

Capture and Control: The Institutional Dynamics of EU Regulatory Independence

ABSTRACT

The paper investigates potential influences on the European Commission's regulatory independence in merger review. The central argument is that Member States enjoy less influence than merging firms, decreasing the capacity for political control and raising the possibility of regulatory capture. The study also introduces another source of influence—third parties, mostly competitors and suppliers—which exercise considerable influence due to the institutional structure and information asymmetries of the EU merger review process. In short, the role of third parties further increases the possibility of regulatory capture, but by different firms. The influence of Member States, merging firms and third parties is compared through a careful empirical survey of the institutional structures of EU merger review. These structures function as avenues for and obstacles to political control and regulatory capture, determining the comparative influence of central actors in the EU merger review process.

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I. INTRODUCTION

Regulatory independence is an important explanatory variable of regulatory outputs. Since the 1990 Merger Control Regulation, regulatory output in European Union (EU) merger review has taken on increasing importance. Commensurate with this development in merger policy, challenges to regulatory independence at the European level have also taken on greater importance. The detailed study of these potential threats to EU regulatory independence in merger policy uncovers rich empirical and theoretical insights. Such insights follow from the central research question: What are the potential sources of influence on EU merger review and what accounts for their relative influence? The relative influences of these sources suggest different shapes of regulatory outputs in EU merger review.

The current study assesses two important sources of influence on EU regulatory output: Member States and firms. Focusing on the merger review process—a policy area in which the EU supranational institutions enjoy considerable discretion—the paper compares the institutional avenues for and obstacles to political intervention by Member States and regulatory capture by firms. The study also supplements existing theoretical

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approaches to regulatory independence with empirical evidence suggesting a significant potential for influence by third parties in the EU merger review process.

The current study is organized in the following manner. The next section of the paper provides a brief empirical discussion of the law and institutions guiding the EU's merger review policy. The third section introduces two theoretical approaches that explain different, potential influences on regulation. Specifically, this section engages the debates on political control and regulatory capture. The fourth section of the paper compares the institutional avenues for and obstacles to the relative influence of Member States, merging firms and third parties. The final section concludes with a summary of the findings.

II. INSTITUTIONS and PROCESSES in EU MERGER REVIEW

Vital to the functioning of the SEM, the application of the EU's merger review policy has undergone significant changes in the 1990s. Within the Union's institutional structure, the Commission is by far the dominant player in merger review, exercising comprehensive supranational powers.² Within the Commission itself, merger review is the domain of the Competition Directorate.³

In 1990, a very important step was taken by the Commission with the implementation of Regulation (EEC) No 4064/89, more commonly known as the Merger Control Regulation (MCR). The MCR greatly expands the authority of the Commission,

² Indeed, McGowan and Cini argue "in contrast to all other EU policy areas, competition policy is unique, for both the Council of Ministers and the European Parliament find themselves on the sidelines" (1999, 177).

³ Highlighting the central role of this Directorate, Wilks and McGowan argue that its "rise to prominence provides a spectacular case study in organizational success. In ten short years [the Competition Directorate] had transformed itself from a sleepy, ineffectual backwater of Community administration into a formidable machine for economic integration" (Wilks and McGowan 1996, 225).

providing preventive control of mergers with a Community-wide impact. In other words, the MCR allows the Commission to approve or prohibit mergers before they are completed. The intent of this pre-merger authority is to prevent the creation or strengthening of “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” (Article 2[2]).

The Regulation also established the Merger Task Force (MTF) within the Competition Directorate. This unit takes action based on complaint or the initiative of the Directorate. The MTF has “firmly established its reputation for fast and efficient work” (O’Keefe 1994, 21).⁴ The MTF “is divided into four units, though there is no sectoral or functional specialization between them. Merger officials are thus expected to operate on a fast learning curve, picking up background information as they go along, and drawing on sectoral expertise from outside their directorate” (McGowan and Cini 1999, 183). While the MTF has the primary responsibility for conducting merger reviews, the final decision on mergers remains with the Competition Commissioner and/or the full College of the Commission. This institutional arrangement has led to concerns over the possible politicization of and lack of transparency in the merger control decision-making process.⁵

The procedures for firms pursuing merger approval by the EU are explicit in the regulation, which sets thresholds at which the Commission examines mergers.⁶ If the

⁴ For a more detailed study of the MTF’s effectiveness, see Neven et al. (1993).

⁵ For examples of such politicization, see Cini and McGowan (1998, 126-131), McGowan and Cini (1999).

⁶ Mergers that do not meet the MCR thresholds are vetted individually by effected EU Member States. The EU’s thresholds were amended June 30, 1997 (Council Regulation [EC] No. 1310/97) to trigger Union merger review when 1) the combined aggregate world-wide turnover of all the undertakings concerned is more than ECU 2 500 million; 2) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than ECU 100 million; 3) in each of at least three Member States included for the purpose of point #2, the aggregate turnover of each of at least two of the undertaking concerned is more than ECU 25 million; 4) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 100 million; unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member

turnover of the merging firms does not meet these thresholds, national European competition authorities are responsible for reviewing and approving or prohibiting the merger.⁷ Proposed mergers exceeding these thresholds are required to notify formally (via Form CO) their transaction to the MTF. The MCR requires merging firms to file a notification within seven days “after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest. That week shall begin when the first of those events occurs” (Article 4[1]).⁸

While not formally mentioned in the MCR, the first contacts between regulators and firms are often taken prior to this seven-day period, during a so-called pre-notification phase.⁹ Once the merging firms have notified formally the MTF of their plans to merge, a strict timetable is set in motion. Throughout the remainder of the merger review process, the Commission’s Legal Service is consulted by the MTF. The Legal Service must approve all substance of merger decisions, a function taken seriously because the Service is responsible for arguing merger cases appealed to the Court of First Instance (CFI). Procedural decisions also must be run by this body, even though such matters do not require approval from the full College or the Member States.

State. In the US, firms must notify competition authorities of a planned merger if they meet the threshold filing requirements (‘size of party’ and ‘size of transaction’ tests) provided in the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (ICPAC 2000, 90).

⁷ According to Article 9(3), the Commission may refer all or part of a merger case that exceeds the thresholds to a national competition authority upon request of that Member State. This article is the so-called “German clause” because it was added to the MCR on the insistence of Germany’s pro-competition and efficiency approach. Alternatively, Article 23(3), known as the “Dutch clause”, allows Member States to request the MTF to review a merger that does not meet the MCR thresholds (McGowan and Cini 1999, 182).

⁸ In the US, such notification “may be made as early as an agreement in principle is reached or a (non-binding) letter of intent or contract has been signed” (ICPAC 2000, 110).

⁹ As noted by the European Commission, “Before any formal steps are taken, the members of the Merger Task Force are always prepared to discuss with the parties to mergers proposed transactions which may be notifiable informally and in confidence. Such prior contact is, in the Commission’s experience, generally regarded as beneficial to all concerned. In particular, it can reduce or remove the risk of delay or other inconvenience arising from submission of an incomplete notification or of notifying a transaction to which the Regulation does not apply” (1998, 13).

By explicitly indicating time limits, the MCR's strict deadlines reduce the discretion of the MTF.¹⁰ While the tight timetables are generally followed, the Commission did allow one late filing in 1999. The Commission is also known to reject requests for late filings (European Commission 2000, 59). As Cini and McGowan argue, the tight and transparent timetables reflect the Commission and Council's appreciation "that the benefits of a merger can be lost if a case is not dealt with quickly. Moreover, speedy responses reduce the negative effects on share prices and minimize the likelihood of rival and hostile take-over bids" (1998, 122).

Following a formal notification, the merger review process establishes two primary stages, Phase I and Phase II. Phase I includes the initial assessment of the proposed merger, which may last no longer than one month.¹¹ During this period, the MTF collects information on the merging parties. Information is collected from a variety of sources, including Form CO and confidential meetings attended by the merging parties.¹² This process is primarily conducted by the MTF case handlers and managers assigned to review the merger. During Phase I, national competition authorities remain in close contact with the MTF and, within three weeks of the formal notification, may request a referral of the merger review.¹³

¹⁰ Details on such timetables are outlined in the Implementing Regulation on notifications, time limits and hearings (EC No 447/98). This regulation was developed under the discretionary authority of the Commission, established as a Commission Regulation.

¹¹ If a merger is referred to a national competition authority, the duration of Phase 1 is extended to six weeks. Phase 1 may also be extended to six weeks if the merging parties propose remedies designed to address the concerns of the MTF.

¹² The lengthy Form CO requires detailed information on the merging firms as well as the impact of proposed merger:

¹³ Article 9 of the MCR outlines the reasons why a Member State may request referral of a merger review. In short, the article requires Member States to show that the resulting merger would significantly impede effective competition "on a market within that Member State, which presents all the characteristics of a distinct market" and/or "which does not constitute a substantial part of the common market" (2[a][b]).

At the end of this first phase, the MTF prepares a draft decision, which is sent to the Competition Commissioner for approval. If the Commissioner does not take a formal decision on the case, the merger is considered approved. However, the Commissioner may formally decide that 1) the merger does not fall within the jurisdiction of the MCR; 2) the merger does not raise serious doubts whether it will be compatible with the SEM; or 3) the merger raises serious doubts whether it will be compatible with the SEM. It is up to the Commissioner's discretion whether or not to bring a Phase I case before the full College of the Commission for approval. However, the decision to raise serious doubts requires approval of the Competition Commissioner as well as the President of the Commission.

As Cini and McGowan note, over 95 percent of proposed mergers are approved during Phase I (1998, 123). Those mergers deemed to raise serious doubts over compatibility with the SEM enter Phase II of the merger review process, which lasts another four months. Phase II proceedings include a more detailed investigation of the proposed merger. During this stage, oral hearings are conducted by the MTF with the merging firms and interested, relevant third parties.

Oral hearings are subject to the guidelines established in the Implementing Regulation on notifications, time limits and hearings (EC No 447/98).¹⁴ The hearings have been described as "quasi-court-like but closer to an arbitration style of examination" (Doern 1995, 205). The hearings, which typically last two to three days, are attended by representatives of the merging parties (usually top lawyers and senior company officials), Commission rapporteurs, the MTF official in charge of the case, the Commission's Legal

¹⁴ See Doern (1995, 205-206) and Johannes (1990) for excellent accounts of the oral hearings.

Service, translators and representatives of the Member States (typically officials from their competition and industry departments).

The oral hearing is managed by a Hearing Officer (HO).¹⁵ The HO is independent from the Commission, “and is not subordinate to one of the directorates. He or she has a special right of access to the commissioner if the hearing officer feels his or her views are not being addressed” (Doern 1995, 205).¹⁶ Following a hearing, the HO writes a report to the Competition Commissioner and Director-General. The HO can suggest that the report be given to the entire College of Commissioners. Occasionally there are recommendations attached to these reports, but most simply report on the content of the oral hearing.¹⁷ HOs are typically respected officials with long careers in the Competition Directorate, many close to retirement. Their interests are the same as the merging firms: get the information out quickly and in an organized fashion.

During Phase II proceedings, the Commission issues a formal Statement of Objections. Statements of Objection outline the Commission’s conditions for approval or reasons for prohibition of the proposed merger. The merging firms, as well as third parties, are then given two weeks to respond to the statement. Responses by the merging firms typically include measures designed to remedy any problems raised by the MTF. The merging firms then have the right to reply in writing to the objections and to request a formal oral hearing. Prior to issuing a final decision, the Commission consults the Advisory Committee on Concentrations, which is comprised of competition authorities from the Member States (MCR Article 19). The Advisory Committee delivers a non-

¹⁵ The EU typically employs two Hearing Officers, one responsible for merger review and one for antitrust.

¹⁶ For more on the HO, see Gilchrist (2000/2001) and Johannes (2000, 1990).

¹⁷ In the report, Gilchrist notes that the HO “can freely comment on the further progress of the proceedings including the need for further information, the withdrawal of certain objections and the formulation of further objections” (2000/2001, 6-7).

binding opinion on each merger case in Phase II, prior to the Commission's final decision. For a final decision, the entire College of the Commission declares the merger 1) compatible with the SEM, 2) incompatible with the SEM or 3) compatible with the SEM based on conditions and obligations imposed on the merging firms.

Any final Commission decision on a proposed merger can be appealed to the European Court of Justice. Such appeals are submitted to the Court of First Instance (CFI). When merger cases are appealed to the CFI, the court will make its decision based on the substance of the facts at the time of the proposed merger. Thus, there is little concern about the market changing during an appeal and the MTF decision losing its relevance. In addition, appeals take a significant amount of time, especially considering the time sensitivity of mergers. This issue will be considered in greater detail below.

As merger review institutions and law have developed in the EU, so too have mergers increased. The escalation in merger activity has dramatically increased the workload of the MTF case teams. Table 1 shows the increasing merger and subsequent MTF activity in the SEM.

TABLE 1: Merger Activity in the SEM, 1994-99

	1994	1995	1996	1997	1998	1999
Merger notifications received	95	110	131	172	235	272
Total cases closed by final decision¹⁸	91	109	125	142	238	270

Source: European Commission (2000, 368).

¹⁸ Total cases closed by final decision are generally lower than the notifications received because some cases are referred to Member States and/or the merger proposal may be withdrawn by the merging firms.

The preceding discussion focuses on the institutional and legal structure of the EU merger review process. These structures suggest an influential role for the Commission as the dominant supranational EU actor. However, Member States and firms are also active in the process. In addition, within the Commission itself, a complex relationship exists among the MTF, Competition Directorate, Commission's Legal Service, College of the Commission and the Advisory Committee on Concentrations. These different actors provide a system of checks and balances. The exact ways in which they check and balance the independence of EU competition authorities will be assessed in greater detail in Section IV. The next section discusses theoretical approaches useful for understanding the EU's review of increasing merger activity.

III. POLITICAL CONTROL and REGULATORY CAPTURE

The issue of regulatory independence has generated a great deal of attention in political science, especially within the American Politics literature. Regulation and regulatory independence have also taken on increasing importance within the European integration literature.¹⁹ Two potential sources of influence on regulatory independence often identified in the broader literature are political intervention and regulatory capture.²⁰ This section introduces two different theoretical approaches to organize and assess these two sources of influence on EU merger review: principal-agent theory and the theory of regulatory capture. These approaches are employed as ordering devices, which also draw out causal linkages between the potential influences on regulatory independence and regulatory outputs.

¹⁹ In political science, the focus on regulation in the EU is particularly notable in the work of Egan (2001, 1998), Majone (2001, 1996), Pollack (1997) and Heritier et al. (1996).

²⁰ For a useful discussion of the different theoretical arguments on regulation, see Majone (1996b).

Beginning in the 1980s, much of the regulatory literature in American Politics relied on the rational choice assumptions of the principle-agent debate.²¹ The current study introduces principal-agent theory in order to clarify the actors involved, their roles and their motivations. The principal-agent debate begins with the initial delegation of regulatory authority from political principals to regulatory agents.²² From here, questions arise concerning the sustained and/or expanded independence of regulatory agents and the ability of political principals to regain control or influence over those agents.

The first task of this section is to identify the principal and agent in the EU's merger review process. The principal in the current study is the collective Member States, which have delegated regulatory authority for merger review to the European Commission. The central agent is the European Commission, or more precisely, the Competition Directorate's Merger Task Force. These actors will be discussed in greater detail in the next section. Majone outlines the dynamic principal-agent tug-of-war, which is readily apparent in relations between the EU's Member States and the Commission:

Over time... bureaucrats accumulate several advantages, including institutionalization and job-specific expertise, which alter the original relationships. Now politicians must deal with agents they once selected, and in these dealings the bureaucrats have a strong bargaining position because of their technical and institutional expertise. As a result, they are increasingly able to pursue their objective of greater autonomy (1996a, 72).

²¹ For an overview, see Moe (1984).

²² Noll provides a useful description of delegation and the resulting regulatory authority:

All levels of government attempt to control some private-sector economic decisions to which the government is not a party. One such method of control is to assign to a government agency the responsibility of writing rules constraining certain kinds of private economic decisions, using a quasi-judicial administrative process to develop these rules. This process has two key features. First, the job of the agency is to channel and to alter the direction of an economic activity that is generally regarded as desirable to society. Second, because private ownership of property and its exchange through markets are protected constitutional rights, the agency must satisfy elaborate procedural and evidentiary rules if it seeks to constrain market activities. These rules give rise to the quasi-judicial process by which the agency develops its policies and means of controlling economic activities within its sphere of responsibility (Noll 1985, 9-10).

The concern over whether regulatory agents are able to avoid control by political principals largely arises from the need for democratic accountability in the regulatory process. According to institutionalist arguments, in order to ensure the democratic accountability of regulatory agents, political authorities must have access to a variety of control instruments, such as oversight committees, the power of appointment, strict procedural requirements, professional standards, public participation and judicial review (Majone 1996a, 39). Majone simplifies these control instruments, arguing there are two main forms of control: “oversight (monitoring, hearings, investigations, budgetary reviews, sanctions), and rules that specify the procedures to be followed in agency decision-making” (2000, 293).²³ The control instruments available to the political principal in the EU—the Member States—fall in both categories. The limitations to political control through oversight and rules in EU merger review will be discussed in more detail in the next section.

While accountability is generally accepted as a prerequisite of a democratic society, too much control by political principals over regulatory agencies can reduce their independence and potentially result in ineffective regulation. Such politicization can generate regulation that benefits specific, narrow (and often partisan) interests and constituencies instead of the statutory mandate of the regulatory agency. Therefore, regulatory agents closely guard their independence in order to pursue their statutory mandate without political intervention. Politicization—even the perception of politicization—can undermine the credibility of regulatory agents, in particular, the credibility of a non-governmental, administrative regulatory agent like the European

²³ For work on US Congressional oversight and monitoring, see Calvert et al. (1989) and McCubbins and Schwartz (1984).

Commission. One solution to avoiding the possibility of politicization is to delegate authority to supranational institutions, as has occurred in the EU.²⁴ But, once again, after the initial delegation has occurred, principals must be cautious of agents pursuing greater autonomy, whether the pursuit of that autonomy is intended to increase independence from political or corporate influence.

In addition to political control, another potential influence on regulatory independence arises from the economic theory of regulation, or more precisely, the theory of regulatory capture.²⁵ The theory of regulatory capture, as posited by Stigler, argues that public regulation is “acquired by the industry and is designed and operated primarily for its benefit” (1971, 3). In other words, by carefully allocating their resources, business interests can “capture” and exert pressure over political principals and regulatory agents in order to achieve a favorable outcome (greater efficiency gains) for themselves.²⁶ Such outcomes increase the ability of individual firms to maximize profits and/or markets but may not be favorable for overall competition within those markets.

While firms generally maintain a financial and organizational resource advantage, their influence over regulatory agents can be further enhanced by information asymmetries. According to Gatsios and Seabright, regulatory capture occurs “usually because asymmetries of information between government and firms require the regulatory agency to be closely involved with firms on a day-to-day basis, with a resulting tendency to identify with the aims of the firms themselves” (1989, 46). These information asymmetries are inherent in merger review because “...firms are also the

²⁴ For more on why delegation occurs in the EU, see Majone (2001), Pollack (1997), Nicolaidis (1994) and Gatsios and Seabright (1989).

²⁵ For more on the developments of regulatory capture within the American Politics literature, see Viscusi et al. (1996) and Peltzman (1976).

²⁶ Industry is influential because it is the most organized and concentrated interests group (Olson 1971).

main source for specialist information, a fact which also gives considerable scope to bias or changes the character of official governmental consideration” (Doern 1995, 204). Such information asymmetries become readily apparent in the institutional structure of the EU merger review process. In merger cases, the MTF and Member States clearly have to rely on merging firms for sensitive business information. The implications of information asymmetries on the day-to-day activities of a regulatory agency are a central analytical target of the current study.

In order to maintain their independence from political principals, regulators often attempt to increase their discretionary authority, that is, the authority to decide on matters not specifically codified in statute.²⁷ Gatsios and Seabright distinguish between non-discretionary and discretionary authority as the “...difference between systems in which general rules are set and compliance monitored, and one in which terms of reference are set for an agency that decides rules in particular cases” (1989, 46). Discretionary authority in the EU is not governed by an overarching procedural act (Majone 2000) that covers all policy areas. Rather, in EU merger review, the MTF’s discretion is outlined in general terms in Article 23 of the MCR.²⁸ Subsequently, discretion for merger review has been embedded in the Commission’s Implementing Regulation and seven interpretive

²⁷ Wilson offers a number of reasons why regulators would desire expanding discretionary authority: “For all agencies with less than precise standards for their actions and conspicuous boundaries to their authority, regulatory management will consist of efforts to enlarge the domain and specificity of regulation” (1974, 152). In addition to other reasons, Wilson continues his argument, claiming “as a matter of bureaucratic politics, agency officials often wish to hold the initiative. The existence of an unchanging policy or set of substantive rules makes more predictable the behavior of an agency in various circumstances; the more predictable the behavior, the more it can be taken for granted, and the less discretionary influence the agency can wield” (1974, 156).

²⁸ Article 23: “The Commission shall have the power to adopt implementing provisions concerning the form, content and other details of notifications pursuant to Article 4, time limits pursuant to Articles 7, 9, 10 and 22 and hearings pursuant to Article 18. The Commission shall have the power to lay down the procedure and time limits for the submission of commitments pursuant to Articles 6(2) and 8(2).”

notices.²⁹ These provisions give the MTF and Commission considerable discretionary authority in an area where they already enjoy broad, statutory authority.

While discretionary authority tends to reduce political control, it also can raise problems, especially for the targets of regulation.³⁰ Discretion often increases uncertainty, an unsavory proposition for firms seeking approval of an important and complex business transaction like a merger. Another potential concern over expanding discretionary authority is that, as regulatory autonomy increases, the opportunity also increases for the targets of regulation (merging firms) to influence its shape (Doern 1995). Gatsios and Seabright agree, arguing that because merger policy is an exemplary case of discretionary regulatory authority, it is more susceptible to regulatory capture. They argue that the influence susceptibility of highly-discretionary merger authorities lies in the information asymmetries inherent in merger review: Merger regulators are vulnerable to capture by merging firms because under discretionary regulation

there is uncertainty not only about the facts relating to particular firms but also about the precise aims that the regulatory agency is pursuing... Credibility problems... are often worse in the case of discretionary regulation, because it is harder (both for firms and for other member states) to observe whether the actual aims and intentions of regulatory agencies are consistent with what governments claim them to be (1989, 46).

Many studies of regulation focus on the influence of principals and business interests on the initial delegation of regulatory authority. However, the current study focuses on the day-to-day, case-specific implementation of a particular regulation, not the

²⁹ The first implementing regulation was in 1989, the second in 1994, and the third in 1998 (Com Reg No 447/98). As a Commission Regulation, "The Implementing Regulation lays down rules regarding the notifications, time limits and hearings provided for in the Merger Regulation" (Commission 1998), and Form CO for notifications. Interpretative notices cover various issues, such as the calculation of turnover, the definition of relevant markets (Commission 1998).

³⁰ For more on the importance of discretionary authority and how it decreases political control, see Wilson (1974) and Stewart (1975). Alternatively, Weingast and Moran (1983) argue that political principals maintain a dominant role due to their power over budgets and administrative confirmations.

initial creation of that regulation. This approach is adopted because the case-specific interests of Member States and merging firms inform their day-to-day behavior and help to explain their interaction with the EU’s competition authorities.

Based on this approach, the analysis begins with those institutions that function as avenues for and obstacles to principal (political control) and firm (regulatory capture) influence, particularly those that influence the day-to-day implementation of the MCR. The principal-agent theory of political control posits that as agents implement regulations, they are susceptible to influence, via oversight and rules, from principals. While keeping agents accountable, such politicization can undermine the credibility of the agents and may be detrimental to the aggregate welfare if regulation is made to serve narrow political interests. The theory of regulatory capture allows for the susceptibility of both agents *and* principals to influence from firms. The current study focuses exclusively on the ability of principals and firms to influence agents. Table 2 provides a simple depiction of these potential sources of influence during the merger review process. The table indicates the potential for influence (X) on the three specific targets.

TABLE 2: Potential Influence Susceptibility in the EU Merger Review Process

		Influence Targets		
		Agents	Principals	Firms
Influence Peddlers	Agents ³¹	--	X	X
	Principals	X	--	X
	Firms	X	X	--

Table 2 makes it clear that the EU’s merger review process is a dynamic one in which the policy outcome is potentially susceptible to numerous influences. In fact, a

³¹ The agent here is the MTF. Of course, this is a simplification. The exact composition of the agent will be addressed in greater detail in the next section.

similar table could be constructed for the influence of actors during the initial delegation of authority from the principal to the agent. However, as mentioned above, the current study focuses on the potential influence of actors on a day-to-day, or case-specific, basis during the actual merger review process. The possibility that firms can influence principals is largely outside the scope of the current study. Gatsios and Seabright (1989) provide a similar and useful distinction along the same lines used in the current study by differentiating between “firm capture” and “government capture”.³² Such an approach is particularly useful when analyzing regulation in the EU because of the ongoing and highly contentious process of delegation from Member States to agents and the increasing, organized business lobbying of those same agents.³³

The current study does not simply investigate the initial creation of the MCR, but rather identifies the potential influences on the MCR as it is implemented on a day-to-day (or case-specific) basis. In order to identify these influences and their attendant motivations, the current study introduces principal-agent theory and the theory of regulatory capture as ordering devices that illuminate causal linkages between relevant actors and EU regulatory independence. Much of the following analysis focuses on the institutional avenues for and obstacles to influence on the EU merger regime.

IV. POTENTIAL INFLUENCES in EU MERGER REVIEW

Efforts to identify potential influences on EU regulatory independence require an initial identification of the actors involved. As shown in Table 2 above, much of the

³² Gatsios and Seabright (1989) also identify the possibility of “bureaucratic capture”, in which regulatory outputs increasingly reflect the individual aims and desires of regulators. While this is a potential problem, it remains outside the analytical scope of the current study.

³³ For work on the role of business interests in the EU, see Coen (1997), Mazey and Richardson (1997) and Green Cowles (1995).

relevant theoretical literature on regulation anticipates the potential for influence from Member States (political control) and firms (regulatory capture) in the regulatory process. However, an exploration of the empirical realities of the EU’s merger review process suggests that third parties are also significant influence peddlers. Thus, this section requires a reconceptualization of the influence susceptibility of the EU’s merger review process. The most notable revision is the introduction of third parties into the analysis, as shown in Table 3.

TABLE 3: Revised Potential Influence Susceptibility in the EU Merger Review Process

		Influence Targets			
		Agents	Principals	Firms	Third Parties
Influence Peddlers	Agents	--	X	X	X
	Principals	X	--	X	X
	Firms	X	X	--	X
	Third Parties	X	X	X	--

Before investigating the potential impact of these three influence peddlers on the EU competition authorities, it is necessary to establish a distinction between the MTF and other units within the European Commission. The MTF is a separate unit within the Competition Directorate, having primary responsibility as the regulatory agent in charge of merger review across the SEM. The Director-General (DG), Competition Commissioner, Commission’s Legal Service and full College of the Commission also function as regulatory agents in the merger review process. The DG and Competition Commissioner enter the process after the MTF has completed its Phase I analysis and are bound to enforce EU merger review in accordance with the same statutory objectives as the MTF. The Commission’s Legal Service enters the merger review process much earlier and also shares the same statutory objectives as the MTF. As such, the DG,

Competition Commissioner and Commission’s Legal Service are empirically distinct from the MTF, but are assumed to be analytically similar to the MTF as agents resisting the influence of principals, regulatory targets and third parties. In the sections below, distinctions among these different units within the Commission will be made when necessary. The role of the College as a potential source of Member State influence also will be discussed in greater detail below.

The MTF is subject to a number of formal, institutional checks on its regulatory authority. The intent of the following discussion is to investigate exactly how and why the independence of the EU’s competition authorities can be influenced, whether through formal institutional or less formal, discretionary avenues. The intent is not to suggest that competition authorities are unaware of or helpless to resist such influences. Indeed, the MTF is very aware of the potential influences on its regulatory independence. And the EU’s competition authorities enjoy considerable authority, “being effectively investigator, prosecutor, jury, judge and executioner in its own cause” (Gilchrist 2000/2001, 3). Moreover, while the MTF relies heavily on merging firms and third parties for information, it does cross-check submissions—acquired from the Form CO and oral and written testimony—for veracity. The remainder of this section investigates the ways in which the institutional structure of the EU merger review regime shapes the behavior of the relevant actors, either increasing or decreasing the likelihood of influence on the MTF.

A. *Member States*

Member State influence in the merger review process may be increased through institutional structures that function as control instruments. These control instruments include the consideration of “legitimate interests” in the merger analysis, the right to request referrals of individual cases, the right to attend oral hearings and the roles of the Advisory Committee on Concentrations and the College of the Commission. Individual Member States can be expected to promote their own national interests through these control instruments by supporting mergers that enhance their national welfare.³⁴ Thus, it can be assumed that Member States will resist and try to change merger decisions that are contrary to their individual national interests.³⁵ The current subsection assesses these avenues of influence for Member States and reveals significant obstacles to such influence.

The first avenue of influence for the Member States becomes apparent in Article 21(3) of the MCR, which allows for the consideration of national, “legitimate interests” in the competition analysis. This article provides an explicit, but not exhaustive, list of potential legitimate interests.³⁶ However, Article 21 does not remove the authority of final decision from the Commission. National appeals to Article 21 are very rare because of the success and general acceptance of the MCR as legitimately governing competition

³⁴ It should be noted that some, typically smaller, Member States are less active in the merger review process for the simple reason that they have small markets with limited merger activity. While mergers with an EU dimension (those exceeding the MCR thresholds) may have an impact on the SEM, they may not have an equal impact on *all* Member States, and thus, are not necessarily considered a priority for smaller states with limited resources.

³⁵ For more on the role of national interests in the EU merger review process, see Damro (2001), Majone (2000), Doern (1995) and Gatsios and Seabright (1989).

³⁶ “...Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law. Public security, plurality of the media and prudential rules shall be regarded as legitimate interests...” (Article 21, 3).

across the entire SEM. Indeed, the success of the MCR has increased the credibility of the MTF, subsequently reducing the efforts of Member States to argue for the introduction of legitimate interests in the pursuit of individual national goals.

The second avenue of influence follows from the right of Member States to request the referral of individual merger cases to national competition authorities, even if the case exceeds the MCR's thresholds.³⁷ While this right is provided for in Article 9 of the MCR, such requests are seldom made. Table 4 shows the limited number of Member State requests for referral.

TABLE 4: Member State Requests for Referral of Merger Cases, 1996-1999

	1996	1997	1998	1999
Art. 9 requests by Member States	4	11	4	10
Art. 9 total or partial referrals	3	7	4	5
Total merger notifications to MTF	131	172	235	272

Source: European Commission (2000, 368-69).

In comparison with the total merger notifications, the low number of Article 9 requests and referrals should not be interpreted necessarily as a weakness of the Member States. Rather, the Member States only request referrals on those rare cases that have a significant impact on their national markets. Article 9 of the MCR provides clear guidelines determining whether a referral will be granted. The most important obstacle to Article 9 requests is that the Commission maintains the authority to determine whether or

³⁷ For detailed descriptions of Member State requests for referrals, see European Commission (2000 and 1999).

not it will refer a merger case to the requesting Member State. Thus, the Commission's considerable authority over the granting of referrals may help to explain the limited number of Article 9 requests. However, it should be noted that cooperation between the Member States and Commission on these infrequent Article 9 requests is rarely conflictive.

The right to attend oral hearings during Phase II also provides Member States with an avenue of influence. At oral hearings, Member States are permitted to ask questions of the merging firms and third parties in attendance.³⁸ Doern argues, "The presence of representatives of the Member States is significant for the party being charged because the party usually hopes that their presence will allow useful non-competition arguments to be heard and perhaps to prevail" (1995, 205). However, in practice, if a Member State has serious reservations over how the Commission is handling a merger case, it will typically save its arguments for later in the process (Gilchrist 2000/2001, 6). Member States typically are inclined to wait until later in the process because the avenues available offer a greater potential for influence. Thus, the evidence above suggests the potential for influence by national interests is limited in the first three institutional avenues open to Member States.

Following the oral hearing, Member State influence may be exerted through Article 19 of the MCR. This article creates another avenue of influence via the Advisory Committee on Concentrations (ACC). The ACC is composed of representatives from the national competition authorities, with each Member State afforded one vote. The Commission is required by the MCR to ask the ACC for its advisory opinion on Phase II merger cases. Typical ACC opinions are unanimous, but some express a majority (or

³⁸ Most Member States attend, except for those with limited interest in the merger and/or limited resources.

minority) opinion. In the event that the opinion is not unanimous, no identification is made of individual, dissenting Member States. Also, the Commission maintains the right to decide whether or not to publish the ACC opinion.³⁹ Most important for the current study, while the Commission takes into account the ACC's advisory opinion, it is not binding. In addition, the ACC opinion rarely, if ever, challenges the basic MTF ruling, choosing rather to focus on issues such as the scope of market definitions and the exact level of fines being considered.

The College of the Commission provides the final avenue for Member State influence. Because final decisions on Phase II mergers require approval of the full College, the potential for national political interests to enter the process is raised once again. Majone summarizes the potential problem raised by the Commission's collegial principle: "Although they are not supposed to pursue national interests, many Commissioners are politicians who, after leaving Brussels, will return to their home country to continue their career there. This makes national pressures often difficult to resist..." (2000, 285). However, because the authority to approve a merger after Phase I has been delegated to the individual Competition Commissioner, a full meeting of the College is often not necessary.⁴⁰ Indeed, ninety-five percent of mergers are cleared during Phase I (Cini and McGowan 1998, 123), largely removing the College from the day-to-day merger review process. In addition, it is very unlikely that the College will overturn

³⁹ It should be noted that the Commission normally publishes the opinion of the ACC.

⁴⁰ For mergers cleared during Phase I, approval of the Competition Commissioner alone is needed, with agreement of the Commission Legal Service and previous consultation of relevant, internal EU units/directorates. Whether the Commissioner brings a Phase I merger to the full Commission is his/her sole discretion. The decision to open a Phase II investigation must be made jointly by the Competition Commissioner and the President of the Commission.

or adjust an MTF decision.⁴¹ For the College to challenge or overturn an MTF draft decision requires a majority of Commissioners. This creates a significant challenge to lobbyists who must recruit a majority of Commissioners possibly representing different national interests based on the needs of different national markets. The lobbying endeavor is made all the more challenging because the tight MCR timetables limit access to Commissioners during the actual review process. Considering the nature of merger decisions—often complex and built on detailed economic analysis across multiple geographic and product markets—time limits on access to Commissioners can raise an insurmountable obstacle to merging firms wishing to sway opinions.

So, what is the overall assessment of the potential influence exercised by Member States in the merger review process? The answer to this question speaks volumes for the potential of political control in the EU merger review process. The institutional structure of the MTF creates significant avenues of influence for individual national interests because Member States can intervene in the process at various points. These avenues of influence are not paper tigers to be disregarded easily or summarily. However, an empirical investigation of how the control instruments operate suggests that the avenues of influence for Member States are seriously limited. To summarize, significant obstacles stand in the way of each avenue for Member State influence:

1. Article 21 appeals to legitimate interests are rare because of the success and general acceptance of the MCR;
2. Article 9 requests for referrals are infrequent and determined by the Commission;
3. Member States can only ask questions at oral hearings;

⁴¹ During the eleven-year existence of the MCR, the College has only challenged one MTF draft decision. This challenged required the MTF to re-write the decision, which still was completed within the MCR's tight timetables.

4. ACC opinions are non-binding and rarely challenge MTF draft decisions;
5. Ninety-five percent of mergers are approved before going to the full College of the Commission;
6. Majority decision rule and tight deadlines make it difficult to lobby those cases going to the full College.

In addition to these obstacles, it should be noted that MTF case handlers are relatively insulated from contact with the Member States. This insulation arises from the organizational structure of the MTF. Unlike the rest of the Competition Directorate, MTF case handlers are not organized hierarchically or sectorally, even though they do begin to specialize in certain sectors after a period of time. This organizational structure allows MTF case handlers greater autonomy than that found in other parts of Commission. The MTF's autonomy translates into less political control being exerted from the top down—political control is most likely to come from the top down, whether from Member States acting through the ACC or through the College. Overall, officials at various levels in the Competition Directorate, not surprisingly, argue that political control is not a problem in the day-to-day implementation of the MCR. The explanation given is that while higher-level officials in the Competition Directorate have to consider seriously and deal with Member States, the technocrats in the MTF are more concerned with daily influence from businesses. This potential influence from business interests is discussed in the next two subsections.

B. Merging Firms

Before investigating the avenues of influence open to the targets of merger review—the merging firms—it is useful to begin with a brief description of the interests motivating merging firms. This subsection then briefly discusses the importance of information asymmetries inherent in the merger review process. Next, the subsection analyzes the influence of merging firms on EU regulatory independence, primarily pre-notification contacts and oral hearings. These avenues appear in areas in which the MTF enjoys considerable discretionary authority. This subsection also assesses institutional obstacles to the influence of merging firms, primarily the lack of an effective, timely judicial remedy, the need of merging firms to appear cooperative in order to make deals and the threat of fines.

The short-term interests of merging firms, which focus on the day-to-day implementation of the MCR, hold the greatest insights for the current study. The most important short-term interest of merging firms is to gain regulatory approval of the proposed merger as quickly as possible. This interest reveals two interrelated issues: *approval* and *speed*.

First, merging firms require approval, which, in most cases, requires some type of negotiated deal on possible remedies during Phase I. For a merger to be approved, deals often must be made. Deals are the most important way for firms to overcome MTF concerns during the early stages of the review process and preemptively address concerns that might be raised in the formal Statement of Objections.⁴² Negotiated deals typically require merging firms to make concessions, such as the divestment of certain assets. Thus, in order to reduce the likelihood of an outright prohibition, lawyers representing

⁴² The importance of deal-making is suggested by the limited number of mergers that advance to Phase II.

merging firms must balance between the need to satisfy the competition authorities and to protect the interests of their clients. As one experienced Brussels lawyer explained the interaction with the MTF, “The art is to know when you stop litigating and start negotiating.” The fact that very few mergers are prohibited outright suggests that negotiated remedies are meeting the needs of merging firms—approval of the transaction.

Second, regarding the need for speed, mergers are sensitive to the passage of time because “if a merger is not consummated within a very short time frame, the economic and industrial structure factors which led to the proposal will have changed so much that it cannot be resuscitated” (Gilchrist 2000/2001, 2). Also, Cini and McGowan argue “that the benefits of a merger can be lost if a case is not dealt with quickly. Moreover, speedy responses reduce the negative effects on share prices and minimize the likelihood of rival and hostile take-over bids” (1998, 122). Indeed, the need for speedy approval is so important that, on occasion, merging firms will inform the MTF that they will only proceed with the merger if it does not go to Phase II. In some cases, lawyers claim that the need for a speedy decision far outweighs the risks of superficial analysis that could result from a hurried merger review. The fact that most mergers are approved during Phase I suggests that merging firms are, once again, getting what they want—speedy approval. Indeed, Gilchrist agrees, arguing that the MTF “can be proud of a major achievement. They have provided a speedy and efficient service to the business community” (2000/2001, 2).

The first avenue of influence for merging firms opens due to the information asymmetries inherent in the merger review process. The nature of merger review requires close, regular contacts between regulators and merging firms. These close contacts are

the result of extreme information asymmetries that are amplified by the tight deadlines of the MCR. Because the MTF is required to collect large amounts of information under the tight deadlines prescribed in the MCR, the competition authorities must depend heavily on merging firms for sensitive, private business information about current and prospective market shares and market activity. Because of the institutional structure of the MCR, the MTF's heavy reliance on information from merging firms creates a significant avenue of influence for merging firms. This avenue of influence is expanded further in those areas in which the competition authorities exercise considerable discretionary authority: pre-notification contacts and oral hearings.

The initial stage in the merger review process provides a second avenue of influence for merging firms, pre-notification contacts (PNCs). Such contacts are not mentioned in the MCR, making them largely discretionary in content and purpose. PNCs significantly expand MTF discretion, especially by delaying the onset of the MCR's strict timetables.⁴³ Such contacts represent an extremely important institutional avenue through which the merging firms can begin to influence the merger review process. The importance of PNCs becomes apparent in the first section of Form CO, which declares that

Experience has shown that pre-notification meetings are extremely valuable to both the notifying parties and the Commission in determining the precise amount of information required in a notification and, in the large majority of cases, will result in a significant reduction of the information required. Accordingly, notifying parties are encouraged to consult the Commission regarding the possibility of dispensing with the

⁴³ As the Director of the MTF describes, "Before any formal steps are taken, the members of the Merger Task Force are always prepared to discuss with the parties to mergers proposed transactions which may be notifiable informally and in confidence. Such prior contact is, in the Commission's experience, generally regarded as beneficial to all concerned. In particular, it can reduce or remove the risk of delay or other inconvenience arising from submission of an incomplete notification or of notifying a transaction to which the Regulation does not apply" (Drauz 1998, 13).

obligation to provide certain information... (European Commission 1998, 81).

PNCs are confidential meetings and other less formal contacts arranged between the merging firms and competition authorities *prior to formal notification of a merger deal*. As formal meetings, PNCs are usually attended by the case manager, two handlers, representatives of the parties and their outside counsel.⁴⁴ PNCs are becoming increasingly viewed as standard operating procedures, with some Commission officials estimating that 90-95 percent of mergers involve such confidential contacts. Because PNCs occur prior to a formal notification of a merger deal, the strict timetables outlined in the MCR are not set in motion. Thus, the MTF can grant informal extensions before initiating the seven-day deadline mandated in the MCR for formal notification of a merger deal; often firms will need more than seven days to finalize the technicalities of a merger agreement and complete the Form CO.⁴⁵ Private practice lawyers in Brussels will usually be employed by the merging firms to contact the MTF and request an extension. Such lawyers specialize in these issues, fully aware of the usefulness of PNCs. Particularly adept Brussels lawyers will encourage their merging clients to initiate PNCs as soon as possible, in order to tailor their merger agreements to preempt early MTF concerns.

There is a great deal of variation in the duration of PNCs because merger agreements are constructed in very different ways. The actual process by which the firms agree to a merger can begin as a “golf-course” agreement or a formal Memo of Understanding between the firms. As an agreement is being reached, the merging firms

⁴⁴ The actual negotiators of the merger are often advised by their legal counsel to be present as the representatives of the merging firms.

⁴⁵ An official notification requires submission of a completed Form CO. During PNCs, the merging firms and the MTF usually agree on the “amount of information required in the Form CO notification document” (Gilchrist 2000/2001, 9).

generally will contact their legal counsel (whether in-house or a private practice law firm) to inquire about regulatory requirements.⁴⁶ The legal counsel in Brussels then typically contacts the Head of the MTF, explaining that a merger filing is expected. Usually that same day, the legal counsel is informed of which MTF case manager to contact. Within a few days, the legal counsel has organized a PNC meeting and submitted a memo—about five pages detailing which firms, sectors and markets will be involved in the proposed merger.

PNCs are a crucial part of the merger review process because this is where firms start arguing for approval of their proposed merger. At these very informal meetings, MTF case handlers usually inquire about what markets will be involved, what the current market shares are of the merging firms and what the future market position will be of the merged firm. Here the regulatory skirmish begins, with firms careful not to divulge too much information on their current or prospective market positions and competition authorities arguing that such information must have been assessed prior to a merger deal having been made. During PNCs, firms also will launch hypothetical trial balloons. For example, the merging firms may inquire whether a possible divestment would likely get the merger cleared in Phase I or argue that a proposed merger will not be problematic because the relevant market has a history of changing rapidly, eliminating any concern that a fifty-percent market share constitutes dominance. During the PNCs, some agreements are written down, but they are rather cautious and informal positions of

⁴⁶ Sometimes firms notify their lawyers of a merger at the same time the news is made publicly available. When this happens, the firms must meet the seven-day deadline for filing a completed Form CO. In such cases, lawyers have been known to ask for additional time, arguing that the Form CO cannot be completed by the deadline. When an incomplete Form CO is submitted, the MTF is required to ask for another filing, which further delays the entire merger review process. Thus, such firms are occasionally granted extensions beyond the deadline.

Commission officials (typically case handlers), not the entire College. Thus, such written agreements usually employ language asserting that a merger is “likely” to be approved with agreed remedies and further cooperation.

During the initial PNC, if the competition authorities disagree about the relevant markets, further meetings can be requested by the merging firms in an attempt to reach an agreement. At such follow-up PNCs, firms will often present hypothetical commitments to resolve any outstanding issues. There are no rules governing how many PNCs can be arranged, greatly expanding the discretionary authority of the MTF case team. Thus, if a merger is particularly complex (e.g., involving new and/or highly technical markets), lawyers will often request more than two meetings on behalf of their clients.

PNCs are also important to the merger review process because this is where the MTF develops its first impression of the merging firms, generally as cooperative or uncooperative. The institutional strictures of the MCR, including the tight timetables and the (statutory and discretionary) authority of the MTF, demand that merging firms display a cooperative image during these initial contacts. When merging firms have successful PNCs, face-to-face contacts with the MTF case teams may not even be needed during Phase I. Alternatively, a bad experience during PNCs can poison the rest of the review process for the merging firms. Thus, during PNCs, lawyers for the merging firms must argue vigorously while dealing professionally and respectfully with the case teams. The legal representatives of merging firms tend to agree that PNCs are most useful when the competition authorities have sufficient resources (i.e., time and personnel).

PNCs have become a standard, discretionary part of the EU’s merger review process. Such contacts are in the interest of MTF case teams because by the time the

formal notification is received, they are already familiar with the merger case, accelerating the decision-making process by reducing considerably the learning curve of these resource-strapped individuals. PNCs also are in the interest of the merging firms because they allow firms to begin testing their arguments and can delay the onset of the strict timetables in the MCR. Thus, the competition authorities and merging firms begin to share close contacts and similar interests, a sign of possible regulatory capture.

A third avenue of influence for merging firms opens after the conclusion of PNCs, in particular during the oral hearings in Phase II. However, before the oral hearings and following the formal notification of the merger, the strict timetables for Phase I are initiated. During Phase I, further contacts occur, the frequency of which depends on the nature, complexity and size of the firms involved in the case. Following Phase I, the Competition Commissioner (along with the President of the Commission) may determine that a Phase II investigation is necessary. In Phase II, more information and more analysis are required, which typically means closer contact with the merging firms. The decision to move to Phase II proceedings is extremely significant for the merging firms, which will actively resist such a development. The severe aversion to Phase II derives from the time sensitivity of mergers; once a merger has moved to Phase II, a final decision is delayed even further. In addition, during Phase II, the MTF formulates conditions, or remedies (e.g., divestments), that will be required of the merging firms if they are to gain approval. These conditions can be harsh enough that the merging firms actually will decide to abort the proposed merger rather than implement the conditions.

During Phase II, the MCR provides merging firms with a right to an oral hearing at the Competition Directorate. Sometimes firms find it to their advantage to waive the

oral hearing. Such waivers occur because firms fear negative comments from third parties, which are also allowed to attend such hearings.⁴⁷ Negative comments from a single third party or a collective effort by third parties with similar interests could potentially derail an oral hearing that had previously been useful to the merging firms. Thus, merging firms may choose to avoid such a negative situation by waiving their right.

Those firms choosing to exercise their right to an oral hearing will try to influence the hearing to their benefit. One way in which firms influence the oral hearing is by attempting to shape the agenda to their advantage. Representatives of the merging firms often will go to the Hearing Officer (HO) beforehand, typically with the intent of influencing the agenda order. The HO, who determines the final agenda, typically will present a draft agenda of the oral hearing to merging firms during these meetings and will seek their comments. One strategy of merging firms is to try to put effective competitors at the beginning of the hearing in the hope that the influence of their testimony will elapse or be eclipsed by subsequent testimony. Another strategy is to try to put effective competitors at the end of the hearing in the hope that competition authorities will develop an early, positive view of the merger and discount any subsequent, potentially-damaging testimony. The strategy pursued by the merging firms depends on the previous experience of their lawyers. It is difficult to determine which strategy is most effective, but it is clear that an avenue exists for the merging firms to potentially influence the oral hearings to their advantage. While rare, setting the agenda order for the oral hearing can be a very contentious issue. One constant of the oral hearing is that HO's always provide the merging firms with the final right to comment at the conclusion of the hearing.

⁴⁷ For more on attendees at oral hearings, see Implementing Regulation on notifications, time limits and hearings (EC No 447/98).

The first obstacle to the influence of merging firms relates to their role as information providers. As mentioned above, the competition authorities are heavily dependent on the merging firms for sensitive business information. However, the MTF does not rely solely on information from the merging firms. Rather, the MTF collects information from a variety of sources, including publicly available documents and contacts with other, relevant market players. The information the MTF does receive from the merging firms is cross-checked with information provided by other sources. However, cross-checking information may be insufficient considering the competition authorities have only limited resources (e.g., time, personnel). The reliance on other sources for information reflects the MTF's inability to independently collect and investigate information. Indeed, a high-level official within the Competition Directorate admits that, in comparison, the US has more resources to collect and investigate information independently, "which is probably better."

Following a final decision by the College of the Commission, merging firms still have the right to appeal to the Court of First Instance (CFI). This right would typically be considered a significant institutional avenue of influence for merging firms, because the CFI provides an additional, objective judgment on the final decision of the regulatory agents. Indeed, frequent appeals to the CFI would be expected because merging parties often feel disadvantaged during the merger review process (Gilchrist 2000/2001, 9). However, an appeal to the CFI takes a considerable amount of money and, more importantly, may take as long as two to three years.⁴⁸ Thus, due to the time sensitivity of mergers, an appeal to the CFI is actually an unrealistic option for the merging firms. In

⁴⁸ A new appeal procedure has been instituted in the CFI for time-sensitive cases, such as mergers. But, even this new "fast-track" procedure can take one year. Thus, even if individual cases may be expedited, it is unlikely that firms will appeal because there is a perception that no appeal exists for merging firms.

fact, it is unlikely that firms will appeal conditions set by the MTF unless there is a significant point of principal that may affect future, long-term business considerations. As competition authorities are aware, firms essentially have to “take what they get.” This reality creates a significant obstacle to the influence of merging firms on the competition authorities.

The lack of an effective, timely judicial remedy creates leverage for the competition authorities and pressure for merging firms to compromise on commitments, divestitures and other remedies.⁴⁹ This pressure on merging firms is most often felt in “marginal” issues. For example, in cases where market definitions are being argued, merging firms might feel the pressure to accept the MTF’s definition, even if it is questionable or untenable. The pressure on merging firms to compromise can be so immense that representatives of merging firms report offering more for remedies than they would have under a system that realistically provided for a judicial review. Whether these claims of merging firms are true or not, the current system does create the *perception* of leverage on the part of the competition authorities and limits the influence of merging firms. Indeed, such a perception must help to determine when a lawyer will “stop litigating and start negotiating.”

Due to the institutional authority of the MTF, another obstacle to the influence of merging firms is their perception that they need to appear cooperative. Throughout the process, merging firms admit to the need to appear cooperative in the eyes of the competition authorities. While seemingly self-evident, this need functions as a significant obstacle to the potential influence of merging firms. Similar to their motives during PNCs, firms strive to create an impression of being a cooperative party during the

⁴⁹ The author is grateful to Jacques Bourgeois for the phraseology of “an effective, timely judicial remedy.”

process. This image can be important to the outcome of the immediate merger and any future merger proposals. Firms want competition authorities to trust and come to them before approaching their competitors for information. In addition, if competition authorities feel merging firms are being uncooperative, they can increase the pressure. For example, merger regulators can issue requests for large amounts of information on short deadlines. The regulators know how many people a firm has working on each case, which makes it easy to determine when and what kind of information requests will be a problem for the merging firms. The intent of most merging firms is to avoid such situations by developing good relations with the competition authorities from the outset of the PNCs. Once a cooperative reputation has been established, legal counsels then can more easily opt to make deals.

The final obstacle to the influence of merging firms is the EU's threat of fines. Due to their reliance on firms and third parties for information, the MTF has the credible authority to impose fines on firms providing incomplete or misleading information. Article 14 of the MCR provides for fines of EUR 1,000-50,000. In 1999, the Commission imposed the first fines on firms providing such information. These three fines were all imposed on merging firms, not third parties.⁵⁰ The Commission's determination to impose fines clearly reflects its reliance on firms for information and desire to limit inaccurate information, whether provided intentionally or negligently:

The relatively short time periods within which the Commission has to investigate notified operations and the fact that transactions are becoming increasingly complex make it essential for the achievement of a proper (p. 49) outcome that notifying parties provide the Commission with full and accurate information. By imposing these fines the Commission has emphasised the importance it attaches to compliance with these

⁵⁰ For a more detailed description of the fines and the four firms receiving them, see Commission (2000, 61-62).

requirements. It is also considering whether it may be appropriate to propose to the Council that the maximum amounts of fines should be increased (European Commission 2000, 49-50).

The Commission's consideration of proposing increases in the fines suggests a concern that the current amounts may not provide the necessary incentive for merging firms to provide accurate information.

In summary, the institutional structure of EU merger review creates significant avenues of influence for merging firms, especially in areas under the discretionary authority of the MTF. Due to information asymmetries, the MTF must rely heavily on the merging firms for the information needed to conduct a merger analysis. PNCs and oral hearings also are important ways for merging firms to increase their influence and increase their ability to make deals. These avenues of influence reflect the needs of both the MTF and the merging firms. These shared needs and the MTF's desire to speed up the review process suggest the possibility of regulatory capture. However, the institutional structure of the EU's merger review process creates significant obstacles to the influence of merging firms. The MTF's cross-checking of information may be a minor obstacle. However, due to the lack of an effective, timely judicial remedy, the desire to appear cooperative and the credible threat of fines, merging firms are more likely to compromise than if they were in a system absent such obstacles. This suggests that merging firm influence may be mitigated, but does not speak to the influence of third parties, which will be discussed in the next subsection.

C. *Third Parties*

The same extreme information asymmetries that require the EU to depend heavily on merging firms for information also require heavy reliance on third parties. As a potential source of influence, third parties are largely outside traditional explanatory frameworks of regulatory independence. However, they play an important role in the EU's merger review process. This subsection begins by identifying third parties. It continues with an investigation of the avenues of influence open to third parties by oral hearings, information asymmetries and market-testing. The subsection concludes by assessing the obstacles to the influence of third parties.

According to the Implementing Regulation on notifications, time limits and hearings,⁵¹ third parties are defined as “natural or legal persons showing a sufficient interest, including customers, suppliers and competitors, and especially members of the administration or management organs of the undertakings concerned or recognized workers’ representatives of those undertakings” (Article 11).⁵² These third parties can submit their views in writing, or, if appropriate, participate in the oral hearing. The determination between a written or oral submission of views is the discretion of the Commission (Article 16). Should merging firms waive their right to an oral hearing, third parties can still request that the Commission organize a hearing (Gilchrist 2000/2001, 6). When oral hearings are held, third parties are frequently active participants, allowed to make formal presentations and ask questions of the merging firms. Their role in the oral

⁵¹ Commission Regulation (EC) No 447/98, 1 March 1998, on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings.

⁵² While labor interests are invited to attend oral hearings, they typically play a small role due to the structure of the merger review process. For example, arguments that a merger should not be approved because it will eliminate jobs cannot be considered under the MCR. Indeed, such arguments are very rare in oral hearings because they do not speak to the central, statutory issue, the creation of a dominant position.

hearings and ability to request an oral hearing may not necessarily translate into influence for third parties. However, these options clearly open an avenue for potential influence by third parties at the oral hearings.

This potential for influence is increased due to the extreme information asymmetries in the merger review process. Concerns over this potential for influence are expressed because “competitors of merging firms are given plenty of opportunities to object to proposed deals, a process that has evolved into intense commercial lobbying as firms try to log objections whose resolution would directly benefit their own operation. Lawyers say that harassed task-force officials sometimes lift competitors’ objections directly into formal EC statements” (The Economist 2000, 73). This influential role of third parties is the direct result of the MTF’s reliance on them for information crucial to the merger analysis. As Venit and Kolasky argue,

The importance of the role played by competitors in the EU process is increased by two factors: the commission’s shortage of highly trained staff and particularly of skilled antitrust economists; and the adversarial nature of EU procedures, including the pivotal role played by the oral hearing, in which the notifying parties are confronted not merely by the commission’s challenges to its transaction but more important by the challenges (and the rebuttals of the notifying parties’ defenses) presented by competitors (2000, 88).

Even some within the Competition Directorate express a concern that the MTF relies too heavily on third parties for information, arguing that the MTF’s dependence arises from the pressure of strict timetables, limited resources and the new and complex nature of many merger issues, such as new markets in information and communication technologies.

For merging firms, the MTF’s reliance on third parties is often very problematic. The main criticism from merging firms is the MTF’s reliance on third parties to review

remedies that are proposed by the merging firms. Firms often will offer proposals for divestiture and other remedies in order to overcome MTF objections. One of the ways in which the MTF assesses these proposals is to engage in market-testing. As a discretionary system, market-testing is not mentioned in the MCR (Gilchrist 2000/2001, 3). When market-testing, the MTF will ask for comments from third parties who are relevant market players (i.e., third parties) on the proposed remedies. Even if the merging firms request that competitors not be allowed to have input on the proposed remedies, the MTF typically proceeds with the market-testing. Generally, the arrangement is accepted because merging firms would rather have a quick decision than a slow, well-considered one. The alternative for merging firms would be to have an independent consultant undertake the market-testing, which could add additional time to the review process. As currently structured, market testing by third parties is still governed by MCR's strict timetables.

For third parties, the market-testing system offers considerable influence. For competitive reasons, third parties are likely "to express dissatisfaction with whatever concessions are offered by the [merging] parties. The [merging] parties therefore are placed under great pressure to make that extra concession which it is hoped will lead to an acceptable compromise..." (Gilchrist 2000/2001, 3). Gilchrist continues: "It would be illogical to expect competitors to say that concessions offered by parties to a merger are sufficient or perhaps even too much" (2000/2001, 7).

The prospect of market-testing along with the MCR's tight timetables increase considerably the pressure on merging firms as they try to formulate remedies that might be acceptable. In addition, as Gilchrist, a former Hearing Officer argues, merging parties

consider themselves to be at a considerable disadvantage and under great pressure. It is considered to be up to them to make concessions. The Commission gives little or no precise guidance as to the degree of remedy it considers will be adequate to meet the serious doubts it has identified and expressed. This is in contrast to normal procedure in merger cases where it is up to the Commission to prove that the merger leads to the creation or strengthening its dominant position which could impede competition (2000/2001, 3).

Given these significant avenues of influence for third parties, are there any obstacles to their potential influence? Yes, three obstacles exist, but they appear limited. First, throughout the merger review process, the MTF does not rely exclusively on information from third parties. Because the MTF knows that competitors and suppliers may be biased, they cross-check third party information with that provided by merging firms (including Form CO) and publicly available sources. Nevertheless, as mentioned in the previous subsection, cross-checking information is not a perfect substitute for independent verification. Rather, it is a half-measure relied upon by resource-strapped case handlers.

The second obstacle to influence by third parties is the threat of fines by the Commission. Like merging firms, it is conceivable that third parties could be fined for providing incomplete or misleading information to the EU's competition authorities. However, these fines are less credible than those threatened against merging firms. The reason is simple: third parties have never been fined for providing misleading or incomplete information. It is unclear how high such fines might be for third parties. Whether or not they would hit the maximum (EUR 50,000) fine provided for in the MCR would likely depend on whether the incomplete or misleading information was supplied intentionally or negligently.

A final obstacle to influence from third parties is the desire to develop a positive, cooperative reputation with the competition authorities. Third parties desire this type of reputation because, in the future, they may propose a merger and be reviewed by the same authorities under the MCR. Thus, many want to avoid the impression of being uncooperative or dishonest. While the desire to be perceived as a good cooperator is strong for third parties, it is less an obstacle to them than to merging firms. This is so for three reasons. First, third parties are less at the whim of the competition authorities because they are not seeking approval of a major business decision (i.e., a merger). Second, third parties generally have less intensive contact with competition authorities (whether on an immediate case or in a future merger case) and, thus, less chance to offend the sensibilities of the MTF case handlers. Third, competition authorities are likely to associate their interests with those of third parties. Third parties can develop an image as a good cooperator by providing the competition authorities with useful and exacting information that effectively indicts the merging firms—exactly what the third parties want and a constructive contribution from the authorities' point of view. It is useful to point out again that such a sharing of interests between the competition authorities and the third parties is associated with the notion of regulatory capture.

While formal procedures create avenues for business influence, the obstacles to that influence appear greater for merging firms than third parties. Because of the time-sensitivity of mergers, merging firms have no real opportunity to appeal decisions and, therefore, face great pressure to compromise. While third party competitors have interests against providing false information, they can still influence the resource-strapped MTF because the competition authorities are so dependent on them for information. The

avenues of influence for third parties allow a significant presence in the EU's merger review process, including participation in oral hearings and the ability to review proposed remedies before they are accepted by the Commission. Such avenues of influence demand greater attention be paid to the influence of third parties in the EU merger review process.

V. CONCLUSIONS

The current study investigates the potential influences on EU regulatory independence in merger review. Regulatory independence is deserving of detailed analysis because it is an important explanatory variable of regulatory outputs. The study is not intended to challenge the economic analysis employed in individual merger cases. And the current findings are specific to competition policy, in particular merger review. Further research is required to determine whether the conclusions hold in other policy areas. The central research question of the current study is "What are the sources of influence on EU merger review and what accounts for their relative influence?" The short answer to this question appears to be 1) Member States, merging firms and third parties and 2) institutional structures of EU merger review.

The institutional structures of the EU's merger review process determine the comparative influence of the central actors, creating important avenues for and obstacles to political control and regulatory capture. As a result, the current study finds that Member States are less influential than merging firms, decreasing the capacity for political control and raising the possibility of regulatory capture. The institutional relationship between the EU and the Member States is clearly tilted in favor of the Union,

especially when compared to the more discretionary and informationally asymmetric relationship between competition authorities and firms.

The theoretical literature on regulatory independence focuses on the possible influence of political principals (i.e., Member States) and the targets of merger review (i.e., merging firms). However, the literature does not directly anticipate the possible influence of third parties—mostly competitors and suppliers. This study gains an analytical insight by differentiating between the firms that are trying to acquire regulatory approval and those that are trying to prevent or otherwise influence the regulatory process to their advantage (i.e., third parties). The potential for influence by third parties appears to be increased by the institutional structure of the EU merger review process. This influence may prevent traditional regulatory capture by the merging firms but raises the possibility of capture by different firms. While third parties may expand the resources of the MTF by providing additional information, they also can cause non-traditional and unanticipated problems of regulatory capture: the resulting decisions and remedies in a given merger case may largely reflect the narrow interests of relevant third parties. Such a situation could reduce the independence and possibly the credibility of the EU's merger review regime.

The evidence presented suggests that the control instruments available to Member States allow for only limited influence while merging firms, and especially third parties, enjoy considerable avenues for influence. Table 5 summarizes the avenues for and obstacles to influence in the EU's merger review process.

TABLE 5: Influence Avenues and Obstacles in EU Merger Review

	Member States	Merging Firms	Third Parties
Influence Avenues	<ul style="list-style-type: none"> • Appeal to legitimate interests; • Right to request referrals of individual merger cases; • Attendance at oral hearings; • ACC; • College of the Commission. 	<ul style="list-style-type: none"> • Information asymmetries; • PNCs; • Oral hearings. 	<ul style="list-style-type: none"> • Information asymmetries; • Oral hearings; • Market-testing.
Influence Obstacles	<ul style="list-style-type: none"> • Lack of appeal to ‘legitimate interests’ because of MCR’s success/general acceptance; • Requests for referrals are infrequent and decided by Commission; • Member States can only ask questions at oral hearings; • ACC opinions are non-binding and rarely challenge MTF draft decisions; • 95 percent of mergers are approved without going to full College; • Majority decision rule and tight deadlines make it difficult to lobby those cases going to the full College; • MTF case handlers are relatively insulated from Member State contact. 	<ul style="list-style-type: none"> • Cross-checking information; • No effective, timely judicial review; • Desire to appear cooperative; • Credible threat of fines. 	<ul style="list-style-type: none"> • Cross-checking information; • Threat of fines; • Desire to appear cooperative.

While investigating the sources of influence on the EU merger review regime, it is useful to focus on activity that occurs under the discretionary authority of competition authorities. As discretion increases, political control by principals decreases and the possibility of regulatory capture by firms increases. The same institutional structure that limits the influence of principals provides considerable regulatory autonomy for the agents, who have significantly increased their discretionary authority (via implementing regulations). This increase in discretionary authority further isolates the principals, but increases the potential for influence by the targets of the regulation—merging firms—on

whom the resource-strapped agents must rely for information. However, regulatory capture may be avoided because institutional obstacles place considerable pressure on the merging firms to compromise. Nevertheless, regulatory capture still may occur due to the MTF's discretionary use of third parties to overcome information asymmetries. This potential for regulatory capture by third parties faces few realistic obstacles to influence.

In summary, the institutional structure of the EU merger review regime, which creates extreme information asymmetries, suggests that regulatory capture is a more likely threat to regulatory independence than political control. In fact, the potential for political control may be so limited that it could undermine the EU's accountability and, thus, credibility. Regarding regulatory capture, on a case-by-case basis, business influence is more likely from third parties than the merging firms. While merging firms have considerable avenues open to them for influence, significant obstacles also stand in their way. On the other hand, third parties enjoy considerable avenues for and few obstacles to exercising their influence. This situation could raise problems for EU merger review in the future. As firms increase their lobbying efforts at the supranational level, the regulatory capture of EU competition authorities may become more likely. In addition, the perception of the EU as susceptible to regulatory capture may increase the likelihood that national governments will seek to reacquire competition authority previously delegated to the Union.

If these conclusions are correct, competition authorities may require additional resources in order to ensure sufficient time and personnel to independently verify information collected from merging firms and third parties. While the principals may wish to limit the resources available to the agents as a way of budgetarily controlling

them, the current study suggests that this limitation and the institutional structure of the EU merger review process have increased the regulatory autonomy of the agent (via discretionary expansion) and its dependence on merging firms and third parties for information. Sufficient resource increases in the MTF would reduce concerns over the possible limitations of information cross-checking and reduce the likelihood of regulatory capture by merging firms and third parties. As the EU acquires greater authority over other policy areas managing the SEM, the lessons learned in merger review may prove instructive, if not crucial, to the long-term accountability and credibility of the Union.

REFERENCES

- Calvert, Randall, Mathew McCubbins, and Barry Weingast (1989), "A Theory of Political Control and Agency Discretion," *American Journal of Political Science* 33, 3: 588-611.
- Cini, Michelle, and Lee McGowan (1998), *Competition Policy in the European Union*, New York: St. Martin's Press.
- Coen, David (1997), "The Evolution of the Large Firm as a Political Actor in the European Union," *Journal of European Public Policy* 4, 1: 91-108.
- Damro, Chad (2001), "Building an International Identity: The EU and Extraterritorial Competition Policy," *Journal of European Public Policy* 8, 2 (April): 208-226.
- Doern, G. Bruce (1995), "A Political-Institutional Framework for the Analysis of Competition Policy Institutions," *Governance* 8, 2 (April): 195-217.
- Drauz, Götz (1998), "Introduction," *Merger Control Law in the European Union: Situation in March 1998*, Luxembourg: Office for Official Publications of the European Communities.
- The Economist* (2000), "Europe's Merger Morass," 356 (September 23): 73-74.
- Egan, Michelle P. (2001), *Constructing a European Market: Standards, Regulations, and Governance*, New York: Oxford University Press.
- Egan, Michelle (1998), "Regulatory Strategies, Delegation and European Market Integration," *Journal of European Public Policy* 5, 3: 485-506.
- European Commission (2000), *29th Report on Competition Policy*, Luxembourg: Office for Official Publications of the European Communities.
- European Commission (1999), *28th Report on Competition Policy*, Luxembourg: Office for Official Publications of the European Communities.
- European Commission (1998), *Merger Control Law in the European Union: Situation in March 1998*, Luxembourg: Office for Official Publications of the European Communities.
- Gatsios, K. and Seabright, P. (1989), "Regulation in the European Community," *Oxford Review of Economic Policy* 5, 2: 37-60.
- Gilchrist, Joseph (2000/2001), "Rights of Defence and the Role of the Hearing Officer in Merger Cases," *Global Competition Review* (December/January): 1-12.

Green Cowles, Maria (1995), "Setting the Agenda for a New Europe: The ERT and EC 1992," *Journal of Common Market Studies* 33, 4: 501-526.

Heritier, Adrienne, Christoph Knill, and Susanne Mingers (1996), *Ringing the Changes in Europe: Regulatory Competition and Redefinition of the State. Britain, France and Germany*, Berlin: Walter de Gruyter.

Johannes, Hartmut (2000), "Strengthening the Role of the Hearing Officer," Testimony before the United Kingdom House of Lords Select Committee on the European Union, 19th Report, HL Paper 125, London: The Stationery Office.

Johannes, Hartmut (1990), "The Role of the Hearing Officer," *Annual Proceedings of the Fordam Corporate Law Institute*, 347-382, Ardsley-on-Hudson, New York: Transnational Juris Publications, Inc.

Majone, Giandomenico (2001), "Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance," *European Union Politics* 2, 1 (February): 103-122.

Majone, Giandomenico (2000), "The Credibility Crisis of Community Regulation," *Journal of Common Market Studies* 38, 2 (June): 273-302.

Majone, Giandomenico (1996), "A European Regulatory State?" in *European Union Power and Policy-Making*, Jeremy Richardson, ed., 263-277. London: Routledge.

Majone, Giandomenico (1996a), *Regulating Europe*, London: Routledge.

Majone, Giandomenico (1996b), "Theories of Regulation," in *Regulating Europe*, G. Majone, ed., 28-46. London: Routledge.

Mazey, Sonia, and Jeremy Richardson (1997), "Policy Framing: Interest Groups and the Lead up to 1996 Inter-governmental Conference," *West European Politics* 20, 3 (July): 111-134.

McCubbins, Mathew, and Thomas Schwartz (1984), "Congressional Oversight Overlooked: Police Patrols versus Fire Alarms," *American Journal of Political Science* 28: 165-179.

McGowan, Lee, and Michelle Cini (1999), "Discretion and Politicization in EU Competition Policy: The Case of Merger Control." *Governance* 12 (April), 175-200.

Moe, Terry (1984), "The New Economics of Organization," *American Journal of Political Science* 28: 739-777.

Neven, Damien, Robin Nuttall and Paul Seabright (1993), *Merger in Daylight: The Economics and Politics of European Merger Control*. London: Centre for Economic Policy Research.

Nicolaides, Phedon (1994), "The Role of Competition Policy in Economic Integration," in *The Competition Policy of the European Community*, Phedon Nicolaides and Arianne van der Klugt, eds., 9-17. Maastricht, The Netherlands: European Institute of Public Administration.

Noll, Roger, ed. (1985), *Regulatory Policy and the Social Sciences*, Berkeley, CA: University of California Press.

Noll, Roger (1980), "What Is Regulation?" Social Science Working Paper Number 324. Pasadena: California Institute of Technology.

O'Keefe, Siun (1994), "Merger Regulation Thresholds: An Analysis of the Community-dimension Thresholds in Regulation 4064/89." *European Competition Law Review* 1: 21-31.

Olson, Mancur (1971), *The Logic of Collective Action: Public Goods and the Theory of Groups*, Cambridge, MA: Harvard University Press.

Pollack, Mark A. (1997), "Delegation, Agency, and Agenda Setting in the European Community," *International Organization* 51, 1 (Winter): 99-134.

Stewart, Richard B. (1975), "The Reformation of American Administrative Law," *Harvard Law Review* 88: 1669-813.

Stigler, George J. (1971), "The Theory of Economic Regulation," *Bell Journal of Economics and Management Science* 2 (Spring): 3-21.

Venit, James S., and William J. Kolasky (2000), "Substantive Convergence and Procedural Dissonance in Merger Review," in *Antitrust Goes Global: What Future for Transatlantic Cooperation?*, Simon J. Evenett, Alexander Lehmann, and Benn Steil, eds., 79-97. Washington, DC: Brookings Institution Press.

Viscusi, Kip W., John M. Vernon, and Joseph E. Harrington, Jr. (1996), *Economics of Regulation and Antitrust*, 2nd edition, Cambridge, MA: The MIT Press.

Weingast, Barry R., and Mark J. Moran (1983), "Bureaucratic Discretion or Congressional Control: Regulatory Policymaking by the Federal Trade Commission," *Journal of Political Economy* 91: 765-800.

Wilks, Stephen, with Lee McGowan (1996), "Competition Policy in the European Union: Creating a Federal Agency?" In *Comparative Competition Policy: National Institutions*

in a Global Market, ed. G. Bruce Doern and Stephen Wilks, 225-267. Oxford: Clarendon Press.

Wilson, James Q. (1974), "The Politics of Regulation," in James W. McKie, ed., *Social Responsibility and the Business Predicament*, 135-168. Washington, DC: The Brookings Institution.