LSE Research Online

THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE

Mark Thatcher

European Commission merger control: combining competition and the creation of larger European firms

Article (Accepted version) (Refereed)

Original citation:
Thatcher, Mark (2014) *European Commission merger control: combining competition and the creation of larger European firms.* European Journal of Political Research, 53 (3). pp. 443-464. ISSN 0304-4130

DOI: 10.1111/1475-6765.12040

© 2013 European Consortium for Political Research

This version available at: http://eprints.lse.ac.uk/54743/

Available in LSE Research Online: May 2015

LSE has developed LSE Research Online so that users may access research output of the School. Copyright © and Moral Rights for the papers on this site are retained by the individual authors and/or other copyright owners. Users may download and/or print one copy of any article(s) in LSE Research Online to facilitate their private study or for non-commercial research. You may not engage in further distribution of the material or use it for any profit-making activities or any commercial gain. You may freely distribute the URL (http://eprints.lse.ac.uk) of the LSE Research Online website.

This document is the author's final accepted version of the journal article. There may be differences between this version and the published version. You are advised to consult the publisher's version if you wish to cite from it.

http://eprints.lse.ac.uk

European Commission merger control: combining competition and the creation of larger European firms

Mark Thatcher

Department of Government

London School of Economics

Address for correspondence

Department of Government

London School of Economics

Houghton Street

London WC2A 2AE

Email: m.thatcher@lse.ac.uk

European Commission merger control: combining competition and the creation of larger European firms

Mark Thatcher

London School of Economics

Abstract

The article examines the European Commission's use of its legal powers over mergers. It discusses and tests two views. One is that the 'neo-liberal' Commission has ended previous industrial policies of aiding 'national champion' firms to grow through mergers and instead pursues a 'merger constraining' policy of vigorously using its legal powers to block mergers. The other is that the Commission follows an 'integrationist policy' of seeking the development of larger European firms to deepen economic integration. It examines Commission decisions under the 1989 EC Merger Regulation between 1990 and 2009. It selects three major sectors that are 'likely' for the 'merger-constraining' view -banking, energy and telecommunications- and analyses a dataset of almost six hundred Commission decisions and then individual merger cases. It finds that the Commission has approved almost all mergers, including by former 'national champion' firms. There have been only two prohibitions over twenty years in the three sectors and the outcome has been the creation of larger European firms through mergers. It explains how the Commission can pursue an integrationist policy through the application of competition processes and criteria. The wider implication is that the Commission can combine competition policy with achieving the 'industrial policy' aim of aiding the development of larger European firms.

Key words: mergers; European Commission; neo-liberalism; national champions

Competition policy occupies a central place in European policy making due to its importance for economic markets and the wide powers conferred on the European Commission (cf. Cini and McGowan 2009, Gerber 2001, McGowan and Wilks 1995, Wilks 2010). Within competition policy, merger control is especially noteworthy as the legal regime begun by the 1989 EC Merger Regulation (ECMR) empowers the Commission itself to take decisions that concern billions of Euros, powerful firms and major markets.

A key issue in both competition policy generally and merger control specifically is the balance between 'promoting competition' and 'industrial policies' of aiding national or European firms. The two aims are usually seen as conflicting, especially regarding large former 'national champions'- firms that had previously enjoyed national legal monopolies or state-supported oligopolies and still retain powerful positions in their domestic markets.

The article discusses the view that the Commission pursues a 'neo-liberal' policy of constraining mergers through vigorous application of its legal powers. It presents an alternative view that the Commission pursues an 'integrationist policy' whereby it accepts the development of larger European firms through mergers in order to enhance economic integration. It tests the two views in three major sectors that are 'likely' for the merger-constraining view -banking, energy and telecommunications- by analysing an original dataset of almost six hundred Commission decisions, as well as looking at individual merger cases.

The central finding is that the Commission has followed an integrationist policy. It has approved the vast majority of mergers in the three industries without conditions after a first

phase investigation. They include cross-border and domestic mergers by former ‘national champion’ firms. Even the rare exceptions when the Commission has found problems under the ECMR have almost all been approved subject to conditions. There have been only two prohibitions across the three sectors in twenty years.

The Commission has applied only competition criteria in its decisions. The article shows how it has been able to do so and at the same time approve mergers and achieve deeper European economic integration. The Commission’s competition-based criteria over market shares and loss of a competitor lead it to approve many mergers, including by former ‘national champion’ firms. When it identifies problems under the ECMR, it approves mergers subject to conditions that are acceptable to the merging parties and at the same time, open domestic markets to entry. Most proposed mergers are between European firms, especially across borders, and hence the outcome has been the creation of larger European firms.

Thus the article argues that the Commission can both apply competition criteria and achieve other aims, notably the enlargement of European firms and furthering European economic integration. Hence simply labeling the Commission as ‘neo-liberal’ and merger-constraining because it uses competition criteria is misleading, as it can combine these different aims. If applicable more generally to economic regulation, the wider implication is that the application of competition criteria can aid the development of larger European firms.

A ‘neo-liberal’ view of Commission constraint of mergers

From the ECMR’s inception, there was a strong tension between the aims of ‘competition’ and ‘industrial policy’ that delayed its passing for several years (Bulmer 1994, Cini and

McGowan 2009:128-140). Some member states (notably Britain and Germany) sought to replace ‘political interference’ by national governments with reliance on competition criteria while others favoured ‘industrial policy’ to aid the development of large European firms (e.g., France and Italy).

Moreover, studies of the operation of the ECMR present competition and industrial policy as antagonistic. An increasingly influential view is that the Commission, and especially the Directorate General for Competition (DG Competition), pursues ‘neo-liberalism’ and has broken with past ‘industrial policies’ of encouraging mergers to create national and European ‘champions’ (Buch-Hansen and Wigger 2010, 2011; cf. Gerber 2001,Wilks 2010). Thus for instance, Buch-Hansen and Wigger (2010, 2011) claim that the Commission focuses solely on promoting competition, ending previous ‘mercantilist’ policies of building up ‘national champion’ or ‘European champion’ firms. Geradin and Girgenson (2011: 359) agree, stating that after the ECMR “the European Commission largely ignored industrial policy considerations, focusing instead on the strict implementation of the competition-based test”. Daniel Kelemen also contrasts recent “vigorous” EU competition policy in which the Commission pursues a “strict, prohibition-style regime” with traditional EU policies of the 1960s in which “competition was not pursued as an end in itself” but for broader objectives (Kelemen 2011: 158, 155, 159).

The studies argue that the Commission’s policy is due to the legal framework, notably the wording of the ECMR, and also to the ‘neo-liberal’ beliefs of Competition Commissioners since the 1980s such as Sir Leon Britten, Mario Monti, Karel van Miert and Neelie Kroes, who repeatedly stressed the virtues of competition. They also underline the rise of an increasingly juridified model of competition policy- for instance, Kelemen points to a

'dramatic growth' in Commission assertiveness and legal conflict, arguing that "there will be no legal armistice between the Commission and the firms it regulates" (Keleman 2011: 192).

Empirically, the most direct evidence comes from prominent Commission decisions blocking mergers. Studies frequently cite the 1991 De Havilland case, in which the French and Italian firms Aerospatiale and Alenia sought to purchase the De Havilland company from the US firm Boeing, thereby achieving a strong position in world and European markets for small aircraft manufacturing. But led by DG Competition, the Commission prohibited the merger on the grounds that it would create a dominant position. [1] The case was followed by other prominent prohibitions,[2] and Geradin and Girgenson (2011: 354) state that "some observers argued that EU merger control prevented industrial consolidation", and suggest that this applies particularly in network industries.

The arguments about 'neo-liberal' Commission merger control are becoming widespread in public policy analyses of EU competition policy. They relate to broader arguments that the Commission is 'neo-liberal' in its governance of economic markets (cf. Crouch 2011). They fit in well with popular views of the Commission, and especially DG Competition, as using its array of legal powers to expand competition. But they are also open to important criticisms and questions.

One is that the meaning of 'neo-liberal' competition policy varies widely - from strict state regulation to prevent abuses or high market shares to a presumption in favour of mergers on efficiency grounds (cf. Gerber 2001). A second is that the Commission's goal of achieving European integration through promoting large European firms is ignored or presented as conflicting with the neo-liberal pursuit of competition. Yet Competition Commissioners have

claimed to pursue both aims, including Commissioners labeled as ‘neo-liberal’. Thus for instance, Neelie Kroes, referring to the energy, telecommunications and financial services industries, stated that, “I’m all for champions- European champions who can go out and win on global markets” (Kroes 2006; cf. Brittan 1992: 21). Finally, a few very high-profile cases may be unrepresentative.

An alternative view- an integrationist competition policy

The present article offers a different view of the operation of the ECMR. It suggests that the Commission pursues an ‘integrationist merger policy’ whereby it both applies competition criteria and also allows the development of larger European to enhance economic integration.

Its starting points are analyses of the purposes of the Single Market and the aims of the Commission. In an influential article Sandholtz and Zysman (1989) argued that a key objective of the single European market programme (‘1992’) was to aid European firms to compete with large US and Japanese rivals by opening domestic markets to entry from firms in other member states and developing cross-border European firms. Following on from their work, neo-functionalists stated that the Commission, in alliance with transnational firms, and supported by the European Court of Justice, leads a self-reinforcing process of opening markets, increasing cross-border trade and strengthening cross-border firms (Sandholtz and Stone Sweet 1998, 2012).

More specifically, Jabko (2006) argues that the Commission uses the different meanings of 'the market' as part of a political strategy to hold together a heterogeneous coalition (often including large firms and governments) in order to attain its goals of sustaining its own power and driving forward European integration. In the case of merger policy, the coalition contains members with diverse preferences- some seeking to 'depoliticise' decisions, while others support 'industrial policies' of building larger European firms. Jabko's analysis would suggest that the Commission seeks to satisfy these diverse aims in interpreting the idea of 'protecting competition'.

Indeed, the concept is particularly suitable for interpretation in diverse ways. Thus Gerber (2001: x-xi) stresses that it can encompass diverse goals, including promoting economic efficiency, protecting economic freedom, countering the economic power of firms, and confronting obstacles to economic development. Moreover, there are different views on what constitute threats to competition. The Harvard' or 'structure-conduct-performance' analysis of competition policy that dominated US discussions in the 1960s and 1970s (cf. Monti 2007: 57-61; Peritz 1996: 181-228) and to an extent more recent 'post-Chicago school' theories (cf. Budinski 2008) underline the dangers of mergers that increase market power. In contrast, the 1970s and 1980s saw the rise of the 'Chicago school', which offered theoretical arguments for allowing many mergers, even those creating high market shares (Monti 2007: 63-67, Peritz 1996: 229-299).

Thus the neo-functionalist integration literature predicts that the Commission will favour mergers by European firms, especially across borders, as part of a wider strategy of deepening economic integration. It suggests that the Commission will build broad coalitions and act in alliance with large European firms rather than facing legalized conflict with them.

However, at present, an ‘integrationist’ view of merger policy is little developed and tested. There is insufficient discussion of how the Commission can combine protecting competition and allowing the creation of larger European firms within the legal framework of the ECMR. Moreover integrationist arguments need to be subject to empirical tests rather than relying on claims about the original purposes of the single market programme.

Testing claims of ‘merger constraining’ versus ‘integrationist’ policy in Commission merger control

This section proposes empirical tests for the two views of Commission merger control. For short hand, the first is labeled ‘merger constraining’ policy and the second ‘integrationist policy’. The term ‘neo-liberal’ is avoided due to its multiple meanings (cf. Schmidt and Thatcher 2013), as is ‘competition only’.

A first step is to set out some observable implications concerning the Commission’s use of its legal powers, as well as scope conditions for each of the two views. A ‘merger constraining’ policy would mean that the Commission is suspicious of mergers that risk increasing the market power of firms, especially if those firms already have such power. Hence the Commission would use its legal powers ‘vigorously’ against such mergers, including ones that create larger European firms, through an antagonistic legalized relationship with them. The outcome would be that a significant number of mergers are prohibited or face tough conditions that offset gains in market power, especially for firms that already enjoy such power.

In contrast, an ‘integrationist policy’ involves greater acceptance of mergers that increase the market power of firms if they also enhance European integration. It would expect limited use of Commission powers to investigate, condition or prohibit mergers, especially cross-border ones that deepen integration. If legal problems under the ECMR are found, the Commission would act to resolve them in cooperation with the merging European firms, especially if they are large transnational firms, since they are allies in pursuing European integration.

Neither policy is absolute- a merger constraining policy would not expect every merger to be investigated or prohibited nor would an integrationist policy expect all mergers to be approved unconditionally. Thus comparative analysis is needed as well as study of individual cases. This analysis selects ‘likely’ sectors and cases for the ‘merger-constraining’ view. ‘Likely is defined using the *Commission’s own criteria and interpretation of the ECMR* (discussed below).

The article looks at three sectors- banking, energy and telecommunications- that are marked by features that to the Commission’s own criteria, make mergers *relatively* more likely to raise competition problems than for the economy as a whole. Key features include high shares of domestic markets held by former ‘national champion’ firms, entry barriers (legal, economic and political), and a limited number of actual or potential competitors. [3] Hence if the Commission follows a ‘merger-constraining’ policy, it would be expected to make greater use of its powers to constrain mergers in these sectors than in aggregate. But if the Commission has followed an ‘integrationist’ policy however, then no differences or even lower use of powers should be observed since these are major sectors for European integration.

The analysis also includes individual cases, especially mergers by large former 'national champion' firms, i.e. historic incumbent suppliers, including state-owned or recently-privatised who previously held legal monopolies in national markets and also traditional private oligopoly suppliers who enjoyed strong state support. These firms often enjoy market power in their domestic markets and provide a good test of whether the EU pursues merger constraining policies and has ended 'industrial policies' of building up companies through mergers. [4]

After setting out the Commission's powers under the ECMR the article sets out aggregate data on Commission decisions. It then analyses the use of these powers in the three sectors and compares with the aggregate data. The section also studies the nationality of the firms involved to see whether the Commission has encouraged European mergers as suggested by an integrationist policy.

Thereafter the article examines unconditional first phase approval in individual merger decisions within the three sectors. The cases selected are likely to see use of Commission powers to constrain mergers according to *the Commission's own criteria* and focus especially on former 'national champion' firms.

The fourth part looks at cases that *the Commission itself* has not approved unconditionally in a first phase investigation because it has found problems under the ECMR. The section examines its decisions, including prohibition or approval subject to conditions.

It is worth underlining that the article studies the Commission's use of its legal powers and excludes informal discussions and negotiations. Although these are very important in firms deciding whether to propose mergers (cf. DG Competition 2004), the article is testing claims about Commission application of its formal ECMR powers once mergers are actually proposed. Moreover, if arguments about 'Euro-legalism' apply, legal decisions and conflicts will be an important part of the process (cf. Kelemen 2011).

Equally, the article is not concerned with whether the Commission is 'lax' or 'strict'- these normative considerations lie outside its scope- nor does it seek to second-guess whether the Commission's analysis was economically or legally 'correct'. It should be underlined that throughout, the analysis assumes that the Commission *acts within the legal framework:* the Commission has discretion (discussed below), but such discretion is limited by legal rulings of the General Court and European Court of Justice. The analysis refers to 'the Commission's policy' since these are Commission decisions, but whether they are due to its discretion or European court rulings is not the central issue here- rather it is which policy the Commission follows within the legal framework.

Commission powers under the EC Merger Regulation

It is essential to briefly set out the provisions of the ECMR concerning the Commission's powers over mergers, especially as the 'merger-constraining view' highlights these (for legal analyses see Goyder, Cook and Kerse 2009, Monti 2007: ch8, Whish and Bailey 2012: ch.

21). It is also important to set out the features of mergers that the Commission itself highlights as making the use of those powers more likely.

The ECMR covers 'concentrations' which incorporates mergers and acquisitions, and since 1997 the creation of many joint ventures.[5] Here, 'merger' is used synonymously with 'concentration'. The ECMR requires all 'concentrations with a Community dimension', defined through a threshold, to be notified to the European Commission. [6] The thresholds are based on both the worldwide aggregate turnover of the firms and their turnover within the EU. The initial levels of 1989 were somewhat lowered in 1997.[7]

The Commission appraises concentrations to see if they are "compatible with the common market" (Article 2(1)). The appraisal criteria are broad: the Commission is to "take into account" … 'the need to maintain and develop effective competition and then other factors such as 'the interests of consumers', and 'technical and economic progress'.[8] However, the most formal and imperative criteria are focused on competition (Goyder 2003: 351). The test for approval/prohibition in the 1989 ECMR was whether a concentration 'created or strengthened a dominant position as a result of which effective competition would be significantly impeded in the common market'.[9] Following a revised ECMR in 2004, the general test of compatibility is now expressed as a 'significant impediment of effective competition'. However, dominance was retained as the core criterion and despite debate, a major legal authority argues that there is considerable continuity in the substantive criteria used (cf. Monti 2007: 250, 256-264).

The Commission carries out its appraisal using a two-stage procedure. Following a 'first phase' ('phase I') investigation under Article 6, it can approve a concentration or

alternatively approve it subject to conditions ('commitments' or 'undertakings') offered by the parties.[10] Otherwise, it undertakes a fuller 'phase II' investigation under Article 8 that leads to unconditional approval, conditional approval, or prohibition.[11] The choice of a second phase investigation is important for the length and detail of the scrutiny, and for possible outcomes- a prohibition is only available after a phase II investigation.

The Commission acts within a highly legalised framework.[12] Judicial decisions are crucial and a number have overturned Commission decisions, notably on grounds of weaknesses in procedures and economic reasoning. Nevertheless, the General Court recognises that the Commission has a margin of discretion and that it should not substitute its judgement for the Commission's over matters of policy or enforcement (Cook and Kerse 2009: 370-3). The Commission exercises discretion even over vitally important matters such as market definition and remedies (Cook and Kerse 2009: 217, 280). Finally, cases depend on parties bringing actions before the General Court and ECJ, and have been few in number: Cook and Kerse (2009: 353) found approximately 40 appeals against Commission decisions of which 10 saw the Commission's decision overturned.

The analysis here is what policy the Commission pursues within the legal framework. Indeed, the Commission has issued Guidelines which summarise its approach and understanding of the ECMR (Commission 2004, 2008). The Guidelines declare that horizontal mergers which involve the loss of direct competition in a market are more likely to cause concern than vertical ones (Commission 2008: paragraph 11). They offer several factors to be taken into account in decisions. For horizontal mergers, they suggest the importance of market shares and degrees of concentration.[13] They also highlight the role of barriers to entry- be these legal, technical or due to the established position of firms.[14]

The Guidelines underline the importance of a merger causing the "loss of competition between merging firms" and "creating or strengthening the dominant position of a single firm which, typically, would have an appreciably larger market share than the next competitor post-merger" (paragraph 25) in assessing the 'uncoordinated effects' of a merger.[15] These issues are especially important in "oligopolistic markets". The Guidelines offer a number of specific factors to be examined including whether:

-merging firms have high market shares or are close competitors;

-customers have limited possibilities of switching supplier;

-competitors would be unlikely to increase supply if prices rise, especially due to capacity constraints;

-the merged entity would be able to hinder expansion by competitors.

They underline the significance of whether the merger would remove an important competitive force (including a recent entrant supplier expected to exert significant competitive pressure in the future), especially when the market is concentrated.[16]

Several of these factors applied strongly to many parts of banking, energy and telecommunications in Europe in the 1990s and 2000s.[17] Most electricity and telecommunications markets had a national or regional historic 'incumbent' operator, who had traditionally enjoyed a legal monopoly and usually had kept a very high market share, even when competition was legally permitted. There were capacity constraints in some parts of the sectors such as energy generation or supply. In banking, competition often existed but parts of the sector remained oligopolistic. Customers faced significant barriers to switching supplier in all three sectors. The high levels of investment required in segments of the industries produce pressures for oligopoly. Following the Commission's Guidelines, these

features make mergers problematic, especially by former ‘national champion’ suppliers, and particularly for mergers with ‘horizontal’ elements, where the firms are actual or potential direct competitors.

Analysing Commission decisions 1990-2009: aggregate data and banking, energy and telecommunications decisions

Data sources and analysis

The analysis looks at Commission decisions under the ECMR over its first twenty years (September 1990 until end 2009). To allow comparison, it begins with aggregate data for all decisions before turning to the three sectors. Here, it divides cases by the ‘nationality’ of the companies involved, which is closely linked to issues of industrial policy and building-up national or European ‘champions’. It offers five categories: ‘domestic’, i.e. involving firms from the same member state; EU cross-border, in which all the parties are European but from more than one EU/EEA member state;[18] EU-non-EU in which at least one of the acquirers, merging parties or joint venture parties is a non-EU/EEA firm (allowing assessment of whether there is any difference in treatment with purely European mergers); decisions involving just non-EU/EEA firms; acquisitions of non-EU firms by EU firms. [19] An initial analysis separated takeovers and acquisitions from joint ventures, but no major differences were found.

The ‘nationality’ of a firm is based on the description given in the Commission’s decision and/or press release, and other factors, notably location of its headquarters and history. Empirically, one nationality was identified for all firms except two.[20] Where an acquirer is known to be controlled by another firm (e.g. it is a subsidiary or majority owned), it was treated as having the nationality of its controlling firm.

Merger decisions were collated using data provided by the European Commission.[21] Since most decisions do not give turnover figures, the analysis is based on numbers of cases, not their value. The analysis concerns Commission decisions, not actual mergers as sometimes the firms did not go ahead even if the merger was approved. The categorisation of decisions was based on the sector in which the *target company* operated using Commission categories and examination of the cases. The three sectors were defined through their core activities. Thus banking covers target firms that are registered as banks, or engage in bank-like activities such as lending. Energy covers the supply of electricity and gas- generation, transmission and distribution. Telecommunications includes services for transmission of voice and data.

Aggregate data

Aggregate data covering all merger decisions over the period 1990-2009 show that the Commission has rarely used its powers to investigate, condition and prohibit mergers. In terms of procedures, the vast majority of cases (92%) were dealt with through a phase I investigation under Article 6 (see Table 1). Only a very small percentage of cases were subjected to a phase II investigation under Article 8- i.e. those raising “serious doubts” about

their compatibility with the single market. Thus between 1990 and 2009, there were 161 phase II decisions, representing less than 4% of all notifications.

Table 1 Treatment of notified cases by the Commission 1990-2009

	Number	% of total notified cases
Decisions under Article 6 (phase I decisions)	3939	92%
Cases withdrawn during phase I	96	2%
Decisions under Article 8 (phase II decisions)	161	4%
Cases withdrawn during phase II	35	1%
Other[22]	43	1%
Total notified cases	4280	100%

Table 2 sets out the Commission's decisions. It shows that the Commission has unconditionally approved the vast majority of cases in the relatively rapid Article 6 phase I process - 3697 cases, representing 86% of all notified cases. In addition, a further small group- 190 cases, representing 4% of all notified cases- are accepted subject to conditions (i.e. commitments by the parties) in phase I investigations.

Within the select group of mergers subject to a second phase investigation under Article 8, the vast majority are held to be compatible with the ECMR - 137 or 85% of phase II investigations. Almost no concentrations are prohibited- only 20 decisions plus another 4 of restoring effective competition. This represents a limited proportion of all phase II decisions (15%) and a tiny percentage of all Commission decisions (less than 1%). Even if all prohibitions are added to all cases withdrawn after notification, the number merely reaches 155 cases, or 3.6%. Overall, more than 94% of all cases notified to the Commission have been approved.

Table 2 Commission ECMR decisions 1990-2009

	Number	% of total notified cases [23](4280)
Article 6(1) out of scope of ECMR	52	1%
Unconditional approval after Phase I investigation- Article 6(1)(b)	3697	86%
Approval subject to commitments after Phase I investigation -Article 6(2)	190	4%
Unconditional approval after phase II investigation- Article 8(1)	46	1%

Approval subject to commitments after Phase II investigation -Article 8(2)	91	2%
Article 8(3) prohibition	20	Less than 1%
Article 8(4) restore competition	4	Less than 1%

Commission decisions in banking, energy and telecommunications

The number of Commission decisions in banking, energy and telecommunications grew from the late 1990s onwards and account for a substantial proportion of total Commission decisions. There are 581 cases for the sectoral dataset (i.e. the three sectors combined) which represent 14% of the total number of 4,280 cases across all sectors 1990-2009. The cases comprise the largest mergers in the three sectors since the ECMR sets a threshold by value.

The Commission has rarely used its legal powers to constrain mergers both in terms of investigatory procedures (Table 3) and its decisions (Table 4). Thus the vast majority of cases in all three sectors have been dealt with under a phase I investigation - notably every single banking case and over 90% of cases in the other two sectors. Although following the Commission's Guidelines, mergers in the three sectors were 'likely' to raise issues about maintaining competition, these percentages are similar or higher than for merger cases as a whole (92%).

Moreover, the vast majority of mergers have been approved unconditionally. The figures are 95% of all cases in banking, 87% for energy and 86% for telecommunications. These percentages are actually higher than for aggregate merger decisions (see table 2 above)!

Table 3 Treatment of notified cases in banking, energy and telecommunications 1990-2009

	Banking	Energy	Telecommunications
Decisions under Article 6 (phase 1 decisions)	99 % (186 cases)	91% (179 cases)	90% (178 cases)
Cases withdrawn during phase 1	0	1% (2 cases)	3% (6 cases)
Decisions under Article 8 (phase II decisions)	0	5% (9 cases)	4% (7 cases)
Cases withdrawn during phase II	0	0	1% (2 cases)
Other	Under 1% (1 case)	3% (6 cases)	3% (5 cases)
Total notified cases	187	196	198

Table 4 Commission decisions in banking, energy and telecommunications 1990-2009

	Banking	Energy	Telecommunications
Unconditional approval with phase I investigation– Article 6(1)(b)	95% (181 cases)	87% (170 cases)	86% (170 cases)
Approval subject to obligations/commitments under phase I investigation- Article 6(2)	3 % (5 cases)	5% (9 cases)	4% (8 cases)
Unconditional approval after phase II investigation –Article 8(2)	0	0	Under 1% (1 case)
Conditional approval after phase II investigation-Article 8(1)	0	4% (8 cases)	3% (5 cases)
Prohibitions- Article 8(3)	0	Under 1% (1 case)	Under 1% (1 case)
Withdrawn or no decision	0	1% (2 cases)	4% (8 cases)
Other	Under 1% (1 case)	3% (6 cases)	3% (5 cases)
Total number of cases	187	196	198

What does analysis by nationality of the parties reveal? Why certain types of merger are proposed is beyond this article, but in terms of the effects of Commission decisions, it is useful to see that the substantial majority of concentrations covered by the ECMR are cross-border and solely among European firms (Table 5)- these represented 61% of all decisions for the three sectors combined. The number of 'domestic' mergers involving firms of the same EU nationality have been smaller but still significant- 87 cases, representing 16% of Commission decisions. So too have numbers involving EU and non-EU firms (79 cases- 14% of the three sectors combined).

Table 6 examines the exceptional cases in which the Commission has used its formal powers to constrain mergers by launching a detailed phase II investigation, and/or to approve subject to conditions or prohibit by nationality of the parties. It shows that for all types, there have been few phase II investigations. There is no evidence of greater use of powers for mergers involving EU and non-EU firms than for cross-border EU ones.

Although the great majority of domestic mergers have been approved by the Commission, the percentage of these exceptional decisions in which the Commission exercised some constraint was higher than for cross-border EU mergers (14.9% compared with 5.6%). This may be due to a 'merger constraining policy', especially as most markets are defined as being national, which affects assessments of market power. However, it is also compatible with an 'integrationist policy', which values cross-border mergers that achieve greater economic integration more than domestic mergers.

Table 5 Composition of ECMR decisions in banking, energy and telecommunications 1990-2009 by nationality of the parties[24]

	Banking	Energy	Telecommunications
Cross-border EU	60% (113)	68% (127)	58% (107)
EU Domestic	20% (38)	18% (33)	7% (12)
One non-EU acquirer or party to merger or joint ventures with EU firms	11% (21)	10% (19)	23% (42)
Only non-EU parties	6% (11)	1% (2)	8% (14)
EU firms acquiring control over non-EU targets	2% (3)	4% (7)	5% (10)
Total cases	186	188	185

Table 6 Exceptional cases- Commission constraint of mergers in banking, energy and telecommunications

	Article 6(1) conditional approval	Article 8 conditional approval	Article 8 prohibition	Total exceptional cases	Exceptional cases as % total cases of each category
Cross-border EU	12	6	1	19	5.6%
Domestic EU	9	4	0	13	14.9%
Non-EU firms acquiring EU firms or parties to joint ventures with EU firms	0	1	0	1	1.2%
Non-EU-non-EU	1	1[25]	1	3	15%
EU firms acquiring control over non-EU targets	0	1	0	0	5%
All banking, energy and telecommunications mergers	22	13	2	37	6.3%

The high level of unconditional phase I approval has not changed significantly over time, as Table 7 shows. The figures suggest the Commission has pursed a consistent policy, despite the reforms of 2004, notably the revised ECMR, or changes of Competition Commissioner.

Table 7 Exceptional decisions by Commissioner

Competition Commissioner and years covered[26]	% decisions subject to conditions or prohibition or phase II investigation
Sir Leon Brittan (1989-1993)	0 (0 of 3 decisions)
Karel van Miert (1993-1999)	6.8% (10 out of 147 decisions)
Mario Monti (2000-2004)	7.4% (15 out of 202 decisions)
Neelie Kroes (2004-2010)	5.3% (12 out of 228 decisions)

Thus data show that Commission has very rarely used its legal powers to constrain mergers in banking, energy and telecommunications. Only 6% of Commission decisions in the three sectors were conditional approval or prohibitions, with 94% being unconditional first phase approval. The percentages are similar or lower than for mergers as a whole. This runs counter to the expectations of a 'merger-constraining' view since these sectors are 'likely' ones for use of the Commission's legal powers.

Examining individual cases of unconditional Commission approval in the three sectors

Examination of unconditional first phase approval of mergers by former ‘national champion’ firms is particularly valuable for understanding how the Commission deals with market power. These firms are likely candidates for an integrationist policy, since they are well-placed to operate across borders and compete with large non-EU rivals. But their mergers are also especially likely cases for the Commission to use its powers, given the criteria in its Guidelines: such firms usually have high market shares in their domestic markets and several are vertically integrated and hence may be able to influence competition through control of infrastructure. Of particular interest are mergers with ‘horizontal’ elements that eliminate an actual or likely future competitor, another factor underlined by the Commission Guidelines.

Analysis of individual mergers indicates that the Commission has unconditionally approved several acquisitions by ‘national champions’ of overseas firms who were actual or potential competitors in their domestic market and/or in other EU markets. Thus in telecommunications, historic incumbents such as France Télécom and Deutsche Telecom, acquired overseas mobile operators who were actual or potential competitors in their home markets.[27] Sometimes the merging firms were also competitors in other EU markets, especially the domestic market of the mobile operator. In energy too, the Commission unconditionally approved several mergers by incumbents with overseas suppliers who were potential future competitors- for instance, between the Portuguese electricity incumbent EDP and a Spanish electricity generator[28] or the vertically-integrated French incumbent EDF buying UK electricity companies.[29] In banking, it approved purchases of significant overseas banks by historic national banks such as the French Crédit Lyonnais and BNP Paribas, and the British banks RBS and HSBC.[30]

The Commission has also unconditionally approved domestic mergers, often allowing existing 'national champion' firms to enhance their position in their home markets. There were major examples in banking in Germany[31] and Belgium/Holland[32] and in German energy.[33]

Thus several mergers removed actual or potential competitors to 'national champion' firms in their home and/or overseas markets but allowed them to expand across borders or consolidate domestically. The unconditional phase I approval decisions are based on competition criteria and not on other factors listed in the ECMR. Although usually fairly short, they frequently give two related reasons using solely competition criteria.

The first is that the loss of actual competition is limited. The 'relevant market' (i.e. the one within which competition is judged to take place and hence the basis for matters such as market shares) is usually national. This is crucial in many cross-border mergers. In some, the overseas firm does not operate in the national champion's market (e.g. in several banking cases or sometimes in electricity[34]). In others, it has achieved a limited market share (e.g. in the 1990s and early 2000s most banks and energy firms remained largely national, while many national mobile operators achieved only limited success abroad) and the Commission accepts this loss of a competitor. Limited actual competition means that the main issue becomes loss of a potential competitor, which is more uncertain, and which the Commission often does not find in unconditional approval decisions.

The second factor is that the Commission generally treats market shares of under 25%-30% as unproblematic. In cross-border mergers, where overlap between the firms within individual national markets is limited, this level is rarely surpassed. Thus for instance, in

telecommunications, historic incumbent operators such as Deutsche Telekom or France Télécom began operating in overseas European mobile markets, but achieved only limited market shares. They then acquired overseas mobile operators but this did not result in excessively high market shares in the overseas market nor did it greatly increase their share of their domestic markets because the overseas operator had no or little presence there. In domestic mergers, the 25-30% norm means that even horizontal mergers are possible where the market is already fragmented and hence even incumbents do not have very high market shares (e.g. German electricity or banking).

The two factors allow the Commission, using competition criteria, to approve mergers by former national champion firms which involve horizontal elements.

The exceptional cases of Commission conditions and second phase investigations

The 37 mergers which the Commission did not approve unconditionally in the three sectors 1990-2009 (6.3% of cases across the three sectors) provide a particularly stringent test for the apparent conflict between enforcing competition and allowing mergers to create larger firms since these are cases that the Commission itself has identified as 'problematic' under the ECMR.

These cases (listed in Appendix 1 online) often involve mergers by former 'national champion' firms with another existing large sectoral supplier. Many had strong 'horizontal' elements. Moreover, several national champion suppliers enjoyed powerful positions in the provision of network infrastructure and some still enjoyed legal monopolies in parts of the

sectors. Hence many of the cases had features that the Commission Guidelines (Commission 2004 and 2008) had underlined as likely to lead to prevent approval (as discussed above). The cases also counter the possibility that no mergers that could pose competition issues are ever formally proposed due to anticipation of problems under the ECMR.

A majority of the cases are cross-national. Thus for instance, in telecommunications, several involved historic incumbents such as British Telecom, France Télécom and Telefonica acquiring large mobile overseas suppliers.[35] Two incumbent operators- the Norwegian Telenor and the Swedish Telia- even sought to merge.[36] In electricity, the French incumbent EDF bought electricity suppliers in the UK, Belgium, and Germany.[37] In banking, BNP Paribas bought a large part of the Belgo-Dutch group Fortis.[38] Only two cases concerned EU and non-EU parties.[39]

A significant proportion of the mergers were domestic 35% (13 of the 37 decisions). Many resulted in the elimination of an actual or likely potential competitor in the national champion's home market, which according to the Commission Guidelines is likely to pose problems for approval. Thus for instance, in energy, conditional approval was given for mergers by French gas incumbent Gaz de France with Suez, and the German firms VEBA and Viag. Equally, there were mergers between well-established banks in Germany, Belgium and the Netherlands, Sweden and Austria.[40]

Despite the Commission's concerns and the features of the mergers, as Table 8 shows, most are settled by commitments agreed with the firms after a phase I investigation; the lengthier phase II investigations are a minority, representing 40% (15) of the 37 decisions. The point is made even more strongly by the almost total absence of prohibitions (under Article 8(3))–

there were only two, one in telecommunications and one in energy. Table 8 also indicates that in banking, not a single merger was subjected to a phase II investigation or prohibited between 1990 and 2009.

Table 8 Composition of exceptional cases

	Banking	Electricity	Telecommunications	Total and % of total exceptions
Phase I investigation and approval subject to conditions under Article 6(2)	5	9	8	22 (59%)
Phase II investigation and approval under Article 8(2)	0	8	5	13 (35%)
Phase II investigation and prohibition under Article	0	1	1	2 (5.4%)

8(3)				

The Commission's decisions are almost entirely focused on competition concerns. It approved even highly controversial hostile bids, such as Vodafone's takeover of Mannesmann.[41] They are not concentrated on one type of member state- instead, cases concern 'national champions' across large and small states and across different 'varieties of capitalism'.

Analysis of Commission decisions suggests three factors that explain its approval of these cases. The first two are similar to unconditional phase I approvals. Thus 'relevant markets' are often defined as national, and hence cross-border mergers often have limited effects on market shares. A second is that the Commission accepts high market shares within national markets. Several decisions express concerns when a concentration would raise market shares to around 40% or over, but little disquiet at levels of under 30%.[42] In one major case the Commission stated that "market shares (in the range 39-47% ……) did not by themselves indicate a creation of a single dominant position".[43]

The third factor differs: loss of an existing or potential competitor to a dominant supplier is the most frequent reason the Commission gives for not giving unconditional approval. To counter this loss, it has required conditions ('commitments' or 'undertakings') by the merging parties. The commitments are formally offered by the merging firms, usually after informal discussions with the Commission.

Commitments often open domestic markets to greater competition. Many are 'structural', such as divestiture of assets or reduction of restrictions on new competition, notably involving access to network infrastructure. Incumbent firms sell off capacity (such as energy supplies or mobile capacity[44]) or part of the firm acquired[45] or end cross-holdings,[46] which can allow entry by new suppliers. A few have been behavioural- for instance, non-discriminatory access to networks[47] or promising to exert no influence over a competitor in which the merged entity had a stake.[48] Hence the Commission has been able to both approve the mergers and also use the conditions to further open national markets to competition, thereby complementing Commission policies of ending national monopolies, and also offering opportunities for overseas entry and hence greater European integration.[49]

Indeed, the Commission and merging firms have been able to cooperate in agreeing conditions that further integration, as suggested by the integrationist view. The firms have avoided drastic remedies such as being broken up to deal with problems such as high market shares or vertical integration. The extent of cooperation is indicated by the very small number of legal challenges to Commission decisions requiring conditions by the merging parties. Equally, almost no mergers have been withdrawn during the process of merger control (which might indicate the inability of merging parties to agree conditions with the Commission)- only 10 cases across the three sectors (see Table 4).

The nature of conditions is worth analysing in two prominent cases approved after a phase II investigation, namely the Telia-Telenor merger and EDF's purchase of ENBW. The first involved a merger between two state-owned telecommunications incumbents.[50] The Commission found that the "transaction would create or strengthen dominant positions" in most telecommunications markets and several television markets, due to market power and

vertical integration and “would also serve as a significant barrier to entry on all levels of its activities”.[51] The merger removed both actual competition, since the two operators competed in each other’s domestic markets, and potential competition. It also created concerns about possible retaliation against other competing companies. Finally, the Commission argued that regulation in the two countries was inadequate.

Despite its findings, the Commission approved the merger, subject to conditions. The major ones were divestiture of cable TV businesses and promises by the governments of the two countries to introduce local loop unbundling (although this was mandated by an EU Regulation later that year). The conditions can be contrasted with the break up imposed on the US operator AT&T in 1982 or the functional separation which was introduced in the UK after 2005 for BT. At the same time, they achieved integrationist policy aims of opening markets, and indeed have been analysed as the Commission seeking to achieve regulatory objectives of liberalising markets but through merger control rather than sectoral regulatory legislation.[52]

The second case is the purchase in 2000 by EDF of a controlling stake in ENBW, the incumbent integrated electricity supplier in Southwest Germany. EDF is the largest energy company in Europe and in 2000 was majority state owned. Moreover, electricity liberalisation was an important policy for the Commission. The Commission’s decision focused on EDF’s dominant position in France, which stood at over 80% of the market opened to competition under EU law (‘eligible customers’). It offered a devastating critique of the extent to which the French market was closed to competition, due to factors such as EDF’s control over generation capacity and trading and its ability to outbid entrants.[53] It concluded that the purchase removed a well-placed and likely potential competitor to EDF in

the French market and would also allow EDF to retaliate against German competitors who attempted to enter the French market.

Yet the merger was approved subject to commitments that did not involve breaking up EDF nor significant divestiture. One was to reduce EDF's links with CNR (Compagnie Nationale du Rhône). But CNR represented merely 3 per cent of French production and was then sold by the French state, without open auction, to the private French national champion Suez in 2001.[54] Another was to make available 6000 MW of generation capacity in France to competitors, for a period of at least five years, with continuation decided by the Commission. The figure represented 30-32% of the market for 'eligible customers', although since only part of the French market was liberalized, it accounted for much less of the total French market. But it offered opportunities for entry, including by overseas suppliers.

There were only two prohibitions between 1990 and 2009. One concerned two American companies (MCI WorldCom's attempt to buy Sprint), and the Commission only examined two markets, leaving others to the US Department of Justice. The other was an attempt by EDP (the incumbent Portuguese electricity company) and ENI (the Italian incumbent oil and gas firm) to buy the incumbent gas operator in Portugal, GDP.[55] The merger would have left one company with strong state links dominant in both electricity and gas markets in Portugal. The Commission rejected the commitments proposed by EDP and ENI, but the main reasons given were problems of monitoring, lack of clarity and especially uncertainty concerning the undertakings put forward.[56] The rarity and features of the case (a merger between national energy incumbents) illustrate how high the bar is for prohibition.

Conclusion

The present article has tested two views of the Commission merger control: that it pursues a 'neo-liberal' 'merger-constraining' policy by vigorously using its legal powers; an alternative view that it pursues an 'integrationist policy' of building up larger European firms through mergers.

Analysis of Commission decisions suggests that it follows an integrationist policy. The Commission makes very limited use of its legal powers to constrain mergers, despite the three sectors and individual cases selected having features that, according to the Commission's own Guidelines, are likely to create problems for the aim of preventing market power under the ECMR. Yet the Commission launches few detailed second phase investigations and approves almost all mergers. In the rare cases in which it finds competition problems, it almost always gives approval subject to conditions that are acceptable for the merging parties. There have been almost no prohibitions of mergers in the three sectors. Indeed, use of the Commission's formal powers has been similar or lower than for mergers as a whole.

The outcomes have been approval of mergers by large European firms, including by former 'national champion' firms, even when this leads to the removal of actual or potential competitors. Yet Commission decisions are almost exclusively based on competition criteria. Equally, no differences in treatment between EU and non-EU mergers were found.

How has the Commission been able to combine following legal criteria and processes based entirely on competition and at the same time approving mergers to create larger European

firms? Analysis of Commission decisions suggests several reasons. First, the Commission accepts market shares of 30%-40%. Second, the vast majority of mergers proposed have been between European firms. Hence merger approval has not meant non-European firms taking over European firms, especially former ‘national champions’. Moreover, within these, the majority have been cross-border mergers, aiding approval since many ‘relevant markets’ are defined as national and hence cross-border mergers often increase national market shares by limited amounts. Third, many mergers, especially cross-border ones, either do not lead to the loss of actual or potential competitors within relevant markets or any loss is found to be insufficient to prohibit the merger. Finally, when the Commission finds concerns under the ECMR, it agrees conditions that are both acceptable to the firms concerned and also open up national markets, complementing wider Commission policies of liberalizing the three sectors.

Thus the analysis shows that the Commission has been able to apply only competition criteria while obtaining outcomes of creating larger European firms. It has also shown how this is possible under the ECMR, thereby responding to the question of how an ‘integrationist policy’ operates within a legal framework dominated by competition criteria.

The findings point to further questions for research that have been beyond the scope of the present article. One is why so few non-EU mergers have been proposed, especially takeovers of large EU companies which would test the integrationist policy of building up European firms. Is this due to lack of commercial interest or feared or actual hostility by policy makers? A second issue is why the Commission follows an integrationist policy. Explanatory factors include legal constraints, norms arising from professional and legal policy networks and communities (cf. Maher 2008, 2009, Scott 2001) or constraints due to internal struggles within the Commission (Karagiannis 2010).

The findings have wider implications concerning the nature of EU competition policy and indeed economic regulation. Claims that the Commission pursues a 'neo-liberal' policy of competition rather than 'industrial policy' are widely made. The evidence presented offers a different conclusion. The processes and criteria of competition have been applied, and individual firms have not been selected and favoured through political processes. But the application of competition criteria has led to outcomes sought by 'industrial policy', namely the development of larger European firms and notably 'European champion' firms- i.e. previous national champion firms which have retained their strong domestic base but expanded through mergers into other European markets. Far from following a policy of constraining mergers through vigorous use of its extensive legal powers, the Commission has both applied competition criteria and allowed large European firms to expand through mergers.

Acknowledgements

I gratefully acknowledge research support from the Suntory and Toyota International Centres for Economics and Related Disciplines at LSE and research assistance by Khaled Madi. I thank the many people who have offered comments on previous drafts, including: Pablo Ibanez-Colombo; Yannis Karagiannis; Ioannis Kokkoris; Imelda Maher; Giorgio Monti; Alec Stone Sweet; Stephen Wilks; Kevin Young; Jonathan Zeitlin; three anonymous journal referees. I also thank the editors for their encouragement and constructive discussions. Of course the views expressed remain mine.

---

[1] Case IV/M053.
[2] For instance, Volvo/Scania Case M.1672 (2000), Schneider/ Legrand Case M.2283 (2002), GE/Honeywell Case M. 2220 (2001) and more recently, Olympic/Aegean Airlines Case M.5830 (2011), Ryanair/ Aer Lingus Case M.4439 (2007) and Deutsche Börse/NYSE Euronext Case M.6166 (2012).

[3] Among the vast literature on national champion policies and liberalization in the sectors see e.g. Hayward 1995, Bulmer et al 2007, Thatcher 2007, Busch 2008.
[4] For a general policy-oriented discussion, see OECD 2009; the background paper (pp.25-46) suggests that "the creation of national champions endowed with a lot of market power is often at odds with merger control policy" (p.26), although for a different view from the European Commission that the two are compatible because the term 'industrial policy' should be replaced by 'competitiveness policy', see pp.143-148.
[5] Those "performing on a lasting basis all the functions of an autonomous economic entity."
[6] Mandatory Commission notification does not apply if the firms achieve more than two thirds of their aggregate Community-wide turnover within one member state; conversely, the use of worldwide turnover means that some very large mergers between firms from the same EU country, and even mergers involving only non-EU firms which have some activities in the EU, can be covered by the ECMR.
[7] Aggregate worldwide turnover of more than 5 billion ECU was lowered to 2.5B ECU and aggregate EU turnover of at least two of the firms of over 250million ECU was altered to combined aggregate turnover in each of at least three member states of 100M ECU, with the turnover of at least two of the firms being more than 25M ECU and aggregate EU-wide turnover of at least two of the firms being 100M ECU- Regulation 1310/97.
[8] Article 2(1) (a) and (b), albeit subject to not forming "an obstacle to competition"
[9] ECMR Articles 2(2) and (3).
[10] Under Article 6(1)(b) and Article 6(2) respectively. Since 2000, many phase I proceedings are dealt with rapidly under the 'simplified procedure'- Cook and Kerse 2009: 159-161.
[11] Under Article 8(1), 8(2) and 8(3) respectively.
[12] Commission decisions can be appealed before the General Court and then points of law can be challenged before the European Court of Justice (ECJ)
[13] Commission 2004: Paragraph 17; concentration is usually measured by the Herfindal Hirschmann Index.
[14] Commission 2004: paragraph 71.
[15] I.e. those arising from removal of competitive constraints without coordination among firms.
[16] Moreover, for 'coordinated effects', the Guidelines underline the role of removing a 'maverick firm' that has a history of preventing or disrupting coordination, notably in markets with few players.
[17] For a classic economic analysis, see eg. Armstrong, Cowan and Vickers 1994; for reports, see e.g. European Commission Annual reports on telecommunications and energy- https://ec.europa.eu/digital-agenda/node/30065
and
http://ec.europa.eu/energy/gas_electricity/legislation/doc/20100609_internal_market_report_2009_2010.pdf and
http://europa.eu/legislation_summaries/energy/internal_energy_market/index_en.htm accessed September 2013.
[18] The ECMR has been extended to EEA countries.
[19] The last two are covered by the ECMR due to the parties having significant operations within the EU; the last applies where EU parties clearly acquired control over non-EU firms.
[20] Fortis (Belgo-Dutch) and Dexia (Franco-Belgian).
[21] European Commission: http://ec.europa.eu/competition/mergers/statistics.pdf
And
http://ec.europa.eu/competition/mergers/cases/
figures last accessed September 2013.

[22] E.g. referral back to national competition authorities.
[23] The total is less than 100% of notified cases as the table excludes the category 'other cases' of Table 1 such as referral back to national competition authorities and also cases withdrawn for which there is no Commission decision.
[24] Excludes withdrawals, no published decision, outside scope of ECMR and referral back to national competition authority.
[25] There was also an Article 8(2) unconditional approval.
[26] Complete years are taken, even if left/arrived during year.
[27] E.g. France Télécom bought the UK firm One2One -Case M.1669 (1999); it and the German firm Schmid jointly acquired the German mobile operator Mobilcom- Case M.2155 (2000); Deutsche Telekom acquired Orange- Case M.4748 (2007).
[28] EDP- Hidroelectrica del Cantabrico Case M.3448 (2004).
[29] Notably London Electricity Case M.1346 (1999), South West Electricity Board Case M.1606 (1999), Seeboard Case M.2890 (2002).
[30] Crédit Lyonnais/BFG Bank Case M.296 (1993); BNP Paribas/BNL Case M.4155 (2006) ; RBS/ABN-AMRO Case M.4843 2007; HSBC/CCF Case M.1944 (2000).
[31] E.g. Deutsche Bank and Berliner Bank Case M.4356 (2006).
[32] E.g. acquisitions by the Belgian-Dutch Fortis group Cases M.1172 (1998), M2225(2000), M.981 (1997), M.850 (1997).
[33] E.g. Viag and Bayerwerk Case M.417 (1994).
[34] E.g see BNP Paribas/BNL Case M.4155 (2006), or EDF's purchases of UK electricity distribution companies- London Electricity Case M.1346 (1999), South West Electricity Board Case M.1606 (1999), Seeboard Case M.2890 (2002).
[35]British Telecom/MCI Case M.856 (1997), France Télécom/Orange (UK) Case M.2016 and Telefonica/O2 (UK) Case M.4035
[36] Case M.1439 (1999).
[37] EDF/British Energy Case M.5224 (2008); EDF/Segenbel Case M.5549 (2009); EDF/ ENBW Case M.1853 (2000).
[38] Fortis/ABN AMRO Assets Case M.4844 (2007).
[39] A joint venture between British Telecom and AT&T in 1998 and the British Telecom-MCI merger of 1997.
[40] E.g. Allianz and Dresdner in Germany or the Belgian-Dutch Fortis purchase of business units belonging to ABN AMRO.
[41] Case M.1795 (2000).
[42] See for instance, Fortis/ABN AMRO Case M.4844 (2007).
[43] Paragraph 220 of the WorldCom/Sprint Case M.1741 (2000), commenting on the earlier ATT/BT decision Case JV15 (1999).
[44] E.g. auctioning of gas capacity- Dong/ Elsam/ Energie E2 Case M.3868, and the sale of mobile capacity – see for instance- T Mobile Austria/Tele.ring Case M.3916 .
[45] E.g. sale of some of Suez's businesses in France and Belgium- GDF/Suez- Case M.4180.
[46] E.g. in VEBA/Viag Case M.1673.
[47] Used in Telia's purchase of Sonera and Vodafone's acquisition of Mannesmann.
[48] E.g. in the AT&T- BT joint venture concerning Telewest.
[49] See e.g. Bulmer et al 2007, Thatcher 2007.
[50] Although the parties later decided not to proceed.
[51]Telia/Telenor Case M.1439 (1999), Paragraph 376.
[52] Cf. Popovic 2009.
[53] Paragraphs 32-50, 54-74.
[54] *Libération* 29.8.01.

[55] ENI / EDP / GDP Case M.3440 (2004); a legal challenge to the decision failed.
[56] Paragraph 660.

REFERENCES

Armstrong, M. Cowan, M. and Vickers, J. (1994). *Regulatory Reform – Regulation of Economic Activity.* Cambridge,MA: MIT Press

Brittan, Sir L. (1992). *European Competition Policy. Keeping the Playing-Field Level*. Brussels: CEPS.

Buch-Hansen, H. and Wigger, A. (2010). Revisiting 50 Years of Market-Making: The Neoliberal Transformation of EC Competition Policy. *Review of International Political Economy***,** 17(1): 20-44.

Buch-Hansen, H. and Wigger, A. (2011). *The Politics of European Competition Regulation.* London and New York: Routledge.

Budzinski, O. (2008), Monoculture versus diversity in competition economics. *Cambridge Journal of Economics* 32(2): 295–324.

Bulmer, S. (1994). Institutions and Policy Change in the European Communities: The Case of Merger Control. *Public Administration* 72(3): 423-444.

Bulmer, S., Dolowitz, D., Humphreys, P. and Padgett, S. (2007). *Policy Transfer in the European Union. Regulating the Utilities.* London: Routledge.

Busch, A. (2008). *Banking Regulation and Globalization.* Oxford: Oxford University Press

Cini, M. and McGowan, L. (2009). *Competition Policy in the European Union.* 2nd. Ed. Basingstoke: Macmillan.

Commission of the European Communities (2004). *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*. OJ 5.2.2004 C31.

Commission of the European Communities (2008). *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings*. OJ 18.10.2008 C 265.

Cook, J. and Kerse, C. (2009). *EC Merger Control.* London: Sweet and Maxwell.

Crouch, C. (2011). *The Strange Non-Death of Neo-liberalism*. Cambridge: Polity Press.

DG Competition (2004). *Best practices in the conduct of merger control proceedings*. Brussels: DG Competition.

Geradin, D. and Girgenson, I. (2011). In Hawk, B. (ed.). *International Antitrust Law & Policy: Fordham Competition Law 2011.* Juris: New York, pp.353-382.

Gerber, D. (2001). *Law and Competition in Twentieth Century Europe*. Oxford: Clarendon Press.

Goyder, D.G. (2003). *EC Competition Law,* 4th ed. Oxford: Oxford University Press.

Hayward, J. (ed.) (1995). *Industrial Enterprise and European Integration.* Oxford: Oxford University Press.

Jabko, N. (2006). *Playing the Market: A Political Strategy for Uniting Europe, 1985-2005*, Ithaca, NY: Cornell University Press.

Karagiannis, Y. (2010). Political Analyses of European Competition Policy. *Journal of European Public Policy* 17(4): 599-611.

Kassim, H and Wright, K. (2009). Bringing Regulatory Processes Back In: The Reform of EU Antitrust and Merger Control'. *West European Politics*, 32: 4, 738 — 755

Kelemen, D. (2011). *Eurolegalism: The Transformation of Law and Regulation in the European Union.* Cambridge, MA: Harvard University Press.

Maher, I. (2008). Regulation and Modes of Governance in EC Competition Law: What’s new in enforcement?. *Fordham International Law Journal* 31(6): 1713-40

Maher, I. (2009), Functional and Normative Delegation to Non-majoritarian Institutions: The case of the European Competition Network, *Comparative European Politics* 7(4): 414–434

McGowan, L. and Wilks, S. (1995). The First Supranational Policy in the European Union: Competition Policy. *European Journal of Political Research* 28(2): 141-169

Monti, G. (2007). *EC Competition Law.* Cambridge: Cambridge University Press.

Morgan, E. (2001). A Decade of EC Merger Control, *International Journal of the Economics of Business* 8(3): 451-473.

Peritz, J.R. (1996). *Competition Policy in America, 1888-1992*. New York: Oxford University Press.

Popović, D. (2009). ‘Merger Remedies and Regulatory Measures in the EU Electronic Communications Sector: A Critical Assessment’. *European Business Organization Law Review*, 10: 575-594.

Sandholtz, W. and Zysman, J. (1989). 1992: Recasting the European Bargain. *World Politics* 42(1): 95-128.

Sandholtz, W. and Stone Sweet, A (eds.) (1998). *European Integration and Supranational Governance.* Oxford: Oxford University Press.

Sandholtz, W. and Stone Sweet, A (2012). Neo-functionalism and Supranational Governance. In Jones, E., Menon, A. and Weatherill, S. (eds.) *The Oxford Handbook of the European Union*. Oxford: Oxford University Press.

Scott, C. (2001). Analysing Regulatory Space: Fragmented Resources and Institutional Design. *Public Law* Summer?:329–353.

Schmidt, V.A. and Thatcher, M. (eds.) (2013). *Resilient Liberalism in Europe's Political Economy.* Cambridge: Cambridge University Press.

Thatcher, M (2007). *Internationalisation and Economic Institutions. Comparing European Experiences*. Oxford: Oxford University Press.

Whish, R. and Bailey, D. (2012). *Competition Law*. Oxford and New York: Oxford University Press (7th ed.).

Wilks, S. (2010). Competition Policy. In Coen, D, Grant, W and Wilson, G (eds) *The Oxford Handbook of Business and Government*. Oxford: Oxford University Press, pp.730-756.