest representation organisations has been well-documented, only a handful of academics have been interested in the relationship between firms and the European Courts of Justice – in the context of political strategy (Bouwen et al. 2007). Although the Court is neutral and even isolated in the Duchy of Luxembourg – away from political influences – it plays a critical role. Some groups have not failed to acknowledge that role (see Greenwood 2003 and the case of the Women's Legal Defence Fund). Concerning merger regulation I have elsewhere showed the importance of the Courts to the development of the policy (Aubry 2005). Legal strategies are much more related to outsider strategies, as the Court's judges, rapporteurs and Advocates-General are not lobbied as such. They receive information from the media and the legal literature discussing cases (Schepel et al. 1997). Some authors have noted the importance of the press (Meznar et al. 2006), notably in merger cases (Heim 2003).

3.2.2. The 'vehicles' element

Hambrick and Frederikson's second element is *'vehicles'*. Back in 1994, Greenwood and Ronit discussed the different channels firms could use to exert influence on EU policy making. More importantly they suggested reasons why some channels may be used by firms. Interestingly most of the reasons given still ring true and the vehicles that firms can choose to interact at EU policy-making level still remain. Multi-level governance and corporate interest intermediation literatures indicate that many options are open to firms when entering political activity at the European level. As mentioned earlier Bennett (1999) identifies three main channels available.

Focusing on the large firms' perspective this study favours a two-dimensional analysis of routes, based on the direct and associational split. This distinction prime to the design of a corporate political strategy mirrors that between core interests and secondary issues which Coen (1997) briefly touched upon. As the object of study is large firms, one can assume that both direct and associational routes are available for their interest representation.

Comparatively, direct representation has emerged late in the history of European integration (see Cowles 1996); prior to the single market, firms played a rather moderate role at the European level – national perspectives, because of the extensive use of unanimity voting were prevailing. Coen (1997) explains changes in corporate political representation according to a chronological description around three periods: the 'formative period' where a 'lowest common denominator' style of policy-making was customary. The Single European Act and its legislative boom with the removal of the need for unanimity on single market measures opened up the Commission to lobbyists, making it the second period. The last identified era is the early 90s, the post-Maastricht era. The Commission fostered the building of loose groupings – such as the Ravenstein group[52] – due to an 'access overload', as Coen describes it. Those forums generally provide a better focus than Euro groups. This has led to an asymmetry of representation between large and small enterprises in favour of groupings of multinational enterprises. A new period might have commenced with the Commission White Paper on European Governance that seeks to strengthen the relationship between EU institutions and civil society.

A firms' corporate political strategy may also entail the hiring of consultants (Jordan 1991, Lahusen 2003, Michalowitz 2004). The literature on the subject remains mainly empirical and descriptive. In merger proceedings legal – i.e. law firms – and occasionally economic and political consultants are hired. Scholars are divided regarding the influence ascribed to consultancies. Their work generally is either seen as a mere complement to lobbying strategies (Greenwood 1997, Coen 1997), while others argue that more attention should be paid to them (Kohler-Koch 1997,

[52] The Ravenstein group is a cross-section of Brussels-based political affairs directors. It is an informal industrial club which discusses broad issues; however, it is more a networking group than a policy forum.

Michalowitz 2004). The larger role is given to viewing them as experts of European policy making and institutions. This difference of views probably relates to the policy studied. The merger control regime has always required the hiring of lawyers, and, as DG Comp moves towards a more economic-based approach, the use of economic consultants is increasingly common. 'Political' consultants do play a role, yet my interviews show that there is clear split regarding their function. Some interviewees discard their role totally while others see benefit in listing them. Indeed consultants – mainly political – may on the one hand be used as a support platform, able to perform an adequate lobbying function whenever direct lobbying tasks are required in a cost-effective way; but on the other hand, their expertise make them useful lobbying agents for certain tasks. Michalowitz (2004) identified, for instance, five main functions performed by political consultants at the European level – an advisory/support function at each stage of public affairs, contact provision, the provision of specific non-lobbying tasks such as guidance on fund raising activities, a cost-sparing role, and a function of crisis management.

As far as the associational route is concerned, the management literature has dealt extensively with collective approaches, such as the use of trade associations. Accordingly, collective approaches may be appropriate under certain conditions, when firms in an industry are unified by external threats such as new technologies (Russo 1993), or competing industrial sectors (Staber 1985), or when the expertise or resources of any one firm are limited due to small size (Lehne 1993). In general, attention to collective strategies (including collective political strategies) seems fairly limited among students of strategic management, due at least in part to the emphasis on the firm as the unit of analysis (Astley & Fombrun, 1983, Russo 1993). The European literature has studied associations extensively, either by countries (Denmark, Sidenius 1998, USA, Jacek 1995, the Netherlands, Van Schendelen 1987, France, Van den Hoven 2002), sectors (Agriculture - Saurruger 2003; Banking and Insurance - Vipond 1995) or policy specific (competition policy, Reid 2003; environment policy, Webster 1998) – to name only a few studies from the overwhelming number of scholarly work available.

The collective action problem (Olson 1965) has also been much discussed. The problem is linked to industry-wide legislative and regulatory decisions. A firm has

little economic incentive to incur any of the costs of political action when it knows that it will not be excluded from the 'collective good' (Olson 1965) that a favourable decision will bring. Free riders may thus acquire part of the collective benefits at no cost; however, if too many firms in an industry decide to pursue a free-rider strategy, the government may decide not to provide the collective benefits (Olson 1965). Those firms that choose a follower strategy express their political commitment by paying trade association fees and participating in trade association debates. This strategy gives a firm some input into the political process while minimising costs. On the other hand, followers may have to compromise their individual positions in order to achieve the trade association's objectives. A leader underwrites all costs, even though a trade association may exist. Thus, a leader can shape political outcomes and receive a disproportionate share of the collective benefits, if the outcome is favourable. Interestingly, previous findings have not found any statistically important differences between leaders and followers. Therefore followers have the resources available to pursue a leadership strategy but have chosen not to[53] (Lenway & Rehbein 1991).

Strategically collective action is problematic. Yoffie and Bergenstein's[54] model of political entrepreneurship clearly warns against the involvement of firms in established trade associations or interest groups. However resource-based studies (Barney 1991, Penrose 1959, Wernerfelt 1984) highlight that collective action may be the only available option for a resource-poor firm. Resources can be quantified in financial terms, expertise, or time. Indeed although large firms have financial means at their disposal, they usually lack the time to be active on all the issues enacting from Brussels, as these are only a portion of what an in-house public affairs person is supposed to work on. In the case of the European merger control regulation firms are wary of having DG Comp know their reaction regarding policy developments. They fear long-term negative implications should they interact with the European authority. Associations are, therefore, a platform to convey political inputs without being named – in the collective clock concept identified by Greenwood (2000). This will be analysed in more depth in Chapter 4.

[53] Some researchers (e.g. Baldwin 1985, Olson 1983) have suggested that firms are more likely to become organised for political action when their competitive positions have been threatened. Lenway & Rehbein's results, however, indicate that firms may use political processes to complement their competitive advantages.

[54] Yoffie, D. B. & Bergenstein, S. (1985), 'Creating Political Advantage: the Rise of the Corporate Political Entrepreneur', in *California Management Review*, XXVIII(1), p. 128

At a basic level the vehicles element, in designing corporate political strategies, are split between direct and associational routes. This section has explained both routes in considering the advantages and disadvantages of different options offered to firms. The next element of the Hambrick et al. framework relates to the choice of these options.

3.2.3. The 'differentiators' element

The third element of the framework is *'differentiators'*. Hambrick et al. (2005) indicate that this element should answer, in a corporate environment: 'H*ow will we win in the marketplace?*' The literature has been rather quiet regarding differentiators – the topic is harder to define in comparison to the identification of arenas or vehicles (Moe 1980). And yet differentiators are a critical element of the design of a political strategy as it accounts for choosing one option over another one, or to follow two routes simultaneously. In Britain, for instance, the financial services sector is populated with numerous associations, with a usually overlapping constituency base. Therefore this element is underlying each decision made on each element of the framework and does not appear as a separate element in my framework for analysis.

Translated into a public policy research agenda, differentiators are, for instance, what can guarantee access – the access goods described by Bouwen (2002). It can also reflect the quality of the relationship established with officials – a long term one, rather than an *ad hoc* one. It may also represent the possibility of combining a 'high level' and 'technical' style of interest representation, which is a concept that will become important in my analysis in Chapter 4. However another 'internal' dimension should be added to this external view, as previously mentioned firms, especially multi-nationals, can either opt for a direct representation of interest or choose the associational route. The options may be limited to only direct representation in the case of a merger. Moreover some associations will have an overlapping constituency base, as aforementioned, and can work on the same issues. Internal factors will determine what use to make of an association rather than another. One may be more aggressive when another one is seen as more consensual. One may be more expert than another one on some topics.

As aforementioned these issues are softer issues that may be difficult to integrate as a separate element in a framework for analysis of corporate political strategies but needs flagging up at this stage of the thesis, as they are considered in the overall design of corporate political strategies.

3.2.4. The 'staging' element

The fourth element comes under the banner of *'staging'*. Many authors in political science have pointed out the importance of some stages of the public policy process – notably agenda-setting and implementation. Applying the principal-agent theory to European interest intermediation, Michalowitz (2004) hypothesises that due to the functional divisions between lobbying agents, which in her associations include: in-house lobbyists, political consultants and other agents; corporate actors will use different lobbyists strategically upon consideration of the public policy life cycle stage.

The 'stagist' approach – a common approach dividing the policy process into phases and stages beginning with policy formation and ending with evaluation and termination – is often perceived by scholars as an over-simplification of public policy (see Sabatier & Jenkins-Smith, 1993). The framework is based upon the postulate that policies emerge from the interrelationships between intentions and actions of political participants. *Ergo* the procedure allows the formulation of pertinent questions about the effectiveness of the policy process, but also about the differential influence of stakeholders according to their ability to set the political agenda. The approach has been widely criticised[55] for it creates an artificial view of policy making. Many interpretations to the public policy process have emerged as a result. John (1998) has distinguished five main streams, that will be also of use here – institutional, group/network, socio-economic, rational-choice, and idea-based. The 'stagist' approach can only offer a roadmap to research, identifying different stages of analysis. Often compared to the London underground map, this framework simplifies reality, distorts it even, but highlights the key element to one's journey in a

[55] Sabatier and Jenkins (1993, pp.1-4) offered a five-point critic of the PPLC.

manageable way. The idea is therefore to identify key milestones in the public policy process when corporate actors actively interact with the institutions to further develop the European merger control regulation (EMCR). More importantly, the very procedural mechanisms of the EMCR (as explained in Regulation 139/2004 in Annex 1), and the amendments of the regulation (political crisis, Green Paper, reviews and final regulation), invite intuitively to view the regulation as a replicate of a public policy life cycle.

Many cycles comprise of three or four of such stages. The life cycle often begins with changing expectations creating a gap between reality and expectations – *the formulation of an issue*. Only when the size of the 'window of opportunity' is wide enough, for instance affecting a significant number of people or impacting extensively upon corporations it can appear on the political agenda – *the politicisation of an issue*. As far as European institutions are concerned, the Commission's role as initiator of legislation puts the institution in a strong position at this stage. The legislative phase refers to the time period surrounding the enactment of legislation dealing with the issue and its implementation. The rules of the game for business are being changed in this phase with the formal enactment of legislative and regulatory requirements. New legislation and regulations may require considerable debate and bargaining and even be the subject of court rulings. But at this stage, the issue has become institutionalised – *the institutionalisation stage***.** The last stage, the *litigation stage*, is one of implementing the new rules of the game. During this period, there may be many negotiations between the government and businesses regarding enforcement provisions. If government agencies do not believe a business is successfully meeting the new rules and negotiating breaks down, they may file suit in court to force compliance. At this stage, the potential for conflicts between business and government is most acute.

A four-element public policy cycle, as shown in Figure 1, will be adapted and further examined in the next chapter. At this stage, the importance of identifying different stages that may/will shape the design of corporate political strategies needs only reminding.

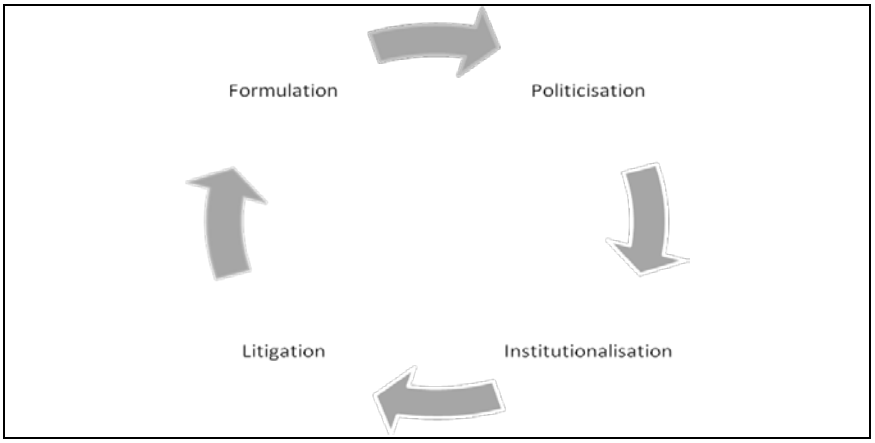

Fig 1: The stages of the Public Policy Life Cycle based on John (1998)

3.2.5. The 'economic logic' element

Hambrick and Frederickson explain that the *economic logic,* the last element of their framework, answers the question of how a firm will obtain its returns. They present the examples of lowering of cost through scale advantages or through scope and replication advantages, the charging of premium prices due to unmatchable service or due to proprietary product features.

The economic logic could be defined in general terms as obtaining a favourable outcome for the firm whose interests are represented. If strategy is understood as a plan, this element is the 'B' position firms want to reach, knowing that they are at situation 'A'. This vague definition is adaptable to each stage of the policy development of merger regulation. At the policy making stage, for instance, firms hope for a regulatory framework that is useful – legal certainty, a one-stop shop, etc. Each stage will define the rest of the elements to be chosen. The management literature evaluates objectives according to the SMART criteria – accordingly objectives should be Specific, Measurable, Achievable, Relevant and Time Bound. In turn the SMART framework will be helpful in conceptualising the position 'B' - a large business will want to achieve in the political environment and show how it integrates with its corporate activities.

All these elements have been identified for commercial activities. However as mentioned throughout each section on the individual elements, Hambrick and Frederickson's model can be adapted into a framework for the analysis of corporate

political strategies. This will be explained in further details below. This section also pointed to the interdependence of the different elements, but also establishing a certain degree of hierarchy. The staging element is to be considered in first position. All these components will be further studied in the next section of this chapter, in the context of the European merger control regime.

4. A four-element structure to corporate political strategy

Based on the review of the European literature on interest representation and on the management framework discussed above, how can a model for corporate political strategy be developed?

As defined in a previous section of this chapter, strategy can be defined as *'a plan, a 'how', a means of getting from A to B'*. This definition begs, first and foremost, the inclusion of two elements in the model of strategy design – i.e. that of a start situation 'A' and that of a final position 'B'. The situation 'A' is defined externally and internally (see Figure 2). This basic understanding of strategy mirrors my own definition of corporate political strategies as an encompassing process from formulation to shaping outcomes matching the preferences of firms.

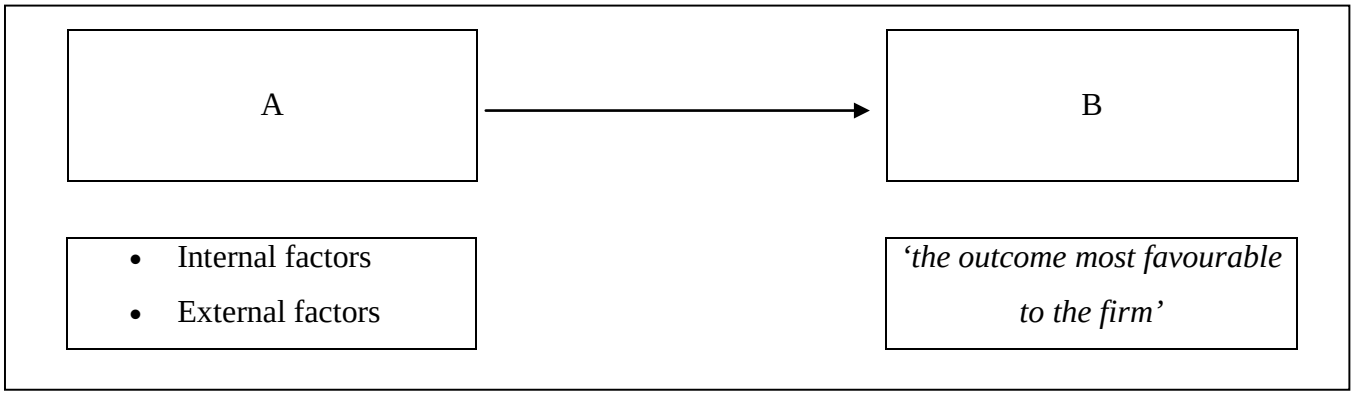

Fig 2: The 'economic logic' of design of corporate political strategies

Situation 'A' and position 'B' will affect in turn the large firms' message to the political environment that will be the basis for the corporate political strategy. The message refers to Hambrick et al.'s 'economic logic' – a critical element of a corporate political strategy. However this element precedes the design of a political

strategy. The main type of message identified by the literature is information or expertise. By 'message' in this context, I am not only interested in the substantial form of it but also the format in which the messages are conveyed to the interlocutors of a firm (Fig. 3).

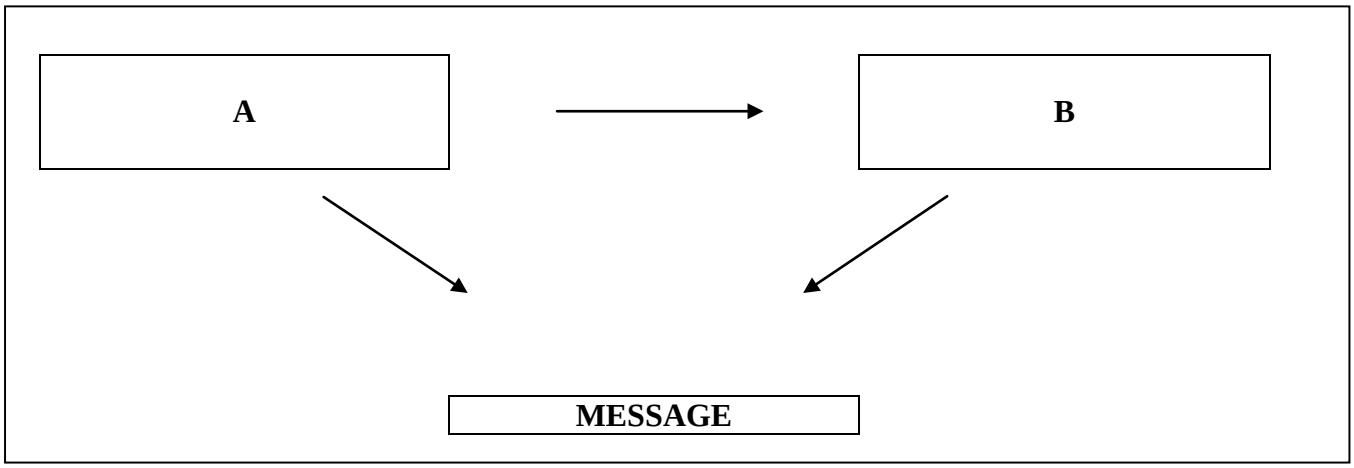

Fig. 3: From the economic logic to the message

On the basis of Hambrick and Frederickson's framework I have identified three other key elements to incorporate into corporate political strategies that represent the core of the strategy. The 'economic logic' was referred to in the 'message' component and differentiators are omnipresent in the design of corporate political strategies as was mentioned in this chapter. These core elements are: staging, arenas, and vehicles – the SAV core of the model. The components will allow for the establishment of a generic approach to corporate political strategies. This will in turn serve as the basis for comparing French and British firms' corporate political strategies.

As aforementioned the staging element will be considered first in the design of corporate political strategies, as it directly impacts which institutions are involved – the 'arenas' element. In turn the latter element has, to a certain extent, an impact on the 'vehicles' element, as some 'arenas' may prefer some vehicles rather than others – as Bouwen (2002) showed in his conclusions.

The staging and arenas elements were previously described. Chapter 2 will explain the contextual characteristics of these elements related to the European merger control

regime. In the design of a corporate political strategy these two elements come first. They relate to the public policy development, and have an impact on the choice of vehicles by firms.

One of the main tasks of a public affairs department is to monitor, identify, and prioritise issues of relevance for its business, i.e. assess the determinants of situation 'A'. However the scarcity of resources and the number of issues that may affect a company lead public affairs staff to focus on certain issues rather than all of them, as highlighted by the resource-dependency theory (Bretherton et al. 2005). Resource-dependency theory suggests that agents lacking resources will seek to establish relationships with other agents to obtain these resources.

Although this seems to be rather obvious, the process whereby issues are selected is difficult to pin down. One European public affairs specialist[56], based in London, explains that his way to draw the corporate priority list is to assess how much value for the business each issue holds. This is usually done via the establishment of internal working groups in the different business units. Consultation paper responses for instance are built upon the feedback 'the business' sends back to the public affairs department. Accordingly the public affairs department acts as an interface between the business and political stakeholders.

> *'The only way you can [assess the lobbying strategies to adopt] is by understanding what the business wants out of it. So we have links within the business units at different levels. Within each of the business units, there are a number of people who are our first points of contact. On any particular issue, we will find the technical expert within the business, and they will build an internal team for themselves around this particular issue, which will go up and down within their particular business area'*[57].

In the design of my strategy I have added the element 'C' which represents the political outcome of this effort. 'C' could be, but is not necessarily, the same as the position 'B'. The diagram below reflects the different stages of the design of a corporate political strategy.

[56] Interview with author, London, 13th December 2005.
[57] Interview with author, London, 13th December 2005.

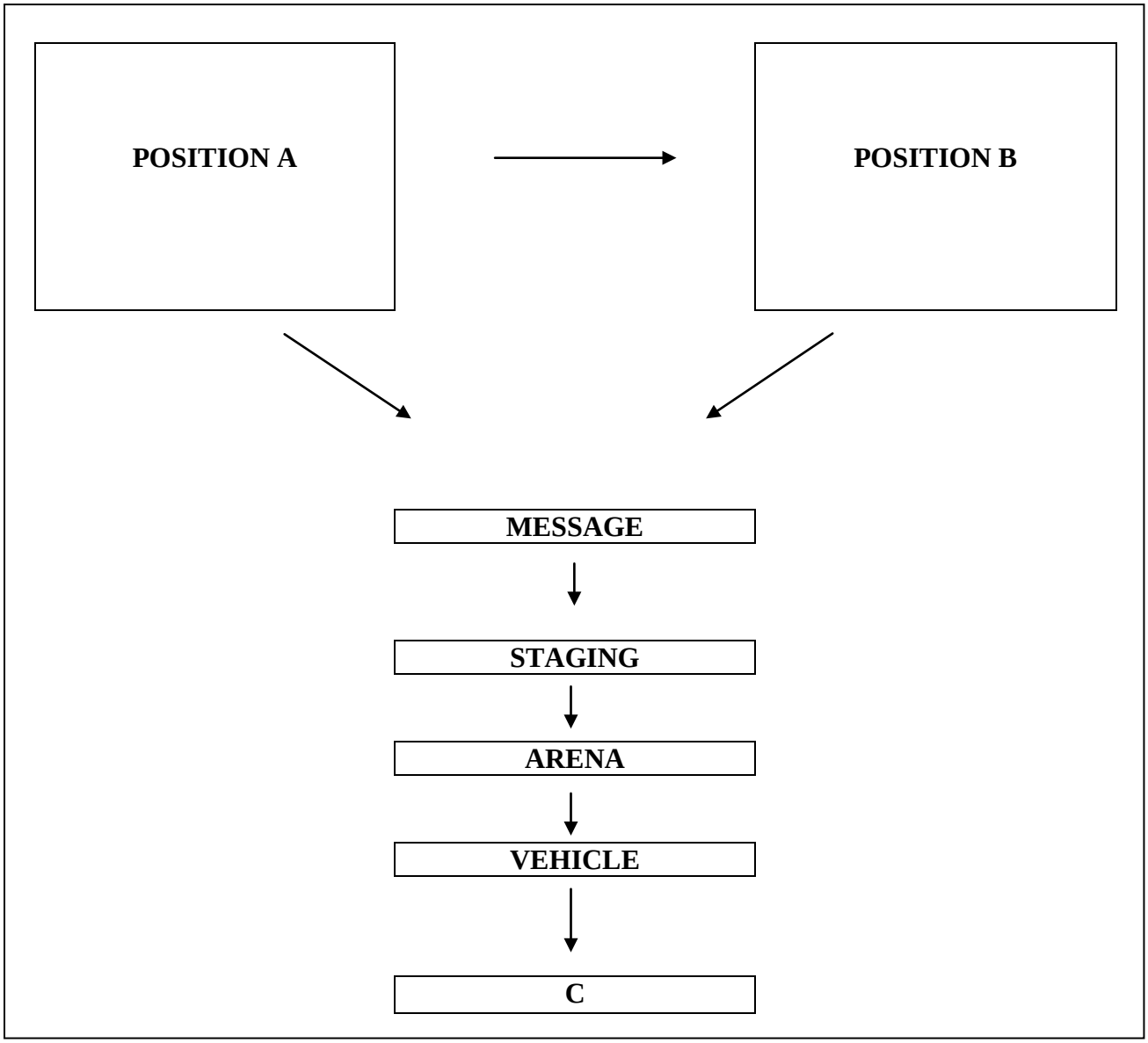

Fig.4: The design of a corporate political strategy

I have established in this section a basic framework for the design of a corporate political strategy. The different elements of this framework will be further detailed in the context of the European merger control regime in Chapter 2 and therefore understood in the context of this project, and then tested empirically – as will be explained in Chapter 3. Although the data collected will be helpful in understanding how French and British firms interact with the Commission and how the choice of the different elements is made, the data will also highlight at which point French and British firms differ in selecting the elements of corporate political strategies. These differences will form the basis of a wider discussion on whether

corporate political strategies are national or European in the context studied. To introduce this discussion, the next section will define Europeanization.

5. Defining Europeanization

The main current debate based around the concept of "Europeanization" in the literature is interested in, as far as the study of interest intermediation is concerned, the extent to which interest representation modes are detaching themselves from the structuring relationship with the national state. Yet, the scholarly community has no defined definition for the concept of Europeanization (Olsen 2001, Vink 2002).

5.1. The different definitions of Europeanization

In fact, Olsen (2001) identified five possible uses of the term Europeanization. According to his article on 'T*he Many Faces of Europeanization'*, the term can firstly refer to geographical changes. Secondly the literature on Europeanization used the concept to identify the development of institutions and governance structures at the European level. Thirdly, the term denotes the penetration of national and sub-national systems – a top-down process. Fourthly, Europeanization evokes the exportation of forms of political organisation and governance that are typical and distinct for Europe beyond the European territory. Finally, the concept explains the political project that is Europe aiming at a unified and politically stronger area.

Saurugger (2003) presents three possible definitions of the concept – one related to the work of Ladrech (1994), the second one based on the work of Risse et al. (2001) and finally a definition given by Radaelli (2000). Based on the work of Ladrech (1994), the first definition defines Europeanization as an incremental process reorienting the direction and the form of politics to the extent that European political and economic dynamics have become an element of the organisational logic of politics and policy–making at national level, i.e. a top-down process defined by Olsen. In an edited volume Green Cowles and Caporaso and Risse (2001) proposed to define Europeanization as the emergence and development of distinct structures of governance at the European level, i.e. the emergence of institutions related to the management of European-based issues, a bottom-up process. Finally based on

Radaelli's work (2000) – itself influenced by Ladrech (1994) - Saurruger identified a third definition. Europeanization is defined as a process of '*(a) construction, (b) diffusion, and (c) institutionalisation of formal and informal rules, procedures, policy paradigms, styles, ways of doing things and shared beliefs and norms which are first defined and consolidated in the making of EU decisions and then incorporated in the logic of domestic discourses, identities, political structures and public policies'*.

The array of possible definitions shows the difficulties to grasp the concept. At a basic level I understand Europeanization as a process which affects the behaviours of agents, particularly at the national level. Questions derive from this definition, however further research is needed to answer them. What sort of process occurs? Many scholars have identified top-down or bottom-up sources of the process, but I will add a horizontal element. My data collection and Chapter 4 will analyse the corporate political strategies of French and British firms and which of these elements have been Europeanized. My Chapter 5 will attempt to explain the differences in corporate political strategies and analyse the extent to which national systems affect corporate political strategies. This project is solely interested in the European corporate political strategies. However further research is needed on the changes of national corporate political strategies in national systems.

5.2. Europeanization as a vertical and horizontal concept

Europeanization, as a concept, relies heavily on a vertical flow – bottom-up or top-down (Ladrech 1994, Radaelli 2000, Cole et al. 2000, Dyson 2002, Thatcher 2004, Schmidt 2006). Yet such a view is limiting. Indeed global firms are usually affected not only by their home state and the European level of regulation. Their branches are usually subject to host state supervisory powers. Indeed the Commission is dependent upon the Member State to give effect to measures prepared at the European level, through implementation of provisions and the day-to-day enforcement of rules (Maher 1996). The most frequently designed form of the EC legislative measure is the directive, binding as far as policy outcomes are concerned, but provides for Member States room for manoeuvre as far as how they reach these results. The multi-layered nature of the governance structure within the European polity detaches the decision-making centres from the day-to-day enforcement in the

hands of national governmental bodies. As Schmidt (2006, p.672) explains, *'enforcement is the black hole of the EU'*. This can result in discrepancies in the rules at Member States level.

In an increasingly global world the largest firms – usually those affected by the European level of merger control – have interests in other Member States regulatory developments, and in a horizontal component that needs adding to the Europeanization process. The creation of pan-European forums where implementation is discussed (CESR[58], CEBS[59], CEIOPS[60] for instance in the case of the financial services sector) epitomises this regulatory aspect. The multi-level governance approach suggests that new and complex vertical and horizontal relationships are emerging (Hooghe et al. 2001). Private sector actors have responded to this change in their opportunity structure (Smith 2001) in taking advantage of the regulatory favourable corporate environment.

In merger matters national developments should be known by firms in order to correctly comply with requirements. Anticipating national regulator's expectations could prove useful to smooth out the process or even speed it up. Faced with a European-wide merger, one French commentator explained,

> '*Not all national authorities offer [pre-notification] possibilities. In one of my recent cases […], I have managed, for instance, to speed up the procedure thanks to the pre-notification possibility. There was no real competition issue because of the market structure – we were selling to a LBO [Leveraged Buyout]. Moreover this was only possible because the two countries concerned, Germany and Poland, accommodated a pre-notification phase'*[61].

It also means that public affairs or compliance departments and trade associations need to be aware of other Member States' developments regarding implementation measures, and aggregate useful intelligence. This can be done through the European Federation platform, but also in less formal settings. European Federations provide an opportunity for members to benefit from brainstorming sessions between members, assess best practices in other Member States, and the

[58] Committee of European Securities Regulators
[59] Committee of European Banking Supervisors
[60] Committee of European Insurance and Occupational Pensions Supervisors
[61] Interview with author, translated by author, Paris, 1st February 2007.

positions of other European sectoral stakeholders. As a result, it is a means to develop functioning modes (Karpeles 2005).

Recent debates regarding supervision of financial services firms exemplified this concept. Cooperation between national supervisors has developed organically both to strengthen capacity and to respond to cross-border problems, and to develop common supervisory approaches in tackling new forms of prudential risks in banking, insurance, and in the securities markets. The Committees which assist the Commission in implementation of single market legislation have emerged as a focal point for supervisory cooperation. Other activities by supervisors, such as the creation of CESR[62] (the former FESCO) or the Committee of European Banking Supervisors (CEBS), can also help to promote cooperation in this area. Increased cooperation among supervisory authorities is key in the management of institutional/prudential risk[63].

As financial institutions reorganise themselves on a cross-border basis, their nationality may become less clear and ascertaining which supervisor should assume responsibility in the event of a solvency crisis could become difficult. Here too intensive cooperation between supervisors in problem detection and early-response is critical. Progress with the adoption in Council of the winding-up and liquidation directives in banking and insurance is a vital component of legal clarity in this area. The trend towards financial conglomeration is also blurring the dividing-lines between financial activities and their related supervision. Cooperation between sectoral supervisors should be reinforced in line with progress in the Joint Forum. Similarly, the trend towards outsourcing of some financial activities to external bodies complicates the task of supervisors in detecting and assessing the behaviour of financial operators.

The Commission tried to address this problem with the level 3 of the Lamfalussy process which fosters better cooperation between supervisors within institutions such as CESR, CEBS, and CEIOPS. The underlying conceptual idea is to have supervisors following the same way in supervising mergers. However, the approach needs to be

[62] The Committee of European Securities Regulators.
[63] European Commission (1998), Financial Services: Building a Framework for Action, October 1998

practiced – it is a learning curve for all the supervisors. EU forums improve the daily operations of supervisors, but they do not mean that supervisors are ready to be less influential because they are part of such a forum. Furthermore, such forums or authorities are slower than the market: the start of the proposal can be traced back to 2004, before cases were brought against the Member State.

A sector fully harmonized is one where the same, amended rules apply if there is a problem. The directive and the amendments are aimed at these uncertainties and lifting the last obstacles for cross-border operations. The proposal offers considerable reduction of uncertainties. The issue remains around the achievement of an integrated market allowing cross-border mergers, and keeping supervisors. Supervisors are accustomed to being very powerful and they have a responsibility towards financial stability. The legislative proposal takes into account these expectations and leaves a certain degree of discretion to the supervisors. However, it is probable that the final outcome will be streamlined and watered down through the consultation process.

Although finance ministers and central bankers should not interfere in the process of approving mergers, the Commission realises that supervisors had an important role to secure financial stability, and deliver. The proposal tries to tighten the framework so there is no abuse of the power, or when if there is abuse of power coercive actions can be put in place.

However this type of function is usually endorsed by legal and compliance departments within firms, notably in merger cases. They can gather the necessary information through local legal and compliance teams. The legislative framework may be a European one, but gold-plating[64] or silver-plating[65] during the transposition exercise can affect a firm. Its branches could be subject to other legal requirements compared to that of the headquarters. The Commission tries to reduce this possibility as much as possible, with better regulation stances for instance, but cannot avoid it totally.

[64] National rules added to the original European directive
[65] National rules are already more stringent than the European directive.

One main objective of the aforementioned forums is creating a sense of legal certainty for firms present in the European market. Because of the nature of the European regulatory work and the importance at the transposition stage of national influences, it also means that corporate departments and trade associations need to be aware of other Member States' developments regarding implementation measures, and aggregate more encompassing intelligence. This can be done through their own branches, using their own resources and European associational platforms, but also less formal settings.

At a basic level, I understand Europeanization as a process whereby the existence of the European level of governance impacts national modes of representation. However I do not limit the process as a solely top-down one, but also consider horizontal flow of influence between Member States. Chapter 4 will make some suggestions that indeed French firms were looking at British firms as far as their corporate political strategies were concerned, for instance. The framework of corporate political strategy design explained in this chapter is used in Chapter 4 as a basis for analysis of French and British firms' corporate political strategies.

Conclusion

Corporate political activities have been increasingly studied by academics, in light of a surge of the involvement of firms in the European arena.

This chapter presents the object of my study - large firms and their corporate political strategies. I was firstly interested in explaining the reasons behind firms' involvement in the political arena, as well the dynamics between corporate 'economic' activities and the political environment. This section led to understanding corporate political activities as an integrated part of corporate activities. However one may ask why large firms should be active in the political arena? Different rationale is identified in this chapter: the attention large firms attract, the expectations of the 'public' that affect the choice of participating, and finally the expertise and legitimacy needed by the institutions. However does it mean that businesses interact in political arenas in a rational manner? The 'specific kind of value' allocated to a rent-seeking activity

explains that businesses follow the pattern of rational actors. The financial allocation element to this activity is one that also needs reminding as it differs from commercial investments.

Following the review of the reasons why firms should engage in corporate political strategies, the logical step was to explain how this could be done. An extensive review of the literature on corporate political strategies showed that the literature failed to address the design of corporate political strategies as a whole but provided essential contributions regarding different elements of the strategies. Using the management literature to identify the different elements that need taking into account in the design of such strategies, this chapter has established a generic framework for analysis of corporate political strategies (as shown by Fig. 4). Four main elements will be analysed in subsequent chapters – the message, and the SAV core of the framework, namely staging, arena and vehicle.

Finally the ultimate question posed by this project relates to the 'nationality' of corporate political strategies. Early in this thesis it was useful to understand the concept of Europeanization, a concept ascribed different meanings by different scholars. At a basic level, I understand Europeanization as a process whereby the existence of the European level of governance impacts national modes of representation. However I do not limit the process as a solely top-down one, but also consider the horizontal flow of influence between Member States.

This general chapter lays a basis framework for analysis, however it lacks the 'contextual meat' I have chosen to analyse – the European merger control regime. The next chapter presents a thorough analysis of the regime.

Chapter 2

A Merger Control Regime for Europe

Acquiring and divesting firms is common practice. The drivers for merging and acquiring may differ, yet the basic feature remains – one firm emerges where two existed before. Some of the motives identified by the literature are, for instance, economies of scale which relate to the efficiency of production. Greater market presence and market share are also cited as other motives for merging or acquiring. Diversifying business risk is also mentioned. Globalisation and advanced technologies have encouraged the sophistication of merger & acquisition – or M&A – activities; and a cross-fertilisation of global practices, through the internationalisation of transactions, has contributed to regulatory evolutions in different competent authorities.

At the European level, the Single Market/1992-programme goaded unprecedented corporate restructuring, *via* notably merger and acquisition, symptomatic of intense global competition (Jacquemin & Wright 1993). In this context the Commission (1987) regretted its lack of control over market activities,

> '*At a time of extensive takeovers and acquisitions often entailing heavy stock market activity, the absence of legislation at a Community level that could enable the Commission to authorize mergers that are in the Community interest is damaging (...) In the unified Community market to be achieved by 1992, an industrial structure policy must include powers for assessment of mergers between forms in different Member States which are becoming more and more common'*. (p.16)

From this quote it is clear that a European Merger Control Regulation was a long-waited and needed milestone in the development of a European market and the '*first supranational policy in the European Union*' – the European competition policy (McGowan and Wilks 1995). As Mario Monti explained, *'a law governing merger*

control is an essential instrument in any competition policy armoury'[66], yet a European merger regime was long in gestation.

The Community's competition law system has always been considered as 'special' (Gerber 1994). Although established to protect competition, unlike national systems, it did not primarily aim at promoting consumer welfare or industrial and technological progress (Commission 1972). Indeed, it was, from the outset, established as a part of a program designed to reach a specific political aim - the unifying of the European market. As a result competition did not constitute an end, it was considered as a medium to achieve the common goals of economic and social development of Article 2 (TEC)[67]. Competition rules would allow the integration of the national markets and the reduction in trade barriers which were set up by private agreements between undertakings, by the abuse of market powers or by state subsidies.

This 'unification imperative' (Gerber 1994) is critical to the understanding of the development of the competition law institutional framework and the related Commission's competences. In addition to the political goal of replacing conflict with cooperation, the Common Market was seen as serving a variety of economic goals. The Member States were still recovering from the ravages of the Second World War, and economic integration was widely viewed as necessary for rapid economic growth. Many also saw economic integration as the only means of dealing with the combined economic and political power of the United States (Gloeckler 1998). References to this European integrationist agenda still underline the Commission's interventions in merger cases. Commissioner McCreevy, the current Commissioner for the Internal Market, faced with a clear case of nationalism in Italy[68], has used speeches and other public statements to confront the national supervisor. He promoted the emergence of a European capital market and the functioning of that market.

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[66] Monti, M (2002), 'Analytical framework of merger review', *International Competition Network Inaugural Conference*, Speech, Naples, 28-29 September.

[67] Article 2 of the EEC Treaty specifies that *"The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of member states, to promote throughout the community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it"*.

[68] The Bank of Italy was prohibiting the merger of Antovenetta and ABN Amro.

This chapter aims firstly at setting the scene and contextualising my project. My previous chapter laid out elements essential to the design of a corporate political strategy. These elements need further detailing in the context of the European merger control regime. This chapter will also provide the contextual framework for the analysis of corporate political strategies. The development of the European merger regime – both at European and national level, the different legal requirements against which the European merger regime is administrated, and the institutions central to the development of the policy, are thoroughly analysed. This chapter will thus present corporate political activities as an integrated part of the development of the European policy.

1. The origins of a European merger control regime

This section follows, to a certain extent, Bulmer's (1994) threefold categorisation of the 'different' regimes of supranational control over mergers. The first regime is encapsulated by ECSC – European Coal and Steel Community – provisions, limiting regulation of mergers to the coal and steel sectors. Subsequently, other sectors were subject to some of the 1957 Treaty of Rome provisions, firstly under Article 86 (EEC), and then under Article 85 (EEC) [69]. Annex 2 provides a chronological overview of the development to the formalised introduction of the European merger control Regulation. Finally, the coming into force of Council Regulation 4064/89 established a specific regulatory framework of control. The fourth added phase accounts for the recent revamp of the merger regulation – the milestone date being set at 2002 with a trio of Court judgements[70].

[69] See Annex 2. It provides a chronological view of the development of the European Merger Control Regulation.
[70] Namely Airtours, Schneider and Tetra Laval.

1.1. From Paris to Rome

No merger control provisions are included in the founding Treaty of Rome, whilst a regime of merger control was provided for in the ECSC Treaty (1951)[71] and this despite attachment to the idea of free competition (see Article 3 of TEC). Different explanations are proposed to clarify this omission.

Some authors see an explanation of this omission in the different nature of the documents: whereas the ECSC is a *traité-loi* which specifies the regulatory content, the Treaty of Rome (1957) in contrast represents a *traité-cadre* that establishes a framework of action but which compels further legislation to apply the principles (Bulmer 1994). As a Commission official explains[72],

> *'The ECSC Treaty was 100 articles long exactly. They clearly said what they were going to do, and how they were going to do it. But (…) when it came to writing the [Treaty of Rome] Member States governments had since seen that the High Authority have been extremely effective to run this sort of supranational power. But they did not feel that they could give away virtually that degree of control over their own economies, particularly in the field, I expect, of state aids. (…) Generally there was not a great deal of will to have a sort of merger control at the time'.*

Moreover given the political (and military) context and the particular place of the coal, iron and steel industries – 'the industries of war' – in any such revival, merger control was deemed as a necessity for the ECSC (McGowan and Cini 1999). As McGowan (2000) further explains, conceptions of economic governance and productivity were considered as secondary to the question of German economic power containment through the development of competition rules in the ECSC. The Schuman Plan was explicitly conceived in light of the question of German reconstruction, and *de facto* the question of German cartels and concentrations[73].

[71] Despite subsequent constitutional changes such as the SEA and the TEU, and the fusion of the institutions of the three Communities in 1967, merger control in the coal and steel sectors is based on separate treaty provisions from merger control for other economic sectors.
[72] Interview with official, DG Comp, Brussels, 18th January 2006.
[73] The German *Konzerns* question – that worried other founding Member States companies – was addressed by the Americans that proceeded with the post-war decartelisation of the German corporate structure. See Roussel, E. (1996), *Jean Monnet*, Fayard, p.590-91.

Moreover economic concentrations were not necessarily perceived as problematic in the 1950s. National economic capacities were taking precedence, and globalisation was not yet a matter of economic concern. As Cini et al. (1998) explain,

> *'Mergers were not seen as a threat to competition, and economies of scale were held to benefit industrial competitiveness. This thinking was also reflected in the newly evolving domestic competition regimes which also failed to take on board the potentially anti-competitive impact of concentration' (p.117).*

In the negotiations for the Treaty of Paris Monnet presented anti-trust provisions largely inspired by US expertise[74] (Ullrich 2006). They were aimed at cartel-like behaviour (even though other provisions effectively endorsed collusive practices) and were understood to be set up at a supranational level. Indeed Articles 65 and 66 of the ECSC Treaty were particularly restrictive towards cartels and concentrations (reflecting the concerns of the post-war period)[75]. Although these anti-trust proposals met some opposition, the Treaty was agreed upon with the proposed measures largely intact. The broad scope for intervention allocated to the High Authority can be explained by both French pressure to bridle German heavy industries and the absence of national regulatory authorities dedicated to merger control (Bulmer 1994).

1.2. A merger control regime based on Treaty provisions

As aforementioned, the Treaty of Rome contains no specific match to the ECSC Treaty Article 65 and 66. Yet the Spaak Report (1956) introduces clearly the idea of a merger control system (Akman 2007). The omission is unlikely to have been inadvertent (Cook et al 2000). Although Articles 85 and 86 (EEC) (now Articles 81 and 82) deal with concepts such as dominance, there is little evidence that those responsible for their drafting intended that these should give control over mergers to the Commission.

[74] Jean Monnet was assisted by Americans in the design of competition policy provisions – Bowie and Tomlinson, both eminent members of the Society of Europeans, and George Ball. See Roussel, E. (1996), *op.cit.*, p. 601.

[75] For a comprehensive account of the Treaty of Paris see, for instance, Bebr, G. (1953), ´The European Coal and Steel Community, a political and legal innovation´, in *the Yale Law Journal*, 63(1), pp. 1-43.

1.2.1. Articles 85 and 86 (EEC)

Both Articles 85 and 86 (EEC) seek to achieve the same objective, namely the maintenance of effective competition within the common market as prescribed in Articles 2 and 3 of the EEC Treaty. They together lay down a merger control structure, though a weak one. The vagueness of both Articles and the limitations of the regime in terms of control meant that mergers remained scrutinised by the separate national governments, thereby creating a barrier to the development of a European single market.

Framed in very general terms, Article 85 (EEC) can claim to catch almost all agreements between direct competitors (horizontal restraints) and anti-competitive agreements between firms involved in different stages of the production/distribution/marketing process within a market (vertical restraints). Provisions to control concentrations are concerned primarily with lasting changes in market structure - a distinction emphasised in the final text of the Regulation and in its application by the Commission. Article 86 (EEC) is similarly general. It deals with the abuse of a dominant position, rather than dominance itself, therefore it has an extremely limited use. Indeed it can only be used in merger cases where a pre-existing dominant position is strengthened. These articles apply only to conduct that affects trade between the Member States. Article 90 (EEC)[76] (now Article 86) then adapts the principles contained in these provisions for applications to state-owned companies. The Treaty framers envisioned (in articles 87 through 89 EEC) that Community institutions would create a system to develop, apply, and enforce these principles.

[76] Article 90 :

- In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those provided for in Article 7 and Articles 85 to 94.
- Undertakings entrusted with the operation of services of general interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.
- The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

The Treaty itself provides little guidance for the construction of a merger control system, and there is little evidence that the framers had any well-developed conceptions of how such a system might look (Gerber 1994). Articles 85 and 86 (EEC) provide a basic regulatory structure against anti-competitive practices, and set out conditions of possible exemption. They also have the merit to allow for negotiating opportunities for firms and governments with the Commission (McGowan 2000).

The preparation of an institutional framework for implementing Articles 85 and 86 (EEC) dominated the agenda of the Commission's competition law officials for approximately half a decade. The process involved extensive and sometimes difficult negotiations amongst the Council, the Commission, the European Parliament, and Member State governments, culminating in the 1962 enactment of Regulation 17 (now Regulation 1/2003), the blueprint for the institutional structure of the competition law system. This document encapsulates the independence of the Commission in competition matters, as explained in Article 9 entitled 'powers':

> *'Article 9*
> *Powers*
>
> *1. Subject to review of its decision by the Court of Justice, the Commission shall have sole power to declare Article 85 (1) inapplicable pursuant to Article 85 (3) of the Treaty.*
>
> *2. The Commission shall have power to apply Article 85 (1) and Article 86 of the Treaty ; this power may be exercised notwithstanding that the time limits specified in Article 5 (1) and in Article 7 (2) relating to notification have not expired.*
>
> *3. As long as the Commission has not initiated any procedure under Articles 2, 3 or 6, the authorities of the Member States shall remain competent to apply Article 85 (1) and Article 86 in accordance with Article 88 of the Treaty; they shall remain competent in this respect notwithstanding that the time limits specified in Article 5 (1) and in Article 7 (2) relating to notification have not expired'.*

1.2.2. The 1966 Memorandum

During the 1960s, the Commission made no use[77] of the available provisions contained in Article 86 (EEC) for the control of mergers, although it started in the mid-1960s – in a Memorandum – to issue statements on how it might use the provision. This was partly out of fear of hampering the growth of post-war Member State firms as explained earlier in this chapter. Moreover, the lack of any well-accepted sense of how the provision should be applied made enforcement by a politically weakened Commission – following the 1966 Luxembourg compromise – highly risky (Bulmer 1994). The fact that Article 86 (EEC) is concerned with market-dominating firms made the Member States very wary of any attempts to interfere with their 'national champions'.

The Commission published in 1966 *a Memorandum on Concentration* which was the result of a study by a group of eminent Professors. The Commission considered Article 85 (EEC) unsuitable as a means of control of merger, only the creation of a single new organic unit as a result of a merger was considered relevant - a view to be overturned later with the *Philip Morris* case[78]. The 1966 memorandum did not, however, exclude the application under certain circumstances of Article 86 to mergers. The Commission had regarded Article 86 (EEC) according to the Memorandum as an appropriate instrument to control infringements where one undertaking '*already enjoying a dominant position'* in the Community or a substantial part of it, '*get closer to a monopolistic situation following the joining with one or several undertakings, and, as a result, limit the number of choices for clients, suppliers and ultimate consumers'* (Commission 1966, Part III, p.26).

1.2.3. Merger control regulation proposals.

Although the Commission did not take advantage, at first, of the conclusions of the above-mentioned *Memorandum*, its first decision to apply Article 86 (EEC) to

[77] Article 86 (EEC) was applied by the Commission for the first time in 1971 in its *Continental Can* decision (see Case IV-26811 OJ 1972, L7, 9.12.71).
[78] 1987 Cases 142 and 156/84 1987 ECR 4487

merger decisions in the *Continental Can* case[79], and in subsequent decisions, was to mark the beginning of a European merger regime (Elland 1987). Moreover, in the *Continental Can* case, the European Court of Justice extended the scope of Article 86 (EEC) to include structural changes brought about by mergers and acquisitions. Accordingly, it confirmed that Article 86 (EEC) could apply to the acquisition of a competitor by a firm enjoying a dominant position.

In initiating proceedings the Commission was not only taking action towards a specific concentration, but also seeking to develop the principle of merger regulation *via* Article 86 (EEC). As the Commission explained in its First Report (Commission 1971, p.16), *'subject to contrary interpretation of the provision by the Court of Justice, the Commission will also apply Article 86 of the EEC Treaty to mergers entered into by enterprises in a dominant position to the prejudice of consumers'*. The Court of Justice held that an abuse may be committed where an undertaking already in a dominant position strengthened or extended its position by acquiring control of another undertaking, thus substantially fettering residual competition in the market concerned. The Court also added to the test that undertakings remaining in the market should be placed in a position of dependence vis-à-vis the dominant undertaking, but this strict proviso was not taken up in later cases on the definition of abuse (Brittan 1991).

However the EC's limited merger control regime was reactive – it applied only to cases where a dominant market position had already been established. In addition the test for intervention under Article 86 (EEC) was a strict one. The Court suggested that an acquisition had to result in the virtual elimination of competition in that product market before the Article could be infringed[80].

Following its *Continental Can* decision and recognising the limitations of Article 86 (EEC) in the context of mergers and acquisitions the Commission was soon to draft its

[79] Europemballage Corporation and Continental Can Co. Inc. v EC Commission (Case 6/72), OJ C68, ECR 215, 21.09.73.

[80] It did, however, comment at paragraph 29 that 'such a narrow precondition as the elimination of all competition need not exist in all cases'. The concept of collective dominance developed under Article 82 and the Regulation implies that Article 82, absent the Regulation, could now be a more subtle weapon against increased concentration in oligopolistic markets.

first proposal of a merger control regulation in 1973[81]. In October 1972 the Commission informed the Council of its intention *'to submit, independently of the application of Article 86 to specific cases, proposals for the introduction of more systematic supervision arrangements for mergers reaching a certain scale'* (Commission 1972, p.28). The relationship between the *Continental Can* decision and the scope and content of the first draft of the merger regulation issued a few months after the decision of the Court (at the request of Member States[82]) was, however, more psychological than substantive. In retrospect the Commission (1990) concluded,

> *'Given the inadequacy of the existing competition rules in dealing with the entire concentration phenomenon at Community level, the need for such a regulation was recognised as early as 1974 in the wake of the Continental Can judgement. However, at that time, the Council did not give serious consideration to the new draft Regulation'.*

Indeed although the ECJ agreed upon the use of Article 86 (EEC) in merger control matters, the case was actually dismissed on the premise that the Commission had not satisfactorily defined the relevant market.

Thus, companies did not feel sufficiently threatened to decisively change their behaviour. As a matter of fact, the Commission did not make any formal decision prohibiting mergers under Article 86 following *Continental Can*. Only an informal approach to see control of mergers was presented in its Tenth Report on Competition Policy. The Commission explained that *'in dealing with various cases during the year, [it] was able to work out, with the firms concerned, solutions geared both to industrial requirements and the need to maintain adequate competition on the relevant market'* (Commission 1980, p.11). Corporate merger advisers were more careful in their assessments of market concentration levels at Community and national levels and might have considered informal approaches to the Competition Directorate. From its inception the draft proposal had little chance of becoming law given the

[81] 1973 OJ C92/1-7, 31 October 1973, presentation of first draft proposal to Council of Ministers on 20 July 1973.

[82] Point 7 of the final Declaration of the EEC summit of October 1972 said that: […] necessary to seek to establish a single industrial base for the Community as a whole. This involves the formulation of measures that ensure that mergers affecting firms established in the Community are in harmony with the economic and social aims of the Community and the maintenance of fair competition as much within the Common Market as in external markets in conformity with the rules laid down by the Treaty', Final declaration of the Conference of the Heads of State or of Governments of the Member States of the enlarged Communities, point 7.

sensitivity in some national capitals. Despite Council rejection, the Commission continued to press for such legislation throughout the seventies and into the eighties, but its objectives were not aided by a decline in merger activity resulting from a continuing world-wide recession.

Yet, due to stiff opposition from Member States, little progress was made until a plethora of mergers and acquisitions was to happen in the mid-80s in anticipation of the Single Market. Merger control did not materialise as a prominent issue of the European political agenda and all three proposals of merger legislation, in 1982[83], 1984[84] and 1986[85] respectively, failed to find favour with the Council. Commissioner Sutherland, responsible at the time for competition policy, indicated publicly on a number of occasions from 1985 onwards that no ratifying from Member States would leave the Commission no alternative but to rely on Articles 85 and 86 (EEC) for the purposes of a merger control[86].

1.2.4. The 1989 Merger Control Regulation

However the number, size and speed of Single Market Program-induced mergers, and the SEA's pro-integrationist stance gave the Commission, pressed by interest groups[87], the ultimate legitimate pretext to convince national governments to cede more regulatory authority to Brussels. Prominently the ERT and UNICE pushed for a supranational regulation structure and for a clear set of rules to be designed for companies engaging in merger activity (Bulmer 1994). As the UNICE announced in its 1987 Declaration:

> *'The completion of the internal market by 1992 and the exigencies of international competition will give rise to a major restructuring of companies in the EEC.*

[83] 1982 LJ C36/3, 12.2.1982.
[84] 1984 OJ C51/8, 23.2.1984.
[85] 1986 OJ C324/5, 17.12.86.
[86] In memo dated 23 July 1987 Mr Peter Sutherland in his introduction of the 16th Report on Competition Policy is quoted as saying 'I agree with Parliament if there is no prospect of progress with respect to our legislative proposals, the Commission will have to envisage alternative means of achieving Community-wide merger control' (See Elland, W. (1987), p.167).
[87] For the proposing of the legislation the Commission had some input from interest groups such as ERT and UNICE (See Bulmer 1994).

> *National controls on company restructuring, being based on different national criteria, are incompatible with the existence of a really integrated market and the increasing geographical extension of a large number of markets.*
>
> *The EEC does not contain any suitable provisions concerning the control of company mergers from the competition point of view.*
>
> *For these reasons, UNICE is in favour of a Council Regulation providing for the observance of the rules of competition in the firm of Community-level control over European-scale mergers, including joint ventures having a concentrative character'*[88].

In light of the forthcoming Single Market Programme, Member States started to appreciate the threat that uncontrolled EC-wide mergers posed to the emerging single market, and also the advantage for big businesses of dealing with one European competition authority rather than several national ones.

It was against this background that industry demands for the creation of a level-playing field,' an essential feature of any common market, and 'one-stop shop' for merger control reverberated. The European Court of Justice (ECJ) jurisprudence was to assist the Commission as it sought to add merger control to its competition armoury. The *Philip Morris* ruling pleased the Commission and enhanced DGIV's (now DG Comp's) prestige. As the Commission indicated in its 1987 Competition Report (Commission 1988),

> *'[…] 1987 was a year of considerable importance in that several Court of Justice judgements provided the Commission with particularly useful guidelines for the implementation of Community competition policy.*
>
> *A judgement worth particular attention is one concerning the tobacco industry, in which the Court ruled for the first time that Article 85 of the Treaty could in certain circumstances, be applied to acquisitions of financial holdings between two competing firms. The line taken by the Court would suggest that the prohibition on cartels contained in Article 85 could possibly be applied to certain mergers, both by the Commission and by a national court. […] The judgement has far-reaching implications. It underlines the need for an economic approach in interpreting and applying Articles 85 and 86 (EEC)'.*

[88] UNICE (1987), *Merger Control at EC level, UNICE Declaration*, 10 November 1987.

However the ruling failed to compensate for the lack of an independent and effective European merger regime. It only served to intensify the level of insecurity and confusion felt by the business community. Industry, notably the ERT, was at the forefront in pushing for an EU merger control regime (McGowan and Wilks 1995). Supranational powers granted to the Commission following the *Philip Morris* case and approval systems sought by companies led Member States' capitals to be opened to the establishment of a supranational merger regime (Shea et al. 2006).

Nevertheless, Member States disagreed on the criteria for the Commission's scope as far as prohibitions and approvals were concerned. Moreover an important difference laid between those member states that wanted the criteria expressly limited to competition issues (especially Germany and UK) and those, such as France, which wanted social and industrial policy issues to remain among the criteria that could be applied in evaluating merger cases. Whilst the debates over the drafting of what became the 1989 Merger Control Regulation were heated and often acrimonious, it is important to note that the arguments were largely about the form the control should take, rather than about whether regulation was necessary (Cini and McGowan 1998).

As a result, it was not until December 1989 that the Council adopted a regulation providing for the prior authorisation of mergers, thus enabling the Commission to control economically dominant structures. The 1989 merger Regulation constituted a cornerstone of the EU's competition policy and reflected its commitment to the single market programme (Dinan 1999). Mergers were to be notified prior to implementation, and the Commission was to prohibit the merger when it would *'create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it'* (according to the dominance test). The final agreement on the Regulation was a classic case of Council of Ministers compromise – about halfway between the two proposed thresholds, the smaller against bigger countries battleground, and including provisions such as Article 9[89] ('The German clause') and Article 22[90] ('The

[89] Under Article 9 a Member State may ask the Commission to conduct its own investigation of a merger, if it can make the case that a merger may create an anti-competitive situation on the domestic market. This provision reflected German and British wishes not to cede all possible control to Brussels (see the merger between Tarmac and Steetley in the UK).

Dutch clause'), and Article 21[91] on '*legitimate interests*' to soothe the French delegation. In the case of the latter Article, the European approval is not sufficient for a merger to be approved; the national hurdle needs to be lifted as well.

The introduction of a Merger Control Regulation fundamentally altered competition policy in Europe. By centralising authority to investigate large mergers, it focused attention on the European Commission and greatly enhanced its potential for influencing major business decisions. Whereas prior to the Merger Regulation authority was scattered among the competition authorities of the Member States, efforts to influence decision-making in this area now focused on DG Comp. Moreover, because of its enormous political and economic importance, the Merger Regulation immediately became the centre of DG Competition's own attention, occupying an exceptionally large part of DG Comp's time, resources, and interest and shifting attention away from the conventional areas of the directorate's activity – with, for instance, the setting up of the MTF, the Merger Task Force. As a former official explained[92],

> *'The real problem was the deadline. They were set by the Council and imposed upon the Commission as an obligation to reach the impossible effectively, or so it appeared. A merger between companies or a number of companies with complex operations, and these were not just mergers, they were concentrations which covered ephemeral and complicated structures (joint ventures – concentrative or not), and all of this was to be done in 30 days'.*

Furthermore the number of concentration cases notified to the Commission increased exponentially over the years as shown in Annex 3 and exceeding all expectations (the Commission (1990) expected that 50 notifications a year would be received), making assessing mergers the most prolific and visible activity of DG Comp (Maudhuit and Soames 2005a).

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[90] According to Article 22 it is open to a member government to invite the Commission to investigate a merger which falls below the thresholds but which would limit competition within that member state.

[91] '*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 (…)*'.

[92] Interview with author, Brussels, 27th January 2006.

1.3. A Community with a European merger control system

When on 21 December 1989 the EMCR was finally adopted it was decided that the regulation was to be reviewed before the end of 1993. However, due to strong resistance from the Member States, rather than carrying on with the original timetable for process, the Commission decided to postpone the review so that it had to be carried out at the latest by the end of 1996 (Broberg 1996).

In its report to the Council published in 1993[93], the Commission confirmed that it would review the state of play regarding the merger thresholds before 1996. The Commission was always of the view that the original thresholds were too high[94]. The Commission's Green Paper on the review of merger control published in January of that year (Commission 1996) indeed suggested lower thresholds. As Overbury, the first Head of the MTF, explained at the birth of the EMCR,

> *'It is clear that it would be in the interest of consumers and industry for the thresholds to be reduced: the trend towards cross-border mergers within the Community constantly increases leading to ever more multiple control by the national competition authorities. It is equally important that the 'level playing field' for competitors created throughout the EEC by the 92 process is mirrored by a similar regulatory approach to concentrations irrespective of in which member states they take place'* (Overbury 1990).

The Green Paper suggested an extensive period of dialogue between the Commission and industrial associations, companies and legal advisors and followed a survey of 300 EU companies undertaken in 1995. The dialogue focused on three main issues: thresholds reductions, multiple notifications and joint ventures, and the turnover of banks[95] (Commission 1996).

[93]Com (93) 385 final, 28.7.93.

[94] The turnover of the companies involved in a concentration must exceed ECU 5bn on a worldwide basis, for at least of two of those companies, ECU 250 million in the Community. The Green Paper (Commission 96) suggested that thresholds of ECU 2 billion and ECU 100 million respectively would be more appropriate.

[95] The issue related to the calculation of turnover for credit and financial institutions. The Merger Regulation like many other national authorities was using assets instead of turnover for purposes of the application of Article 1(2). Two problems arose from this method: 1) certain transactions were excluded; 2) the geographic allocation of turnover was difficult.

In May 1997, thanks to the prompting of the Council presidency, Member States agreed to a major change on the merger regulation, a general reduction of the notification thresholds, as requested by the Commission. The EMCR had matured. The Commission proved to be able to handle an ever increasing workload as Monetary Union superseded the single market as the driving force for consolidation in the EU. In March 1998 a new set of turnover thresholds, extending the Commission's jurisdiction, was introduced to supplement the original thresholds and strengthen the one-stop shop concept, which had suffered serious erosion as a result of a proliferation of national merger control regimes in Europe (Cook *et al.* 2000). The Council agreed to increase the Commission's role by giving it jurisdiction over mergers falling short of the turnover thresholds that require multiple notifications to national competition authorities (subject to new thresholds for these cases) and over all 'full function' joint ventures[96], whether concentrative or co-operative. The Council's intent was to obviate the need for companies in certain merger cases to notify and await approval from national authorities in several member states (Dinan 1999).

1.4. The 2002 reform package – a regulation reaching maturity?

Against a backdrop of only one of its decisions overturned by the European Courts, the Commission has seen some of its high profile decisions overturned by the CFI[97] – the Court of First Instance – since 2002. Although the Commission had initiated a review of the Regulation as far back as the summer of 2000 (Vickers 2004), heightened media attention meant that DG Comp had to engage in a broader revamp of the EMCR[98]. As Monti, then Commissioner for Competition, commented,

> *'In order to ensure that the EU's regime of merger control will continue to successfully face the challenges of today and tomorrow, the Commission felt that there was some scope for further improvements.*

[96] See Commission (1998), Commission Notice on the concept of full function joint ventures under Council Regulation (EEC) No 4084/89 on the control of concentrations between undertakings, OJ C 66 of 2.03.98.
[97] Since 1989 an additional Court of First Instance has been responsible for the bulk of cases relating to competition policy, its creation reflecting the volume of competition cases.
[98] The 2000 EMCR review primarily focused on the criteria for determining which body – the Commission or national authorities – should scrutinise proposed transactions.

Indeed, despite the recent slowdown in merger activity, our system has had to cope with a rapidly growing number of increasingly complex cases. Higher levels of industrial concentration necessitate greater sophistication in the economic analysis, and our decisions are subject to increasingly close scrutiny by the European courts, culminating in the judgements delivered this year by the Court of First Instance. Last year's case law of the CFI represents the most far-reaching judicial "feedback" that the Commission has received on its merger enforcement policy since 1990: the judgements deal with fundamental substantive, procedural and systemic aspects of merger review at the EU level. In particular, it is clear that the CFI is now holding the Commission to a high standard of proof, and this has clear implications for the way in which we conduct our investigations and draft our decisions.

I guess I do not have to emphasise that our reform was not triggered by these judgements. Nevertheless, we were able to feed some of the conclusions we drew from the judgements into our reform project.

What emerged is a reform package which, to my mind, will improve our merger control regime and enable us to grapple with the major challenges ahead an increasingly globalised economy and the prospect of a Union which will soon have 25 Member States. At the same time, this reform will preserve the very real merits inherent in the current system. In sum, I sincerely believe that it will transform what is already a very good system into an even better one'[99].

In December 2001, the European Commission launched a full review of the EMCR and issued a consultative Green Paper (Commission 2001). The latter looked at a number of jurisdictional, substantive[100] and procedural issues and a wide consultation resulted in a new draft EMCR presented in December 2002. The review aimed at minimising transaction costs for business through the 'one-stop-shop' principle and at augmenting the transparency and speed of the assessment procedure, leading thus to enhanced legal certainty. For instance, the timetable was widely regarded as too compressed. The introduction of 'stop the clock' procedures both in phase I and phase II to allow extra time at the parties' request for the consideration of remedies concerned, as proposed in the Commission's Green Paper, seemed a useful way of

[99] Monti, M. (2003), 'European Competition Policy: Quo Vadis?', XX. International Forum on European Competition Policy, SPEECH/03/195, Brussels, 10 April 2003.

[100] The Commission balanced arguments between using the US-Style SLC test – substantial lessening of competition test, and the current dominance test. The discussions led to the establishment of a new more flexible test – SIEC, the significantly impede competition test, which focuses on effects rather than dominance.

reducing the pressures (Morgan 2002). The implementing regulation[101] explained the procedures to follow in merger cases, distinguishing between the parties who notified the concentration, other parties involved in the proposed concentration, third parties,[102] and parties regarding whom the Commission intended to take a decision imposing a fine or periodic penalty payments. Notifications were to be submitted in the manner explained by the Form CO[103].

Following the eight high-profile prohibitions under Commissioner Monti's tenure as Competition Commissioner and high-profile withdrawals such as *Skandinaviska Enskilda Bank/FöreningsSparbanken* and *EMI/Time Warner*, public criticism ran high. Serious concerns were raised regarding the role of the MTF - the investigator, prosecutor, judge and jury of any transaction. The Commission's original Green Paper set out the view that existing checks and balances were sufficient. Yet there was an overwhelming view that the existing system needed to be reformed[104], following the *Airtours* case[105] but also in light of the forthcoming eastern enlargement.

Indeed the Commission in its *Airtours* decision undermined the credibility of the concept of collective dominance and induced legal uncertainty by adopting an approach markedly different from its approach in previous cases[106]. The CFI found that the Commission had not yet proved to the required legal standard that the merger could lead to a collectively dominant position. In the *Schneider/Legrand* merger case

[101] Commission Regulation (EC) No 802/2004 of 7 April 2004, implementing Council Regulation (EC) No 139/2004 of 20 January 2004, on the control of concentrations between undertakings

[102] During cases – or at the institutionalisation stage - parties have the right to complain and highlight problems. The implementing regulation states, para.13, that *'third parties demonstrating a sufficient interest must also be given the opportunity of expressing their views, if they make a written application to that effect'*.

[103] Ibid., Annex I.

[104] Monti, M. (2002), 'Merger Control in the EU: A radical reform', European Commission/IBA Conference on EU Merger Control, Brussels, Nov 7 2002, p.2, http://europa.eu.int/rapid/start/cgi/guesten.ksh?p-action.gettxt=gt&doc=Speech/02/5450RAPID&lg=EN&display=

[105] In April 1999 Airtours, the international travel group, launched a hostile bid for First Choice, which was emerging as an effective vertically-integrated rival in the U.K. The acquisition of First Choice by Airtours would have left only three major vertically-integrated travel groups in the U.K.. The three groups would have held over 70% of the U.K. short-haul foreign package holiday market. Despite a history of competition in the U.K. travel markets, the Commission considered that the rapid consolidation and vertical integration which had followed the 1997 report of the U.K. Competition Commission into the industry meant that structural conditions in the U.K. had changed radically.

[106] Korah, V. (2001), *Cases and Materials on EC Competition Law*, 2nd ed., Hart Publishing.

the Court held that the Commission was also to blame on the grounds of '*several obvious errors, omissions and contradictions*' in its economic reasoning[107]. The business community had long criticised the Commission for establishing lawyers at the heart of its merger decision-making process, and hoped to push for inclusion of economics rigour[108] in decision-making procedures. UNICE, representing the European business community, described the critics in its response to the Green Paper on the Review of the Merger Regulation[109] thus,

> *'In UNICE view one of the greatest shortcomings of the Merger Regulation and the present procedural framework is the lack of due process and proper checks and balances in the system. (…) UNICE considers that there is a lack of both effective external and internal controls in Community competition proceedings, where the Commission acts in fact both as investigator and decision-maker. The current system of judicial review of merger decisions is unsatisfactory and ineffective'.*

The result of this consultation was the setting up of a new regime under Regulation 139/2004. The reformed package has taken into account many of the criticisms made by the epistemic community surrounding the former MTF – the legal profession, academics and the business community – and the European courts. The passage to a new test – SIEC[110] – was one of the prominent features of the new regime. The new Regulation mirrored the maturity and experience of DG Comp in merger activities.

The development of the European merger control regime and its four parts, is significant to the understanding of Commission-firms relationships. This brief description indeed shows the importance of the business community in the merger control regime. From the content of the regime, I turn now to study the aspirations of a European regime, in terms of economic endeavours and traditions from Member States that need to be articulated in the design of pan-European tool – adding a new layer to policy-making and enforcement. These considerations are of importance to

[107] The Court of First Instance ruled in July 2007 that the seriousness of the errors was so great to justify that Schneider deserves compensation. Judgement of the Court of First Instance of 11 July 2007, Schneider Electric SA v Commission of the European Communities, Case T-351/03.
[108] The Commission subsequently announced its intention to appoint a chief economist for the competition directorate and dissolute the Merger Task Force as a separate unit (Vickers 2004).
[109] COM(2001) 745/6 final, 28 March 2002.
[110] Significantly Impede Effective Competition

understand the role of the various stakeholders – roles that will be described in the subsequent section.

2. The various rationale for a European merger control regime

2.1. A pan-European merger control regime

The economic rationale for a merger control system can be presented according to two divergent schools of thoughts – the divergence has clear policy implications (see Furse 2004). On the one hand the Harvard School favours competitive environments, and its main concern is the avoidance of anti-competitive structures. Yet free markets – i.e. uncontrolled – should not be sought as they can foster the emergence of economic concentration and dominant market position. Intervention allows competition to be maintained. The Chicago School, on the other hand, assumes that free markets result in the best outcomes, even in the event of economic concentration and dominant positions. The School rests on the concept of potential competition. Accordingly competition policy should enable new competitors to enter markets – and entry barriers to be avoided.

Another question that needed addressing focused on the enforcement of a supranational competition law when national experiences were scarce. In Europe, at the time of signing the Treaty of Rome, Germany accepted, and competition law played a minimal, if any, role in government policy and in the business decision-making[111]. It was therefore widely expected that Community competition law provisions would not be seriously enforced. The fact that competition law came to play such a significant role may be explained, at least partially, by the recognition that it represented a potentially valuable tool for achieving the Community's central mission of economic integration. Indeed the inclusion of competition policy represented one of the pillars upon which the Community was to be constructed, and an integrated part of its 'economic constitution' (Cini and McGowan, 1998). Dismantling trade barriers between Member States is meaningful as long as they are

[111] See 6th Report on Competition Policy - 1976

not replaced by anti-competitive behaviours – be it in the form of private or public trade barriers.

Another issue concerned the nature of the system - Was it to be a legal instrument or a political one? Here two quite different images of competition law drawn from fundamentally different national experiences confronted each other (Wolf 1997). European competition policy resulted in a combination of diverse state traditions (Gloeckler 1998). Germany's policy encompassed liberal aspirations and a tendency towards '*Ordnungspolitik*' rather than '*Interventionspolitik*', following the US administration post-1945 strong emphasis on anti-trust rules. The German participants tended to view a competition law system as fundamentally juridical: legal analysis should be the primary guide to decision-making. Constitutional substance can undoubtedly be found in Articles 2 & 3 (f) EEC, which clearly tied competition to the common market and European economic and social aspirations (Wolf 1997). In addition, they had recently worked through these issues in a decade-long controversy over the introduction of their own competition law.

The competition law systems of the other Member States, if any, was usually based on 'administrative control' or the 'industrial policy' model in which political rather than juridical processes were dominant. The French, *via* a ministerial decision-making process, tended to see competition law in political terms. They would expect to base Community decisions on the evaluation by officials of the needs of the Community and its Member States at a given time. A strong tradition of interventionism and 'dirigisme' was reflected in their values and methods (Gerber 1994).

In 2006, Neelie Kroes, the current Competition Commissioner, reflected on the tension between competition policy and industrial policy in Europe in the following terms[112],

> *'Industrial policy and competition policy! For Europeans just putting these two notions in one sentence still tends to conjure up a great ideological divide. A divide between Colbertian "dirigistes" and economic libertarians. On the one hand, a faith in the ability of governments to successfully build, direct,*

[112] Kroes, N. (2006), 'Industrial policy and competition law & policy', Fordham University School of Law, New York City, 14th September 2006.

> *and protect the supply side of the economy. On the other hand, a belief that markets should be subject only to rules to guarantee a level playing field, but that they are otherwise best left to their own devices. This ideological divide has always been something of a caricature, but it has lasted because there is some truth underlying it. And as a result, to put it bluntly, "industrial policy" has been rather bad-mouthed by the advocates of competition policy'.*

Merger control is an instrument that, as a policy tool, can potentially reshape market structures. The experience of Brittan[113] , then Competition Commissioner, at the inception of the Merger Control Regulation reflected the different approaches. Indeed, as explained, Member States and Ministers tended to see merger control very differently. It was considered as a tool of industrial, regional and social policies, a way of shaping industrial structure and location, and an opportunity to create European champions to compete overseas with American and Japanese giants. Others saw merger control as a pure expression of competition principles – accordingly, monopolisation and market domination should be stopped, and everything else should be allowed to proceed. These considerations were particularly manifest in the *de Havilland*[114] case. On this occasion, the then French Minister of Industry and Telecommunications, Mr Gérard Longuet, demanded that the Commissioner for Competition Policy, Sir Leon Brittan, resigned, and that the merger regulation revised to allow for national industrial policy concerns (see Laudati 1996). Sir Leon Brittan at the 2000 IBA conference reminded the audience of the different approaches to a European Merger Regulation,

> *'I was determined that the Merger Regulation should not be used as a way of imposing an industrial policy on Europe, although there were quite a number of participants in the debate who wanted to do just that. Whether it was because they wished to create European champions, or wanted to allow social considerations to have an important impact, they wanted the wording of the Regulation to be sufficiently broad for the Commission to be able to consider matters going well beyond the effects of the merger on competition in the relevant market. In the end, the supporters of an industrial policy were effectively beaten back, and the Regulation gives clear primacy to the competition criterion, with only the smallest nod in the direction of anything else'*[115].

[113] Brittan, L. (1991), 'The development of Merger Control Regulation in EEC Competition Law', in Brittan, L, *Competition Policy and Merger Control in the Single European Market*, Hersch Lauterpacht Memorial Lectures, Grotius.
[114] Commission decision IV/M.053, *Aerospatiale/Alenia/de Havilland* (1991), OJ L334/42.
[115] Brittan, L. (2000), 'The early days of EC Merger Control', in European Commission (eds.), *EC Merger Control: Ten Years On*, International Bar Association.

2.2. The difficulties of controlling mergers

The basic requirements of a Merger Control Regulation were self-evident to the Commission: clear substantive rules providing criteria for prohibition and clearance; prior notification, and clarification of the relationship between Community rules and national law (Brittan 1991). From a broader perspective, merger control relates largely to comparing perfect competition and pure monopoly in terms of relative efficiency, discussion showing the inherent inefficiency of monopolistic structures (Kemp 1999). Indeed, according to economic theories, monopolies reduce output, increase price and reduce welfare in comparison with perfect competition. However, this purely economic result depends critically on the assumption that 'other things are equal'. In particular, it could easily be contended that subsequent monopolisation costs are unlikely to remain unchanged. Mergers can arguably be beneficial by fostering economies of scale. Large-scale production is generally considered as technically more efficient. Further analysis suggests that there is indeed no theoretical justification for condemning monopoly and/or mergers from the outset, since output reduction needs to be considered simultaneously with reductions in costs, which in turn can be passed on to consumers.

Consequently determining mergers' knock-on effects require caution. Ideally, any reservations regarding merger economics would need to be taken into account whilst attempting to design policy. Economic theory solely does not suffice to present clear-cut parameters to condemn mergers outright. Indeed in light of economic theory we can conclude that lack of competition can lead to both market inefficiencies as well as benefits of lowering production costs. Empirical studies have not yet given any conclusive results as far as the implications of mergers in terms of losses and benefits are concerned. It becomes difficult to envisage a policy embracing all of those concerns, and as a matter of fact the role of economics in Commission decision-making processes has been advocated for[116] - this has been addressed to a certain extent by the recent reorganisation of DG Comp. Still few governments feel at ease with intervening in merger policing as it involves direct intervention in the legal

[116] See http://www.theepc.be/en/default.asp?TYP=TEWN&LV=187&see=y&t=&PG=TEWN/EN/detail&1=1&AI=472

corporate activities. Politics, as much as economics, are important components to the shaping of merger policy (Kemp 1999).

The fundamental premise of the European Merger Control Regulation is spelt out in Article 2(3) which states that '*a concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market shall be declared as incompatible with the common market'*. Dominance in itself is therefore *not* condemned by European provisions taking into account the aforementioned considerations. It is worth noting that the Regulation applies not simply to mergers, in the technical sense, but to all concentrations, whether a) through the acquisition of shares or assets, including situations where an undertaking acquires control (defined as the possibility of exercising decisive influence) on its own, or b) jointly with other undertakings, over another undertaking, such that they can no longer be considered independent. This influence may derive from substantial minority shareholdings, but may also arise from a number of factors, individually or in combination, such as management agreements or close commercial links between the undertakings concerned.

2.3. The coexistence of European and national merger control regimes

In her study of the British merger control regime, Kryda (2002) firstly explained,

> *'The European Union decision-making framework [of controlling mergers] does not limit [national] merger control. The EU's threshold criteria are necessary to segregate jurisdictions between the supranational and Member States levels; otherwise, both systems would lose transparency, and firms would 'forum shop'. Once a merger meets the EU's thresholds criteria, the national regulators spin off*'.

Merger control is exercised by both the European and the national tiers of governance. The European Union as well Member States disposes of a merger control regime which is composed of substantive legislation, enforcement agencies and provisions for judicial review. The delimitation of the competences followed the calls for a 'one-stop shop' as explained previously. Overlapping competencies and parallel proceedings on different levels were supposed to be explicitly avoided (Brittan 1991).

The quantitative criteria were to ensure a relatively transparent split between the European Union and Member States levels. As the European Commission Notice on case referrals[117] explains,

> *'2. Community jurisdiction in the field of merger control is defined by the application of the turnover-related criteria contained in Articles 1(2) and 1(3) of the Merger Regulation. When dealing with concentrations, the Commission and Member States do not have concurrent jurisdiction. Rather, the Merger Regulation establishes a clear division of competence. Concentrations with a "Community dimension", i.e. those above the turnover thresholds in Article 1 of the Merger Regulation, fall within the exclusive jurisdiction of the Commission; Member States are precluded from applying national competition law to such concentrations by virtue of Article 21 of the Merger Regulation. Concentrations falling below the thresholds remain within the competence of the Member States; the Commission has no jurisdiction to deal with them under the Merger Regulation'.*

The discussions over boundaries between the competences, and allocation of responsibilities between different jurisdictions and referral mechanisms, were therefore crucial from the outset. In addition these issues remained the key component to the development of the European merger control system. The European merger control system has been in fact the result of a multitude of provisions and competent authorities, and their constant interactions.

The two levels of the European system are indeed in constant interaction and in fact highly interdependent (McGowan and Wilks 1995). Firstly, the Member State governments are participating in policy-making at the Council level. They have at their disposal formal powers in any major discussions with regards to a piece of legislation, and ultimate approval power. Secondly, national competition authorities (NCAs) and courts have become increasingly involved in the enforcement of Community law.

The amended 2004 merger Regulation only brought minor changes regarding competence allocation. The Commission published alongside the Regulation a Notice on case referrals[118]. The theme central to the Notice revolved around multiple

[117] Commission Notice on case referral in respect of concentrations, OJ C 056, 05/03/2005.
[118] *Ibid.*

notifications and a proposal towards a system of 'streamlined referrals' introduced to strengthen the principle of a 'one stop shop'. As announced in the Notice,

> *'5. The revisions made to the referral system in the Merger Regulation are designed to facilitate the re-attribution of cases between the Commission and Member States, consistent with the principle of subsidiarity, so that the more appropriate authority or authorities for carrying out a particular merger investigation should in principle deal with the case. At the same time, the revisions are intended to preserve the basic features of the Community merger control system introduced in 1989, in particular the provision of a "one-stop-shop" for the competition scrutiny of mergers with a cross-border impact and an alternative to multiple merger control notifications within the Community. Such multiple filings often entail considerable cost for competition authorities and businesses alike'*[119].

The Commission and the national competition authorities have therefore been aware of the inherent issues and ambiguities of the formal allocation of cases within the European merger control system, and consequently established in 2002 the European Competition Network (ECN). The latter network catalyses horizontal flows of information between the different national competition authorities. The existence of such a platform may facilitate, to a certain degree, the Europeanization of merger control practices.

However, it is worth reiterating that national competition authorities have constantly been involved in decision-making and policy making processes as far as the European merger control regime is concerned. The establishment of the ECN is understood to put focus on consolidating cooperation within, and thus strengthening, the system, rather than creating a new stakeholder involved in processes. In spite of all harmonisation and centralisation, the national systems have retained certain peculiarities and continue to pursue partly different goals (Maher 1996), as the account of the British and the French merger control regimes below demonstrates.

French and British competition policies remained for a long time under tight government control (Budzinski and Christiansen 2005). Indeed the first French legislation regarding competition that dates back to 1953 was closely linked to the price controls regime, and it was seen as little more than window-dressing. It was

[119] *Ibid.*

revisited in 1977 which was the first attempt at the establishment of a merger control system. The UK's competition regime was first enacted as early as in1948. In addition it was the first European country to establish merger control rules in 1965. However the powers of the competent authority – the Monopolies Commission – were limited by the fact that only the government could issue formal requests to act upon. However both regimes have evolved, as will now be discussed.

The important reform of the French competition regime was introduced in 1986 following the enactment of the *Ordonnance n° 86-1243 of 1st December 1986* on *'price freedom and competition'*. The latter specifically introduced a complete and coherent merger control regulatory system in France – *Titre V de la concentration économique* and creating a competition regulatory body – *Le Conseil de la Concurrence*. This *Ordonnance* was replaced in 2000 by the New Economic Regulations[120] adopted in 2001 and effective from May 2002.

The French authorities in charge of merger control are, on the one hand, the Minister of Economy and Finance via its administrative arm – the DGCCRF[121] - and, on the other, the *Conseil de la Concurrence* – French competition regulator created by the 1986 *Ordonnance.* In effect a transaction – within the scope of the turnover thresholds set in the New Economic Regulations – is to be notified to the Minister for Economy and Finance. The DGCCRF has five weeks to investigate the case. The Guidelines issued by the administrative body explains that pre-notification is welcomed. If parties present measures to solve competitive problems in the defined market – the so-called 'remedies' – the DGCCRF has an added two weeks to consider them. At the end of this first phase, equivalent to the European one laid out in Council Regulation (EC) No 139/2004, shown in Annex 1, the Minister will approve any transaction that, importantly, does not adversely affect competition in the market. If the competent authority has serious concerns about the transaction, the investigation will enter a second phase that includes a referral for opinion to the *Conseil de la Concurrence*. The referral is a *'preparatory act and does not constitute a decision in itself capable*

[120] *Les Nouvelles Régulations Economiques*, NRE.
[121] *Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes* – the Directorate General for Competition, consumption and Fraud.

of being appealed for abuse of power'[122], and does not anticipate the Minister's decisions. On the basis of the first phase investigation conclusions with the opinion issued by the Competition regulator, ultimately the final decision is issued by the Minister.

The UK regime has also evolved substantially since the 1965 Monopolies and Mergers Act which had formally extended the jurisdiction of the Monopolies Commission to the regulation of mergers. In 1973 the Fair Trading Act laid a more adequate administrative function with the Office of Fair Trading (OFT) advising the Secretary of State on decisions. In July 2003 the UK regime underwent a reform with the enactment of the Entreprise Act 2002 provisions. The new regime has three objectives in mind: 1) the extrication of political influence from the process of merger control, 2) the instigation of procedural reforms to leave the regime more open and transparent, and 3) the installation of an exclusively competition-based standard against which they might be pursued. Interestingly the UK merger control regime has remained relatively unaffected, at least in formal terms, by the parallel existence of control established at the European tier of governance. A merger is firstly under scrutiny of the Office of Fair Trading (OFT). A decision of referral to the Competition Commission may be made by the OFT in cases of further investigation. Any merger that may result or may be expected to result in a substantial lessening of competition (SLC test) in the UK market must be referred.

In competition matters, it is generally accepted that the UK is in favour of strong competition rhetoric whereas France prefers an 'industrial policy' rhetoric[123]. In 1996 Schmidt used the examples of European competition policy to evaluate the impact of European integration on French government-business relations (Schmidt 1996). Accordingly, French business and government officials resented the 'Anglo-Saxon' inclination towards liberal economic ideology that they felt had spread through DG Comp (then DG IV) especially under Sir Leon Brittan. Despite supporting European integration, a majority of French CEOs showed hostility towards European competition policy. The *de Havilland* case was perceived as a decision based solely on 'liberal' grounds – as in the impact of a takeover on world

[122] Conseil D'Etat, Sogebra case, 9th July 2003.
[123] Ibid.

competition – rather than on the position Aérospatiale would acquire in comparison to its main competitors (Dumez et al. 1992). French business and government officials supposed wrongly that the process was political, not technical, and failed the European lobbying exercise, not providing sufficient technical information at an early stage when it might have swayed the Commission (Dumez et al. 1992).

The question of independence of merger control regimes epitomises this difference. In the UK the Competition Commission[124] – an independent body - is in charge of investigating national mergers. An independent competition authority – *le Conseil de la Concurrence* – was set up in France in 1986. However, the French merger control regime remained within the remit of the competences of the Ministry of the Economy, Finance and Industry[125].

The choice of the country where head offices are based is particularly decisive to the understanding of Franco-British differences towards mergers. When Michel Pébereau proposed the merger between BNP with two other French banks (Paribas and Société Générale) during the summer of 1999, he promised to create '*a global banking group which will have its decision-making centre in France*'[126]. These words were not aimed at the shareholders constituencies of the three banks, as foreign investments owned about a third of their capital, but they were aimed at the government which support Michel Pébereau, and hoping to push Société Générale to accept its offer. This argument seemed to have convinced them as '*the SBP – Société Générale – BNP – Paribas project has always been favourably regarded by the High Administration*'[127]. In contrast, the proposed merger between Barclays and ABN Amro – and the suggested establishment of the new entity head office in the Netherlands – showed, firstly, how much importance is given to such 'psychological'

[124] The Competition Commission is an independent public body established by the Competition Act 1998. It replaced the Monopolies and Mergers Commission on 1 April 1999.
[125] As explained previously, the General Directorate for Fair Trading, Consumer Affairs and Fraud Control (DGCCRF) is in charge of the enforcement of merger control rules. *Le Conseil de la Concurrence* is an adviser in the Phase II cases to the Minister of the Economy, Finance and Industry.
[126] Faujas, A. (16 March 1999*), 'Faut-il avoir peur des entreprises sans frontières?'*, Le Monde – Economie, p.I.
[127] Santi, P. (7 August 1999), 'BNP a obtenu finalement 65.1% de Paribas et 36.8% de la Générale', Le Monde, p.10.

moves[128], and secondly, how less protective the British government may seem to be of its firms. Clearly Pébereau played the national card that certainly works in France, when in Britain this card may be second to that of the intrinsic value of the transaction for the economy as a whole. Although this comparison of government-business relations draws on the financial services sector, other examples such as the Centrica-Gazprom suggested merger in Britain[129], and Suez-Gaz de France[130] reflect similar conclusions, as well as the aborted takeover of Danone by Pepsico[131].

Such differences will undoubtedly impact the way firms interact with competent competition authorities. Yet, the European level of governance in the control of concentrations has probably also had an impact on firms. This will be the focus of the Chapter 4 of this thesis entitled 'Comparing French and British corporate political strategies'.

2.4. The 'soft' development of the European merger control regime

[128] Head offices may have been established in Amsterdam, yet the new group would still have been supervised by the British authority – the FSA – and not the Dutch one.

[129] In Spring 2006, the government was reported to be considering modifying UK merger control regime to keep Gazprom out because of energy security worries. Alan Duncan, shadow trade and industry secretary, epitomised the mood, "*There should be no question of Gazprom being able to buy a UK utility without at the very least the company's management being decoupled from the Russian government*". Tony Blair, the then Prime Minister, ruled out blocking the merger.

[130] The French government orchestrated the merger of Suez SA and the state-owned Gaz de France in order to pre-empt Italy's Enel which was considering putting an offer for Suez. The merger creates the world's second largest energy utility. De Villepin, then Prime Minister, announced the transaction in February 2006, explaining, 'that given the strategic importance of energy, the fusion of Gaz de France and Suez seems today to be the most appropriate path'. Italy's government labelled the move as a declaration of war, 'we still have time to stop this race by the European states to build protective barriers'. See http://www.abcmoney.co.uk/news/2820062044.htm.

[131] Rumours of a hostile takeover bid from the US company PepsiCo for the French group Danone lead to a heated political debate in summer 2005. Although the threat never materialised the Economist labelled France 'a land where protecting the 'culture' has come to mean saving the national yoghurt from PepsiCo'. As a result the then Minister of the Economy, Finance and Industry, proposed the introduction of a new legislation on takeover bids. The *Décret n° 2005-1739 du 30 décembre 2005 réglementant les relations financières avec l'étranger et portent application de l'article L.151-3 du code monétaire et financier* is inspired by what has been dubbed the Danone amendment, which includes:

- for the company launching the takeover bid, the obligation to state its intentions to the Financial Markets' Authority (Autorité des Marchés Financiers – AMF).
- for the company that is being bid for, the option of issuing stock purchase warrants.

The legislation aims in effect at deterring takeover bids that are either hostile or motivated by speculation by increasing the targeted company's capital through the issuing of stock purchase warrants, and the raising of the price to be paid by the bidder.

The term soft law is used to describe any system of regulation other than the traditional process – explained previously – which involves a democratically elected legislature making laws which are then enforced through the civil or criminal procedure of the courts. Soft law, therefore, encompasses a broad range of quasi-legal activities, from pure self-regulation by a single company, through trade association codes of practice and codes developed under powers given to a body by statute, or 'guidelines'. Soft law is flexible and adapts to new conditions in the market more easily than traditional regulation. The regulator is expected to be responsible for ensuring that the codes are regularly reviewed to make sure they deal with current problems.

During the first decade of the EMCR, the role of the Courts has been little more than of a procedural nature. Although some cases were brought to the Court, no major follow-up – in the sense of 'grand bargains'- was seen. The distinction between day-to-day policy-making and grand bargains is key, as well as the ECJ dependence upon its external environment. Indeed without firms or Member States going to Court against the Commission, the ECJ remains a silent witness. Therefore, as far as the judicial process is concerned, the autonomy of the Court is undisputable, but not as far as the broad institutional context is concerned.

The use of soft law at the Commission level, most notable in the case of competition policy (see Van Waarden & Drahos 2002), echoes the importance placed on judicial decisions. In the case of merger regulation, the concept takes different forms: codes of conduct, notices, declarations, guidance notes/guidelines, and circulars, for example. Some of the concepts highlighted in the Court's decision are usually incorporated in those notices, or remain informally enforceable as the concept of collective dominance.

Some notices, based on case-law, further enhance the merger procedural process. Some authors have talked about constitutionalisation of the Treaty – henceforth giving a key role to European Courts to play in European integration. Path-dependency is an enlightening concept at this stage (Amstrong 1998). Accordingly integration is limited and facilitated. Past decisions have an effect of future developments. It echoes a 'politics under law' perception of the role of European

Courts. Guidelines, notices or block-exemption regulations and established decision practice by the competent authority as well as judicial precedents can qualify as rules, because they provide guidance beyond the individual case. This refers to the debate between the rules of reason against per se rules[132].

2.5. Liberalisation and the unity of the Common market

Competition policy is one of the most integrated areas of EU policy-making. However, the Commission has long faced criticism for failing to place consumers at the centre of its approach to competition. As Cini et al. (1998) explained, '*it is clear that the economic or consumer rationale behind European competition policy is not the only justification for the policy […] the promotion of competition at the supranational level was not an end in itself, but was a means of promoting a whole range of European-level objectives'*. Critics claim that it pays too much attention to competitors and too little to the needs of the consumers when reaching decisions in competition cases. Only in the last couple of years has the Commission stated that the competition policy is to benefit consumers. The appointment of a consumer liaison officer shows greater commitment to integrate consumer opinions to individual cases. In its 2004 communication on a 'proactive competition policy'[133] the European Commission explained that '*competition policy contributes to the process of opening up monopoly sectors (e.g. telecoms, energy, transport) to competition […] It encourages Member States to lower barriers of entry on all regulated sectors*.'

The adding of a new layer of governance has been key to the development of a European market as the 'integrative imperative' expresses. As mentioned in both previous sections the business community has used various channels to be active in the European merger control regime. By identifying the various stakeholders upon which the European merger regime rests, the next section will therefore identify where access points are available for the business community to engage in the European merger system.

[132] See http://www.eale-slovenia.org/papers/Christiansen-Kerber.doc.
[133] European Commission (2004), '*A proactive competition policy for Europe'*, Brussel, 20.04.04 COM(2004) 293 final, p.6.

3. The predominance of European institutions

The centre of gravity of the European competition policy lies with the bureaucratic and judicial institutions of the EU rather than the political and representative institutions. The roles of the European Parliament, Council of Ministers, and European Council are relatively limited.

Legislation in the Council has of course been required to establish regulatory powers and to extend competences. Yet the amount of legislation required to put in place the merger control system has been fairly small in comparison to other areas of policy-making, and correspondingly the Council and European Parliament have had few opportunities to shape the contours and content of competition policy. The bulk of day-to-day activities, and even strategic initiatives, are carried out without formal recourse to the Council (McGowan 2000).

That is not to say that there are not extensive contacts with member governments. National authorities have been (and will increasingly be[134]) involved in both individual cases and broader policy definition, while, more informally, ministries and ministers will lobby at both the administrative and political levels, as current cases show (Italian and Spanish cases for instance). The Commission, however, does not need to engage on the same level of negotiations with Member States as in other areas of policy for furthering policy. Indeed the European merger regime relies on the day-to-day decisions as well as the Regulation, and the European Commission is in charge of the enforcement. The possibilities for Member States to clip the wings of European competition policy are therefore limited to the Intergovernmental Conferences (IGCs) (McGowan 2000).

3.1. The European Commission

Institutionally, few areas of European policy-making see the Commission in a more central and autonomous position than in competition policy (From 2002). In

[134] See 2003 Competition Law Forum paper titled 'cooperation within the European Competition Network', available at http://www.biicl.org/files/1107_cooperation_within_ecn.pdf

addition to playing its traditional role of treaty guardian and policy initiator the Commission exercises a strong regulatory role as well.

The European Commission is well-known for being understaffed and constrained by scarce resources as has already been mentioned in Chapter 1. With an exponential increase in merger notifications and over a million pages of documentation submitted by companies in support of a deal[135], the European institution is under immense pressure, which provides possibilities for non-governmental actors to interact with Commission officials. The Commission's hunger for information and its lack of time and financial resources open a window of opportunity for interest representation (McGowan 2000). The Merger Regulation unit (Directorate B, ex-Merger Task Force) is no exception. Case-specific interactions take place on an everyday basis in DG Competition between the different stakeholders – law firms, firms, on the one hand, and Commission officials, on the other. In parallel, economic and legal experts keep the competition debate alive. The epistemic community influence underlies moves towards economic reasoning in competition policy in the past ten years (McGowan 2000).

The literature has defined the Commission as either an independent regulator (Majone 1996, McGowan & Wallace 1996) – a bureaucracy under pressure that might be captured by external interests (Mazey and Richardson 1996); or a body whose power is derived from policy network membership (McGowan and Wilks 1995), and therefore looks to other actors for information and collective intelligence – the view expressed in Chapter 1. Although the institutional provisions have indeed allowed for the Commission to act as a quasi-federal agency (Cini & McGowan 1998) in competition matters, only subject to judicial scrutiny, clearly external pressure is key. As one of my interviewees explained, *'to a certain extent all institutional elements are present, yet DG Comp functions as a technocratie'*[136]. In merger control regulation, protagonists are expected to interact at the different stages of the regulation life cycle – in instrument design as well as in operational matters.

[135] Bannerman, E. (2002), *The future of EU competition policy*, CER publication, p.10.
[136] Interview with author, Luxembourg (CFI), 29th June 2006.

3.2. The European Courts of Justice

As aforementioned the Commission is not a law unto itself in making competition policy. As in other areas it is subject to legal challenge. The European Courts of Justice adjudicate on the basis of complaints from the Commission, member governments, or firms, or in response to a referral from a national court. Overall the trend in the jurisprudence in respect of merger control has been to strengthen the role of the Commission for a long time. The ECJ and the CFI had been generally found in the Commission's favour and some landmark cases (such as *Continental Case* in 1973 and *Philip Morris* in 1987) expanded the scope of its 'supranational' responsibilities (From 2002). As previously explained the European Courts have recently been thoroughly scrutinising the Commission's judgements and overturned them. Up to 2002, the Courts had mainly circumscribed and criticised the Commission on procedural grounds[137].

The Courts took a pragmatic view, relying on the principle of *effet utile*[138], regarding the special characteristics of competition law and ensured the system was an important medium of integration and this at the moment all too often dismissed by the European literature. Indeed the 1960s and 1970s are often dubbed as *stagnation* and *sclerosis* as far as other EU institutions are concerned. In the latter period however, the Court had laid the foundations for the development of a comprehensive competition law system, as mentioned in the first section of this chapter. It articulated a broad conception of competition law as important to the process of integration, and its decisions in this area sought to make that conception viable and convincing[139].

Since the *Grundig* case[140], the Commission's windows of policy opportunity[141] have come from the ECJ's willingness to interpret the European competition provisions in a broad and generous manner (see also *Continental Can* case in the specific case of

[137] Indeed the *Continental Can* case pinpoints the ECJ attitude. Although the Court did confirm the use of Article 86 (EEC) in merger matters, the judicial body also penalised the Commission for not satisfactorily defining the relevant market.
[138] The need to achieve effectiveness of EC law.
[139] See cases such as *Aquiline Dyes*, *Consten-Grundig* or *Hoffman-la-Roche*.
[140] *Consten and Grundig v. Commission* (Cases 56 & 58/64) [1966] ECR 299, [1966] CMLR 418.
[141] The ECJ held that the object of the agreement was to eliminate competition at the level of supply by the wholesaler to the distributor. Therefore vertical agreements are clearly brought within the scope of Article 85(1).

merger control). Arguably, the ECJ's most important contribution to competition enforcement has been its espousal of market integration as the determining principle in its competition judgements. Although this is now largely taken as a given, other principles, such as efficiency or consumer protection, might quite easily have been prioritised at the expense of the single market. In placing market integration at centre stage, the ECJ identified competition policy as fundamental to the European integration process, giving the Commission scope to increase its competition competence. The European body conveyed a clear message that this goal-driven methodology was not merely to be one of many principles to be used in interpreting the treaty, but rather the dominant interpretative method.

This espousal played a determining role in the inception of a European Regulation to control mergers. The Court of Justice was the catalyst for change. The comforting position that Article 85 (EEC) had no application to mergers, following the *Philip Morris* case, had upset the established regime. If the *Philip Morris* ruling[142] did not provide for an effective merger control regime, it created such an uncertain environment for the industry that corporate actors joined the existing alliance promoting supranational solutions to merger regulation (Bulmer 1994). Unlike the *Continental Can* case, companies started to adapt to this new environment when norms and rules were not clearly defined. Plans for mergers were notified voluntarily to the Commission. And indeed, the Financial Times reported, 25 formal decisions on mergers and 36 written clearances from the Commission[143] by 1989. The uncertainty towards merger regulation was further intensified by the Commission action towards the British Airways/British Caledonian merger (1987)[144], and the GEC and Siemens/Plessey[145] (1989).

[142] In 1981, Philip Morris Inc. bought from Rembrandt Group Ltd. one half of Rembrandt's controlling interest in the Rothmans Group. Following the complaint of three other tobacco companies the Commission commenced the proceedings under Article 85 and 86 (EEC). Philip Morris and Rembrandt twice amended their agreements and the Commission eventually decided to close proceedings and to reject the three complaints on the grounds that the amended agreements did not infringe the Treaty rules. BAT and R.J. Reynolds challenged the Commission's decision and the Court of Justice gave judgement on 17 November 1987

[143] FT, 6 Feb 1989

[144] In this case the Commission significantly strengthened the conditions for allowing the merger after a weak response by the UK competition authorities (the MMC). The decision created uncertainty regarding the geographical scope of the Commission's investigation powers.

[145] This transaction highlighted difficulties inherent to multiple jurisdictions being responsible for decisions, and not having a one-stop-shop for European-wide mergers.

Moreover there was much less belief in old-fashioned industrial policy where politicians and bureaucrats sat in their offices playing with industrial structures much as children do with Lego sets (Brittan 1991). The Commission's prestige as a responsible and effective enforcer of competition policy was riding high. Finally the European executive arm fully exploited the ambiguities of the *Philip Morris* judgement, and the resulting uncertainty was used skilfully, particularly by the then Competition Commissioner, Mr Peter Sutherland, to persuade Member States to return to the negotiating table on a new draft of the Regulation first proposed by the Commission in 1973.

Yet the Commission manages issues through the legislative route, as the judicial route can prove burdensome. It takes approximately six months for the Commission to intervene at the Member States level. From the moment a formal notice from the Commission is issued a Member State has two months to reply. The reply needs to be reviewed by the Commission to ensure that it is reasonable. A Commission proposal to take action against a Member State is reviewed by the College – on infringement procedures matters the College of Commissioners only meet four times a year, although there are some exceptional meetings that can be scheduled. Infringement procedures can be done on the basis of Article 56 or Article 226 of the Treaty. Then the case is with the Court and from then on it can take two or three years to get a settlement. This is a difficult instrument to use for the Commission. Another problem linked to the previous reasoning is the presentation of the case. Should it be done on the basis of Article 21[146] of the EU Merger Control regulation if the intervention of a Member State is supposedly contrary to the Treaty and cannot be justified on prudential grounds or Article 226 as will be explained

[146] Under Article 21 of the EU Merger Regulation, the Commission has exclusive competence to assess the competitive impact of concentrations with a Community dimension. Member States cannot apply their national competition law to such operations. Moreover, Member States cannot adopt measures which could prohibit or prejudice (*de jure* or *de facto*) such concentrations unless the measures in question:

- protect interests other than competition, and
- are necessary and proportionate to protect interests which are compatible with all aspects of Community law.

Public security, plurality of media and prudential rules are interests that are recognised by the Merger Regulation as being legitimate, but specific measures must still be proportionate and fully compatible with all aspects of Community law.

below? The cooperation between DG Market and DG Comp is clearly key to resolve such legal conundrum.

The Article 226 could be used very quickly against the Spanish government. But the fact that it all ends in Court is problematic. However a certain 'announcement effect' accompanies any public statement. On the basis of the Commission announcement and action private parties can go directly to national courts and appeal the decision – as it is incompatible with EU law. This was the case in the Endesa case – parties went to the Tribunal de Commerce and the Supreme Court. When the Commission takes a Member State to Court, it is not an ideal situation, and 1) it should be avoided, as the Commission aims for minimum friction, and 2) open discussions are initiated between the services and the Member States to avoid such situations and resolve problems. Therefore the number of cases that actually go to Court is limited compared to the number of proceedings/open discussions that have occurred. The information has to go to the Member States and therefore the Commission is responsible for ensuring the truthfulness of the information that may be given informally or formally by the Member States but also the firms. However there are limits to what the Commission can do with limited information.

3.3. The Member States

Although the role of the Commission, and to a lesser extent the European Courts of Justice, are central in the merger regulation, Member States have been able to leverage some political influence. The absence of merger control provisions in the Treaty of Rome reflected to a certain extent Member States preference with regards to economics and institutional considerations at that particular time. Moreover intergovernmentalists are certainly right to focus on Member States in the grand bargains as far as the EMCR is concerned, as shown by the delays of the initial Regulation and its subsequent amendments. Member States are also able to invoke Article 9 for a case to be referred to their national authority – the subsidiarity principle is also present in the Commission's attitude. Moreover national authorities have also always retained a consultative role in the merger review as part of the Advisory Committee on Restrictive Practices and Policies and the Advisory Committee on Mergers or as part of the European competition network (ECN).

More importantly, Member States have been involved in the shaping, to a certain extent, of the European merger regime, notably in its judicial aspect. Indeed some Member States have intervened in judicial proceedings in favour of national firms. As will be discussed in my comparative chapter (Chapter 4) cultural differences affect the terms under which Member States interact at this level. However, at this stage, it is important to note that Member States also take part in the enforcement of the merger regulation. For instance the French decree (the so-called 'Danone amendment', explained earlier in this chapter) regarding takeovers is symptomatic – and the traditional reflex some Member States have. Other Member States are also extremely keen to protect their national security. However the Commission and Member states have also bilateral discussions to smooth interpretations mishaps. It is clear that Member States are quite active in engaging with the Commission to expose their views and interpretation of rules, or explain decisions more thoroughly.

Yet the Commission is particularly proud of the independence it has achieved over the years in competition policy. Therefore the European body has been reluctant to become influenced by national capitals. This chapter therefore acknowledges the impact of the day-to-day running of European affairs through the cases and soft law instruments *inter alia*, on the EU merger control system, alongside more important reviews of the European regime.

3.4. The industry

Most forms of consolidation alter market structures and thus competition. Mergers can be divided into three broad categories (see Annex 4 for more detailed explanations): 1) horizontal - mergers between firms at the same level in the economic chain, for example, two manufacturers merging, or two wholesalers, 2) vertical - mergers between firms at different levels, such as a manufacturer merging with a distributor or *vice versa*. Where a firm at a higher level takes over one at a lower level (nearer the ultimate consumers) it is 'forward integration', and where the reverse obtains, it is 'backward integration', and 3) conglomerate - mergers falling outside both the aforementioned types of mergers, as where a firm seeks to diversify its activities by spreading into another industry. In all three cases mergers alter the

structure of industries, in that they alter the direct or indirect ownership of enterprises. The European merger control regime therefore represents the framework within which corporate restructuring takes place and can, in short order, force a radical change on companies involved in corporate restructuring or indeed force a change on a whole industry (Heim 2003).

From the outset, at the drafting of the first version of the future merger control regulation, the Commission worked with representatives of industry, the legal profession, and national competition authorities to ensure that the merger regulation worked well. Firms welcomed a single EU-level procedure ensuring a level playing-field instead of having to deal with a number of procedures at the national level. Most companies complied fully with the notification requirement. But many actually complained that because of the law thresholds levels, many mergers and acquisitions had still to be dealt with multiple national authorities rather than benefit from the Commission's 'one-stop shop' (Dinan 1999).

Mergers were also taking place at an increasing pace and companies were, in any event, coming to the Commission for advice and clearance under Articles 85 (EEC) and 86 (EEC) as they believed that there was a real risk that these provisions might be used to stop mergers which the Commission regarded as detrimental to competition. Companies did not want to face a succession of test cases to probe the outer limits of the Treaty and were concerned with the run up to 1993 and its implications for the European economic landscape (Brittan, 1991).

The industry usually complained that they had to seek approvals from several national authorities[147] as well and that the establishment of a 'one-stop shop' in merger policy was needed, to reduce transaction costs and legal uncertainty. A single authority, the Commission, would examine and assess mergers having a 'Community dimension'[148] uniformly within a strict and short-timetable and with an exclusive Community-wide competence. Mergers which were of a dimension to have a significant effect within

[147] A classic case of multiple filling is the GEC Siemens bid for Plessey. British, French, German and Italian authorities, as well as the European Commission and four authorities outside the then European Community, were involved.

[148] The concept of 'Community dimension' expresses policy objectives fundamental both to the European Community generally and to the specific requirements of EMCR, encapsulated in Article 1.

the Community should be dealt with by a Community authority whose decision should be final throughout the Community, subject only to judicial review. As Cook argued, in large part the desire of businessmen in a Single/Community market to operate under one clear system of merger regulation at the E.C. level had prevailed over the concerns of Member States' governments to retain (sometimes well-tried) national regimes (Cook *et al.* 2000).

Obviously the rapidity with which the Commission reached its decisions following merger notifications was crucial for companies engaged in restructuring strategies. Tight deadlines had always appeared on the Commission agenda regarding the EMCR. Indeed time scheduling in the two-phase process of the investigation laid at the heart of the debate, reflecting the industry concerns.

The critical role of the industry from the outset is still very present today. Earlier in this Chapter I discussed concerns of the industry with regards to the revamp of the European merger control regime. The industry has monitored closely the regime development and participated actively to this development at each stage. Chapter 4 will explain the different strategies put in place to interact at different points of the EU merger control regime and at different stages of the public policy life cycle with the Commission.

Conclusion

The European Commission expected that some 55-60 mergers a year would need to be dealt with by the Merger Task Force, which was set up within the Competition DG specifically for this purpose. Merger activity has far outstripped this estimate. The intensity of merger activity affecting Europe has been the major influence on the inception of a European merger control regime and the development of the Regulation, as it formed the backdrop for the maturity of the policy.

The addition of a new layer of governance, particularly in the area of economic concentrations, proved a political and institutional challenge. Indeed political tension and industrial preferences had to be reflected in the design of a new instrument and its day-to-day running. Yet it is clear that merger control regulation has been one of the

successes of European policy-making – responding to a gap in the market and ultimately helping the unification of a European market and a level-playing field.

As the multi-level governance literature explains access points can be found at different levels. The examples of the French and British merger systems also show institutional differences between the layers of European merger governance. As a result firms are able to strategically choose which forums they should interact in to push for their preferred outcomes. The descriptions of the institutional framework and the historical developments show that indeed the business community has been active throughout the establishment and the development of the EU merger control regime.

Whereas my previous chapter was concerned with the establishment of an analytical framework to account for the design of corporate political strategies, this chapter sets out the context in which firms interact with governmental bodies in merger situations. Both chapters provide crucial elements to understand the rest of this research project. The next chapter represents the junction of my project. In light of my first two chapters, I have designed a research method project that will provide data to firstly compare corporate political activities, and at a later stage engage with the Europeanization literature.

Chapter 3

Research Design and Research Methods

The basic framework for analysis of corporate political strategies was explained in my first chapter. The present chapter will define the research design aimed at addressing research questions posed in my introduction on the nature of the interaction between firms and the European institutions in charge of the EU merger control regime.

This chapter will follow the view that research design is a 'blueprint' of research. Accordingly, the research design needs to take into account at least four basic components: what questions to study, what data is relevant, what data to collect, and finally, how to analyse the results (Yin 1994). This chapter is constructed around these four questions. Thus it will not limit itself to a mere logistical problem, but will try to uncover the logic behind my research project.

The project is, in terms of research methods, of a qualitative nature. The main drivers for such a choice will be identified in this introduction and referred to throughout this Chapter. Firstly, merger control related issues are secretive and notoriously difficult to research. As a result the literature on political aspects of merger control was scarce and no data was available. My research methodology was designed to generate new data in an environment difficult to access. Qualitative data gathering was expected to produce quality data and ensuring that I did not miss vital information that may come from semi-structured interviews. Moreover the qualitative research methodology has been carefully designed, as described in this Chapter, and can be easily reproduced by other researchers.

My first attempt at laying out my research strategy did not entail all the data collection procedures explained in this Chapter. The main component of my research strategy was a comparative geographical case study between French and British firms. However my first semi-structured interviews showed that solely relying on the

literature, notably the literature on French corporate political activities, would not provide the full picture of corporate political strategies – where internal considerations are as important as external ones. Yet the former considerations are much harder to uncover from a purely external observational viewpoint. In addition, the financial services industry started to rapidly consolidate – offering at the same time a rich contemporary research field. Although I kept the comparative case study element of my research design, I adapted my research strategy to include an ethnographic component – that of participant observation. As explained in this chapter, this research tool enabled me to generate data to confirm my framework for analysis, and detach the project from current theoretical propositions, in fact questioning the latter, as will be done in Chapter 5.

This chapter accounts for the research journey I took and explains the research design in terms of form - the questions that the project is investigating – which in turn has an impact on the data to be collected and the choice of the research strategies, and therefore the substance and the results produced. I will discuss qualitative and quantitative research methods. Throughout the text I attempt to evaluate the research strategies used balancing merits against weaknesses.

1. Questions to study

The purpose of the research questions posed at the beginning of this thesis was to firstly provide a sound basis for this project and, as a result, to generate actual evidence to study corporate political strategies, in the case of French and British firms. The framework, as designed in my first chapter and the results of my comparative study, will in turn be analysed in terms of Europeanization of interest intermediation.

My research project is original in the types of questions it asks. As my previous chapters noted many academic contributions on interest representation are focused on collective action problems, whereas my own focus is corporate behaviours in political activities – and therefore joining an association, for instance, represents one strategy, out of the possible ones available to firms. Therefore the nature of the relationship with European institutions and the choice of the type of relationship is of prime

significance. This question underlies the emphasis put on studying the nature of linkages within governance constructs.

The organic concept of organisations is a synecdoche for all living and adapting units. The apparent distinctiveness of organisation behaviour is resolved by seeing it/them as mere cases of general principles of evolution, adaptation, and/or natural laws. Deciding what is to count as a unit of analysis is fundamentally an interpretive issue requiring judgment and choice. It is however a choice that cuts to the core of qualitative methods – where meanings rather than frequencies assume paramount significance.

This research project attempts to supplement previous academic work and, building upon previous conclusions, tries to explain different corporate political strategies; as a result it hopes to make wider conclusions with regards to Europeanization. The latter concept is generally accepted to be a dynamic process rather than a static form. The research construct was designed with this is in mind. Moreover because of the nature of the context studied – European merger control regulation – I am able to provide a cross-sectoral view, whereas many studies are confined to a particular sector.

1.1. Ontological considerations

Methodology is scarcely defined in research methods publications. It was defined by Hall in a 2003 contribution to a larger volume, as *'means scholars employ to increase confidence that the inferences they make about the social and political world are valid'*. He further explains that one of the most methodologically researched inferences rests upon causal relationships when one variable or event exerts a causal effect on another. This definition suggests, however, a determined path of deductive research and leaving aside inductive research. This is too limiting to encompass all methodologies, as will be further discussed below.

My first chapter on corporate political strategies has concluded on three core interdependent elements –staging, arenas, and vehicles – that establish a framework for analysis within the wider strategy design scheme, on the basis of Hambrick and

Frederickson's strategy framework. These elements were to come together following the identification of the message to convey. In this context, the distinction, touched upon earlier, made between inductive and deductive considerations in research methods is to be apprehended. Patton explained (2002),

> *'Inductive analysis involves discovering patterns, themes and categories in one's data […] in contrast to deductive analysis where the data is analysed according to an existing framework'.*

Although I have established a framework for the analysis of corporate political strategies, my project, centred on the Europeanization of these strategies, remains inspired by inductive research methods. This project follows a grounded theory's research type – the theory on Europeanization is developed inductively from a pool of data gathered by participant observation as will be explained in the following Chapters of this thesis. In order to construe on the problem of Europeanization in the context of the European merger control regimes, I have undertaken to study the patterns, themes and categories of my data. Such an endeavour is consistent with an ethnographic research method.

Methodological considerations underpinning this project such as ontological and epistemological questions need discussing. Both meta-theoretical concepts underlie all research inquiries (Bates et al. 2007) as they are both concerned with knowledge and the production of knowledge. Hall (2003) further explains, *'ontology is ultimately crucial to methodology because the appropriateness of a particular set of methods for a given problem relates to assumptions about the nature of the causal relations they are meant to discover'*. Ontology questions 'the very nature of 'being'' – the nature of the social and political reality (Marsh et al. 2002). Entities can therefore be conceptualised as either existing independently of social actors or as being constructed by social actors. Epistemology *'reflects [the researcher's] view of what we can know about the world and how we can know it'* (Marsh et al. 2002) – the fact that the reality is out there independent of observation. The literature offers competing views regarding the directional relationship between ontology and epistemology but acknowledges their value in furthering research processes. The literature, discussing between ontology and epistemology, distinguishes here between

the knowledge acquired by an interpretivist approach and the knowledge acquired by a positivist approach respectively.

The ultimate question of this project is interested in furthering the academic discussion of the concept of Europeanization in the case of European interest intermediation. This question is primarily an ontological question. As a result the set of research methods that will be used in this project reflects such a consideration, as will be discussed below. However Featherstone (2003) explained, *'the ontology of 'Europeanization' is also complex. Within the international system, the relationship between 'Europeanization' and globalisation is often difficult to distinguish in case studies of domestic adaptation, obscuring the key independent variables'*. As touched upon previously, the literature with regards to the relationship between ontology and epistemology is not clear cut. Epistemological considerations need, to a certain extent, to be taken into account carefully in light of the pitfalls of the topic of study.

2. Relevant data to collect

Downey et al. (1983) explained that in the literature, discussion usually focuses on choosing between so-called 'objective' and 'subjective' methods of research. 'Objective' in the positivist context – from the view that human studies must conform to the methodology of the physical sciences – usually refers to the tabulations of objects/subjects or events in a specific environment. Such measures are thought to be gathered, essentially, from surveys or archival sources. Examples of such data might be the number of firms in an industry, the number of government regulations specific to a firm's industry, etc. Conversely, 'subjective' is usually applied to tap participant's perceptions of their organizations' environments, and is, almost *de facto*, linked to qualitative methods. Indeed qualitative research methods have been perceived as simple set of methods that are employed to collect data. However qualitative methods offer the possibility, through data collecting, to further one's understanding of the perspective of its participants and their interactions within social life – an element that will allow conclusion regarding the dynamic process of Europeanization.

2.1. Limits of quantitative research methods

With quantitative methods the investigator attempts to isolate the various elements in a complex situation. To do this, the evaluator usually knows (or assumes he or she knows) what the elements are, and to separate them out he or she usually employs pre-developed instruments and analyses the results quantitatively (Parsons 1995, Hogwood et al. 1988). He or she then identifies the dependent, independent, and intervening variables, and assesses the links between them.
As Morgan et al (1980, p. 498) explained,

> *'In manipulating 'data' through sophisticated quantitative approaches, such as multivariate statistical analysis, social scientists are in effect attempting to freeze the social world in to structured immobility (…). They are presuming that the social world lends itself to an objective form of measurement, and that the social scientist can reveal the nature of that world by examining lawful relations between elements that, for the sake of accurate definition and measurement, have to be abstracted from their context'*.

A lot can be missed by quantitative methods partly because pre-developed instruments used may not suit the particular situation and partly because these methods cut reality up into discrete fragments of surface behaviour which are then recombined into statistical clusters. As aforementioned in my introduction, this particular project has adopted a qualitative methods because of the research questions it poses. By contrast a holistic path would consider a complete set of activities including training for instance as an interrelated system with a deep structure. Part or all of it may be hidden from view, implicit in the qualitative study. Outcome measures on defined objectives are important data, but until they are combined with a holistic analysis of the process/programme, they do not explore the 'black box' that stakeholders enter at one end and leave at the other. One gains no insight into what the outcome measures mean in terms of the process itself. Of course, those running the process are sure they know how the process works; after all they designed it and ran it. But this may in fact be deceiving as the deep structure of the process may be quite different from what its designers assume it to be. This is particularly in terms of values, habits, self-esteem, self-identification, and the more subtle aspects of the process.

Many researchers use questionnaires but fail to exploit the information stimulated by the request. The number of respondents and therefore the response rates do reveal theoretically relevant information. The non response is as much behaviour as a response. Much non-responding is predictably random. Respondent loss, for instance, usually follows an exponential function with time.

The limits of quantitative research methods – notably for this project – should not make one lose sight of the problems inherent to qualitative research methods. A problem with qualitative data methods in general and case studies in particular, is the limitations that are placed on the possibilities for statistical analysis, replication, and secondary analysis of the data. However this study is embedded in a contemporary setting, and tries through the use of different research methods to overcome these criticisms by setting out clearly, for instance, the steps taken through the research design and data collection.

Finally both qualitative and quantitative research methods, and the production of data, are highly dependent upon the clear definition of the unit of analysis throughout the design of the research project. The next section will be looking at this.

2.2. Unit of analysis

The appropriate unit of analysis is a critical factor in any research strategy. As mentioned in other parts of this thesis, many research projects have been looking at collective action as a unit of analysis. In this study, individual firms are the prime unit of analysis. An enhanced study of corporate political behaviours in the European integration process calls for more definition in the unit of analysis. Indeed the different corporate political behaviour forms – individual action, collective action, and third party representation – each need investigating. The secondary level of investigation is related to the different national traditions of political behaviours – France and Britain. In addition it would be too limited to study just the unit of analysis – single organisations – as my questions are in fact ultimately concerned with the organisation's relationships with other organisations.

The choice of data collection strategies is further explained in section 3 of this chapter. However before explaining in detail the data collection stage of this project, I will be looking at the complementary aspects of the different qualitative research strategies that were used throughout this project – namely ethnographic and case study research tools.

2.3. The choice of complementary qualitative research strategies

As explained by the qualitative research methods literature, ethnographic methods and therefore, to a certain extent, the more general 'grounded theory' approach rely on the production of data to design theories and theoretical propositions. The rationale is that theory based on experimental data ties it to the data and makes it irrefutable. It reduces room for maneuver for researchers to use available theories or force fit existing theories to the data they generated. Finally it also avoids "exampling", i.e. finding examples to match a theory.

As I explained in the introduction of this chapter, the ethnographic research strategy was not one I envisaged straight away. It first came about following my initial semi-structured interviews. Indeed the latter highlighted the fact that mergers and acquisitions are operations that are conceived and realised in secretive environments – notably if I were to uncover political influences. Secondly, research in corporate political strategies, especially in France, was scarce, and usually limited to activities in Brussels, failing to take into account the European political activity done from Paris. Ethnography became an obvious choice. However the breadth and depth of a case study cannot be replaced by a purely ethnographic project.

3. The data collection stage

This thesis is based upon a choice of various and varied research tools – namely semi-structured interviews, participant observation, a case study, and comparative work. Most of the literature on European corporate political activity is based upon surveys and quantitative data gathering, sometimes combined with interviews (Coen 1998, Markussen et al. 2005, Bouwen 2002, 2004, Eising 2004, Broscheid et al. 2003). The context of my own research does not make the choice of

quantitative methodologies appropriate. The confidentiality surrounding merger transactions and the lack of publicly available information affected the project profoundly. From basic internet, library and archives searches, the lack of readily available information meant that quantitative methods would necessarily affect the quality of the responses and, *in fine,* my conclusions, as it would enable respondents to avoid, to a certain extent, addressing political issues.

3.1. Appropriate qualitative methods to collect data

Qualitative research is a sociological and anthropological tradition of inquiry. Most critically, qualitative research involves sustained interaction with the people being studied in their own language, and on their own turf. Less important is whether or not, or at what level of sophistication, numbers are employed to reveal patterns of social life. To see qualitative research as strictly disengaged from any form of counting is to miss the point that its basic strategy depends on the reconciliation of diverse research tactics.

Basic research paradigms can be identified along the epistemological continuum from positivism to post-modernism. This continuum represents the degree of objectivity and subjectivity attached to theoretical perspectives – positivism being perceived as the most objective perspective and post modernism as the most subjective.

From these paradigms in the context of qualitative research methods, a range of types of research methods are derived: case study, grounded theory, phenomenology, ethnography, and historical research. Two different types of methods identified along the epistemological continuum from positivism to post-modernism will be used in this project – namely ethnography and case study.

In the case of this project participant observation generated data that has been complemented by semi-structured interviews with identified key players in the European merger control regime. The interviewees were drawn from seven categories of actors. The table below identifies the number of interviews per actors.

Type of actors	No of interviews
Firms	16
National and European officials	12
Legal profession	10
Consultants	8
National and European associations	6
Journalists	2
Academia	1
Total	55

Table 1: Number of semi-structured interviews per type of actors

The number of interviews led in each category is a fair representation of the importance of each actor involved in the European merger regulation regime, and also emphasises the particular angle of the research with a clear choice for interviews of firms' representatives. In addition, in terms of industry distribution, my project is obviously oriented towards financial services. As a result 11 interviews out of the 55 conducted are related to this sector – 2 associations and 9 of interest representatives. However, for confidentiality reasons and at the request of most of my interviewees, no name is mentioned.

Qualitative methods traditions assume that systematic inquiry must occur in a natural setting rather than an artificially constrained one such as an experiment (Marshall et al 1995). Qualitative methods are described as 'thick' (Geertz 1973 in Marshall et al. 1995), 'deep' (Sieber 1973 in Marshall et al. 1995), and 'holistic' (Rist 1977 in Marshall et al. 1995). By contrast quantitative approaches can be characterized as 'thin' (Geertz 1973 in Marshall et al. 1995), 'narrow' (Rist 1977 in Marshall et al. 1995), but "generalisable" (Sieber 1973 in Marshall et al. 1995). These distinctions often extend to fundamental epistemological differences resulting in the mutual denial of validity to the data of the other approach.

Technically, a 'qualitative observation' identifies the presence or absence of something, in contrast to 'quantitative observation', which involves measuring the degree to which a feature is present. When open-ended interviews are ridiculed as

'impressionistic' and 'anecdotal', it is against the standard of econometric theory that they are being judged. The term anecdotal usually implies that the observations are not randomly collected and are not sufficiently numerous to identify a systematic pattern of behaviour. The term impressionistic usually implies that the answers are neither quantitative nor quantifiable. Open-ended interviews may not meet the standards of econometric evidence. However, as mentioned in my introduction, the standard that also needs taking into account is appropriateness and suitability of the research tools.

3.2. The choice of the financial services industry

This project has a strong focus upon the financial services industry. This choice derived from the fact that, *inter alia*, my first placement was in the field. Indeed, in order to draw comparable conclusions in both countries, my second placement was to be done in the same industry. In addition, this first-hand experience gave me greater access to this particular epistemic community.

Moreover contextual aspects made this choice appealing. This industry has been notoriously challenging in terms of creating a European single market because of the high degree of fragmentation along national lines. The European merger control regulation has aimed, as discussed in Chapter 2, at creating legal certainty in the marketplace by establishing a one-stop shop for instance. However, the Regulation also refers to '*legitimate interests'*- and prudential matters can come under this umbrella term. Member States have therefore been able to intervene in operations with a Community dimension on the basis of this legal concept as discussed in Chapter 2 of my thesis.

Sequentially DG Comp is examining the case, according to the criteria laid down – defining the Community dimension of a transaction – in the European Merger Control Regulation. Because of the degree of fragmentation of the sector banking transactions are approved without any problem. Yet a merger needs to also be approved by target's national authority in charge of banking supervision[149]. At this

[149] According to Article 16 of the Banking Directive.

stage, banks may experience political barriers to mergers. My interviewees referred to these political obstacles in terms of '*national champions'* and *'legislative measures against foreign ownership'* in this category.

Therefore the institutional framework, as previously described, allows for the national political side to be more salient – and therefore more identifiable from an analytical point of view – than in other sectors. Unlike other sectors the national competition authorities still play a role in the supervising of large mergers. The main contentious cases, as far as the industry is concerned, are that involving the Portuguese, Italian and finally Polish supervisors. I will refer to these cases throughout this thesis. They blocked or delayed the process the mergers on national political grounds. The analysis of this sector thus allows me to identify political interventions as well as the interconnections between the relevant DGs in the Commission – DG Markt and DG Comp have worked a lot under Commissioners Kroes and McCreevy.

There was also no case for consolidation until recently. The introduction of the euro, and soon of European payments (SEPA), will change the landscape. In terms of research strategies, focusing on the financial services industry was a reasonable option. Although other studies have been interested in interest representation in this particular sector (Bouwen 2002, Grossman 2004, Quaglia 2005), none has looked at corporate political strategies from a firm's perspective.

Ayadi et al. (2002) explained in their report on pan-European consolidation movement, that the financial services industry has probably entered a second phase in its European development, that of an acceleration of pan-European consolidating operations. A clear goal of the European Commission has been to create a functioning pan-European single market for capital, one of the four freedoms of the original Treaty of Rome. The fact that the industry movements are contemporary of my field research stage may have meant that stakeholders were less likely to discuss some aspects of the deals, in some instances. I avoided this pitfall, to a certain extent, by immersing myself in this field and joining public affairs departments in France and Britain, as will be discussed.

3.3. Ethnography and participant observation

3.3.1. The Ethnographic Method

Methodologically, organisational researchers schooled in an ethnographic tradition take the prescription of less theory, better facts; more facts, better theory. In essence, ethnographers believe that separating the facts from the fictions, the extraordinary from the common, and the general from the specific is best accomplished by lengthy, continuous, firsthand involvement in the organizational setting under study. As a result the method is capable of generating massive amounts of data.

Conklin (1968, quoted in Van Maanen 1983, p.38) described the ethnographic method as,

> *'a long period of intimate study and residence in a well-defined community employing a wide range of observational techniques including prolonged face-to-face contacts with members of local groups, direct participation in some of the group's activities, and a greater emphasis on intensive work with informants than on the use of documentary or survey data'.*

The holistic style is the oldest and is represented by at least two opposing cultural theories. On the one hand there are the configurationalists represented by the work of Benedict and Mead and on the other there are functionalists of British social anthropology represented by the work of Malinowski and Radcliffe-Brown. These four scholars were alike in their commitment to the study of culture as an integrated whole, and a desire to interpret behaviour as observed in the studied particular configuration.

Ethnographical studies have traditionally focused on the sociology of meaning through close field observation of phenomena. This methodology focuses on the study of human existence and interaction as seen from the standpoint of insiders. Typically, the ethnographer focuses on a 'community' (not necessarily geographic, it may be work, leisure, and other communities), selecting informants who are known to have an overview of the activities of the community. Such informants are asked to identify

other informants representative of the community, using chain sampling to obtain a saturation of informants in all empirical areas of investigation. Informants are interviewed multiple times, using information from previous informants to elicit clarification and deeper responses upon re-interview. This process is intended to reveal common cultural understandings related to the phenomena under study. These subjective but collective understandings on a subject are often interpreted to be more significant than objective data.

As a result of this process, my own research tools developed and my questions – or my way to respond to my informants' replies – became more sophisticated, thus yielding better and more accurate data. As an example, one of my informants – who introduced me to many Commission officials – explained the role of these officials, and more importantly the cases they worked on. This is not publicly, easily accessible information. However it was extremely helpful. It was, in effect, easy to direct the Commission officials I met towards the explanations of the cases they worked on – the ones they would have the best available knowledge about – rather than attempt to gather information using other cases as examples when they would have followed only as outsiders.

From this perspective ethnographical techniques can be a great methodological component in so far that they helped to more clearly identify sociological aspects of the studied environment. The sociological aspects are part of the strategic behaviours of firms. For instance, in the financial services sector, an informal ECOFIN meeting was held under the Dutch presidency and was at the origins of policy developments regarding the question of banking consolidation. Three CEOs were invited to this meeting – from ABN Amro, Royal Bank of Scotland, and BNP Paribas. It is easy to account for the invitation of ABN Amro, one the major Dutch financial institutions, to this exclusive meeting. Sociological considerations and my ethnographic work (at BNP Paribas and ABN Amro) provided some evidence on the reasons why RBS and BNP Paribas' CEOs were also invited.

3.3.2. Schools of thought and participant observation

The Chicago School and its school of sociology have based the emergence of participant observation as a research method upon two intellectual traditions, namely pragmatism and formalism. The former perceives social life as dynamic and in constant change. The consequence for the researchers is that they must participate in order to record how the participants experience these dynamics, the effects on social life, as well as how changes are interpreted. Participation in the social environment enables the understanding of actions within the context of the participants. Researchers can make sense of the meanings. Researchers must become part of the context as this is the only way they are able to understand the actions of the people. This intellectual tradition is formalism which argues that although social dynamics may differ from each other, their forms may still display similarities. Researchers are therefore encouraged to *stroll* in order to observe the dynamics of social life to which the individual is subject to. The two conceptions have an impact on the degree of participation the researcher should endorse when engaging with his/her research field. In this project I have opted for a pragmatic method as far as participation is concerned.

3.3.3. The participant's role

This project advocates a research strategy that goes beneath stated objectives and surface behaviour. A way to achieve the required standards is participant observation as explained previously. Indeed, although questionnaires and interviews have their value, systematic observation has a number of advantages for organisational analysis and this project. Longitudinal data is also important. If one wishes to analyse a continuing process then one needs continuous data that measure each stage in the process. In terms of research timeline, this project starts at the inception of the European Merger Control Regulation. This can be done using questionnaires, interviews, and observations but since observations focus on process, they are the most likely of the three to provide valuable information about how the programme affects the stakeholders.

Observation allows one to develop hypotheses, test them, alter them, and retest them while the study is going on. Fixed instruments tend to lock one in until external information suggests that new instruments need to be developed and another study conducted. Observations are easy to quantify as any other data, so the issue is not whether to use quantitative or qualitative. Rather, the central point is that organization behaviour requires holistic analysis and that direct observation is a critical element of the analysis.

This methodology requires that the researcher become directly involved as a participant in people's daily lives. As explained previously, this participatory methodology provides access to the world of everyday life from the standpoint of a member or an insider. Human meaning and interaction is approached through sympathetic introspection, *verstehen*, a humanistic coefficient or sympathetic reconstruction (Jorgensen 1989). As a participant, the researcher must sustain access once it has been granted, and maintain relationships with people in the field. The character of field relations heavily influences the researcher's ability to collect accurate, truthful information. Jorgensen (1989) provides some extreme examples – a researcher becoming a professional card player (the phenomenon studied) as part of his participant observational investigation of poker players, another becoming a jazz pianist to study improvised conduct.

In my own case, the changes were less dramatic. My academic background was suited to my research field. My first degree was in international management and contained financial elements in its *curriculum*, as well as European politics. My Master's degree was entirely devoted to European politics and governance. Both of these academic experiences were helpful in getting to grips with the studied environment. In addition I already had practical contact with interest representation in Europe – I had some experience working in a think tank in Brussels – and in financial services – my undergraduate placement was within the business banking division of a bank. By the time I started the participant observation phase of my study, I had already spent a year and a half working on my PhD and strategies in interest representation, and I had conducted more than half of my semi-structured interviews and analysis. Although

my practical experience in interest representation was limited, I probably had already received the adequate academic background.

My methodological journey has been strengthened by awareness of a variety of assumptions upon which this project has developed and strengthened. The significance of assumptions is further explained by Morgan and Smircich (1980).

Ethnography assumes an ability to identify the relevant community of interest. In some settings, this can be difficult. Community, formal organization, informal group, and individual-level perceptions may all play a causal role in the subject under study, and the importance of these may vary by time, place, and issue. My preliminary interviews allowed me to clearly identify the relevant community. Moreover, the public accessible documents – showing the Commission's commitment to transparent policy-making – was helpful in cross-checking my findings. As a result, it became clear that although public affairs (in a general sense) departments were relevant to the study of European merger control regulation, especially from a political viewpoint, legal departments and General Counsels were equally and maybe more significant to firms' interaction with the Commission. Therefore the community that needed to be studied was wider than it was expected at first.

Ethnography assumes the researcher is capable of understanding the cultural customs of the population under study, has mastered the language or technical jargon of the culture, and has based findings on comprehensive knowledge of the culture. This assumption is relevant at two levels. The 'public affairs' jargon is easily identifiable, for instance, in responses to consultation papers that are publicly available. Moreover practical guides to lobbying are helpful. In my own research, the fact that I can speak and write both English and French – and that I have lived extensively in both countries – have been extremely helpful to gain trust in the environment I studied. I was able to interact in a suitable manner to enter circles quite rapidly. This was further highlighted in the Netherlands where the limits of my basic Dutch became a barrier to

interact with stakeholders (mainly governmental) and consequently affected my understanding of national corporate political processes.

3.3.4. The 5-step to the ethnographic method

The ethnographic method starts with the selection of a culture, review of the literature pertaining to the culture, and identification of elements of interest - typically elements perceived as significant by members of the culture. The ethnographer then goes about gaining entrance, which in turn sets the stage for cultural immersion of the ethnographer in the culture (as shown by the Fig. 5 below).

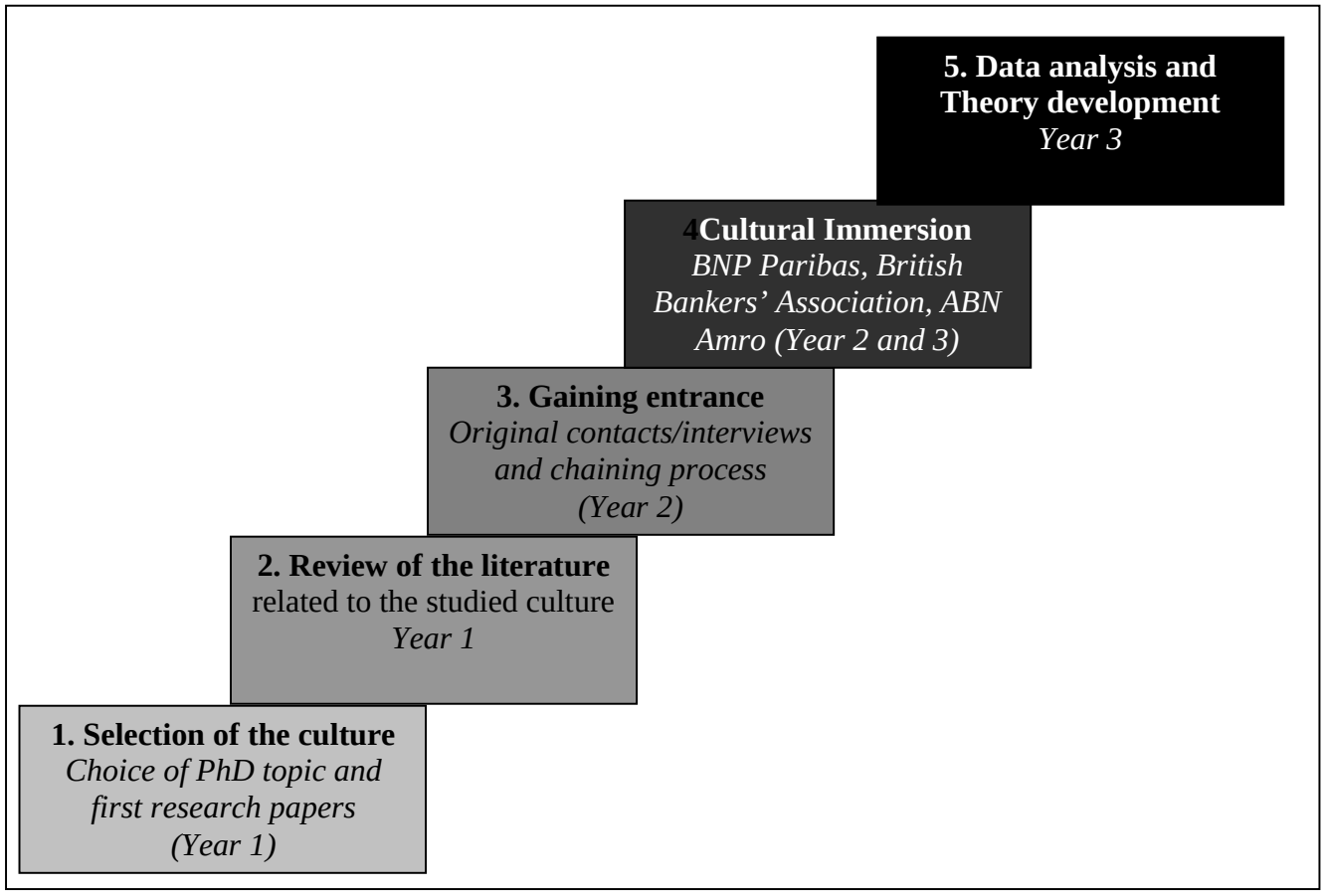

Fig. 5: Steps of the ethnographic method

It is not unusual for ethnographers to live in the culture for months or even years. I personally stayed six months at BNP Paribas and the British Bankers' Association (BBA). The three months at ABN Amro and my current position are considered as outside this data collection phase – to the extent I have not kept comprehensive diaries

as I did during the other two placements. The middle stages of the ethnographic method (steps 2 and 3 of the above diagram) involve identifying informants, gaining more relevant informants through a chaining process, and gathering data in the form of observational transcripts and interview recordings. Data analysis and theory development (step 5) come at the end, though theories may emerge from cultural immersion and theory-articulation by members of the culture. However, the ethnographic researcher strives to avoid theoretical preconceptions and instead searches to induce theory from the perspectives of the members of the culture and from observation. The researcher may seek validation of induced theories by going back to members of the culture for their reaction.

3.3.5. Recording data as part of participation-observation methodology

The literature on research methods usually indicates that data should be recorded in a systematic manner (Marshall et al. 1995) – this is true in both participant observation data collection and interviews. Following the ethnographic tradition, I used the same diary (my data log) during any of my meetings – internal and external – (who attended, where it was held, the outcomes and the intervening parties etc.), the different papers I worked on (consultation paper, internal circulars, responses to the Commission, European bodies and national authorities etc.), the conferences I prepared and attended, and more informal gatherings I may have been invited to.

However there is a real danger as the researcher becomes immersed in the setting that he/she will find it increasingly difficult to stand back and generate a fruitful perspective on what is of interest. Whilst recording data, I have been concerned to focus solely on corporate political strategies, rather than getting personally engaged in discussions outside this remit – such as office politics, although I noted their existence in my reports. I also refrained to, as much as I could, answer any questions on evaluations of corporate political strategies, as my answers could have an effect on the setting I was trying to observe. This may have been the most difficult element of being a participant-observer in my case. Finally I constantly questioned my research methods and interview questions – such as: Am I generating

adequate material for my analysis? Can I start drawing conclusions as far as corporate political strategies are concerned from an insider's viewpoint? Can I add new elements to my initial framework? Is it a reflection of insiders or my own interpretation of what a corporate political strategy should be? This type of constant questioning was the support I used throughout the year-long participant observation stage of my project.

3.3.6. Preparing data for analysis

Selected strategies must be employed by the ethnographer to build conceptual frameworks. The strategy most commonly employed by a fieldworker is to explicitly examine the linguistic categories used by informants in the setting to describe various aspects of their routine and problematic situations.

A central postulate of the ethnographic method is that people lie about the things that matter most to them. *Penetrating fronts*, a phrase used with powerful effect by Douglas (quoted in Van Maanen 1983), then becomes one of the more important goals of the competent fieldworker. If the ethnographer can uncover the lie, much is revealed about what is deemed crucial by the individual, group, or organization. Evasion too enters the calculus of deception for it is unfortunately true that most informants are only as good as the questions put to them.

A prime objective of participant observation is the definition of key concepts in terms of the insiders' perspective. A first step recommended is to list key words used by members of the environment studied. With my study, I had to learn two main sets of new terms. Indeed the financial services sector has its own language and acronyms, which I did not know before. I remember for instance going to a conference in Paris regarding a new directive which *'cesar'* was going to publish an advice on. 'Cesar' is in fact what I wrote in my notes. I used a search engine to identify this body called 'cesar' and could not find anything with the spelling. I traced the body back on the European Commission website and under the Directive it was referred to at the beginning. 'Cesar' is in fact CESR – the Committee of European Securities Regulators – which is in fact in French CERVM – *le Comité Européen des Régulateurs des marches de Valeurs Mobilières*.

The most relevant example in corporate political strategies terminology in both my experiences was to become familiar with new acronyms that are used on a daily basis. For instance, to draft a response to a CP/DP means to respond to a consultation paper and a discussion paper respectively. Another key concept that is relevant with regards to my framework of analysis is 'high-level'. This is referred to for example in the possible following contexts: a trade association can be high level, or a response can be high-level (*'keep this response high-level'*). The concept is usually opposed to 'technical, detailed'. 'High-level' relates to anything that is probably upper-management, destined to the Commissioner's cabinet rather than a policy officer in one of the directorate general, and therefore is written with a very general message. Interestingly, during both experiences, lobbying as a term was nearly never pronounced, whereas the term 'strategy' was mentioned quite a lot. These key definitions and concepts will be incorporated into the next Chapter of my thesis.

The identification of terms and concepts has been carried out throughout both my placements, in two different cultures in terms of nationality and type of corporate political activities, but similar in terms of the generic interest representation element. In addition, because I worked in the Netherlands and I am now working with a trade association in London in a similar environment, I have been able to constantly cross-check the validity and reliability of my findings.

3.4. Geographical comparative case study

Case studies tend to be selective, focusing on one or two issues that are fundamental to understanding the system being examined. Following my section on the unit of analysis of my research project: corporate political strategies of individual organisations when interacting with European institutions, notably the European Commission – from the individual organisations viewpoint – are the 'cases' investigated.

Levy (1988) studied a single case to study progress in information technologies at the University of Arizona. Yin (1994) explained that single cases are best used to corroborate or test a theory, or to characterize a unique or extreme case

(Yin 1994). Single-case studies may also reveal new phenomenon when an observer is able to access data that was previously difficult to get to (Tellis 1997). My case study confirms two of these three rationales. It relies on fresh, new data that no other project tried to reach, relying on new research methods that generated excellent access to many actors. It also tries to challenge or qualify the Europeanization conclusions of other academic work on interest intermediation.

Multiple-case studies, two dimensional in the case of this project, follow a reproduction process. Yet this process is not to be confused with a simple sampling logic, whereby a selection is made out of a population for inclusion in the study. The objective of multiple-case studies consist of each individual case representing a "whole" study, in which data is gathered using various sources and conclusions based upon the collected data. The most telling example is that of interviewing lawyers. Indeed European competition lawyers are involved in many cases, usually cross-sectoral. Interviewing these types of actors, who have a real overview of DG Comp work and, as a result, the European authority's interaction with firms has been particularly valuable and informative in my comparison between French and British corporate political activities. This has been validated by interviews of public affairs – in the largest sense – or General Counsels in different sectors. I have replicated my set of interviews in both countries – four sectors were selected in the end (aerospace, financial services, postal services and telecommunications).

3.4.1. The aim of case studies

Logically my choice of case studies is to be justified in this context. As Yin (1994) explained, *'case studies are the preferred strategy when 'how' or 'why' questions are being posed, when the investigator has little control over events, and when the focus is on a contemporary phenomenon within some real-life context'*. The characteristics and features of the context of this research project, as explained in Chapter 2, reflect the aforementioned quote. Indeed M&A is a famously volatile and instable environment. Since the summer of 2007 the market has experienced turbulences that have slowed down the number of mergers and acquisitions to a near-standstill. Some bids were even abandoned in light of the economic outlook.

The ethnographer – participant observation – step has helped in observing and understanding the various aspects of Commission-firms relations and how a strategy could be designed according to the three elements highlighted in my previous chapter. The case study would provide a deeper analytical focus to this initial data collection stage.

Yin (1994, p.8), in the second version of his seminal work on case study, explained that *'the case study is preferred in examining contemporary events, but when the relevant behaviour cannot be manipulated. The case study relies on many of the same techniques as a history, but it adds two sources of evidence not usually included in the historian's repertoire: direct observation and systematic interviewing'*. Tellis (1997) further explained that case study is an ideal methodology when a holistic, in-depth investigation is needed.

As mentioned in my account of my work experiences, contextual contemporary conditions are prime in my project and the understanding of corporate political strategies. Case studies are particularly valuable as a research method in this context. Unlike experiments, it does not separate, outcomes from context. In fact, case studies are multi-perspective analyses. This means that the researcher considers not only the voice and perspective of the actors, but also of the relevant groups of actors and the interaction between them (Tellis 1997).

The aim of this comparative case study is to replicate in two distinct environments the same 'experiment'. Therefore it was key, in the case of this project, to mirror the gathering of data in both countries. However it was also important to ensure that other stakeholders – in the case of this project: European institutions, competitors, and third party representation venues – were involved in the data collection process. The analysis of the date also had to *'follow cross-experiment rather than within-experiment design and logic'* (Yin 1994).

3.4.2. Semi-structured interviews

Research methods using semi-structured interviews attempt to introduce flexibility in the communication process between the interviewer and the interviewee.

Indeed the open framework allows for conversational communication flow. As a result, information can be received as well as given. I have noticed with my interviews that interviewees were generally interested in the preliminary conclusions of my data collection. Unlike detailed questionnaires and surveys, semi-structured interview questions are not formulated ahead of time, but introduce general themes on the topic to begin with. Indeed questions are being designed throughout the interview, adapted to the interviewee's reactions. Semi-structured interviewees can therefore be as intrusive as the interviewee allows it to be.

At first, I developed an elaborate list of questions for the 'preliminary' part of the interview, but I quickly found that the questions had very little to do with the success or failure of the interview. As I learned in descriptions and analytical work in relation to the Hawthorne effect, most people have a story to tell. Indeed the Hawthorne effect has been broadly described as the change in behaviour and performance as a result of any new or increased attention by third parties (an external observer for instance). The Hawthorne effect was a term coined by Landsberger (1958) when he revisited experiments that were conducted at the Hawthorne Works factory, based near Chicago, between 1924 and 1952. Landsberger in fact defined the Hawthorne effect as *'a short term improvement caused by observing worker performance'*, which is a more limited definition than the one currently used in organisational behaviour.

The interviewees also used my questions as an excuse for telling their stories. Since I thought of my initial interview as a means of developing rapport, this did not bother me at first. Indeed, I was glad to be relieved of the burden of keeping the conversation going, and I began to look for ways to get the respondent to do his or her thing. Later, I became interested in using the same interview format to obtain the answers to a specific list of questions, but I was unable to change the interview process. Either I let the respondent tell his or her story using my questions as an excuse, or else forced him or her to treat the questions seriously and give me a 'code-able' response to each item. If I took the latter approach, the respondents soon lost interest in the project and began to concentrate on getting through the questionnaire and on to their next appointment. In this process, they often provided misinformation in order to avoid an anticipated follow-up question.

A common criticism is that you can never believe the answer to a direct question about behaviour, or more crudely, '*businessmen always lie*'. This interpretation, however, suggests that this law misses the point: what interviews can reveal is not a set of specific answers to a specific questions, individual bits and pieces of information. What they reveal are patterns of responses. Each answer, whether true or false, is a piece of that pattern. Individual responses cannot be interpreted in isolation. But the responses grouped together and taken as a whole are clues to the mental processes of the participants.

The virtue of using 'insider' informants in case studies of organizations is that these informants can think in terms of the organization as a whole as well as in the various settings within it, and they can be used to keep researchers in continuous contact with the setting. These advantages do not, however, eliminate two fundamental methodological problems in using informants. It is important to select informants who are knowledgeable and also to know what sayings of the informant are accurate. The problem is not that bias exists but how to control it in the research design. Salamone (1977) argues that even lies, when identified as such, are useful sources of information: *'Lies in short, are a form of communication, not its negation'*. Moreover lies, incomplete perceptions, and ulterior motives are not random features of a setting, and it is possible to strategically select informants who represent desired variation in perspective.

Freilich's (1970 quoted in Salamone 1977, p.118) discussion of rapport and humanism suggested that the relationship between anthropologist and informant in transactional terms strives to structure the situation in the most favourable terms possible for each actor.

Not all informants are good informants since the information they possess – regardless of their willingness to part with it – is hardly equivalent. What is proper may be either popular or rational to all members of an organization and informants will differ greatly along these lines. The distribution of knowledge about what is going on in any organization is an important part of the sociology of that organization and the fieldworker must take care to establish the limits of an informant's expertise.

Freilich offered a table describing the rapport between the interviewer and the informant, and the information that will be provided as a result. I have, in turn, used this table, adapted to the information provided to me, to categorize the different interviews I led.

Rapport level	**Information provided**	***(Total:55)***
Lying	Zero	1
Image	Social Niceties	10
Low	Public Information	10
Medium	Confidential Information	21
High	Secret Information	8
Intimacy	Private Information	5

Table 2: Levels of rapport and information provided

The most interesting contribution of this table is the first category as the lying aspect of the interview was regarding questions about the political aspects of the European merger control regime. While the interviewee suggested that there was no political involvement as far as she could see, at a conference for a specific audience she indicated that political involvement in European merger cases was not unheard of. I was able to cross-check this fact via a third-party to whom I did not reveal the name or answers of my interviewee. In fact it was pure luck for me to be able to gain insights of what had been said during the conference I referred to.

Freilich (1970) put forward a typology of reasons for lying. Firstly, lying informants may do so for personal reasons, for example perhaps the data giver wishes to appear wiser, or of higher status, or richer than he actually is. Secondly, the scholar evoked social reasons, i.e. pressure from the audience present in an encounter with the interviewer. Finally cultural reasons may explain that certain information is not given truthfully in that socio-cultural system.

Whitten (1970 quoted in Salamone 1977, p.120) indicated the importance of discerning motives for lying as an aid to discovering an informant's network and his evaluation of it at a given time as '*[the] discernible motive [for the informant is] to*

place himself/herself in the most advantageous position according to his perception of social relationships at any particular time'. I can link this lie to cultural reasons as there was no audience during the interview and, as she was in secondment and was about to leave DG Comp, this lie would not have granted any higher status.

3.4.3. Strengths and weaknesses of semi-structured interviews

Most interesting respondents are the ones that become 'informants'. Such persons suggest sources of corroboratory evidence and may even initiate access to such sources. Interviews are an essential source of case study evidence because most case studies relate to human affairs. The latter should be reported and interpreted through the eyes of specific interviewees, and well-informed respondents can provide valuable insights into a situation.

Interviewing has limitations and weaknesses that need addressing at this point. Interviews involve personal interaction; cooperation is essential. Interviewees may be unwilling or uncomfortable sharing all that the interviewer hopes to explore, or they may be unaware of recurring patterns in their activities. The interviewer may not ask questions that evoke long narratives from participants either because of a lack of expertise or familiarity with local language or because of lack of skill. By the same token, responses to the questions or elements of the conversation may not be properly comprehended by the interviewer. And, at times, interviewees may have good reason not to be truthful. Finally reliance on other people's cooperation selects the knowledge an interviewer gathers. At an early stage in the research process I identified the events, settings, actors and artefacts that would have the greatest potential to yield good data about corporate political strategies in the context of European merger control regulation.

Interviews can generate huge volumes of data, but these are time-consuming to analyse. Moreover the issue of the quality of the data needs highlighting. When interviews are used as the sole way of gathering data, the researcher should have demonstrated through the conceptual framework that the purpose of the study is to uncover and describe the participants' perspectives on events; that is that the

subjective view is what matters. Studies making more objective assumptions would triangulate interview data with data gathered through other methods.

3.4.4. The recording of data

The process of preserving the data and meanings on tape is known to greatly increase the efficiency of data analysis. However, I was limited by my respondents' requirements. Half of them were more comfortable not talking to a tape recorder, but allowed me to take notes. One of my interviewees did not allow me to take notes at all. The reluctance to have recorded evidence of the interviews proves the sensitivity of the topic. I have on tape 17 semi-structured interviews, and 37 notes taking recordings. I also conducted phone interviews (7) which explain the number of note taking.

Type of recording	No of interviews
Taped semi-structured interviews	17
Phone interviews	7
Note taking	30
Not allowed notes	1
Total	55

Table 3: The recording of semi-structured interviews

During my various interviews I had to stop the recorder three times as my respondents felt that their responses could not be taped, or they spent their time looking worryingly at the tape recorder and being aware of its presence. Still the table above also shows the openness of the European Commission vis-à-vis researchers as all officials accepted to be recorded.

There are probably underlying cultural differences here. For instance, French respondents were more likely to refuse the use of a tape recorder compared to interviewees from Brussels or London. Consequently, in order to create a more trusting environment and get more interesting insights, I asked whether I could take notes and did not try to get the interviews taped at the start of interviews.

Manning explained in 1983 that the problem of qualitative analysis based on fieldwork is that of avoiding solipsism on the one hand and avoiding positivism on the other. He advocates for an approach that makes language the locus of analysis and not to confuse the language systems used to 'explain' or formulate the world with the objects of study.

My interviews were led in two different languages, although when I had the choice, I tried as much as possible to lead them in English. I have chosen not to fully translate the interviews to keep the value in the wording formulation. Key concepts were matched throughout the coding phase.

The Table 4 below identifies the types of data collected according to each element of the original framework of analysis established in Chapter 1 – which contextual element is linked to which element of the framework of analysis. I have therefore given reference of which circumstances I have been able to gather the data according to to four contextual components. Firstly events I attended – this type of data has mainly been collected through participant-observation. The second contextual component relates to the setting in which I collected the data, i.e. the institutions I was based at when each element of the framework was mentioned. The third element directs to the documents I gathered. I collected this data at different stages of this project. Finally the last component is linked to the actors I interacted with throughout my project and categorised according to the different elements of my framework. In order to prepare the grounds for the next chapter, I have distinguished between political and technical strategies as part of the vehicle element of the framework for analysis.

Table 4: Types of data collected

		Arena	Arena	Staging	Vehicle	Vehicle
		Commission	European Courts		Technical strategies	High-level strategies
	Events					
P.O.	In working groups	x	x		x	x
P.O. / I.	In conferences/seminars		x			x
P.O.	In internal meetings (same departments)	x	x	x	x	x
P.O.	In internal meetings (cross-departmental)	x	x	x	x	x
P.O.	In external meetings (formal)	x			x	x
P.O.	In external meetings (formal, limited access)	x			x	x
P.O.	In external meetings (informal – lunch, etc.)	x				x
	Settings					
P.O./ I.	Association	x	x		x	x
P.O./I.	Firm	x	x	x	x	x
I.	Investment Bank			x	x	x
I.	Competition authority (DG Comp)				x	
I.	Competition Cabinet				x	x
I.	Court of Justice		x	x		
I.	Law firm offices	x		x	x	x
P.O./ I.	Ad hoc coalition (association)	x	x		x	x
I.	Ad hoc coalition (firm)	x	x			x
I./D.A.	Council	x				x
	Documents					
P.O./I/D.A.	Response to consultation paper (public domain)				x	
I.	Response to consultation paper (not in public domain)	x			x	x
P.O.	Conference presentation		x			x
P.O./I/D.A.	Newspaper article		x	x		x
P.O./I/D.A.	Newspaper quote		x		x	x
P.O./I./D.A.	Research Papers/Report	x	x	x	x	
	Actors					
I./D.A.	Lawyer	x		x	x	x
I./D.A.	In house – Brussels	x				x
P.O./ I.	In house – national capital	x			x	x
I.	In house – both	x			x	x
P.O./I.	General Counsel			x	x	x
I.	Upper Management	x	x	x		x
I.	Consultants – political	x	x			x
I.	Consultants – economist			x	x	
P.O./I./D.A.	Association	x	x		x	x
P.O./I./D.A.	European Federation	x			x	x
P.O./I./D.A.	European Roundtable	x				x
P.O./I./D.A.	Journalist		x			x

NB: P.O. stands for Participant Observation, I. stands for Interviews, D.A. stands for Data Analysis

3.4.5. Coding for analysis

Case study methodologies vary and scholars advocate the use of structured observation schedules by which one may code observed behaviours or cultural artefacts for purposes of later statistical analysis. Coding and subsequent statistical analysis is treated in Hodson (1999).

In order to make sense of the volumes of gathered data I relied on a two-stage coding exercise as far as the interviews were concerned. The first stage deals with the main themes and derives, to a great extent, from the questions I asked. Theses themes are corporate political strategies (CPS), staging (STA), arenas (ARE), vehicles (VEC), mergers and acquisition (M+A). The second stage qualifies the themes, for instance, under the 'corporate political strategies' theme, I identified several main answers about the definition (CPSDEF), French corporate political strategies (CPSFR), British (CPSUK), and comparison elements of corporate political strategies (CPSCOMP).

The categorisation remains intentionally large to keep whole sentences of the answers given by my interviewees and therefore keep the formulation my interviewees used to refer to each different code. This is used to identify the different vocabulary used by each of the communities studied (as according to the seven categories of actors identified at the interviewing stage).

3.5. The different role of the researchers according to methods

As aforementioned, typically, ethnography and 'grounded theory' avoid specifying any theoretical propositions at the outset of the inquiry. The case study method requires having some insight into the theoretical considerations that are taken into account. As a result, this project is constructed around these two steps. The ethnographic work is intended to provide data for the second step analysis of the Europeanization concept by the case study strategy – to study the linkages between the addition of a level of supranational governance on corporate political strategies. The literature has already offered theoretical propositions in this regard. This research project tries to shed new light on these propositions.

Sanday (1983) has discussed the different data collection procedures available to the ethnographer. Of importance for this project is the fact that the researcher is an instrument which involves him/her becoming part of the situation being studied in order to feel what it is like for the people in that situation. I therefore needed to learn to use myself as the principal and most reliable instrument of observation, selection, coordination, and interpretation. Yet the total immersion can also create a kind of disorientation – culture shock – arising from the need to identify with and at the same time to remain distant from the process being studied.

The role of a qualitative researcher entails varying degrees of 'participateness' – that is, the degree of actual participation in daily life. At one extreme is the full participant, who goes about ordinary life in a role or set of roles constructed in the setting. At the other is the complete observer, who does not engage at all in social interaction and may not even be involved in the world being studied (see Table 5 below).

Table 5: Different roles of researcher and data collection methods

	Roles			
Data Collection	*Observer as a participant*	*Interviewer during participant observation*	*Interviewer as a researcher*	*Comments*
1. Observation and recording of descriptive data	+	+	+	Particularly useful in understanding the different uses of arenas and vehicles
2. Informal interviews	+	+	-	Identification of differentiators
3. semi-structured interviews – tape recorded	-	*	+	Possible with most officials in Brussels and London
4. semi-structured interviews – taking notes	-	+	+	Possible with most officials and actors
5. semi-structured interviews – no notes during interview	-	*	+	Could be during a taped interview or for the full duration of the interview – mostly about cases not in public domain or about the community
6. Written records				Checking the reliability of gathered data
Newspaper	+	+	+	Checking the reliability of gathered data
Official minutes	+	*	*	Policy agenda
Cases	+	+	+	Interviews revealed which cases were more problematic
Reports	+	+	+	Checking the reliability of gathered data
Correspondence	+	-	-	Community
Speeches	+	+	+	Used in computer aided analysis

Adapted from Marshall, C. et al. (1995, p. 102) table on the data collection methods related to observation role.
NOTE: + = likely to be used, * = may occasionally be used, - = difficult or impossible to use.

My personal experience constitutes a mix of these two extremes. I have been fully involved in the environment studied, be it a firm or an association, but I a made a conscious decision not to take part in the merger regime aspects of the political strategy. As mentioned in my section on the issues of inherent ethnographic strategies I was wary that my two hats – that of a researcher and that of a 'public affairs' employee – would send mixed messages to future interviewees. I therefore refused two 'stage' offers from a consultancy, which would have allowed me to work more closely on merger and acquisition transactions, but would have endangered chances to gain access to authorities or change the messages I would have received from interviewees.

Some sort of participation was however becoming necessary as I conducted my interviews. Some interviewees actually advised me to pursue such an option. It eased my learning process on the particular activity that is corporate political activity. I also chose to fully disclose my research topic to my colleagues. However I noticed a real difference in the responsiveness of solicited interviewees when I contacted them as solely a PhD student or as also a member of a public affairs department. Some in-house lobbyists ignored my email when I first contacted them with my university email address, whereas they contacted me as soon as I sent my email with my employer's name – because I belonged to the community. I spent a total of nearly a year in both a firm and an association. I was able to conduct my interviews simultaneously, thus my second year was solely dedicated to data collection. This allowed me to conduct an extensive and intensive research regarding corporate strategic behaviours of firms – I was able to develop trusting relationships in my studied environment, follow different issues, and be exposed to many behaviours. As a novice researcher, it would have been harder to stay a shorter period within the institutions and identify patterns and strategic development.

Participant observation is supplemented by a variety of data collection tools. They are employed depending on the issue studied, the likelihood of access to data, and the theoretical orientation of the project. They may range from key-informant interviewing, collection of life histories, structured interviews, and questionnaire administration to the less well-known techniques of ethno-science. The main reason

for employing a variety of data collection procedures is that it enables the investigator to cross check results obtained from observations and recorded in field notes. Triangulation will be discussed more thoroughly later in this chapter.

Two questions are frequently posed by anthropologists regarding the methods of ethnography. The first concerns the criteria by which a person's qualifications for conducting an ethnographic study are to be judged. One of the most important criteria in the past has been prior experience in another culture. Such a restriction may appear overly demanding. Its rationale is based on the assumption that one comes to understand something by seeing it as an outsider. An outsider is likely to be more sensitive to the nuances observed in a different culture, which otherwise might be ignored.

This point has been particularly acute in my experience. In joining the department of European public affairs in BNP Paribas I only had my literary background to explain strategic behaviours and did not have any expectations regarding the why and how these strategies should be chosen. However when I moved to my second observational experience – in a radically different context – I had some experiences of what I should be looking for. Yet, as I mentioned, the context was sufficiently different from the first one to enable me to detach myself from my first experience and identify strategies. Moreover this second observational experience validated my first experience's findings and allowed me to go deeper in being able to identify strategies.

The second question in connection with doing ethnographic studies concerns the criteria for judging the descriptive adequacy of the completed ethnography. If, after having completed the project the ethnography can communicate within the rules for proper and predictable conduct as judged by the people studied, he or she has produced a successful product. The ethnographer is like the linguist who has studied and recorded a foreign language so that others can learn the rules for producing intelligible speech in that language – anticipating the scenes of the society.

Through contacts made during my participant observation experiences I was able to cross-check my findings with key actors working in corporate political activities. Moreover European merger control regulation is obviously still being

applied and provides many fresh examples for me to check the validity of my conclusions.

4. The analysis of the results

4.1. A two-level triangulation project

To enhance the validity of my research I multiplied the source points of information and interviewed actors with different roles in merger regulation. Therefore I chose a two-level triangulation that is hoped to increase the soundness of the conclusions. Denzin (1984) identified four types of triangulation: data source triangulation, when the researcher looks for the data to remain the same in different contexts; investigator triangulation, when several investigators examine the same phenomenon; theory triangulation, when investigators with different view points interpret the same results; and methodological triangulation, when one approach is followed by another, to increase confidence in the interpretation. The data source triangulation was chosen for this project. The conclusions of this project relied, due to its very nature, on a case study comprising of the analysis of the financial services sector, and a geographical comparative study of Franco-British corporate political behaviours. This choice can be understood by my reflection on a quote from Schramm (1971, quoted in Yin 1994, p.12), '*The essence of a case study tendency among all types of case study, is that it tries to illuminate a decision or set of decisions: why they were taken , how they were implemented, and with what result'*.

Of course triangulation is not without its shortcomings. First of all, replication is exceedingly difficult (Jick 1983). Replication has been largely absent from most organisational research, but it is usually considered to be a necessary step in scientific progress. Replicating a mixed-methods package, including idiosyncratic techniques, is a nearly impossible task and not likely to become a popular exercise. Qualitative methods in particular are problematic to replicate. Secondly, while it may be rather obvious, multi-methods are of no use with the 'wrong' questions. If the research is not clearly focused theoretically or conceptually, all the methods in the world will not produce a satisfactory outcome. Similarly, triangulation should not be used to legitimate a dominant, personally preferred method. That is, if either quantitative or

qualitative methods become mere window dressing for the other, then the design is inadequate or biased. Each method should be represented in a significant way. This does however raise the question of whether the various instruments may be viewed as equally sensitive to the phenomenon being studied. One method may in fact be stronger or more appropriate but this needs to be carefully justified and made explicit, otherwise, the purpose of triangulation is subverted. The following table shows the different advantages of each research method.

The ethnographer path I discussed so far reflects both strands of the triangulation exercise – henceforth linking the different research methods. I worked, as part of my research project[150], for one bank (BNP Paribas) and an association of bankers (the British Bankers' Association). I was based in the first instance in Paris at the head office, and in the second in London. During both experiences I was mainly exposed to European legislation discussed at the EU level or implemented at national level, but never directly involved in the merger regulation process. However I started my work placement at an interesting time. BNP Paribas was at the time merging with BNL (Banca Nazionale del Lavoro) in Italy – a country that was notoriously difficult as far as banking mergers were concerned[151]. It enabled me to gather unprecedented data from the team who worked on the transaction. The BBA had been very involved in the discussions leading to the revamp of Article 16 – which forms the basis of the supervision of bank mergers at the national level – in order to prevent national supervisors to intervene in merger matters.

Moreover my experiences following these two periods of fieldwork have allowed me to refine, to a certain extent, my conclusions. The opportunity to work for ABN Amro

[150] Obtaining these two placements was subject to the fact that I was a PhD student and that I would have access to all meetings and documentation, in the context of my research. As a result, in line with my comparative framework, I had to work in France and the United Kingdom, and for a firm and an association in order to understand the full sense of 'corporate political strategy'. I later worked for ABN Amro in the Netherlands, Barclays in U.K. and currently work for ICMA London. Although these experiences supplemented my overall understanding of corporate political activity and provided further examples, they were not originally planned in my research project.

[151] BNP bid for BNL in February 2006 and the final sale ended a period of Italian banking mergers that have damaged the nation's credibility. A number of scandals have sprung up around the takeover of BNL and another Italian lender, Banca Antonveneta. The head of the Bank of Italy, Antonio Fazio, was forced to resign following allegations that he favoured a domestic buyer in a tussle for control over Banca Antonveneta.

in The Hague – at the time of its takeover[152] – on the Dutch implementation European directive (MiFID, the Markets in Financial Instruments Directive) allowed me to further investigate national differences in corporate political strategies. Finally my return to London and positions within Barclays – then still in the battle to takeover ABN Amro – and subsequently ICMA (the International Capital Market Association) permitted analysing further the choice of vehicles in corporate political activities.

As abovementioned, although I 'participated' – to use the ethnographic jargon – the data produced by the case study is different from that produced by participant observation. As Jorgensen (1989) explained,

> *'Direct involvement in the here and now of people's daily lives provides both a point of reference for the logic and process of participant observational inquiry and a strategy for gaining access to phenomena that commonly are obscured from the standpoint of participants'*.

Firstly, they do not use the same techniques and did not focus in the same way on my topic of study as was explained throughout this chapter. My geographical case study of French and British corporate political strategies, in the context of European merger control regime, covered grounds as far as corporate political strategies were concerned, irrespective of the types of issue at hand – with a clear stir away from working on competition concerns in the sector. Yet there is a certain amount of cross-fertilisation between both research methods. My interviews provided data and sharpened my understanding of the different political strategies. Participating permitted me to explain decisional outcomes and corporate political behaviours. The fact that I interviewed financial services experts, amongst others, and also worked in the banking sector provided useful data for my case study.

The second level of my triangulation resides in the additions I was able to make to the field I have been researching. This followed a two-pronged strategy. Firstly, during my participant-observation phase, I was exposed to more aspects of corporate political strategies than those of the European merger control regime. Indeed I have worked on different projects of the Financial Services Action Plan

[152] During the three-month period I worked at ABN Amro, Barclays seemed to be the likely winner of the takeover battle between themselves and 'the consortium' (RBS, Fortis and Santander). In the end, (October 2007), the consortium was to 'win'.

(FSAP)[153] – such as MiFID[154] or SEPA[155]. As a result my results are cross-checked to a certain extent to the financial services field. In addition, I have also interviewed – in addition to my core financial services semi-structured interviews – other public affairs experts (9 semi-structured interviews, with a 4 British and 5 French firms split) that have dealt with other economic environments, such as the travel industry, postal services, the defence, telecommunications, agrochemicals, and the equipment industry.

Conclusion

This chapter represents my methodological journey. It is a mix of theoretical considerations, practical issues and opportunities and my research experience. Throughout my year in fieldwork I was constantly aware of obtaining objectivity, validity and reliability of the results of the data collection phase of this project. The use of different research methods epitomises such an endeavour. The use of different research strategies, the different experiences I was able to acquire during my project, and the data I collected meet the standards of reliability.

Moreover researchers are also interested in the generalisability of their project. Yin rightly presents the notion that two types of generalisation are to be considered – namely analytical generalisation and statistical generalisation. The latter reflects the fact that an inference is made about a population on the basis of empirical data collected from a sample. This is the most common way used to generalise data from surveys and experiments. However with case studies statistical generalisation cannot be conceived in the same way. Indeed case studies are not selected in laboratory

[153] The FSAP represents part of a wider scheme to create a European single market in financial services aimed at unlocking potentially huge economic advantages. At present a company wishing to offer financial services products in different member states faces considerable barriers, through having to comply with the different regulatory requirements of each state. The banking sector has already demonstrated that it is possible to lessen such costly bureaucracy through mutual recognition by the different national regulatory regimes. This means that once a company has fulfilled the regulatory requirements of one state it can offer its products across the EU. The initial regulatory clearance effectively acts as a "passport" and it is this concept which lies behind the European single market in financial services. The FSAP is the means by which the Commission is seeking to harmonize the regulatory regimes of the member states, to make this mutual recognition viable. The introduction of the single currency in many of the member states has acted as an additional stimulus in driving forward this agenda.

[154] The Markets in Financial Instruments Directive implemented on November 1, 2007.

[155] The Single European Payment Area

conditions. The method that should be used, as a result, is analytical generalisation – whereby a previously designed theory is used as a template to cross-check the newly produced data.

I have seized as many opportunities as possible to interact with the community that is important in my studied context – going to launch parties, participating in conferences and making contacts while working. I am therefore confident that my access and analysis of data have been representative of the realities. The cross-checking with contacts is invaluable to validate my conclusions.

This project is primarily inductive – relying on 'real' data collected, qualitatively, through experience and open-ended interviews to generate interpretations and understandings regarding corporate political behaviours. This is a key recognised difference between qualitative and quantitative research methods. Accordingly quantitative researchers tend to adopt the deductive approach, using a theory to generate hypotheses, which are then tested empirically. The choice of qualitative research methods was necessitated by the type of questions asked and the information sought.

The following chapters present my analysis of the data I collected. Firstly, I analyse the interaction between firms and European and national competition authorities in terms of strategic behaviours and make some early pointers to the Europeanization literature based on a comparison between French and British firms in the financial services sector. Some conclusions made in the financial services sector are validated and other elements refined my overall conclusions. Finally my last chapter embodies these results and goes theoretically further challenging the Europeanization conclusions of other academic work.

Chapter 4

Comparing French and British Corporate Political Strategies: the Case of the Financial Services Industry

Using the research strategy and methods explained in my previous chapter, this project examines the interaction between firms and European institutions responsible for merger regulation – understood as encompassing institutions based in Brussels and national bodies. The competition directorate of the European Commission is the main Brussels-based authority studied in this section of my project; yet an investigation of its relationship with other directorates and national levels of authorities will provide a broader understanding of European governance dynamics.

Through the analysis of a generic framework for corporate political strategies, as designed in my first chapter, this chapter highlights important themes in corporate political strategies. As previously explained the case study, supplemented by data collected through the ethnographic method, tests the framework on a geographical level. How do French and British firms interact with competition authorities in merger cases, and how differently? Is there a generic model – maybe European – of corporate political activities? If there are differences, at which level and how can they be accounted for?

Maclean et al. (2006) made interesting observations regarding the attitudes of French and British firms in the context of merger and takeover activity. These observations are tangent to my own project, but shed light on the usefulness of the Franco-British comparison. They encouraged the taking into account of national traditions when analysing the European merger regime.

In the UK, takeover activities have been generally accepted as providing a necessary discipline that works in shareholders' interests, facilitating where necessary the replacement of inefficient management by a more effective management team better able to add value. A convergence of interests between management and shareholders is thereby fostered, at least in theory, as boards are alerted to the need to achieve a high level of performance. The downside is that by focusing attention on the share price, the use of takeover activity as a stick to beat poor management may encourage short-termism at the expense of long-term growth, with profits distributed as dividends rather than ploughed back into the company to fund future investment.

Traditionally, the situation in France with respect to takeover activity has been rather different. Until relatively recently, it would have been almost impossible to see the share price ever sparking a takeover battle. Since the 1960s large French firms have sought to arm themselves to the hilt with a battalion of takeover defences, including crossed shareholders. The combined effect of these weapons has been to shield management from potential challenges from outside investors and to impede share movement, encouraging a 'reciprocal complacency' designed to protect the *status quo* by preserving intact the establishment network – a sort of 'nomenklatura' – which has long held France's large companies in its grip. In Anglo-American terms, managerial failure has been allowed to continue uncorrected, with the main threats to the position of an incumbent *Président Directeur Général* (PDG) – French CEO – often coming from journalists or judges rather than corporate predators. How do these observations help the study of French and British firms' corporate political strategies? How do these observations fit in the overall analysis of Europeanization?

As mentioned in Chapter 1, there is agreement in the field of European interest politics that business interests are much better represented than other societal interests (Mazey and Richardson 1999). Organised interest groups are important and accepted actors at the EU level of governance. They provide the EU with information (Perez-Solorzano 2004, Commission 2006), political support, and the possibility of democratic potential that some have defined as 'input legitimacy' (Scharpf 1999). A certain symbiosis can be detected between interest groups and bureaucracies. The latter have a tendency to construct stable relationships with the former as a means of securing a sort of 'negotiated order'. Interest groups, for their part, also exhibit a

preference for public bureaucracies as a venue for obtaining reliable information and influencing public policy, particularly planned or impending legislative measures.

Indeed the very establishment of a European merger control regime directly derives from a direct push from European interest groups (as explained throughout Chapter 2), which became a valuable support tool in the hands of the Commission to legitimise and concretise the first European merger regime. The development of the European merger regime is also to be analysed in terms of industry-Commission interactions at different public policy life cycle stages. Yet, if the literature refers to European collective action regarding the development of the European merger control regulation (Cini et al. 1998, Bulmer 1994), no study has looked at the role of individual firms – when these actors are primarily affected by the EMCR – or tried to define where these pressures came from geographically. It is clear from Chapter 2 that not all Member States were at the inception of the European competition policy, or even at that of the European merger control regulation at the same development stage. Is it conceivable that corporate pressure from certain members of the most advanced Member States could have been felt at the European level? There is no answer from the literature. Yet Chapter 2 suggested in light of an analysis of the development of the European merger control regime that the industry – through trade associations or individually – had a critical impact on this development. This chapter will look at the design of corporate political strategies in this context in more depth.

At the European level lobbying was defined as *'all activities carried out with the objective of influencing the policy formulation and decision-making processes of European institutions'* (Commission 2006). 'Lobbying' as a concept is regarded differently in different national cultures'. In France 'lobbying' activities remain suspicious and controversial. Colbertist culture[156], a French peculiarity, is one of the possible explanations. Colbertism favoured a leading role for the State[157]; as a result interest representation by groups was seen as 'specific', in contrast to 'general interest' legitimately symbolized by the State (Meny 1986, Manin 1995, Saurugger

[156] Jean-Baptiste Colbert, King Louis XIV's financial controller, first set out to make France economically self-sufficient with a state-orchestrated industrial policy; successive French leaders have seen it as their duty to intervene in commercial affairs in the general interest.
[157] See FT article (27th September 2007), 'National champions, French energy mergers test Europe's free market puritans', p. 13.

2004). This perception of the State is to be compared with the more liberal stance taken by the United Kingdom. There all-powerful prerogatives are less likely to be attributed to the State. Indeed its field of action is more prone to be limited. As Knapp and Wright (2001) explained,

> *'It was a view that contrasted with those more liberal 'Anglos-Saxon' less ready to attribute god like qualities to the State and more inclined to limit its role to holding the ring between competing private interests whose social role was viewed as broadly beneficial'.*

The State predominance in France and the antagonism between specific interests and the general good are strong explanatory variables (Aubry 2006). As a result as Kohler-Koch et al. observed, national traditions do matter in designing lobbying strategies (Kohler-Koch et al. 1999).

In another paper (Berkhout and Aubry 2007) I have collaboratively assessed comparative work regarding the study of interest intermediation, and called for more studies of this type. The above-mentioned article argued for a 'functional segmentation', along the lines of the influence production process, to build a common research program. The influence production process was further divided into four stages (Lowery and Brasher 2003): 1) the mobilisation and maintenance stage, 2) the interest community stage, 3) the exercise of influence stage, and 4) the political outcome stage (see Table 6 below). This project is essentially based on the third segmentation of this process – namely 'the exercise and influence' stage.

Table 6: Interest representation segmentation

Segmentation	Description	Related literature
The mobilization and Maintenance Stage	Explains how certain latent interests become organized	Population ecology, collection action theory Messer (2007), Olson (1965)
The Interest Community Stage	Explains the dynamics between different groups	Truman (1951), Schmitter and Lehmbruch (1979)
The Exercise and Influence stage	Explains the strategies and tactics of organizations. What do groups do?	Boléat (1996), Fairbrass (2003)
Political and Policy outcome stage	Explains the effect of a group's politics on public policy	Greenwood (2003), Duer et al. (2007)

Much of the literature on corporate political activity falls into two main categories: 'how-to' books written by practitioners, which seek to describe those activities which are commonly employed in a given institutional environment, and another set of texts following theoretical and academic approaches. Importantly this also reflects a Franco-British dichotomy. Despite a nascent French academic literature (Dahan 2003, Saurruger 2003, Grossman 2004, Woll 2007), most volumes on lobbying remain technical manuals (Nonon et al. 1991, Lefébure 1991, Autret 2003, Coste 2006). The British literature is more varied, but has usually been at the forefront of academic research on interest representation (Grant et al. 1989, McLaughlin et al. 1993, Coen 1997, 1998, Greenwood 2003, 2007).

As explained in other parts of this thesis, generally speaking, approaches to the study of interest representation have tended to take an external, systemic view. Theories of interest representation would then analyse the role of pressure groups in a given political system. An effort to challenge traditional literature and use other academic resources to explain corporate political activity is visible (Fairbrass 2003, Attarça 2001, Dahan 2003). This chapter analyses corporate political activity from within the firm and asks questions about strategic behaviours – how do firms design a strategy? Which channels do they choose and why? Who interacts with the European

institutions and at what stage? These questions will be calling for questions regarding the importance of national government and the importance of national 'lobbying' traditions. Indeed Europeanization scholars are interested in understanding whether the emergence of large multinational firms, apparently subject to no single jurisdiction, led to the dispelling of national political reflexes. These issues are essential to understand corporate behaviour.

Building upon the framework of analysis of corporate political strategies design – established in Chapter 1 – and the contextual aspects of the European merger regulation – in Chapter 2 –, and the data collected as explained in Chapter 3, this chapter is interested in the analysis of corporate political strategies by comparing French and British financial services firms. As with other comparative projects in interest representation, the Europeanization theme is latent throughout the chapter. My case study work and this comparative project are stepping stones to the next, more theoretical, chapter regarding Europeanization.

1. Why a Franco-British comparison?

As previously mentioned the most favoured means of quickly developing global presence is by taking over the operations of other companies. Mergers and acquisitions have occurred in a series of waves since the second half of the nineteenth century (Maclean et al. 2004). The appetite for mergers and acquisitions shown by French and UK firms at the beginning of the twenty-first century was not sector specific. Nor was it confined to cross-border transactions. Quantitatively comparing takeover activity of both countries, Maclean et al (2006) concluded that the approach taken by French companies, most typically but not always, is to internationalise within the EU before expanding further afield, whereas UK companies look more naturally to the US and Commonwealth countries, as well as the EU, for major strategic opportunities.

In the context of the European merger control regime, it is important to distinguish between the national and the European level. Both coexist, as was explained in my second chapter. The latter chapter indicated that considerations such as the

independence of national authorities in charge of merger control, the substantive tests applied and so on may explain differences in behaviours of firms.

1.1. Comparing government-industry relations

Other projects have been built upon a Franco-British comparison (Josselin 1996, Fairbrass 2003, Maclean et al. 2006). Indeed, the UK and French government-industry relations have exhibited some distinctive characteristics, as a result of contrasting, of core politico-administrative and economic institutions – more fundamentally governance structures – and sociological background.

In terms of similarities, as political and economic actors within the EU, they have a broadly comparable role and status, with equal weighing in the EU's institutions reflecting their similar demographic and economic characteristics. Crucially for this project both countries have been subject to the European merger regulation at the same time.

However, the two countries have exhibited some striking differences in terms of certain politico-economic structures, macro-economic management, and industrial policy aspirations. In the immediate post-war period, the UK showed political commitment to nationalisation, economic planning and state direction of industry and in a limited way attempted to emulate the French indicative planning model in the 1960s. During the last two decades of the 20th century, the UK has opted for the espousal of market-led responses to economic crises, its early and extensive moves to market liberalization, and largely *laissez-faire* treatment of industrial matters. In contrast, France has been distinguished from other EU Member States and the UK in particular, for its third model of capitalism (Schmidt 2003). The latter shows its enduring attachment to *'le service public'*, and its support for industry. Although Schmidt acknowledged that the post-war state-led capitalism may be gone, she also argued (Schmidt 2003),

> *' […] that continuing importance of the state or state-related institutions in the economic management systems of countries which have evolved from post-war 'state-led capitalism' to what one might call today 'state-enhanced*

capitalism', [means that] the state having played a highly directive role in the past, continues to exercise significant albeit less direct influence'.

In terms of the centralisation of the governance system, both systems present a certain degree of centralisation. However the British devolution effort has had more impact than the French decentralisation efforts.

In competition matters, it is generally accepted that the UK is in favour of strong competition rhetoric whereas France prefers an 'industrial policy' rhetoric[158]. In 1996 Schmidt used the examples of European competition policy to evaluate the impact of European integration on French government-business relations (Schmidt 1996). French business and government officials complain in particular of what they see as distinctively 'Anglo-Saxon' bias, or the liberal economic ideology, that they insist has pervaded DG Comp (then DG IV) especially under Sir Leon Brittan. A majority of French CEOs, despite their general support to the acceleration of European integration were quite hostile to a European competition policy. Their 'fears' were 'confirmed' by the *de Havilland* case, where the French criticised EC civil servants for basing their decisions not to allow the acquisition by Aérospatiale and Alena on purely 'liberal' grounds, that is on the effect of a takeover on world competition, rather than, say, in what position this would leave Aérospatiale by comparison with its major competitors (Dumez et al. 1992). French business and government officials incorrectly assumed that the process was political, not technical, and were not up to the European lobbying exercise, having failed early on to provide the kind of technical information that might have swayed the European Commission (Dumez et al. 1992).

One of my interviewees, from the Competition Commissioner Cabinet, made this point very clear in reference to French firms. He explained[159],

'Schneider was not the only one to be totally wrong. Any French firm which is misled by the fact that the European Union's structure resembled that of the French structure with its ministries and Directorate-Generals and a President – at the thirteenth level of this Berlaymont building – and therefore supposes that you lobby here as you would in Paris – which means that you do not do

[158] Schmidt, V. (1996)
[159] Interview with author, Competition Cabinet Member, January 16, 2006, translated by author.

anything, you do not try to convince with valid arguments, and in fact you only have to wait to go the Head of the Cabinet – is wrong. This is not how you go about things here. The main difference here, contrary to Paris, is that there is no argument of authority. I, as a member of the Competition Commissioner Cabinet, cannot tell the Head of DG Comp that although he has valid arguments in his technical file about a merger case, I am going to go against his decision only because I am an important Member of the Cabinet. This sort of argument does not work here, whereas I can guarantee you that in Paris, it does exist to a very large extent'.

1.2. Is there a national interest representation model?

National policy-making patterns can be situated along an axis from statist to corporatist (Schmidt 2006). For Member States showing signs of statist patterns, state actors have traditionally provided interest representatives with little access or influence in policy formulation but have generally accommodated them in implementation. By contrast, for Member States closer to corporatist models of governance state actors have traditionally brought certain societal interests, mainly business and labour, into both policy formulation and implementation.

A number of general studies on interest representation exist in both countries. These often suggest that a national 'model' of interest representation can be ascribed specifically to France and Britain. This model would be closely linked with the notion of 'policy style' as defined by Richardson (1982) and originally developed by Anderson (1979) as the interaction between the form of approach intentionally envisaged by the government in order to find solutions to public policy issues on the one hand, and the relations between the government and other actors in the political process, on the other (Saurugger 2003). Accordingly a four-element matrix of policy styles was established. On one side it would qualify the relationship between governmental actors and interest representatives, consensual or coercive relationships, and on the other a distinction would be made between anticipating and reactive governmental attitudes towards public policy issues. Policy styles are defined as the result of different systems of decision-making and implementation processes. This concept assumes that governmental actors usually design standard operating procedures thanks to which they deal with issues on the political agenda. Consequently, the relationships between interest representatives and the public sphere will also be subject to standardised procedures – such as regular meetings,

institutionalised consultation processes, or close relations between actors of a similar community, for instance graduating from the same *Grandes Ecoles*.

In France the principle of pluralist democracy gives the State the mission of guaranteeing – beyond the specific interests of individuals and interest groups – the primacy of the general interest. In this context, many constitutional, legislative and customs dispositions, as identified by Mény (1986), aim at preserving the ideal of the general interest. The statist intermediation processes indeed perceive the influence of lobbies as illegitimate, and traditionally use formal consultation processes with a view to inform rather than incorporate interest views (Hayward 1995, Schmidt 1996). Despite this legal and constitutional construct the government and the French administration have nurtured personal relationships. This attitude can be explained in terms of legacy of Le Chapelier laws which, in the 19th century, prohibited any grouping around interests. Wilson (1987) in his seminal work on French interest groups explained that in fact no model – neo-corporatism, neo-Marxism elitism, or pluralism, could be applied in its entirety to the whole of the French interest representation landscape. Accordingly a mix of the three may be a more appropriate model.

As far as corporate political activity is concerned, the role of elites that link the management board of companies to ministerial cabinets as well as administrations – relationships based upon common education paths (at the French *Grandes Ecoles*) – characterised the 'French model' of corporate interest representation. The concept of *'pantouflage'* encapsulates the possibility of senior civil servants to leave the civil service to work in the private sector, mostly in public enterprises or former public enterprises. This particular relationship encapsulates a type of French dirigisme made up of interventionist policies and top-down policy-making processes. While dirigisme today is very much diminished (Cohen 1992), the movement of individuals between the private and the public sector is still very common (Saurugger 2004). The European layer of governance has as a result sociologically diluted the old French network established by the *Grandes Ecoles* and the *pantouflage*[160]. The object of this study is to assess whether the dilution of this model has led to a different –

[160] Athenora conference, Brussels, 31 May 2005, 'les francais a Bruxelles: un lobbying professionel a visage decouvert'.

Europeanised – model. However, the national model of British interest representation needs also explaining at this stage.

The British government is associated with the model of representative democracy. The determination of specific policies in government emerges from a complex process involving consultation between a triumvirate of ministers, civil servants and representatives of those interests likely to be affected (Jones et al. 1998). Finer's work[161] concluded that,

> *'[Pressure groups'] day-to-day activities pervade every sphere of domestic policy, every day, every way, in every nook and cranny of government.'*

As a result the representative democracy, which is based upon geographical areas, is therefore supplemented in practice by what can be seen as 'functional democracy' or 'group representation'.

The government has always had to deal with groups in society, but in the last two centuries they have organised themselves more effectively as society has become more complex and as government has intervened in more areas of life. The anti-slavery movement and the Anti-Corn Law league were two early examples. The nineteenth century also saw the formation of the major groups concerned with industrial production. Trade unions increased in membership and coalesced to form bigger units, while business groups too formed federations in order to negotiate more effectively with the unions and the government, itself an increasingly important economic interest. This was catalysed by two world wars and Labour's 1945-50 nationalisation programmes.

The case study and comparison between French and British firms is therefore expected to be analysed at two levels. Firstly, it will be analysed in generic terms and will provide insight in the design of corporate political strategies in the context of European merger control regime. Secondly it will provide analytical data regarding differences between French and British corporate political strategies according to the

[161] As quoted in Jones et al. (1998, p. 195)

different elements of the framework of analysis. In turn, the resulting analytical data will be used in Chapter 5 to contribute to the Europeanization literature.

2. A generic analysis of corporate political strategies in the financial services sector

2.1. High-level and technical organisational levels of interaction

My research project's participants – contributors to the participant-observation research phase as well as the case study one – seem to unanimously agree that they are using high-level as well as technical strategies in interacting with the European Commission in merger cases. This has an impact on the arenas and vehicles elements of my original framework for analysis.

This dichotomy further qualifies Bouwen's (2002) typology of information. Bouwen explained that each European institution needed one type of information: Expert knowledge in the case of the Commission, Information about European Encompassing Interest in that of the European Parliament, and finally Information about Domestic Encompassing Interest in the Council. I contend that considering the organisational structure of the Commission, the European body expects differentiated information from interest representatives.

The organisational structure of BNP Paribas is particularly relevant in this context. Indeed, different 'public affairs' departments were scattered throughout the business units and one had prime access to upper management levels, i.e. the Chairman and the CEO. The type of documents produced by the different organisational entity reflected the internal audience the public affairs dealt with and represented. Indeed, public affairs departments within the different business units were interested in specific and technical issues, whereas the upper-management public affairs departments overviewed all the issues at a very early stage, usually at the Commissioner's level. No response paper would be formally drafted in this particular structure. The briefing papers would refer to long-term objectives and would identify European issues where it was felt that the Commission had a clear role to play. The EFR will therefore be the prime interlocutor of such departments. The EBF or other banking associations and their working groups will be seen as more

'technical vehicles'. In merger cases, the Chairman or CEO would be expected to meet the Competition Commissioner whereas the legal department would provide detailed feedback to the case team.

Within the British Bankers' Association such a structure was not apparent at first glance. However the organisation is much smaller and the staff has to be able to deliver at different levels. The dichotomy appeared in the language used when strategy was talked about. On the one hand, the BBA drafted position papers and organised different meetings with Commission Directorate-General's officials in charge of drafting a legislative proposal. On the other hand my department also sent 'high level letters', i.e. signed by CEOs of major banks, which contributed to debates through articles in the *Financial Times* and/or wrote 'academic' papers on general issues. Based on my diary and subsequent research into papers produced by the banking industry, I tried to explain this dichotomy by a scaling exercise (Figure 6). I took into account the audience that would receive this type of interaction, the participants in the drafting of the documents in preparation or as result of these interactions, and the content of the latter[162].

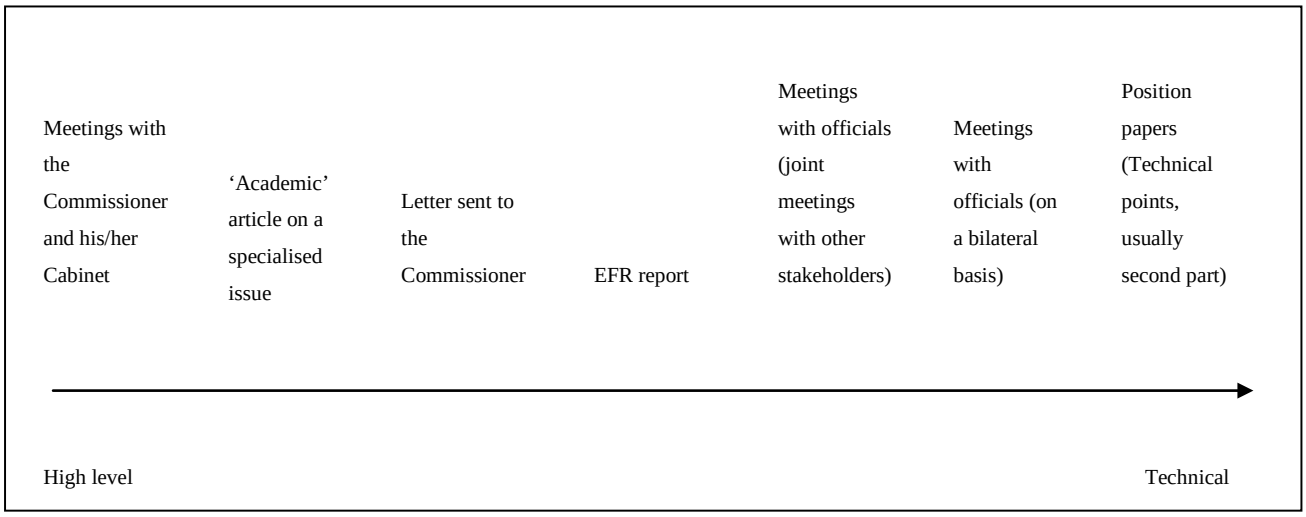

Fig.6: Spectrum of high-level/technical examples of output from public affairs organisations

[162] For instance, some responses details all articles of the legal text and the wording of it. A 'high level paper' will discuss the overarching objectives of the Directive proposals – or the future work programme.

This continuum from high-level to technical interactions with the European Commission also reflects the organisational structure of the European Commission, as will be discussed below.

2.2. The impact of the high-level/technical dichotomy on the framework of analysis

My framework of analysis can be refined in light of the discussion around the high-level and technical dichotomy. Indeed the type of the information along this continuum can be provided by different vehicles. Therefore the choice of vehicle will be highly dependent upon the information that will be contained in the message.

A certain amount of political sensitivity regarding the arena in which the corporate political strategy will be designed should guide the choice of the 'internal vehicle' that will be discussing merger regulation implications. As one of the Brussels-based lawyers interviewed[163] explained,

> *'You have to realise that you have a case manager, one of the heads of unit, and a team of officials. The case manager reports to a director, the director reports to the deputy Director-General of the Directorate General, and above that there is the Director General and then there is Neelie Kroes and above that there is the Cabinet. And each of these people has a say in the process. (…) This is how the system works, and it is easier if you have some sensitivity about the process and institutions'.*

It is, therefore, probable that corporate top management will meet Commissioner's cabinets rather than Directorate General officials – the 'arenas' element of corporate political strategies to which the message should be conveyed to. The dichotomy between high-level and technical reflects in effect the type of discussions that they will have, and the level of technicality involved. As one Head of European Public Affairs explained[164],

> *'It depends what we would want to achieve. Clearly if we go to see a Commissioner, we will probably try to get someone more senior. But if you are talking to a Commissioner you are probably talking policy rather than details anyway. And then, the issue is more about how technical it is. If it is*

[163] Interview with author, Brussels, 18th January 2006
[164] Interview with author, London, 13th December 2005

> *technical, I will try to get a technical person that is able to explain the technical details of a particular issue. (…) The higher you go up [the hierarchy], the more distant individuals are from the technicality of the topic and the more they are able to lead overview discussions of the issue (…). It is a balancing act around what you are really saying. It is a case of importance. You are sending a strong signal if you have top management coming, as a senior member of the company has taken the time to come and explain how serious the issue is, and the Commission should therefore take it seriously'.*

Indeed the choice of internal vehicle reflects the fact that the arena, in particular the Commission, is a multi-layered organisation (Cram 1994, 1997) as explained by the bureaucratic politics approach (Downs 1976, Crozier 1963). The latter suggests that different units of the governmental system follow three objectives: increase their budget, reinforce their legitimacy, and guarantee their autonomy (Pollack 1997, Peters 1992). Page (1997) indicates *'there is clear evidence that shows that different ministries and agencies within a government develop distinct ideologies'* (p.11).

European institutions are easing policy-making processes at the European level but are also bodies that wish to gain, widen or at least keep its own competencies, which leads to intra- and inter-institutional struggles (Cram 1994, Pollack 1994). The Commission, as an executive entity in the case of mergers, is obliged to find a compromise at the highest level. Coate (2002) explained this tension through a two-stage policy modem in the case of bureaucracies. Accordingly,

> *'In stage one, the bureaucrats choose a desired outcome based on their interpretation of the agency mission (this interpretation could be coloured by self-interest). Then in stage two, the politicians interact to affect the policy outcome. In some cases, transaction costs preclude political control, such that default bureaucratic outcome occurs, while in other cases, the political control model determine the outcome. Although bureaucrats may have limited power in the policy process, their influence now stems from a first-mover advantage associated with making the initial choice'.*

The case of the Mannesmann/Vallourec/Ilva merger referred to in my introduction[165] is telling. The technical level is in constant interaction with the political level within the Commission.

[165] The latter is considered a controversial decision for the collegiate Commission. Indeed the decision went against the Advisory Committee – made up of representatives of Member States – recommendation, and Competition Commissioner Karel Van Miert was outvoted.

This distinction suggests that the more aggregated or 'macro' levels of analysis used in political science, economics and sociology may have its flaws. Indeed in the case of the Commission individual DGs play different roles and command different budgets (Bellier 1997). The separation between the distinct elements of an organisation provides a more comprehensive analytical basis for corporate political strategies, as can be seen in the diagram below based on my Chapter 1 framework.

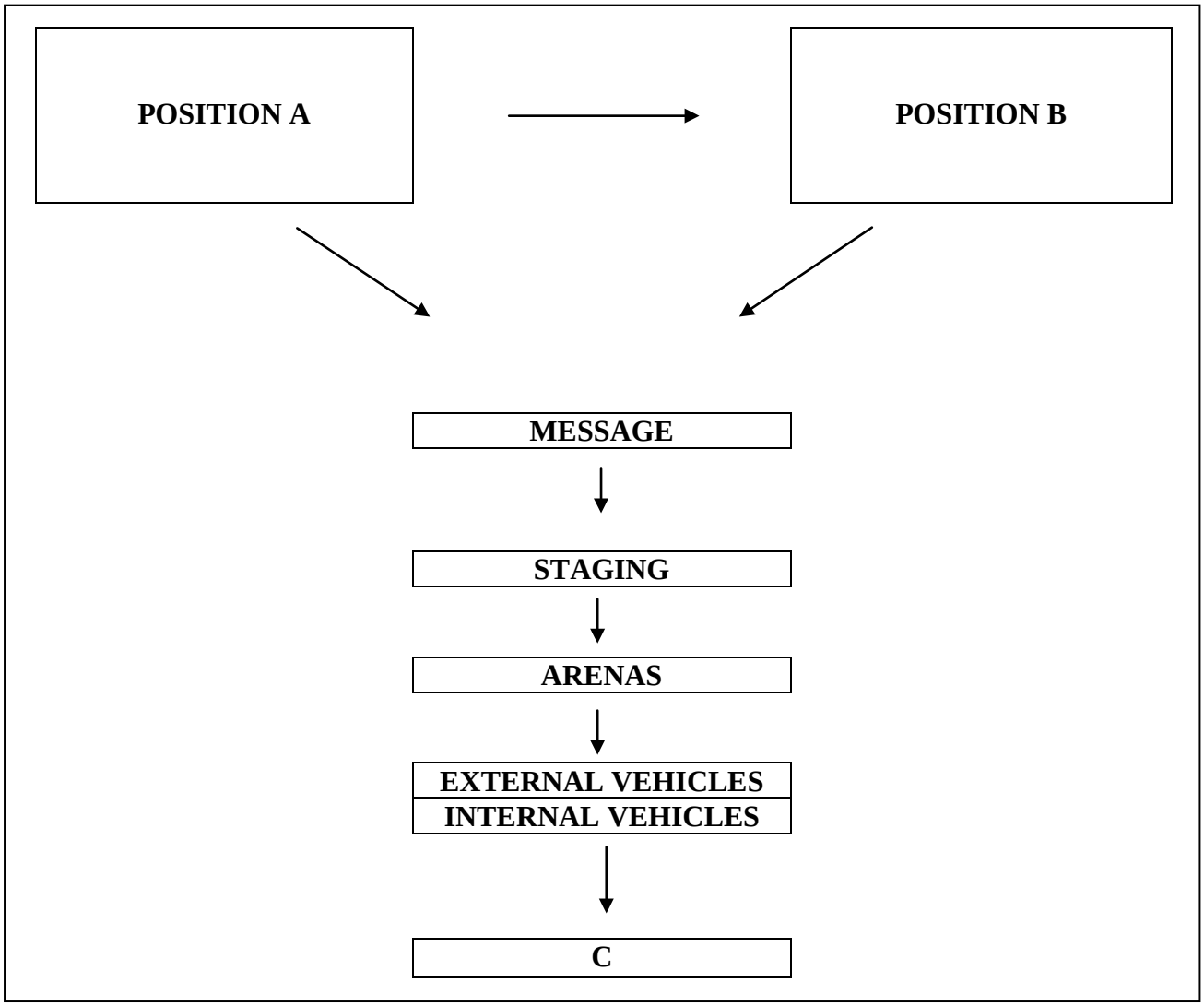

Fig.7: The design of a corporate political strategy

The distinction between high-level and technical also highlights the inter-dependence of the different elements composing the design of corporate political strategies.

3. Comparing corporate political strategies – and elements of strategies

Boléat (1996) used the analogy of a salesman to explain the importance of the presentation of a position to the authorities (also in Van Schendelen 2005). This analogy can also be usefully applied to firms presenting their case to DG Comp officials. In this context presenting a merger case is like selling a product. Accordingly, the client or customer would be the case team. It follows that the sales technique should be that employed by any responsible salesman. The first essential is to have a good case, well presented, that is likely to be acceptable to the person buying the product. One is not dealing here with ignorant customers who will buy anything but rather with highly expert people. While clever packaging and aggressive sales techniques might work in selling a product that is inappropriate, with experts these techniques not only do not work but are also counter-productive[166].

Indeed merger case teams are primarily interested in understanding how market dynamics hold and what competition structures are like to ultimately be able to assess the market structure and how the transaction is going to affect that market. Within a couple of months the case team is considered the experts of the European Competition authority regarding the industry where the transaction is taking place. Indeed DG Markt, rather than DG Comp, would usually have the expertise and the relationships with the stakeholders within this industry. One European Cabinet official, while explaining how case teams were assembled, pointed out the difficulties regarding the level of expertise needed,

> *'I can guarantee you that when you investigate a merger in the satellite systems industry in order to grasp competition issues you need to know how it works, and what the product substitutes are. And therefore you need engineers and not any engineer. In France, we would hire graduates from X-Mines[167], for instance'[168].*

Bouwen (2002) explained the importance of the 'access goods' to European institutions. He also distinguished between different types of expertise according to

[166] Interviews with European Commission officials, Brussels, January 2006.
[167] Students graduating from the *Ecole of Polytechnique* who aspire to enter the Corps of Mines – the great technical corps of the French state, attached to the French Ministry in charge of the industry.
[168] Interview with European Commission official, translated by author, Brussels, 17th January 2006.

the different vehicles. This concept is taken, to a certain extent, in my own project under the 'internal vehicles' banner.

3.1. The delivery of the message

Apart from confirming the high-level/technical dichotomy, the comparison between French and British firms highlighted the importance of the attitude of firms when establishing relationships with the authorities in merger control cases. The role of expertise in regulatory contexts was highlighted in my first chapter. The European level of governance is seeking to aggregate knowledge. Interest representatives capable of displaying the required competencies are better positioned. Analysing the Commission or a firm as one entity may distort an otherwise thorough study of corporate political strategies. The financial services case study used as the basis of this chapter confirms such an approach.

Different Directorate Generals provide – vertically – different expertise. However DG Comp stands out as its decisions affect all sectors, and as a result impact, to a certain extent, all other DGs on a permanent basis. One of the Commission's officials explained that thus DG Comp and DG Markt, in the financial services sector, work in concert. DG Comp does not hold the expertise in banking, neither does it have the long-term established relationship with that industry. Most of the European public affairs experts in the financial services industry I interviewed explained that they do not see DG Comp on a regular basis whereas they are all permanently in contact with DG Markt. Moreover the use of different regulatory tools in DG Comp influences in turn their behaviour. As the Commission official explained,

> *'When I left DG Markt everyone told me that I was going to see the same companies but with their lawyers, and this proved to be true.*
>
> *The procedures are very different. Commissioners cover different aspect of the same area, and they use different tools, which in turn influence their attitude. DG Comp is not a talkative service – people are scared of information leakages. There is a definite culture of secrecy here compared to DG Markt. DG Markt in a sense is a lot more transparent because the services deal with policy-making*

and need input from firms about the realities of the market. It is a bottom-up approach that is encouraged. It is done through consultation.

De facto there are different attitudes in people. The way DG Comp operates is a lot more confrontational than in DG Markt - because they are more cautious of corporate operations. But firms interact with DG Comp the same way, i.e. by involving a legal team. When you come to DG Comp it is because you may be in breach of a European provision, and this shows in attitudes'[169].

Yet coordination prevails and both services work in parallel on many cases. In the Polish case[170], it is worth noting that the infringement proceedings were coordinated at DG Comp and DG Markt levels. Both services joined forces at the start of the proceedings[171]. The European body started proceedings on the basis of Article 21 (of the EMCR) – within the remit of DG Comp –, and Article 56 (EC Treaty rules of the free movement of capital), Article 43 (the right for establishment) – within the remit of its internal market responsibilities. The infringement procedures also followed those of Article 226 of the EC Treaty. Such an approach takes advantages of both instruments in merger cases proceedings. The famous case involving the Bank of Italy[172] also shows the interaction between both services. Every sentence of a decision is revised by both services. DG Markt endorses the role of guardian of the Treaty and DG Comp has executive powers on authorising mergers. Therefore DG Markt will be interested in stability whereas DG Comp will look at market share or other technical economic elements.

The coordination aspect of this inter-institutional relationship is accentuated by a phenomenon of cross-fertilisation between the two DGs; some senior officials, such as Alexander Schaubb former head of DG Markt were formerly with DG Comp and vice-versa. Indeed, the recently appointed head of the financial services unit at DG

[169] Interview with author, Brussels, 9th January 2007

[170] According to a Commission Press release of March 8, 2006, 'The European Commission came to the preliminary conclusion that the Polish Government has violated the EU's Merger Regulation (Article 21), which gives the Commission exclusive powers to take decisions on mergers of a Community dimension. In particular, the Commission considers that the Polish Government has encroached on the Commission's exclusive competence by requiring Italian bank Unicredit to divest its shares in Polish bank BPH, despite the fact that the Commission already authorised, on 18th October 2005, Unicredit's acquisition of BPH as part of its takeover of German bank HVB. The Commission has therefore decided to send a letter to the Polish authorities, asking them to justify their actions within fifteen working days. The Commission has also opened an infringement procedure against the Polish measures based on the EC Treaty's Internal Market rules'.

[171] Two separate press releases were issued as a result of the proceedings – on the same day, March 8, 2006 –, IP 06/276 for the Internal Market services, and IP 06/277 for the competition services.

[172] The Bank of Italy had delayed the ABN Amro bid for an Italian bank, Antoveneta, in March 2005.

Comp comes from DG Markt and has already established a relationship with DG Comp officials. Mutual recognition is therefore fostered by staff movements.

This does not mean that the services always agree on everything – as different approaches to a case demonstrate. The procedures are very different from one service to the next. For instance, DG Comp may want a reply within three hours according to internal procedures regarding mergers when the normal timeline for DG Markt is ten working days. The current situation is exceptional. As Cini (1995) further encapsulated,

> *'It should come as no surprise (…) that directorate-generals within the Commission [have] their own policy style, their own ways of working, and their own policy and organisational objectives. In addition DGs tend to be protective of what they consider to be their own sphere of policy influence, in Commission cases even seeking to 'steal' policy competencies from elsewhere in the Commission'.*

A Weberian defined bureaucracy that is the Commission, the different Directorate-Generals, and the particular culture of DG Comp, have an impact on the way corporate political strategies are conducted, as a European public affairs expert explained plainly[173],

> '*Well, [going to DG Comp] is very much like going to the police station. You go in there completely innocent but you are made to feel you are a criminal. Because their job is to get industry, find cartels and punish them. That's all they are thinking about. Whereas none of the DGs are protecting consumers and they are not there to point out the flaws of the industry. So they have a different mindset.*
>
> *My experience of them is that there is not a sense of open dialogue with them because their function is different'*

One of my interviewees, based at the CFI, related that the surge in merger Court cases is in fact symptomatic of bureaucracy issues[174], notably its capture by conflicting interests which in turn stalls the decision-making processes. He referred to the Airtours, Schneider-Legrand and Tetra cases. As mentioned in Chapter 2 these three judgements had an impact on organisational arrangements within DG Comp. A study

[173] Interview with author, London, 13th December 2005.
[174] Interview with author, by phone, CFI référendaire, 29th June 2006, translated by author.

in the US Federal Trade Commission (FTC) studied the political influence on merger bureaucratic decision-making processes (Coate 2002). When asked how stakeholders and observers explain the string of prohibitions as shown by Annex 3[175] – and subsequent surge in Court cases, one interviewee explained,

> *'Firms have the feeling that they hold a counter-power. When firms are interacting with the Commission, they feel they go against a brick wall. During a CFI audience they can bring to the fore all they would have liked to produce during the administrative phase of the review of the merger cases'*[176].

The differences that can be observed within the Commission, as exemplified by the relationship dynamics between DG Comp and DG Markt above, are mirrored in important organisational elements in firms.

Unsurprisingly, within firms, mergers are primarily the responsibility of the legal department and, in particular, of the General Counsel. The tension between public affairs and legal departments is palpable regarding the interaction with political stakeholders and legislative developments. Indeed both units are interested in policy-making, and inter-departmental frequent meetings are usually organised within firms. For instance, BNP Paribas set up a monthly European legislative overview composed of public affairs and legal experts, in order to discuss forthcoming policies and allocate responsibilities. Merger cases meetings are also scheduled to ensure best representation and information gathering as cases developed.

One government affairs official explained that his legal department was great for ideas and conceptual thinking but that they could not translate those into understandable political messages, or prioritise items[177]. That may explain why many legal firms now have a public affairs department attached to them in charge of competition issues, especially in Brussels or Washington (DLA Piper, for instance). However this complementary of expertise is better acknowledged within firms than between legal firms and their clients – probably because they work on a permanent basis together. Therefore a firm's legal department will be in charge of the legal

[175] From 1994 to 1999, 7 cases judgements were made by both European courts; from 2000 26 cases were closed.
[176] *Ibid.*
[177] Interview with author in the Hague, 8th February 2007

documentation of a merger transaction – useful in competition cases – whereas the public affairs unit will 'talk to its stakeholders'[178], i.e. national politicians in the Ministry, Parliament etc and its designated EU sectoral Directorate-General. Unsurprisingly corporate lawyers have switched to public affairs. The task of a public affairs department is based upon the deciphering of legal texts and a legal background is perceived as helpful.

Interestingly a British debate highlighted this tension between public affairs and legal departments and their role. The Legal Services Bill was supposed to allow for the involvement of non-legal participants in a business of delivering legal services[179]. The importance of the legislation from the perspective of public affairs lies in Part 5 of the Bill. This part of the Bill aimed at a) removing barriers thus preventing those outside the legal profession from investing in, and b) holding equity in law firms therefore allowing non-lawyers to enter legal services.

Such considerations need careful attention when interacting with the European Commission in merger cases. The differences in organisational culture, and awareness of the latter, should be taken into account in conveying messages for merger cases. Although the Commission remains, as a whole, a bureaucracy in need of expertise as highlighted in the literature, the type of expertise should be adapted according to the interlocutors and the issue to be discussed at tend. A phase I and a phase II of a merger cases do not require the same level of details. It is indeed usual that economic reports are presented in investigation.

The style of interaction between firms and EU policy makers was one area where major differences emerged between the UK and French firms as far as EMCR is concerned, as will be discussed in the 'arenas' section. Several observers commented that the UK firms were 'pragmatic', more 'technical', and more concerned with the

[178] *Ibid.*

[179] In October 2007 the Bill passed into law as the Legal Services Act. The Legal Services Act is the first attempt to draw the entire legal services market into one regulatory framework. It is a far reaching and radical departure from existing regulations and legal business structures and achieves this departure by allowing the creation of what has been termed *"Alternative Business Structures"* (ABS).The Act maintains the status quo in relation to "reserved activities" i.e. advocacy, conducting litigation, conveyancing and probate, yet fails to regulate unreserved legal activities e.g. Will writing, employment advice, health & safety, although the Act does give the ability to quickly apply regulations to these unreserved activities.

details of policy and/or legislation than the French firms. By contrast, the French were perceived to be 'philosophical' and 'political' in their approaches to EU policy makers, and more concerned with broader 'architectural' issues than the fine detail of a policy or directive.

However as DG Comp is keen to be perceived as an independent agency in the different strands of its competences, political intervention may be viewed as 'aggressive' – in the sense that it questions the powers of the Commission, and in contrast to an expert relational strategy. Moreover, the Commission, especially in competition matters, relies heavily on its independence[180]. Throughout my interviews with European officials, notably within DG Comp, the same logic of asserting the concept of independence in merger cases investigations could be felt. Many officials were keen to explain the latest economics techniques applied to merger cases[181], the checks and balances in place, the appointment of a Chief Economist, for instance. I conducted my interviews after the overhaul of DG Comp and the merger case teams. The impact of industry comments and CFI judgements was clearly palpable.

As a result calling upon the Competition Commissioner or his/her Cabinet or other Commissioners may be a risky strategy. Commissioners are very different from European officials as was experienced by Schneider and Volvo. The argument of Commission independence despite the national legacy as highlighted by Bellier (1997) still stands.

Yet critics of the European merger regime point out that the system is too politicised - unlike for instance the German *Bundeskartellamt*. They advocate for a European Cartel Office[182] as a solution. Indeed Commissioners are remembered as other politicians for their decisions and policy developments. However Commissioners are

[180] Interview with author, Cabinet to Nellie Kroes, Brussels, January 2006.
[181] The Commission has started to develop and apply new economics-based theories of harm. Economic analysis shows that harm can in principle arise from diagonal mergers, where a firm acquires, but does not supply inputs to, a rival to one of its customers, or from partial ownership or minority stakes that confer positive or negative control. These theories are reflected in the approach adopted in Universal/BMG Music Publishing. Equally, whereas entry conditions are traditionally used as a theory of defence, the Commission has also examined mergers to establish whether they may reduce competition by eliminating a potential entrant (e.g. Aker Yards/MTX), a case that mirrors the 2005 UK investigation of Bucher/Johnson.
[182] See Wilks et al.(95), McGowan (96).

not experts in each and every case going through DG Comp. Commissioner Monti, for instance, heavily relied on the work of the case team and its members when dealing with firms. As a former spokesman of DG Competition recalled,

> *'Monti was very supportive of his team. This is one trait that everyone can agree upon. It really came through when companies came to meet him to expose the facts. Monti was defending the machinery and the documents that his services would produce and this could be in front of other Commissioners as well as in front of companies. The case team and the whole team which worked on the case would be present throughout the process. He took the view that they were the expert in the case'*[183].

It is then the role of the Commission to decide upon the 'political correctness' (Saurugger 2003) of the information presented to the European institution. As a 2003 working paper of the European Parliament advises as a best practice,

> *'Your case should always be presented as being able to make a contribution to the aims of European integration, which is based on a number of principles; such as free movement of goods and persons, social cohesion, the fight against unemployment and competitiveness. Highlighting these principles, on which all European legislation and initiatives are based, will enhance your profile'*[184].

This advice was directly given to French firms during an Athenora conference in Brussels supported by MEPs. French firms were urged to adapt their messages when interacting with European institutions. Accordingly,

> *'More basically, the French need to renew their vocabulary in a universe where certain terms are not well-received whereas they are right on target at national level. Many expressions do not simply need a "translation": Community interest for general interest, service of general interest for public utility, consumer's protection for social protection, cohesion for regional planning... Some actors, besides, understood it well and make a virtuoso use of Community rhetoric, hoping to relegate to the background points which can cause mistrust, if not the reprobation of the institutions'.*[185]

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[183] Interview with author, translated by author, Brussels, 12th January 2006.
[184] European Parliament (2003)
[185] Athenora conference held on 31st May 2005 at the European Parliament. The short report is available at http://www.athenora.com/uploads/en/Article%20conference%20lobbying_EN.pdf?PHPSESSID=19e70556812c2c1a6fded061d8df93f0

Although the Commission is dependent upon expertise, one of the organ's roles is to manage public policies and to filter the information. Indeed the fragmented structure of the European Commission – referred to throughout this Chapter – lead to situations where the bureaucratic entities may be in conflict and that the gathered expertise may also be used for political ends. In fact providing information to the Commission, within a corporate political strategy, should be perceived from two angles: expertise in order to legitimise the European institutions' activities and enhancers of competencies of Commission entities in an intra-institutional context.

As will be explained later French firms have been slower to recognise the importance of the European level of governance. Yet it should be recognised that French firms have now taken a much more active role. British firms, on the other hand, have quickly recognised the opportunities that a new layer of governance provides. In previous chapters I referred to the 'output legitimacy' debate. The Commission welcomes interest representatives as the European body is hungry for information, and recognises the importance of external expertise in policy-making. In addition in the European merger regime, the Commission is attached to its independence – underlying this concept is the notion that the Commission does feel it has to be pressurised by Member States.

The fact that French firms may be relying in European merger cases, to a certain extent, on French authorities has an effect on the quality of the relationship French firms have with European bodies. This may be explained by two factors. Firstly French authorities have been perceived to 'intervene' in merger cases as related in newspapers, overtly criticising the Commission (De Havilland, Schneider/Legrand[186]). This has been mentioned by my interviewees as a major *'faux pas'* in merger cases. As one lawyer interviewed explained, in the case of the Schneider case,

> *'We tried to contain the French company's willingness to manage everything from Paris and get involved in all aspects of the case. We advised Schneider*

[186] I have heard contradicting stories on this front. All interviewed lawyers familiar with the case accept the intervention of French authorities, but they dispute the timing of it and therefore the actual influence this intervention may have had on the Commission's final decision.

CEO […] to keep quiet until the Commission came out and to take it from there'.[187]

Secondly, French firms may have different visions of the European policy-making system in merger control regulation. It is viewed as an economic system that simply goes against industrial policy (Van den Hoven 2002). Understanding decision making mechanisms and aspirations of the European merger regime is key. In merger cases the case team is a crucial element. Commissioners generally become involved only when an issue is politically important, requiring in-depth analysis. The majority of decisions are handled by DG Comp officials and even where a matter is ultimately determined by a Commissioner, because they are at the top of a directorate-general, Commissioners will normally accept the advice of their officials, as explained earlier with the example of Mario Monti. Where there are issues to a merger decision or where there are significant political implications then officials will properly put forward a range of options with the pros and cons of each, leaving it to the Commissioner to decide. This system, also applied in other segments of public policy and in other political systems (see Boléat 1996 for an example of the British system), ensures that merger cases are examined professionally. Regardless of who is doing the examining the same end result should be reached.

This latitude in attitudes towards the European level of governance has an impact on the type of relationship firms have with the Commission. Indeed resorting to Member States' governmental intervention challenges the perception the Commission has of itself as an independent authority, and the ultimate objective the European authority has: the integration of the European market. This explains why 'national champions' – the merger of firms of the same nationality - pose more problems. Airtours/First Choice and Schneider/Legrand are prime examples of this. More recently, the merger involving the former gas monopoly GDF and the French company Suez was a clear defensive move to counter Suez's hostile takeover launched by Enel.

As a result the delivery of messages also plays a crucial part in the comparison of French and British corporate political strategies. This added dimension to the overall

[187] Interview with lawyer based in Brussels, 25th October 2005.

strategy encapsulates the degree of recognition of the European level of governance in its own right and how the discourse firms present to European authorities is adapted to its perception of itself and its objectives.

Using exchange theory jargon, corporate political actors do not possess a monopoly of the good of information (or only in exceptional cases). Moreover, information is not readily available, rather it has to be generated and adapted to the demand side. Depending on the issue, specific firms can deliver specific information about the way legislation will affect for instance their sector and the amount of conflict or consensus that can be expected from a certain regulation. The information good delivered can also specify how to curb conflict and foster consensus. Related to the specific needs of European decision-makers, this involves, for instance, information about effects in all EU Member States. Merger cases require similar adaptation of information, depending, for instance, on which phase of the proceedings the case has reached – the different stages are explained in Chapter 2 - , or which type of operation is considered.

3.2. Case study data analysis and the 'staging' element

In my first chapter I referred to the definition of a strategy from the management literature. Hambrick et al's (2005) definition of a strategy identifies five critical elements to its designing – namely arenas, vehicles, differentiators, staging, and economic logic. From this definition I identified three core elements –staging, arenas, and vehicles. The three core elements are to be understood within a wider corporate political strategy design framework that incorporates the importance of messages as described in Chapter 1.

Merger decisions should be reached as quickly as possible, with the least possible number of remedies given to the authorities. Therefore designing strategies promptly is essential. As one French commentator explained,

'The prime aim of the ARFA[188] is to work on the time of the transaction. It is looking at how to reduce it (…). Indeed the time spent on the one transaction affects directly to the implementation of the overarching corporate strategy. A firm cannot do several transactions at the same time'[189].

As explained in Chapters 1 and 2 of my thesis, the 'staging element' is particularly important for firms and drives the design of corporate political strategies, as it will determine which 'arenas' to interact with and which documents to provide. Indeed responses to a consultation paper on a new European merger regulation - such as the 2001 consultation led by the Commission on the review of the EMCR - are radically different from filing a Form CO – the formal notification form in European merger cases – sent to the Commission to seek approval on one transaction. My second chapter discussed the consultation period under 'the politicisation stage' of the public policy life cycle. I will, in this chapter, focus on two different stages – namely the institutionalization and litigation phases of the public policy life cycle[190], where similarities and differences between French and British firms are prominent. This analysis will re-emphasise the interdependence between different elements of the analytical framework of corporate political strategies design highlighted in this chapter.

The literature studying corporate lobbying has been interested in the setting up of Brussels' offices and their role in corporate political activity (Michalowitz 2005). My experiences and interviews helped to identify two main types of European presentation – 'diplomatic bureaux of representation' or 'expert bureaux in European affairs'. National patterns are harder to uncover in the set up of either structure, although the effectiveness of national associations is an important factor – as discussed at a later stage of this Chapter. Despite this there is some merit in placing a senior officer at the Brussels level of public affairs, or ensuring that upper management levels interact with the Commission. Indeed policy views should not come from one particular quarter in a company. In addition appreciation of the public policy life cycle, and showing sensitivity to it, is a prime function of these bureaux.

[188] The 'Association des Responsables de Fusions et Acquisitions' – a Paris based association that represents corporate managers in charge of mergers and acquisitions.
[189] Interview with author, translated by author, Paris, 1st February 2007.
[190] See Aubry (2006)

Moreover Commission officials are keen to discuss cases with *'people who have some weight in the company'*, and *'can commit on behalf of their organisation'*[191]. These offices are the company's 'eyes and the ears' in Brussels. However in merger cases, most of my respondents saw the Brussels structures as a monitoring aid and political system advisers, as transactions decision-makers, were usually similar within the companies' headquarters.

As explained in my section regarding the interaction between DG Comp and other Directorate-General of the Commission, such as DG Markt, the need for expertise is grander for merger case teams than any other part of the Commission. Does it mean that DG Comp is 'captured' by corporate interests? Merger decisions tend to evidence that this may not be the case, in terms of 'political capture'. Indeed throughout the public policy life cycle DG Comp has put in place a 'pluralist' structure consultation on each case, whereby all stakeholders (competitors, consumers) are invited to provide information. Checks and balances are more robust, internally as well as externally, since the revamping of European merger control regulation. Finally, economics and legal analysis are more advanced. The introduction of new prohibition criteria, explained in Chapter 2, intends to close an alleged gap with regards to mergers in heterogeneous oligopolistic markets, and is hoped to strengthen economic analysis. The 'more economic approach' has also led to a number of organisational changes within DG Comp. One is the appointment of the first Chief Economist. Another is that the Merger Task Force has been disbanded and its members have been integrated into existing sector-specific directorates. However, it may be the case that DG Comp, and merger case teams to a certain extent, is 'technically captured'. Indeed European Commission officials[192] were keen to discuss their visits to the industry according to my interviewees as they felt it enabled them to understand market dynamics, corporate organisation and processes. Increasing reliance of economic work to push through mergers comforts this conclusion. Technically advanced merger decisions also create 'soft law' and precedence to future merger investigations, as Airtours explained when they went to Court. This type of technical lobbying has therefore a long-term impact on shaping policy directions. In turn, this will have an impact on the choice of vehicles used by firms internally and externally. A CEO is

[191] Interviews with Heads of European public affairs and Commission officials, 2005 and 2006.
[192] Interviews with author, Brussels, January 2006.

more likely to wish to meet the Commissioner than a case team handler – and the dialogue may also be more fruitful as a result. The technical side of a firm is understood by the interviewees to be handled by *'the business people on the ground'*.

However the stage at which the case impacts the nature of the expertise is needed from the case team. One lawyer explained that he was willing to disclose everything at a very early stage, even at pre-notification stage. His *'own philosophy which has worked for [him] is to make a complete disclosure and even more that is required. Indeed, [for him], there is nothing more useful than credibility. When [a lawyer] communicates with the official the fact that [he/she] is honest and will cooperate fully then already [he/she] is in good shape'*[193]. A phase II case receives more media attention than a phase I, as the trio cases looked at in Chapter 2 show – Airtours, Schneider and Tetra - and necessarily becomes more political as more layers of decision-makers are involved, because in essence it questions the whole transaction. One of my interlocutors explained it thus,

> *'And there is still an element of career developing, by working on phase 2, and Commission officials are remembered for working on their work on phase 2 cases. It is much more interesting'.*[194]

National competition authorities (NCAs) are also included in case filing process formally through the Advisory Committee – although its actual influence is limited. However not all NCAs display the same level of involvement in EU merger cases. Some national competition authorities are willing to advise firms, at different points of the public policy life cycle, and gather information through their contacts[195]. This is the case for the French authority, for instance[196]. This remains at a very technical level – Form CO, argumentation of the transaction, etc. – rather than exercising political influence over the European institution.

Despite their quasi-institutionalised relationship the UK government and firms, on the other hand, tend to have a fairly distant relationship when it comes to competition matters (Fairbrass 2003). Government officials are reluctant to act as

[193] Interview with author, Brussels-based lawyer, January 18, 2006
[194] *Ibid.*
[195] Interview with French merger authority, Paris, December 2005.
[196] Interview with former French merger regulation officer, Paris, 26 June 2006

spokesmen for British firms. In the Airtours case, the legal team representing the British package holiday operators tried to get the UK government on board, and the latter refused[197]. In France, the French government has been keen to openly and politically support Schneider in its bid for Legrand, and was involved in judicial proceedings[198]. The independence of the competition policy in the United Kingdom can explain such a detachment.

This is clearly reflected in Court cases. The French government is, statistically, more willing to intervene at the European Courts level. Indeed, from the introduction of the Regulation (EEC) No 4064/89, the French Republic was party in the proceedings eight times, when the United Kingdom of Britain has never been party. Seven out of the eight interventions were made in reflection of a decision affecting a French company.

Table 7: Number of Court cases and role of the French and British governments (since 1994)

	Intervener applicant	Intervener (defendant)	Applicant	Total
French Republic	2	5	1	8
United Kingdom of Britain	0	0	0	0

Two salient points emerge from this section. Firstly, as would be expected in light of the context of the European merger control regime as described in Chapter 2, different expertise is needed at different stages of the public policy life cycle. Secondly, the French government is more willing to intervene at different stages of the cycle, in comparison with the British government. In this instance, the involvement of the French Republic in European courts cases affecting French firms is particularly telling.

[197] Interview with Airtours legal team, London, September 2005.
[198] According to Le Monde (5th October 2001), after the prohibition, announced on 27th September 2001, the French political class had been trying to rescue the two national champions. Mr Fabius (left-wing) rang Mr Monti, and Mr Chirac (right-wing) rang the then President of the Commission – Romano Prodi.

3.3. Case study data analysis and 'arenas' element

3.3.1. The political and technical game

As far as corporate political activity is concerned, the *de Havilland* case provides some insights as what one might expect from a French and British comparison. It is worth noting that French public affairs and legal departments – when talking about European lobbying – permanently compare themselves to 'the British way'. This comparative work seems pertinent as Britain is perceived as the 'successful' benchmark in France. Yet in my different interviews in Britain many of my respondents were keen to tell me that *'the French were good at the political game'*.

Exerting influence in the policy-making process of the EU is quite different from what it is in France – more so than in Britain, where the system is more consultative – and French government and business officials encountered understandably, as a result, difficulty adapting themselves to this very different administrative culture, as explained in the Chapter 2 difference between France and UK merger authorities. Repeated reference to this difficulty can be found in 'how to' books on lobbying the EU such as: *'the Dutch and British are virtuosos, the Irish excellent, the Germans (as always) efficient, and the French (as often) lightweight and late'*. In particular it is felt that the French tend to wait until the last minute to act, and are too abstract, especially in contrast to the British who tend to propose ready-to-use amendments (Fourçans 1993). Another source of difficulty for France arises from a longstanding underestimation within its ministries of the importance of EC/EU administration. (Schmidt 1996). The 2002 CCIP Report (Derieux 2002) epitomises this lack of interest from French officials with a telling example,

> *'On 27th November 2001, the 'cercle des délégués permanents français' (composed of French groups, firms, consultants, regional representatives, chamber of commerce) organised in Brussels its annual dinner inviting all French MEPs at the time of a Brussels plenary session. Out of the 87 French MEPs, only 7 came to the dinner'*[199].

[199] Translated by author, in Derieux 02, p.26

The French permanent representation in Brussels, unlike its British counterpart, does not seem to be providing the French industry with support. As one French commentator based in Brussels indicated, '*when I need a working paper in view of a Council working party's meeting I do not attempt to go to the French permanent representation. I usually go to other permanent representations which are more helpful'*[200]. The role of the permanent representation is crucial to get documents with 'limited distribution', and intervene in decision-making processes as an insider. The CCIP Report (Derieux 2002) was very critical of the French governmental representation in general:

> '*We will note that at EU Council level, French civil servants, by contrast to many of their counterparts, refuse too often to cooperate with French firms' representatives or to communicate information on discussed texts - an attitude that has no justification'*[201].

The British interest representation experiences a totally different attitude,

> *'During the British beef crisis, British beef producers were supported by the British permanent representation to the European Union in the recognition of the quality of their produce and obtained, via the permanent representation, the support of all 87 British MEPs from all political parties. The latter protested, in one voice, through a common action within the European Parliament in Strasbourg in July 2000. Simultaneously the British Chamber of Commerce in Brussels was organizing a dinner to celebrate the quality of British beef'*[202].

However French multinationals have made progress at the EU level and are involved in the European policy-making level. They have a much greater appreciation of the importance of Brussels than the ministries, given not only their obvious interest in EU regulation where it affects their products and operations, but also their early support for accelerating European integration (Green Cowles 1995).

These original differences impact to a certain degree the comparison between French and British corporate political strategies. Indeed the high-level and technical dichotomy is helpful. French firms tend to go to the highest level of the European

[200] Informal interview with author, on 9th January 2007
[201] Translated by the author (op.cit. , p.17)
[202] Translated by author, in op.cit., p.28

Commission to get their case resolved. The merger case of Schneider/Legrand is symptomatic in this instance[203]. The press was keen to relay that both the French President and the Prime Minister were involved at the highest level. This is further explained by Table 7. One in-house lawyer informed me of a similar reaction,

> *'I was late to hand in our joint response to a consultation paper on the merger legislation, about which I told our public affairs department. The latter panicked straight away and was wondering whether we should not ring the Head of DG Comp or even Kroes to let them know that the response was going to be delayed. This is their answer to everything - ring the Cabinet'*[204].

Yet many Commissioners, unlike senior officials, have had virtually no training in the handling of the technicalities of merger decisions. They are primarily interested in policy directions and strategy rather than the technicality of the legal texts[205]. Significantly Brussels insiders can only recall one case that a Competition Commissioner actually lost after collegial decision[206]. One lobbyist explained that intervention at different levels depended upon what needed achieving[207].

Over recent years there has been a proliferation of bodies that exist purely to study and influence public policy (CEPS, EPC, Brueghel). A few bodies are aligned with particular parties or sections of parties or political philosophies. Other bodies are studiously non-political and seek influence through the quality of their research. These bodies probably enjoy having an increasing influence on the development of public policy.

However, there is a small number of academics who influence the big policy debate both directly and indirectly, and this may be in legal and economic terms. Indirectly, academics have analysed merger cases and policy developments. Firms can also commission studies to help them pursue certain arguments in specific merger cases. In merger cases, this is particularly true with economic reports.

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[203] Le Monde reported on 5th October 2001 that the French political class attempts to save the two national champions – Schneider and Legrand. Following the prohibition decision of the European Commission, it was reported in the French press that both Mr. Fabius, then Prime Minister, and the French President, Mr. Chirac, called respectively Commissioner Monti and President Prodi.
[204] Translated by author, Interview with author, 8th March 2006, Paris
[205] Interview with Head of European Public Policy, London, 13th December 2005.
[206] Commissioner Van Miert advised the College to proceed with the prohibition of the merger between Ilva SpA, Mannessmann AG and Vallourec SA.
[207] Interview with Head of European Public Policy, London, 13th December 2005.

Relying upon the case team's need of technical expertise, British firms have favoured adding economic reports and hire economic consultants in merger cases at the European level (during the investigation and judicial reviews). Unsurprisingly, major economic consultancies are of British or American origin. The only major French economic research organisation, used by consultants in merger cases, is based in Toulouse within the *Université I*[208]. Although French firms are now hiring economists to strengthen their case[209], they were slow at integrating this component into their strategy, as this is less used at the national level. This example is symptomatic of the difference between French and British firms when interacting with authorities.

Firms with professional lobbyists probably interact with the Commission making use of the whole of the spectrum. Yet, in general, French and British firms differ on their understanding of what to ask from different levels. French firms have a tendency to assume that the upper level of the spectrum is able to circumvent the lower level – however expert the latter might be. Interestingly more French firms than British firms have accommodated in their organisational structure a department closed to the corporate upper management, whose work solely focuses on 'high-level' policy strategy. Business assumes that the solution is to go to the top or, as one CEO observed, *'the French think that a phone call to Jacques Delors [then President of the Commission] can solve everything. They're wrong'* (quoted in Schmidt 1996). British firms display a better understanding of the political and technical mechanisms and how to use them efficiently in a merger case. Yet they are less competent at the political game.

In France, ultimate decision-making in the ministries is political, and the most important level of decision-making is at the top - any decision on a dossier, however technically competent, may be reversed higher up; by the minister or even, in particular sensitive merger cases, by the minister, by the Prime Minister or President as explained in Chapter 2. Moreover the State has guaranteed pools of expertise

[208] Paul Seabright, Patrick Rey and Jean Tirole.
[209] 'Upon appeal, Schneider hired NERA to provide economic evidence to bolster its case. NERA's structure of distribution in the different national markets to show that the merger would not increase market power and provided evidence that demonstrated that the EC was wrong to exclude vertically integrated sales from its market analysis', in NERA (07), *Antitrust and Competition Policy Economics*, NERA Publications.

within its own governmental ranks. The State's institutionalisation of expertise (Saurugger 2003) is demonstrated by the establishment of *Grands Corps* which have *'established an expertise fully integrated in the decision-making processes'* (Papon 1978). This administrative practice reflects the Weberian technocratic model within which technical competence is linked to legal competence. The notion of the *Corps* is one inherited from the *Ancien Régime* which is closely related to that of corporatism (Kessler 1986). *'The members of the group are unified in an organisation thanks to an established position, legally protected by the State. Members are close through rituals, common recruiting systems, and a similar collective vision of themselves'* (Kessler 1986, p.9).

Lobbying is still, to a certain extent, regarded as illegitimate. The key to having influence, however, is with personal relationships between business and leaders, and top ministers and their staffs. Relationships are based on old school ties, membership in the *Grand Corps* (the elite civil service corps), or common working experience in politics, ministries, or industries, so much so that this more than anything else is seen as 'lobbying' *à la française* (Lefébure 91). It would be wrong not to mention the '*pantouflage*', the concept that explains in part French public and private relationships (Saurugger 2004).

In the United Kingdom the lobbying industry has been steadily growing in recent years. Hansard Society[210] assessed that the industry was worth USD 1.9 billion and was employing 14,000 people. The report also suggested that MPs are approached over 100 times a week by lobbyists. The House of Commons Public Administration Select Committee investigated lobbying in the UK, and its 2009 report called for a 'statutory register of lobbying activity to bring greater transparency to the dealings between Whitehall decision-makers and outside interests'[211]. The report also concluded that self-regulation of the professional lobbying industry was 'fragmented' and appeared to involve 'very little regulation of any substance'.

[210] Parvin, P. (2007), 'Friend or Foe? Lobbying in British democracy', available at www.hansardsociety.org.uk.
[211] Public Administration Select Committee (2009), ' PASC calls fro a register of lobbying activity' available at www.parliament.uk

In the EU general directorates, 'lobbying' is regarded as a legitimate activity in policy formulation and even encouraged by the European Commission[212]; Decision-making is by comparison less political for the vast majority of decisions, although for larger issues politics of course plays a role; the most important level is the bottom one, where the first level of civil servants charged with a given dossier has the most weight (for the complexities of the EU decision-making structure, see Donnelly 1993). This is reflected in the evaluation of merger cases as one Brussels-based consultant explained the inner dynamics of the case team,

> '*At the case team level there is no lobbying possible and it is not advisable to lobby. They are the experts of the case, and they look at a case from a very objective viewpoint – even a clinical one. No other argument, other than legal or economic, will prevail in their analysis, which makes it a waste of time to attempt to get political considerations across'*[213].

As a result personal and in particular 'corporatist' (based on the *grand corps* membership) contacts are rare at the level of the case teams, unlike what may occur at higher levels involved in more strategic or political cases (such as Phase II cases), where informal networks of influence operate alongside the more formal channels of power.

Therefore this study also shows that nationality also affects corporate political strategies to the extent that French firms are more likely to target generally French officials, whereas British firms are more likely to interact with the different European institutions' officials relevant to the stage at which the case or the stage of EMCR development is looked at. This will be further examined in the next section

Also a first qualification of the comparison between French and British firms can be drawn from the experience of the EMCR. French firms show a preference for using high-level rather than technical corporate political strategies, and have an impact on both the arena element and, in turn, the vehicle element.

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[212] 'The Commission has always been an institution open to outside input. The Commission believes this process to be fundamental to the development of its policies. (…) Commission officials acknowledge the need for such outside input and welcome it', in Commission 93, p.1

[213] Interview with Consultant, Brussels, 12th January 2006.

3.3.2. A European level of governance in a multi-level structure – the logic of nationality.

One of the most significant issues facing European interest representatives is the shifting balance of power amongst European institutions. The extension of qualified majority voting in the Council took the veto power from Member States in some economic areas; Co-decision procedure gave the European Parliament a greater role in decision-making processes and the ability to reject legislation that the Council may favour. Institutional changes helped to underpin the importance of non-state actors in policy-making processes. In the EU merger control regime, the shift happened in 1990 with the establishment of a long-awaited European merger control regime, as discussed earlier in this thesis. With the Regulation the Commission obtained full powers regarding the investigation of merger decisions – for mergers above the discussed thresholds – and it was also established that the investigation process was only subject to European judicial review. Yet, the national level has still a certain degree of latitude in getting involved in the EU merger control. I discussed 'legitimate interests' in my second chapter, and certain provisions within the letter of the Regulation (see Chapter 2) which still enable Member States to interact at European level. Unlike neofunctionalism which focused primarily on dominance of the EU level of policy-making and liberal intergovernmentalism that posited Member States as main political actors in EU policy-making, a mid-way analysis such as the multi-level governance which consider both levels would be more useful in the context of corporate political strategies. Accordingly the EU multi-level governance structure presents political opportunities at each level of structure (Kitschelt 1986, Ladrech 1994). The EU has a clear impact on options available to interest representatives in terms of 'vehicles' and 'arenas' of corporate political strategy. As one French commentator explained,

> *'Merger regulation allows for a possible transfer of cases back to national authorities [via Article 9]. Some law firms will advise to follow such a route, as their ties with national authorities and understanding of local rules are better than those at European level, and permit to expect better outcomes'*[214].

[214] Interview with author, translated by author, Paris, 8th March 2006

The mere existence of the EU as a political system offers additional and/or alternative political opportunities (and threats). In other words, in absence of an EU political system, interest representatives would be confined to a more limited range of vehicles and arenas to interact with.

Observers such as European Commission staff, however, noted that cultural factors – *'the logic of nationality'* (Kohler-Koch 1994, 1996)- had an impact on interest representation activities in the merger regime context from UK and French firms, resulting in contrasting behaviours, perhaps reflecting resilient national characteristics. Both British and French firms try to exploit national contacts within the Commission. Yet British interest representatives also contact officials of other nationalities. The French sees less value in contacting other nationalities from a comparative point of view. In merger proceedings French firms suppose that other nationalities' officials may not understand as well as French officials the industrial consequences behind transaction projects. French-based government administrators are also supporting French firms[215] - at Commission level and at European Courts level[216] as was discussed earlier in this Chapter.

This interaction with authorities of different nationalities is reflected in my own experiences. Indeed both ethnographic experiences focused on the European aspect of financial services policy-making, and therefore my main interlocutors were in both instances European officials. However, significantly, during my placement in France, I solely interacted with European and French officials. By contrast, during my placement within the British Bankers' Association, I met various European officials and national UK officials, but the BBA was also in touch once a month with other national officials (most notably the French *Trésor*) and 'sister' trade associations in other EU Member States.

3.4. The direct and indirect representation – the 'vehicles' element

Previous academic research has suggested that interest groups and individual firms will choose to use one or more of three potential 'routes' to gain access to EU

[215] Interview with former French national official, Paris, 28th June 2006.
[216] For instance Schneider case, Air France case.

policy makers: the 'direct' route; the 'national' route, or the 'European' route (see Grant 1989; Bennett 1999). Evidence collected attests to the preference of both UK and French firms for direct contact with EU policy makers especially in merger transactions. Additionally, both UK and French firms were willing to make use of intermediaries such as national and European wide trade associations but this was regarded as a second choice compared to direct contact, tied in with specific tasks (response to consultation papers on competition issues, industry surveys, etc.).

The European Commission may assess the importance of an issue in light of the number of responses received following a consultation period. This can affect the vehicle firms may choose. They may decide to emphasise directly the message their relevant association or Federation has already provided. Simultaneously firms may decide not to directly intervene in the consultation process but participate under the association's name, such as the strength of a consensual message. Many of my interviewees have highlighted factors that may explain such behaviour, despite collective action issues; time constraints may or may not always enable firms to intervene directly. Importantly the merger regime context firms may want to hide behind the association's name to raise an issue without being perceived as the initiator and '*avoid being picked on'* later by the competition authorities. The latter reason has been mentioned by many of my interviewees. Greenwood et al. (2000) first referred to it when looking at how governable business associations were. Greenwood (2002) defined it as follows,

> *'At a superficial level, all members of EU associations confirm the presence of [the collective cloak] factor – that is, the conveyance of interests to the EU institutions under the weight of a collective badge or identity – as a reason for membership; and may cite it as the principle reason. (…) On their own [companies] are too exposed to articulate what they really want, but under the guise of an association they may be able to articulate these views'.*

For firms a fine balance has to be struck between formal and informal representation. Formal representative work, that is making submissions or 'primary lobbying' (Karpeles 05), is essential. However, policy submissions and meetings are more likely to be successful if essential ground work has been done first – going through the merger transaction with the Commission, highlighting the main points and arguments. The best approach is to have the meeting at an earlier stage (pre-

notification in the case of merger cases) so that it can help laying down the grounds for the case later. The Commission welcomes such initiatives[217] as it allows them to plan their workload and bring experts they may need.

From a comparative viewpoint, French firms are relying more on their sectoral associations compared to British ones. As the 2005 CCIP Report explains the French tend not to multiply responses to European consultation papers. Accordingly a French firm will only reply once through its association or federation, whereas a British firm makes use of more channels, responding under its own name and via other channels (using different trade association).

The significance of the associational route for French firms is also highlighted by the presence of French financial services firms at the head of European institutions. Indeed they are represented on the Executive Committees of major European federations. At the time of writing up this project, Michel Pébereau – Chairman of BNP Paribas – is also President of the European Banking Federation (EBF); Charles Milhaud –Président du Directoire, Caisse Nationale des Caisses d'Epargne (CNCE) – has also endorsed the role of Vice-President to the European Savings Banks Group (ESBG); Jean-Marie Sander – Vice-Chairman of the Board of Fédération Nationale du Crédit Agricole – is also Vice President of the European Association of Cooperative Banks (EACB).

This case study therefore shows a distinct preference for the associational route compared to direct representation by French firms. As a result, national preferences have a direct effect on the 'vehicles' element of corporate political strategies chosen by firms.

3.5. A certain adaptation of national corporate political activities?

Grossman (2004) indicated that for major banks it has slowly become second nature to turn to the European policy level to solve domestic conflicts. Grossman refers in particular to the rescue of the Crédit Lyonnais in the state aid policy field.

[217] Interviews with DG Comp officials, January 2006.

In this Chapter, I discussed major differences and similarities in French and British corporate political strategies' design. Despite this, recent French studies have also acknowledged a degree of adaptation of French corporate political activities to the European layer of governance. For instance the CCIP reports, which were referred to throughout this Chapter, written first in 2002 and then in 2005 highlight changes in approaches from French firms. In addition the current debate at French *Assemblée Nationale*, following the European Commission's Transparency Initiative, prompted a debate as the supervision of lobbying practices in France - A significant step towards the acknowledgement of the practice. Moreover French corporate lobbying strategies, as well as UK ones, have become more and more sophisticated. So what does this comparison between French and British firms show as far as the impact of a shift of competencies to the European authorities? I can only venture conclusions on three aspects: the high-level/technical strategy spectrum, the type of relationship firms and authorities build, and finally the inclusion of a strategic design framework in corporate political activities.

Firstly French and British firms seem to be able to use the full spectrum of strategies, from technical to high-level strategies. This is demonstrated by responses to European consultation papers and to invitations which top managers receive from Commissioners and their cabinets. French firms, as well as British firms, will favour being represented directly in high-level forums. However at a technical level, French firms are more likely to interact through sectoral national associations than British ones. This may be related to resources allocated to a European 'public affairs' department – and the attitude and appreciation of top management within firms of the European level of governance. In France the existence of a strong network between public and private spheres is seen as important and as a more formalised consultation process at the European level. One of my former colleagues explained to me,

> *'I am one of the lucky ones in European government affairs. Indeed my Chairman has quickly understood the importance of European authorities. Other [European representatives in other companies] have to fight to make their management understand the importance of Brussels'*[218].

[218] Author work placement in Paris.

Secondly, in the specific context of merger regulation, French authorities have been more likely to intervene in merger decision proceedings in favour of French firms. As explained British authorities have refused to support UK firms in the filing of their cases. This difference in approach may have an impact on the type of relationship firms will have with European competition authorities. Indeed the concept of independence of DG Comp is pervasive throughout the European Directorate-General and the Competition cabinet. The intervention of French authorities may therefore be ill-received by the EU bodies

Finally, the literature has established that British firms have been quicker to incorporate a wider range of corporate political strategies aimed at the EU level of governance. National traditions have favoured the recognition of the importance and the need of establishing relations with governments of other Member States as well. scholarly work (Schmidt 1996, Grossman 2004) interested in French firms' interest representation at the European level highlight that French firms have been slower to interact with Brussels' bodies and to incorporate a department dedicated to European affairs. However French firms have adapted their strategies and attuned them to Brussels and the European corporate political strategies. More and more post-graduate courses in France are now dedicated to European institutions and lobbying. An increasing number of political consultants are present in France. As Jean-Claude Adler[219] explained in a 2007 article published by *Le Parisien*[220], *'the profession begins in France and doesn't gather more than 200 lobbyists versus 200.000 in Brussels, [but] the business should be promising regarding its growth for the last decade'*. The importance of Brussels is clearly recognised. Yet French top managers, as explained by the high-level/technical dichotomy affecting the choice of arenas, are still attached to their traditional ways of interacting with the governments.

Conclusion

Competition policy 'hurts' French industrial policy from the outset. One of the facets of the French industrial policy was to favour industrial concentration in order to create the infamous 'national champions' predisposed to confront international

[219] President of the AFCL – L'Association Française des Conseils en Lobbying, founded in 1991.
[220] Le Parisien, September 24, 2007,'Lobbying at the heart of firms' strategy'

competition. This policy has elsewhere been nicknamed the policy of the *'meccano industriel'*[221] because the government is often involved in the construction as well as the dismantling of industrial groups. This aspect of French industrial policy was preferred after the wave of privatisation, with the creation of the 'hard cores'[222] and the system of golden shares. The British system – more liberal towards foreign ownership and competition – was therefore more prepared for the recognition of an independent European competition authority. Both systems have, however, been affected by the presence of both an added European layer of competition authority and other traditions in the sphere of competition policy.

From my observations, semi-structured interviews, and analysis of documents available in the public domain, and on the basis of my original framework of analysis explained in Chapter 1, I have been able to complete a two-level data analysis. Accordingly I have further detailed the original framework by reflecting the high level and technical distinction in light of results generated by the case of the financial services sector. This was done by distinguishing between internal and external vehicles. Both are chosen according to this dichotomy, most notably the internal vehicle.

At a second level of the analysis, I have compared the different elements of the new framework of analysis in light of the comparison between French and British firms. The comparison between French and British firms has clearly affected an element of the strategy design framework – that of the delivery of the message. As I explained in the case of the staging element, different expertise is needed. Messages to the European institutions should also reflect such sensitivity to what the European body needs. In addition, cases such as Schneider/Legrand showed that the European level of governance and the independence of DG Comp have to be recognised in their own rights throughout the interactions between firms and the European institutions. The staging element shows that the expertise needed from firms differs at each stage of the public policy life cycle. However the support for French firms from their national government is more visible at each stage of the cycle. The comparative case study

[221] Hennion, B. (1992), 'Le 'meccano industriel' d'Edith Cresson', L'Etat de la France 1992 (La Decouverte), pp. 512-43.
[222] 'Les noyaux durs' was established by Prime Minister Balladur to guarantee control over the shareholder constituency of the newly privatised firms.

shows that, as regards the ‘arenas’ element of the framework, French firms are more likely to play a political game as opposed to a technical game. In addition French firms follow, to a certain degree, a logic of nationality while interacting with the European level of governance. They will be more willing to target a French official rather than the official in charge of *the dossier*. As far as the ‘vehicles’ element is concerned, British firms tend to use the full spectrum of vehicles at their disposal, whereas French firms have an inclination to use the associational route – both national and European one.

This project does not reject or accept strategies, but attempts to define different strategies according to elements and dimensional qualifications. There are traditional tendencies in choosing strategies – and case-by-case the efficiency of strategies can be assessed. The best strategies will be technical as well as political, making use of the whole spectrum of strategies, and which recognise the value of a European level of governance, opting accordingly for the different components according to the original framework for analysis.

Chapter 5

Europeanization of Corporate Political Strategies

Concluding Chapter

The European merger regime has proved to be a fruitful regulatory context to study as far as corporate political strategies are concerned. Firstly mergers and acquisitions represent such significant operations for a company that the full array of corporate political strategies can be put in place when firms interact with the Commission. Corporate political strategies may in fact include the CEO and his/her close involvement to the merger case review process. Upper management levels may also be interacting with European institutions as was explained in Chapter 4 of this project. Secondly, from a researcher's perspective, the number of mergers scrutinised by DG Comp and, in fact, the overall development of the European merger control regime have provided fertile grounds for analysis, also in terms of policy-making. The European merger control regime also allows, to a certain extent, for cross-sectoral analysis in the context of a geographical case study. Other authors in fact acknowledged the potential of the study of merger regulation (Bulmer 1994, Zahariadis 2005).

Chapter 4 has established differences and similarities between British and French financial services firms' corporate political strategies in the context of European merger control regime. As mentioned throughout the thesis, this analysis will lead to further examination in terms of Europeanization. Indeed the conclusions highlighted in the previous chapter will now be explored to assess whether the emergence of a European mode of representation can be identified in the context of this study.

Europeanization remains a vague concept, although one heavily studied since 1973[223]. The number of scholarly work on this concept culminated in 2007. The Social Science Citation Index listed 85 pieces of work on the topic at that time. Different scholars have attached different meanings to the concept (Ladrech 1994, Bulmer et al. 2000, 2004, Bache et al. 2004, Schmidt 2006, Beyers et al. 2007, Schneider et al 2008). However an underlying question emerges from the literature when it refers to Europeanization: a question about the relationship between the European level of governance and the studied object. This vagueness relates probably to the difficulties to define the various elements that may be included in the term 'relationship'. Scholars have tried to qualify the type and direction the relationship may take – one of 'bottom-up' or 'top-down' direction. Others have considered that Europeanization may only be part of what needs to be analysed, globalisation could equally influence the studied object. This aspect is pertinent in the case of large firms exposed to other jurisdictions and therefore other institutional systems. Chapter 1 took into consideration all these elements and added a horizontal element. My own definition is therefore based on vertical and horizontal influences.

This wide range of academic conclusions will need to be analysed in a systematic manner, so as to identify what the concept of Europeanization could mean with regards to corporate political strategies. As will be explained in this chapter the main current debate in this field relates to questions concerning which interest representation modes are detaching themselves from the structuring relationship with the national state. The fact that European merger control regime offers a suitable framework of analysis in terms of the multi-layered structure of responsibilities between the national and European level was explained in my second chapter. The study of firms' European institutions' interactions will therefore lead to an assessment of the importance of the national and European institutional structures in shaping corporate interest intermediation patterns.

[223] The Social Science Citation Index identified one publication in 1973, namely the article of Fry (1973), 'the Europeanisation of development aid' which was published in African Social Research.

The literature related to the role of interest groups in the development of a European merger control regime failed to delve deeper. My study also attempted to fill in this gap. Chapter 2 explained the critical role of interest representatives in the development of a European merger control regime from the outset and throughout the development of the EU merger control regime. My framework of analysis and the data collected showed different strategies put in place by firms when interacting with the European Commission. Chapter 4 accounted for the importance of the message delivered to the Commission in the design of a corporate political strategy. In addition the enhanced framework, generated by a first-level of analysis of the data collected, identified core elements to corporate political strategies – namely staging, arenas, and internal and external vehicles. How can conclusions regarding these different elements now be interpreted in Europeanization terms?

My research has tried so far to explain the relationship between firms and European authorities – mainly the Commission in the context of European merger control regulation. Data collection has been undertaken through two main research method strategies, namely the ethnographic method – and therefore participation observation – and a comparative geographical case study. The particular focus has been, from an established framework of analysis explained in Chapter 1, to test corporate political strategies through the lens of a comparison between French and British firms. The most salient differences were laid out in Chapter 4 of this project. Study of each element seems to show that there are clear differences between French and British firms' corporate political strategies in the context of European merger control regulation. The next step is to look at it from the Europeanization angle.

This chapter is divided into three sections. Based on the Europeanization definition established in Chapter 1, the first section looks at analysis and conclusions of my previous chapter. The comparison between French and British corporate political strategies in the case of the European merger control regime has generated some interesting findings in this regard. The second part will suggest some explanations of my findings, and identify the role of national structures in the study of European interest intermediation. Finally a third part will be presenting this study in the wider context of the study of European modes of interest representation.

1. The Franco-British comparison, how is the picture changing?

This project, and notably the Franco-British case study, has attempted to contribute to the Europeanization literature and qualify the extent to which national interest representation traditions have been affected by the existence of a European level of governance – horizontally and vertically. It has highlighted some important national preferences regarding interest representation traditions in analysing different types of corporate political behaviours in the context of the European merger control regime. In this last section I will firstly emphasise the importance of the structure of the European merger control regime. I will then attempt to identify main themes of differences between France and Britain in terms of corporate political strategies, and the extent to which the concept of Europeanization is challenged. This may in turn help me explain factors influencing corporate political practices in these two countries.

1.1. European merger regime developments and national merger regimes

European legislation exercises an important influence on national policy even in areas where there is no pressure or need to incorporate it into national legislation directives or regulations agreed upon in Brussels (Zahariadis 2005). The study of Europeanization of public policy has received considerable analytical attention as explained in Chapter 1 and earlier in this Chapter (Ladrech 1994, Bulmer 2000, 2004, Green Cowles et al. 2001, Bache 2004, Featherstone et al. 2003, Graziano et al. 2008). Of particular importance has been the effort to clarify the mechanisms linking European and national governing structures. The Table in Annex 5 represents the changes in national merger regulation. It is evident that some Member States have taken into account the overhaul of the European merger control regime and as a result adapted their own national merger control regime. Others have not. The Franco-British comparison is interesting in this context.

As explained in previous chapters, European merger policy represents an area where jurisdictional responsibilities are clearly split between national and European authorities. Yet the European merger regulation had a significant impact on national

merger systems. What are the mechanisms of Europe's influence? Mergers occur within and across countries. Hence, solutions that work at a transnational level may be exported to specific national contexts. Changes to national merger systems did not occur at the same pace across Member States and to the same extent. The last EU changes appeared in 2004. The changes in the French merger system appeared in 2001 – effective in 2002. The French changes adopted, for instance, the substantive test of the original European merger control regulation established in 1989. As previously explained the modifications of national legislation were not made by transposition of European legislation. A top-down process can be identified in the context of merger control, however it is not as noticeable as some authors may have portrayed in other areas (Boerzel et al. 2000). Moreover the existence of a forum where national authorities can communicate – the Advisory Committee in the case of the European merger regime – have enabled them to learn from the European level and other Member States experiences. Since 1997, the British Office of Fair Trading (OFT) has been in almost daily communication with the competition authorities in Brussels (Zahariadis 2005). The British merger system deficiencies – the discretionary powers of national authorities (Office of Fair Trading and Monopolies and Mergers Commission) –, for instance, did not just come to the fore as a result of the introduction of the EU regulation. Several authors had pointed them out for a long time (Fairburn & Kay 1989; Doern et al. 1996). However they needed addressing by the emergence of a new system and its significance for domestic actors – exposed to other systems. In France the NRE (*Nouvelles Régulations Economiques*) introduced the mandatory *ex ante* notification of mergers to the French national authority. This was perceived as clear alignment of the French legislation to the European system (Condomines 2007).

In addition through repeated interaction in professional forums, individuals dealing with similar issues, for example, merger policy, learn from one another about what is appropriate and what good policy is – this idea is captured by the concept 'normative socialisation'. Although national competition authorities are not normally involved in making EU merger decisions, they regularly hold meetings with EU officials to discuss issues of mutual concern (Cini & McGowan, 1998). European legislation affects national merger practice via the mechanism of policy framing and the process

of institutional isomorphism (for a study of British merger policy, see Zahariadis 2005).

Yet the creation of the European Competition Network (ECN) that has simultaneously come into effect with the new merger regulation recognises the importance of cooperation and official communication channels between Member States and European authorities – and conceptually the bottom-up Europeanization process. The ECN has a crucial role to play in coordination and cooperation of European Competition Authorities – an element the importance of which has now increased with the enlargement of the European Union to new members.

Consequently the changes in European competencies have had an impact on national merger systems. Some authors (Zahariadis 2005) have mentioned briefly that this may be due to business pressures to create legal certainty and similar systems throughout Europe. Yet changes in national regimes need to be qualified. France, for instance, has introduced the so-called 'dominance test' – the previous European substantive test – in 2002, which is now at odds with the new European regime. Despite this, regulatory developments did occur at the national level. Have corporate political activities also been affected by European regulatory developments?

1.2. The Europeanization of national corporate political strategies

Firms have been affected, to a certain extent, by the existence of a European layer of governance. Some have set up a European government relations office in Brussels, while others have European public affairs experts at their head offices – around 13% of the permanent representation bureaux in Brussels (Landmarks 2007). The impact and the recognition of another public policy centre is indisputable. As van Schendelen (2005) explained, *'an organisation is never independent from and always more or less dependent on its challenging environment […] the permanently changing complexities of the environment make adaptive and/or influencing behaviours continuously necessary'*. My project however attempts to qualify the interaction between firms and the European level of governance and identify the extent to which the way they interact has been affected by the existence of 'Brussels'.

As previously defined, the concept of 'Europeanization' should be examined in the context of the three flows of influence. Firms will not have been affected solely by the fact that the European Commission, for instance, welcomes expert input in its policy-making processes. Firms will also be affected because their national governments have forced them to be aware of the European level of governance as well (like Edith Cresson in France, or by implementing directives from Brussels). As a result vertically, the relationship may be bidirectional – top-down and bottom-up. More importantly, the horizontality of the 'Europeanization' concept is also a factor that needs to be taken into account. Accordingly, the interaction with competing firms that are more sophisticated in their corporate political activities may compel firms to adopt more sophisticated – and adapted – corporate political strategies.

From my research project, and the subsequent work I have undertaken, however, I am inclined to agree with those authors who have recognised the importance of national traditions in corporate political strategies. Clearly, this conclusion cannot be applied to all firms or all areas of policy. However, the way corporate political strategies are constructed at national level – because of diverse factors such as the institutional setting, the public opinion on lobbying, etc – have an impact on the way firms will interact with European institutions. Chapter 4 highlighted some clear demarcation between French and British financial services firms in the context of the European merger control regime. These elements of variation will be reviewed.

1.3. Corporate political strategies, French and British firms compared

My research strategies, laid out in Chapter 3 of this project, are based upon the collection of qualitative data, which in turn were analysed in Chapter 4. The research methods used were the ethnographic - through participation-observation - and case study methods – through the comparison between French and British corporate political studies in the financial services sector.

Chapter 4 explained that a national interest representation strategy can be identified through the analysis of national models of governance. However the addition of a new layer of governance and the consequent shift of competencies to a new centre of governance since the Single European Act has also been recognised by interest

representatives. The basic framework for analysis for corporate political strategies design which was originally established in Chapter 1 was further enhanced in my first-level analysis in Chapter 4. The organisational structure has an impact upon the 'vehicles' element of the original framework by identifying internal and external vehicles.

The comparison between French and British firms identified five main differences in corporate political strategies following the analysis of the various elements of the framework of analysis. Firstly, the fragmented structure of the Commission and internal bureaucratic aspects of the institution, as well as corporate organisational structures, have led to furthering analysis of the relationship between firms and the European Commission in merger cases. It has led to the dichotomy between high-level and technical corporate political strategies. French firms have a preference towards 'high-level' corporate political strategies. British firms have displayed a better understanding of the high-level to technical continuum of information. This element, as was discussed in Chapter 4, has a direct impact on the nature of the expertise needed by the case team. Moreover this study also highlighted the willingness of the French government to intervene at different stages of the cycle in comparison to the British government. The involvement of the French Republic as a party in European court cases affecting French firms is particularly telling in this analysis (see Table 7). Nationality also affects corporate political strategies to the extent that French firms are generally more likely to target French officials, whereas British firms are more likely to interact with officials relevant to the issue looked at. Fourthly, the case study has highlighted a decisive preference of French firms towards the associational route compared to direct representation – although there are a growing number of dedicated French representational bureaux in Brussels.

This specific examination of data in Chapter 4 demonstrated that the style of interaction between firms and EU policy makers – and in turn the type of relationship firms have with the Commission - was another area where differences emerged. The framework for analysis of corporate political strategies design also shows that the message conveyed is important. A strategy discarding - notably in merger regulation – the independence of the Commission may not produce the desired outcomes. However it is conceivable that on the same piece of legislation a firm may decide to

directly interact with the Commission at a high-level, and adapt its discourse accordingly, while simultaneously provide expert technical knowledge to the officials who are '*holding the pen*'. The degree of recognition of both the European level of governance in its own right and the independence of the European competition policy affect this relationship. French firms have had a tendency to discard these two factors in interacting with European authorities, whereas British firms were better perceived.

These five characteristics of the analysis of French and British corporate political strategies in the field of the financial services have highlighted differences between strategies. However the link to the concept of Europeanization needs to be further refined in light of these conclusions.

1.4. Conclusions from the data analysis in terms of Europeanization

The scholarly literature interested in the Europeanization of interest representation has often argued that a European mode of representation would emerge from the existence of an added level of governance. Despite this, other academic authors have been reluctant to acknowledge convergence of modes of interest representation. This study and the analysis of data collected have shown clear differences in the design of corporate political strategies between French and British firms. In the end five main features were highlighted by the framework of analysis, and in fact question the degree to which corporate political behaviours are affected by the European level of competence in competition policy.

Europeanization was discussed as a process according to three directional flows of influence. The concept was supposed to designate bottom-up and top-down impact of the added layer of governance on national corporate political strategies. In addition a horizontal vector of influence was added to the definition of the concept. For benefits of membership to the European Union to be reaped, firms have to assimilate the existence of the European level of governance and also devise an effective response to the multi-level governance structure. This model was coined by Bulmer and Burch (2000) as a two-stage response: reception and projection. From the data analysis, French and British corporate political strategies, in the financial services sector, have recognised the competence of the European Commission in the regulation of merger

and acquisition operations (within the thresholds discussed in Chapter 2) – the reception stage discussed by Bulmer et al (2000). The projection stage has produced different outcomes in terms of modes of interest intermediation of firms.

From my data analysis French firms seemed to have replicated, to a certain degree, national interest representation patterns at the European level – in the context of the European merger control regime. The importance of the 'high-level' strategy, in comparison of the more 'technical strategies' preferred by British firms – replicates also the importance given in French public policy to the political level rather than administration. Finally the importance of the delivery of the message, recognising notably the European level of governance and the independence of the European Commission in merger controls demonstrates the significance of the second stage of the Bulmer et al. (2000) response – projection.

How can these differences and challenges to the concept of Europeanization be explained? The next section will attempt to provide different avenues for explanations. Firstly, I will be reiterating the importance of the institutional structure of the European merger control regime and existence of, in fact, a two-level governance structure which still allows the national level to have an important role to play. Secondly I will be focusing on the role of firms as sources of Europeanization – the European merger control regulation is a direct response to this. Thirdly this section will present a rationale directly derived from the importance of the national government in the European merger cases: The importance of national governments in the degree of Europeanization. Finally Europeanization will be discussed as a learning process. This point in fact relates indirectly to the goodness of fit model referred to in Chapter 1.

2. Possible explanations of corporate political behaviours at the European level

2.1. Merger Control Regulation – the existence of two forums

Arguments in favour of corporate political integration within the overall corporate strategy contend that participation is inevitable given the highly diverse and complex nature of issues public policy actors deal with. The latter require a much-

needed expertise to successfully resolve these issues in line with market functioning. As was suggested in Chapter 1, corporations have a legitimate role to play in political activities, as they are affected as any other actors by such public policy issues and can provide valuable expertise. Corporate interests should thus be placed on an equal footing with other interests in the public policy arena. Indeed there are many public issues either on the current public policy agenda, or that will make their way to that agenda, affecting business one way or another. Effective resolution of issues needs business participation. Theoretical approaches to EU lobbying have as a result increasingly conceptualised lobbying as a political exchange (Pappi et al. 1999; Bouwen 2002, 2003, Michalowitz 2005).

Yet, using exchange theory jargon, corporate lobbying actors do not possess a monopoly of the good of information (or only in exceptional cases), as they are not sole information providers. Moreover information therefore is not readily available; rather it has to be generated and adapted to the demand side. Depending on the issue, specific firms can thus deliver specific information regarding the impact of legislation upon their sector and amount of conflict or consensus that can be expected on a certain regulation. The information good delivered can also specify how to curb conflict and foster consensus. Related to specific needs of European decision-makers, this involves, for instance, information about pan-European effects.

As a result, the European Commission's highly visible commitment to enforcing European merger rules, growing familiarity – as was explained partly by the soft law angle of the European merger regime – of private firms and business associations with competition rules, and the prominence of competition policy case law pushed corporate actors to use EU competition rules as an opportunity to pursue interests. Actors increasingly identify both the Commission and, recently, the European Courts as potential productive venues for transcending the confines of interest articulation in the domestic political arena (Smith 2001).

Smith explained (2001) that one consequence of a single European market competition policy regime has created opportunities for private sector actors to attack political restraints on competition. Smith referred to the 90s and competition developments. In contrast, the European regime has really been reshaped at the

beginning of 21st century. Indeed, following the latest revamp of the EMCR, the European Commission has become more sophisticated in its application of economic theory to merger cases, and the CFI and ECJ present the opportunity for private actors - mainly individual firms – to challenge government policies toward public sector activities.

As explained in different parts of this thesis, the Commission – within the remit of its powers with regards to competition policy – has been trying to play a proactive role in the development of an integrated European financial services market. DG Comp has in fact taken decisions opposing domestic prohibitions – regardless of a political environment in favour of subsidiarity. Other authors have observed similar usage of merger control regulation in the media markets for instance (Harcourt in Featherstone and Radaelli 2003) the defence sector and telecommunications.

Rules have to be crystal clear to avoid unnecessary frictions. Sequentially DG Comp is examining the case according to the criteria laid down in the Regulation (see Annex 1) – defining the Community dimension of a transaction. Yet some mergers need to also be approved by the transaction target's national authority in a specific sector, for instance in the banking sector.

In most cases national authorities intervene in the Advisory Committee to voice concerns. They can also ask for the merger decision to be 'brought back' to their national competition authority. Some countries have been keen to keep some room of manoeuvre in merger decisions, notably in energy services, using the criteria to ensure that a merger decision rests within their authority. At this stage, firms may experience national political barriers to mergers. This has an impact in the way firms engage with competition authorities. As a result the European decision-making level is not a sufficient arena to convince, and furthermore, national actors are also involved and could endanger a transaction. The most obvious market to keep an eye on is the target's Member State, but also markets where positions will significantly increase are of importance.

Member States' approach to merger investigations cannot be considered in isolation from the wider European policy perspective and national policy transposition

work as was explained in my approach towards Europeanization. Indeed firms are also subject to other Member States' rules, through their branches and subsidiaries for instance – according to the home/host divide. National developments should be known and considered by firms in order to correctly comply with requirements. Directives and the concept of subsidiarity acknowledge diversity of market structures and conditions within the European single market. A policy cannot be applied in the same way to different national market structures.

Indeed Schmidt (1999, 2006) explained the limits to which the EU level of governance has an impact on the national level. Differences in implementation of European policies are also manifest within the competence of European competition policy. The existence of DG Comp – which reviews mergers of all Member states above some defined thresholds (as explained in Chapter 2 of this thesis) – and the evolution of responsibilities of national competition authorities – which are generally gaining independence vis-à-vis national governments (see table in Annex 5) – explain the sense of public policy convergence in this field. Yet differences remain in the powers these national authorities enjoy, types of case they scrutinise, and procedures used to base their decisions upon (for instance, the different substantive tests used). As explained in Chapter 2, in the UK competition policy is institutionally independent compared to France in the mergers and acquisitions area (Schmidt 1999). Indeed the publishing of an adverse report by the UK Competition Commission – if the relevant merger has resulted, or may be expected to result in a substantial lessening of competition within any market in the UK for goods or services – requires parties to act upon it immediately. The French *Conseil de de la Concurrence* does not issue binding decisions, and the Minister can decide not to follow its opinion. Indeed in France only Ministers can issue a definitive decision regarding merger and acquisition operations. Moreover a problematic operation does not necessarily have to be referred to the *Conseil*.

As a result the Europeanization concept is to be qualified to recognise importance of the national level and limits of the implementation process of the European level regulation – even in the case of Regulations, as opposed to Directives. To these limits is to be added the horizontal flow of influence I referred to earlier in Chapter 1 related to the conceptualisation of Europeanization. In the case of interest intermediation this

implies a separation between national political activities and European ones – as they reflect different governmental attitudes to a particular topic and *de facto* different outcomes. Therefore, although Europe has had an impact on the political agendas of companies – EU government affairs department are established in the capital and/or in Brussels - the nature of the relationship is still dependent upon national political activities of the firm – even for major companies.

2.2. Firms as actors of the Europeanization of the merger control regime

This project has focused on the intervention of firms in the political sphere. However, as Green Cowles (1997) explained, economic activities of firms also have an impact on political decisions. As noted by Lindblom (1977) market activities of firms shape and limit options opened to national politicians, as they are convinced that a strong and stable economy is one of the foundations of their election success. By the same token the economic activity of a firm at the national or global level can influence public policies. As Gerd Junne (1994) noted that by their choice of investments, private companies shape structures of the global economy - the framework under which political decisions are taken. Private firms influence political choices as these structures determine the definition of national interest and margins of manoeuvre of politicians in a country.

Faced with the multiplication of merger and acquisition transactions, the Commission had to reinforce, as was explained in Chapter 2 of this thesis, its competition policy tools with regards to merger operations.

Although governmental activity can profoundly transform market structures, which can in turn impact the profitability of firms within an industry (Schuler 1996), firms have also had a profound impact on national and European institutional arrangements as far as scrutiny of mergers is concerned. Following European regulatory developments in the financial services sector, Mario Draghi, the governor of the Bank of Italy, explained that huge progress has been made in 'cleaning' the sector. Politics, he said, has become much more distant from banking. According to him mergers have opened up banks to the scrutiny of shareholders; the system is more transparent and better regulated as a result (Michaels 2007). Old national monopoles have been forced

to face and adapt to competitive pressures, rather than be protected by the government. Although this influence may formally come from the European Commission, changes have in fact been driven by firms experiencing issues in certain Member States to acquire national firms.

The lack of cross-border operations in banking sectors has been highlighted by 2005 events involving ABN Amro in Italy and Unicredito in Poland. These events in fact brought to light the realities of cross-border banking mergers, '*quite brutally*'[224]. Following political obstacles experienced by both firms in the Italian and Polish markets respectively, the process of making merger and acquisition rules in the banking sector clearer gathered pace, and there was more impetus to challenge current practices. This was already established during the 2004 Scheveningen Council meeting – as brought to the ECOFIN attention by ABN Amro – and the ensuing Commission's report on cross-border mergers in the banking sector[225]. In both cases, the process of merger and acquisition was nearly complete, and the EU approval was in fact gained. Yet the last leg of the process, the supervisor's approval at national level was denied. Both firms' experiences resulted in amendments to Article 16 of the banking directive which is aimed at lifting the last political obstacles for cross-border operations and clarify grey areas.

As a result, firms have become more and more involved in the governmental arena to voice their concerns. As explained in previous chapters, at EU and national levels, firms can opt for an individual direct interaction with governmental bodies, or use collective action platforms. Most authors interested in interest intermediation, have agreed upon the fact that firms have become more and more professional in their political activities. Trade associations have thus stepped up their services to members in order to add value and, in fact, justify their presence.

[224] Interview with author, DG Markt official, Brussels, January 4, 2007.
[225] European Commission (2005), Cross-border consolidation in the EU financial sector, SEC (2005) 1398.

2.3. The importance of the national governmental structure

As this thesis explains, the multi-level governance approach is of particular importance in the study of Europeanization. It shows that the European level of governance has opened up more opportunities for firms to interact with authorities and to shape policy-making and decision-making. As a result, a Europeanization process does exist; firms have recognised the existence of a European level of governance and are using it in their strategies. In effect, this new layer affects each element of the framework for analysis in creating more arenas, more vehicles and another set of stages in the public policy life cycle of the European merger control regime; institutionally one cannot deny its impact. However, has this new layer of governance affected the traditional ways firms interact with authorities? At the Athenora conference referred to in Chapter 4, Europeanization of corporate political strategies is visible – however these signs may be limited to French firms' Brussels offices. As the report states,

> *'Indeed, some companies' representatives often feel badly understood by their Parisian 'direction'. Their information is sometimes insufficiently integrated into the internal circuit of the company, their files become a priority only when it is too late, while at the same time they had drawn the alarm bell very upstream. Information will thus often take precedence over the action of influence whose technique is badly understood, even purely and simply ignored. The polemic around the constitutional treaty does not reflect only the identity crisis which goes through in France: it also says much about the ignorance and the mistrust of the citizens with respect to the fifty year-old institutions. As long as this ignorance and this mistrust will persist, the lobbies will not be able to stress the European stakes and will be unable to work as effectively as they would wish in Brussels*[226]*'.*

This quote is symptomatic of the attitude of French firms vis-à-vis the European level of governance. It is expected that the French government will intervene in favour of French businesses if European institutions' decisions do not suit. The reflex to the national government is latent throughout my analysis of corporate political strategies in the context of the European merger control regime. This was further highlighted by the fact that the British government refused to engage on behalf of British firms at the

[226] Athenora conference held on 31st May 2005 at the European Parliament. The short report is available at http://www.athenora.com/uploads/en/Article%20conference%20lobbying_EN.pdf?PHPSESSID=19e70556812c2c1a6fded061d8df93f0

European level. This involvement of French firms, as well as the fact that British firms also attempt to get their national government involved at the European level in their favour – albeit unsuccessfully – show the importance of the national level of governance. This observation is made in spite of the fact that the competence in competition matters of the European Commission is quasi-autonomous. The implementation of the Directive and the various enforcement issues (described earlier in this Chapter) would further emphasise the importance of the national level of governance for firms when interacting at the European level.

2.4. A learning process

Although my conclusions have challenged the current scholarly discussion with regards to the degree of Europeanization of corporate political strategies, other analytical features need further studying. The goodness of fit model focuses on the level of adaptational pressure each Member States and domestic institutions face as a result of the existence of the European level of governance. This argument was first put forward by Risse, Cowles and Caporaso in 2000. Bulmer and Radaelli (2004) explained the main contention as follows, *'in order to produce domestic effects, EU policy must be somewhat difficult to absorb at the domestic level. If the policy of country A fits in well with EU policy, there will no impact: things can go on as they were before. At the other extreme, where country A has a policy which is completely different from the EU policy, it would be almost impossible to adapt to Europe. They argued that the impact of Europeanization will be most pronounced in cases of moderate goodness of fit'*. Accordingly national institutional structures participate actively in the absorbing, rejecting, or adapting to the European level of governance.

As was discussed in Chapter 4, the French landscape, as far as interest representation is concerned, is an evolving one. In that Chapter, I discussed, for instance, the development of professional lobbying and the professionalisation of lobbying. Two independent evolutions illustrate this trend. Firstly Grossman and Saurugger (2006) consider that a real market for interest representatives with a specific know-how is now opening. A symptom of this is the apparition of firms dedicated to public affairs firms and consultancies in France; these firms have been created in their vast majority in the 1990s, following the adoption of the Single European Act and therefore clearly

with the European level of governance in mind. As a result Grossman et al. (2006) explained that interest representation was not limited to Anglo-Saxon firms but was aimed at a thriving market in France too, although a late emerging one. Indeed mistrust towards lobbying and its techniques in France, as explained in Chapter 4, have delayed the opening of such a market. Faced with the existence of such professional firms, the *Assemblée Nationale* has looked at introducing a Bill to ensure transparency of these activities – following the Kallas Green Paper on Transparency[227].

The emergence of a new market, recognised to a certain extent by national authorities shows the impact of the European level of governance on the national socio-economic landscape. France and the French state were more reluctant to recognise both Brussels as a centre for decision-making and 'lobbying' as a legitimate activity. The impact on the latter is clearly strong; the former is, to a certain extent, less evident.

3. Contribution to the Europeanization literature: a research agenda

Few studies have solely focused on the Europeanization of corporate political activities compared to studies with a more policy-making focus. Neofunctionalist conclusions of a shift in preferences of non-governmental actors towards EU institutions have failed to materialise. Intergovernmentalism has also given a biased picture, overemphasising the role of Member States to provide a solid framework for analysis. However the multi-level governance literature gives a sound platform for my research and how Europeanisation can be conceptualised. Other authors have already appreciated the value in using multi-level governance in the study of Europeanization and interest intermediation (Constantelos 2004, Eising 2004). My project clearly recognises this contribution henceforth mitigating neofunctionalist and integovernmentalist focuses on governmental bodies' importance.

The institutionalist literature has shown that institutions do matter. The construction of the analytical framework for corporate political strategies design is perceived as an adaptable model for different policy processes and institutions. By identifying distinct elements, the comparative case study was able to qualify and

[227] European Commission (2005), 'Green Paper: European transparency Initiative', COM (2006) 194.

contextualise these elements and analyse French and British firms' corporate political strategies in financial services. My research methods were a mix of theoretical considerations, practical issues and opportunities and my research experience. In addition to the use of in-depth case studies, I have tried to complement my case study with a third experience set in another country. In my third year I was working part-time for the government affairs department of one of the major Dutch banks liaising between their European office and their national one. Because at the time of my work experience this particular firm was the target of two bidders, this experience provided further exposure to the topic of my thesis.

As I did not actively participate in political work surrounding mergers, I was able to observe and cross-check my analysis, and this from two different points of view. Firstly, this permitted a better understanding of the different roles which a European office and a nationally-based one undertake. In addition this third experience enabled me to overcome the purely Franco-British comparative framework and highlighted the main components my research could focus on. The institutionalisation of interest representation at the European level has initially been established in order to enable the development of corporatist structures, via, for instance, the establishment of institutionalised committees and favouring of interest representation through European associations. In terms of the Europeanization literature it allows me to widen my conclusions with regards to the interest intermediation literature. However, it is probably true to acknowledge the limitations of this study towards new Member States – as their experiences of interacting with the European competition authority is recent and less advanced than that of Western Europe.

As a result of my work experiences I have also interacted with many more participants and stakeholders than the number of interviewees accounts for. Although I have worked solely in the financial services sector, many public affairs forums rally practitioners from other industries working in similar positions and engaged in different policies. I have seized as many opportunities as possible to interact with the community in my studied context – going to launch parties, participating in conferences and making contacts while working. Therefore I was able to cross-check the different 'stories' interviewees were telling me in confidentiality, which in turn enabled me to identify one story to be at odds with another respondent's explanation.

Moreover it enabled me to check my own hypothesis and conclusions with practitioners. The setting for these meetings was more informal, and I could also in fact engage in some of these general political activities issues. This extra measure was in place and helped me validate my data. Finally, as I explained throughout my research method chapter I have been wary of interacting in merger settings during my work experience and kept my position of observer rather than becoming an active participant. My tasks were focused on diverse policy projects and developments unrelated to competition policies. The horizontal dimension of Europeanization, for instance, is one that came to the forefront through my own work and different meetings with European and national officials – rather than my interviews.

This study challenges scholars who have predicted the development of a European mode of representation that would accompany the shift of competences from the national to the European level of governance. The European merger control regime is a very strong case. Indeed the European Commission holds powers in this area which are not equalled in any other areas. Five differences in corporate political behaviours have been highlighted in Chapter 4, and summarised earlier in this chapter. Although firms have recognised the level of European governance – the reception stage of their response – the projection stage differs in the case of French and British firms.

I put forward four rationales to explain this conclusion. Firstly the European merger control regime is in fact a two-level institutional regime – where the national levels coexist and constantly interact with the European level. As a result the national level has a role to play in this regime. Secondly my research, notably in the financial services sector, has highlighted the importance of firms as sources of Europeanization. Thirdly the importance of national governmental and institutional structures is apparent. These shape the type of relationship firms may be enjoying with the European competent authority as they affect the delivery of messages to European institutions, notably the European Commission. Finally I analysed my conclusions in light of a learning process. France – as the model of goodness of fit would suspect – has changed the most, notably in the market for public affairs and its professionalisation. Accordingly these observations demonstrate that the strength of

the pressure on France is greater than those on Britain. This may explain why France is more likely to keep national reflexes.

The case of European merger control regulation is clearly distinct from other competences held by the European Commission – and as a result it may be difficult to argue for a general application of these findings to other competences of the Commission. Competition policy is however not confined to the European merger control regime, and further research in the development of Articles 81 and 82, in which the European Parliament and the Council are active, may shed new light in the design of corporate political strategies.

Moreover the use of management tools in public policy and political science may also mean that further studies will be able to assess thoroughly the impact of corporate political strategies on public policy outcomes. Throughout my thesis, and notably with the analysis of the message element of my framework for analysis, I have highlighted merger cases that failed at the European level. This failure may be partly explained by corporate political behaviours, although further investigation would be required to study this factor systematically.

Conclusion

This research project has focused on European corporate political strategies. The context of my thesis – the European merger control regime – has provided numerous fruitful opportunities for the analysis of strategies. My data collection, through different channels, has been instrumental in bringing fresh conclusions to the fore. I was able to establish a framework for the analysis of the design of corporate political strategies. Based on this framework, the analysis of my data collection allowed me to systematically review each element of the framework and make conclusive remarks in the comparison between French and British corporate political strategies. Finally, my data contributed to furthering the Europeanization conceptual view – as far as interest intermediation is concerned.

Indeed, unlike the current conclusions in Europeanization literature this research project acknowledges five main themes of differences between French and British

corporate political strategies design, and thus the extent to which Europeanization affects interest intermediation needs to be qualified. Both horizontal and vertical flows have an impact on corporate political activity because of economic activities of firms. However, this impact should not be over stated. National constructs and traditions do matter in the design of corporate political strategies.

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ANNEX 1: Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (Text with EEA relevance)

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 83 and 308 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 European Economic and Social Committee(3),

Whereas:

(1) Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (4) has been substantially amended. Since further amendments are to be made, it should be recast in the interest of clarity.

(2) For the achievement of the aims of the Treaty, Article 3(1)(g) gives the Community the objective of instituting a system ensuring that competition in the internal market is not distorted. Article 4(1) of the Treaty provides that the activities of the Member States and the Community are to be conducted in accordance with the principle of an open market economy with free competition. These principles are essential for the further development of the internal market.

(3) The completion of the internal market and of economic and monetary union, the enlargement of the European Union and the lowering of international barriers to trade and investment will continue to result in major corporate reorganisations, particularly in the form of concentrations.

(4) Such reorganisations are to be welcomed to the extent that they are 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) However, it should be ensured that the process of reorganisation does not result in lasting damage to competition; 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) A specific legal instrument is therefore necessary to permit effective control of all concentrations in terms of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations. Regulation (EEC) No 4064/89 has allowed a Community policy to develop in this field. In the light of experience, however, that Regulation should now be recast into legislation designed to meet the challenges of a more integrated market and the future enlargement of the European Union. In accordance with the principles of subsidiarity and of proportionality as set out in Article 5 of the Treaty, this Regulation does not go beyond what is necessary in order to achieve the objective of ensuring that competition in the common market is not distorted, in accordance with the principle of an open market economy with free competition.

(7) Articles 81 and 82, while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not sufficient to control all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty. This Regulation should therefore be based not only on Article 83 but, principally, on Article 308 of the Treaty, under which the Community may give itself the additional powers of action necessary for the attainment of its objectives, and also powers of action with regard to concentrations on the markets for agricultural products listed in Annex I to the Treaty.

(8) 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. Such concentrations should, as a general rule, be reviewed exclusively at Community level, in application of a "one-stop shop" system and in compliance with the principle of subsidiarity. Concentrations not covered by this Regulation come, in principle, within the jurisdiction of the Member States.

(9) The scope of application of this Regulation should 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. The Commission should report to the Council on the implementation of the applicable thresholds and criteria so that the Council, acting in accordance with Article 202 of the Treaty, is in a position to review them regularly, as well as the rules regarding pre-notification referral, in the light of the experience gained; this requires statistical data to be provided by the Member States to the Commission to enable it to prepare such reports and possible proposals for amendments. The Commission's reports and proposals should be based on relevant information regularly provided by the Member States.

(10) A concentration with a Community dimension should be deemed to exist where the aggregate turnover of the undertakings concerned exceeds given thresholds; that is the case irrespective of whether or not the undertakings effecting the concentration have their seat or their principal fields of activity in the Community, provided they have substantial operations there.

(11) The rules governing the referral of concentrations from the Commission to Member States and from Member States to the Commission should operate as an effective corrective mechanism in the light of the principle of subsidiarity; these rules protect the competition interests of the Member States in an adequate manner and take due account of legal certainty and the "one-stop shop" principle.

(12) Concentrations may qualify for examination under a number of national merger control systems if they fall below the turnover thresholds referred to in this Regulation. Multiple notification of the same transaction increases legal uncertainty, effort and cost for undertakings and may lead to conflicting assessments. The system whereby concentrations may be referred to the Commission by the Member States concerned should therefore be further developed.

(13) The Commission should act in close and constant liaison with the competent authorities of the Member States from which it obtains comments and information.

(14) The Commission and the competent authorities of the Member States should together form a network of public authorities, applying their respective competences in close cooperation, using efficient arrangements for information-sharing and consultation, with a view to ensuring that a case is dealt with by the most appropriate authority, in the light of the principle of subsidiarity and with a view to ensuring that multiple notifications of a given concentration are avoided to the greatest extent possible. Referrals of concentrations from the Commission to Member States and from Member States to the Commission should be made in an efficient manner avoiding, to the greatest extent possible, situations where a concentration is subject to a referral both before and after its notification.

(15) The Commission should be able to refer to a Member State notified concentrations with a Community dimension which threaten significantly to affect competition in a market within that Member State presenting all the characteristics of a distinct market. Where the concentration affects competition on such a market, which does not constitute a substantial part of the common market, the Commission should be obliged, upon request, to refer the whole or part of the case to the Member State concerned. A Member State should be able to refer to the Commission a concentration which does not have a Community dimension but which affects trade between Member States and threatens to significantly affect competition within its territory. Other Member States which are also competent to review the concentration should be able to join the request. In such a situation, in order to ensure the efficiency and predictability of the system, national time limits should be suspended until a decision has been reached as to the referral of the case. The Commission should have the power to examine and deal with a concentration on behalf of a requesting Member State or requesting Member States.

(16) The undertakings concerned should be granted the possibility of requesting referrals to or from the Commission before a concentration is notified so as to further improve the efficiency of the system for the control of concentrations within the Community. In such situations, the Commission and national competition authorities should decide within short, clearly defined time limits whether a referral to or from the Commission ought to be made, thereby ensuring the efficiency of the system. Upon request by the undertakings concerned, the Commission should be able to refer to a Member State a concentration with a Community dimension which may significantly affect competition in a market within that Member State presenting all the characteristics of a distinct market; the undertakings concerned should not, however, be required to demonstrate that the effects of the concentration would be detrimental to competition. A

concentration should not be referred from the Commission to a Member State which has expressed its disagreement to such a referral. Before notification to national authorities, the undertakings concerned should also be able to request that a concentration without a Community dimension which is capable of being reviewed under the national competition laws of at least three Member States be referred to the Commission. Such requests for pre-notification referrals to the Commission would be particularly pertinent in situations where the concentration would affect competition beyond the territory of one Member State. Where a concentration capable of being reviewed under the competition laws of three or more Member States is referred to the Commission prior to any national notification, and no Member State competent to review the case expresses its disagreement, the Commission should acquire exclusive competence to review the concentration and such a concentration should be deemed to have a Community dimension. Such pre-notification referrals from Member States to the Commission should not, however, be made where at least one Member State competent to review the case has expressed its disagreement with such a referral.

(17) The Commission should be given exclusive competence to apply this Regulation, subject to review by the Court of Justice.

(18) The Member States should not be permitted to apply their national legislation on competition to concentrations with a Community dimension, unless this Regulation makes provision therefor. 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. The Member States concerned must act promptly in such cases; this Regulation cannot, because of the diversity of national law, fix a single time limit for the adoption of final decisions under national law.

(19) Furthermore, the exclusive application of this Regulation to concentrations with a Community dimension is without prejudice to Article 296 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.

(20) It is expedient to define the concept of concentration in such a manner as to cover operations bringing about a lasting change in the control of the undertakings concerned and therefore in the structure of the market. It is therefore appropriate to include, within the scope of this Regulation, all joint ventures performing on a lasting basis all the functions of an autonomous economic entity. It is moreover appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time.

(21) This Regulation should also apply where the undertakings concerned accept restrictions directly related to, and necessary for, the implementation of the concentration. Commission decisions declaring concentrations compatible with the common market in application of this Regulation should automatically cover such restrictions, without the Commission having to assess such restrictions in individual cases. At the request of the undertakings concerned, however, the Commission should, in cases presenting novel or unresolved questions giving rise to genuine uncertainty, expressly assess whether or not any restriction is directly related to, and necessary for, the implementation of the concentration. A case presents a novel or unresolved question giving rise to genuine uncertainty if the question is not covered by the relevant Commission notice in force or a published Commission decision.

(22) The arrangements to be introduced for the control of concentrations should, without prejudice to Article 86(2) of the Treaty, respect the principle of non-discrimination between the public and the private sectors. 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.

(23) It is necessary to establish whether or not concentrations with a Community dimension are compatible with the common market in terms of the need to maintain and develop effective competition in the common market. 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 establishing the European Community and Article 2 of the Treaty on European

Union.

(24) In order to ensure a system of undistorted competition in the common market, in furtherance of a policy conducted in accordance with the principle of an open market economy with free competition, this Regulation must permit effective control of all concentrations from the point of view of their effect on competition in the Community. Accordingly, Regulation (EEC) No 4064/89 established the principle that a concentration with a Community dimension which creates or strengthens a dominant position as a result of which effective competition in the common market or in a substantial part of it would be significantly impeded should be declared incompatible with the common market.

(25) In view of the consequences that concentrations in oligopolistic market structures may have, it is all the more necessary to maintain effective competition in such markets. Many oligopolistic markets exhibit a healthy degree of competition. However, under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition. The Community courts have, however, not to date expressly interpreted Regulation (EEC) No 4064/89 as requiring concentrations giving rise to such non-coordinated effects to be declared incompatible with the common market. Therefore, in the interests of legal certainty, it should be made clear that this Regulation permits effective control of all such concentrations by providing that any concentration which would significantly impede effective competition, in the common market or in a substantial part of it, should be declared incompatible with the common market. The notion of "significant impediment to effective competition" in Article 2(2) and (3) should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned.

(26) A significant impediment to effective competition generally results from the creation or strengthening of a dominant position. With a view to preserving the guidance that may be drawn from past judgments of the European courts and Commission decisions pursuant to Regulation (EEC) No 4064/89, while at the same time maintaining consistency with the standards of competitive harm which have been applied by the Commission and the Community courts regarding the compatibility of a concentration with the common market, this Regulation should accordingly establish the principle that a concentration with a Community dimension which would significantly impede effective competition, in the common market or in a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position, is to be declared incompatible with the common market.

(27) In addition, the criteria of Article 81(1) and (3) of the Treaty should be applied to joint ventures performing, on a lasting basis, all the functions of autonomous economic entities, to the extent that their creation has as its consequence an appreciable restriction of competition between undertakings that remain independent.

(28) In order to clarify and explain the Commission's appraisal of concentrations under this Regulation, it is appropriate for the Commission to publish guidance which should provide a sound economic framework for the assessment of concentrations with a view to determining whether or not they may be declared compatible with the common market.

(29) In order to determine the impact of a concentration on competition in the common market, it is appropriate to take account of any substantiated and likely efficiencies put forward by the undertakings concerned. It is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers, that it might otherwise have and that, as a consequence, the concentration would not significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position. The Commission should publish guidance on the conditions under which it may take efficiencies into account in the assessment of a concentration.

(30) Where the undertakings concerned modify a notified concentration, in particular by offering commitments with a view to rendering the concentration compatible with the common market, the Commission should be able to declare the concentration, as modified, compatible with the common market. Such commitments should be proportionate to the competition problem and entirely eliminate it. It is also appropriate to accept commitments before the initiation of

proceedings where the competition problem is readily identifiable and can easily be remedied. It should be expressly provided that the Commission may attach to its decision conditions and obligations in order to ensure that the undertakings concerned comply with their commitments in a timely and effective manner so as to render the concentration compatible with the common market. Transparency and effective consultation of Member States as well as of interested third parties should be ensured throughout the procedure.

(31) The Commission should have at its disposal appropriate instruments to ensure the enforcement of commitments and to deal with situations where they are not fulfilled. In cases of failure to fulfil a condition attached to the decision declaring a concentration compatible with the common market, the situation rendering the concentration compatible with the common market does not materialise and the concentration, as implemented, is therefore not authorised by the Commission. As a consequence, if the concentration is implemented, it should be treated in the same way as a non-notified concentration implemented without authorisation. Furthermore, where the Commission has already found that, in the absence of the condition, the concentration would be incompatible with the common market, it should have the power to directly order the dissolution of the concentration, so as to restore the situation prevailing prior to the implementation of the concentration. Where an obligation attached to a decision declaring the concentration compatible with the common market is not fulfilled, the Commission should be able to revoke its decision. Moreover, the Commission should be able to impose appropriate financial sanctions where conditions or obligations are not fulfilled.

(32) 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. Without prejudice to Articles 81 and 82 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.

(33) 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 the situation prevailing prior to the implementation of a concentration which has been declared incompatible with the common market.

(34) To ensure effective control, undertakings should be obliged to give prior notification of concentrations with a Community dimension following the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest. Notification should also be possible where the undertakings concerned satisfy the Commission of their intention to enter into an agreement for a proposed concentration and demonstrate to the Commission that their plan for that proposed concentration is sufficiently concrete, for example on the basis of an agreement in principle, a memorandum of understanding, or a letter of intent signed by all undertakings concerned, or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a Community dimension. The implementation of concentrations should be suspended until a final decision of the Commission has been taken. However, it should be possible to derogate from this suspension at the request of the undertakings concerned, where appropriate. In deciding whether or not to grant a derogation, the Commission should take account of all pertinent factors, such as the nature and gravity of damage to the undertakings concerned or to third parties, and the threat to competition posed by the concentration. In the interest of legal certainty, the validity of transactions must nevertheless be protected as much as necessary.

(35) A period within which the Commission must initiate proceedings in respect of a notified concentration and a period within which it must take a final decision on the compatibility or incompatibility with the common market of that concentration should be laid down. These periods should be extended whenever the undertakings concerned offer commitments with a view to rendering the concentration compatible with the common market, in order to allow for sufficient time for the analysis and market testing of such commitment offers and for the consultation of Member States as well as interested third parties. A limited extension of the period within which the Commission must take a final decision should also be possible in order to allow sufficient time for the investigation of the case and the verification of the facts and arguments submitted to the Commission.

(36) The Community respects the fundamental rights and observes the principles recognised in

particular by the Charter of Fundamental Rights of the European Union (5). Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles.

(37) The undertakings concerned must be afforded the right to be heard by the Commission when proceedings have been initiated; the members of the management and supervisory bodies and the recognised representatives of the employees of the undertakings concerned, and interested third parties, must also be given the opportunity to be heard.

(38) In order properly to appraise concentrations, the Commission should have the right to request all necessary information and to conduct all necessary inspections throughout the Community. To that end, and with a view to protecting competition effectively, the Commission's powers of investigation need to be expanded. The Commission should, in particular, have the right to interview any persons who may be in possession of useful information and to record the statements made.

(39) In the course of an inspection, officials authorised by the Commission should have the right to ask for any information relevant to the subject matter and purpose of the inspection; they should also have the right to affix seals during inspections, particularly in circumstances where there are reasonable grounds to suspect that a concentration has been implemented without being notified; that incorrect, incomplete or misleading information has been supplied to the Commission; or that the undertakings or persons concerned have failed to comply with a condition or obligation imposed by decision of the Commission. In any event, seals should only be used in exceptional circumstances, for the period of time strictly necessary for the inspection, normally not for more than 48 hours.

(40) Without prejudice to the case-law of the Court of Justice, it is also useful to set out the scope of the control that the national judicial authority may exercise when it authorises, as provided by national law and as a precautionary measure, assistance from law enforcement authorities in order to overcome possible opposition on the part of the undertaking against an inspection, including the affixing of seals, ordered by Commission decision. It results from the case-law that the national judicial authority may in particular ask of the Commission further information which it needs to carry out its control and in the absence of which it could refuse the authorisation. The case-law also confirms the competence of the national courts to control the application of national rules governing the implementation of coercive measures. The competent authorities of the Member States should cooperate actively in the exercise of the Commission's investigative powers.

(41) When complying with decisions of the Commission, the undertakings and persons concerned cannot be forced to admit that they have committed infringements, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against themselves or against others the existence of such infringements.

(42) For the sake of transparency, all decisions of the Commission which are not of a merely procedural nature should be widely publicised. While ensuring preservation of the rights of defence of the undertakings concerned, in particular the right of access to the file, it is essential that business secrets be protected. The confidentiality of information exchanged in the network and with the competent authorities of third countries should likewise be safeguarded.

(43) Compliance with this Regulation should be enforceable, as appropriate, by means of fines and periodic penalty payments. The Court of Justice should be given unlimited jurisdiction in that regard pursuant to Article 229 of the Treaty.

(44) The conditions in which concentrations, involving undertakings having their seat or their principal fields of activity in the Community, are carried out in third 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 such undertakings.

(45) This Regulation in no way detracts from the collective rights of employees, as recognised in the undertakings concerned, notably with regard to any obligation to inform or consult their recognised representatives under Community and national law.

(46) The Commission should be able to lay down detailed rules concerning the implementation of this Regulation in accordance with the procedures for the exercise of implementing powers conferred on the Commission. For the adoption of such implementing provisions, the Commission should be assisted by an Advisory Committee composed of the representatives of the Member States as specified in Article 23,

HAS ADOPTED THIS REGULATION:

Article 1

Scope

1. Without prejudice to Article 4(5) and Article 22, this Regulation shall apply to all concentrations with a Community dimension as defined in this Article.

2. A concentration has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and

(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 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. A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million;

(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;

(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and

(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

4. On the basis of statistical data that may be regularly provided by the Member States, the Commission shall report to the Council on the operation of the thresholds and criteria set out in paragraphs 2 and 3 by 1 July 2009 and may present proposals pursuant to paragraph 5.

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

Article 2

Appraisal of concentrations

1. Concentrations within the scope of this Regulation shall be appraised in accordance with the objectives of this Regulation and the following provisions with a view to establishing whether or not they are compatible with the common market.

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

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

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

2. A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market.

3. A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.

4. To the extent that the creation of a joint venture constituting a concentration pursuant to Article

3 has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 81(1) and (3) of the Treaty, with a view to establishing whether or not the operation is compatible with the common market.

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

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

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

Article 3

Definition of concentration

1. A concentration shall be deemed to arise where a change of control on a lasting basis results from:

(a) the merger of two or more previously independent undertakings or parts of undertakings, or

(b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

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

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

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

3. Control is acquired by persons or undertakings which:

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

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

4. The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b).

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 Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies(6) 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 and pre-notification referral at the request of the notifying parties

1. Concentrations with a Community dimension defined in this Regulation shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.

Notification may also be made where the undertakings concerned demonstrate to the Commission a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a Community dimension.

For the purposes of this Regulation, the term "notified concentration" shall also cover intended concentrations notified pursuant to the second subparagraph. For the purposes of paragraphs 4 and 5 of this Article, the term "concentration" includes intended concentrations within the meaning of the second subparagraph.

2. A concentration which consists of a merger within the meaning of Article 3(1)(a) or in the acquisition of joint control within the meaning of Article 3(1)(b) shall be notified jointly by the parties to the merger or by those acquiring joint control as the case may be. In all other cases, the notification shall be effected by the person or undertaking acquiring control of the whole or parts of one or more undertakings.

3. Where the Commission finds that a notified concentration falls within the scope of this Regulation, it shall publish the fact of the notification, at the same time indicating the names of the undertakings concerned, their country of origin, 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.

4. Prior to the notification of a concentration within the meaning of paragraph 1, the persons or undertakings referred to in paragraph 2 may inform the Commission, by means of a reasoned submission, that the concentration may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by that Member State.

The Commission shall transmit this submission to all Member States without delay. The Member State referred to in the reasoned submission shall, within 15 working days of receiving the submission, express its agreement or disagreement as regards the request to refer the case. Where that Member State takes no such decision within this period, it shall be deemed to have agreed.

Unless that Member State disagrees, the Commission, where it considers that such a distinct market exists, and that competition in that market may be significantly affected by the concentration, may decide to refer the whole or part of the case to the competent authorities of that Member State with a view to the application of that State's national competition law.

The decision whether or not to refer the case in accordance with the third subparagraph shall be taken within 25 working days starting from the receipt of the reasoned submission by the Commission. The Commission shall inform the other Member States and the persons or undertakings concerned of its decision. If the Commission does not take a decision within this period, it shall be deemed to have adopted a decision to refer the case in accordance with the submission made by the persons or undertakings concerned.

If the Commission decides, or is deemed to have decided, pursuant to the third and fourth subparagraphs, to refer the whole of the case, no notification shall be made pursuant to paragraph 1 and national competition law shall apply. Article 9(6) to (9) shall apply mutatis mutandis.

5. With regard to a concentration as defined in Article 3 which does not have a Community dimension within the meaning of Article 1 and which is capable of being reviewed under the national competition laws of at least three Member States, the persons or undertakings referred to in paragraph 2 may, before any notification to the competent authorities, inform the Commission by means of a reasoned submission that the concentration should be examined by the Commission.

The Commission shall transmit this submission to all Member States without delay.

Any Member State competent to examine the concentration under its national competition law

may, within 15 working days of receiving the reasoned submission, express its disagreement as regards the request to refer the case.

Where at least one such Member State has expressed its disagreement in accordance with the third subparagraph within the period of 15 working days, the case shall not be referred. The Commission shall, without delay, inform all Member States and the persons or undertakings concerned of any such expression of disagreement.

Where no Member State has expressed its disagreement in accordance with the third subparagraph within the period of 15 working days, the concentration shall be deemed to have a Community dimension and shall be notified to the Commission in accordance with paragraphs 1 and 2. In such situations, no Member State shall apply its national competition law to the concentration.

6. The Commission shall report to the Council on the operation of paragraphs 4 and 5 by 1 July 2009. Following this report and on a proposal from the Commission, the Council, acting by a qualified majority, may revise paragraphs 4 and 5.

Article 5

Calculation of turnover

1. Aggregate turnover within the meaning of this Regulation 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 of 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 concentration 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, the sum of the following income items as defined in Council Directive 86/635/EEC(7), after deduction of value added tax and other taxes directly related to those items, where appropriate:

(i) interest income and similar income;

(ii) income from securities:

- income from shares and other variable yield securities,

- income from participating interests,

- income from shares in affiliated undertakings;

(iii) commissions receivable;

(iv) net profit on financial operations;

(v) other operating income.

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

(b) for insurance undertakings, the value of gross premiums written which shall comprise all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurance undertakings, including also outgoing reinsurance premiums, and after deduction of taxes and parafiscal contributions or levies charged by reference to the amounts of individual premiums or the total volume of premiums; as regards Article 1(2)(b) and (3)(b), (c) and (d) and

the final part of Article 1(2) and (3), gross premiums received from Community residents and from residents of one Member State respectively shall be taken into account.

4. Without prejudice to paragraph 2, the aggregate turnover of an undertaking concerned within the meaning of this Regulation 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:

(i) owns more than half the capital or business assets, or

(ii) has the power to exercise more than half the voting rights, or

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

(iv) 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 this Regulation:

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

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

Article 6

Examination of the notification and initiation of proceedings

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

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

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

A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.

(c) Without prejudice to paragraph 2, where the Commission finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to its compatibility with the common market, it shall decide to initiate proceedings. Without prejudice to Article 9, such proceedings shall be closed by means of a decision as provided for in Article 8(1) to (4), unless the undertakings concerned have demonstrated to the satisfaction of the Commission that they have abandoned the concentration.

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

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

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

(a) the decision is based on incorrect information for which one of the undertakings is responsible

or where it has been obtained by deceit,

or

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

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

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

Article 7

Suspension of concentrations

1. A concentration with a Community dimension as defined in Article 1, or which is to be examined by the Commission pursuant to Article 4(5), shall not be implemented either before its notification or until it has been declared compatible with the common market pursuant to a decision under Articles 6(1)(b), 8(1) or 8(2), or on the basis of a presumption according to Article 10(6).

2. Paragraph 1 shall not prevent the implementation of a public bid or of a series of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, by which control within the meaning of Article 3 is acquired from various sellers, provided that:

(a) the concentration is notified to the Commission pursuant to Article 4 without delay; and

(b) the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on a derogation granted by the Commission under paragraph 3.

3. The Commission may, on request, grant a derogation from the obligations imposed in paragraphs 1 or 2. The request to grant a derogation must be reasoned. In deciding on the request, the Commission shall take into account inter alia the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration. Such a 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, be it before notification or after the transaction.

4. The validity of any transaction carried out in contravention of paragraph 1 shall be dependent on a decision pursuant to Article 6(1)(b) or Article 8(1), (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 such as a stock exchange, unless the buyer and seller knew or ought to have known that the transaction was carried out in contravention of paragraph 1.

Article 8

Powers of decision of the Commission

1. Where the Commission finds that a notified concentration fulfils the criterion laid down in Article 2(2) and, in the cases referred to in Article 2(4), the criteria laid down in Article 81(3) of the Treaty, it shall issue a decision declaring the concentration compatible with the common market.

A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.

2. Where the Commission finds that, following modification by the undertakings concerned, a notified concentration fulfils the criterion laid down in Article 2(2) and, in the cases referred to in Article 2(4), the criteria laid down in Article 81(3) of the Treaty, it shall issue a decision declaring the concentration compatible with the common market.

The Commission 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 rendering the concentration compatible with the common market.

A decision declaring a concentration compatible shall be deemed to cover restrictions directly

related and necessary to the implementation of the concentration.

3. Where the Commission finds that a concentration fulfils the criterion defined in Article 2(3) or, in the cases referred to in Article 2(4), does not fulfil the criteria laid down in Article 81(3) of the Treaty, it shall issue a decision declaring that the concentration is incompatible with the common market.

4. Where the Commission finds that a concentration:

(a) has already been implemented and that concentration has been declared incompatible with the common market, or

(b) has been implemented in contravention of a condition attached to a decision taken under paragraph 2, which has found that, in the absence of the condition, the concentration would fulfil the criterion laid down in Article 2(3) or, in the cases referred to in Article 2(4), would not fulfil the criteria laid down in Article 81(3) of the Treaty,

the Commission may:

- require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration; in circumstances where restoration of the situation prevailing before the implementation of the concentration is not possible through dissolution of the concentration, the Commission may take any other measure appropriate to achieve such restoration as far as possible,

- order any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision.

In cases falling within point (a) of the first subparagraph, the measures referred to in that subparagraph may be imposed either in a decision pursuant to paragraph 3 or by separate decision.

5. The Commission may take interim measures appropriate to restore or maintain conditions of effective competition where a concentration:

(a) has been implemented in contravention of Article 7, and a decision as to the compatibility of the concentration with the common market has not yet been taken;

(b) has been implemented in contravention of a condition attached to a decision under Article 6(1)(b) or paragraph 2 of this Article;

(c) has already been implemented and is declared incompatible with the common market.

6. The Commission may revoke the decision it has taken pursuant to paragraphs 1 or 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.

7. The Commission may take a decision pursuant to paragraphs 1 to 3 without being bound by the time limits referred to in Article 10(3), in cases where:

(a) it finds that a concentration has been implemented

(i) in contravention of a condition attached to a decision under Article 6(1)(b), or

(ii) in contravention of a condition attached to a decision taken under paragraph 2 and in accordance with Article 10(2), which has found that, in the absence of the condition, the concentration would raise serious doubts as to its compatibility with the common market; or

(b) a decision has been revoked pursuant to paragraph 6.

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

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 15 working days of the date of receipt of the copy of the notification, a Member State, on its own initiative or upon the invitation of the Commission, may inform the Commission, which shall inform the undertakings concerned, that:

(a) a concentration threatens to affect significantly competition in a market within that Member State, which presents all the characteristics of a distinct market, or

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

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 accordance with this Regulation; or

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

If, however, the Commission considers that such a distinct market or threat does not exist, it shall adopt a decision to that effect which it shall address to the Member State concerned, and shall itself deal with the case in accordance with this Regulation.

In cases where a Member State informs the Commission pursuant to paragraph 2(b) that a concentration affects competition in a distinct market within its territory that does not form a substantial part of the common market, the Commission shall refer the whole or part of the case relating to the distinct market concerned, if it considers that such a distinct market is affected.

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

(a) as a general rule within the 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 65 working days 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), (3) or (4) to maintain or restore effective competition on the market concerned.

5. If within the 65 working days 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 competent authority of the Member State concerned shall decide upon the case without undue delay.

Within 45 working days after the Commission's referral, the competent authority of the Member State concerned shall inform the undertakings concerned of the result of the preliminary competition assessment and what further action, if any, it proposes to take. The Member State concerned may exceptionally suspend this time limit where necessary information has not been provided to it by the undertakings concerned as provided for by its national competition law.

Where a notification is requested under national law, the period of 45 working days shall begin on the working day following that of the receipt of a complete notification by the competent authority of that Member State.

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

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

9. In accordance with the relevant provisions of the Treaty, any Member State may appeal to the Court of Justice, and in particular request the application of Article 243 of the Treaty, for the

purpose of applying its national competition law.

Article 10

Time limits for initiating proceedings and for decisions

1. Without prejudice to Article 6(4), the decisions referred to in Article 6(1) shall be taken within 25 working days at most. That period shall begin on the working day following that of the receipt of a notification or, if the information to be supplied with the notification is incomplete, on the working day following that of the receipt of the complete information.

That period shall be increased to 35 working days where the Commission receives a request from a Member State in accordance with Article 9(2)or where, the undertakings concerned offer commitments pursuant to Article 6(2) with a view to rendering the concentration compatible with the common market.

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

3. Without prejudice to Article 8(7), decisions pursuant to Article 8(1) to (3) concerning notified concentrations shall be taken within not more than 90 working days of the date on which the proceedings are initiated. That period shall be increased to 105 working days where the undertakings concerned offer commitments pursuant to Article 8(2), second subparagraph, with a view to rendering the concentration compatible with the common market, unless these commitments have been offered less than 55 working days after the initiation of proceedings.

The periods set by the first subparagraph shall likewise be extended if the notifying parties make a request to that effect not later than 15 working days after the initiation of proceedings pursuant to Article 6(1)(c). The notifying parties may make only one such request. Likewise, at any time following the initiation of proceedings, the periods set by the first subparagraph may be extended by the Commission with the agreement of the notifying parties. The total duration of any extension or extensions effected pursuant to this subparagraph shall not exceed 20 working days.

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

The first subparagraph shall also apply to the period referred to in Article 9(4)(b).

5. Where the Court of Justice gives a judgment which annuls the whole or part of a Commission decision which is subject to a time limit set by this Article, the concentration shall be re-examined by the Commission with a view to adopting a decision pursuant to Article 6(1).

The concentration shall be re-examined in the light of current market conditions.

The notifying parties shall submit a new notification or supplement the original notification, without delay, where the original notification becomes incomplete by reason of intervening changes in market conditions or in the information provided. Where there are no such changes, the parties shall certify this fact without delay.

The periods laid down in paragraph 1 shall start on the working day following that of the receipt of complete information in a new notification, a supplemented notification, or a certification within the meaning of the third subparagraph.

The second and third subparagraphs shall also apply in the cases referred to in Article 6(4) and Article 8(7).

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

Article 11

Requests for information

1. In order to carry out the duties assigned to it by this Regulation, the Commission may, by

simple request or by decision, require the persons referred to in Article 3(1)(b), as well as undertakings and associations of undertakings, to provide all necessary information.

2. When sending a simple request for information to a person, an undertaking or an association of undertakings, the Commission shall state the legal basis and the purpose of the request, specify what information is required and fix the time limit within which the information is to be provided, as well as the penalties provided for in Article 14 for supplying incorrect or misleading information.

3. Where the Commission requires a person, an undertaking or an association of undertakings to supply information by decision, it shall state the legal basis and the purpose of the request, specify what information is required and fix the time limit within which it is to be provided. It shall also indicate the penalties provided for in Article 14 and indicate or impose the penalties provided for in Article 15. It shall further indicate the right to have the decision reviewed by the Court of Justice.

4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution, shall supply the information requested on behalf of the undertaking concerned. Persons duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.

5. The Commission shall without delay forward a copy of any decision taken pursuant to paragraph 3 to the competent authorities of the Member State in whose territory the residence of the person or the seat of the undertaking or association of undertakings is situated, and to the competent authority of the Member State whose territory is affected. At the specific request of the competent authority of a Member State, the Commission shall also forward to that authority copies of simple requests for information relating to a notified concentration.

6. At the request of the Commission, the governments and competent authorities of the Member States shall provide the Commission with all necessary information to carry out the duties assigned to it by this Regulation.

7. In order to carry out the duties assigned to it by this Regulation, the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation. At the beginning of the interview, which may be conducted by telephone or other electronic means, the Commission shall state the legal basis and the purpose of the interview.

Where an interview is not conducted on the premises of the Commission or by telephone or other electronic means, the Commission shall inform in advance the competent authority of the Member State in whose territory the interview takes place. If the competent authority of that Member State so requests, officials of that authority may assist the officials and other persons authorised by the Commission to conduct the interview.

Article 12

Inspections by the authorities of the Member States

1. At the request of the Commission, the competent authorities of the Member States shall undertake the inspections which the Commission considers to be necessary under Article 13(1), or which it has ordered by decision pursuant to Article 13(4). The officials of the competent authorities of the Member States who are responsible for conducting these inspections as well as those authorised or appointed by them shall exercise their powers in accordance with their national law.

2. If so requested by the Commission or by the competent authority of the Member State within whose territory the inspection is to be conducted, officials and other accompanying persons authorised by the Commission may assist the officials of the authority concerned.

Article 13

The Commission's powers of inspection

1. In order to carry out the duties assigned to it by this Regulation, the Commission may conduct all necessary inspections of undertakings and associations of undertakings.

2. The officials and other accompanying persons authorised by the Commission to conduct an

inspection shall have the power:

(a) to enter any premises, land and means of transport of undertakings and associations of undertakings;

(b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;

(c) to take or obtain in any form copies of or extracts from such books or records;

(d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;

(e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers.

3. Officials and other accompanying persons authorised by the Commission to conduct an inspection shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the inspection and the penalties provided for in Article 14, in the production of the required books or other records related to the business which is incomplete or where answers to questions asked under paragraph 2 of this Article are incorrect or misleading. In good time before the inspection, the Commission shall give notice of the inspection to the competent authority of the Member State in whose territory the inspection is to be conducted.

4. Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 14 and 15 and the right to have the decision reviewed by the Court of Justice. The Commission shall take such decisions after consulting the competent authority of the Member State in whose territory the inspection is to be conducted.

5. Officials of, and those authorised or appointed by, the competent authority of the Member State in whose territory the inspection is to be conducted shall, at the request of that authority or of the Commission, actively assist the officials and other accompanying persons authorised by the Commission. To this end, they shall enjoy the powers specified in paragraph 2.

6. Where the officials and other accompanying persons authorised by the Commission find that an undertaking opposes an inspection, including the sealing of business premises, books or records, ordered pursuant to this Article, the Member State concerned shall afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection.

7. If the assistance provided for in paragraph 6 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.

8. Where authorisation as referred to in paragraph 7 is applied for, the national judicial authority shall ensure that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of proportionality of the coercive measures, the national judicial authority may ask the Commission, directly or through the competent authority of that Member State, for detailed explanations relating to the subject matter of the inspection. However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with the information in the Commission's file. The lawfulness of the Commission's decision shall be subject to review only by the Court of Justice.

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 not exceeding 1 % of the aggregate turnover of the undertaking or association of undertakings concerned within the meaning of Article 5 where, intentionally or negligently:

(a) they supply incorrect or misleading information in a submission, certification, notification or supplement thereto, pursuant to Article 4, Article 10(5) or Article 22(3);

(b) they supply incorrect or misleading information in response to a request made pursuant to

Article 11(2);

(c) in response to a request made by decision adopted pursuant to Article 11(3), they supply incorrect, incomplete or misleading information or do not supply information within the required time limit;

(d) they produce the required books or other records related to the business in incomplete form during inspections under Article 13, or refuse to submit to an inspection ordered by decision taken pursuant to Article 13(4);

(e) in response to a question asked in accordance with Article 13(2)(e),

- they give an incorrect or misleading answer,

- they fail to rectify within a time limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or

- they fail or refuse to provide a complete answer on facts relating to the subject matter and purpose of an inspection ordered by a decision adopted pursuant to Article 13(4);

(f) seals affixed by officials or other accompanying persons authorised by the Commission in accordance with Article 13(2)(d) have been broken.

2. The Commission may by decision impose fines not exceeding 10 % of the aggregate turnover of the undertaking concerned within the meaning of Article 5 on the persons referred to in Article 3(1)b or the undertakings concerned where, either intentionally or negligently, they:

(a) fail to notify a concentration in accordance with Articles 4 or 22(3) prior to its implementation, unless they are expressly authorised to do so by Article 7(2) or by a decision taken pursuant to Article 7(3);

(b) implement a concentration in breach of Article 7;

(c) implement a concentration declared incompatible with the common market by decision pursuant to Article 8(3) or do not comply with any measure ordered by decision pursuant to Article 8(4) or (5);

(d) fail to comply with a condition or an obligation imposed by decision pursuant to Articles 6(1)(b), Article 7(3) or Article 8(2), second subparagraph.

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

4. Decisions taken pursuant to paragraphs 1, 2 and 3 shall not be of a 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, periodic penalty payments not exceeding 5 % of the average daily aggregate turnover of the undertaking or association of undertakings concerned within the meaning of Article 5 for each working 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 taken pursuant to Article 11(3);

(b) to submit to an inspection which it has ordered by decision taken pursuant to Article 13(4);

(c) to comply with an obligation imposed by decision pursuant to Article 6(1)(b), Article 7(3) or Article 8(2), second subparagraph; or;

(d) to comply with any measures ordered by decision pursuant to Article 8(4) or (5).

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

Article 16

Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction within the meaning of Article 229 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payments; it may cancel, reduce or increase the fine or periodic penalty payment imposed.

Article 17

Professional secrecy

1. Information acquired as a result of the application of this Regulation shall be used only for the purposes of the relevant request, investigation or hearing.

2. Without prejudice to Article 4(3), Articles 18 and 20, the Commission and the competent authorities of the Member States, their officials and other servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information they have acquired through the application of this Regulation of the kind covered by the obligation of professional secrecy.

3. Paragraphs 1 and 2 shall not prevent publication of general information or of surveys which do not contain information relating to particular undertakings or associations of undertakings.

Article 18

Hearing of the parties and of third persons

1. Before taking any decision provided for in Article 6(3), Article 7(3), Article 8(2) to (6), and Articles 14 and 15, the Commission shall give the persons, undertakings and associations of undertakings concerned the opportunity, at every stage of the procedure up to the consultation of the Advisory Committee, of making known their views on the objections against them.

2. By way of derogation from paragraph 1, a decision pursuant to Articles 7(3) and 8(5) 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 recognised representatives of their employees shall be entitled, upon application, to be heard.

Article 19

Liaison with the authorities of the Member States

1. The Commission shall transmit to the competent authorities of the Member States copies of notifications within three working days and, as soon as possible, copies of the most important documents lodged with or issued by the Commission pursuant to this Regulation. Such documents shall include commitments offered by the undertakings concerned vis-à-vis the Commission with a view to rendering the concentration compatible with the common market pursuant to Article 6(2) or Article 8(2), second subparagraph.

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(1) to (6), Articles 14 or 15 with the exception of provisional decisions taken in accordance with Article 18(2).

4. The Advisory Committee shall consist of representatives of the competent 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 10 working 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 Commission shall communicate the opinion of the Advisory Committee, together with the decision, to the addressees of the decision. It shall make the opinion public together with the decision, having regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 20

Publication of decisions

1. The Commission shall publish the decisions which it takes pursuant to Article 8(1) to (6), Articles 14 and 15 with the exception of provisional decisions taken in accordance with Article 18(2) together with the opinion of the Advisory Committee in the Official Journal of the European Union.

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

Application of the Regulation and jurisdiction

1. This Regulation alone shall apply to concentrations as defined in Article 3, and Council Regulations (EC) No 1/2003(8), (EEC) No 1017/68(9), (EEC) No 4056/86(10) and (EEC) No 3975/87(11) shall not apply, except in relation to joint ventures that do not have a Community dimension and which have as their object or effect the coordination of the competitive behaviour of undertakings that remain independent.

2. Subject to review by the Court of Justice, the Commission shall have sole jurisdiction to take the decisions provided for in this Regulation.

3. No Member State shall apply its national legislation on competition to any concentration that has a Community dimension.

The first subparagraph shall be without prejudice to any Member State's power to carry out any enquiries necessary for the application of Articles 4(4), 9(2) or after referral, pursuant to Article 9(3), first subparagraph, indent (b), or Article 9(5), to take the measures strictly necessary for the application of Article 9(8).

4. Notwithstanding paragraphs 2 and 3, 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 recognised 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 25 working days of that communication.

Article 22

Referral to the Commission

1. One or more Member States may request the Commission to examine any concentration as defined in Article 3 that does not have a Community dimension within the meaning of Article 1 but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request.

Such a request shall be made at most within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned.

2. The Commission shall inform the competent authorities of the Member States and the undertakings concerned of any request received pursuant to paragraph 1 without delay.

Any other Member State shall have the right to join the initial request within a period of 15 working days of being informed by the Commission of the initial request.

All national time limits relating to the concentration shall be suspended until, in accordance with the procedure set out in this Article, it has been decided where the concentration shall be examined. As soon as a Member State has informed the Commission and the undertakings concerned that it does not wish to join the request, the suspension of its national time limits shall end.

3. The Commission may, at the latest 10 working days after the expiry of the period set in paragraph 2, decide to examine, the concentration where it considers that it affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request. If the Commission does not take a decision within this period, it shall be deemed to have adopted a decision to examine the concentration in accordance with the request.

The Commission shall inform all Member States and the undertakings concerned of its decision. It may request the submission of a notification pursuant to Article 4.

The Member State or States having made the request shall no longer apply their national legislation on competition to the concentration.

4. Article 2, Article 4(2) to (3), Articles 5, 6, and 8 to 21 shall apply where the Commission examines a concentration pursuant to paragraph 3. Article 7 shall apply to the extent that the concentration has not been implemented on the date on which the Commission informs the undertakings concerned that a request has been made.

Where a notification pursuant to Article 4 is not required, the period set in Article 10(1) within which proceedings may be initiated shall begin on the working day following that on which the Commission informs the undertakings concerned that it has decided to examine the concentration pursuant to paragraph 3.

5. The Commission may inform one or several Member States that it considers a concentration fulfils the criteria in paragraph 1. In such cases, the Commission may invite that Member State or those Member States to make a request pursuant to paragraph 1.

Article 23

Implementing provisions

1. The Commission shall have the power to lay down in accordance with the procedure referred to in paragraph 2:

(a) implementing provisions concerning the form, content and other details of notifications and submissions pursuant to Article 4;

(b) implementing provisions concerning time limits pursuant to Article 4(4), (5) Articles 7, 9, 10 and 22;

(c) the procedure and time limits for the submission and implementation of commitments pursuant to Article 6(2) and Article 8(2);

(d) implementing provisions concerning hearings pursuant to Article 18.

2. The Commission shall be assisted by an Advisory Committee, composed of representatives of the Member States.

(a) Before publishing draft implementing provisions and before adopting such provisions, the Commission shall consult the Advisory Committee.

(b) Consultation shall take place at a meeting convened at the invitation of and chaired by the Commission. A draft of the implementing provisions to be taken shall be sent with the invitation. The meeting shall take place not less than 10 working days after the invitation has been sent.

(c) The Advisory Committee shall deliver an opinion on the draft implementing provisions, if necessary by taking a vote. The Commission shall take the utmost account of the opinion delivered by the Committee.

Article 24

Relations with third countries

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

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

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

4. Measures taken under this Article shall comply with the obligations of the Community or of the Member States, without prejudice to Article 307 of the Treaty, under international agreements, whether bilateral or multilateral.

Article 25

Repeal

1. Without prejudice to Article 26(2), Regulations (EEC) No 4064/89 and (EC) No 1310/97 shall be repealed with effect from 1 May 2004.

2. References to the repealed Regulations shall be construed as references to this Regulation and shall be read in accordance with the correlation table in the Annex.

Article 26

Entry into force and transitional provisions

1. This Regulation shall enter into force on the 20th day following that of its publication in the Official Journal of the European Union.

It shall apply from 1 May 2004.

2. Regulation (EEC) No 4064/89 shall continue to 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) of that Regulation before the date of application of this Regulation, subject, in particular, to the provisions governing applicability set out in Article 25(2) and (3) of Regulation (EEC) No 4064/89 and Article 2 of Regulation (EEC) No 1310/97.

3. As regards concentrations to which this Regulation applies by virtue of accession, the date of accession shall be substituted for the date of application of this Regulation.

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

Done at Brussels, 20 January 2004.

For the Council

The President

C. McCreevy

(1) OJ C 20, 28.1.2003, p. 4.

(2) Opinion delivered on 9.10.2003 (not yet published in the Official Journal).

(3) Opinion delivered on 24.10.2003 (not yet published in the Official Journal).

(4) OJ L 395, 30.12.1989, p. 1. Corrected version in OJ L 257, 21.9.1990, p. 13. Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9.7.1997, p. 1). Corrigendum in OJ L 40, 13.2.1998, p. 17.

(5) OJ C 364, 18.12.2000, p. 1.

(6) OJ L 222, 14. 8. 1978, p. 11. Directive as last amended by Directive 2003/51/EC of the European Parliament and of the Council (OJ L 178, 17.7.2003, p. 16).

(7) OJ L 372, 31. 12. 1986, p. 1. Directive as last amended by Directive 2003/51/EC of the European Parliament and of the Council.

(8) OJ L 1, 4.1.2003, p. 1.

(9) OJ L 175, 23. 7. 1968, p. 1. Regulation as last amended by Regulation (EC) No 1/2003 (OJ L 1, 4.1.2003, p. 1).

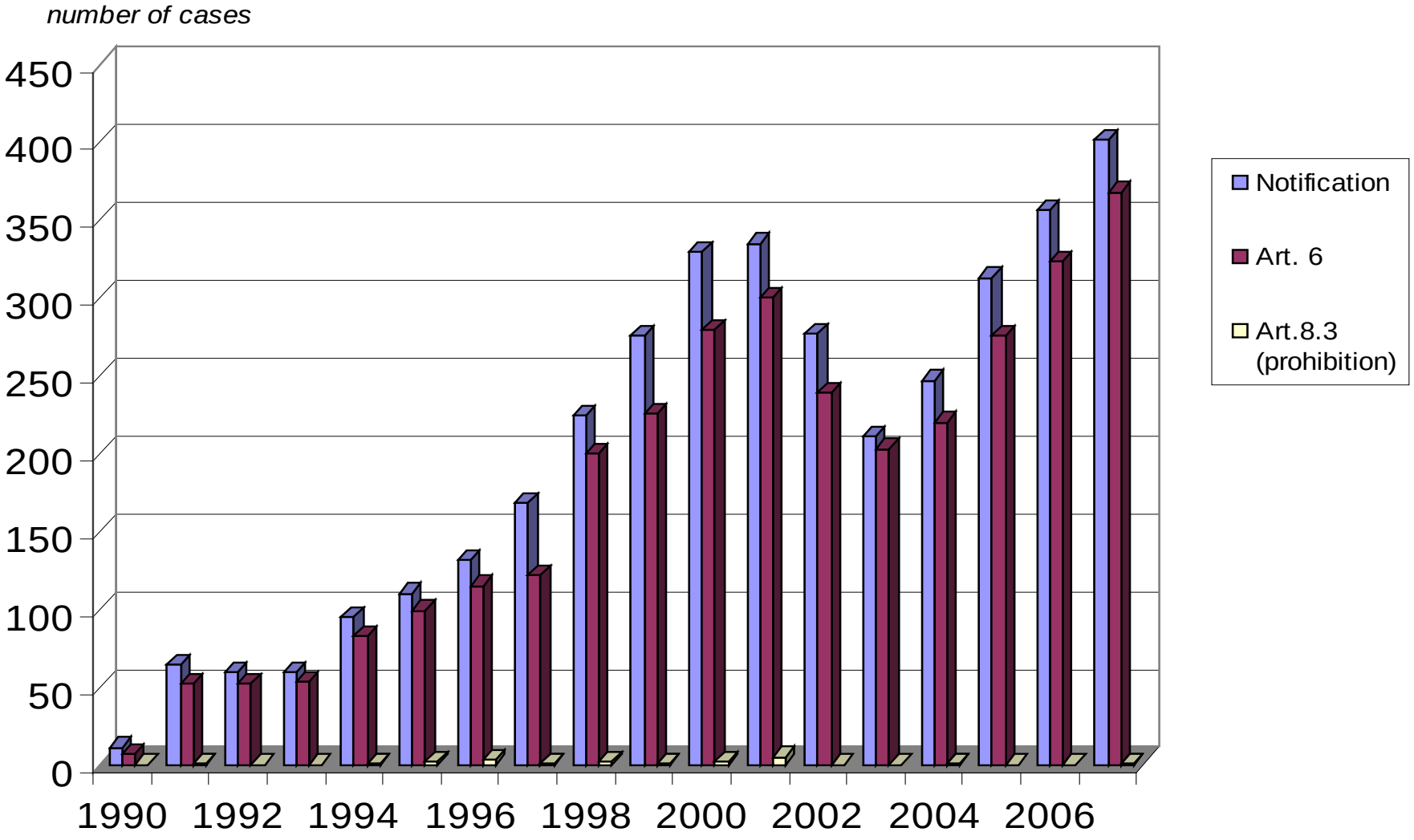
(10) OJ L 378, 31. 12. 1986, p. 4. Regulation as last amended by Regulation (EC) No 1/2003.

(11) OJ L 374. 31. 12. 1987, p. 1. Regulation as last amended by Regulation (EC) No 1/2003.

ANNEX 2: Key Dates to the European Merger Control Regulation			
Date	**Event**	**Institution**	**Substance**
1951	Treaty of Paris	European Coal and Steel Community	Articles 65 & 66
June 1956	Spaak Report	Basis for the Treaty of Rome	It is *'necessary to seek to establish a single industrial base for the Community as a whole. This involves the formulation of measures that ensure that mergers affecting firms established in the Community (…)*'
1957	Treaty of Rome	Belgium, Luxembourg, Netherlands, France, Germany, Italy	Articles 85 & 86, and Article 3(f)
1966	Memorandum on the problems of concentrations in the Common market	Commission	Application possible of Article 86 to the control of mergers. Article 85 is considered not applicable.
June 1971	Berkhouwer Report	European Parliament	There should be prior notification of merger resulting in firms exceeding a certain size or holding more than a stated share in the market
December 1971	Continental Can decision	Commission	Application of Article 86 to mergers
October 1972	Paris Summit	Heads of State or of Government	Called for the formulation of measures to ensure that mergers involving firms established in the Community are in harmony with the economic and social aims of the Community and the maintenance of fair competition
October 1972	Political Announcement	Commission	The Commission will submit, independently of the application of Article 86 to specific cases, proposals designed to introduce a more systematic control of merger operations of a given scale.
February 1973	Continental Can Case	European Court of Justice	Clarification of the question of the application of Article 86 to combinations effected within the common market by firms in a dominant position
June 1973	Proposal for Regulation	Commission	Proposal for a Regulation on the control of concentrations between undertakings based on Articles 87 and 235.
July 1973	24th Conference of Government Experts of Member States on Restrictive Agreements and Dominant Position (Brussels)	Commission	Preliminary discussion with relevant national authorities on draft regulation establishing more systematic control over business concentrations
July 1975	Communication to Council	Commission	Asked the Council to give priority to the proposal
March 1976	Interim Report to the Permanent Representatives Committee	Council Working Party on Economic Questions	Areas of difficulties: - Principle of pre-merger control and legal basis for regulation - Field of application - Possibility of derogation from any prohibition - Notification of planned mergers - Decision-making procedures

1981	Amended Proposal for a Regulation	Commission	Two political problems addressed: - Conditions for applying Community rules - Association of Member States in Decision-making process
February 1984	Amendments to the proposed regulation on control of concentrations	Commission	Although the majority of Member States have expressed their approval of the principles of merger control, views on details and certain essential points remain quite divergent.
1986	Amendments to the proposed regulation on control of concentrations	Commission	
17 November 1987	Philip Morris Case	European Court of Justice	Application of Article 85 possible to mergers
30 November 1987	Meeting	Council	Positive attitude on Commission's approach and prepared to give priority to the proposal
April 1988	Amended proposal for regulation	Commission	
18 November 1988	Meeting	Council	Basic problems are: - exclusive competence of Commission - compatibility and incompatibility requirements
25 November 1988	Amended proposal	Commission	- Definition of concentration having a Community dimension - Compatibility requirements - Commission and sole competence - Suspension period
December 1988	Meeting	Council	No definitive decision
1988	Decisions under Article 86	Commission	- Irish Distillers Group - British Airways/British Caledonian
December 1989	Meeting	Council	Adoption of Commission's proposal for the control of concentrations between undertakings
September 1990	Regulation 4064/89 enters into force		

Annex 3: Cases reviewed by the Commission



ANNEX 4 : Different types of mergers and effects			
Types of merger	**Definition**	**Potential effects of merger type**	**Examples**
HORIZONTAL	Occur when a merger takes place between competitors in the same product and geographic markets and at the same level of production or distribution cycle.	As a general proposition, horizontal mergers present a greater danger to competition than vertical ones – 'unilateral effects' or 'coordinated effects'.	Carnival/P&O Princess (M.2706) Airtours/First Choice (M.1524) SEB/Foereningssparbanken (aborted)
VERTICAL	May be experienced when a merger occurs between firms that operate at different levels of the market: a firm may acquire control of another firm further up or further down the distribution chain (backward or forward integration)	Vertical integration may have a harmful effect on competition, in particular if it gives rise to a risk of the market becoming foreclosed to third parties (e.g. a firm downstream in the market acquires a, upstream undertaking that has monopoly power in relation to an important raw material and input: concerns that competitors in the downstream market will be unable to obtain supplies of the raw material or input, or they will be able to do so only on discriminatory terms)	Telia/Sonera (M.2803) AOL/Time Warner (M.1845) RTL/Veronica/Endemol (M.553) Nordic Satellite Distribution (M.490)
CONGLOMERATE	A merger that brings together firms which do not compete with each other in any product market and which does not entail vertical integration. There are three types: - product line extension - market extension - pure conglomerates	Whether conglomerate mergers should be controlled at all is a matter for controversy. US law long ago abandoned any interest in the conglomerate effects of mergers. However in recent years the European Commission has expressed concern about 'the portfolio' or 'range effect'.	Grand Metropolitan/Guinness (M.938) GE/Honeywell (M.220) *Tetra Laval v Commission* – the CFI recognised that the effects of conglomerate mergers are generally neutral, or even beneficial to competition.

Annex 5 : Different European national merger regimes				
Jurisdiction	**Entering in force of merger regime**	**Authority in charge of national merger regulation**	**Substantive Test applied**	**Notification procedure**
Austria	1993	The Federal Competition Authority (*Bundeswettbewerbsbehörde)*	Dominant position test	Compulsory and Ex ante
Belgium	1991	Commission Bancaire et Financiere	create or strengthen a "dominant position" that significantly hinders effective competition within the relevant market	Compulsory and Ex ante
Bulgaria	1998	the Commission on the Protection of Competition (independent body)	Concerned with the establishment or strengthening of a dominant position, where such a dominant position would materially limit or impede competition in the relevant market.	Compulsory and Ex ante
Cyprus	1999	Cyprus Commission for the Protection of Competition	EC's former dominance test	Compulsory and ex post
Czech Republic	2001	Office for the Protection of Economic Competition	Result in substantial distortion of economic competition especially due to fact that it would lead to the strengthening of a dominant position of either of the merging undertakings	Compulsory, no defined deadline
Denmark	2000	The Competition Council ("Konkurrencerådet") and the Competition Authority ("Konkurrencestyrelsen")	EC's current significant impediment to effective competition test	Compulsory and ex post
Estonia	2001	The Competition Board ("*Konkurentsiamet*")	significantly damages competition in particular	Compulsory and ex ante and ex post

			through the creating or strengthening of a dominant position	
Finland	1998	Finnish Competition Authority	SIC – significantly impede competition	Compulsory and ex ante (thresholds)
France	1986	• The Ministry for Economy, Finance and Industry (DGCCRF) • Conseil de la Concurrence (advisory role)	significantly lessens competition, especially by creating or strengthening an individual or dominant position.	Compulsory and Ex ante (thresholds)
Germany	1958	The Federal Cartel Office (Bundeskartellamt)	former ECMR's dominance test	Notification is compulsory. There is no deadline for filing but the transaction may not be implemented unless and until it has been approved
Hungary	1996	Hungarian Competition Office (independent)	EC's former dominance test	Compulsory and ex post
Greece	1977	the Hellenic Competition Commission	SIC – significantly impede competition	Compulsory, ex ante and ex post
Ireland	1991	The Irish Competition Authority independent statutory body	SLC test	Compulsory and ex post
Italy	1990	Autorità Garante della Concorrenza e del Mercato Independent body from the government	EC's former dominance test	Compulsory and ex ante
Latvia	2002	The Competition Council (*Konkurences padome*) appointed by the Latvian government (Cabinet of Ministers) and it is subordinate to the Ministry of Economics	EC's former "dominance" test	Compulsory and ex ante
Lithuania	1999	Competition Council of the Republic of Lithuania independent	The Law on Competition prohibits any concentrations that (a) create or strengthen a dominant position; or (b) result in significant impediment of competition in the relevant market.	Compulsory and ex ante
Luxemburg		The Conseil de la Concurrence (independent body) and the Inspection de la Concurrence (a		the undertakings concerned cannot even file a voluntary notification with the competition

		department within the Ministry of Economic Affairs that receives competition law-related complaints)		authorities. Ex post
Malta	2002	Director of the Office for Fair Competition and the Commission for Fair Trading	the "substantial lessening of competition test" ("SLC Test")	Compulsory and ex post
Netherlands	1998	The Dutch Competition Authority, the *Nederlandse Mededingingsautoriteit* ("NMa") an independent administrative body	the EC's former dominance test	Compulsory and ex ante
Poland	2000	President of the Office for Competition and Consumer Protection ("Prezes Urzêdu Ochrony Konkurencji i Konsumentów") the UOKiK President will no longer be an independent authority	whether competition on the market will not be substantially restricted, in particular by creating or strengthening the controlling market position	Compulsory and ex ante
Portugal	2003	*Autoridade da Concorrência* ("Competition Authority")	the EC's former dominance test	Compulsory and ex post
Romania	1997	Romanian Competition Council	whether the transaction leads (or could lead) to the creation or the consolidation of a dominant position on the relevant market on which the transaction takes place.	Compulsory and ex post
Slovakia	2001	The Antimonopoly Office of the Slovak Republic Office is headed by a Chairperson appointed and recalled by the President of the Slovak Republic based on a proposal of the Slovak Government.	the EC's former dominance test	Compulsory and ex post
Slovenia	1999	The Slovenian Competition Protection Office	Corresponds broadly to the European Commission's "substantial impediment to effective competition test".	Compulsory and ex post
Spain	1989	The *"Servicio de Defensa de la Competencia"* (SDC), a Directorate General within the Ministry of Economy which conducts the investigation in the first phase of the procedure.	Equivalent to the "substantial lessening of competition" test used under the EC Merger Regulation	notification of a concentration to the Spanish competition authority is compulsory. Under the Spanish merger control regime, notification must be filed before the execution

		The Minister of Economy, who has the power, upon the proposal of the SDC, to authorise mergers after the first phase of the procedure or to refer the case to the TDC for a second-phase investigation. The *"Tribunal de Defensa de la Competencia"* (TDC), an autonomous body independent from the Ministry of Economy. After a second-phase analysis in the merger procedure it issues a non-binding report that is referred to the Government. The Government (Council of Ministers), which is entitled, under Law 16/1989, to forbid or approve (with or without conditions) a proposed transaction at the end of the second-phase investigation upon the proposal of the TDC		of the transaction
Sweden	1993	Swedish Competition Authority (the Competition Authority) and the Stockholm District Court	corresponds to the former dominance test as applied under EC law	an obligation to notify the transaction to the Competition Authority when the jurisdictional thresholds are met. There is no deadline for filing.
United-Kingdom	1973	the Office of Fair Trading ("OFT") and the Competition Commission ("CC").	Substantial lessening of competition.	not compulsory in the UK; accordingly there is no deadline for notification but the OFT has the power to review mergers whether or not they are notified