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Policy Formulation, Implementation and Feedback in EU Merger Control.[1]

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EU Merger Control:
Policy Communities and Private Interests

Abstract

This paper analyses the formulation of the EU Merger Control Regulation (MCR) and its implementation via the 1992 Nestlé/Perrier merger. It offers two arguments. First, these phases of policy development occurred in 'macro' and 'micro' policy communities found at the supranational level of governance. The first community consists of larger Commission and business interests that formulated the MCR and the second of specific actors within the 'macro' community - the Merger Task Force and the firms – that implemented the rules. Secondly, the development of these communities can be explained by private interest theory. The conclusions highlight two main lessons for students of comparative European politics. First, the concept of 'macro' and 'micro' communities existing at both the formulation and implementation phases of policy offers a framework for comparativists to better analyse which types of actors will interact during different stages of the policy-making process. It is argued that while the (larger) 'macro' community helps define the nature of the regulations, a related, but not necessarily equally composed, 'micro' community eventually implements the rules, potentially changing the nature of the policy itself via a 'feedback' mechanism. Secondly, this study suggests that comparativists must pay more attention to the private interests of policy-makers and how these are intertwined with their 'private fears.' Such interests and fears guide policy-makers while simultaneously constrain them from acting alone.

Introduction and Objectives

Research within the rubric of ‘EU policy-making’ has become a major focus for students of comparative European politics over the last decade. Using Hix’s (1999, 2005) classification, five main strands of EU policies have been analysed – regulatory, redistributive, economic and monetary, internal security, and foreign policies. One may argue that research has concentrated on the first three of these areas because “approximately 80 percent of all social, economic and environmental regulation applicable in the member states is adopted through the EU policy process” (Hix 1999, 211). The early 1990s thus saw scholars, guided by the concepts of pluralism, corporatism, and elitism, paying more attention to interest groups’ role in the policy process. Building on the American based literature by those such as Dahl (1961, 1982), Lindblom (1977), and later Schlozman and Tierney (1986), scholars such as Gardner (1991), Greenwood *et al.* (1992), Mazey and Richardson (1993), Pedler and Schendelen (1994) and Crouch and Menon (1997) made insights into how non-state actors sought to influence EU integration by identifying patterns of private interest involvement in the policy process. More recently, as discussed by Peterson (1995) and seen in the work of Daugbjerg (1999), the ‘policy network’ approach, emerging as an alternative to pluralist and corporatist analyses, is enjoying increasing popularity amongst EU policy scholars.

The term ‘policy network’ has its roots in Bently’s (1967) and Truman’s (1971) work that “pointed to the existence of horizontal relations between government, administration and organized interests” (Kenis and Schneider 1991, 27). Throughout the 1970s, the network approach evolved into different typologies and was applied to a myriad of policies. As a response to critics highlighting the approach’s weak theoretical underpinning, Benson (1982) defined networks as “a complex of organizations connected…by resource dependencies and distinguished from each other by breaks in structure(s)….” Guided by Benson’s analysis, Jordan and Richardson (1982), and Rhodes (1986, 1988) further clarified characteristics of networks, emphasizing the interdependencies and the endurance of the relationship between the actors. However, their work raised some confusion given synonymous usage of the concept of ‘network’ and ‘community.’ As a remedy, although perhaps confounding the issue even more, Wilks and Wright (1987)[2] differentiated between the types of actors involved in the

different levels of the policy process, referring to a policy 'universe' (existing at the larger policy area), 'community' (at the policy sector level) and 'network' (at the policy sub-sector focus).

In wake of this, Marsh and Rhodes (1992) offered a more definitive clarification of terms in network/community analysis. Building on the work of Grant *et al.* (1988) and Rhodes (1988), the Marsh-Rhodes typology suggests that while issue networks involve only policy consultation, there are four main characteristics of a community.[3] First, a limited number of participants operate in a largely insulated fashion, while others are consciously excluded. This points to a highly restrictive membership. Second, when an issue is discussed there is interaction between members that have their own goals. Third, there is a consensus between actors as well as a consistency in values shared by them, pointing to a 'policy paradigm', or, a view of the world in which there is agreement on the most urgent problems to be tackled.[4] Fourth, interaction is based on bargaining between members with resources, where outcomes reflect a positive sum game (although all members may not equally benefit). Extending on this last point, more recent 'inter-organizational' approaches to policy networks implicitly argue against the necessity of a hierarchical relationship in communities consisting of both public and private actors. Accordingly, "such actors are partially interdependent but also partly autonomous, being linked horizontally without being part of a single organizational hierarchy; their relations are based on exchange, thereby producing policy networks, and combine elements of conflict with those of cooperation" (Thatcher 1998, 389).

Despite its strengths, the policy networks/community literature suffers from two main insufficiencies. The first relates to the impreciseness of the classification scheme itself and its inability to provide for an exhaustive typology (Thatcher 1998). One may argue that the Wilks-Wright typology counters this generalization: it is one of the few studies that characterizes the types of actors involved in different levels of policy-making by focusing on the policy area, sector and sub-sector. However, there remains a void in our understanding of how different types of related communities may emerge during the two main phases of policy development, namely policy formulation and implementation. This is crucial for political systems generally, and the EU in particular, where regulations are set and then, later, implemented. For example, are the actors that influence the

formulation of supranational regulatory initiatives, such as merger rules, state aid rules and CAP, the exact same as those that participate when such regulations are implemented? If not, how are the actors related and their relationships better theorised?

The second, perhaps more important, insufficiency in the community literature is that it offers description without explanation. Heywood and Wright (1997, 88) argue that "the most telling criticisms are that most of the approaches rest on imprecise definitions and that its analytical insight is purchased only at the cost of ever-greater descriptive detail". Dowding (1995) further contends that the network approach presents a sophisticated map of policy formulation and co-ordination, rather than an explanatory model with predictive capacity. Thatcher (1998, 403) also suggests that responses to the question of 'why do such networks/communities arise in the first place,' such as fragmentation of governments and interdependence of governments on interest groups, are too vague.

Although the existing literature has not fully tested this idea, one may argue that an avenue for explanation for the development and persistence of communities may be found focusing on a (second) set of literature broadly defined as 'private interest theory.' The use of this theory in the realm of regulatory policies, and antitrust policy in particular, has its roots in what has become known as the 'Virginia School' as reflected in the works of Buchanan (1972), Tullock (1967) and Tollison (1983, 1989). This literature was developed as a reaction to those 'public interest' theorists who argued that policies toward business were formulated and executed by well-informed public servants who maximized public welfare.[5] Private interest theory argues that there is an inherent tension in ideas raised by public interest scholars: on the one hand, market power/failure arises from the activities of self-interested firms seeking to maximize their own private benefits (Stigler 1975), and, on the other, government intervention by public servants promotes general welfare. Given these inherent tensions, wherein in one setting individuals are assumed to be self-interested and in the other they are assumed to be publicly-interested, an interpretation pointing fully to 'private interests' suggests that while policy may be employed to promote the public's interest, it may also further the private interests of all actors - including policymakers themselves – potentially at the expense of others (Shepsle and Bonchek 1997, 223). From this perspective, antitrust enforcement may

actually work against the public interest.[6] The assumption in private interest theory is that all individuals, in or out of government, pursue their own self-interests: as consumers seek to maximize their utility and firms seek to maximize their profits, policy-makers seek to maximize their own institutional power and policy objectives. This suggests that the observed differences between public and private choices emerge not because individuals adopt different behavioural objectives in the two settings, but rather because the constraints on behaviour are different (Laver 1997).

Seeking to transcend these two main insufficiencies, this paper offers insights into the theoretical classification of policy communities while attempting to explain why they develop. More specifically, it examines the development of EU-level merger control policy communities at both the formulation and implementation phases and utilizes private interest theory as an explanatory variable. Analysis of merger policy is justified on two grounds beyond the fact that few existing political science-based works analyse merger policy. First, mergers have increasingly occurred given economic globalisation and, as such, their study offers the opportunity to examine how transnational actors may operate in the context of supranational governance. In particular, since the late 80s there has been a massive merger wave across Europe, with the total number of merger and acquisition (M&A) transactions involving EU firms increasing nearly threefold over 13 years since 1987 with the peak occurring in 1990[7] – the same year the Merger Control Regulation (MCR) came into force as discussed below. Secondly, this analysis also potentially allows for clear insights into policy developments in the EU political system, including areas of competition policy where firms are the objects of regulation, as seen in restrictive practices and monopoly policy, and other areas such as redistributive policies. Such lessons may offer insights and are potentially transferable to other political systems.

The next section examines the formulation of the 1990 MCR. Emphasised here is the emergence of what we refer to as a 'macro-community' comprised of two main sets of actors – officials of different DGs in the Commission and representatives of capital - that acted in unison at this stage of policy development. The evidence suggests that these actors had self-supporting, interdependent, private interests and pursued political activity that was ultimately isolated from the general public and other social actors. Thereafter, a more detailed analysis of the *Nestlé/Perrier* decision of 1992 is made, offering a picture

of how the actors and their self-supporting motivations interact in the decision-making process during MCR implementation. It will be argued that this particular 'micro-community' depicts an insulated relationship between both specific-firm actors and members of DG Competition's Merger Task Force (MTF) operating in a regulatory policy environment where the actors are interdependent and autonomous, while their relationship combines elements of conflict and cooperation. Because this 'micro' community found at the implementation phase is representative of more specific players within the 'macro' one, both communities are related. However, it is suggested that the outcomes of the 'micro' level may effectively change the nature of decisions originally taken by the 'macro' community, pointing to the dynamic nature of the relationship. It is contended that in order to explain the development of this 'micro-community,' attention must be focused on the overlapping, self-supporting private interests of both sets of actors, which ultimately served as a strong foundation for working together, while preventing other social actors such as organised labour from participating. The conclusions highlight the main findings and the relevance of the work to students of comparative European politics.

The Formulation of the MCR: The 'Macro' Merger Policy Community

The 1990 Merger Control Regulation defined a merger as the consolidation of two or more firms, characterised as being one of three types: horizontal, vertical, or conglomerate. Horizontal mergers are defined as those where rivals in the same market merge; vertical combine two firms having potential or actual buyer-seller relationships; and conglomerate see a consolidation of firms that are neither sellers in the same market, nor involved in a buyer-seller relationship (Viscusi et al. 1995, 195-215). The MCR gives the Merger Task Force (MTF), a sub-bureaucratic actor within Directorate General Competition of the European Commission, the exclusive power to investigate and stop mergers with a Community dimension.[8] The focus of the regulation is dominance (Article 2(3)):

> A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market.[9]

Which actors were involved when the MCR rules were formulated and why did they participate? In order to understand the dynamics between actors, analysis of events related to the Single European Act are necessary.

As the literature notes, the 1992 Programme led to a massive repositioning of firms within the EU because multinationals realised that centralisation of market regulation would significantly reduce business transactions costs. Individual companies as well as Euro-groups were consequently some of the most vocal proponents of the 1992 Programme and these actors' demands for a privileged policy-making access has been well documented.[10] In turn, these demands were "met with concomitant supply of access to the policy-process by political actors in EU institutions seeking policy expertise"(Hix 1999, 206). The formation of the European Round Table of Industrialists (ERT)[11] in the 1980s is a solid illustration. Because member states and Community officials were incapable of unilaterally launching a Single Market initiative, economic leaders could shape the rules of the market in which they would operate. In fact, it was ERT chairman Wisse Dekker's 1985 proposal for a five-year plan to re-invent Europe that precipitated the Single Market: the Commission President, Jacques Delors adopted the ERT's proposal which would later result in Industry Commissioner Cockfield's White Paper which was the basis for the SEA.[12]

Herein lay the roots of a self-supporting relationship that was later manifest in negotiating the MCR: on the one hand, as discussed by Rose (2000, 7) and Cowles (1995), capital actors knew that EC institutions, increasingly responsible for shaping the regulatory environment, were understaffed and in need of expertise and thus private interests actively politically organised themselves in order to shape the Community's policy agenda.[13] Rose cogently argues that with the Single Market, actors such as manufacturers, organised labour and even member state governments

> increasingly find their scope for manoeuvre limited by EU regulations, and are therefore forming policy networks to bring pressure to bear on Brussels to adopt policies defined in terms of economic interests instead of national interests (Rose, 2000, 7)

And on the other, as discussed by Greenwood and Cram (1996, 453), business relied on the EU institutions for information such as standards of service cultures, employment practices and price traditions. Access to this type of information was clearly crucial for rationally acting capital actors seeking to minimize the uncertainty of their operating environment: in order to secure the availability of reliable sources of information, networking with European institutions had to be pursued. As a result of these resources dependencies, the Commission and economic elites forged a close relationship that ultimately evolved into a tight policy community. These observations add strength to arguments such as Bouwen's (2002) that the Commission "looks for a policy community which may provide a source of grass-root and European level information."

When turning to the development of the MCR, one sees that European Commission authorities and business leaders felt the need for supranational merger regulation because market consolidation went hand in hand with (neo-liberal economic) globalisation and resulted in an exponential growth of mergers throughout the 1980s (Eberlein 2001). Although the founders of the Community were explicitly concerned with preventing collusion (cartels) and price discrimination along national lines, explicit reference to merger control was absent. However, Garrett and Mitchell (2001, 149) highlight the constraining policy effects of globalisation throughout the 80s and 90s that forced a re-evaluation for a need for merger control by both the Commission and economic actors.[14] The Commission thus sought to increase its stronghold of power in a regulatory policy process which was increasingly necessary given global economic dynamics, without necessarily isolating the very object of their regulation - industrial interests - if the single internal market was to reach its fullest potential.[15] European industry also realised that if the internal market was to become a tangible entity, massive corporate mergers and restructuring would become reality and thus sought to gain a foothold in its regulatory policy-process. Against these backdrops of expectation, support by both parties of the Commission's led MCR materialized some 30 years later in 1989.

After the SEA came into force in 1986, the ERT concentrated on shaping the nature of merger regulations: between 1987 and 1992, members of the ERT's Internal Market Support Committee had a profusion of meetings with government and Commission representatives (Cowles 1995, 519-20). Considering the relationships and

contacts previously established in the build-up to the single market programme and the fact that both actors shared the goal of making European industry globally competitive, it is not surprising that the Commission felt comfortable involving capital in the form of the ERT and UNICE in subsequent MCR negotiations. Taking into account Majone's (1991) claim that "the real costs of most regulatory programmes are borne directly by the firms and individuals who have to comply with them," it seems little surprise that during the development of the MCR economic elites and the Commission proved once again to be natural policy partners during negotiation of the MCR.

In terms of specific dynamics when the MCR was negotiated, then, actors representative of larger capital interests (UNICE and ERT) as well as the European Commission would thus act interdependently and seek the establishment of merger control based on their own self-supporting goals. From this perspective, the 'community' revolving around both actors can be defined as 'macro' in the sense that they were representative of the general interests of capital and that of main Directorate Generals within the Commission, including Competition, Economic and Financial Affairs, Industry, Transport, and Internal Markets and Financial Services which all keenly supported the idea of merger control in order to create a truly single, integrated European market (Armstrong and Bulmer 1998, Interview 2001b).

Regarding the calculation of interests of the Commission, in general, and DG Competition, in particular, these actors warmly welcomed merger control regulation based on interests to extend regulatory power. As Peterson and Bomberg (1999) state, "the Commission (could) use the MCR to set policy where it has been unable to before." Moreover, along the lines of Coen (1998) and the Commission (2002), great weight was given by the Commission to discuss the nature of the regulation along with those firms prepared to establish some form of 'European credibility.' By appearing to accommodate capital actors' demand for the creation of a 'level playing field' and a 'one-stop shop' for merger control, the Commission was successful in securing a 'strong' policy partner and expanding its policy competence via a new area where it would be the sole EU institutional actor.

Turning to business' overall interests, a codified directive on merger control would not only aid capital in attaining its goals of reorganisation and consolidation in the

global economy, but also, more importantly, limit potential abuses of Commission power over economic actors that may have otherwise occurred in absence of clearly defined rules. With regard to potential abuses, business fears were based on a previous European Court of Justice (ECJ) decision regarding the *Phillip Morris* case (1987)**,** which gave the Commission the authority it was seeking to use the Community's pre-existing antitrust laws[16] to prohibit certain types of mergers. *Phillip Morris* worried capital because specific powers granted to the Commission to deal with supranational merger control remained unclear, subsequently offering an uncertain regulatory environment for business. Based on *Phillip Morris,* and the idea that companies considered it inefficient and costly to gain the approval of various national competition authorities when merging, capital felt that a supranational merger regime offered a more simplified and predictable regulatory environment. This idea verifies Sandholtz and Stone Sweet's (1998, 15) hypothesis that, "companies with an interest in cross-national sales or investment will press for the reduction of national barriers, and for the establishment of regional rules and standards."

The private desires that guided them thus united these two sets of actors – the Commission and representatives of capital - in negotiating the MCR out of public scrutiny. Over several informal meetings, capital actors, represented by UNICE and the ERT and the European Commission, led by DG Competition, negotiated over years the details of the policy (Armstrong and Bulmer 1998, Interview 2002). The negotiations hinged on three major issues, all of which were major concerns of capital and to a lesser extent the Commission: the jurisdiction of the MCR and Commission control; the test and criteria that would be used to analyse merger proposals; and the time limits placed on the Commission to make a decision.

After three drafts (1984, 86 and 88) the outcome of the negotiations resulted in the inclusion of a vast majority of capital's demands. However, there were two issues – the types of joint ventures to be considered under the MCR and the worldwide turnover threshold[17] – where both the Commission and capital had to compromise with the Council. In both instances these concessions were deemed necessary to convince the members of the Council (particularly the UK and Germany) to vote in the affirmative. The legislation that emerged effectively gave birth to a 'one-stop-shop' for all mergers

meeting the established turnover thresholds at the European level. In so doing, the Merger Task Force of the European Commission was granted substantial discretion in leading the merger review process and also deciding which future actors were to be consulted when the MCR was put into practice. It should be noted that during the formal legislation process the European Parliament was consulted by both the Commission and Council in accordance with EU law, however there was minimal Parliamentary debate or feedback. According to one high-level official involved in the process, "once the Council agreed on the final MCR draft, that was it. The Parliament was not even a minute concern because in those days the Commission owned the EP even though the MCR became law after the SEA"(Interview 2001a). This point is clarified somewhat by Gardner (1991, 36) who points out that "the Parliament has been reluctant to use its negative powers (veto power under the co-operation procedure), fearing that this would hinder the accomplishment of the basic goal it shares with the Commission – speedy completion of the 1992 process."

The MCR negotiations on the various issues above provide a clear picture of the policy actors involved. The two main actors were the Commission and business which took the lead by working together in an insulated policy environment. The third actor, the Council, acted more as a gatekeeper and eventually approved an acceptable draft that was largely formulated by the main two actors. Of particular importance is that on the substantive issues of the MCR the Commission and capital operated in an insular fashion, were guided by their own self-supporting goals when negotiating, exchanged information to the exclusion of others, attained consensus, and ultimately achieved a similar outcome from which both would benefit – evidence that the policy community approach is the most useful in understanding this particular case. What is even more striking is that even in the instances that the macro community did not achieve its way (thresholds and joint ventures) it managed to reverse those 'loses' several years later during the 1997 MCR Review,[18] which reflects that not only did the Commission and capital work together in the negotiation phase, but did so also in the implementation phase as considered in more detail below.

It is also significant to note that the tightness of the community during the MCR formulation is illustrated not only by the virtual exclusion of policy advice from EU

institutions beyond the Commission and to a limited extent the Council, but also the exclusion of organised labour. As Hoar (2000) argues, Brussels was…. a real 'dialogue city' for business and policy-makers," when it came to MCR negotiation. In the MCR's creation, both parties agreed that these goals might not benefit everyone, including workers. As leaders of DG Competition would later state with regard to the goals of the MCR,

> It may be that, in the short term, efforts to improve the competitiveness of firms by means of mergers or acquisitions involve restructuring and thus loss of jobs. However, this does not change the fact that improving firms' competitiveness on the global market is the only effective way to ensure the growth needed to create business (DGIV 2001).

Further evidence of labour's exclusion is seen in a Commission statement on the amendments produced by the 1997 MCR Review: "This followed wide-ranging consultations with Member States, the competent competition authorities and the business community"(Commission 1998, 49). The absence of organised labour may be attributed to the possibility that labour – as a consequence of the restricted nature of the EU policy process - has sought to make political representation through work councils in large firms. By doing so this has strengthened the transnational social identity of the firm. However, while business clearly benefits from these political alliances in terms of EU credibility and labour relations, the EU labour movement only participates as a second best option (Coen 1998, 81).

In sum, although the creation of the MCR seems a direct result of closed, collective action by representatives of capital and the Commission in general that can be explained based on the self-supporting private interests of both actors, how 'extendable' are the characteristics of the developed community when actual merger decisions based on MCR rules were taken? We thus turn to detailed analysis of one of the first major cases when MCR rules were implemented.

The Implementation of the MCR: The Nestlé/Perrier Case and The 'Micro' Merger Policy Community

While the previous section examined the policy-process when the MCR was formulated, this section examines which actors were involved when the MCR rules were

put into practice, what motivated them, and which self-interests were served. The 1992 *Nestlé/Perrier* decision, which represents one of the first major cases examined by the MTF, is analysed. In an integrated discussion we consider whether or not the MTF negotiated alongside specific firms, how this 'community' can be characterised relative to that found when the MCR was negotiated, and how its development can be explained.

In February 1992, the multi-national Swiss-based food conglomerate, Nestlé, notified the Commission of its intention to acquire all of Perrier, a French bottled water-company. The proposed merger would have left Nestlé with 48% of the French market for mineral water, with the next largest supplier being BSN with a 20% share. However, in a bid to squeeze the deal past the MTF, Nestlé agreed to sell Volvic (one of Perrier's leading brands) to BSN if the merger was approved. Estimated post-merger market shares with the Volvic deal would have left Nestlé with 37% and BSN with 31% of the market. The MTF was concerned that even with the Volvic deal, the merger posed significant problems for competition in the French market for bottled source water. Although the sale of Volvic would have eliminated the threat of a Nestlé monopoly, the MTF believed that Nestlé and BSN would become collectively dominant.

Nestlé/Perrier represented the first major case[19] in which the MTF investigated the matter not as a single firm dominance case but as a joint or collective dominance case.[20] The MCR neither explicitly allows for, nor rules out the possibility of collusion as a source of dominant position: it states only that a merger will be prohibited if effective competition is significantly impeded. However, the wording of the Regulation itself was restricted by pervious decisions of the ECJ. The definition of a dominant position in the MCR is consistent with that given by the ECJ for the application of Article 82 during the aforementioned *Phillip Morris* case. According to the Commission a dominant position:

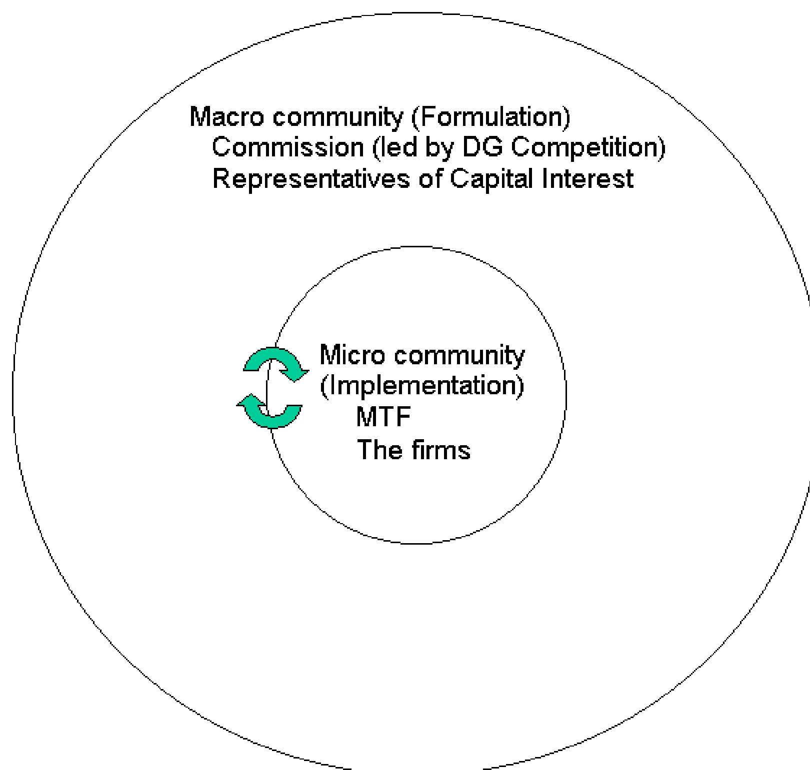
> is a situation of economic power held by a firm, which allows it to hinder effective competition in the relevant market. It puts the firm in a position to exert considerable influence on the conditions in which competition is to develop and to act without having to take that into account (Commission 2000).

Because the MCR only allowed the MTF to investigate and prohibit mergers that would result in the creation or strengthening of a single dominant (monopoly) position,

Nestlé/Perrier thus represented a test case in order to potentially set a collective dominance precedent (Linklaters and Paines 1992).

After notification of the merger and preliminary Phase I analysis, a deeper Phase II investigation into the merger ensued. According to officials, this last phase could best be characterized as an informal and closed-process involving only both *rappateurs* and high level MTF officials as well as the firms concerned (Interview 2001a, Interview 2002).[21] This points to the existence of what we refer to as a 'micro' community. Relative to the 'macro-community,' wherein the several DGs within the Commission led by DG IV and the umbrella organisations representing capital as a whole were involved in the formulation of the MCR, the actors involved during regulation of the merger process based on MCR rules consisted of (two) more specific actors representative of those having acted within the larger 'macro-community,' namely the MTF and the specific merging firms.

Figure 1. European Merger Policy Communities



As conceptualised in Figure 1, in geometric terms the relationship between the two communities can be likened to larger and smaller co-centric circles fitting within the same plane, where the macro-community is the larger and the micro-community the smaller. Although this case sees the 'micro' community consisting of members of the MTF leading the *Nestlé/Perrier* merger investigation and specific members from Nestlé and Perrier, one may hypothesize that other 'micro' communities, consisting of members of the MTF analysing a specific merger as well as members of relevant merging firms for each case, exist within the evolution of this issue area. Quite clearly, the key members of the macro-community help define, or cement, which actors participate in the micro-one: those in the latter are specific actors within the former. In fact, there may even be some overlap between the actors within the two communities as well: leaders of DG Competition, for example, were prime movers within the 'macro-community' that formulated the MCR, while also key in the functioning of the MTF. Yet, as will be discussed later when we analyse the actions of the MTF which used the *Nestlé/Perrier* case as a means to increase its jurisdictional power and set policy where it was not previously defined by the MCR, it does not necessarily follow that decisions taken within the 'micro' community are bound within the scope of outcomes emanating from the 'macro' community. This points to the idea that there is *feedback* from the implementation phase, ultimately affecting the nature of the originally formulated policy over time.

Turning to negotiating dynamics within the 'micro-community' during the *Nestlé/Perrier* merger, near the end of the Phase II investigation the MTF actually considered blocking the deal. However, a last second concession by Nestlé at the end of Phase II was sufficient enough to gain approval with the support of Competition Commissioner Brittan: the MTF offered Nestlé a deal where the latter was forced to dispose of eight of its lesser brands to a single approved buyer who could not sell them to BSN or back to Nestlé within a ten-year period. These eight brands represented approximately 20% of the market and, if Nestlé agreed, the sale of Volvic to BSN would be indefinitely held. Besides the creation of a new third entity, the estimated post remedy market shares were not particularly different from the bid involving the Volvic sale. As

DuBois (1992, 3) states, "after the remedy, both Nestlé and BSN would have roughly 30% of the market."

From this perspective, it is difficult to explain the remedy based solely on economic grounds. Deeper economic analysis shows that both the pre-and post merger market shares of Nestlé and BSN were significantly high. By prescribing a remedy - taking from Nestlé and creating a third entity - the market positions of the two firms were effectively more symmetrical without their combined market share falling at all. This, according to standard economic analysis, would increase the temptation for Nestlé and BSN to collude. In other words, the divestiture actually strengthened the duopolistic structure of the market: the very thing the MTF was supposedly trying to remedy. With this in mind, allowing Nestlé to re-negotiate and alter the original merger bid indicates that the MTF preferred not to create difficulties for the merger proposals and exercised its discretion towards merger approval (Neven 1993).

Accordingly, the ultimate decision to approve the merger, in which both MTF officials and representatives of the merging firms participated in less than transparent conditions, can be explained based on the self-supporting private interests of the participants: the MTF had an interest in extending its (and ultimately DG Competition's) institutional power while economic actors had an interest in breaking into new markets and thus increasing market power. Both actors could not have achieved their own goals unless there was respect for each others' goals, coupled with fear of the threat that each represented should a satisfactory solution to both parties not be achieved. This points to the interdependent nature between the negotiating parties, where the outcomes represented a positive-sum game for both actors that comprised the community.

In more detail, the MTF's ultimate interest was to use *Nestlé/Perrier* as a test case to establish a precedent in which it could investigate and possibly prohibit mergers that would lead to oligopolistic market structures. Such a power was not clearly defined in the MCR and it would have not been possible to achieve had the MTF not accepted the remedy solution given by economic actors who sought to increase their market power. Subsequent merger decisions by the MTF dealing with potential oligopolist markets have firmly established a 'collective dominance policy' within the MCR framework that has been confirmed by the ECJ.[22] Given this, the MTF was able to effectively extend its

institutional power to deal with mergers that were hitherto not clearly defined. Moreover, prohibiting a merger could have been costly to the MTF because the firms in question may have threatened to appeal the merger decision to the ECJ or Court of First Instance (CFI). If such a threat were successful, then the MTF faced the costs of time, trouble, and loss of credibility at this early stage of MCR implementation. The magnitude and significance of these costs are particularly high in this case precisely because *Nestlé/Perrier* was hand picked by the agency to further its 'collective dominance' agenda. This adds strength to Broscheid and Coen's (2002) argument that Commission actors are sometimes political entrepreneurs in certain situations. Based on previously raised ideas of 'macro' and 'micro' communities, the actions of the MTF also point to the theoretical conceptualisation that although members of the 'micro' community may form part of the larger 'macro' one, their actions are not static: they have the ability to influence the nature of the policy itself that was previously negotiated by the macro-community, reflecting a type of dynamism or 'feedback' between both communities (as indicated by the arrows in Figure 1). One could argue that this insight was clearly reflected in the MTF's desire to use the *Nestlé/Perrier* case to carve out a new niche of 'collective dominance' previously undefined in the MCR.

In a similar vein, economic actors, seeking to increase market shares and hence profits, had to be fearful of the potential threat that the MTF represented if it would have blocked the deal outright, while being respectful of the MTF's institutional goals. Had business been stubborn and not respected the idea of pursuing a remedy solution in order to meet the MTF's goals, an approved merger would have not been achieved ultimately leading to decreased profits. Avoiding this scenario, business took a reasonable strategy by seeking a 'Commission demanded compromise' in order to attain increased market power. Analysing the French markets for both still and sparkling water before the merger bid, Nestlé had a 20% and 5% share in those markets respectively. Perrier for the same markets had a 35% and 50% share (Fleming 1992).[23] The approved merger, despite not developing as Nestlé originally envisioned, entailed the disappearance and acquisition of a rival firm in Perrier while enabling Nestlé to firmly establish itself in the lucrative French bottled water market where it would have otherwise remained marginal.[24]

The exclusiveness of the participation of both the MTF and Nestlé is also reflected in labour's absence, pointing to the interest-restrictive nature of the implementation process. Because of the negative effects of the merger on employment, labour's virtual role is even more significant. Despite its inability to directly negotiate with both parties, labour nevertheless attempted to influence the outcome through the Community's legal channels. After Commission approval of *Nestlé/Perrier,* workers from Grandes Sources, one of the mineral water springs making up Perrier, lodged an ECJ appeal on the basis of improper consultation. Awaiting the ECJ's decision, labour also requested to the Court of First Instance (CFI) to have all redundancies and transfer of control of Perrier to Nestlé temporarily suspended, subject to the results of the ECJ's inquiry. Ultimately, labour lost on both fronts. The CFI decided that it was the Commission's job to rule on mergers according to a strict timetable and the Court refused to take action that might interfere with the merger. The ECJ also sided with the Commission, although the judge stated that "the rights of workers during merger operations merited profound study" (Anonymous 1993). Analysis of subsequent mergers show that 'workers rights' have not been represented or considered by the MTF.[25]

A second aspect of the Community's institutional structure that silenced labour is seen in the actions of the Advisory Committee on Concentrations. MCR regulations state that when a merger is subject to Phase II investigations the advisory opinion of this committee, chaired by the Commission and comprised of representatives from Member States (usually from their competition authority), must be taken into account. Through this Committee other interests that may have been excluded from previous decision-making, such as labour or the environmentalist lobby, can theoretically raise concerns. However, "although the MTF claims it pays more than mere lip service to the Advisory Committee's opinion, the truth of the matter is that the Advisory Committee has minimal influence on the Commission's decision and is likely to be ignored if its opinion strays from the preliminary decision drafted by the MTF"(Maciver 1991, 762). Such a dynamic reinforces the idea that the options for labour to be involved in the MCR decision-making framework are relatively limited.

Beyond its lack of success at, or exclusion from, the European institutional structure a third reason for labour's absence in the implementation phase is based on the

objective of European merger policy itself. As previously discussed, the MCR's objective since its conception has been regulation of the consolidation of firms seeking to compete in Europe and ultimately, globally, regardless of costs to workers. Evidence of this 'prime objective' of merger regulation was seen recently when Goetrz Drauz, the director of the MTF, justified no codified role for labour in the MCR by stating that the regulations only allow for blocking mergers on competition grounds, not "…the employment effects of deals" (Shishkin and Winestock 2000).

A final factor that explains labour's insignificant role relates to its power position vis-à-vis the other actors, namely capital and the MTF. As above, both the MTF and firm actors were respective of each other, not only because their overall goals were self-supporting, but also because they represented a threat to each other should a satisfactory solution to both not be found. However, this was not the situation for labour. On the one hand, its goals of employment maintenance were particularly at odds with capital and were irrelevant to the goals of the MTF who desired extension of its institutional power. On the other, labour did not particularly pose any threat to either party if a solution inconsistent to its goals were achieved. This suggests that labour was restricted not only because it was consciously excluded by the other participants (even though it was), but also because its relative power position was never a threat to other participants who would have otherwise been forced to negotiate with it.

Conclusions

Analysing both the formulation of the EU's Merger Control Regulation (MCR) as well as the implementation of MCR rules during the *Nestlé/Perrier* merger, the paper has examined the development of the EU-level merger control policy communities and attempted to explain this based on private interest theory. The main conclusions are two fold, where the first relates to contributions of our understanding of different, but related, communities that may emerge during different stages of the policy process and the second relates to how the development of such communities can be explained based on private interest theory.

With regard to the first main conclusion, we have attempted to add theoretical precision by arguing that different communities found throughout different phases of a policy process within the same issue area may be related, but they are not necessarily comprised of the exact same specific actors. In particular, we have argued that during the formulation phase of the MCR, one witnessed the existence of a 'macro' community, comprised of several DGs within the European Commission led by DG Competition as well as representatives of capital actors from organizations, such as the ERT. However, when MCR rules were put into practice, the community for making decisions was 'refined' in the sense that the main players in this 'micro' community were representative of specific actors within these two groups from within the 'macro' community, namely the Merger Task Force and the specific merging firms. The relationships between the two communities are two-fold. On the one hand, we suggested that the goals of both communities are similar and are reflective of a lasting relationship between the main actors, namely the Commission and capital. One can also see 'overlap' in these particular communities: leaders of DG Competition, for example, were main players within the 'macro-community' that formulated the MCR, while also being crucial in determining how the MTF would function. On the other hand, outcomes of the implementation phase were dynamic and eventually resulted in a type of *feedback* between the communities. Because rules previously negotiated (by the macro-community in the formulation phase) had become redefined (by the micro-community in the implementation one) to achieve the specific goals of members of the 'micro' community, this points to the idea that the relationship between the two types of communities is not necessarily static. This was particularly seen when the MTF was able to use the *Nestlé/Perrier* merger as a means to increase its regulatory domain by establishing a (new) 'collective dominance' policy that had not previously existed within the MCR framework.

Secondly, we have explained that the development of these communities is based on the self-supporting, private interests of the actors, which motivates a bargaining relationship based not only on resources, but also respect for and fear of each other. When the MCR was developed, we argued that the Commission sought to regulate in order to increase efficiency of single market, while capital representatives sought to have rules clearly defined so as to not disadvantage themselves. During the *Nestlé/Perrier*

investigation the MTF sought to increase its institutional power and carve out a previously non-existent regulatory policy niche, while Nestlé in particular desired expansion into different (French) markets. Both scenarios demonstrate that private interests brought them together into creating an interdependent, closed community with highly restrictive membership. This last point was demonstrated by the lack of role of labour, both in formulating the MCR and involvement in the *Nestlé/Perrier* decision. We argued that its exclusion from the process is based not only on the fact that its goals were not necessarily supportive of the other actors, but also because it was not in a power position vis-à-vis the other players, highlighting that interdependency within the community was also based on the potential threat that actors posed to each other. This suggests that respect for each others' goals along with potential conflict between main players helps achieve satisfactory outcomes.

It is useful to attempt to extract general lessons from this study that may be of value to students of comparative European politics. Indeed, one may justifiably argue that any generalisation must be made in caution: because this study has focused on EU merger policy, deeper research is still needed in other areas of both domestic and supranational policy-making. Nevertheless, this study may still offer insights that can be verified or falsified by other scholars in future work. With this in mind, the paper considers two main lessons.

First, the concept of 'macro' and 'micro' communities existing at both the formulation and implementation phases of policy offers a framework for comparativists to better understand which types of actors will form bonds with each other in different stages of the policy-making process. The argument offered here is that while the (larger) 'macro' community helps define the nature of regulations, a related, but not necessarily equally composed, 'micro' community eventually implements the rules, potentially changing the nature of the policy itself via a feedback process. Such a distinction between the actions of both communities may be of particular value in understanding developments in other domestic and supranational policy areas. Turning to the latter level of governance, for example, although Common Agriculture Policy regulations may be defined at the larger level (by the Council of Ministers, Commission and EU farming interests), how the rules are ultimately enforced depends on the actions of specific actors

(such as member state governments, regional governments, and specific actors in the farming community) guided by their self supporting interests who may change the nature of the policy. Some evidence of this is seen in flax subsidies where, despite the existence of EU directives negotiated between the Council, Commission and larger farming interests to regulate flax subsidies, poor implementation of the rules by specific, but related, domestic and supranational actors ultimately changed the nature and effectiveness of the policy (Kerby and Chari 2002). Similarly, rules surrounding EU state aid control may be formulated at a more 'macro' level by general actors such as the Commission, the Council and capital representatives. However, the implementation of such rules when specific cases are investigated may be negotiated by a more specific set of related actors in a 'micro' community who effectively change the 'rules of the game.' As recent evidence suggests, although specific capital and Community actors involved in investigating aids are part of the 'macro' community that helped define the nature of state aid rules, their own specific, self-supporting, goals guided them to turn a blind eye to potential infringements during state aid decision making, resulting in the very object of regulation being ignored (Chari and Cavatorta 2002). This suggests that a potential avenue for future research should not only be focused on how related communities of like-minded actors are involved during the different phases of policy-making, but how their actions may result in a type of feedback that may have a dynamic effect on the evolution of the policy over time.

Secondly, this study suggests that in order to fully understand institutional dynamics, comparative political scientists must pay more attention to the private desires of policy-makers and how this is intertwined with their 'private fears.' There is no doubt of the value of different authors' arguments that actors in a community negotiate because they are dependent on each others' resources. However, this study has also extended on this idea by suggested that, without necessarily being in a hierarchical relationship, an important element in explaining why communities develop and persist over time lies in the actors' own private interests, coupled with their own fear. Such interests and fears guide actors while also constrain them from acting alone. As seen particularly in the dynamics of the *Nestlé/Perrier* negotiation, institutional actors seek to pursue outcomes that extend their own power position and not necessarily seek to maximize public

welfare; and economic actors will not necessarily ignore intermediary solutions if an altogether negative outcome against their interests is eminent. Rather, motivated by their private desires, but constrained by their own fears, actors in the community will act in a three-fold fashion. First, they will interact with each other because they have little choice, especially if the nature of policy is such that it cements their representation. Secondly, they will respect each others' goals, which are symbiotic and self-supporting. And thirdly, pointing to the importance of ideas raised by authors discussing the interorganisational policy network approach who highlight the autonomous and conflictive aspects, the actors will calculate the potential damage the other may make in order to prevent their goals. This last point highlights that consensus within a community is not only a product of having similar or shared values, but also, perhaps more importantly, based on the fear that other (equally autonomous) actors may pose a threat to the realization of private desires. It also helps explain why other actors, such as labour, are restricted from entering the community: not only are they consciously excluded, but also they could *remain* consciously excluded from the process because they were neither necessary for the realization of the main actors' goals, nor representative of a threat that could otherwise thwart such goals.

NOTES

[1] We are indebted to Arantza Gómez who has performed research assistance for this project. And we gratefully acknowledge the financial support of the IIIS and the encouragement of its Director, Philip Lane, who has supported our research work on regulation.

[2] See also Wilks (1989) and Wright (1991) for further insights.

[3] As discussed in Rhodes (1997). It is noteworthy that these points help distinguish the community/network approach from other approaches such as pluralism, elitism and corporatism: there is no equal access to the (theoretically open) policy-making process for an unlimited number of freely competing actors as pluralism argues (Klijn 1997); there is no exclusive and privileged position for private (economic) actors unilaterally imposing decisions as elitism contends; and there is no fixed, tripartite power consisting of the sate, labour, and capital as discussions informed by corporatism suggest.

[4] Klijn (1997, 27-8) also states that "nearly all authors underline the fact that actors within a policy community have certain interests in common which separate them from the actors of other policy communities and from actors not included in their particular community."

[5] For examples of public interest theorists, see Posner (1970, 1976); Long et al. (1973); Scherer (1990) and Hazlett (1986). However, the seminal work is Bork (1979). More recent 'public' interest theory, as seen in the work of (Noll and Owen 1983), known as normative positive theory (NPT), argues that when regulatory problems arise given the self-interest of economic actors, there should be a prescription of reforms including that enforcement agencies work more effectively, that legislators and government officials learn economic principles, and that incumbent policy-makers resign in the interests of serving the public.

[6] For an in-depth discussion see Shughart and Tollison (1985) and Shughart (1990).

[7] Data can be found at AMDATA

[8] Even though the College of Commissioners theoretically has the final say, there has not been a decision taken by the MTF that has been overturned at this level. However, there have been some decisions that have provoked heavy debates in the College. An example of this was the *de Havilland* case (1992a), which resulted in the first prohibited merger under the MCR. The main debate centered on what criteria should be used in merger analysis. The French delegation argued for social and industrial criteria to be included and for the merger to be allowed. However, those in the Commission and the MTF, who agreed with Commissioner Brittan's 'competition only' criteria, won. The debate set the stage for the future of the MCR and put an end to the possibility that the MCR could be used to strengthen European industry via the creation of European Champions.

[9] The Community dimension of a merger is assessed using thresholds based on the turnover of the firms involved. The most important are the worldwide threshold (EURO 5 billion) and the Community-wide threshold (EURO 100 Million). Below these thresholds, the comparable authorities in the Member States carry out merger control.

[10] Several pieces have been influenced by this school of thought attempting to understand businesses influence on EU policy-making given the new centre of European governance. For example, see Cowles (1996, 1998) and Bennett (1997).

[11] ERT is a forum of 42 European industrial leaders aiming at promoting the competitiveness and growth of the Single Market.

[12] The similarities between the White Paper and the ERT proposal were substantial with the only difference being the 1992 deadline for member state compliance instead of the ERT's overly optimistic 1990 deadline. Once the capital-inspired single market package was proposed the ERT vigorously lobbied undecided national government leaders. According to Richardson, a former ERT chairman, "Wisse Dekker of Philips made it (the single market) his main priority for four years. Bearing in mind that when it was launched governments were not very keen, we helped a lot to push it through" (Balanya et al. 2000, 22).

[13] The establishment of the ERT represented important new fora that sought to collectively represent Capital interests at the EU. By organizing and presenting a unified vision of Europe, these organizations developed legitimacy in the public sphere and thus were considered "politically safe" policy partners by the EC institutions.

[14] The two main constraining effects are, " (a) increasing competition in international goods and services

markets and (b) the ability of the holders of capital to move money around the world in search of higher rates of return."

[15] This is precisely the argument that found itself at the forefront of European debates in the 1990s regarding the crisis of the welfare state and its dependence on capital.

[16] Before the MCR was established as the third strand of European Competition Policy, the EU regulated its market via articles 81 (ex 85), 82 (ex 86) and 86 (ex 90), which made up its antitrust policy. The second strand is the regulation of state aids of which articles 87 to 89 (ex 92 to 94) apply.

[17] Both the Commission and capital wanted all joint ventures to be considered under the MCR. However it was negotiated that only concentrative joint ventures would be scrutinized under the merger rules. All other co-operative joint ventures would have to be scrutinized under Article 81. The other concession was the raising of the original 2000 million Euro world-wide turnover threshold to 5000 million Euro.

[18] Since the MCR came into force in 1990 there have been two Commission led Green Papers that have amended it. The first 1997 Green Paper focused on three main issues: the expansion of the MTF's jurisdiction by adding a new turnover threshold; allowing all full function joint ventures to be analyzed under the MCR; and the adding of a provision so that companies can propose commitments during the first stage of proceedings. The Green Paper of 2002 saw a review of the merits of the 'dominance test' used under the MCR and the 'significant lessening of competition test' used in the US. It considered the possibility of amending the MCR because of the desirability of international convergence of merger control. It also recognized the need for the Commission to move from 'soft' qualitative analysis to the use of more econometric tools for quantitative analysis. Concerns regarding the combined role of investigator and decision maker were also acknowledged.

[19] Although *Nestle/Perrier* was the first major collective dominance case considered by the MTF, there were preceding cases where this topic did come up; most notably in *Alcatel/AEG Kabel* and *Thorn EMI/Virgin Music*.

[20] Collective dominance is a term broadly used to describe a market situation where a small number of large firms in a given market are able to co-ordinate their actions and maintain prices above the competitive level. Collective dominance differs from a cartel because co-ordination need not be explicit.

[21] It is worth noting that these processes – Phase I and II investigations – are set out by the MCR and are accompanied by strict time lines. See Council Regulation 4064 (1989).

[22] The most notable collective dominance cases after *Nestlé/Perrier* were the *Kali + Salz (1993)*, *Gencor/Lonrho (1996)*, and *Air Tours/First Choice(1999a)* merger cases. However, one of the most Important decisions came from the ECJ in the form of the *Gencor/Lonrho* appeal case (1999b) where the Court gave the Commission a legal basis from which it could actively pursue a collective dominance policy.

[23] Statistics were formulated by Morgan Stanley for the Commission.

[24] One of the findings by the MTF here was that the French bottled water market was a mature and stable one dominated by long-time established brands which attracted great consumer loyalty. In the past there have been numerous efforts by other non-French companies to enter the market: all of them failed. This made for a 'great prize' for Nestlé if the merger was allowed.

[25] It is an established norm that the MTF does not consider employment concerns when reviewing mergers. Another high-profile merger decision that was openly questioned by labour was the *WorldCom/Sprint* merger of 1999 where unions protested outside Commission headquarters.

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