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# The Canadian Middle Road: Balancing Efficiency and Sovereignty in the Age of Multijurisdictional Merger Review

Ryan Marth\*

## INTRODUCTION

When the European Commission (Commission) announced its decision to block General Electric's (GE) acquisition of Honeywell International Inc. (Honeywell), accusations of protectionism flew from politicians and the popular press.<sup>1</sup> Senator Jay Rockefeller, chair of the Senate aviation subcommittee, indicated that the European Union (EU)<sup>2</sup> could face trade retaliations for its actions.<sup>3</sup> Others, especially business leaders, lamented that the European and U.S. approaches to merger control were hopelessly irreconcilable.<sup>4</sup> They feared that the diverging views of the United States and EU would impose exorbitant costs on corporations by forcing them to comply with two

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\* J.D. Candidate, 2003, University of Minnesota Law School; B.A. *magna cum laude*, 1999, St. Olaf College; Fulbright Scholar, 1999-2000, University of Oslo; Clerk to the Honorable Helen Meyer, Minnesota Supreme Court, 2003-2004 Term. The author would like to dedicate this article to his parents, Herb and Nancy Marth, and to his grandmother, Dorothy Dorr.

1. See Editorial, *Europe to GE: Go Home*, WALL ST. J., June 15, 2001, at A14; Andrew Hill & Kevin Done, *Going Home, Alone*, FIN. TIMES, June 18, 2001, at 18; *Merger Muddle: Transatlantic Antitrust Troubles: The EU is Entitled to Veto the GE/Honeywell Merger - But its Procedures Need Improvement*, ECONOMIST, June 23, 2001, at 11; Brandon Mitchener & Matt Murray, *EU's Monti Stands Firm on GE Deal: Commissioner Rejects Claims that Review Was Politically Tainted*, WALL ST. J., June 27, 2001, at A8.

2. Although the terms are sometimes used interchangeably, this Note refers to the political unit of the European Member states as the European Union and refers to the law governing economic relations within the EU as European Community (EC) law.

3. Mitchener & Murray, *supra* note 1.

4. Brian M. Carney, *Blame the EU's Antitrust Rules-Not Monti*, WALL ST. J., July 6, 2001, at A8; Anita Raghaven & Bob Davis, *Uncle Sam and Mr. Monti: Tale of Two Trustbusters*, WALL ST. J., June 15, 2001, at A11; *Trans-Atlantic Differences Hurt GE Deal*, O'Neil Says, WALL ST. J., July 6, 2001, at A2.

distinct sets of competition regulations.<sup>5</sup>

Contrary to the views of these skeptics, however, U.S. and European Community (EC)<sup>6</sup> merger regulations are converging in substance.<sup>7</sup> Transatlantic treaties and increased contacts between competition officials in the United States and the EU have led their respective agencies to agree on methods of analyzing particular mergers. This consensus among enforcement officials on methods of analysis has fostered agreement on the results of most investigations.<sup>8</sup> Officials from the Directorate General for Competition (DG-IV), the antitrust arm of the Commission, consult regularly with their counterparts at the Federal Trade Commission (FTC) and the Department of Justice (DOJ).<sup>9</sup> These agencies entered into two bilateral antitrust enforcement agreements in the 1990's, covering the extraterritorial reach of each jurisdiction's competition laws and the investigative techniques employed by their enforcement agencies.<sup>10</sup> The few differences in policy that remain reflect the different historical backgrounds of the two competition regimes rather than a fundamental disagreement over merger enforcement policy.<sup>11</sup>

This Note will focus on those instances when the enforcement bodies have disagreed and will suggest reforms in the Commission's merger review procedure that will decrease the likelihood of discord in future transactions. Part I will present the history that forms the basis of current European and U.S.

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5. See Brandon Mitchener, *Can Globalization Include Regulators?*, WALL ST. J., June 25, 2001, at A12.

6. See *supra* note 2 for an explanation of the Note's use of EC and EU.

7. See Thomas E. Kauper, *Merger Control in the United States and the European Union: Some Observations*, 74 ST. JOHN'S L. REV. 305, 312-13 (2000).

8. See Debra A. Valentine, *Jurisdiction and Enforcement: Building a Cooperative Framework for Oversight in Mergers—The Answer to Extraterritorial Issues in Merger Review*, 6 GEO. MASON L. REV. 525, 530-31 (1998); John R. Wilke, *US Antitrust Chief Criticizes EU Decision to Reject Merger of GE and Honeywell*, WALL ST. J., July 5, 2001, at A3 (quoting Charles James, head of the DOJ's Antitrust Division that "there were extensive consultations in the matter throughout the entire process [of investigating the GE-Honeywell merger]").

9. Valentine, *supra* note 8, at 530-31.

10. The United States and the EU entered into an agreement in 1991 which aided each agency in procuring information from its transatlantic partner and clarified notions of positive comity between the two jurisdictions. Agreement on the Application of their Competition Laws, Sept. 23, 1991, U.S.-EC, 30 I.L.M. 1487. This treaty was amended and strengthened to its current form in 1997. Agreement between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of their Competition Laws, June 4, 1998, U.S.-EC, 37 I.L.M. 1070.

11. See Kauper, *supra* note 7, at 310-13.

antitrust regulations. Part II will contrast the U.S. analysis of merger review with the Commission's and explain how the two frameworks have generally led to similar results. This section will argue that the Commission's theories predict competitive harm that will not materialize in the short run and are therefore too speculative to form the basis for blocking proposed mergers. After presenting some of the reforms that commentators have suggested, Part III will suggest that the adoption of a Canadian-style post-merger review would allow the Commission to address antitrust concerns without restraining global efficiency and would also bring EU analysis more in line with U.S. analysis. Throughout the analysis, the Note will emphasize the goals of efficiency maximization and protection of the Commission's right to safeguard its own consumers.

## I. THE CURRENT DEBATE OVER MULTIJURISDICTIONAL MERGER ENFORCEMENT

When the Commission vetoed the GE-Honeywell deal, the judgment spawned a rash of criticism that merger review by multiple jurisdictions was costly to multinational business transactions.<sup>12</sup> The business community was mainly concerned with the heavy costs of compliance with the regulations of numerous countries.<sup>13</sup> Jack Welch, GE's high-profile CEO, expressed dissatisfaction with the fact that the U.S. clearance his company secured for the acquisition was meaningless in the face of the Commission's action.<sup>14</sup> The concerns of Mr. Welch and the parties to this transaction reflect the worries of many: that multijurisdictional scrutiny of mergers imposes excessive costs on business.<sup>15</sup> These excessive costs take the form of high compliance costs and uncertainty.<sup>16</sup>

Ideally, merging multinational companies should be forced to submit to review before only one body. This would reduce the

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12. See *Europe to GE: Go Home*, *supra* note 1; George Mellon, *GE—Honeywell Exposes Flaws in Antitrust Policy: Global View*, WALL ST. J., June 26, 2001, at A23.

13. See William J. Kolasky & Leon B. Greenfield, *A View to Kill: The Lost GE/Honeywell Deal Reveals a Trans-Atlantic Clash of Essentials*, LEGAL TIMES, July 30, 2001, at 28-29; Mitchener, *supra* note 5, at A12.

14. Mellon, *supra* note 12; Deborah Hargreaves & Peter Spiegel, *Oceans Apart on Competition Policy: Brussels' Objections to the GE-Honeywell Deal Have Done Little to Ease US-EU Relations*, FIN. TIMES, June 15, 2001, at 17.

15. See Eleanor M. Fox, *Harmonization of Law and Procedures in a Globalized World: Why, What and How?*, 60 ANTITRUST L.J. 593, 594 (1991).

16. See *id.*

costs inherent in filing for approval, producing the necessary documents, and maintaining contact with regulators, which would result in savings for consumers.<sup>17</sup> The potential efficiencies that lie within an integrated system of merger review has prompted business leaders to lobby government officials in various jurisdictions for increased cooperation in the area of antitrust enforcement.<sup>18</sup> Antitrust scholars generally agree that mergers that increase such “productive efficiency”<sup>19</sup> should be encouraged because such efficiencies increase “allocative efficiency,”<sup>20</sup> thereby distributing greater resources and wealth to consumers.

Greater convergence among national antitrust policies would also increase certainty in international business transactions.<sup>21</sup> While companies undoubtedly prefer lenient standards, their primary concern is that regulations be applied in a predictable fashion.<sup>22</sup> If firms know how antitrust regulators will react to a particular transaction, they will be able to internalize the costs associated with merger analysis into their business decisions.<sup>23</sup> Accordingly, predictability encourages firms to enter into decisions that they otherwise would not have attempted, due to high regulatory costs.<sup>24</sup>

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17. See Mellon, *supra* note 12.

18. See Mitchener, *supra* note 5.

19. Productive efficiency refers to the effective use of resources by firms. ROBERT H. BORK, *THE ANTITRUST PARADOX* 91 (1978). “Economies of scale such as specialization of function, ability to obtain capital, [and] management skill” are some factors that influence productive efficiency. *Id.* at 105.

20. Allocative efficiency is attained when resources are placed where consumers value them most. *Id.* at 91.

21. Kolasky & Greenfield, *supra* note 13, at 29; Calvin S. Goldman & John D. Bodrug, *The Merger Review Process: The Canadian Experience*, 65 *ANTITRUST L.J.* 573, 573-74 (1997).

22. Kolasky & Greenfield, *supra* note 13, at 29.

23. Goldman & Bodrug, *supra* note 21, at 573-74. The GE-Honeywell deal, for example, was expected to produce \$1.5 billion in synergies. *A Memorable Encore: General Electric: GE's Bid for Honeywell is a Dramatic Finale to Jack Welch's Brilliant Career. Fittingly, It is Also a Risky One.*, *ECONOMIST*, Oct. 28, 2000, at 59.

24. Goldman & Bodrug, *supra* note 21, at 573-74.

## II. DEVELOPMENT OF U.S. AND EC MERGER REGULATIONS

### A. HOW IT ALL BEGAN: THE HISTORICAL PROGRESSION OF U.S. AND EC REGULATIONS

#### 1. U.S. Merger Regulations

The current emphasis on efficiency in merger review is relatively new.<sup>25</sup> Congress enacted § 7 of the Clayton Act during the progressive era, intending to prevent the accumulation of wealth and political power.<sup>26</sup> By doing so, Congress outlawed all mergers that could “substantially . . . lessen competition.”<sup>27</sup> Contrary to the intent of Congress, however, the Supreme Court applied § 7 only to stock purchases and analyzed asset acquisitions under the Sherman Act and the “Rule of Reason.”<sup>28</sup> By structuring transactions as asset acquisitions, firms could easily avoid antitrust scrutiny.<sup>29</sup>

The Court’s decision in *United States v. Columbia Steel Co.* finally drew the attention of Congress to the Supreme Court’s interpretation of § 7.<sup>30</sup> Congress responded by passing the Celler-Kefauver amendments to the Clayton Act.<sup>31</sup> These amendments, as interpreted by the Warren Court, allowed lower courts to enjoin mergers with a showing of a “reasonable probability” of

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25. See E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 390 (3d ed. 1998).

26. See *id.* at 353.

27. 15 U.S.C. § 18 (2002).

28. The Rule of Reason was first articulated in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), and requires that the court examine harm to the public resulting from the entire practice in question to determine whether or not it violates the antitrust laws. *Id.* at 78. This contrasts with other anticompetitive conduct, such as horizontal minimum price fixing and market division, which the Court has held to be *per se* illegal. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 210-18 (1940) (discussing horizontal minimum price fixing); *United States v. Sealy Co.*, 388 U.S. 350, 356-57 (1967) (discussing horizontal market division).

29. See SULLIVAN & HARRISON, *supra* note 25, at 355.

30. See *id.* at 353. In *United States v. Columbia Steel*, 334 U.S. 495 (1948), the Court declared legal a merger that allowed a firm to gain nearly a one-quarter share of the national market for steel production because it felt that the market conditions prevented anticompetitive effects. *Id.* at 526-31.

31. Celler-Kefauver Anti-Merger Act of 1950, Pub. L. No. 81-899, 64 Stat. 1125 (codified as 15 U.S.C. §§ 18, 21 (2002)); SULLIVAN & HARRISON, *supra* note 25, at 353-54.

anticompetitive effects.<sup>32</sup> With a series of decisions including *Brown Shoe* and *Von's Grocery*, the Court blocked mergers that created minimal market concentration.<sup>33</sup> The Court, in these and other decisions, emphasized its intention to preserve the presence of small business in the economy.<sup>34</sup> Even at the peak of hostility towards mergers, however, the Court stressed that the antitrust laws were intended to protect "competition, not competitors, and . . . to restrain mergers only to the extent that such combinations may tend to lessen competition."<sup>35</sup>

At that time, divestiture was the only remedy available to courts when transactions violated § 7 of the Clayton Act.<sup>36</sup> Because divestiture was a time-consuming remedy and imposed disproportionately high costs on violating companies, Congress introduced pre-merger screening through the Hart-Scott-Rodino Antitrust Improvements Act.<sup>37</sup> This Act requires that companies request clearance from the FTC or DOJ for all mergers and acquisitions that meet certain thresholds.<sup>38</sup> The agencies are then authorized to seek preliminary injunctions against those mergers with a "substantial likelihood to lessen competition."<sup>39</sup> Courts will grant a preliminary injunction if the agencies demonstrate that they are likely to succeed on the merits of the case in a full administrative proceeding.<sup>40</sup> The Act, therefore, vested power in the agencies to evaluate the competitive effects of mergers before they were consummated and established independent judicial review of those decisions.

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32. 15 U.S.C. § 18 (2002); *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 626 (1957). *Du Pont* was the first case to address the amended Clayton Act and held that a merger was illegal if it had a reasonable probability of foreclosing competition at the time it was commenced. This did not require the government to show actual competitive harm. *E.I. du Pont de Nemours & Co.*, *supra*, at 626.

33. *Brown Shoe v. United States*, 370 U.S. 294 (1963); *United States v. Von's Grocery Co.*, 384 U.S. 270, 302 (1966).

34. *See Brown Shoe*, 370 U.S. at 314-16.

35. *Id.* at 320.

36. Kauper, *supra* note 7, at 310 n.29.

37. *Id.*; STEPHEN M. AXINN, ET. AL., ACQUISITIONS UNDER THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT § 1.04, at 1-23 (5th ed. 1993).

38. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435 (codified as 15 U.S.C. § 18A (2002)).

39. *Id.* The Act requires that a company receive clearance from the agencies if, *inter alia*, it is acquiring assets of another company in excess of \$15,000,000. The threshold has recently been increased to \$50,000,000. Pub. L. 106-553, § 1(a)(2) (2000).

40. *See, e.g.*, *Fed. Trade Comm'n v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 45 (D.D.C. 1998); *Fed. Trade Comm'n v. Staples, Inc.*, 970 F. Supp 1066, 1070-71 (D.D.C. 1997). In order to issue an injunction, a court does not have to determine that a merger would violate the antitrust laws. *Id.*

The agencies also made a significant contribution to merger enforcement in 1984 with the FTC and DOJ Horizontal Merger Guidelines (Guidelines), a roadmap intended to provide transparency and uniformity to merger enforcement procedures.<sup>41</sup> By adopting the Guidelines, the agencies acknowledged that mergers have potential competitive benefits. The agencies also sought to eliminate the uncertainties that stymied companies' willingness to merge.<sup>42</sup> Commentators generally approved of the Guidelines and courts largely adopted the agencies' methodology in preliminary injunction actions.<sup>43</sup> When the agencies revised the Guidelines in 1997, they granted the wish of Chicago School economists by making available an "efficiencies defense" to companies that claim their mergers create synergies in excess of the transaction's anticompetitive effects.<sup>44</sup> This evolution resulted in a U.S. antitrust policy that encourages companies to improve their competitiveness by merging and creating cost synergies.<sup>45</sup>

## 2. European Community Merger Regulations

In the early days of European integration, competition policy was a single brick in a larger scheme of market integration.<sup>46</sup> Competition policy helped drive the formation of the common market, which arose out of the Coal and Steel Community of the 1950's.<sup>47</sup> Even after the formation of the EU and the completion of the common market, economic integration continued as a goal

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41. U.S. DEPT OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1997) (hereinafter GUIDELINES). The Guidelines were originally adopted in 1984 and revised in 1992 and 1997 to give increased weight to efficiencies analysis. Eric J. Stock, *Explaining the Differing U.S. and EU Positions on the Boeing/McDonnell-Douglas Merger: Avoiding Another Near-Miss*, 20 U. PA. J. INT'L ECON L. 825, 827-28 n.10. This Note will refer to the 1997 version.

42. See SULLIVAN & HARRISON, *supra* note 25, at 382.

43. See, e.g., *Cardinal Health*, 12 F. Supp. at 53; *Fed. Trade Comm'n v. Univ. Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991).

44. GUIDELINES, *supra* note 41, § 4.0.

45. See, e.g., LEXICON, *THE ECONOMICS OF GE-HONEYWELL* (2001); Kolasky & Greenfield, *supra* note 13, at 29.

46. Article 2 of the Treaty of Amsterdam states the European Union shall establish the common market to promote values such as high levels of employment, sustainable development, non-inflationary economic growth, environmental protection, and a high standard of living. Treaty Establishing the European Community, Nov. 10, 1997, O.J. (C 340) 3 (1997), art. 2 [hereinafter EC Treaty]. Article 3 names "a system ensuring that competition in the internal market is not distorted," as a means to bring about the goals set forth in Article 2. *Id.* at art. 3; see also Julian Maitland-Walker, *Chapter 1: European Community*, in *COMPETITION LAWS OF EUROPE 3* (Julian Maitland-Walker ed., 1995).

47. See Maitland-Walker, *supra* note 46, at 3.



of European competition policy.<sup>48</sup> This is an important distinction from the United States, where the commerce clause laid the foundation for a national economic unit independent of the anti-trust laws.<sup>49</sup>

The European counterpart to the Sherman and Clayton Acts came into force with the Treaty of Rome of 1957. Articles 81 and 82 (formerly Articles 85 and 86, respectively) of the treaty set forth the European Community's competition policy.<sup>50</sup> Article 81 prohibits many of the acts which are considered *per se* illegal in the United States, such as price fixing, market division, and price discrimination.<sup>51</sup> Article 82 is worded more broadly and prohibits any "abuse by one or more undertakings of a dominant position."<sup>52</sup> This language served as the basis for European Court of Justice (E.C.J.) decisions holding that a dominant firm abuses its position by acquiring another firm in the same market.<sup>53</sup> In the late 1980's, the E.C.J. expanded on this decision by holding that Article 85 (now Article 81) could prohibit a merger even between two non-dominant firms.<sup>54</sup>

These decisions prompted the Council of Ministers to adopt the comprehensive Merger Regulation of 1989.<sup>55</sup> The Merger Regulation borrows language from Article 82 and forbids any merger that "creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it."<sup>56</sup>

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48. *Id.*

49. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537-38 (1949); Valentine, *supra* note 8, at 528.

50. Treaty Establishing the European Economic Community, Mar. 25, 1957, arts. 85-86, 298 U.N.T.S. 11 [hereinafter EEC Treaty]. The Treaty of Amsterdam integrated these provisions into the current agreement. EC Treaty, *supra* note 46, at arts. 81-82.

51. EC Treaty, *supra* note 46, at arts. 81-82; see discussion of *per se* illegality and the rule of reason, *supra* note 28. The article outlaws, price fixing, output restrictions, and price discrimination. EEC Treaty, *supra* note 50, at art. 81(a), (b), (d).

52. EC Treaty, *supra* note 46, at art. 82.

53. *Europernballage Corp. and Continental Can v. Comm'n: 6/72 [1973] E.C.R. 215*; see also Maitland-Walker, *supra* note 46, at 24.

54. *BAT & Reynolds v. Comm'n: 142, 156/84 [1987] E.C.R. 4487*; see also Maitland-Walker, *supra* note 46, at 24.

55. Council Regulation 4064/89 of 21 December 1989 on the Control of Concentrations between Undertakings, 1990 O.J. (L 257) [hereinafter Merger Regulation]; see also Maitland-Walker, *supra* note 46, at 24-25.

56. Merger Regulation, *supra* note 55, at art. 2(3). As is the case in the United States, a Commission investigation of dominance begins with an inquiry into the relevant product and geographic markets. VALENTINE KORAH, EC COMPETITION LAW AND PRACTICE §§ 3.2.2-3.3.3, at 110 (6th ed. 1997). Thereafter, in *United Brands*, the E.C.J. defined dominance as "a position of economic strength enjoyed by an under-

The Merger Regulation resembles U.S. regulations in three ways. First, similar to the Hart-Scott-Rodino reforms undertaken by Congress, the EC regulation requires pre-merger notification and approval by the Commission for all transactions that meet certain "turnover" thresholds.<sup>57</sup> Second, the EC law imposes jurisdictional limits that restrict the application to transactions "with a community dimension."<sup>58</sup> Third, the creation of the Merger Task Force, an executive body within DG-IV specifically empowered to enforce the Merger Regulation, demonstrates another parallel between the European and U.S. provisions.<sup>59</sup>

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taking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers." *United Brands*, 1976 O.J. (L 95/1); *on appeal* Case 27/76 *United Brands v. Comm'n*, 1978 E.C.R. 207. This is basically similar to the U.S. view of monopoly power. See *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427 (2d Cir. 1945).

57. Merger Regulation, *supra* note 55, at art. 4(1). Article 5 lays out a complicated calculation formula for "turnover." It will suffice for purposes of this article, however, to define turnover as "the total sum derived by the [merging parties] in the preceding financial year from the sale of products and the provision of services . . . after the deduction of sales rebates and VAT, and other taxes directly related to turnover." RICCARDO CELLI & LOUIS MILLS, *EC Merger Control, in CORPORATE ACQUISITIONS AND MERGERS, EUROPEAN UNION 11* (Peter F.C. Begg & Jason Haines eds., 1999).

58. Merger Regulation, *supra* note 55, at art. 1(1). Mergers are deemed to have a "community dimension" when the aggregate worldwide turnover exceeds five billion euros, and the Community-wide turnover exceeds 250 million euros, unless two-thirds of the parties' Community-wide turnover falls within any single member state. *Id.* at art. 1(2). To provide greater uniformity in relation to enforcement by the individual member states, the Council of Ministers added the following alternative means by which a merger can attain a community dimension:

- (a) the combined aggregate worldwide turnover of the undertakings concerned is more than 2.5 billion euros; and
- (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than 100 million euros; and
- (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than 25 million euros; and
- (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than 100 million euros;

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

Council Regulation 1310/97, 1997 O.J. (L 180/1). This resembles the regulation of the Sherman and Clayton Acts of commerce "among the several states or with foreign nations." 15 U.S.C. §§ 1, 12 (2002).

59. Maitland-Walker, *supra* note 46, at 24-25.

In 1997, the EU also adopted its own Market Definition Guidelines, which resemble the U.S. Guidelines to a remarkable degree.<sup>60</sup> The Commission sought to provide transparency and consistency to merger review and to encourage procompetitive mergers.<sup>61</sup> In this way, the Commission pursued goals that resemble those of the U.S. enforcing agencies.<sup>62</sup>

### 3. *Positive Comity: The Crossroads of U.S. and EC Competition Policy*

An important convergence in the histories of U.S. and EU antitrust policy resulted from the Agreement on Positive Comity.<sup>63</sup> The U.S. and EU enforcement agencies entered into the agreement because they foresaw that extraterritorial application of merger review could lead to transatlantic friction.<sup>64</sup> This treaty signaled a compromise in that each party recognized the right of the other to apply its antitrust laws to extraterritorial transactions, but agreed not to exercise jurisdiction in cases in which the other party clearly had a stronger interest.<sup>65</sup> The Agreement on Positive Comity is significant for market definition because it allows the agencies to share information to establish relevant antitrust markets.<sup>66</sup> The agreement has been largely successful, both as a culmination of a long cooperative process between agencies and as a basis for further contacts and consultations.<sup>67</sup> Even though the U.S. and EC rules are not identical, collaboration between the agencies has, in practice,

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60. Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law, 1997 O.J. (C 372) [hereinafter *Market Definition Guidelines*]; Simon Baker & Lawrence Wu, *Applying the Market Definition Guidelines of the European Commission*, 19 EUR. COMPETITION L. REV. 273, 273 (1998); Robert Pitofsky, *EU and U.S. Approaches to International Mergers—Views from the U.S. Federal Trade Commission*, Remarks at the EC Merger Control 10<sup>th</sup> Anniversary Conference to the European Commission Directorate General for Competition and the International Bar Association (Sept. 14-15, 2000), available at [www.ftc.gov/speeches/pitofsky/pitintermergers.html](http://www.ftc.gov/speeches/pitofsky/pitintermergers.html).

61. *Market Definition Guidelines*, *supra* note 60, at I.

62. *See supra* notes 41-42 and accompanying text.

63. Agreement between the European Communities and the Government of the United States of America Regarding the Application of Their Competition Laws, Sept. 23, 1991, 30 I.L.M. 1487 (1991) [hereinafter *Comity Agreement*].

64. *See Valentine*, *supra* note 8, at 527.

65. *Comity Agreement*, *supra* note 63, at art. IV(2)(a)(ii). This would apply, for example, to the merger of two U.S. companies that met the EC “turnover” thresholds, but sold the overwhelming majority of their products in the United States.

66. *Id.* at art. III.

67. *See Valentine*, *supra* note 8, at 530; Pitofsky, *supra* note 60.

increased convergence.<sup>68</sup>

## B. UNBUNDLING THE DIFFERENCES: THE CURRENT STATE OF MERGER ANALYSIS IN THE UNITED STATES AND EUROPEAN UNION

### 1. Market Definition

Notwithstanding their distinct historical roots, merger review in the United States and EC follow similar analytical paths, which has increased convergence. Both jurisdictions view the definition of relevant product and geographic markets as prerequisites to evaluating the effects of a merger.<sup>69</sup> U.S. and European analyses of the relevant product market begin by hypothesizing how consumers would respond to a post-merger price increase.<sup>70</sup> Both jurisdictions account for “demand substitution”<sup>71</sup> by including in the relevant product market all those products which consumers would substitute if the merged company imposed a “small, but significant and nontransitory” price increase.<sup>72</sup> While supply substitution<sup>73</sup> is used to broaden the

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68. See Valentine, *supra* note 8, at 530-31; Pitofsky, *supra* note 60; see also Wilke, *supra* note 8 (quoting Assistant Attorney General Charles James that increased consultations were needed after GE-Honeywell to foster greater convergence).

69. Compare GUIDELINES, *supra* note 41, § 1.0, with Market Definition Guidelines, *supra* note 60, at I.

70. Compare GUIDELINES, *supra* note 41, § 1.0, with Market Definition Guidelines, *supra* note 60, at I.

71. Demand side substitution occurs when customers switch their purchases from one supplier to another in response to a relative price change. This is often the most direct and immediate constraint on firms. Baker & Wu, *supra* note 60, at 275.

72. This phrase is used throughout the FTC and DOJ Guidelines to analyze how customers of the merging parties would behave if the merged company increased its prices. GUIDELINES, *supra* note 41, § 1.0. The EU uses similar language. See Market Definition Guidelines, *supra* note 60, at 11 (“hypothetical small, non-transitory change in relative prices”). The level of increase required to be “small but significant” is also similar in the jurisdictions. The standards are a five percent increase in the United States, and a five to ten percent increase in the EU. GUIDELINES, *supra* note 41, § 1.11; Market Definition Guidelines, *supra* note 60, at II. If, for example, two soft drink manufacturers planned to merge, the United States and EU enforcers would ask whether, in the event of a price increase, consumers would switch over to juice, coffee, or other brands of soft drinks. If consumers would substitute one of these products for the beverages of the merged parties, the companies would have no incentive to raise prices, so the merger would raise no competitive concerns.

73. Supply substitution refers to the willingness of firms to produce more of a particular good in response to a competitor’s price increase. GUIDELINES, *supra* note 41, § 1.32.

relevant market for purposes of DG-IV's analysis, the FTC and DOJ Guidelines consider only uncommitted<sup>74</sup> firms, thereby narrowing the market.<sup>75</sup> Uncommitted supply substitutability dilutes calculations of market share, which reduces the likelihood of a challenge to a merger in both the U.S. and EC frameworks.<sup>76</sup> The similarity of market definition in the United States and EU is a strong foundation for further convergence.

## 2. Analysis of Competitive Effects

While the U.S. enforcing agencies and the Commission generally agree on how to define markets, their approaches in analyzing the effects in each market differ. The United States scrutinizes mergers based upon the belief that *oligopoly* power<sup>77</sup> in the hands of a few firms creates interdependence and frees firms from the restraints of competition.<sup>78</sup> According to U.S. theory, if only a few firms exist in a market, each will realize that they cannot profit by lowering prices and will explicitly or tacitly settle on an equilibrium price that is above competitive levels.<sup>79</sup> Because the United States views competitors in an oli-

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74. Uncommitted firms are those that can begin producing goods for the relevant market without making any significant long-term investments by shifting resources from the production of one product to another. Those firms that can only enter the market after significant investments specific to production in the relevant market are committed firms. See, e.g., GUIDELINES, *supra* note 41, § 1.0 n.7.

75. Compare GUIDELINES, *supra* note 41, § 1.32, with Market Definition Guidelines, *supra* note 60, at II.

76. Baker & Wu, *supra* note 60, at 275; Pitofsky, *supra* note 60. In both jurisdictions, uncommitted entry can rebut presumptions of anticompetitiveness in a merger that increases market share. Compare Market Definition Guidelines, *supra* note 60, at II, with GUIDELINES, *supra* note 41, § 3.0.

77. Oligopoly is characterized as a few firms in a market, each possessing market power, that perceive that they can increase profits by acting interdependently instead of independently. SULLIVAN & HARRISON, *supra* note 25, at 26.

78. GUIDELINES, *supra* note 41, §§ 2.1-2.12; Kauper, *supra* note 7, at 322-23.

79. See *Hosp. Corp. of Am. v. Fed. Trade Comm'n*, 807 F.2d 1381, 1386 (7th Cir. 1986); GUIDELINES, *supra* note 41, §§ 2.1-2.12; Kauper, *supra* note 7, at 322-23. A hypothetical example from the airline industry demonstrates this theory. Imagine that Airline A and Airline B, both oligopolists, each charge \$200 for a ticket from New York to Los Angeles and that each receives fifty percent of the market share. Assume further that each operates with average costs equal to \$100 per ticket. If A lowers its price to \$150, its profits per ticket would decrease, but its total profits would increase, as it would grab 100 percent of the market. Fearing a complete loss of business, B would immediately lower its prices to \$150, which would create an equilibrium in which each airline has the same market share as before, only with half the profits. Interdependence theory is concerned that, over time, the airlines will realize that it is not in their best interest to lower fares, and therefore will maintain super competitive prices.

gopolistic market as potential partners in collusion, there is little reason to consider the strength of those competitors in merger analysis.<sup>80</sup>

Unlike the U.S. agencies, the Commission has primarily been concerned with *monopoly* power.<sup>81</sup> This leads European officials to view firms in an oligopolistic market as potential competitors instead of potential colluders.<sup>82</sup> In contrast to the U.S. view, the Commission assumes that, even in an oligopolistic market, strong competitors can offset the merged firm's dominance.<sup>83</sup> In light of recent EC decisions, however, these distinctions overstate the differences between the theories of the two jurisdictions. In a line of Commission and E.C.J. decisions beginning with the challenge to a merger between Nestle and Perrier and another blocking the merger of pharmaceutical company Kali und Salz with MdK and Treuhand, the EU has begun to consider interdependent behavior as collective dominance in violation of Article 11 of the Merger Regulation.<sup>84</sup> Despite the differing U.S. and EC theories of competitive harm, executive and judicial decisions in the two jurisdictions have led to convergence in the analysis of market definition and participation.<sup>85</sup>

### 3. Divergent Treatment of Efficiencies

Some of the strongest claims of divergence between the U.S. and EU approaches have addressed the failure of the Commission to incorporate defenses, namely the efficiencies defense, into its review.<sup>86</sup> U.S. business leaders have focused their strongest criticism against Community merger policy on this point, claiming that the Commission harms businesses and consumers by preventing synergistic mergers.<sup>87</sup> They argue that efficiency-enhancing mergers benefit consumers by lowering pro-

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80. See Kauper, *supra* note 7, at 335.

81. See *id.* at 329-31; Korah, *supra* note 56, §§ 10.2.5-10.2.5.3, at 268-70.

82. See, e.g., Joined Cases C 68/94 & C 30/95, *France v. Comm.*, 1998 E.C.R. 1-375, [1998] 4 C.M.L.R. 829 (1998) [hereinafter *Kali-Salz*]; see also Kauper, *supra* note 7, at 335-36.

83. Kauper, *supra* note 7, at 335-36.

84. *Id.* at 330; *Kali-Salz*, *supra* note 82.

85. See *supra* notes 60-62 and accompanying text.

86. See *Europe to GE: Go Home*, *supra* note 1; Stock, *supra* note 41, at 869-70; LEXECON, *supra* note 45.

87. *Europe to GE: Go Home*, *supra* note 1; George L. Priest & Franco Romani, *The GE/Honeywell Precedent*, WALL ST. J., June 20, 2001, at A1; Kolasky & Greenfield, *supra* note 13, at 29.

duction costs and decreasing prices.<sup>88</sup> U.S. regulators account for consumer benefit by weighing evidence of merger-specific efficiencies against any merger-related anticompetitive effects.<sup>89</sup>

Although the FTC and DOJ embraced the efficiencies analysis, U.S. courts have been uncertain and inconsistent in their application of the defense.<sup>90</sup> The Guidelines themselves provide only vague guidance, stating that the agencies will approve mergers creating efficiencies that eliminate the likelihood of anticompetitive effects in all relevant markets.<sup>91</sup> This vagueness has caused difficulty for courts that have attempted to quantify merger-specific efficiencies.<sup>92</sup> Courts have also had difficulty determining whether the defense requires proof that merging firms will pass efficiencies on to consumers.<sup>93</sup>

#### 4. *European Commission's "Portfolio Theory"*

While the desirability of an efficiencies defense provided a common battleground for proponents of the U.S. and EU systems, the most significant disagreements arose over the Commission's "portfolio theory," the doctrine used to block the GE-Honeywell deal.<sup>94</sup> Under the portfolio theory, a company in a

88. LEXECON, *supra* note 45.

89. GUIDELINES, *supra* note 41, § 4.0. The Guidelines clarify that, as merger-induced concentration increases, firms will face a stricter burden of proof in justifying a transaction's anticompetitive effects. *Id.*; see also Fed. Trade Comm'n v. Staples, Inc., 970 F. Supp. 1066, 1088-89 (D.D.C. 1997) (stating that it is "not entirely clear" whether courts have adopted the Guidelines integration of an efficiencies defense, but nonetheless applying such a defense in a merger between two office superstore chains).

90. Thomas L. Greaney, *Not for Import: Why the EU Should not Adopt the American Efficiency Defense for Analyzing Mergers and Joint Ventures*, 44 ST. LOUIS U. L.J. 871, 893 (2000).

91. GUIDELINES, *supra* note 41, §4.0.

92. See Fed. Trade Comm'n v. Staples, Inc., 970 F. Supp. 1066, 1089 (D.D.C. 1997) (explaining that "where. . . the merger has not yet been consummated, it is impossible to quantify precisely the efficiencies that it will generate"). The *Staples* court relied largely on historical evidence to dismiss as unreliable the efficiency defense raised by office superstores Staples and Office Depot. *Id.* at 1089-90; see also Fed. Trade Comm'n v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 62-63 (D.D.C. 1998) (stating that a merger's efficiencies were insufficient to rebut a presumption of anticompetitive effects even though the government conceded that it would produce over \$150 million in synergies).

93. Compare *Staples*, 970 F. Supp. at 1090 (finding that history did not support Defendants' contention that they would pass significant savings on to consumers), with *Cardinal Health*, 12 F. Supp. 2d at 62-63 (finding that a projected decrease in defendants' pass-through percentage mitigated against allowing an efficiencies defense).

94. Kolasky & Greenfield, *supra* note 13, at 28; Hill & Done, *supra* note 1.

dominant position could engage in "mixed bundling,"<sup>95</sup> whereby it would sell products in bundles at relatively low prices, while increasing the relative price of the individual components sold separately.<sup>96</sup> In order for customers to receive the benefit of the merged firm's pricing efficiency, they must purchase the entire bundle.<sup>97</sup> The merged company could then engage in price discrimination against those customers who chose to mix a product of the merged company with one of a competitor.<sup>98</sup> According to the portfolio theory, such a merger could lead to lower prices on bundles in the short run but would foreclose competition and allow the merged firm to charge monopoly prices in the long run.<sup>99</sup>

The Commission has applied the portfolio theory in a number of merger cases, starting in 1998 with the merger of the alcohol distributors, Guinness and Grand Metropolitan.<sup>100</sup> Although the Commission conditionally approved the merger, it found that the parties could bundle their combined products and price the bundles strategically to undercut competitors.<sup>101</sup> Two years later, the Commission applied similar logic when it approved the Air Liquide-BOC merger.<sup>102</sup> The Commission hypothesized that a bundling problem could exist because the merging companies, one French and one British, could offer package deals to procure the business of customers operating in both France and the United Kingdom.<sup>103</sup> The Commission also envisioned a situation in which the merged company could charge monopoly prices in its home markets to cross-subsidize

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95. Mixed bundling is a practice, by which companies sell products both in bundles and as stand-alone products. This contrasts with "pure bundling," or tying, in which a company only sells its products together. LEXECON, *supra* note 45.

96. FRONTIER ECONOMICS, UNBUNDLING THE ARGUMENTS: ECONOMIC ISSUES RAISED BY THE PROPOSED GE-HONEYWELL MERGER 2 (2001), available at <http://www.frontier-economics.com/bulletins/en/23.pdf>. Frontier Economics is a consulting firm retained by Rolls Royce, a competitor of GE, during the Commission's investigation. The merged firm can be expected to do this if it sells complementary products. Complements are products that are usually consumed together, such that a decrease in the price of one product leads to an increase in the demand for its complement. *Id.*

97. *Id.*; LEXECON, *supra* note 45.

98. LEXECON, *supra* note 45.

99. FRONTIER ECONOMICS, *supra* note 96.

100. Commission Decision 98/602/EC 1998 O.J. (L 288) paras. 99-100.

101. *Id.* The FTC also required the parties to divest assets in order to secure approval, however, it did so based on the horizontal effects the merger would have in the United States. Complaint of the Fed. Trade Comm'n paras. 17-20, *In the matter of Guinness PLC, a corporation, and Grand Metropolitan PLC, a corporation, F.T.C. (No. 971 008 1)*, available at [www.ftc.gov/os/1998/9804/9710081.do.htm](http://www.ftc.gov/os/1998/9804/9710081.do.htm).

102. LEXECON, "INDIRECT EFFECTS" IN MERGER ANALYSIS (2000).

103. *Id.*



predatory behavior in other markets.<sup>104</sup>

In the GE-Honeywell case, the EU's most recent application of the portfolio theory, the Commission addressed potential bundling effects in several relevant markets.<sup>105</sup> The Commission concluded that the merged GE-Honeywell could offer packages of products to customers that consist of aircraft engines, for which GE was dominant, with avionics equipment, Honeywell's area of dominance.<sup>106</sup> The merged company could offer discounts on bundles that neither could offer on their respective individual products.<sup>107</sup> The Commission reasoned that, since Honeywell had already bundled various types of avionics together in the past, the parties could add components of GE's aircraft engine portfolio to their bundles.<sup>108</sup> In the short run, this would have the effect of isolating competitors from the market.<sup>109</sup> In the long run, the Commission concluded that this behavior could drive competitors out of the market and lead to near monopoly power for the merged company.<sup>110</sup> The Commission concluded that this would happen regardless of the company's intentions.<sup>111</sup> Furthermore, the Commission found that the parties could "leverage" their dominant positions in one market into other markets by tying products in which the company has a monopoly with products in which the company faces competition.<sup>112</sup> This problem would be particularly acute if GE engaged in "technical bundling," by programming their equipment not to function with non-GE components.<sup>113</sup>

Contrary to commentators' assertions of divergence, the behavior that the Commission envisioned, if it occurs post-merger, is actionable under U.S. law.<sup>114</sup> Despite scholarly criticism, vertical tying arrangements are still considered *per se* illegal under

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104. *Id.*

105. General Electric/Honeywell, Case No. COMP/M.2220 para. 8 (2001).

106. *Id.* para. 415.

107. *Id.* paras. 350-51, 353.

108. *Id.* paras. 361-70.

109. *Id.* para. 354.

110. *Id.*

111. General Electric/Honeywell, *supra* note 105, para. 353.

112. *Id.* para. 415.

113. *Id.* para. 351.

114. For an example of a claim of divergence, see Kolasky & Greenfield, *supra* note 13, at 28. U.S. plaintiffs may maintain antitrust actions based on theories of tying, *Jefferson Parish Hosp. v. Hyde*, 466 U.S. 2, 12 (1984), and cross-subsidization, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). See discussion *infra* notes 127-29 of why these theories are insufficient to block a proposed merger.

the Sherman and Clayton Acts.<sup>115</sup> Similar to the Commission's allegations regarding GE's aircraft financing division, GECAS, the Supreme Court has held that credit can be a tying product in a monopolization action.<sup>116</sup> Most recently, the D.C. Circuit, in the *Microsoft* case, concluded that the software manufacturer's "technical bundling" practices violated § 2 of the Sherman Act under a monopolization theory.<sup>117</sup>

The Commission's theories of leveraging also resemble the U.S. prohibition on cross-subsidization.<sup>118</sup> In the United States, cross-subsidization is illegal regardless of whether the practice results from a merger or unilateral conduct.<sup>119</sup> U.S. courts view theories of cross-subsidization as plausible but place extremely high substantive and procedural<sup>120</sup> bars to actions based on cross-subsidization.<sup>121</sup> Substantively, a plaintiff must demonstrate that the defendant priced below cost and had a possibility of recoupment of its losses.<sup>122</sup> Because the plaintiff has to produce evidence of below-cost pricing, it cannot use potential cross-subsidization as a basis for blocking a merger before con-

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115. *Jefferson Parish*, 466 U.S. at 12. While the holding in *Jefferson Parish* represents the current state of the law, the concurring opinion of Justice O'Connor that tying should be analyzed under a modified rule of reason analysis carries heavy persuasive value. *Id.* at 34-35 (O'Connor, J., concurring).

116. *Fortner Enter. v. United States Steel*, 394 U.S. 495, 508 (1965).

117. *United States v. Microsoft Corp.*, 253 F.3d 34, 60-62 (D.C. Cir. 2001). The court upheld the trial court's conclusion that Microsoft violated the Sherman Act in three ways: preventing Original Equipment Manufacturers (OEMs) from removing any icons from desktop or "Start Menu" of the Windows operating system, and preventing them from altering the initial boot sequence, the images a user sees as she starts her PC. *Id.* at 62. This, the court concluded, had the effect of isolating competing internet browser manufacturers from the market. *Id.*

118. Cross-subsidization refers to a firm with a monopoly in one market using its monopoly profits to subsidize below-cost pricing in another market to drive out competitors. See E. THOMAS SULLIVAN & HERBERT HOVENKAMP, *ANTITRUST LAW, POLICY AND PROCEDURE* 989 (4th ed. 1999).

119. See, e.g., *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) (affirming a private plaintiff's ability to block a merger based on § 7 Clayton Act, but concluding that Monfort was not injured "by anything forbidden in the antitrust laws").

120. See *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 597-98 (1986) (holding that to survive summary judgment, antitrust plaintiffs must present evidence that "tend[s] to exclude the possibility" that defendants acted pursuant to a legitimate business motive).

121. See, e.g., *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

122. *Id.* at 222, 224. ("For the investment to be rational, the [predator] must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered.") (quoting *Matsushita*, 475 U.S. at 588-89).

summation.<sup>123</sup>

In response to the GE-Honeywell decision, commentators criticized the Commission for attacking the parties with an “efficiencies offense” instead of allowing them to rebut anticompetitive presumptions with claims of efficiencies.<sup>124</sup> These criticisms are justified to the extent that the Commission itself acknowledged that its hypothesized anticompetitive effects would result from GE-Honeywell’s profit maximizing behavior, absent any predatory intent.<sup>125</sup> In this way, the EU’s analysis takes a sharp turn from the lynchpin of U.S. merger analysis that the anti-trust laws are meant to protect competition, not competitors.<sup>126</sup>

The greatest weakness of the GE-Honeywell decision lies in its speculative nature.<sup>127</sup> Even by the Commission’s logic, any exit of competitors caused by the merger would occur only in the medium to long run.<sup>128</sup> Even though pre-merger screening is inherently speculative as to anticompetitive effects, competition agencies must predict future events.<sup>129</sup> Accordingly, the United States only considers those anticompetitive effects that would materialize within two years of a merger.<sup>130</sup> The U.S. enforcement agencies are willing to clear some potentially anticompetitive mergers because they have strong post-merger remedies, such as divestiture, to address competitive concerns that arise post-merger.<sup>131</sup> The EU, in contrast, does not have strong post-merger remedies at their disposal, so its merger review process becomes a “one-shot” chance to stop future anticompetitive effects.<sup>132</sup> Therefore, based on the present EU analysis, en-

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123. See generally *Cargill*, 479 U.S. at 117-18 (describing the standard for predatory pricing and holding that Monfort lacks standing to block Cargill’s acquisition).

124. See *LEXECON*, *supra* note 45; Kolasky & Greenfield, *supra* note 13, at 28; Peter Spiegel, *US to Press EU Over GE-Honeywell Antitrust Argument*, FIN. TIMES, Oct. 15, 2001, at A12 (quoting Charles James that Commission decision “punishes efficiency” and “punishes success”).

125. General Electric/Honeywell, *supra* note 105, para. 353.

126. See *supra* text accompanying note 35.

127. See *LEXECON*, *supra* note 45.

128. General Electric/Honeywell, *supra* note 105, para. 354.

129. See *LEXECON*, *supra* note 45.

130. GUIDELINES, *supra* note 41, § 3.2; see also *Fed. Trade Comm’n v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 55 (D.D.C. 1998) (stating that U.S. courts will give weight to short run effects of mergers); Kolasky & Greenfield, *supra* note 13, at 38-39.

131. See Raghaven & Davis, *supra* note 4, at A11.

132. Philip Shishkin, *Barred Merger Signals U.S.-EU Divergence*, WALL ST. J., July 5, 2001, at A4. The EU’s competition commissioner, Mario Monti, was quoted as saying “we have a one-shot possibility to approve or block a merger.” *Id.*

forcement agencies have to look to prospective events and weigh them more critically.

### III. SOME PROPOSED SOLUTIONS AND THEIR CRITIQUES

When the Commission nearly blocked the Boeing-McDonnell Douglas merger in 1997, a number of remedies to the difficulties of extraterritorial antitrust enforcement were proposed. European officials reiterated their desire for a binding international antitrust agreement, possibly integrated into the World Trade Organization (WTO) as part of the Dispute Settlement Mechanism.<sup>133</sup> Others have called for the voluntary consultations in regional and national fora to settle competition disputes, possibly through the Organization for Economic Cooperation and Development (OECD).<sup>134</sup> U.S. business leaders and scholars urged the EU to adopt the U.S. efficiency and "failing firm" defenses in the wake of the GE-Honeywell decision.<sup>135</sup>

While antitrust commentators disagree over the proper place for efficiency analysis in merger review, nearly all agree that allocative efficiency should be at least one goal of international antitrust enforcement.<sup>136</sup> Therefore, this Note will urge that any reforms in European or international competition policy be undertaken with the goal of increasing global output. Substantive agreement on competition policy can promote global efficiency by reducing the differences in national antitrust policies, thereby reducing compliance costs,<sup>137</sup> encouraging efficiency enhancing transactions,<sup>138</sup> and eliminating barriers to trade.<sup>139</sup>

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133. See Valentine, *supra* note 8, at 529 (describing the support of former EC trade commissioner, Sir Leon Brittan, for a binding set of international antitrust rules); Guy de Jonquieres, *WTO Urged to Set Up Basic Competition Rules*, FIN. TIMES, June 18, 1996, at 4.

134. See, e.g., A. Douglas Melamed, Address before the Fordham Corporate Law Institute 27th Annual Conference on International Antitrust Law and Policy (Oct. 19, 2000), in 1230 *PLI/CORP.* 415, 420.

135. Spiegel, *supra* note 124, at A12. See generally Greaney, *supra* note 90, at 872-74 (describing the development of the efficiencies defense in the U.S. and movements to implement similar provisions in EC merger review).

136. See, e.g., Daniel J. Gifford & E. Thomas Sullivan, *Can International Antitrust be Saved for the Post Boeing Merger World? A Proposal to Minimize International Conflict and to Rescue Antitrust from Misuse*, 45 *ANTITRUST BULL.* 55, 67 (2000).

137. See *supra* note 23 and accompanying text.

138. See *supra* note 24 and accompanying text.

139. See *supra* note 24 and accompanying text.

Aside from promoting efficiency, any changes in international antitrust enforcement should seek to preserve the right of individual jurisdictions to promote their own domestic policy goals through their own competition laws.<sup>140</sup> Domestic goals should play the most prominent role in determining the degree to which competition laws should encourage wealth transfers from producers to consumers or vice versa.<sup>141</sup> Accordingly, nations at various stages of development may tolerate varying degrees of concentration in order to further their industrial policies.<sup>142</sup> Furthermore, enforcement agencies may disagree on the desirability of concentrating political and economic power into a few hands for political reasons.<sup>143</sup> Any changes in global competition policy should, therefore, preserve the right of national officials to make distributive decisions at the national level, free from international interference.

#### A. A PROPOSAL FOR A BINDING INTERNATIONAL ANTITRUST AGREEMENT

Intuitively, nations should resolve their disagreements over antitrust enforcement through an established mechanism, such as the WTO. After all, the WTO developed a set of binding Multilateral Trade Agreements and established a dispute settlement mechanism in once divisive areas of trade policy.<sup>144</sup> The legitimacy and uniformity of the rules of the WTO have allowed substantial advances in globalization to take place since the WTO's inception.<sup>145</sup>

During the past decade, commentators and political leaders proposed a number of supranational answers to the challenge of extraterritorial application of competition laws. Some proposals merely required agreement among nations on minimum stan-

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140. See Valentine, *supra* note 8, at 527.

141. See generally Greaney, *supra* note 90, at 875-76, 892 (addressing this concept as it relates to the "efficiencies defense" in merger review).

142. See Valentine, *supra* note 8, at 527-28.

143. See generally Eleanor M. Fox, *supra* note 15, at 596-97 (discussing the ways in which antitrust policy is intertwined with other areas of domestic affairs).

144. See Brian Peck, *Extraterritorial Application of Antitrust Laws and the U.S.-EU Dispute over the Boeing and McDonnell Douglas Merger: From Comity to Conflict? An Argument for a Binding International Agreement on Antitrust Enforcement and Dispute Resolution*, 35 SAN DIEGO L. REV. 1163, 1208-10 (1998). Some of these areas include antidumping procedures, intellectual property rights and agricultural policy. *Id.*

145. See Mitsuo Matsushita, *Competition Law and Policy in the Context of the WTO System*, 44 DEPAUL L. REV. 1097, 1099-1101 (1995).

dards of enforcement in key areas of competition policy, such as cartel behavior.<sup>146</sup> The previous attempt by OECD members to agree on antitrust standards provides the most prominent example of such a proposal.<sup>147</sup> At the other end of the spectrum lies a comprehensive global antitrust code, with binding dispute settlement and enforcement procedures.<sup>148</sup> A prime example of such a code was the draft International Antitrust Code, proposed by a group of academics in Munich in 1993, who suggested that their code be adopted as a GATT-WTO-Plurilateral trade agreement.<sup>149</sup>

The proposal of global competition scholar Eleanor Fox fits somewhere between these two points. Fox suggested that nations agree to general principles of enforcement in the areas of cartels and market access, and integrate this agreement into the WTO.<sup>150</sup> To cure some of the potential implementation problems in developing countries, others have suggest that lesser developed countries receive a grace period before they are expected to fully comply with a global competition agreement.<sup>151</sup> This piecemeal implementation would resemble current WTO trade-in-services provisions.<sup>152</sup>

The proponents of multilateral antitrust agreements are correct to point out that such agreements promote efficiency in enforcement and further liberalization of trade. Whereas extra-territorial application of national antitrust laws increases the transaction costs of multinational mergers, a single competition code would limit the costs of antitrust compliance to those costs necessary to adhere to the international code.<sup>153</sup> This reduction in transaction costs would encourage firms to market their goods internationally and seek efficiencies by engaging in

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146. Valentine, *supra* note 8, at 529.

147. *Id.*

148. See Peck, *supra* note 144, at 1209 (arguing for complete integration of competition policy into the WTO); Matsushita, *supra* note 145, at 1113-14 (advocating the integration of general U.S.-like principles of merger review into the WTO).

149. Daniel J. Gifford, *The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry*, 6 MINN. J. GLOBAL TRADE 1, 4 (1996).

150. See Eleanor M. Fox, *Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade*, 4 PAC. RIM L. & POL'Y J. 1, 30-31 (1995).

151. See Matsushita, *supra* note 145, at 1114-15.

152. *Id.* Trade-in-services refers to the international transactions within sectors such as banking, tourism, and communications. In the WTO framework, these are governed by the General Agreement on Trade in Services. See JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 291 (3d ed. 1995).

153. See *supra* text accompanying notes 18-20.

cross-border mergers.<sup>154</sup> Standardizing competition policy would lead to a greater liberalization of trade and would enhance economic welfare.<sup>155</sup> Therefore competition rules should be integrated into the WTO or promoted at the international level.

## B. POTENTIAL PROBLEMS OF AN INTERNATIONAL AGREEMENT

Notwithstanding these benefits, a supranational competition regulation would encounter a number of philosophical and practical difficulties that would outweigh the utility of a single code. As a practical matter, any multinational organization would consist of members at various stages of development, and these members would have difficulty reaching consensus on the details of an agreement.<sup>156</sup> Many signatories would likely see a supranational body as an encroachment upon national industrial policies that are necessary for development.<sup>157</sup> The specificity of a global competition agreement could lead to further problems. In both the United States and the EU, competition laws are phrased broadly, leaving the courts great discretion to shape policy in accordance with dynamic economic scholarship.<sup>158</sup> Leaving such discretion in the hands of the WTO or another multinational organization with a more fluid dispute settlement body would not provide the benefits of a deliberately evolving antitrust jurisprudence.<sup>159</sup> Conversely, any attempt to draft a more rigid set of rules would allow no flexibility and would encounter opposition from countries that feel that the regulations do not specifically reflect their needs.<sup>160</sup>

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154. See *supra* text accompanying notes 16-18.

155. See Matsushita, *supra* note 145, at 1099-1101, 1104 (arguing that competition policy can promote trade liberalization).

156. See Valentine, *supra* note 8, at 529.

157. See generally *id.* at 528-29 (stating that competition laws reflect nations' histories and values); Diane P. Wood, *International Competition Policy in a Diverse World: Can One Size Fit All?*, 191 *FORDHAM CORP. L. INST.* 71-85 (1992), reprinted in JACKSON, DAVEY & SYKES *supra* note 152, at 1100-1107 (demonstrating that nations at different stages of industrial development have different goals for competition laws and arguing that the international community should recognize their need to pursue these goals).

158. See Valentine, *supra* note 8, at 529.

159. See Valentine, *supra* note 8, at 529. As opposed to national courts, which employ permanent judges, the GATT Dispute Settlement Mechanism relies on *ad hoc* panels of trade experts to settle disputes. See JACKSON, DAVEY & SYKES, *supra* note 152, at 327.

160. See *supra* notes 156-59 and accompanying text. By defining antitrust policy specifically, policy makers would take away from the judiciary the power to interpret regulations in light of current trends in the discipline of economics.

Moreover, a single competition regulation would run contrary to the principles of the WTO in two respects. First, whereas the WTO allows signatories to protect domestic competitors by negotiating tariff agreements with other nations, a global competition authority would necessarily protect competition at the expense of competitors.<sup>161</sup> Because an international set of competition rules would not allow for this option of bargained-for protection, it would be inherently more difficult to integrate into a WTO-based trading order than, for example, environmental policy. Second, unlike the WTO, which preserves the right of signatories to promote national industrial policies, standardizing competition regulations would strip countries of an important tool with which to pursue domestic goals.<sup>162</sup> By restricting the activity of private firms, antitrust policy makes subjective judgments about the desirability of transfers of monopoly or oligopoly profits from business to consumers.<sup>163</sup> Because these questions get to the heart of domestic policy, world leaders should hesitate to take these decisions away from national policy makers.

### C. EUROPEAN ADOPTION OF THE U.S. EFFICIENCY DEFENSE

U.S. business and political leaders have been the most vocal advocates for changes in the EC merger regulation.<sup>164</sup> Aside from labeling the GE-Honeywell decision as protectionist, critics have proffered sound economic arguments suggesting that the EC regulation unwisely punished efficiency in business.<sup>165</sup> Many have urged that the EU adopt the "efficiencies defense" utilized by the FTC and DOJ, in order to encourage future synergistic

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161. See Matsushita, *supra* note 145, at 1104.

162. See *supra* notes 139-141 and accompanying text.

163. See Wood, *supra* note 157, at 1106-07 (concluding that countries should not adopt an U.S.-style "one-size-fits-all" approach to competition policy, so that they can pursue their own goals though antitrust).

164. See Hill & Done, *supra* note 1 (quoting Senators Kohl and DeWine that the diverging conclusions over GE-Honeywell evidence the "need for further examination of the various processes and standards used by the different agencies"); Carney, *supra* note 4, at 8 ("If a change can be effected, there is hope that the commission will be forced to move from a standard that punishes success to one that merely requires companies not to break law.").

165. See *supra* notes 124-26 and accompanying text (highlighting economic argument against "efficiencies offense"). It is important to note that "efficiency" in this context refers to a specific affirmative defense to a *prima facie* case that a merger has anticompetitive effects. This differs from the concept of efficiency used *infra* Part II.A.1, which refers to the cost savings that would result from decreasing the regulatory barriers to mergers and acquisitions.



mergers.<sup>166</sup> Underlying these proposals was a belief that the promotion of allocative efficiencies should be the primary goal of antitrust enforcement.<sup>167</sup>

The Commission, by incorporating efficiencies analysis into its merger review, could theoretically maximize economic welfare in two ways. First, if the EU adopted the efficiencies defense, it would decrease the likelihood that the United States and EU would reach divergent conclusions.<sup>168</sup> However, this undoubtedly assumes that the EU will follow the U.S. technique of weighing merger-specific efficiencies against anticompetitive effects.<sup>169</sup> Secondly, if more transnational mergers are able to secure approval by both bodies, the global economy will realize greater increases in allocative efficiency that mega-mergers, such as GE-Honeywell, would produce.<sup>170</sup> Thus, a European efficiencies defense would increase aggregate global welfare by reducing the regulatory costs associated with blocking mergers and by allowing merged companies to reap the full efficiency gains of combining.<sup>171</sup>

#### D. DRAWBACKS OF A EUROPEAN EFFICIENCIES DEFENSE

Notwithstanding the increases in allocative efficiency that could result if the Commission incorporated efficiency analysis into the EC Merger Regulation, the benefits of such a reform are not as certain as some claim.<sup>172</sup> The U.S. efficiencies defense has hardly increased certainty, given the disparate treatment U.S.

166. See Deborah Hargreaves & Andrew Hill, *Brussels Says it Intends to Block GE-Honeywell Deal*, FIN. TIMES, June 19, 2001, at A13, available at 2001 WL 25828930; Kevin Done, *Airbus Accused of Opposing GE-Honeywell Deal*, FIN. TIMES, June 17, 2001, available at 2001 WL 25827319 (stating the concern of Boeing chairman Harry Stonecipher that aggressive merger enforcement in the EU could hamper global trade).

167. See Raghaven & Davis, *supra* note 4, at A11 (presenting Clinton official's dissatisfaction with the Commission blocking mergers based solely on efficiency); Eleanor M. Fox, *Antitrust, Competitiveness, and the World Arena: Efficiencies and Failing Firms in Perspective*, 64 ANTITRUST L.J. 725, 730 (1996); see also *supra* notes 90-93 and accompanying text (outlining the role of efficiencies in United States merger review and the justification for its incorporation); Greaney, *supra* note 90, at 876-77 (contrasting merger analysis centered on allocative efficiencies with one based on protecting consumer welfare).

168. See *supra* text accompanying notes 15-18.

169. See generally Greaney, *supra* note 90, at 892 (showing how even U.S. courts have been inconsistent in their application of the efficiencies defense). This causes the purported predictability benefits of the efficiency defense to disappear.

170. See *supra* notes 17-20 and accompanying text.

171. See *supra* notes 17-20 and accompanying text.

172. See, e.g., Mitchener, *supra* note 5, at A12.

courts give the defense.<sup>173</sup> Based on the U.S. experience, it is unlikely that a Euro-efficiency defense would increase certainty in international business.<sup>174</sup>

Furthermore, because competition and industrial policy are so closely related, the efficiencies defense provides enforcement agencies with an opportunity to abuse the defense as a tool for protectionism.<sup>175</sup> When efficiencies and anticompetitive effects are measured on a global scale, countries may be tempted to balance efficiencies "at home" against effects abroad.<sup>176</sup> While these transactions may promote the goal of global efficiency, they run the risk of increasing international tensions over competition policy, as enforcement officials in affected nations will inevitably attempt to block a merger after clearance in the merging firms' home countries.<sup>177</sup>

If the EU adopted an efficiencies defense for the purpose of increasing convergence, it would strip itself of the power to make distributive decisions on a union-wide level. When the U.S. agencies integrated the efficiencies defense into the Guidelines, they made a policy judgment that they would consider efficiency together with competition in their merger review. As international antitrust scholar Eleanor Fox points out, the two goals do not overlap completely.<sup>178</sup> A merger may create synergies that do not "balance out" the transaction's anticompetitive effects.<sup>179</sup> Furthermore, many of these savings may not be passed on from producers to consumers.<sup>180</sup> Some proponents of the efficiency defense would encourage even those transactions that do not pass on savings to consumers, provided that the cost savings to the merging companies are greater than the deadweight loss<sup>181</sup> created by the transaction.<sup>182</sup> When these savings are not passed on to consumers, the efficiencies created by

173. See *supra* notes 90-93 and accompanying text.

174. See Greaney, *supra* note 90, at 893; *supra* notes 90-93 and accompanying text.

175. See Greaney, *supra* note 90, at 893; see also Fox, *supra* note 167, at 726-27.

176. See Greaney, *supra* note 90, at 893; Fox, *supra* note 167, at 726-27.

177. See generally Greaney, *supra* note 90, at 893 (describing the tensions that can result from the protection of domestic industry through competition policy).

178. Fox, *supra* note 167, at 730.

179. See *id.* at 731.

180. See *id.*

181. Deadweight loss is the measure of the amount that consumers would be willing to pay for the output that was lost in a monopolistic market. BORK, *supra* note 19, at 108.

182. *Id.*

mergers foster wealth transfers from consumers to producers.<sup>183</sup> Transfers of wealth invoke normative policy judgments and comprise one of the fundamental areas of national primacy in policymaking.

A European efficiency defense accordingly falls short of the goals of international antitrust enforcement, efficiency enhancement, and sovereignty preservation. The potential of the defense to increase global allocative efficiency would suffer if the EU applied the defense with the same inconsistency as U.S. courts. Such a change in EC merger regulations would also run the risk of allowing the Commission to promote its industrial policy at the expense of non-European consumers. Finally, any such reform would change the amount of protection that EC competition law affords to producers and consumers, and therefore should lie within the realm of Community policy.

#### E. THE MIDDLE ROAD: THE CANADIAN SOLUTION TO THE PROBLEMS OF MULTIJURISDICTIONAL REVIEW

A balance between the goals of maximizing global efficiency and protecting the EU's autonomy may be found in the Canadian approach to merger review. After facing difficulties reviewing mergers under its criminal antitrust statutes, the Canadian Parliament enacted the Competition Act of 1985.<sup>184</sup> Canada adopted substantive standards that mimic the analysis of market definition, concentration, and barriers to entry embodied in the Guidelines.<sup>185</sup> Part IX of the Act also established jurisdictional requirements and filing thresholds and timelines that resembled the Hart-Scott-Rodino reforms.<sup>186</sup>

Along with the soundness of Canada's substantive merger regulations, that procedure holds a partial solution to some of the problems of multijurisdictional review. Aside from the pre-merger filing requirements codified in Part IX, parties seeking Canadian clearance have the option of securing an Advanced Ruling Certificate (ARC), a confidential advisory opinion by the

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183. *Id.*

184. Goldman & Bodrug, *supra* note 21, at 577. The ensuing legislation was known as the Competition Act. Competition Act, R.S.C. ch. C-34 (1985) (Can.) (as amended) [hereinafter Competition Act].

185. Competition Act, *supra* note 184, §§ 92-93; Goldman & Bodrug, *supra* note 21, at 582-83.

186. Competition Act, *supra* note 184, §§ 109-24; Goldman & Bodrug, *supra* note 21, at 580; *see also supra* note 39 and accompanying text (noting Hart-Scott-Rodino filing thresholds).

Canadian Competition Bureau (Bureau) on the legality of a merger.<sup>187</sup> When parties file for an ARC, they are exempted from the Part IX timelines, and if they receive a certificate, they are guaranteed that the Bureau will not challenge the merger based on any information included in the ARC application.<sup>188</sup>

Upon denial of an ARC or completion of a full merger investigation under Part IX, the Act provides the Bureau with a number of options. The Bureau may approve the merger unconditionally,<sup>189</sup> or at the other end of the spectrum, may file for an interim injunction against the transaction.<sup>190</sup> If the Bureau has specific concerns that are insufficient to warrant a pre-merger injunction, the Act empowers the Bureau to monitor the merger for up to three years after consummation of the merger.<sup>191</sup> This allows the Canadian authorities to evaluate whether their antitrust concerns or the parties' claims of cost-savings will materialize, without stymieing a potentially synergistic merger.<sup>192</sup>

Efficiency gains from any reforms in the Community's merger regulation would only surface in those few cases in which consultation and cooperation between the United States and the EU do not produce similar results in the two jurisdictions.<sup>193</sup> A Canadian-style post-merger review system has the potential to reduce the regulatory costs of multijurisdictional merger review in a number of ways. For the marginal cases in which U.S. and European regulators disagree, post-merger review may give the Commission the confidence to approve deals on which the Commission has reservations. Post-merger monitoring may allow the Commission to address competitive concerns without relying on its hypothesized theories to block mergers.<sup>194</sup> This would increase efficiency in the short run by conditionally approving mergers whose anticompetitive effects could only materialize in the long run.<sup>195</sup>

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187. Competition Act, *supra* note 184, § 102.

188. *Id.*; see also Goldman & Bodrug, *supra* note 21, at 591-92.

189. See Competition Act, *supra* note 184, § 102; Goldman & Bodrug, *supra* note 21, at 591-95.

190. See Competition Act, *supra* note 184, § 100; Goldman & Bodrug, *supra* note 21, at 595.

191. Competition Act, *supra* note 184, § 97; Goldman & Bodrug, *supra* note 21, at 594-95.

192. Goldman & Bodrug, *supra* note 21, at 594-95.

193. See *supra* notes 81-84 and accompanying text.

194. See Goldman & Bodrug, *supra* note 21, at 594-95; *supra* notes 127-32 and accompanying text.

195. Goldman & Bodrug, *supra* note 21, at 594-95.

If the Commission, with the possibility of monitoring in hand, clears more mergers than it otherwise would have, they will encourage deals that may potentially increase global output.<sup>196</sup> This would remove some of the chilling effect on consolidation that multijurisdictional review poses.<sup>197</sup> In the first eleven years of the compliance system in Canada, no consummated mergers were blocked after post-merger review.<sup>198</sup> This indicates that the Bureau has been able to address concerns adequately in the pre-merger stage. Therefore, the mergers that Canada has subjected to post-closing review are unlikely to have the anticompetitive effects anticipated pre-merger. If the EU had similar procedures, the Commission would be able to encourage synergistic mergers without subjecting consumers to significant reductions in competition.<sup>199</sup>

Aside from furthering uniformity, post-merger monitoring would also allow Europe to continue to pursue distributive goals through merger regulation. This is significant because many of the hypothetical anticompetitive effects the Commission alleged in, for example, GE-Honeywell and Air Liquide-BOC, would not have materialized until long after closing.<sup>200</sup> If the merged GE attempted to tie the purchase of Honeywell parts to GECAS financing, or Air Liquide attempted to cross-subsidize predatory pricing in the French market, Canadian-style monitoring would allow the Commission to detect and remedy these problems post-merger.<sup>201</sup> In this way, post-merger review would provide the EU with the "second shot"<sup>202</sup> necessary to evaluate anticipated anticompetitive behavior effectively.

Because the EC lacks private causes of action for antitrust violations,<sup>203</sup> post-merger monitoring provides an effective and inexpensive means of ensuring that mega-mergers actually

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196. *Id.*

197. See *supra* notes 21-24 and accompanying text.

198. See Goldman & Bodrug, *supra* note 21, at 620.

199. See generally *supra* notes 140-43 and accompanying text (describing how merger review has the potential to affect allocative efficiency and effectuate a nation's domestic policy).

200. See *supra* note 99 and accompanying text.

201. See Goldman & Bodrug, *supra* note 21, at 618-19 ("[Post-merger review] may be an attractive alternative where possible anticompetitive effects of [a] merger are uncertain . . ."); *supra* note 99 and accompanying text (highlighting speculative nature of these decisions).

202. Mario Monti has referred to the EC's merger regulation as a "one-shot possibility" for preventing anticompetitive effects from mergers. Shishkin, *supra* note 132, at A4.

203. EC Treaty, *supra* note 46, at arts. 81-82; Merger Regulation, *supra* note 55.

benefit European consumers.<sup>204</sup> In the United States, treble damages provide competitors with a strong incentive to challenge anticompetitive practices that arise out of a merger.<sup>205</sup> This, combined with the ability of consumers to bring suit for losses due to anticompetitive mergers, provides a check on the behavior of newly joined companies. Post-merger monitoring would provide a similar check for the EU and should not entail efficiency losses greater than those borne by U.S. companies that are targets of private post-merger antitrust actions.

#### F. POTENTIAL PROBLEMS WITH THE CANADIAN APPROACH

The Commission may however encounter some drawbacks if it enacted post-merger review. Even proponents of the Canadian system admit that if the Bureau chooses to monitor a merged firm, the company may simply "behave itself" until the period of monitoring is over.<sup>206</sup> If this occurred, consumers in the EU could be hit with the full anticompetitive effects of the merger after the Commission had completed its observation.

The most serious potential problem with post-merger monitoring would stem from the inability of companies to integrate fully if they fear that regulators may break them apart after three years.<sup>207</sup> Indeed, this was one of the concerns that prompted Congress to adopt the Hart-Scott-Rodino reforms in the first place.<sup>208</sup> As Professor Fox aptly points out, the possibility of disintegration of the merger may also increase the social costs of merger review.<sup>209</sup> If companies became tenuous in the face of Commission monitoring, their merger may not produce all of its expected efficiencies.<sup>210</sup> Furthermore, there may be difficulties in accurately evaluating competitive effects in a merged company that is less than fully-integrated.<sup>211</sup>

Notwithstanding these potential concerns, the benefits of a Canadian style system in the EU outweigh the costs. The charge that merged firms will not reveal their true colors until

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204. See *supra* note 191 and accompanying text.

205. See generally *supra* notes 119, 123 and accompanying text. The Clayton Act provides that most successful antitrust plaintiffs may recover three times their actual injuries from a defendant's antitrust violation. 15 U.S.C. § 15 (2002).

206. See Goldman & Bodrug, *supra* note 21, at 619.

207. Fox, *supra* note 167, at 731-32.

208. *Id.*; see also *supra* note 37 and accompanying text.

209. Fox, *supra* note 167, at 731-32.

210. See *id.* at 731-32.

211. See *id.* at 731-32; Goldman & Bodrug, *supra* note 21, at 619-20.

after the Commission has completed the requisite monitoring does not comport with the Canadian experience.<sup>212</sup> Furthermore, the threat of post-merger action may be only marginally more ominous to business than the threat of U.S. treble damage suits for anticompetitive behavior. If merged companies “behave themselves” and operate less efficiently under post-merger review, the losses in productivity may be less drastic than Professor Fox warns. If there were a loss in productivity, the benefits of protecting the autonomy of EC competition policy and increasing efficiency through a coordination of international antitrust policy would outweigh any marginal losses to efficiency.

### CONCLUSION

U.S. and European competition policy and merger regulations reflect the unique political and economic development of each jurisdiction. Despite these different backgrounds, the merger regulations of the U.S. and EC are remarkably similar in substance. Because the greatest area of disagreement is over substantive issues, for example the debate over the “portfolio effects” theory, reforms in the merger regulation itself are the most promising to facilitate convergence. In fostering greater convergence with U.S. regulations, the Commission should make reforms in a way that allows it to protect European consumers from the harmful competitive effects of some mergers.

Specifically, the Canadian approach of allowing post-merger review of completed transactions may allow the Commission to address competitive concerns without stifling synergistic mergers. By implementing such a reform, the Commission would promote the dual goals of maximizing global output while protecting its consumers from the harmful side effects of that growth. The Commission would increase global efficiency if it approved mergers with screening that it would otherwise have rejected. A Canadian-style post-merger screening mechanism would also protect consumers by guaranteeing that hypothesized anticompetitive effects do not materialize. This reform would allow the Commission to better serve the dual goals of merger enforcement: efficiency maximization and consumer protection.

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212. See Goldman & Bodrug, *supra* note 21, at 620-21.

This Issue is dedicated in memory of

ROBERT E. HUDEC

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