Merger Control in the United States and the European Union: Some Observations

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INTRODUCTION

Traditionally, antitrust lawyers counseling American firms doing business abroad routinely advised clients that so long as their conduct satisfied domestic antitrust standards, they need have little concern with the antitrust laws of foreign nations. A new day has dawned, however, particularly with respect to the Treaty of Rome.1 By the late 1970s, it had become obvious that the competition policy standards promulgated by the European Community (EC) were in some respects more restrictive than our own. This was particularly true with respect to distribution restraints2 and conduct, which might be characterized, in the language of Article 86, as an “abuse of a dominant position.”3 Although aware of the heightened standards that the EC was applying in antitrust cases, many in the American business community reacted with outrage when the European

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3 EC Treaty, supra note 1, art. 86; see also Thomas E. Kauper, Whither Article 86? Observations on Excessive Prices and Refusals to Deal, 1989 Fordham Corp. Law Inst. 651 (Barry Hawk ed., 1990) (discussing the differences between American law and the rules of the European Commission with respect to single-firm dominance).
Commission ("Commission")\(^4\) announced its intention to challenge the Boeing-McDonnell Douglas merger. After all, the Federal Trade Commission (FTC) had indicated that it would not challenge the merger.\(^5\) Even though U.S. enforcement agencies have regularly asserted authority over mergers of foreign firms,\(^6\) the Commission was criticized for interfering with the Boeing acquisition. Some members of the American legal and business communities argued that the merger was outside the jurisdiction of the EC, and that by exercising jurisdiction, the EC was discriminating against American firms in an attempt to protect Airbus, a European consortium.\(^7\) This reaction, however, failed to consider that the EC had acted similarly in other cases not involving American firms. The Commission’s decision to challenge the Boeing-McDonnell Douglas merger, rather than signaling some type of discriminatory intent, may more accurately be viewed as continuing a tightening of what was once a lax policy toward antitrust enforcement, particularly with respect to mergers.

Historically, the European Commission has been seen as relatively lenient with respect to mergers, tolerating acquisitions that would be unlawful in the United States or elsewhere. German officials and scholars have criticized the Commission on this score.\(^8\) Some member states, however, feel the Commission

\(^4\) The European Commission is the EC agency charged with enforcing antitrust regulations.
\(^5\) See Boeing Co., 5 TRADE REG. REP. (CCH) ¶ 24,295 (FTC July 1, 1997).
\(^6\) See U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS § 3.14, at 19–20 (1995) (setting forth Illustrative Example H, indicating that U.S. enforcement agencies can establish jurisdiction over the merger of foreign firms). The Department of Justice and the FTC have indicated that they “would apply the same principles regarding their foreign commerce jurisdiction to Clayton Section 7 cases as they would apply in Sherman Act cases.” Id.

\(^7\) See, e.g., Harry First, The Intersection of Trade and Antitrust Remedies, Fall 1997, ANTITRUST 16, 18–19 (quoting remarks of President Clinton criticizing the Commission’s handling of the Boeing-McDonnell Douglas merger); Interview with Thomas L. Boeder and Benjamin S. Sharp, Attorneys for Boeing, Fall 1997, ANTITRUST 5, 6 (“The Europeans in this particular case were worried about [the] merger because it would have an incremental benefit to the merged party and have an incremental detriment to the European competitor.”); Michael L. Weiner, Conflict and Cooperation: Meeting the Challenge of Increasing Globalization, Fall 1997, ANTITRUST 4, 4 (“Boeing accused the European Commission . . . of acting to support Airbus, regardless of the merits of the transaction.”).

\(^8\) See, e.g., Rainer Bechtold, Antitrust Law in the European Community, 1992 FORDHAM CORP. LAW INST. 343, 353 (Barry Hawk ed., 1993) (indicating that
has been too severe. This conflict is evidenced by the French challenge to the Commission decision, which was supported by the German government, in the *Kali + Salz* case. Others have suggested that while the Commission has tolerated or is prepared to tolerate mergers that might be treated as unlawful, under American standards, the Commission may be acting more reasonably in some cases than the United States would.

Common to all these criticisms is an assertion that in some material ways American and EC laws differ with respect to mergers. This article, however, will demonstrate that the similarities far outweigh the differences, and that even the differences will diminish over time as enforcement officials in both the United States and the EC adapt to the needs of firms to be competitive on a global scale.

The idea to perform a comparative study between U.S. and EC merger control policy began not with Boeing-McDonnell Douglas but with my re-reading of an article published in 1992 by Robert Pitofsky, now Chairman of the Federal Trade Commission. In this article, Pitofsky suggested changes in the enforcement of section seven of the Clayton Act that, in his view, would enhance the competitiveness of American firms in the global economy. In contrast to the enforcement measures that prevailed during the 1980s, Pitofsky urged "tighter enforcement across the board" with respect to horizontal and vertical mergers

German merger controls were generally perceived as both more rigid and severe than those adopted at the outset by the European Commission, leading to the conclusion that there was likely to be conflict between the two systems). Early on in the history of the Merger Regulation, German officials were fearful that the Commission would not adopt a collective dominance approach. This fact was noted and relied upon by the European Court of Justice in the *Kali + Salz* decision. See infra note 9.


10 See generally *Dennis W. Carlton & William D. Bishop, Merger Policy and Market Definition Under the EC Merger Regulation*, 1993 FORDHAM CORP. LAW INST. 409 (Barry Hawk ed., 1994) (noting ways in which the European approach was more lenient than others and suggesting that a more lenient approach could be justified given the nature of European markets).


12 See *id.* at 198.
and "focused enforcement against some few conglomerate mergers," on the premise that stricter enforcement would enhance the competitiveness of American firms.\textsuperscript{13} Specifically, Pitofsky stated that "[t]he best way to foster the ability of American firms to compete effectively in global markets is to ensure that the markets in which they compete at home are highly competitive."\textsuperscript{14} As part of this approach, he urged that stricter enforcement should be accompanied by a greater recognition of efficiencies as a defense,\textsuperscript{15} a liberalized failing company and failing division defense,\textsuperscript{16} an exception for certain "distressed industries,"\textsuperscript{17} and a narrow defense for mergers that facilitate research and development.\textsuperscript{18}

Chairman Pitofsky was not proposing a merger policy that was any less severe than that of the European Commission. He was proposing a trade-off, a tightening of the standards for measuring anti-competitive effects, but only where the defenses he proposed were recognized. As to the efficiencies defense, he proposed emulating, not departing from, the standards of the EC.\textsuperscript{19} Nevertheless, two phenomena have occurred since Chairman Pitofsky made these proposals: (1) such a defense is now being recognized in the United States, and (2) whatever the promise may have been in 1992, there is little to suggest that in fact the EC has been giving significant weight to efficiency claims. This may indeed be a significant difference in the two regimes, but it cuts in the opposite direction from that which Pitofsky described in 1992.

Much can and has been said about Pitofsky's proposal, as well as similar proposals, not all of which will be addressed here. The most striking aspect of Pitofsky's proposal is the conjunction of two propositions. First, the allowance of certain mergers which are otherwise illegal, i.e., anticompetitive, "could" make a

\textsuperscript{13} Id.
\textsuperscript{14} Id.
\textsuperscript{15} See id.
\textsuperscript{16} See id. at 199.
\textsuperscript{17} Id. A distressed industry is one "in which most or all firms have low profits and chronic underutilization of capacity." Id.
\textsuperscript{18} See id.
\textsuperscript{19} See id. 206–27 (discussing the efficiencies defense). Pitofsky proposed that the U.S. adopt an efficiencies defense after noting that the major trading partners of the U.S., including the EC, already recognize such a defense. See id. at 213–15.
difference in the ability of firms to compete internationally.\textsuperscript{20} Second, the resistance to an efficiencies defense is "out of step" with the merger rules in other countries, where efficiencies are commonly recognized.\textsuperscript{21} The same point is made as to failing firms and distressed industries, but with less emphasis.\textsuperscript{22} The implication is that firms subject only to American antitrust standards are competitively handicapped, at least in part because foreign firms are allowed to merge in circumstances presenting efficiency justifications when American firms are not. Carried to its logical conclusion, this amounts to an assertion that American competition policy is anti-competitive, to some degree.

This is not a new proposition. From the very beginning, the key lament of those in the so-called "Chicago school" was that antitrust policy of an earlier day was anti-competitive precisely because it failed to focus on issues of efficiency.\textsuperscript{23} While the argument did not focus on global competitiveness, being presented at a time when, for a variety of reasons, little attention was being paid to such matters, the argument was to a significant degree the same. Even so, however, proponents of the Chicago approach did not urge, and some opposed, recognition of a specific efficiencies defense in merger cases.\textsuperscript{24}

I. BACKGROUND FOR ISSUES TO BE ADDRESSED

Mergers in the United States, or those which significantly impact American markets, are governed by section seven of the

\textsuperscript{20} See id. at 205–06.
\textsuperscript{21} See id. at 213–15. Pitofsky argued that "[i]n resisting incorporation of an efficiencies defense into merger enforcement, the United States is remarkably out of step with the law of other industrialized countries." Id. at 213.
\textsuperscript{22} See id. at 232–33 ("At most, there is a generalized sense in reviewing foreign statutes and cases that many countries are more willing to take distressed industry considerations into account by allowing specialization arrangements, block exemptions, cartels, and occasionally, mergers.").
\textsuperscript{23} See id. at 210–11.
Clayton Act. Like all U.S. antitrust laws, section seven’s substantive standards are put in the most general terms. Simply put, the statute reaches acquisitions whose effect "may be substantially to lessen competition." Putting flesh on this skeleton was left to the federal courts. Cases brought in the 1960s and early 1970s were invariably brought after the consummation of the acquisition. Thus, if a violation was found, the acquisition had to be undone. Divestiture, with all of its inadequacies, was the remedy of the day.

All that changed with the enactment of the advance notification requirements as part of the Hart-Scott-Rodino Antitrust Improvements Act of 1976. Covered acquisitions could not be consummated until notice, a somewhat euphemistic term for the elaborate information submissions now required, was given to the agencies. The agencies were given the opportunity to investigate and obtain much of the information necessary to evaluate the merger’s effects before consummation. The remedy of choice was no longer post-consummation divestiture, but preliminary injunction. Hart-Scott-Rodino wrought changes in the dynamics of merger analysis and litigation which have gone far beyond what even

26 Id.
29 The enactment of the pre-merger notification procedure in 1976 was driven in part by the desire to avoid the difficulties inherent in the divestiture remedy. Divestiture is the most commonly sought remedy in merger cases because of the inability of the enforcement agencies to carry out a full investigation prior to consummation of the transaction. See S. REP. NO. 94-803, at 61–65; H.R. REP. NO. 94-1373, at 8; The Antitrust Improvements Act of 1976, Hearings on S. 1284 Before the Subcommission on Antitrust and Monopoly of the Senate Committee on the Judiciary, 94th Cong. 90, 96 (statement of Assistant Attorney General Thomas E. Kauper); see generally Kenneth G. Elzinga, The Antimerger Law: Pyrrhic Victories?, 12 J.L. & ECON. 43 (1969) (discussing the difficulties with the divestiture remedy). Ironically, most merger cases are now resolved by consent decrees and most of these decrees require some form of divestiture. See Mary Lou Steptoe & David Balto, Finding the Right Prescription: The FTC's Use of Innovative Merger Remedies, Fall 1995, ANTITRUST 16, 16 (recognizing an increase in the number of consent decrees and noting that divestiture is "the most common remedy" under these agreements).
32 See id. §18a(e).
those of us involved in its enactment could have contemplated in our wildest dreams. It is sufficient here simply to note that the Act brought investigation of virtually all significant mergers and put new teeth in government enforcement programs.

The European Commission struggled with merger control almost from the time the Treaty of Rome came into effect. While the Commission proceeded against and investigated mergers under the prohibition of abuse of a dominant position in Article 86, merger control was largely in the hands of member states until the Merger Regulation came into effect in 1990. With the striking exception of Germany, authorities in the member states had neither the legal control machinery nor the inclination to intervene in major acquisitions. Reaching consensus on the Merger Regulation was difficult, spanning nearly twenty years of discussion. There was little agreement as to when, if ever, mergers presented a competition problem. Nor was there a strong desire to surrender control over mergers that impacted inter-member trade to the exclusive jurisdiction of the European Commission, as was being proposed.

The Commission did not become a major factor in merger control until the EC Merger Regulation came into effect ten years ago. The Merger Regulation begins with the establishment of turnover thresholds. Mergers that fall below these turnover levels, which were lowered in 1998, are not covered by the Merger Regulation and are left to the control of member states. Above the set thresholds, jurisdiction is vested

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33 See William J. Baer, Reflections on Twenty Years of Merger Enforcement Under the Hart-Scott-Rodino Act, 65 ANTITRUST L.J. 825, 825 (1997) (indicating that "[a]t the time of its enactment it was described as one of the most far-reaching changes in antitrust enforcement since the passage of the Clayton Act in 1914"); Joe Sims & Deborah P. Herman, The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation, 65 ANTITRUST L.J. 865, 865 (1997) (discussing the "dramatic impact" of the legislation).

34 See HAWK, supra note 2, at 954–63 (discussing the use of Article 86 and its limitations in merger cases).


36 See id. art. 1, ¶ 2, at 16.

37 See id. Thresholds are set in terms of the world-wide and community-wide turnover of the parties to the merger. See id. Threshold levels were substantially lowered by the 1997 amendment, which took effect in 1998. See Council Regulation 1310/97, 1997 O.J. (L 180).
exclusively in the Commission, and member states may act only if the Commission, under the terms of Article Nine, refers the matter back to them. Thus, the Commission's reach is confined to mergers involving large firms, a distinct difference from the authority of the U.S. Department of Justice and the FTC. Therefore, not only is the EC's merger control relatively new, but the Commission, each year, examines a far smaller number of mergers than its American counterparts. There is, to date, a relatively small amount of raw material from which to divine the Commission's approach to mergers.

Like Hart-Scott-Rodino, albeit with different time periods, the Commission's Merger Regulation established a system of advance notification and suspension of the merger during the ensuing investigation. As in the United States, the purpose is to review mergers before their consummation with an eye toward preventing those likely to be anti-competitive.

In both procedural and institutional terms, U.S. and EC merger controls are strikingly similar. First, both require advance notification and a mandatory period for investigation prior to consummation. Secondly, both focus on prohibition rather than subsequent divestiture as the primary relief. Thirdly, mergers must be judged in terms of future probabilities rather than actual effects. This puts heavy emphasis on

38 See EC Merger Regulation art. 9, §§ 1–10, supra note 35, at 20.
39 In the first few years after the effective date of the merger regulation, the Commission dealt with about fifty notified mergers a year; a number that increased in 1998, the year thresholds were lowered to about 200 mergers. See Alexander Schaub, EC Competition System: Proposals for Reform, 1999 FORDHAM CORP. LAW INST. 129, 137 (Barry Hawk ed. 1999).
40 See EC Merger Regulation art. 4, ¶ 1, supra note 35, at 17 (requiring notice to the Commission within 1 week of the "conclusion of the agreement [to merge], or the announcement of the public bid, or the acquisition of a controlling interest"); art. 7, ¶ 1, at 19 (suspending mergers prior to notification and for an additional three weeks after notification); art. 10, ¶ 1, at 20–21 (establishing time limits for investigatory period).
41 Under both regimes, however, divestiture is a common element in resolving cases by consent. In the United States, consent decrees entered into to avoid litigation commonly include some divestiture. In Europe, it is relatively common to offer various undertakings modifying the original proposed transaction to avoid a finding that the merger is incompatible with the common market. These undertakings or commitments commonly include some degree of divestiture. See Götz Drauz, Remedies Under the Merger Regulation, 1996 FORDHAM CORP. LAW INST. 219, 223–25 (Barry Hawk ed., 1997); Martin Heidenhain, Commitments in EC Merger Control, 1993 FORDHAM CORP. LAW INST. 435, 441–43 (Barry Hawk ed., 1994).
approaches that are predictable and have both a sufficient
degree of clarity and transparency to enable those who counsel
in such matters to do so with at least a modicum of confidence.
In the United States, these predictive rules begin, and in some
cases may end, with an examination of market shares and
concentration data. Very low combined market shares may
indicate, without further examination, that a merger poses no
competitive threat.\textsuperscript{42} Very high market shares and
concentration alone may lead to a challenge or at least to a
presumption of illegality.\textsuperscript{43} Other factors such as buyer size and
product homogeneity may be critical in cases in the middle.
Specific defenses such as efficiency may be available. Whatever
may be said about the substance of American law, the courts and
enforcement agencies have attempted to establish a set of
"rules," or, more accurately, a method of analysis which is
relatively clear. To a degree, we have been prepared to sacrifice
correctness, albeit to as little an extent as possible, for
predictability under a statute which provides virtually no
guidance at all.

The approach in the EC is in many ways similar. The
Commission is also confronted with the need to provide rules
that flesh out its Merger Regulation in an understandable way.
Like the Clayton Act, the Merger Regulation itself is too general
to be of assistance to those counseling on merger matters.\textsuperscript{44} In

\textsuperscript{42} See U.S. DEP'T OF JUSTICE & FED. TRADE COMM'n, HORIZONTAL MERGER
GUIDELINES § 1.51(a) (1992), reprinted in 4 TRADE REG. REP. (CCH) ¶ 13,104
[hereinafter 1992 MERGER GUIDELINES] (stating that mergers below a post-merger
concentration level of 1000 on the Herfindahl-Hirschman Index ("HHI") of market
concentration "are unlikely to have adverse competitive effects and ordinarily
require no further analysis").

(holding that a merger should be presumed to be unlawful when the combined firms
held an undue market share and when merger would result in a significant increase
in concentration). The 1992 guidelines provide that when the post-merger HHI is
over 1800 and the increase in concentration brought about by the merger is over 100
points, the merger is presumed "to create or enhance market power or facilitate its
exercise." 1992 MERGER GUIDELINES, supra note 42, § 1.51(c).

\textsuperscript{44} Under Article 2(3) of the EC Merger Regulation, "[a] concentration which
creates or strengthens a dominant position as a result of which effective competition
would be significantly impeded in the common market or in a substantial part of it
shall be declared incompatible with the common market." EC Merger Regulation
art. 2, ¶ 3, supra note 35, at 17. Under Article 2(1), the Commission in making its
appraisal is to consider, among other things, market structure, actual or potential
competition, the economic and financial power of the parties, barriers to entry,
supply and demand trends, the interests of consumers, and "the development of
the ten years since the effective date of the Merger Regulation, the Commission has sought to develop a clearer, standard method of analysis. As in the United States, it begins with market share and concentration data. Beyond that, however, its approach to date has been somewhat less precise. Indeed, there is a feeling in Europe that precision may not have the value accorded to it in the United States. Commission decisions may appear to be more ad hoc, while in fact outcomes may be the same.

Critical to predictability is transparency. Rules are of little consequence unless they are known. In the United States, we tend to believe that transparency is provided by court decisions. This is in one sense true. The ultimate responsibility for antitrust policy in the United States rests with federal courts whose decisions are publicly reported, widely known, and analyzed. But in the real world of merger enforcement, court decisions simply set outer boundaries. In the vast majority of cases, decisions of the enforcement agencies are outcome determinative. Once the agencies decide not to challenge, the merger can proceed. The reverse is also true. If the agencies believe a merger is anti-competitive and threaten legal action to block it, with few exceptions, the parties either negotiate a consent decree "fixing" the competitive problem, often reintroducing the once discredited divestiture remedy into the equation, or they abandon the transaction. Firms whose mergers are challenged do have one important intermediate step available, namely, to force the agency to go to court to obtain a preliminary injunction. Only at that point, if the agency wins,

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45 Any reader of EC merger decisions will be struck by the application of an almost automatic format, which begins with market definition and calculation of market shares. The Preamble to the EC Merger Regulation provides that when combined market shares are below 25%, the merger is presumed to be compatible with the common market. See EC Merger Regulation preamble, ¶ 15, supra note 35, at 15. Conversely, high market shares will create a presumption of dominance. See Commission Decision 97/277, 1997 O.J. (L 110) 53, ¶ 106 (Case No. IV/M.784) [hereinafter Kesko/Tuko].


47 See supra note 29.
may the transaction be abandoned. Seldom is a merger case litigated to this point. The Supreme Court has not decided a merger case on the merits since 1974. The dramatic changes that have occurred since 1977, have come without the Court's supervision, and with relatively slight involvement of the Courts of Appeals. As a practical matter, merger policy is almost exclusively in the hands of the two federal enforcement agencies. Their policies are embodied in the Merger Guidelines, which have changed dramatically over time and have played a significant role, even in court decisions. Because the action or inaction of the enforcement agencies is generally determinative, transparency with respect to merger policy is provided by their Guidelines, which, as a practical matter, are coming closer and closer to being rules.

48 For example, the merger of Staples and Office Depot was abandoned after consent-decree negotiations and the FTC's success in court in obtaining a preliminary injunction. See FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997).


The situation of the European Commission is somewhat different. Until mid-1998, when the Court of Justice decided the Kali + Salz case, the Commission had formulated its approach to mergers virtually without judicial involvement. As in the United States, mergers likely to be objected to by the Commission are often "fixed" by consensual undertakings accepted by the Commission as a solution to the competitive problems it identified. Unlike the enforcement agencies in the United States, the Commission has applied its policies without the issuance of guidelines. Transparency, then, must come primarily from its own published decisions and statements. Unlike the American enforcement agencies, the Commission issues a letter notifying the parties when it concludes a Phase 1 investigation. These letters are publicly available and do provide at least some clues as to the Commission's thinking. This of course is hardly an option for the U.S. agencies. The Commission is notified only with respect to mergers above relatively high threshold levels. American agencies, on the other hand, are notified of virtually all mergers. Thus, the number of notifications received by the EC in eight years is far less than our agencies receive in six months. It is wholly unrealistic to expect our agencies to respond with some kind of formal document every time they conclude that a merger raises no significant competitive threat. Guidelines are in a sense an alternative to that, and are probably the best we can do, at least if the agencies themselves follow them. In one sense, EC merger

53 See supra note 41. In the EC, a Commission decision finding a merger acceptable because of undertakings made by the parties may still be subject to challenge by non-parties. See Kali + Salz, supra note 9, 1998 E.C.R. at I-1396, [1998] 4 C.M.L.R. at 851–852, ¶¶ 28–29. For example, the Commission's decision in Kali + Salz although dealing with the market of Germany, was nonetheless successfully challenged by the French government. See id.
54 Under the Merger Regulation, the Commission must make the decision to initiate a full proceeding within one month of the receipt of notification from the parties. See EC Merger Regulation art. 10, ¶ 1, supra note 35, at 20. Most cases are closed at the end of this so-called Phase 1 period. Phase 2 proceedings initiated after this initial examination involve a full investigation.
55 The notices are published in the Official Journal of the European Communities ("O.J."), and are printed in full text in the EEC MERGER CONTROL REPORTER (Kluwer 2000) along with the decisions following Phase 2 proceedings. Decisions after full proceedings are cited to the "L" series of the Official Journal of the European Communities ("O.J."). Notifications to parties are cited by case number and date.
policy is less transparent than that of American agencies, lacking the coherent, single statement which guidelines provide. The Commission, however, may in fact provide a better sense of what is really going on because it explains non-action as well as action.

In the end, the process of the EC is relatively similar to the process in the United States. While American commentators have been prone to characterize the EC system as regulatory and the U.S. system as a process of law enforcement, this distinction is largely illusory. Both in the U.S. and the EC, merger policy is almost exclusively in the hands of the enforcement agencies. In the U.S. few government cases are litigated and, except for an occasional case filed by a state Attorney General, few other merger cases go to court. Tightening of standing and antitrust injury requirements has made it virtually impossible for private parties to challenge mergers in court.

While the situation under EC merger policy is similar, the Commission's notifications are to some extent different, with respect to timing and content. The Commission may seek information from different sources, placing heavier weight than the U.S. does on the views of competitors. Parties before the

56 The EC process may, in many respects, seem more regulatory than our own, given the fact that the Commission is both prosecutor and, in most cases, the final arbiter. Moreover, the Commission is charged with the formulation and implementation of a broad range of economic policies and is thus, in a sense, acting in a more "political" sense than is true in the United States. In the United States, the enforcement of section seven is also perceived as highly regulatory, at least in the sense that "rules" of the agencies tend to be outcome determinative and are applied in a manner suggesting a broad range of discretion. See Thomas E. Kauper, The Justice Department and the Antitrust Laws: Law Enforcer or Regulator?, 35 ANTITRUST BULL. 83, 105–13 (1990).

57 The decisions in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977), and Cargill, Inc., v. Monfort of Colorado, Inc., 479 U.S. 104 (1986), make it extremely difficult for a competitor to establish the requisite "antitrust injury" necessary to maintain a suit. In the rare case when there is a substantial likelihood that the acquisition will result in predatory conduct, however, a suit can be maintained. See HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 16.3, at 544–47 (1994).

58 The requirements regarding the content of the notification to the Commission are set out in Form Correlating to the Notification of a Concentration Pursuant to Regulation (EEC) No. 4064/89 (Form CO), reprinted in EEC Merger Control Reporter, Part A, at 31 (Kluwer 1998).

59 The parties involved in the Boeing-McDonnell Douglas merger objected throughout to the role played by Airbus during the Commission's investigation. See infra note 156 and accompanying text.
Commission do not have the option of obtaining early judicial input through preliminary injunction proceedings. In this sense, the Commission may appear to have even greater control over the development of merger policy than its American counterparts. Private actions as such do not exist, although the Court of Justice may permit somewhat greater latitude in allowing customers or even third parties to challenge Commission action. Furthermore, member states may need to be consulted. In the end, however, merger policy formulation is largely in the hands of the Commission.

There is, however, one important difference that should be noted here, not because it has resulted in different outcomes, but because it has the potential to do so. Both the Antitrust Division and the Federal Trade Commission have functioned relatively free of interference or influence by other government agencies charged with trade policy or other elements of national economic or industrial policy. The FTC is independent of the Executive Branch, and the Antitrust Division has been successful in characterizing itself as simply engaged in law enforcement and not economic policy making. The European Commission, on the other hand, is charged with responsibility for virtually all of the economic policies of the Community. The Commission,

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60 The criterion governing the ability of a third party to seek annulment of a decision of the Commission under the Merger Regulation is set forth in Comité Central d'Entreprise de la Société Anonyme Vittel v. Commission, T-12/93, 1995 E.R.C. II 1247 (Nestlé).

61 Consultation with a member state Advisory Committee is required before the Commission undertakes any action against a merger. See EC Merger Regulation art. 19, ¶ 3, supra note 35, at 23.


63 This stance is aided to a substantial degree by Court suggestions that the sole concern of our antitrust laws is anti-competitive effects. See National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963). This limitation to an examination of adverse competitive effects has made it easier for the agencies to rebuff claims from others within government based on other social or economic policies. See Calkins, supra note 49, at 35.

therefore, can easily interject other policy concerns, such as employment or trade effects, or even less specific political concerns into its merger analysis. Whether it has actually done so is difficult for an outsider to determine. Because of the potential influence that such external pressures can have on EC decision-making, however, the criticism of the Commission's approach to the Boeing-McDonnell Douglas case as trade policy oriented or, more pejoratively, protectionist, has at least the ring of plausibility. The Commission may also find itself caught between the tugs and pulls of its member states, as was true in Kali + Salz. This may interject other "political" or industrial policy in a way in which the U.S. is unfamiliar.

II. THE SUBSTANCE OF MERGER POLICY: THE U.S. AND EC COMPARED

All this is by way of prelude to the real question. Does EC merger policy differ substantively in significant ways from U.S.
policy? If so, how, and will these differences persist? This section will focus on horizontal mergers, for they form the bulk of the work of both U.S. and EC enforcement agencies.

On the face of it, very significant differences might be expected. American merger policy rests on the general language of section seven of the Clayton Act, which condemns any acquisition where the effect "may be substantially to lessen competition." From the amendment of section seven in the 1950s to the present time, we have been concerned with mergers that enhance the likelihood of collusion, actual or tacit. Combined with theories of interdependent or oligopoly pricing where concentration is high, the base concern has consistently been with price setting by groups of firms. Only in the past several years has there been any focus on the so-called unilateral effects doctrine. The bedrock of American merger policy has been the fear that mergers that increase concentration significantly will facilitate collusion, actual or tacit, between the merged firm and the other firms in the market.

The EC's Merger Regulation, on the other hand, appears to have a more specific focus, prohibiting any merger "which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it." Thus, the Merger Regulation appears to have a more limited scope, directed solely to the creation or strengthening of the dominant position of a single firm. While the U.S. enforcement agencies seem to be more concerned with the enhancement and exercise of collective market power, the EC appears to focus on the

69 See infra note 133.
70 This emphasis on the facilitation of collusion as the measure of harm in horizontal merger cases is deeply rooted in U.S. Supreme Court jurisprudence. See United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363 (1963) (noting that competition is likely to be greater when there are many sellers, none of which maintain a significant share of the market). The 1968, 1982, and 1984 Merger Guidelines all describe the danger of horizontal mergers in such terms, while the 1992 Merger Guidelines take two different approaches. See supra note 50 (discussing the evolution of the Merger Guidelines). The first is focused on explicit or implicit coordination in markets with few firms. See 1992 MERGER GUIDELINES, supra note 42, § 2.1. The other is directed toward concerns over unilateral effects. See id. §2.2. As stated by Professor Hovenkamp, "[t]oday the principal concern of merger policy is that horizontal mergers may facilitate express or tacit collusion or Cournot-style oligopoly behavior." HOVENKAMP, supra note 57, § 12.1b, at 445.
71 EC Merger Regulation art. 2, ¶ 3, supra note 35, at 17.
concentration of power by single firms. Furthermore, while the authority of the Merger Regulation does not rest solely on the condemnation in Article 86 of an "abuse of a dominant position," the language of the Regulation does seem to be closer to the language of Article 86 than to that of Article 85, which deals expressly with collective activity. Indeed, the Merger Regulation could be read more narrowly than Article 86. An immediate word of caution, however, is in order. Even if the EC focus were entirely on the dominant position of a single firm, and today it clearly is not, it would be a mistake to suggest that the Merger Regulation is confined to the kind of "merger to monopoly" that might be unlawful under the prohibitions of section two of the Sherman Act governing monopolizing conduct. The distinction here rests largely on the fact that the thresholds for finding a dominant position under Article 86 may be significantly lower than the measures of monopoly power under section two of the Sherman Act.

However "dominant position" is defined, the language of the Merger Regulation suggests that the Commission is likely to measure competitive harm in terms of injury to competitors. The Commission appears to be primarily concerned with the

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72 EC TREATY, supra note 1, art. 86; see also supra note 34 and accompanying text (discussing Article 86).
73 See EC TREATY, supra note 1, art. 85.
74 In Kali + Salz, the Court of Justice stated clearly that the Merger Regulation is designed to give effect to the principles of both Articles 85 and 86. See Kali + Salz, supra note 9, 1998 E.C.R. at I-1497–98, [1998] 4 C.M.L.R. at 932, ¶ [153].
75 Unlike Article 86, which speaks of abuses "by one or more undertakings" of a dominant position, EC TREATY, supra note 1, art. 86, the Merger Regulation refers only to "a dominant position." EC Merger Regulation art. 2, ¶ 2, supra note 35, at 17. It was this absence of any reference to collective dominance which the French government relied on in Kali + Salz to support its argument that the Merger Regulation does not encompass "oligopolistic" or "collective" dominance. See Kali + Salz, supra note 9, 1998 E.C.R. at I-1428–44, [1998] 4 C.M.L.R. at 883–99, ¶¶ 99–130.
76 See Amy Ann Karpel, Comment, The European Commission's Decision on the Boeing–McDonnell Douglas Merger and the Need for Greater U.S.–EU Cooperation in the Merger Field, 47 AM. U. L. REV. 1029, 1038 n.40 (1998) (discussing the European Commission's interpretation of the Merger Regulation to "prevent the creation or strengthening not just of a dominant position held by a single firm but also of a dominant position held jointly by a number of firms"); see also Spencer Weber Waller, The Internationalization of Antitrust Enforcement, 77 B.U. L. REV. 343, 354 (1997) (arguing that the European Common Market condemns "the abusive use of dominant market positions").
78 See infra note 114.
potential exclusionary effects a merger could create, which in turn could diminish the ability of competitors to compete. Conversely, in the United States, harm is measured more directly in terms of output and price effects felt by consumers, not the competitors of the dominant firm.\textsuperscript{79} Moreover, the Commission's focus on the strengthening of a dominant position also makes it more difficult to take productive efficiencies into account. After all, mergers that create substantial efficiencies may also strengthen a dominant position. The language of the Merger Regulation appears to leave little room for asserting an efficiency justification where the merger would result in the strengthening of a dominant position. Indeed, the Regulation may go even further, finding a dominant position strengthened precisely because efficiencies are created.

If these conjectures based simply on the language of the Merger Regulation prove to be correct, EC and U.S. merger policy would be substantially different, both in their analysis of competitive harm and recognition of cognizable defenses. Whether this is so, and to what degree, requires an analysis of merger policy as actually applied. This article will now examine these questions more specifically.

\section{A. An Analysis of Competitive Harm}

From the beginning of the application of section seven of the Clayton Act, the focus of merger policy in the United States has been on the likelihood of actual or tacit collusion in markets characterized by high market concentrations.\textsuperscript{80} Two fundamental ideas have predominated in applying section seven of the Clayton Act. First, actual collusion is more likely to occur and to be effective when the number of firms in the industry is relatively small. Second, even without express collusion, oligopolistic markets and interdependent pricing, which are likely to accompany such market structures, are more likely to result in higher prices and lower outputs than unconcentrated


\textsuperscript{80} See supra note 70 and accompanying text.
markets. These two propositions have been the bedrock of merger policy since the Supreme Court's decision in United States v. Philadelphia National Bank.\textsuperscript{81} In Philadelphia National Bank, the Court determined that when a merger produces "a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market," there is a presumption of illegality.\textsuperscript{82} The Court further found that a combined market share of thirty percent was sufficient to give rise to such a presumption.\textsuperscript{83} What followed was a series of U.S. Supreme Court decisions between 1963 and the 1974 decision in United States v. General Dynamics Corp.\textsuperscript{84} that had the effect of elevating this presumption to a virtual rule of law, which placed extraordinary emphasis on market definition and the spurious concept of relevant "submarkets."\textsuperscript{85} The low point came in United States v. Von's Grocery Co.,\textsuperscript{86} where the Court condemned an acquisition resulting in a combined market share of seven and one-half percent.\textsuperscript{87}

In General Dynamics, the Court retrenched, finding that static market shares were not an accurate reflection of future market power, and that the presumption of illegality, which the government had established upon a showing of combined market shares in the range of fifteen percent, was therefore rebutted.\textsuperscript{88} The elevation of the market share presumption to a virtual rule of law thus came to an end. General Dynamics is the Supreme Court's last word on the subject, a fact that is as lamentable as it is astonishing. Today, these decisions are looked at with a degree of wonderment. They are, with the exceptions of Philadelphia National Bank and General Dynamics, in a real sense, antiques.

\textsuperscript{81} 374 U.S. 321 (1963).
\textsuperscript{82} Id. at 363.
\textsuperscript{83} See id. at 364.
\textsuperscript{84} 415 U.S. 486 (1974).
\textsuperscript{86} 384 U.S. 270 (1966).
\textsuperscript{87} See id. at 272–74.
\textsuperscript{88} See General Dynamics, 415 U.S. at 486.
These results would not follow today, either here or in the European Community. Any comparison between these early decisions and the approach in the EC would suggest that EC merger policy is lenient indeed. But this of course is not an apt comparison, for things in the United States have changed dramatically, without guidance from the Supreme Court. Rather than being limited to its facts, as it easily could have been, *General Dynamics* was taken by the lower courts and the enforcement agencies as an open invitation to substantially reformulate merger policy without, however, departing from its core concern with collusion. Relying on the consumer welfare standard adopted in a series of Supreme Court decisions dealing with conduct other than mergers, some of which set aside earlier precedent, the courts and agencies have worked a kind of revolution in merger analysis, resulting in decisions like *United States v. Waste Management, Inc.* and *United States v. Baker Hughes, Inc.* At the heart of this change is the series of Merger Guidelines issued by the agencies. These Guidelines reflect significant shifts in thinking and have influenced the courts, guided enforcement policy, and are more often than not, outcome determinative. They may be taken today as a comprehensive statement of American merger policy. Comparisons between U.S. and EC merger policy can fairly begin with the 1992

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89 The two most significant of these non-merger cases of the late 1970s were *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 37-38 (1979) (applying to legality of blanket licensing of a copyright), and *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*, 433 U.S. 36, 37 (1977) (applying to legality of vertical non-price restrictions), which overruled *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). Both of these decisions moved antitrust doctrine in the direction of an efficiency-based consumer welfare standard—a standard that is reflected in all of the Merger Guidelines since 1982.

90 743 F.2d 976, 978–79 (2d Cir. 1984) (upholding an acquisition even though it resulted in a market share in excess of 50% because entry into the market was easy).

91 908 F.2d 981, 984 (D.C. Cir. 1990) (noting that “[e]vidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness”); see also *United States v. Country Lake Foods, Inc.*, 754 F. Supp. 669, 679–81 (D. Minn. 1990) (indicating that despite the increase in concentration, the merger was not likely to lessen competition); *United States v. Calmar, Inc.*, 612 F. Supp. 1298, 1306–07 (D.N.J. 1985) (concluding that despite the high concentration of the merged firms, the government is not likely to establish a section seven violation).

92 See supra note 50.
Horizontal Merger Guidelines issued jointly by the Department of Justice and the FTC.\textsuperscript{93} The 1992 Guidelines continue to stress the avoidance of collusion as the primary concern with horizontal mergers, although the interjection of a concern over unilateral effects, an analysis that continues to mystify some of us, has muddied the waters a bit.\textsuperscript{94} The unilateral effects doctrine has yet to be tested in any real way through litigation.\textsuperscript{95} Whatever else one thinks of it, the analysis is still focused on output and price effects.

While the framework of analysis set forth in the Guidelines is probably well known, it is useful to summarize the process. Under the Guidelines, markets must be defined in product\textsuperscript{96} and geographic terms.\textsuperscript{97} Market shares and concentration levels, as measured by the Herfindahl-Hirschman Index (HHI) are calculated.\textsuperscript{98} The HHI gives great weight to disparity in firm size, being substantially higher when there are one or two firms with market shares significantly higher than those of the other firms in the market.\textsuperscript{99} Market share data will be interpreted taking into account factors that suggest that shares based on historic data either understate or overstate the future significance of the merged firm.\textsuperscript{100} These are the so-called General Dynamics factors\textsuperscript{101} that were critical in the FTC’s conclusions in \textit{Boeing-McDonnell Douglas}.\textsuperscript{102}

\textsuperscript{93} See 1992 MERGER GUIDELINES, supra note 42.
\textsuperscript{94} See infra note 123.
\textsuperscript{96} See 1992 MERGER GUIDELINES, supra note 42, § 1.1.
\textsuperscript{97} See id. § 1.2.
\textsuperscript{98} See id. § 1.5.
\textsuperscript{99} See id.
\textsuperscript{100} See id. §§ 1.52–1.522.
\textsuperscript{101} In \textit{United States v. General Dynamics Corp.}, 415 U.S. 486 (1974), the Court found that the combined market share of the merging coal companies was sufficiently high to create a presumption of illegality. That presumption, however, was rebutted by a showing that the acquired company lacked uncommitted coal reserves and had little opportunity to acquire more. See id. at 510–11. The General Dynamics factors are sometimes referred to as the “failing firm” defense. See Statement of Commissioner Mary L. Azcuenaga in Boeing Co., 5 TRADE REG. REP. (CCH) ¶ 24,295 (FTC July 1, 1997).
\textsuperscript{102} In \textit{Boeing-McDonnell Douglas}, the FTC found that the failure of McDonnell Douglas to improve the technology and efficiency of its aircraft caused its “prospects
The Guidelines create a safe harbor when the post acquisition HHI is below 1000.\textsuperscript{103} When the HHI exceeds 1800, it is presumed that the merger is anti-competitive.\textsuperscript{104} When the HHI is between 1000 and 1800, there is no presumption of illegality and analysis rests on a variety of other factors—factors that may also lead to a rebuttal of the presumption at the above 1800 level.\textsuperscript{105} These factors may be characterized as (1) the presence or absence of elements that go to the detection and punishment of firms that deviate from a pattern of coordinated interaction, including homogeneity of product, a pattern of product standardization and/or information exchanges, frequency of orders, and size of buyers;\textsuperscript{106} (2) ease of entry by committed entrants sufficient to restrain price increases when such entry could be reasonably exacted within about two years;\textsuperscript{107} (3) the creation of internal efficiencies;\textsuperscript{108} and (4) the imminent failure of one of the merging firms.\textsuperscript{109} Ease of entry is a trump card; no merger, whatever the HHI numbers, will be challenged when entry is easy. The failing company defense is likewise absolute.

Much could be said about the Guidelines’ approach and the approach employed by the courts in the relatively few cases that

\textsuperscript{103} See 1992 MERGER GUIDELINES, supra note 42, § 1.51(a) (stating that markets with a post-merger HHI below 1000 are “unconcentrated” and that “mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and ordinarily require no further analysis”).

\textsuperscript{104} See id. § 1.51(c). Markets with a post-merger HHI above 1800 are considered “highly concentrated.” Id. In highly concentrated markets, “mergers producing an increase in the HHI of more than 50 points ... raise significant competitive concerns.” Id. Furthermore, “[w]here the post-merger HHI exceeds 1800, it will be presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise.” Id.

\textsuperscript{105} See id. § 1.51(b). Mergers with a post-merger HHI between 1000 and 1800 are “moderately concentrated.” Id. In moderately concentrated markets, “mergers producing an increase in the HHI of less than 100 points ... are unlikely to have adverse competitive consequences and ordinarily require no further analysis.” Id. Mergers that produce an increase in the HHI of more than 100 points, however, “potentially raise significant competitive concerns.” Id. The competitive concerns created when the post-merger HHI is above 1000, however, are balanced by several other factors. See id. §§ 2–5.

\textsuperscript{106} See id. § 2.1.

\textsuperscript{107} See id. § 3.

\textsuperscript{108} See id. § 4.

\textsuperscript{109} See id. § 5.1.
have been litigated over the past decade. For present purposes, it is enough to say that the courts have accepted the basic approach of the Guidelines. There has, however, been some disagreement over several details. For example, in several prominent cases, the courts have found entry easy and thus have allowed mergers with high market shares, even though the enforcement agencies would not have done so.\textsuperscript{110} With rare exceptions, over the last fifteen years virtually no mergers have been challenged by the agencies when the post-acquisition HHI was below 1800 or when combined markets shares were under thirty percent.\textsuperscript{111} While the analysis begins with market shares and concentration data, other factors, all directed to the question of the likelihood of successful actual or tacit collusion between the merged firms and other firms in the market, will be taken into account.\textsuperscript{112} Among these factors are market transparency,

\textsuperscript{110} See supra notes 90-91 and accompanying text.

\textsuperscript{111} Two exceptions include Hospital Corp. of America \textit{v.} FTC, 807 F.2d 1381, 1384 (7th Cir. 1986) (noting that the combined market share was 26\% but four firm concentration ratio after merger would increase to 91\%) and \textit{In re Occidental Petroleum Corp.}, 115 F.T.C. 1010, 1273 (1992) (indicating a post-acquisition HHI in mass and suspension PVC market of about 1300).

\textsuperscript{112} In a series of other decisions, the Commission applied the concept of oligopolistic dominance but while finding that such dominance appeared to exist, cleared the transaction anyway. In \textit{Mercedes-Benz/Kässbohrer}, infra note 131, the Commission found that the oligopoly of the top three firms would be checked by future entry. Somewhat similarly, in \textit{Krupp/Thyssen/Riva/Palch/Tadfin/AST}, the Commission discussed collective dominance between the top two post-merger firms and among the top five post-merger firms. As to the latter, the Commission found that the market shares of the top five firms were sufficiently disparate that parallel behavior would be difficult, particularly because the industry was marked by considerable excess capacity. Looking only at the top two post-merger firms whose combined market share was 55%-70\%, the remaining competitors had sufficient strength to restrain the ability of the putative duopolists to act independently. More striking are the decisions in \textit{Pilkington-Techint/SIV}, infra note 131, and \textit{Mannesman/Vallourec/Itoya}, infra note 131. In \textit{Pilkington-Techint}, the Commission examined concentration levels of the top five firms in the market. After noting that the transaction in question would increase the degree of concentration in an already highly concentrated market with high entry barriers and that there were strong incentives to engage in anticompetitive parallel behavior, the Commission cleared the transaction because there were significant excess capacities, asymmetries in market shares, little market transparency, and in one segment of the market, large powerful buyers. Thus, whatever the incentives to anticompetitive parallel behavior, it was not likely to occur. This was despite the fact that on two past occasions firms in the market had been found guilty of cartel behavior. In \textit{Mannesmann}, the Commission concluded that while there were strong incentives for the top two firms that would hold 70\% of the post-merger market to engage in anticompetitive parallel behavior because the market was highly transparent and other firms in the market had neither the possibility nor the inclination to significantly constrain the
homogeneity of product, and buyer characteristics. The General Dynamics factors have been given considerable weight in assessing market shares, both by the agencies and the courts. Ease of entry has resulted in the allowance of a number of mergers where market shares and HHIs were very high. Economic analysis has now come to the forefront with economists in the agencies playing a major, if not predominant, role in deciding whether a merger should be challenged. We have come a long way since Von's Grocery. What is driving the change more than anything else is the perception that many, if not most, mergers are efficiency-enhancing, a fact that has come to the forefront with the need to permit American firms to be competitive in international markets. Neatly coinciding with this need has been the shift away from the populist antitrust regime of the 1960s, a regime in which courts seemed prepared to use the antitrust laws to protect small enterprises even at the cost of inefficiency. It was a regime that could no longer be afforded.

How does merger analysis in the EC differ? The Commission begins as the U.S. does, with product and geographic market definition and the derivation of market share.

top two firms, the transaction was not likely to result in a strengthening of a dominant position. Any significant price increase would provoke further entry by Japanese producers. The decision is of particular interest because the Commission reached this conclusion in the face of statements by existing domestic competitors that they would follow the lead of the top two firms in setting prices.

See, e.g., In re B.F. Goodrich Co., 110 F.T.C. 207, 315–17 (1983) (discussing product homogeneity and market transparency); Occidental Petroleum Co., 115 F.T.C. at 1250–64 (same). Size and sophistication of buyers have been elements considered in a number of cases. See, e.g., United States v. Baker Hughes, Inc., 908 F.2d 981, 986 (D.C. Cir. 1990) (stating that the sophistication of the buyers “was likely to promote competition even in a highly concentrated market”); United States v. Archer-Daniels-Midland Co., 781 F. Supp. 1400, 1416 (S.D. Iowa 1991) (noting that “the existence of large, powerful buyers of a product mitigates against the ability of sellers to raise prices”). Size and sophistication of buyers is also significant because the presence of large knowledgeable buyers creates a strong incentive for members of a cartel or oligopoly to cheat on the cartel or oligopoly price. See 1992 MERGER GUIDELINES, supra note 42, § 2.1–2.12.

See 1992 MERGER GUIDELINES, supra note 42, § 1.52–1.522. Boeing-McDonnell Douglas is the best recent example of the application of these factors. See Boeing Co., 5 TRADE REG. REP. (CCH) ¶ 24,285 (FTC July 1, 1997).

See supra notes 90–91 and accompanying text.

See supra notes 86–87 and accompanying text.

If the EC were to define markets more narrowly than the U.S. does, different outcomes might be expected. The Commission has been sharply criticized in the past for the use of narrow market definitions in Article 86 cases. There is, however, little difference between market definition under the Merger Regulation and section seven of the Clayton Act. One difference is that the Commission does not generally consider supply substitutability as part of market definition, in contrast to the conventional market analysis in the United States. This is not a significant difference, however, because the Commission does consider supply substitutability in its assessment of potential entry. The tendency to define markets in national terms, as opposed to EC terms, has diminished as the EC succeeds in breaking down national legal and regulatory barriers. Today, many markets are defined as EC-wide, or even wider. American lawyers and economists should be perfectly comfortable with the process.

The significance of combined market shares in EC analysis, however, is not altogether the same as in the United States, largely because the Commission's concept of competitive harm differs significantly from our own. The Merger Regulation identifies harm as the creation or strengthening of a dominant position. This, in turn, has been identified as the ability of the firm(s) involved to act independently from other firms. While

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120 See Kauper, supra note 119, at 1745–47, 1767.

121 See id.

122 See id. at 1726–33.

123 See id. at 1750–63.

124 See supra note 72 and accompanying text.

125 Decisions under the Merger Regulation routinely refer to single firm dominance as the ability "to behave to an appreciable extent independently of its competitors and its customers." Commission Decision 96/222, 1996 O.J. (L 75) 38, 52, ¶ 83 (Case No. IV/M.603 Crown Cork & Seal/Carnaud Metalbox) [hereinafter
it is true that firms might be able to act independently of each other because they have colluded, this is not the primary meaning attached to independence by the Commission.

From the outset, the Commission has struggled with the question of whether the concept of dominance was limited to an assessment of the power of a single firm. Did the merger, in short, create or strengthen a dominant position in the merging parties themselves? Is this the only circumstance condemned by the Merger Regulation, or does it also extend to the creation or strengthening of collective dominance by the merging firm and one or more other firms? This has been perhaps the most critical substantive question the Commission has faced.

As early as its decision in *Nestlé/Perrier*, the Commission gave the Merger Regulation a broader reach by interpreting it to cover "oligopolistic dominance." The Commission's language in that case sounds much like that used in American cases based on the idea that high concentration is likely to result in supra-competitive pricing through interdependent decision making. Its decision rested, in part, on the Commission's observation that other countries, including several of its own member states, apply their merger controls to prevent the threat of oligopolistic behavior. The Commission did not believe that these member states would have surrendered their control over large mergers to the exclusive jurisdiction of the Commission if, as a result, acquisitions subject to their own rules based on fears of oligopolistic pricing could not be reached by the Commission. Following *Nestlé/Perrier*, the Commission persisted in its view of oligopolistic dominance. Finally, over the objections of France

Crown Cork & Seal/Carnaud Metalbox]. Interestingly, the Court of Justice used the same standard in examining a post-merger duopoly. See Kali + Salz, supra note 9, 1996 E.C.R. at I-1519, 4 C.M.L.R. at 947, ¶ [221] (stating that the alleged duopoly would be “able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and also of consumers”).

*Commission Decision 92/553, 1992 O.J. (L 356) 1 (Case No. IV/M.190 Nestlé/Perrier)* [hereinafter Nestlé/Perrier].

126 *Commission Decision 92/553, 1992 O.J. (L 356) 1 (Case No. IV/M.190 Nestlé/Perrier)* [hereinafter Nestlé/Perrier].

127 See id. at 24, ¶¶ 110–31.

128 See id. at 24, ¶¶ 110–14.

129 See id. at 24–25, ¶ 115.

130 See id.

131 There have been numerous Commission decisions applying the concept of collective dominance. See Commission Decision 99/152, 1999 O.J. (L 50) 27, 40–41, ¶¶ 95–97 (Case IV/M.1016 Price Waterhouse/Coopers & Lybrand) [hereinafter Price Waterhouse/Coopers & Lybrand]; Commission Decision 97/25, 1997 O.J. (L 11) 1, 24 ¶ 131 (Case No. IV/M.580 ABB/Daimler-Benz) [hereinafter ABB/Daimler-Benz];
but with the support of Germany, the Commission's position was accepted in large part just two years ago by the European Court of Justice in *Kali + Salz*.\(^\text{132}\) With objections to the general concept of "collective dominance," now rejected by the Court of Justice, the merger policy of the EC appears to have moved into much closer conformity with American merger control. While this is clearly true, significant differences remain.\(^\text{133}\)

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\(^{133}\) Beginning with the 1992 Merger Guidelines, the enforcement agencies have developed a merger analysis that does not rest solely on the increased likelihood of collusion. See 1992 MERGER GUIDELINES, supra note 42. The Merger Guidelines now also look to the power the merged firm may itself have over its customers. See *id.* §§ 2.2–2.22. This so-called unilateral effects analysis may come into play either (1) when products are highly differentiated and a significant share of the sales of the merging partners is accounted for by purchasers who view the products as their first or second choices, and rivals' repositioning of product lives will not replace sales to these purchasers; or (2) when products are undifferentiated and competition is driven primarily by capacity. In either case, the merged firm may find it profitable to raise the price to customers whose choices are limited even though some sales are lost. For a fuller discussion see Roscoe B. Starek, III & Stephen Stockum, *What Makes Mergers Anticompetitive?: "Unilateral Effects" Analysis Under the 1992 Merger Guidelines*, 63 ANTITRUST L.J. 801 (1995).

The question may be asked whether the unilateral effects analysis brings American law closer to the dominance analysis of the EC. In some respects it does. As in single firm dominance cases, the analysis does not rest on any inference or proof of likely collusion. The Guidelines' unilateral effects threshold of a 35%
To consider these differences, it is useful to consider cases of single-firm dominance first, for these are the cases in which the Commission's approach initially developed. The Commission's analysis under the Merger Regulation is similar to that in Article 86 cases involving a single firm's abuse of a dominant position. Single-firm cases are not based on any increased threat of collusion. The issue invariably raised in such cases is whether the merged firms will be able to act, to a substantial degree, independent of their rivals.

Most of the Commission's decisions in which objections to mergers have been raised have rested on findings that the acquisition would create or strengthen the position of a single dominant firm. Many of these cases involve combined market shares in excess of sixty percent, although dominance has also been found with market shares as low as forty-three percent. Because dominance may be established with market shares significantly lower than what the enforcement agencies would normally define as a monopoly in the United States, the reach of the Merger Regulation, even if confined to single-firm dominance, would extend to many cases that would be thought

to begin to approach the thresholds employed by the EC in determining dominance. Because the response of rivals must be examined, the unilateral effects analysis could lead to a direct examination of their strengths and weaknesses. The analysis differs, however, from that employed by the European Commission in several respects. The American unilateral effects analysis is limited to particular types of cases. The European concept of dominance is more generalized. Nor does unilateral effects focus on the impact of the merger on rivals. The European Commission has frequently described brand preferences as barriers to entry, but has not otherwise embraced the American unilateral effects standards.

134 This similarity is not surprising because it was believed that the Merger Regulation was largely based on Article 86.


objectionable in the United States under an analysis emphasizing the likelihood of collusion. After all, a combined market share of fifty percent would indicate an HHI far in excess of the 1800 level, a level at which the Merger Guidelines indicate an acquisition is likely to be found anti-competitive. Nevertheless, an approach based entirely on single-firm dominance would hardly reach all of the cases in which illegality would likely be found in the United States under an approach placing primary emphasis on the likelihood of actual or tacit collusion.

Analysis in all Commission cases begins with market definition and calculation of market shares. Market shares in excess of the dominance thresholds create no more than a presumption of dominance, much as in the United States. While not articulated as clearly as in the United States Merger Guidelines, the Commission also considers a variety of other factors. The size and power of buyers has been taken into account, not as a barrier to collusion but in terms of countervailing power. The most significant additional elements, at least in single-firm dominance cases, have been ease of entry and an assessment of the strengths and weaknesses of existing competitors including the likely impact the proposed merger will have upon their continuing ability to compete.

As in the United States, ease of entry is a virtual trump card, permitting what otherwise would be objectionable

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137 See supra note 105 and accompanying text.

138 Very high market shares may establish prima facie dominance. See Tetra Pak/Alfa-Laval, supra note 135, 1991 O.J. (L 290) at 41, § IV.B.3.3 ("A market share as high as 90% is, in itself, a very strong indicator of the existence of a dominant position."). Conversely, low market shares may be enough, without more, to lead the Commission to allow a merger even without opening a full inquiry. See Commission Notice, 1994 O.J. (C 178) 15 (Case No. IV/M.441 Daimler Benz/RWE); Commission Notice, 1992 O.J. (C 228) 6 (Case No. IV/M.232 PepsiCo/General Mills). When the facts of the cases are not at either extreme, the Commission's analysis will typically turn on evaluation of the factors further discussed in the text.

139 See Pilkington-Techint/SIV, supra note 131, 1994 O.J. (L 158) at 38, ¶ 56 (relying on buyer purchasing power in finding the merger in question unobjectionable); see also Commission Decision 98/666, 1998 O.J. (L 316) 33, 46 ¶¶ 73–74 (Case No. IV/M.970 TKS/ITW Signode/Titan). More often, however, this element has not been deemed sufficient to conclude that a dominant position will be significantly constrained. See Crown Cork & Seal/Carnaud Metalbox, supra note 125, 1995 O.J. (L 75) at 49–50, ¶¶ 70–74; Nestlé/Perrier, supra note 126, 1992 O.J. (L 356) at 18–20, ¶¶ 77–89.
mergers.\textsuperscript{140} The analysis of ease of entry and the height of entry barriers are, to a substantial degree, similar. Virtually every decision finding a merger objectionable rests, in part, on findings that entry barriers are high. Among other elements indicating difficulty of entry have been lack of access to servicing and distribution,\textsuperscript{141} established brand recognition,\textsuperscript{142} and the presence in the industry of a variety of practices that, in the broad terms used by American agencies, might be characterized as exclusionary. These include extensive use of exclusive dealing arrangements, fidelity rebates, and retail shelf space and freezer arrangements.\textsuperscript{143} Far more often than in the United States, significant legal or regulatory barriers have been found to impede entry.\textsuperscript{144} This is largely because the efforts of the Commission to harmonize these requirements, a key element to market-wide integration, had in many markets not yet come into

\textsuperscript{140} See Mercedes-Benz/Kässbohrer, supra note 131, 1995 O.J. (L 211) at 19–20, ¶¶ 98–101 (stating that despite the increase in the merged firms total share, the transaction will not lead to the creation of a dominant position because of ease of entry); Mannesmann/Vallourec/Ilova, supra note 131, 1994 O.J. (L 102) at 34–36, ¶¶ 109–24 (discussing the ability of other Japanese producers to enter the market).


\textsuperscript{142} See, e.g., Nestlé/Perrier, supra note 126, 1992 O.J. (L 356) at 20, ¶ 89 (recognizing that retailers and wholesalers would not be able to constrain the market power of the remaining “well-known brands”); see also Kimberly-Clark/Scott, supra note 135, 1996 O.J. (L 183) at 30, ¶¶ 200–05 (stating that “[i]n terms of assessing the likelihood of entry in the branded segment of the market, the simple fact that these figures are relatively high must at least act to discourage the entry of a new branded product”); Procter & Gamble/VP Schickedanz, supra note 135, 1994 O.J. (L 354) at 53, ¶¶ 125–30 (commenting that brand loyalty is especially hard to break consumers of, thus making it harder for potential competitors to enter into a branded market).

\textsuperscript{143} See, e.g., Nestlé/Perrier, supra note 126, 1992 O.J. (L 356) at 21, ¶ 95 (“This type of rebate strengthens the position of the established suppliers and raises the barriers to entry for newcomers.”); see also Commission Notice, 1994 O.J. (C 55) 05 (Case No. IV/M. Unilever France/Ortiz/Miko (II); Procter & Gamble/VP Schickedanz, supra note 135, 1994 O.J. (L 354) at 56–57, ¶ 148 (explaining that new members to the market will have a difficult time finding shelf space due to product characteristics).

\textsuperscript{144} See Orkla/Volvo, supra note 135, 1996 O.J. (L 66) at 22, ¶¶ 44–49 (“There are a number of regulatory barriers that hinder the development of imports into Norway, and that, in any case, hamper seriously the price competitiveness of imported beer into Norway.”); Commission Decision 91/251, 1991 O.J. (L 122) 48, 53–54, ¶ 43 (Case No. IV/M.042 Alcatel/Telelettra). More commonly, legal and regulatory barriers are taken into account in defining relevant markets. See Kauper, supra note 119, at 1726–33.
being, or if they had, were not yet effective. More commonly than in the United States, the Commission examines entry in terms of specific firms identified as most likely entrants, firms either outside the geographic market or producing similar products. The Commission has been known to query these firms directly about their likely plans with respect to entry and future conduct.\textsuperscript{145} In general, however, the Commission's entry analysis is not unlike that set forth in U.S. Merger Guidelines, although the Commission does not distinguish sharply between committed and uncommitted entrants.\textsuperscript{146}

The weight which the Commission gives to the strength of remaining competitors vis-
à-vis the merged firm is a different matter and reflects a merger policy significantly at odds with U.S. policy. In the United States, it is assumed that when concentration is high, remaining firms, except perhaps for a few small firms on the fringe,\textsuperscript{147} will find it profitable to collude overtly or tacitly and will elect to do so. Because it is assumed that they will join in the collusion or benefit from it, there is little reason to examine their strength as a competitive counterweight to the power of the merged entity. The nature of these firms, their products, and past behavior go to the question of whether collusion is likely to succeed. The European Commission's approach, at least in single-firm dominance cases, appears to proceed on the assumption that remaining firms will not collude with the merged entity but will, if able, compete directly to check the ability of the dominant firm to raise prices. This leads directly to consideration of the strengths or weaknesses of these firms and the impact of the merger on their ability to compete. As stated by the Court of Justice in \textit{Kali + Salz}, "[t]o assess with a sufficient degree of probability the effect which a concentration might have on competition on the relevant


\textsuperscript{146} Under the U.S. Merger Guidelines, firms that could enter a market quickly without incurring significant sunk costs are treated as though they were in the market for purposes of market definition. See 1992 MERGER GUIDELINES, \textit{supra} note 42, § 10. So-called committed entrants—those that could enter only by incurring such significant sunk costs—are dealt with separately in terms of likely entry. See id. § 3.

\textsuperscript{147} See Hospital Corp. of America v. FTC, 807 F.2d 1381, 1387–89 (7th Cir. 1986) (discussing the likely reaction of smaller firms to the merger and concluding that they would be likely to collude).
market, it is essential to rely on a rigorous analysis of the
competitors’ weight.”\footnote{148} The court’s decision annulled
the Commission’s previous determination because of a failure to
show that a particular firm not involved in the merger with a
market share of about ten percent lacked “the necessary base to
maintain, let alone increase, its market share and thus exert
pressure on the alleged duopoly.”\footnote{149} The Commission did not
establish “that there is no effective counterweight” to the
duopoly firm’s ability to set prices and output.\footnote{150} Strengthening
of a dominant position, in short, generally comes at the expense
of competitors.

The emphasis on the ability of existing firms to check the
power of a dominant firm has led the Commission to conduct a
detailed examination of the financial strength, costs, capacity
limits, brand strengths, distribution systems, and customer
bases of the existing firms.\footnote{151} Some of these same factors might
go to the likelihood of collusion, but at least in single-firm cases,
the Commission does not focus on this issue. Instead, the
Commission considers whether the merged firm can successfully

\footnote{148} Kali + Salz, \textit{supra} note 9, 1998 E.C.R. at I-1525–26, 4 C.M.L.R. at 951, ¶ [246].
\footnote{149} \textit{Id.} 1998 E.C.R. at I-1526, 4 C.M.L.R. at 951, ¶ [247].
\footnote{150} \textit{Id.} 1998 E.C.R. at I-1526, 4 C.M.L.R. at 951, ¶ [248].
\footnote{151} There are various decisions finding that competitors would not likely be able
to check the market power of the dominant firm or firms. \textit{See} ABB/Daimler-Benz,\textit{ supra} note 131, 1997 O.J. (L 11) at 13, ¶ 64 (finding competitors lacked financial
strength needed for technology investment); Kesko/Tuko, \textit{supra} note 45, 1997 O.J.
(L 110), ¶¶ 106–38 (considering lack of access to business premises, inability to use
similar customer loyalty plans, and lack of comparable buying power as factors of
merger analysis); Crown Cork & Seal/Carnaud Metalbox, \textit{supra} note 125, 1996 O.J.
(L 75) at 46, 49, ¶¶ 52, 67 (finding competitors lacked sufficient capacity); Kimberly-
Clark/Scott, 1996 O.J. (L 183) at 19–23, 32, ¶¶ 128–57, 215 (finding competitors
lacked shelf space access and national brands); Orkla/Volvo, \textit{supra} note 135, 1996
O.J. (L 66) at 25–26, ¶¶ 61–68 (finding competitors lacked efficient distribution,
shelf space access, and national brands); Procter & Gamble/VP Schickedanz, 1994
O.J. (L 354) at 60–61, ¶¶ 175–178 (finding competitors lacked financial strength);
Commission Decision 94/811, 1994 O.J. (L 332) 48, 61 ¶ 72 (Case No. IV/M.269
Shell/Montecatini) [hereinafter Shell/Montecatini] (considering disparity in
financial reserves, product lines, and access to technologies as factors of merger
analysis); Accor/Wagons-Lits, \textit{supra} note 135, 1992 O.J. (L 204) at 8–9, ¶ 25(4)
(considering disparate financial strengths as one factor of merger analysis); Nestlé/Perrier, \textit{supra} note 126, 1992 O.J. (L 356) at 17–18, ¶ 75–76 (finding that
competitors lacked financial strength and a known brand name); Commission
Decision 91/619, 1991 O.J. (L 334) 42, 54, ¶ 42 (Case No. IV/M.053 Aerospatiale-
Alenia/de Havilland) [hereinafter Aerospatiale-Alenia/de Havilland] (finding
competitors lacked sales base).}
operate “independently.” This approach, in turn, leads to the question of whether there is an increased likelihood that the now dominant firm may successfully engage in conduct that inhibits remaining firms from expanding, or even holding, their market shares—conduct that the U.S. might broadly characterize as “exclusionary.” Thus, for example, the Commission’s emphasis on disparate financial strength and market share suggests that such strength might be used in some manner to exclude or discipline rivals, much the same fear expressed in the now discredited “deep pocket” theories occasionally used during the 1960s in the United States. The idea that a merger is anti-competitive, i.e., that a dominant position may be strengthened, by future conduct made more likely by the merger, is rooted in the concept of “abuse” under Article 86 and could be taken as embodied in the language of the Merger Regulation itself.

The focus on existing competitors has led the Commission to consider not only their financial position, capacity, technological capabilities, brand strengths, and customer bases, but also conduct by the dominant firms which inhibits remaining firms from expanding or even holding their market shares. Coupled

152 See Crown Cork & Seal/Carnaud Metalbox, supra note 125, 1996 O.J. (L 75) at 52, ¶ 83.
153 See, e.g., ABB/Daimler-Benz, supra note 131, 1997 O.J. (L 11) at 24, ¶ 131 (recognizing that narrowing of oligopoly to duopoly will increase the likelihood “of a joint blocking strategy”); Kesko/Tuko, supra note 45, 1997 O.J. (L 110), ¶ 138 (noting that competitors are aware of how “Kesko could use this position against them”); Shell/Montecatini, 1994 O.J. (L 332) at 66, ¶ 111 (finding that the merged firm could use its financial position “to subsidize niche markets”). In some cases, the Commission has stressed that with greater market share and financial strength, the dominant firm or firms may be able to entrench their position by greater investments in advertising or technology. See, e.g., Procter & Gamble/VP Schickedanz, supra note 135, 1994 O.J. (L 354) at 56, ¶ 145 (finding that Procter & Gamble has the ability to make greater advertising expenditures); DuPont/ICI, supra note 136, 1993 O.J. (L 7) at 21, 22 ¶¶ 41, 47 (finding that DuPont and ICI have greater resources for investment in technology and product development).
154 See, e.g., Ekco Prods. Co. v. FTC, 347 F.2d 745, 753 (7th Cir. 1965); Reynolds Metals Co. v. FTC, 309 F.2d 223, 229–30 (D.C. Cir. 1962). These cases rest on the fear that a large firm’s greater resources, i.e., “deep pockets,” may be used to entrench the merged firm’s market power in some undefined or poorly defined way. More recent cases have virtually ignored the theory, suggesting, in the words of one court, that its underpinnings seem “more metaphorical than real.” Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851, 865 (2d Cir. 1974). See generally HOVENKAMP, supra note 57, § 13.3c, at 507–08 (“[Deep pocket] theories stretch § 7 liability beyond any reasonable limit.”).
155 See, e.g., Nestlé/Perrier, supra note 126, 1992 O.J. (L 356) at 19, 20, ¶¶ 83, 89 (noting that the merger would increase the potential for tying and use of fidelity
with the merger, such conduct may "strengthen" a dominant position. There are, however, several consequences. The likelihood of exclusionary conduct is incorporated directly into the competitive analysis. Injury to competition, rather than to consumers, may become the measure of competitive harm, although real dominance may injure consumers as well. Views of competitors are sought out and weight may be given to competitors' views on the merits. This is in contrast to the approach taken in the United States, where Judge Posner in the Hospital Corp. of America case asserted that the strongest argument that a merger was pro-competitive, and therefore lawful, was that the FTC acted in response to a complaint by a competitor. In other cases, competitors seeking to enjoin horizontal mergers have been denied standing because they stand to gain from, rather than be harmed by, decreased competition and therefore lack antitrust injury.

Finally, the focus on competitor strength readily lends itself to the charge that the Commission is protectionist, a charge most

166 The Commission routinely queries competitors on issues of market definition. See Kauper, supra note 119, at 1732-33. It also seeks and, on occasion, gives weight to their views on competitive effects. See Orkla/Volvo, supra note 135, 1996 O.J. (L 66) at 25-26, ¶¶ 66-68 (expressing concern that the merged firm would benefit from increased shelf space allotments, future use of exclusive dealing, and tying arrangements); RTL/Veronica/Endemol, supra note 136, 1996 O.J. (L 134) at 45, ¶ 78 (noting that the merged firm would benefit from increased use of package deals to advertisers).

157 See Hospital Corp. of America v. FTC, 807 F.2d 1381, 1391-92 (7th Cir. 1986).

158 See, e.g., Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 122 (1986) (holding that "a showing of loss or damage due merely to increased competition does not constitute [an antitrust] injury"); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (indicating that the "[p]laintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes [the] defendants' acts unlawful").
likely to be made when the alleged dominance involves foreign firms. Furthermore, an argument can be made that a consequence of the Commission’s position is to protect firms that are weak, not because of a dominant firm’s anti-competitive conduct, but simply because the weaker firm is less efficient. In the absence of a willingness to allow mergers that strengthen a dominant position by achieving new efficiencies, the net result may be that efficiency is effectively penalized.

The Boeing-McDonnell Douglas case illustrates several of these points and demonstrates how in this respect U.S. and EC merger rules differ. Boeing-McDonnell Douglas, and Airbus, a European consortium, were the only significant producers in the world of large commercial jet aircraft. Boeing and McDonnell Douglas had roughly seventy percent of the world market, as measured in terms of current sales. Even though the combined market share of the two merging firms was about seventy percent and only one competitor remained, the Federal Trade Commission did not challenge the merger. Its analysis rested on the United States Supreme Court’s decision in United States v. General Dynamics Corp. The FTC found that the future of McDonnell Douglas was bleak, largely because it had lagged far behind in technological developments. Its current market share considerably overstated its future potential, a potential that, in the FTC’s view, did not really exist. The FTC was well aware of the complaints made by Airbus, which rested, in part, on the fact that Boeing had entered into long-term supply contracts with a number of the world’s airlines, contracts which Airbus complained would deny it market access. But the FTC disconnected consideration of the effects of these contracts from its analysis of the merger, suggesting

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159 The non-action of the Federal Trade Commission was accompanied by a public statement. See Boeing Co., 5 TRADE REG. REP. (CCH) ¶ 24,295 (FTC July 1, 1997). The European Commission’s action is reported at Commission Decision 97/816, 1997 O.J. (L 336) 16 (Case No. IV/M.877 Boeing/McDonnell Douglas) [hereinafter Boeing/McDonnell Douglas].

160 See Boeing/McDonnell Douglas, supra note 159, 1997 O.J. (L 336) at 17, ¶ 9.

161 See id.

162 See Boeing Co., 5 TRADE REG. REP. (CCH) ¶ 24,295.


164 See Boeing Co., 5 TRADE REG. REP. (CCH) ¶ 24,295.

165 See id.

166 See id.
that while the contracts were "troubling," their effects could be examined in a separate proceeding.\footnote{167}{Id.}

The analysis of the European Commission was strikingly different. First, the Commission gave considerable weight to the evidence submitted by Airbus.\footnote{168}{See, e.g., Boeing/McDonnell Douglas, supra note 159, 1997 O.J. (L 336) at 20, ¶ 29 (relying on market share figures provided by Airbus).} Second, the Commission did not consider the future competitive potential of McDonnell Douglas in light of factors similar to those found in General Dynamics. It relied, in part, on a price study allegedly showing that prices were significantly lower when McDonnell Douglas was a bidder.\footnote{169}{See id. at 25, ¶ 58.} The Commission concluded that Boeing's dominant position would be strengthened as a result of the merger.\footnote{170}{See id. at 36, ¶ 113.} The Commission concluded that as a result of the merger, Boeing would increase its market share from sixty-four percent to seventy percent\footnote{171}{See id. at 24, ¶ 54.} (presumably vis-à-vis Airbus) through new advantages in financial capability, including the ability to cross-subsidize between models, technology, bargaining power, and access to public research and development funds.\footnote{172}{See id. at 24-36, ¶¶ 53-124.} The Commission determined that this strengthening would occur virtually without regard to McDonnell Douglas's future competitive potential. There is thus real doubt whether the so-called General Dynamics factors play any significant role in cases under the Merger Regulation. The language of the Merger Regulation that condemns the strengthening of a dominant position only when "effective competition would be significantly impeded,"\footnote{173}{EC Merger Regulation art. 2, ¶ 3, supra note 35, at 17.} however, might be thought to provide the vehicle for interjecting such factors into the analysis. Finally, the Commission treated Boeing's exclusive contracts as directly relevant to its merger analysis, lessening the ability of Airbus to serve as a check against Boeing's dominance.\footnote{174}{See Boeing/McDonnell Douglas, supra note 159, 1997 O.J. (L 336) at 23, 24 ¶¶ 43-46, ¶54(e). In Boeing/McDonnell Douglas, the Commission treated these exclusive dealing contracts as an integral part of its merger analysis. The Commission suggested that the existing contracts would make it difficult for Airbus to compete effectively and that the merger would increase the merged entity's ability to enter additional exclusivity arrangements in the future, foreclosing still
Commission permitted the merger to proceed on the condition that Boeing undertake to eliminate those exclusive contracts.\textsuperscript{175}

Contrasted with the FTC's analysis, it is easy to see why Americans viewed the Commission's decision as protectionist in the trade policy sense. This criticism, however, is unfair. The Commission did not depart from its own precedent that, to a degree, focuses on a merger's impact on competitors. Given this concern, which is reflected in the language of the Merger Regulation itself, the decision is perfectly logical. The comparison of the FTC and Commission decisions, however, does reflect significant differences in merger policy. But unless we are prepared to assume that U.S. policy is so obviously correct that it should always prevail, we must accord the Commission the right to reach its own conclusions.

Collective dominance cases are more difficult to generalize. The analysis is very fact-intensive with different elements given emphasis in different cases. The prototypical case in which objections are likely to be raised involves a pre-merger oligopolistic market that has a homogeneous product, a high degree of price transparency, and high entry barriers. The post-merger market in such cases is characterized by two top firms that would have a collective market share in excess of sixty percent as well as similar costs and market shares.\textsuperscript{176} While the

\textsuperscript{175} See Boeing/McDonnell Douglas, \textit{supra} note 159, 1997 O.J. (L 336) at 37, ¶ 116.

\textsuperscript{176} There are numerous Commission decisions meeting these general criteria. \textit{See} ABB/Daimler-Benz, \textit{supra} note 131, 1997 O.J. (L 11) at 9, 11, ¶¶ 44, 57; Gencor/Lonrho, \textit{supra} note 131, 1997 O.J. (L 11) at 50, 56, ¶¶ 137, 170; Kali + Salz Commission Decision, \textit{supra} note 9, 1994 O.J. (L 186) at 46, 47, ¶¶ 51–52, 57; Nestlé/Perrier, \textit{supra} note 126, 1992 O.J. (L 356) at 11, 14, ¶¶ 40, 59. The Commission decision in Kali + Salz was annulled by the European Court of Justice. \textit{See} Kali + Salz, \textit{supra} note 9, 1998 E.C.R. I-1375, [1998] 4 C.M.L.R. 829. The Commission's decision in Gencor was upheld by the Court of First Instance in Case
Commission has spoken broadly about oligopolistic dominance, the most telling fact may be that it has objected primarily in cases where the resulting structure involved dominance by an existing firm or an effective duopoly.\textsuperscript{177}

The concept of "collective" dominance rests somewhat uneasily on the foundation established in single-firm dominance cases, blending concerns over parallel interdependent conduct and the health of competitive rivals in the market. \textit{Nestlé/Perrier} was the first Commission decision to apply the concept of oligopolistic dominance.\textsuperscript{178} The Commission found that a merger in a market characterized as oligopolistic even before the merger, exhibiting high, stable prices, a large degree of price transparency, and a pattern of parallel behavior, resulting in a duopoly with two firms whose market shares together exceeded eighty percent, would make "anticompetitive parallel behaviour leading to collective abuses much easier."\textsuperscript{179} The Commission stressed the disparity of size between what would be the two dominant firms and the remaining small firms.\textsuperscript{180} The Commission also noted that the two major firms in the market had similar costs and market shares and that they

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\textsuperscript{177} After this article was submitted, the Commission for the first time objected to a merger that reduced the number of major competitors from four to three, finding that with the resulting increase in concentration, supply would likely be further restricted. \textit{See} Commission Decision 2000/276, 2000 O.J. (L 93) 1 (Case No. IV/M.1524 Airtours/First Choice). While the Commission had hinted at such an outcome previously, it had never actually objected in other than cases resulting in duopoly.

\textit{In Nestlé/Perrier, supra} note 126, 1992 O.J. (L 356) 1, a duopoly case, the Commission spoke broadly about the likely effects of oligopoly in terms not confined to duopolies and in language similar to that of American decisions. Furthermore, the Commission has considered the likelihood of anti-competitive behavior among the top three to five firms. \textit{See} Mercedes-Benz/Kässbohrer, \textit{supra} note 131, 1995 O.J. (L 211) 1; Krupp/Thyssen, \textit{supra} note 131, 1995 O.J. (L 251) 18; Pilkington-Techint/SIV, \textit{supra} note 131, 1994 O.J. (L 158) 24. But no objection was made to these transactions. In the cases cited in the preceding note where objection was made (or would have been made absent the undertakings given by the parties), the Commission’s findings rested on likely coordination among duopolists. \textit{In Price Waterhouse/Coopers & Lybrand,} the Commission seemed to suggest that oligopolistic dominance could never exist among more than four firms. Price Waterhouse/Coopers & Lybrand, \textit{supra} note 131, 1999 O.J. (L 50) at 43, ¶ 113.

\textsuperscript{178} \textit{See} Nestlé/Perrier, \textit{supra} note 126, 1992 O.J. (L 356) at 23–29, ¶¶ 108–134.

\textsuperscript{179} \textit{Id.} at 25–26, ¶ 120.

\textsuperscript{180} \textit{See id.} at 25, ¶ 119.
had a pattern of exchanging price information.\(^{181}\) Finally, the Commission found that the industry technology was mature\(^{182}\) and that entry barriers were very high.\(^{183}\) All of these elements of the Commission's analysis sound much like those set forth in the U.S. Merger Guidelines in considering the likelihood of collusion. At the same time, however, the Commission stressed the weakness of remaining competitors, particularly in the face of strong brand and shelf-space preferences, exacerbated by a system of fidelity rebates and concluded that post-merger, the two dominant firms would both act in parallel fashion vis-à-vis each other and independently from their competitors.\(^{184}\) The Commission expressed concern that the portfolio of brands of the merged entity could be used to further disadvantage rivals.\(^{185}\)

In subsequent collective dominance cases where objections have been raised, the Commission has followed the analysis established in Nestlé/Perrier. In these cases, the Commission relied on a finding that the merged firm and one or more other firms would likely behave in a parallel anti-competitive fashion—a finding based not on any presumption drawn from high concentration alone, although it is a clear predicate, but on other considerations including past behavior of firms in the market; transparency of prices; similarity of market share and costs among the dominant firms; product homogeneity; and existing links among the top two or three firms.\(^{186}\) As in single-firm cases, competitive objections will be raised only if entry barriers are found to be high. Buyer size and characteristics are examined to determine whether buyers have sufficient countervailing power to keep the collectively dominant firm from raising prices. Finally, as in single-firm dominance cases, the Commission places weight on the strength of remaining competitors and on the impact the proposed merger would likely have upon them. Thus, these cases reflect the two fundamental strands apparent in single-firm cases. The firms identified as

\(^{181}\) See id. at 26–27, ¶¶ 121–125.

\(^{182}\) See id. at 27, ¶¶ 126.

\(^{183}\) See id. at 28, ¶ 130.

\(^{184}\) See id. at 28, ¶ 133.

\(^{185}\) See id.

\(^{186}\) See supra note 176 (citing cases applying the Nestlé/Perrier analysis). See infra note 195 (discussing the question of whether a finding that a pattern of linkages has existed among the post-merger dominant firms is a necessary predicate to application of the collective dominance concept).
dominant may, through parallel conduct, tacitly collude. The presumption, however, is that the remaining firms will not collude but instead will vigorously compete and check the market power of the dominant firms if they have sufficient strength to do so. Impact on competitors is again directly at issue.

The decision of the European Court of Justice in Kali + Salz, a duopoly case, generally accepts the position on collective dominance that the Commission enunciated in Nestlé/Perrier. Nevertheless, the Commission's decision was annulled because (1) its findings as to preexisting linkages between the parties to the merger and the remaining firm that would have been the other party to the duopoly after the merger were flawed, and (2) the Commission failed to show "that there is no effective competitive counterweight to the grouping" brought about by the merger. Specifically, the Commission failed to show that a remaining firm with ten percent of the market would not provide such a counterweight.

Kali + Salz raises as many questions about collective dominance as it answers. Consider the standard test for dominance as applied both under Article 86 and the Merger Regulation. A fifty percent share of the market might be sufficient to create a presumption of single-firm dominance, but what does this mean in a collective dominance setting? Suppose that after the merger, two firms will have fifty percent of the market? Or four firms? U.S. enforcement agencies would likely view a very high four-firm concentration ratio as indicative of a market where the fear of collusion is great, but they surely would not do so if four firms of roughly equal size had but fifty percent of the market. What then, is the approximate threshold for finding collective dominance? In Kali + Salz, the Court of Justice found that a combined post-merger market share of sixty percent indicates the existence of collective dominance, particularly where shares of remaining firms are relatively small. But this does not wholly answer the question, which is,
to use its terms, sixty percent divided among how many firms? Kali + Salz was dealing with two firms whose combined market shares exceeded that level, a structure it defined as a duopoly. And it apparently matters how the market shares were divided. In the same case, and without explanation, the Court of Justice concluded that when the combined market share of sixty percent was divided between two firms unequally, as in the particular case,\(^{192}\) there could be no conclusive presumption as to the existence of a collective dominant position.\(^{193}\) This view is consistent with the Commission's position that parallel anti-competitive conduct is most likely when the shares of the duopolists are roughly equal.

Kali + Salz raises a number of other questions concerning competitive harm as well. Most basically, can the concept of collective dominance ever extend beyond duopoly? Must the Commission establish in every case that the market was characterized by parallel anti-competitive conduct even prior to the merger? In Kali + Salz, it did.\(^{194}\) Must there be existing links between the firms alleged to be collectively dominant? The Commission's failure of proof on this question, at least in the eyes of the court, was one of the elements in its decision to annul the Commission's action.\(^{195}\)

\(^{192}\) See id.

\(^{193}\) See id. In Gencor/Lonrho, the Court of First Instance suggested that a collective dominant position might be established when two firms hold 40% each, three firms hold 25–30% each, or four firms hold 25% each. Case T-102/96, Gencor, Ltd. v. Commission, 1999 E.C.R. 4, [1999] 4 C.M.L.R. 971, 1041–42, ¶ 134 (Ct. First Instance 1999) [hereinafter Gencor].

\(^{194}\) See Kali + Salz, supra note 9, 1998 E.C.R. at I-1512, [1998] 4 C.M.L.R. at 942, ¶ [202] (suggesting that whether there was prior effective competition between the companies is a factor to be considered).

\(^{195}\) See id. 1998 E.C.R. at I-1523, [1998] 4 C.M.L.R. at 949, ¶ [239] (noting the less than substantial structural link between the companies). The court's opinion can be read as simply concluding that the evidence on which the Commission itself relied upon was weak and that because the Commission relied upon the existence of linkages between the duopolists, its decision could be challenged on this ground. It would not, therefore, follow that the existence of such links is a critical element of proof in all collective dominance cases. This interpretation is borne out by the subsequent decision in Gencor/Lonrho, where the Court concluded that a "relationship of interdependence existing between the parties to a tight oligopoly within which, in a market with the appropriate characteristics... those parties are in a position to anticipate one another's behavior and are therefore strongly encouraged to align their conduct in the market" was sufficient proof of structural linkages. Gencor, supra note 193, [1999] 4 C.M.L.R. at 1066, ¶ 276. Additional specific linkages would not need to be shown in these circumstances.
Whatever the unanswered questions, the decision in *Kali + Salz* clearly indicates that the strength of remaining competitors and the impact of the merger upon their future ability to compete are critical elements in the analysis of both single-firm and collective dominance cases. A finding of collective dominance will continue to be based on findings that the firms found to be collectively dominant will behave in a parallel anti-competitive manner unless checked by the remaining firms, firms that are presumed to have incentives to behave competitively and will do so if they have the requisite strength.

The key differences between the European and American approaches after *Kali + Salz* are two-fold. First, regardless of whether dominance is single or collective, the European approach rests less on the fear of market-wide collusion than on the ability of the dominant firms to exert market power over its competitors. Injury is found, therefore, at least to some degree, when competitors are injured. Second, any assessment of the creation or strengthening of a dominant position must focus, in part, on the competitive health of remaining rivals and on the impact the merger at issue will have upon them. In contrast, the U.S. agencies are likely to assume that all of the significant firms in the market are likely to collude, and their strength and ability to compete independently is generally not at issue. In short, it is their disposition to compete, not their ability to do so, that is key.

B. An Analysis of Defenses

1. The Failing Firm

The so-called failing firm defense is a kind of antitrust byway, of relevance in relatively few cases. It is, however, critically important to the outcome of some cases and to the overall evaluation of merger control philosophy.

The failing company defense came into being with the U.S. Supreme Court's 1930 decision in the *International Shoe* case.\(^{196}\)

\(^{196}\) See *International Shoe Co. v. FTC*, 280 U.S. 291, 302–03 (1930). In *International Shoe*, the Court stated that:

In the light of the case thus disclosed of a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure ... we hold that the purchase of its
The legislative history of the 1950 amendments to the Clayton Act clearly demonstrates Congress’s intent to retain it.\textsuperscript{197} It appears in all of the Merger Guidelines since 1968.\textsuperscript{198} In its present form, the defense permits an otherwise anti-competitive merger to go forward when (1) the acquired firm would be unable to meet its financial obligations in the near future and is not likely to be able to reorganize successfully under the bankruptcy laws, (2) when the acquiring company has reasonably sought to sell the assets of the failing company in a manner that would pose a lower degree of anti-competitive effects, and (3) when the assets would leave the market absent the merger at issue.\textsuperscript{199} The defense under these conditions is absolute.

The defense is sometimes explained on the ground that when the acquired firm is a competitive non-entity, its acquisition causes no harm, at least when its assets would otherwise leave the market. This explanation is not entirely satisfactory, since it might still be preferable to see its market share dispersed among remaining firms rather than going to a single enterprise.\textsuperscript{200} Nor is this now standard explanation fully consistent with International Shoe, which stressed, among other things, that failure would cause injury to the communities where the failing firm’s plants operated, as well as to its shareholders.\textsuperscript{201} This alternative explanation has clear

\textsuperscript{197} See S. REP. NO. 1775, at 7 (1956) ("[T]he Court has held . . . that a company does not have to be actually in a state of bankruptcy to be exempt from [the Clayton Act's] provisions . . . ").

\textsuperscript{198} See supra note 50 (discussing the Merger Guidelines).

\textsuperscript{199} See 1992 MERGER GUIDELINES, supra note 42, at § 5.1.

\textsuperscript{200} This difficulty with the explanation was more obvious in earlier versions of the Guidelines that did not contain the requirement that the defense was inapplicable unless there was a showing that absent the merger, the assets of the failing firm would otherwise exit the market. See 1984 MERGER GUIDELINES, supra, note 50, § 5.1 (1984). Under this prior version, the assets could lawfully go to a dominant firm even though absent the merger, the assets would remain in the market but would be divided among smaller firms over time. See generally 4A AREEDA, supra note 24, ¶ 925 (providing a more satisfactory economic justification that supports a very limited failing company defense).

\textsuperscript{201} See International Shoe Co., 280 U.S. at 302-03 (emphasizing the "resulting loss to [the failing firm's] stockholders and injury to the communities where its plants were operated").
overtones of industrial, rather than competitive, policy. It reflects a fear of business failure for social reasons.

The European version of the failing firm defense was a core issue in *Kali + Salz*. The Commission had concluded that what amounted to an acquisition by the dominant German potash producer of a former state-owned East German potash producer, an acquisition which effectively gave the joint enterprise a monopoly in the German market, was not in violation of the Merger Regulation under a version of the failing firm defense. The case rested on the Commission’s findings that the East German enterprise was not economically viable and would be forced out of the market in the near future, even though that might not have happened immediately for social and regional political reasons. The Commission also noted that this outcome was in line with the fundamental Community objective of “strengthening the Community’s economic and social cohesion.”

The *Kali + Salz* case arose in a particularly sensitive setting, the absorption of East Germany into the economy of the unified German state. It reflects the problems arising out of the privatization of a state-owned enterprise. In a real sense, it represents a failure of competition policy—a lost opportunity to use the privatization process to bring about a more competitive market.

The French government attacked this application of the “failing company” defense. It argued that the Commission erred by not considering all of the elements of the defense as applied in the United States. The argument that the

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202 See generally 4A AREEDA, supra note 24, ¶ 925; Kauper, supra note 50, at 526–27.
203 See *Kali + Salz Commission Decision*, supra note 9, 1994 O.J. (L 186) at 49–52, ¶¶ 70–90 (characterizing the acquisition as a “rescue merger”). A similar defense was raised in *Aerospatiale-Alenia/de Havilland*, supra note 151, 1991 O.J. (L 334) at 52, ¶ 31, but was factually rejected “[w]ithout prejudice as to whether such a consideration is relevant” under the Merger Regulation. *Id.*; see also *Commission Notice, 1991 O.J. (C 223) 38* (Case No. IV/M.116 Kelt/American Express).
204 See *Kali + Salz Commission Decision*, supra note 9, 1994 O.J. (L 186) at 38, ¶ 77 (“Even if this does not happen immediately, for social, regional and general political reasons, a closure of Mdk is to be expected in the near future with a sufficient degree of probability.”).
205 *Id.* at 53, ¶ 95.
Commission should have applied American standards is both surprising and unusual, particularly coming from the French. Specifically, the French argued that the Commission’s finding that the acquired firm would be forced out of the market in the near future if not taken over was less severe than the U.S. requirements that the firm be unable to meet its obligations in the near future and not be able to reorganize successfully in bankruptcy. In the end, the Court of Justice accepted the Commission’s criteria, namely, that the defense was applicable when (1) the acquired firm would be forced out of the market in the near future; (2) the acquiring firm would gain the acquired firm’s market share in that event; and (3) there was no less anti-competitive purchaser. Only the second of these requirements varies substantially from American standards. By requiring proof that if the acquired firm were allowed to fail, its market share would go to the acquirer, the court concluded that there was otherwise no causal link between the acquisition and a strengthening of a dominant position. This requirement also responds to one of the standard criticisms of the American approach. The court was emphatic in its statement that failure to follow American law was not a ground for invalidating the Commission’s decision. While it noted the Commission’s

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statements about "economic and social cohesion," it did not comment further.\footnote{Id. 1998 E.C.R. at I-1484, [1998] 4 C.M.L.R. at 923, ¶ [99].}

The differences between U.S. and EC law on the failing company defense do not seem to be of any great consequence. In both jurisdictions, the agencies and courts have not based the defense on industrial and social policy concerns, although they lurk in the background of the defense in both instances. Certainly the EC cannot be charged here with incorporating such policies into its merger analysis. It is not easy to find any other case overtly doing so, even though the Commission is charged with all of the EC's economic policies. Concededly, we are not privy to the deliberations of the Commission. Clearly, industrial policy concerns could have come into play in some cases without being disclosed. We can go only by what the Commission says publicly. But the same can be said of the Justice Department and the FTC.

2. The Treatment of Efficiencies

This article will now turn to the final issue, the so-called efficiencies defense. This, it may appear, is at the heart of U.S. and EC differences. How a merger control system deals with efficiencies says a lot about its purpose. As indicated above, Dean Pitofsky called for an expanded efficiencies defense in merger cases in the United States to enhance the competitiveness of U.S. firms in world markets, and that one ground for his proposal was that merger controls in other places, particularly the EC, recognized such a defense.\footnote{See supra notes 11–19 and accompanying text.} As of now, and partially because as Chairman of the FTC, he has led the United States to a greater weighing of efficiency claims,\footnote{The 1997 amendment to the 1992 U.S. Merger Guidelines dealing with efficiency claims was largely the result of an FTC study and series of hearings initiated by Chairman Pitofsky. See generally 1992 MERGER GUIDELINES, supra note 42, (with April 8, 1977 revisions).} there are indeed significant differences between the U.S. and EC in this respect. But the differences run in reverse. The United States now takes efficiencies directly into account, while the EC competition rules with respect to mergers do not. As a result, an American firm whose merger is approved in the United States on
efficiency grounds could run afoul of the competition law of the EC.

Under both U.S. and EC competition law, mergers below certain measures of concentration or dominance are thought to raise no serious issues with respect to collusion or dominance and are therefore lawful. There is no reason to separately assess efficiencies in such cases. If all mergers in which real efficiencies are likely to be achieved are below these threshold levels, there is no reason to worry about such efficiencies. Put another way, if efficiencies such as scale economies and economies of distribution will be achieved before these levels are reached, mergers above them will pose no further efficiency issues and no efficiencies defense would be needed. How confident we are about this obviously depends to a substantial degree on how high market share and concentration thresholds are set.

Conversely, the problem becomes more difficult if there are a significant number of cases involving mergers that achieve significant economies but are otherwise thought to be anti-competitive because of the increased potential for collusion or market dominance. The exercise of market power, whether collectively or by a single firm, will restrict output and increase price. In the United States, at least, this is the basis for finding competitive harm. But if the merger also enhances efficiency, prices could drop. In the abstract, we cannot determine whether prices will go up or down. To answer the question, we need to know the price increasing effects of collusion or dominance, the price decreasing effects of efficiencies, and balance them off—a daunting task.\textsuperscript{216}

In the mid-1960s, the U.S. Supreme Court paid scant attention to efficiencies. To the extent they were considered, they were used to argue that if efficiencies were achieved, the merging firms were advantaged, and competition was harmed.\textsuperscript{217} This outcome may be thought consistent with the relatively populist approach to antitrust which characterized the Court's antitrust analysis at the time, but it is obviously perverse in

\textsuperscript{216} See Kauper, supra note 50, at 519–525 (providing a fuller discussion of this balancing).

\textsuperscript{217} See, e.g., FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967) (“Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition.”).
today's world, where efficiency is the central theme of antitrust analysis.

The first Merger Guidelines issued by the Department of Justice in 1968 did not suggest that a merger would be condemned because it created efficiencies. Unless there were "exceptional circumstances," the Department would not accept the production of economies as a defense because with the threshold levels set forth, which by today's standards were quite low, it was not likely to challenge mergers of companies operating below a size necessary to achieve those economies anyway. Economies, in any event, could generally be achieved through means short of merger, and measurement of the magnitude of likely efficiencies involves "severe difficulties."

Between 1968 and the issuance of new Guidelines in 1982, commentators sharply disagreed over whether an efficiencies defense should be recognized. With the issuance of the 1982 Guidelines, the "exceptional circumstances" seed planted in 1968 remained just that. Now, efficiencies would be considered only "in extraordinary circumstances." Even then, they were to be proved by "clear and convincing evidence," and would be considered only if they could not be achieved through internal expansion or a less anti-competitive merger and only "in close cases." With the issuance of new Guidelines in 1984, the seed grew into a sapling. The Department now recognized that some mergers it would otherwise challenge might give rise to efficiencies of various types and that when they were established by clear and convincing evidence, the efficiencies would be considered. Again, however, only those efficiencies that could

218 See 1968 MERGER GUIDELINES, supra note 50.

219 See id § 10.

220 Id.

221 For further discussion of these views, see 4A AREEDA, supra note 24, ¶ 940; Kauper, supra note 50, at 519–525. During this period, courts uniformly rejected efficiency claims on the ground that they were not cognizable under section seven. See, e.g., International Tel. & Tel. Corp. v. General Tel. & Elecs. Corp., 518 F.2d 913, 936 (9th Cir. 1975); Mississippi River Corp. v. FTC, 454 F.2d 1083, 1089 (8th Cir. 1972) ("Honest intentions, business purposes and economic benefits are not a defense to violations of an antimerger law."); United States v. Manufacturers Hanover Trust Co., 240 F. Supp. 867, 942–943 (S.D.N.Y. 1965) ("[Practices] which restrict competition are unlawful no matter how beneficent they may be.").

222 1982 MERGER GUIDELINES, supra note 50, § V.A.

223 Id.

224 See 1984 MERGER GUIDELINES, supra note 50, § 3.5.
not be achieved by other means would be taken into account. The more significant the competitive risk, the greater the magnitude of the net efficiencies that would be required. The 1992 Horizontal Merger Guidelines are virtually the same.

In 1997, largely under the leadership of now Chairman Pitofsky, the 1992 Guidelines' efficiency provisions set forth a more elaborate analysis of efficiencies. Specifically, efficiencies which cannot, as a practical matter, be achieved short of the merger in question and can reasonably be verified in terms of both their likelihood and magnitude, will be considered in the overall assessment of likely competitive effects. For example, significant efficiencies may make collusion less likely. On the other hand, the efficiencies may be overborne by the merger's other adverse effects. The question to be asked is whether the net effect is to reverse the merger's anticompetitive potential. While effects of both types will not simply be compared, the greater the magnitude of potential harm, the greater the efficiencies must be. If the potential for harm is "particularly large," then "extraordinarily great" efficiencies must be shown. In the words of the Guidelines, "[e]fficiencies almost never justify a merger to monopoly or near monopoly." This move to a greater recognition of efficiencies has been mirrored in several recently litigated merger cases, where the potential for efficiencies has been given considerable weight in allowing mergers to proceed. Whether put as a formal defense

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225 See id.
226 See id.
228 See 1992 MERGER GUIDELINES, supra note 42, § 4 (with April 8, 1977 revisions).
229 See id.
230 Id.
231 Id.
232 In a series of decisions beginning in the 1980s, courts began to consider efficiency claims but rejected them without directly considering whether such claims were cognizable either because the likely efficiencies were not proven, could be achieved without the merger, or were not likely to be passed through to consumers. See, e.g., FTC v. University Health, Inc., 938 F.2d 1206, 1222–1224 (11th Cir. 1991) (holding that there was insufficient evidence that efficiencies would benefit consumers); FTC v. Cardinal Health, Inc., 12 F. Supp.2d 34, 61–63 (D.D.C. 1998) (stating that although substantial efficiencies were shown, savings could also be achieved through existing and continued competition); FTC v. Tenet Healthcare Corp. 17 F. Supp.2d 937, 948 (E.D. Mo. 1998), rev'd 186 F.3d 1045 (8th Cir. 1999) (stating that efficiencies could be obtained without the merger and, in any event, not likely to be passed on); United States v. United Tote, Inc., 768 F. Supp. 1064,
or not, the small seed of 1968 is becoming a full-blown tree. How these Guidelines will be applied in actual practice is hard to tell. Recent speeches of enforcement officials have warned the Bar that there may not be many mergers that meet the new efficiency criteria.

And what about the EC? In the article by Dean Pitofsky, his statement that the EC took efficiencies into account rested, in part, on its early decision in the *de Havilland* case. In that case, the Commission reserved judgment about the relevance of cost savings under the Merger Regulation, finding that the proposed cost savings were too small to have any offsetting impact and could, in any event, be achieved in other ways. He also pointed to the language of Article 85(3) of the Treaty of Rome, exempting certain otherwise anti-competitive agreements that improve "the production or distribution of goods," or "promote technical or economic progress." The Merger Regulation itself directs the Commission to consider "the development of technical and economic progress provided that it

1084–1085 (D. Del. 1991) (rejecting the efficiency claim because there was no assurance that savings would be passed on to consumers); United States v. Rockford Memorial Corp., 717 F. Supp. 1251, 1289 (N.D. Ill. 1989) (suggesting that efficiencies need not be considered if they could be achieved less restrictively), aff'd, 898 F.2d 1278 (7th Cir. 1990); FTC v. Illinois Cereal Mills, Inc., 691 F. Supp. 1131, 1145 (N.D. Ill. 1988) (suggesting that even if efficiencies were present, competition will not necessarily be enhanced), aff'd sub nom., FTC v. Elders Grain, Inc., 868 F.2d 901 (7th Cir. 1989); California ex rel. Van de Kamp v. American Stores Co., 697 F. Supp. 1125, 1133 (C.D. Cal. 1989) (stating that there was no reason to believe that efficiencies, even if proven, would be passed on to consumers), aff'd in part and rev'd in part, 872 F.2d 837 (9th Cir. 1989).

More recently, however, several courts have relied on the presence of efficiencies to uphold what might otherwise be viewed as anticompetitive mergers where, in the court's judgment, savings are likely to be passed on to consumers. See United States v. Long Island Jewish Med. Ctr., 983 F. Supp. 121, 149 (E.D.N.Y. 1997) (finding that the efficiencies gained in the merger would result in benefits to the consumer); FTC v. Butterworth Health Corp., 946 F. Supp. 1285, 1301 (W.D. Mich. 1996) (finding that the merger would result in significant efficiencies that would be passed on to consumers); see also United States v. Carilion Health Sys., 707 F. Supp. 840, 849 (W.D. Va.) (suggesting that an efficiency motive is a relevant factor), aff'd, 892 F.2d 1042 (4th Cir. 1989). In FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997), the court assumed that efficiencies might, in some cases, be a viable defense but concluded that the claims presented were unverifiable and that estimates of pass-through benefits to consumers were unrealistic. See id. at 1088–90; see also FTC v. Tenet Health Care Corp., 136 F.3d 1045 (8th Cir. 1999) (holding that the district court should "have considered evidence of enhanced efficiency").

233 See Aerospatiale-Alenia/de Havilland, supra note 151, 1991 O.J. (L 334) 42.
234 See id. at 59–60, ¶¶ 65–69.
235 EC TREATY, supra note 1, art. 85(3).
is to consumers’ advantage and does not form an obstacle to competition.”

One might think, as Dean Pitofsky did, that these provisions call for a detailed assessment of efficiencies. But the exempting provisions of Article 85(3) do not have a counterpart in Article 86 and its prohibition of abuse of a dominant position, the Article from which the language of the Merger Regulation was drawn. Furthermore, the “technical and economic progress” provision of the Merger Regulation has seldom been alluded to. In Philips/Grundig, the Commission referred to the achievement of economies of scale as evidence of a strengthening of an established firm, hardly the use of such economies as a defense. Recent statements by EC officials take the position

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236 EC Merger Regulation art. 2, ¶ (1)(b), supra note 35, at 16.
237 The language of this provision itself suggests that it is not to read as creating an efficiencies defense. Technical and economic progress is to be considered only if (1) it works to the advantage of consumers and (2) if it does not provide an obstacle to competition. The first of these conditions is consistent with the efficiencies defense as recognized in the United States, where there must be evidence that cost savings will be passed on to consumers. The second condition suggests that once a strengthening of a dominant position is found, considerations of technical and economic progress are no longer relevant. This appears to be the interpretation adopted by the Commission. See Gencor, supra note 193, [1999] 4 C.M.L.R. at 1056, ¶¶ 212–14; Saint-Gobain/Wacker-Chemie/NOM, supra note 211, 1996 O.J. (L 247) at 42–43, ¶¶ 244–46; Commission Decision 94/922, 1994 O.J. (L 364) 1, at 19–20, ¶¶ 100–01 (Case No. IV/M.469 MSG Media Service) [hereinafter MSG Media Service] (interpreting the Article as requiring that no obstacle to competition is created); Accor/Wagons-Lits, supra note 135, 1992 O.J. (L 204) at 8–9, ¶¶ 25(4), 26 (noting the resultant dominant position, that efficiencies were not established, and that there were other means of achieving efficiencies); Aerospatiale-Alenia/de Havilland, supra note 151, 1991 O.J. (L 334) at 60, ¶ 69 (stressing that consumers will be faced with a dominant position which would not be to their advantage); see also Commission Decision 96/177, 1995 O.J. (L 53) 204 at 37–38, ¶¶ 145–52 (Nordic Satellite Distribution) (noting that although the merger could be highly beneficial to consumers, the infrastructure must be open to other parties).


239 As early as 1992, Frédéric Jenny predicted that the Commission was more likely to treat efficiencies as an element contributing to the strengthening of a dominant position than as a defense. See Frédéric Jenny, Competition and Efficiency, 1993 FORDHAM CORP. LAW INST. 185 (Barry Hawk ed., 1994); Frédéric Jenny, EEC Merger Control: Economies as an Antitrust Defense or an Antitrust Attack?, 1992 FORDHAM CORP. LAW INST. 591, 603 (Barry Hawk ed., 1993) (“The possibility that a merger might lead to static efficiency gains... or to dynamic efficiency gains... which other non-merging firms are unlikely to achieve is interpreted as prima facie evidence that the merger will enable the merging firms to acquire a dominant position incompatible with the common market.”). Such a use of
that under the Merger Regulation, once a dominant position or strengthening of a dominant position is found, efficiencies are not considered. Moreover, the officials have noted that, given the high threshold in the Merger Regulation, the firms whose merger is at issue will have achieved most scale economies before the merger itself; an explanation reminiscent of the 1968 Guidelines in the U.S.\textsuperscript{240} Thus, the difference, if any, is now the reverse of that described by Dean Pitofsky.\textsuperscript{241}

\textsuperscript{240} The Commission itself has asserted that efficiencies are relevant under the Merger Regulation only in determining whether a dominant position has been created or strengthened, not to mitigate the effect of that dominance once established. See Contribution from the Commission of the European Union to the Committee on Competition Law and Policy of the Organization for Economic Cooperation and Development (OECD) Concerning Efficiency Claims in Mergers and other Cooperative Agreements (November 1995); REPORT FROM THE COMMISSION TO THE COUNCIL, supra note 65, ¶ 20. More recently, Alexander Schaub, Director-General of the Competition Directorate General-European Commission (DGIV) has said much the same, recognizing that efficiency gains beyond those reached at the levels at which dominance is established may not be taken into account and that efficiency considerations have played little role in EC merger analysis. Compare Alexander Schaub, European Competition Policy in a Changing Economic Environment, 1996 FORDHAM CORP. LAW INST. 71, 83–84 (Barry Hawk ed., 1997) with Juan Briones Alonso, Vertical Aspects of Mergers, Joint Ventures and Strategic Alliances, 1997 FORDHAM CORP. LAW INST. 131, 145 (Barry Hawk ed., 1998) (suggesting that the Commission may consider efficiencies in close cases but does not have freedom under the Merger Regulation to do so once strengthening of a dominant position is established).

\textsuperscript{241} Dean Pitofsky has since recognized that the promise of the \textit{de Havilland} decision has not been met and that it now appears that the European Commission is not prepared to recognize an efficiencies defense or otherwise consider efficiencies in merger, as opposed to Article 85, proceedings. See Robert Pitofsky, Vertical Restraints and Vertical Aspects of Mergers — A U.S. Perspective, 1998 FORDHAM CORP. LAW INST. 11, 113–114 (Barry Hawk ed., 1998).
But is the difference very real? The Commission, after all, is dealing only with mergers creating or strengthening a dominant position. We have already seen that they have challenged only mergers creating a single firm with a market share in the range of fifty percent or higher, or a duopoly where the top two firms after the merger are at a level of sixty percent or higher. The revised U.S. Merger Guidelines suggest that in a merger with quite high market shares and where the potential for harm is "particularly large," efficiencies must be "extraordinarily great."\(^2\)\(^4\)\(^2\) The difference, then, may be more apparent than real, unless the Commission continues from time to time to treat efficiencies as a basis for attacking acquisitions, in which case the differences are very real. If nothing else, the Commission's treatment of efficiencies says a good deal about its overall goals in the prevention of mergers adding to the strength of dominant firms. Coupled with the emphasis on preserving independent firms as a core part of its harm analysis, it suggests that the Commission is less concerned with efficiencies than is the U.S.

**CONCLUSION**

That there are significant differences in U.S. and EC merger control cannot be denied. Even with recognition of oligopolistic dominance, the EC's recognition of oligopoly has not led it to develop an approach based on the increased likelihood of collusion to the degree that this bedrock concern is the centerpiece of its analysis, as it is in the United States.\(^2\)\(^4\)\(^3\) The EC has raised objections only in cases of single firm dominance or duopoly. There are very substantial differences in the treatment of efficiencies, not only in terms of defenses, but in the degree to which the assessment in the EC of the strengthening of a dominant position takes into account the strength of remaining competitors and thus may protect the weak, i.e., less efficient, against the strong.

To a degree, these differences rest on the language of the Merger Regulation itself. This is more than a technicality which the Commission could work around if it elected to do so. The

\(^2\)\(^4\)\(^2\) 1992 MERGER GUIDELINES, supra note 42, § 4 (with April 8, 1997 revisions).

\(^2\)\(^4\)\(^3\) With the further development of the unilateral effects doctrine in the United States, however, the United States may also be moving away from collusion-based standards and in the direction of the European approach, albeit without the European emphasis on impact on competitors.
Merger Regulation was a carefully crafted compromise that took years to achieve. Member states disagreed sharply over the substance of merger control policy. Their disagreements were heightened by the fact that as to mergers within the Merger Regulation's thresholds, the Commission's jurisdiction was made exclusive. As to these mergers, each member State was concerned that the EC approach tracked its own rules as closely as possible. This concern was explicitly noted in *Kali + Salz*, where the Court of Justice found that the concept of oligopolistic dominance was a central feature of German law, a feature which, the Court noted, Germany would not have been prepared to surrender to the exclusive jurisdiction of the Commission.

It would be a mistake, however, to explain these differences with the assertion that the Merger Regulation reflects simply an arbitrary set of compromises. Rather, it reflects a coherent set of policy choices drawn from the traditions of the EC. From the very beginning, the overarching purpose of the Commission has been the integration of the economies of its member states into a single market. The Treaty of Rome contains no provision that deals directly with merger control. Faced with firms that often enjoyed protected status and were not of efficient size to compete effectively outside their protected home markets, it was the policy of the Commission to encourage mergers, not only to permit firms to achieve economic size, but to allow their penetration throughout the entire market. In this setting, there was little concern about the anti-competitive consequences of mergers. Moreover, at least some member states did have merger controls in place. The Treaty of Rome opted instead to control the practices of dominant firms under Article 86, where the prohibition of abuse confers more regulatory authority on the Commission than the U.S. deems appropriate under the Sherman Act. The Merger Regulation, then, can be seen as reflecting an earlier step in the process—a conclusion that the creation or strengthening of a dominant position through merger is best prevented rather than regulated after dominance has been established. And while confident about the interdependence of duopolists, the Commission has been skeptical about the broader notions of oligopoly employed in the United States. They may well be right. U.S. policy, after all, has its own critics.
It would also be a mistake to suggest that the EC has not fully embraced American antitrust analysis because they do not understand it. They know our policies as well as we do—a conclusion reinforced by the high degree of cooperation between the Commission and American enforcement agencies. That they choose to disagree is their business.

Having said that, however, the fact is that the European Commission now confronts the problem addressed by Dean Pitofsky concerning U.S. policy. Throughout most of its history, the EC has directed its attention inward, toward the achievement of a single, fully integrated market. Such a market now exists, in the sense that most trade and regulatory barriers among the member states have been removed. As it turns outward, it must focus more directly on the competitiveness of its firms in global markets. This will force it to give greater credence to efficiency claims than it has in the past, the very point made by Dean Pitofsky as to United States antitrust policy in general, and merger policy in particular.