Transatlantic Merger Control: The Courts and the Agencies

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In a series of merger control case judgments during the past decade, courts in the United States and the European Union have rejected the enforcement agencies' interpretations of law, as well as their factual allegations, in dismissing proposed challenges and in overturning agency

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decisions.[1] In so doing, the courts in both jurisdictions have assumed a central role in shaping current merger control policy.[2]

Disagreements between the courts and agencies are probably inevitable if the courts are to fulfill their role as an effective independent check on the agencies' enforcement activities. Constructive judicial criticism of agency decisions can drive needed procedural and substantive reform, leading to more effective and predictable merger enforcement.[3] On the other hand, if the recent criticism from the courts leads the agencies to become unduly cautious or, worse, to seek ways to circumvent judicial review, the courts' intervention could turn out to have been counterproductive.

This Article considers several recent cases in which the EU and U.S. courts have rejected proposed actions by the European Commission and the U.S. enforcement agencies and analyzes how the agencies have responded to these defeats.

I. The Role of the Agencies and the Courts in EU and U.S. Merger Control

A. Overview of the EU System

European competition enforcement is based on an administrative system in which the European Commission (the Commission)[4] has a broad duty "to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in light of those principles."[5] In the field of merger control, this duty requires the Commission to investigate and hand down decisions clearing, prohibiting, or undoing notified transactions, according to the procedure set out in Regulation 139/2004 (the EC Merger Regulation).[6] In merger cases, the Commission thus serves as investigator, prosecutor, and judge.[7]

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1. *See* Dany H. Assaf & Sarah K. McLean, *It's Not Over Until It's Over: When Is the Deal Really Done?*, 23 ANTITRUST 59, 59–60 (2008); John Temple Lang, *Two Important Merger Regulation Judgments: The Implications of* Schneider-Legrand *and* Tetra Laval-Sidel, 28 EUROPEAN L. REV. 259, 259–60 (2003).

2. *See* Assaf & McLean, *supra* note 1, at 59.

3. Temple Lang, *supra* note 1, at 260, 271.

4. Within the European Commission, DG Competition is the Directorate responsible for competition. *See* Press Release, Eur. Comm'n, Commission Reorganises Its Competition Department in Advance of Enlargement 1, IP/03/603 (Apr. 30, 2003). The Competition Commissioner heads DG Competition, assisted by a director general and three deputy directors general responsible for operations, mergers and antitrust, and state aid respectively. *See id.* Merger cases are handled by specialized merger units in each directorate, with the directorates divided by economic sectors (*e.g.*, Energy and Environment; Financial Services and Health-related Markets; and Basic Industries, Manufacturing, and Agriculture). *See id.*

5. Joined Cases T-305/94, T-306/94, T-307/94, T-316/94, T-325/94, T-328/94, T-329/94 and T-335/94, Limburgse Vinyl Maatschappij v. Comm'n, 1999 E.C.R. II-931, para. 149.

6. *See* Council Regulation, 139/2004, on the Control of Concentrations Between Undertakings, 2004 O.J. (L 24), arts. 6, 8.

7. *See* Temple Lang, *supra* note 1, at 259–60.

Having these roles vested in a single authority is acceptable only if effective due process safeguards and checks and balances constrain the administration's power.[8] As discussed below, since 2002 the Commission has put in place a number of internal measures that have undoubtedly contributed to sounder decision-making.[9] Even with the best of intentions, however, an administrative system will only meet basic standards of fairness and predictability if an independent tribunal oversees the decision maker.[10]

In the EU, the General Court (formerly the Court of First Instance)[11] and the Court of Justice of the European Union (the Court of Justice) (together, the EU Courts) provide this check on the Commission. Merger decisions taken by the Commission may be challenged before the General Court, and decisions of the General Court may be further appealed on points of law to the Court of Justice.[12] The EU Courts may annul Commission decisions where they find "lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, or misuse of powers."[13] Any natural or legal person may challenge a Commission decision that directly addresses or individually affects them.[14]

The EU Courts do not have unfettered discretion when reviewing Commission merger clearance or prohibition decisions.[15] The EU Courts

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8. Bo Vesterdorf, while President of the European Court of First Instance noted that even the European Commission's procedure for investigating and adjudicating antitrust cases would be "inherently flawed" as lacking the necessary independence and impartiality, absent effective judicial review by the Court of First Instance. Bo Vesterdorf, *Judicial Review in EC Competition Law: Reflections on the Role of the Community Courts in the EC System of Competition Law Enforcement*, 1 COMPETITION POL'Y INT'L 3, 20 (2005) (noting that the "combination of important powers in a single body can only be acceptable where there is a real opportunity for effective review by another independent and impartial body.").

9. *See* Nicholas Levy, *Evidentiary Issues in EU Merger Control*, *in* ANNUAL PROCEEDINGS OF THE FORDHAM COMPETITION LAW INSTITUTE: INTERNATIONAL ANTITRUST LAW & POLICY 81, 81–82 (Barry E. Hawk ed., 2009).

10. The European Court of Human Rights has held that administrative authorities can hold decision-making powers as long as they are subject to effective judicial review by an independent and impartial tribunal. *See, e.g.*, Ozturk v. Germany, App. No. 8544/79, 6 Eur. H.R. Rep. 409, 410 (1984).

11. The Court of First Instance was renamed the General Court by the Treaty of Lisbon, 2007 O.J. (C 306) 1, which entered into force on Dec. 1, 2009.

12. Treaty on the Functioning of the European Union (TFEU), 2008 O.J. (C 115) 49, arts. 256, 263 (formerly arts. 225, 230 of the EC Treaty).

13. *Id.* art. 263.

14. Third parties have the right to appeal a merger decision, provided that they can demonstrate that the decision directly and individually affects them. *See, e.g.*, Case T-2/93, Société Anonyme à Participation Ouvrière Compagnie Nationale Air France v. Comm'n, 1994 E.C.R. II-323, paras. 42–47.

15. Case C-12/03 P, Tetra Laval v. Comm'n [*Tetra Laval II*], 2005 E.C.R. I-987, Opinion of Advocate General Tizzano, para. 89 ("The rules on the division of powers between the Commission and the Community judicature, which are fundamental to the Community institutional system, do not . . . allow the judicature to go further, and . . . to enter into the merits of the Commission's complex economic assessments or to substitute its own point of view for that of the institution.").

cannot engage in a de novo review of the facts and cannot substitute their views for those of the Commission.[16] The EU system instead revolves around the "cornerstone of error."[17] While the EU Courts may scrutinize the Commission's factual analysis and are the ultimate arbiters with regard to matters of law, the Commission has traditionally enjoyed a "margin of discretion" in relation to complex economic matters, which are often at the heart of merger control decisions.[18] In this area, the role of the EU Courts is limited to "restrained control,"[19] whereby the courts verify only whether the relevant procedural rules have been complied with, whether the statement of the reasons for the decision is adequate, "whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers."[20]

Notwithstanding these stated limitations, in recent years the EU Courts have increasingly demonstrated a willingness to engage in rigorous and detailed scrutiny of the Commission's use of evidence in complex cases.[21] Thus, while in theory the EU merger control regime envisages a delicate institutional balance in which the Commission and the EU Courts each focus on their primary function of competition policy enforcement and judicial review respectively, in practice the situation is not always so clear cut.[22]

B. Overview of the U.S. System

In the United States, the Federal Trade Commission (FTC) and the Department of Justice (DOJ) share responsibility for merger enforcement under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act)[23] and Section 7 of the Clayton Act.[24] Like the European Commission, the U.S. enforcement agencies investigate proposed transactions for potential competition issues.[25] Unlike the EC, however, the FTC and DOJ do not themselves have the power to prohibit a transaction;[26] the U.S. agencies must bring suit in federal court and obtain a preliminary injunction to

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16. Case T-342/00, Petrolessence SA & Société de gestion de restauration routière SA (SG2R) v. Comm'n, 2003 E.C.R. II-1161, para. 101.

17. Mario Siragusa, Judicial Review of Competition Decisions Under EC Law 66 (Sept. 21, 2004) (Paper for the UK Competition Comm'n), *available at* http://www.competition-commission.org.uk/our_role/cc_lectures/judicial_control_210904_siragusa.pdf.

18. Tetra Laval II, para. 39.

19. Bo Vesterdorf, *Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts*, 1 Eur. Competition J. 3, 12 (2005).

20. Case 42/84 Remia BV & Others v. Comm'n, 1985 E.C.R. 2545, para. 4.

21. *See, e.g.*, Case T-342/99, Airtours v. Comm'n, 2002 E.C.R. II-2585; Case T-5/02, Tetra Laval BV v. Comm'n, 2002 E.C.R. II-4381.

22. *See* Jürgen Schwarze, *Judicial Review of European Administrative Procedure*, 68 Law & Contemp. Probs. 85, 100–01 (2004–).

23. Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (2006).

24. Clayton Act, ch. 323, § 7, 38 Stat. 730, 731–32 (1914) (current version at 15 U.S.C. § 18 (2006)).

25. *See* Nicholas Levy, European Merger Control Law: A Guide to the Merger Regulation § 23.03 (6th ed. 2009).

26. *See* 15 U.S.C. § 18a(f).

block a merger.[27]

Despite the fact that the U.S. agencies lack the power to prohibit transactions on their own, the enactment of the HSR Act in 1976 greatly increased the role of the agencies in U.S. merger policy.[28] Prior to the passage of the HSR Act, companies would often complete a merger before the agencies had time to conduct a review of the transaction's competitive implications.[29] This forced the agencies to pursue divestiture remedies in federal court after the mergers were consummated, placing the agencies in a weak position.[30] The HSR Act, however, requires companies to notify the DOJ and the FTC of transactions that meet prescribed jurisdictional thresholds and to observe a waiting period while the agencies review the transaction.[31] Under the HSR system, most companies facing a serious objection to a proposed transaction will seek negotiated remedies rather than challenge the agencies to litigate.[32] Thus, courts issue relatively few decisions under Section 7 of the Clayton Act.[33]

The fact that the courts hear relatively few merger cases does not, however, diminish their role as an independent check on the agencies. The requirement that the agencies prove to a district judge that a transaction poses a threat to competition ensures greater rigor in the agencies' decision-making and fact gathering.[34] As recent cases have demonstrated, judges are subjecting the agencies' economic theories and legal arguments to increasingly sophisticated and rigorous scrutiny.[35] This trend has implications even for cases that never reach the courtroom: in deciding whether to raise objections against a proposed merger, the agencies must not only persuade themselves that their concerns are well-founded but must also consider the likelihood that they can prove their theories in federal court by a preponderance of the relevant evidence.[36]

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27. *See id.*

28. *See* Scott A. Sher, *Closed But Not Forgotten: Government Review of Consummated Mergers Under Section 7 of the Clayton Act*, 45 SANTA CLARA L. REV. 41, 54 (2005) (explaining that the HSR Act "eliminate[d] the deleterious effects of post-consummation challenges" by requiring the parties to pre-notify the agencies prior to merging).

29. *See id.* at 52.

30. *See id.* at 53–54.

31. 15 U.S.C. §§ 18a(a), 18a(b), 18a(d).

32. *See* Sher, *supra* note 28, at 55.

33. *See id.*

34. *See* William J. Kolasky, Deputy Assistant Att'y Gen., Antitrust Div., Address Before the George Mason University Symposium: Conglomerate Mergers and Range Effects: It's a Long Way from Chicago to Brussels 26 (Nov. 9, 2001), *available at* http://www.usdoj.gov/atr/public/speeches/9536.pdf ("After just six weeks at the agency, I cannot overstate how much knowing we may have to prove our case to an independent fact-finder disciplines our decisionmaking.").

35. *See, e.g.*, United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1158–65 (N.D. Cal. 2004).

36. *See* Kolasky, *supra* note 34, at 26 ("If we decide in the U.S. to challenge a merger, we know we may have to go to court to convince a federal judge, by the preponderance of the evidence after an evidentiary hearing, that the merger may substantially lessen competition.").

While both the FTC and the DOJ must seek a preliminary injunction from a federal district court to prevent a transaction from closing, the agencies have different options for obtaining permanent injunctive relief.[37] The DOJ must seek permanent injunctive relief before a federal district court judge.[38] The FTC, however, has the option of either seeking a permanent injunction in federal court or initiating an administrative suit before an Administrative Law Judge (ALJ).[39] This action is commonly known as "Part 3" litigation.[40] In Part 3 litigation, ALJs preside over complaints brought by the FTC's Bureau of Competition and decide whether a transaction may substantially lessen competition in violation of the antitrust laws.[41] Parties may appeal ALJ decisions to the full Federal Trade Commission.[42] If the FTC decides against the defendant, the defendant may appeal the decision to a U.S. Court of Appeal and, ultimately, to the Supreme Court.[43] Some controversial recent changes to the FTC's administrative litigation process will be discussed in further detail below.

II. Recent Cases Before the Courts

A. EU

In the EU, appeals have been brought in only about forty of the approximately 4,000 Commission merger decisions since the Merger Regulation entered into force in 1990.[44] Nonetheless, these decisions have had a disproportionately large impact on the development of EU merger control. In particular, landmark judgments of 2002 in *Airtours*, *Schneider,* and *Tetra Laval* led directly to a substantial overhaul of the European Commission's internal structure and decision-making practice.[45] More recently, the General Court's judgment in *Impala* has raised the standard of care required of the Commission even in clearance decisions.[46]

1. Airtours

In June 2002, the General Court annulled the Commission's *Airtours/ First Choice* decision in which the Commission prohibited the merger of

37. *See* Antitrust Modernization Comm'n, Report and Recommendations 138 (2007) [hereinafter Commission Report].

38. *See id.*

39. 15 U.S.C. § 53(b) (2006); Commission Report, *supra* note 37, at 129, 138.

40. Part 3 of the FTC Rules of Practice govern the FTC's administrative enforcement process. 16 C.F.R. §§ 3.1, 3.2 (2009) (noting that the process laid out in Part 3 applies to all formal adjudicative proceedings before the FTC, including challenges to mergers and a wide range of other conduct).

41. *See* C.F.R. § 3.1; Thomas V. Vakerics, Antitrust Basics § 2.02[1–2] (36th ed. 2006) (explaining that the Bureau of Competition has primary responsibility within the FTC for enforcing federal antitrust laws).

42. 16 C.F.R. § 3.52(a) (2009).

43. 5 U.S.C. § 704 (2006).

44. This is in stark contrast to cartel and abuse of dominance cases, where a much larger percentage of Commission decisions are appealed to the EU Courts.

45. *See* Levy, *supra* note 9, § 4.03(5)(2).

46. *See* Case T-464/04, Indep. Music Publishers & Labels Ass'n (Impala, Int'l Ass'n) v. Comm'n [*Impala*], 2006 E.C.R. II-2289, paras. 528–541.

two U.K. short-haul, foreign-package holiday suppliers on the ground that the proposed transaction would create a situation of collective dominance.[47] In addition to providing important guidance on the application of the Merger Regulation to situations of collective dominance, this decision marked the first time the EU Courts overturned a Commission merger prohibition decision.[48]

In its judgment, the General Court criticized the way in which the Commission had assessed the impact of the proposed merger.[49] In particular, it reproached the Commission for substantiating its finding of collective dominance on what the court viewed as mere "assertions" that the merger would lead to a higher degree of market concentration, transparency, and interdependence, and would further marginalize smaller operators or new entrants.[50] The Court held that, far from basing its analysis on "cogent evidence," the Commission's decision was "vitiated by a series of errors of assessment . . . ."[51] The General Court's judgment not only provides important guidance as to the legal test for collective dominance but also as to the standard of factual and economic analysis to which the Commission would be held.[52]

Regarding the legal test for collective dominance, the General Court sets out three cumulative conditions that the Commission must fulfill to establish anticompetitive collective dominance.[53] The Commission must show that (1) sufficient market transparency exists to enable participants to monitor each other's conduct, (2) undertakings have an incentive "not to depart from the common policy on the market," and (3) the actions of competitors or consumers "would not jeopardise the results expected from the common policy."[54]

The General Court's treatment of factual and economic evidence in *Airtours* had even broader implications. In contradicting a number of the Commission's findings, the General Court effectively conducted its own review of the facts.[55] Thus, the General Court not only appeared to reduce significantly the deference previously afforded the Commission but also signaled that it would hold the Commission to a new, higher standard of economic analysis in supporting its conclusions.[56]

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47. Case IV/M.524, Airtours/First Choice, 2000 O.J. (L 93) 1, 5 C.M.L.R. 494, *overturned in* Case T-342/99, Airtours v. Comm'n [*Airtours Case*], 2002 E.C.R. II-2585.

48. Gisela Aigner, Oliver Budzinski & Arndt Christiansen, *The Analysis of Coordinated Effects in EU Merger Control: Where do we stand after* Sony/BMG *and* Impala?, 2 Eur. Competition J. 311, 316 (2006).

49. Alessandro Nucara, Schneider/Legrand *and* Tetra Laval/Sidel*: Fast Track Towards Merger Reform?*, 14 European Business Law Review 193 (2003).

50. *Airtours Case*, *supra* note 47, paras. 80, 120, 158, 214, 283–84, 286.

51. *Id.* para. 294.

52. *See* Levy, *supra* note 9, at 94.

53. *See Airtours Case*, *supra* note 47, para. 62.

54. *Id.*

55. *See* Levy, *supra* note 9, at 94.

56. *Id.*

2. *Schneider*

Just four months after the *Airtours* judgment, the General Court annulled two prohibition decisions taken by the Commission in *Schneider/ Legrand*.[57] These were the first competition judgments brought before the General Court under the newly introduced expedited appellate procedure.[58]

Following a detailed review of the Commission's decision, and in pointedly critical language, the Court concluded that the Commission had committed substantive "errors, omissions and inconsistencies . . . of undoubted gravity."[59] The Court found, for example, that the Commission had based its conclusion that the transaction would create or strengthen the merged entity's dominant position vis-à-vis wholesalers in markets outside of France solely on transnational observations, rather than on a rigorous, country-by-country analysis.[60] In light of these shortcomings in the Commission's analysis, the Court overturned the prohibition decision in relation to all markets outside of France.[61]

The General Court then reversed the Commission's decision regarding the French market on the basis of procedural errors committed during the Commission's investigation.[62] The General Court observed that, between the statement of objections (the initial decision expressing doubts as to the transaction's legality) and the prohibition decision, the Commission's views on this market had changed substantially.[63] In particular, concerns regarding possible conglomerate effects in associated markets had replaced the concerns raised in the statement of objections regarding the parties overlapping activities in France by the time the prohibition decision was published.[64] The General Court held that the Commission had violated Schneider's rights of defense by including arguments in its decision that

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57. *See* Case COMP/M.2283, Schneider/Legrand, 2004 O.J. (L 101) 1, in which the Commission prohibited the merger of two French suppliers of low-voltage electricity distribution equipment. The General Court overturned the Commission's prohibition decision in Case T-310/01, Schneider Electric SA v. Comm'n [*Schneider I*], 2002 E.C.R. II-4071. In Case T-77/02, Schneider Electric SA v. Comm'n [*Schneider II*], 2002 E.C.R. II-4201, the General Court overturned the Commission's divestment order. Under the French public takeover code, the purchaser may acquire the target shares before antitrust clearance is granted, provided that associated voting rights are not exercised. At the date of the Commission's prohibition decision, Schneider had acquired shares (with voting rights suspended) in Legrand. *See Schneider II* para. 11-12, 20. In addition to its prohibition decision, therefore, the Commission also issued a second decision ordering Schneider to divest these shares. *See id.* para. 28.

58. *See* Kyriakos Fountoukakos, *Judicial Review and Merger Control: The CFI's Expedited Procedure*, COMPETITION POLICY NEWSLETTER, 2002, at 7, *available at* http://ec.europa.eu/competition/publications/cpn/2002_3_7.pdf. In *Schneider I*, the judgment was handed down ten months after appeal; in *Schneider II*, the judgment was handed down just five months after request for expedited procedure. See *Schneider I*, *supra* note 60, para. 61; *Schneider II*, *supra* note 57, para. 30.

59. *See Schneider I*, *supra* note 57, para. 404.

60. *See id.* paras. 243-44.

61. *See id.* paras. 262-64.

62. *See id.* paras. 412, 460-62.

63. *See id.* 445-53.

64. *Id.* para. 445.

were not included in the statement of objections.[65]

3. Tetra Laval

In the Commission's third defeat of 2002, the General Court annulled the Commission's two decisions in *Tetra Laval/Sidel* in which the Commission prohibited the merger of two producers of packaging materials and ordered the de-merger of the two companies.[66] Following a detailed assessment of the Commission's factual analysis, the court again criticized the Commission's reliance on unsubstantiated economic analysis.[67]

The General Court held that, in reaching its decision that the merger would have anticompetitive conglomerate effects, the Commission had failed to conduct a precise examination supported by "convincing evidence."[68] In particular, the General Court found that the Commission had failed to adequately demonstrate that the merged entity would have an incentive to leverage its dominant position on the carton packaging market into the plastic packaging machine market, ignored the low shares of the merging parties in certain overlapping markets, and failed to take into account the remedies offered by the parties or the strength of their existing competitors.[69] The General Court thus overturned the Commission's prohibition decision on the basis that, absent "convincing evidence" that the transaction would in all likelihood create or strengthen a dominant position, it constituted a "manifest error of assessment."[70]

The Commission appealed the General Court's judgment to the Court of Justice.[71] The Commission claimed that the General Court had not only disregarded its margin of discretion in respect of complex factual and economic assessments but had also exceeded its role in reviewing merger decisions.[72] In particular, it claimed that the General Court had substituted its own view of the facts for that of the Commission and had imposed on the

65. *Id.* paras. 460–62. Having annulled the Commission's decision, the General Court subsequently held that the Commission should pay a portion of the _1.7 billion demanded by Schneider as compensation for the amount the company claimed it would have gained had the merger been permitted, including two-thirds of the reduction in the divestiture price that Schneider conceded when it sold Legrand to Wendel Investissement SA and Kohlberg Kravis Roberts & Co. in December 2002. *See* Case T-351/03, Schneider Electric SA v Comm'n, 2007 E.C.R. II-2237, 4 C.M.L.R. 1533 (2007). The Court of Justice annulled this decision on July 16, 2009, on the ground that, as Schneider had no obligation to sell Legrand in 2002, Schneider could not recover losses incurred in the sale from the Commission. Case C-440/07 P, Comm'n v Schneider Electric SA (not yet reported). However, the Court of Justice held that the Commission must cover costs incurred by Schneider in appealing the disputed merger control decision. *Id.*

66. *See* Case COMP/M.2416, Tetra Laval/Sidel [*Tetra Laval I*], 2004 O.J. (L 43) 13, *overruled by* Case T-5/02, Tetra Laval BV v. Comm'n, 2002 E.C.R. II-4381; COMP/M.2416, Tetra Laval/Sidel [*Tetra Laval II*], 2004 O.J. (L 38) 1, *overruled by* Case T-80/02, Tetra Laval BV v. Comm'n, 2002 E.C.R. II-4519; *see also* comments on the French public takeover code *supra* note 57.

67. *Tetra Laval I*, *supra* note 66 *passim*.

68. *Id.* paras. 155, 336.

69. *See id.* paras. 251, 281, 297.

70. *See id.* paras. 155, 336.

71. Case C-12/03P, Comm'n v. Tetra Laval BV, 2005 E.C.R. I-987, para. 1.

72. *Id.* para. 19.

Commission a disproportionate standard of proof for merger prohibitions.[73]

The Court of Justice rejected the Commission's claim.[74] While recognizing that the Commission has a margin of discretion with regard to economic matters, the Court of Justice nevertheless noted that this "does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature."[75] In fact, the Court of Justice confirmed that the EU Courts must not only "establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it."[76] The Court of Justice noted that this is particularly important in cases where "a prospective analysis" is required.[77] This was true of the present case, where the Commission based its theory of harm on assumptions about what the merged company would do in the future.[78] The Court of Justice therefore concluded that the General Court had not exceeded its role in reviewing the Commission's analysis of the likely anticompetitive conglomerate effects of the merger.[79]

The Court of Justice also rejected the Commission's claim that the General Court had departed substantially from the standard of proof established by the existing jurisprudence of the EU Courts by requiring it to provide "convincing evidence".[80] In particular, the Commission recalled the judgment of the Court of Justice in *Kali and Salz*,[81] in which the EU Courts held that the Commission must provide "cogent and consistent" evidence.[82] However, the Court of Justice in *Tetra Laval* concluded that the General Court's use of the words "convincing evidence" had "by no means added a condition relating to the requisite standard of proof but merely drew attention to the essential function of evidence, which is to establish convincingly the merits of an argument or, as in the present case, of a decision on a merger."[83]

4. *Impala*

On July 13, 2006, the General Court overturned the Commission's 2004 decision in *Sony/BMG*,[84] a case in which the Commission cleared the

73. *Id.* para. 31.
74. *Id.* para. 40.
75. *Id.* para. 39.
76. *Id.*
77. *Id.*
78. *See id.* para. 42.
79. *Id.* paras.48–51.
80. *See id.* at para. 45.
81. Joined Cases C-68/94 and C-30/95, French Republic & Others v Comm'n (*Kali & Salz*), 1998 E.C.R. I-1375, para. 228.
82. *See* Case C-12/03P, Comm'n v. Tetra Laval BV, 2005 E.C.R. I-987, para. 40.
83. *Id.* para. 41.
84. *See* Case COMP/M.3333, Sony/BMG, 2005 O.J. (L 62) 30. The proposed concentration was assessed under the old Merger Regulation 4064/89, as the new Merger

proposed merger of the recorded music businesses of Sony Corporation of America and Bertelsmann AG.[85] This was the first—and only—time that the General Court annulled an unconditional merger clearance decision.[86] It was, moreover, one of the first major cases decided after the Commission's decisional practice had been adapted in an effort to meet the higher burden of proof established in the Court's 2002 judgments.[87]

The General Court held that the Commission had committed a number of manifest errors in concluding that no collective dominant position existed in the market for recorded music prior to the merger and that the merger would not lead to a situation of collective dominance.[88] The General Court further rejected the Commission's conclusion that there was insufficient product homogeneity, market transparency, or evidence of past retaliatory behavior to support the conclusion that the proposed transaction would permit tacit collusion.[89]

In particular, the General Court found that the Commission had failed to conduct sufficient prospective analysis of the effect of the proposed transaction on market transparency and the likelihood of retaliation.[90] The General Court also held that the Commission erred by requiring a higher level of transparency than that necessary to establish the possibility of effective tacit collusion.[91] In rejecting this particular conclusion, the General Court notably qualified the *Airtours* collective dominance test by suggesting, *obiter dictum*, that "close alignment of prices over a long period . . . together with other factors typical of a collective dominant position, might, in the absence of an alternative reasonable explanation, suffice to demonstrate the existence of a collective dominant position . . . ."[92]

The General Court also criticized the Commission for relying on data submitted by the notifying parties in response to the statement of objections, without first examining the methods used to gather and verify that it was "accurate, relevant or objective and representative."[93] The General Court held that the Commission, in relying so heavily on this data, had effectively "delegate[d], without supervision, responsibility for conducting certain parts of the investigation to the parties to the concentration."[94]

Regulation 139/2004 did not enter into force until May 1, 2004. The transaction was re-notified to the Commission under the new Merger Regulation following the General Court's judgment and was re-approved in October 2007, following a detailed and lengthy review. This clearance came more than three years after the transaction had closed and the joint venture had come into operation. Impala has also appealed the Commission's second clearance decision. As discussed further below, the General Court's judgment was subsequently overturned in 2008.

85. *Impala*, *supra* note 46, paras. 542–43.
86. *See* Aigner et al., *supra* note 48, at 311.
87. *Id.*
88. *See Impala*, *supra* note 46, paras. 528, 541.
89. *Id.* paras. 520, 528, 533–34, 542.
90. *See id.* para. 528.
91. *Id.* para. 289.
92. *Id.* para. 252.
93. *See id.* para. 415.
94. *Id.* para. 415.

The General Court, additionally, departed from existing EU jurisprudence on the role of the statement of objections.[95] It held that, although not required to explain changes from the statement of objections in its subsequent decision, the Commission must be "in a position to explain . . . its reasons for considering that its provisional findings were incorrect."[96]

Sony and Bertelsmann appealed the General Court's decision to the Court of Justice.[97] In a judgment that provides important clarification on a number of different issues, the Court of Justice annulled the General Court's decision.[98]

First, in a claim that the Commission did not join, Sony and Bertelsmann argued that the General Court had erred in requiring the Commission to meet the same burden of proof in the context of a merger clearance decision as was required in a prohibition decision.[99] The Court of Justice rejected this claim, explaining that the burden of proof on the Commission is identical in both clearance and prohibition decisions.[100] In clearing a proposed merger, the Commission must be able to affirmatively show that the transaction will have pro-competitive effects or will not result in anticompetitive harm in the same way that it must positively demonstrate anticompetitive effects in cases where it opts to prohibit a merger.[101] In both cases, the Commission must support its decision with evidence that is "cogent and consistent."[102]

Second, the Court of Justice confirmed that the Commission is neither "obliged to maintain the factual or legal assessments" made in the statement of objections nor "to explain any differences with respect to its provisional assessments set out in the statement of objections."[103] The Court of Justice found that the General Court had erred in relying on certain portions of the Commission's findings in the statement of objections as being established facts, recalling that the statement of objections is inherently provisional and may be amended in light of further evidence received during the course of the Commission's investigation.[104]

Third, the Court of Justice rejected the General Court's criticism of the Commission's use of evidence received in response to the statement of objections.[105] The Court of Justice confirmed that while the Commission

95. Earlier case law had established that, as the statement of objections is merely a *preliminary* document setting out *preliminary* views taken in light of evidence received in the initial stages of the Commission's investigation, the Commission is not required to explain deviations from the statement of objections. *See, e.g.*, Case C-60/81, IBM v. Comm'n, 1981 E.C.R. 2639, para. 19.

96. *Impala*, *supra* note 46, para 335.

97. Case C-413/06 P, Bertelsmann AG & Sony Corp. of Am. v. Indep. Music Publishers & Labels Ass'n [*Impala II*], 2008 E.C.R. I-4951, 5 C.M.L.R. 17 (2008) para. 4.

98. *Id.* para. 191.

99. *Id.* para. 40.

100. *See id.* paras. 46–47.

101. *See id.* para. 52.

102. *Id.* para. 50.

103. *Id.* paras. 64–65.

104. *Id.* paras. 73, 76.

105. *Id.* paras. 87–95.

"is required to examine carefully the arguments of the parties to the concentration" and "to disregard them where justified doubts arise,"[106] it cannot apply more stringent criteria to this information than to information received from third parties in response to the statement of objections.[107]

Finally, the Court of Justice rejected the General Court's conclusions on collective dominance.[108] In particular, the Court of Justice criticized the "watered-down" test applied by the General Court, which, in analyzing the Commission's findings on market transparency, had merely postulated a monitoring mechanism based solely on unsubstantiated claims by the complainant Impala.[109] The Court of Justice thus found that the General Court had erred in failing to apply the three-pronged test for collective dominance as set out in the *Airtours* judgment.[110]

B. U.S. Cases

The attitude of the U.S. courts toward agency challenges to proposed mergers has come a long way since Justice Stewart's oft-quoted dissenting remark in *Von's Grocery* that "[t]he sole consistency that I can find is that under § 7, the Government always wins."[111] Reflecting a trend dating back to the 1980s, in four recent cases, the antitrust enforcement agencies have lost high-profile challenges to proposed mergers. The cases discussed in this section each involved a unique set of facts but each illustrates the degree to which the courts influence U.S. merger policy today.

1. Oracle

In *United States v. Oracle Corporation*, the DOJ challenged a proposed acquisition of PeopleSoft by Oracle.[112] Both companies developed and marketed enterprise resource planning (ERP) system software used by large companies to run significant parts of new businesses, such as supply chain software, human relations management, and financial management systems.[113] The DOJ sought to define the product markets as "high function" human relation management and financial management systems, arguing that these were distinct and separate product markets from all other ERP

106. *Id.* para. 94.
107. *Id.*
108. *Id.* paras. 132–34.
109. *Id.* paras. 111, 126, 130.
110. *Id.* paras. 124–34. The General Court's judgment considered only two of Impala's five grounds of appeal. *See id.* para. 90. Although the Court of Justice annulled the General Court's judgment on these two grounds, it remitted the case back to the General Court to consider the remaining three issues. *See id.* at 191. On June 30, 2009, the General Court issued an order stating that the case was devoid of any purpose and that there was no need for the court to adjudicate on the matters referred back by the Court of Justice. *See* Case T-464/04, Indep. Music Publishers & Labels Ass'n v. Comm'n, 2009 O.J. (C 205) 37–38.
111. United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).
112. 331 F. Supp.2d 1098 [*Oracle*], 1100 (N.D. Cal. 2004).
113. *Id.* at 1101–02.

products.[114] In trying to define the market, the DOJ relied primarily on the testimony of several of Oracle's customers, along with the testimony of industry witnesses and experts.[115]

The trial court was unconvinced and held that the evidence did not establish the existence of the product market proposed by the DOJ.[116] Specifically, Judge Walker emphasized the difficulty in identifying "'clear breaks in the chain of substitutes' sufficient to justify bright-line market boundaries in differentiated products unilateral effects cases," such as the one at issue.[117] As a result of these difficulties, the court found that "attempts to create defensible market boundaries are likely to be based on relatively vague product characteristics," falling short of "section 7's requirement that the relevant market be 'well-defined.'"[118] The court observed that the evidentiary problems faced by the DOJ were inherent in qualitative analysis and recommended the use of quantitative analysis using modern econometric methods, such as merger simulation models.[119] The court suggested these methods could assist in reducing the arbitrariness of, and compensate for potential errors in, market definition in cases involving differentiated products and alleged unilateral effects.[120]

The *Oracle* decision also demonstrates how judicial skepticism of presumptions under the 1992 Merger Guidelines can affect the outcome.[121] In its trial brief, the DOJ placed strong emphasis on the fact that "'[s]ufficiently large HHI figures establish [a] . . . prima facie case that a merger is anti-competitive.'"[122] Unconvinced, Judge Walker declared, "[A] strong presumption of anticompetitive effects based on market concentration is especially problematic in a differentiated products unilateral effects context."[123] The court then held that a "presumption of anticompetitive effects from a combined share of 35% in a differentiated product market [was] unwarranted" and that a monopoly or dominant position must be proved.[124]

The DOJ also failed to convince the court of the validity of its unilateral effects theory.[125] The court held that in a differentiated product market the DOJ must prove that the merging firms' products are close substitutes, that the non-merging firms likely cannot introduce products to

114. *Id.* at 1107.
115. *Id.* at 1125.
116. *Id.* at 1132.
117. *Id.* at 1120 (internal citations omitted).
118. *Id.* at 1120–21.
119. *Id.* at 1122.
120. *See id.*
121. *See* Darren S. Tucker, Scott L. Reiter & Kevin L. Yingling, *The Customer Is Sometimes Right: The Role of Customer Views in Merger Investigations*, 3 J. Competition L. & Econ. 551, 562 (2007) (discussing judicial skepticism of customer witnesses as representative of the market).
122. Plaintiff's Trial Brief at 17 (citing FTC v. Heinz Co., 246 F.3d 708, 716 (D.C. Cir. 2001)).
123. *Oracle*, 331 F. Supp.2d at 1122.
124. *Id.* at 1123.
125. *See id.* at 1120–22.

challenge those of the merging firms, and that the other options available to customers are so different that the merging firms likely can act anticompetitively.[126]

2. Arch Coal

The FTC suffered a similar defeat in *FTC v. Arch Coal*.[127] The FTC brought a challenge to Arch Coal's proposed acquisition of Triton Coal (Triton) and its mines in Wyoming.[128] The FTC argued that the relevant market was coal from the Wyoming South Powder River Basin (SPRB) and that the sub-category of 8800 Btu SPRB coal was a distinct relevant market.[129] The defendants countered that the market was no narrower than SPRB coal and could be as broad as all Powder River Basin (PRB) coal.[130] The court found that the relevant product market involved all SPRB coal, noting that the FTC's own expert could offer only weak support for the argument that 8800 Btu SPRB coal was a distinct market and that the defendants' evidence showed that utility companies could and did switch between 8800 Btu and 8400 Btu SPRB coal.[131]

Like the *Oracle* decision, *Arch Coal* illustrates how district courts continue to require much more than market concentration data before granting injunctive relief.[132] Whether measured by reserves, practical capacity, loadout capacity, or production, the market for SPRB coal was highly concentrated.[133] Nonetheless, based on the court's determination that reserves were the correct measure of market concentration, the transaction resulted in only a small increase in concentration (an increase in HHI of just forty-nine).[134] By this measure, even though the concentration figures indicated that the FTC had met its burden of showing a prima facie case, the case was weak, compared to other challenges brought by the agencies.[135] Consequently, the court determined that the defendants were permitted to make less of a showing to rebut the prima facie case.[136] The defendants presented an alternative statistical assessment and a detailed analysis of both present and post-merger competition in the relevant market, which the court found sufficient to undermine the FTC's prima facie case.[137]

The FTC also failed to convince the court of the validity of its coordi-

126. *Id.* at 1117-18.
127. 329 F. Supp. 2d 109 (D.D.C. 2004).
128. *Id.* at 114.
129. *Id.* at 121.
130. *Id.*
131. *Id.* at 121-22.
132. *See, e.g.*, *id.* at 124.
133. *Id.* at 124-25. The Herfindahl-Hirschman Index (HHI) market concentration figures ranged from 2054 to 2201. *Id.* The increase in HHI ranged from forty-nine to 224. *Id.* at 125.
134. *Id.* at 124-25.
135. *See id.* at 129.
136. *Id.* at 129.
137. *Id.* at 130.

nated effects theory.[138] The court pointed to the following factors as making tacit collusion difficult: the significant number of competitors; the heterogeneity of SPRB coal; imperfect pricing information available in the market; the difficulty in obtaining accurate information about supply and demand; the confidentiality of the bidding system; and firms' difficulties in identifying and punishing cheaters.[139] The court also found that Triton was unlikely to become a maverick in the SPRB market and that fringe suppliers in the SPRB market would be a viable constraint on producer price coordination post-merger.[140]

3. *Equitable Resources*

In *FTC v. Equitable Resources*, the FTC suffered a defeat on jurisdictional grounds.[141] The FTC challenged Equitable Resources, Inc.'s proposed acquisition of People's Natural Gas Company.[142] The transaction had received the approval of the Pennsylvania Public Utility Commission (PUC) as being in the public interest.[143] The FTC then alleged that the transaction would result in reduced competition for a small subset of the parties' customers.[144] The court dismissed the complaint, holding that the PUC's approval qualified for state action immunity and prevented the FTC from exercising jurisdiction.[145]

4. *Whole Foods*

The most recent high-profile loss by the FTC occurred during its attempt to obtain a preliminary injunction against Whole Foods Market, Inc.'s proposed acquisition of its rival, Wild Oats.[146] *FTC v. Whole Foods* turned largely on the question of product market definition.[147] The FTC argued that the relevant product market was "premium, natural, and organic supermarkets" (PNOS), a definition that included only the parties to the merger and two other firms.[148] The parties argued that they compete in a much broader "all supermarkets" product market.[149] The lower court considered the "small but significant and nontransitory increase in price" (SSNIP) test of the Horizontal Merger Guidelines, while relying on "critical loss" analysis as an input to that test.[150]

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138. *See id.* at 158.
139. *Id.* at 150.
140. *Id.*
141. 512 F. Supp. 2d 361, 372 (W.D. Pa. 2007).
142. *Id.* at 362–63.
143. *Id.*
144. *Id.*
145. *Id.* at 372.
146. *See* FTC v. Whole Foods Mkt., Inc., 502 F. Supp. 2d 1 (D.D.C. 2007).
147. *Id.* at 7.
148. *Id.* at 8. The FTC asserted that the combined shares of Whole Foods and Wild Oats in the premium natural and organic supermarkets would be 100% in seventeen of the eighteen relevant geographic markets. *Id.* at 39.
149. *Id.* at 15.
150. *See id.* at 17.

The FTC's main argument was that a "core" group of customers of a PNOS would not switch to traditional grocery stores in response to a SSNIP.[151] This group of consumers would thus be vulnerable to a sustained increase in price.[152] The lower court disagreed with the FTC on the product market issue, effectively deciding the case on that issue alone and allowing the merger to proceed.[153] The FTC appealed.

A year later, a divided panel of the U.S. Court of Appeals for the D.C. Circuit reversed the district court decision 2-1, holding that the district court had incorrectly analyzed the relevant product market.[154] Rather than focusing on harm to "fringe" customers who would shop at both premium supermarkets and conventional supermarkets, the appellate court held that the district court should have focused on the effect on "core" consumers who rely entirely on premium supermarkets.[155] Moreover, the court held that when the FTC seeks a preliminary injunction, it need not have finally resolved its relevant market definition.[156] The most far-reaching aspect of the decision, however, was the court's announcement that the FTC need only raise "serious doubts about a transaction" to prevail at the preliminary injunction stage rather than satisfy the traditional four-part test.[157]

III. The Agencies' Responses

A. European Commission: Constructive Response to Criticism

While the General Court's judgments in *Airtours*, *Schneider,* and *Tetra Laval* acknowledged that the Commission has a margin of discretion when dealing with complex economic matters, they nonetheless demonstrated that the CFI will scrutinize not only the facts relied on by the Commission but also the inferences it draws from them. These cases sent a strong message that the Commission needed to become more rigorous in its investigations, evidence, and reasoning—a message the Commission received clearly.[158] Mario Monti, then Competition Commissioner, acknowledged that there were "lessons to be drawn from the judgments," explaining that "the [General Court] is now holding us to a very high standard of proof, and this has clear implications for the way in which we conduct our investigations and draft our decisions."[159]

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151. *Id.* at 16–17.
152. *Id.*
153. *See id.* at 39, 50. Judge Friedman explained that his rejection of the FTC's product market definition meant that "there [was] no need to analyze specific HHI calculations." *Id.* at 39.
154. FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028 (D.C. Cir. 2008).
155. *Id.* at 1037, 1041.
156. *Id.* at 1049.
157. *Id.* at 1036.
158. Levy, *supra* note 9, at 109; Mario Monti, Eur. Comm'r for Competition Pol'y, Merger Control in the European Union: A Radical Reform 2 (Nov.7, 2002), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/02/545&format=PDF&aged=1&language=EN&guiLanguage=EN).
159. Monti, *supra* note 158, at 2.

The Commission was quick to address the issues highlighted by the General Court.[160] It had become clear well before 2002 that DG Competition's specialized Merger Task Force, which then reviewed all mergers notified to the Commission, was understaffed, inadequately resourced, and lacked access to both economists and econometric software.[161] More fundamentally, the string of defeats at the General Court also made it apparent that internal checks on the Merger Task Force were insufficient, leaving too much influence over Commission decision-making in the hands of the individuals who investigated cases.[162] The Commission heeded the General Court's criticisms and pushed ahead with a substantial program of institutional and procedural reforms.[163] Key changes included the adoption of the new Merger Regulation[164] and the Commission's Horizontal Merger Guidelines,[165] the creation of the post of Chief Competition Economist,[166] the introduction of a "peer review" or "devil's advocate" panel procedure to provide independent scrutiny of key recommendations of case teams,[167] the disbanding of the Merger Task Force, and the reorganization of DG COMP into sectoral units.[168]

The 2004 Horizontal Merger Guidelines, together with the revised substantive test and extended timetable for both Phase I and Phase II investigations introduced by the new Merger Regulation, established a more structured analytical framework for merger assessments.[169] In particular, the guidelines identified more clearly the types of evidence relevant to different theories of competitive harm.[170] They also adopted the concepts of

160. Levy, *supra* note 9, at 109; Monti, *supra* note 158.

161. Kai-Uwe Kühn, *Reforming European Merger Review: Targeting Problem Areas in Policy Outcomes*, 2 J.Indus., Competition & Trade 311, 328–30 (2002); Monti, *supra* note 158 (suggesting that the need for reform became apparent in July of 2000, following the submission of a report to the Council on the function of merger review).

162. *See* Levy, *supra* note 9, at 113, 116–17.

163. *See id.* at 109. The Commission had already instigated a reform process in July 2000, when the Commission submitted a Report to the Council on the application and functioning of the Merger Regulation. *See* Monti, *supra* note 158. The Commission then, in December of 2001, adopted a Green Paper on the reform of the ECMR on which third parties could comment. *See* Anne Papaioannou et al., *Green Paper on the Review of the Merger Regulation*, Competition Policy Newsletter 65 (Feb. 2002), *available at* http://ec.europa.eu/competition/publications/cpn/2002_1_65.pdf.

164. *See* Council Regulation, 139/2004, *supra* note 6.

165. Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2004 O.J. (C 31) 5.

166. *See* Levy, *supra* note 9, at 82.

167. Brad Staples, *Communicating in a New European Union Competition Environment*, Global Competition Review (2005).

168. *See* Press Release, *supra* note 4.

169. *See* Council Regulation, 139/2004, *supra* note 6 (explaining that the new test examines whether or not a notified concentration would significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.) *Cf.* the old test, which examines whether "a concentration . . . which creates or strengthens a dominant position as a result of which effective competition in the common market or in a substantial part of it would be significantly impeded should be declared incompatible with the common market." *Id.* at para. 24.

170. *See id. passim.*

coordinated effects and non-coordinated effects and incorporated the three-pronged *Airtours* test.[171]

The appointment of the Chief Competition Economist and his team in 2003 reflected the Commission's recognition of the need to place greater emphasis in its decisions on detailed quantitative and economic evidence.[172] The Chief Economist is, by design, temporarily seconded to the Commission.[173] This arrangement ensures that the incumbent has both real-world knowledge of industrial economics and a future outside the Commission, which is intended to further ensure a measure of objectivity.[174] Supported by a team of economists,[175] the Chief Economist provides economic guidance from the beginning of the investigation process, encouraging merging parties to perform robust economic analysis that they can support with reliable evidence.[176]

Peer review panels, first introduced in *Carnival/P&O Princess,*[177] became a systematic feature of Phase II merger cases from May 1, 2004.[178] The panels consist of experienced officials from across DG COMP and are intended to provide an effective internal check on investigators' preliminary conclusions.[179]

Finally, the Commission dissolved the Merger Task Force and integrated its constituent units into five sectoral directorates within DG COMP that are responsible for certain industrial sectors.[180] Each of these units has a dedicated merger unit working alongside units dealing with cartels and general abuse of dominance cases.[181]

The reforms begun in 2004 sought to establish a "more systematic and

171. *See* Council Regulation, 139/2004, *supra* note 6, paras. 24, 39, 41.

172. *See* Levy, *supra* note 9, at 112–13.

173. Monti, *supra* note 158, at 7.

174. *See id.* (indicating that the role of the Chief Economist is designed to blend hands-on experience with an independent outlook). The Chief Economist also reports directly to the Director General for Competition to preserve a degree of independence from individual case handlers or case teams. *See* Levy, *supra* note 9, at 112.

175. Levy, *supra* note 9, at 112. The Chief Economist is currently supported by about twenty economists. *Id.*

176. *See* Lars-Hendrik Röller & Pierre A. Buigues, *The Office of the Chief Competition Economist at the European Commission,* (May 2005), *available at* http://ec.europa.eu/dgs/competition/officechiefecon_ec.pdf.

177. *See* Case COMP/M.2706, Carnival Corporation/P&O Princess, 2003 O.J. (L 248) 1; Jeremy Grant & Damien J. Neven, *The Attempted Merger Between General Electric and Honeywell: A Case Study of Transatlantic Conflict*, 1 J. COMPETITION L. & ECON. 595, 631 n.78 (2005) (noting that Commissioner Monti unexpectedly cleared the Carnival merger after using a team of officers to challenge the team handling the case).

178. Philip Lowe, Dir. Gen. of the Competition, Address to the IBA Conference: The focus of DG Competition in 2003–2004 2 (Feb. 27, 2003).

179. Levy, *supra* note 9, at 116–17. Questions remain as to whether such panels can offer truly effective scrutiny given the limited time available for review and panel members' lack of familiarity with the facts of the case. *See, e.g.,* Temple Lang, *supra* note 1, at 271–72.

180. Nicholas Levy, *Mario Monti's Legacy in EC Merger Control*, 1 COMPETITION POLICY INT'L 99, 130 (2005).

181. Press Release, *supra* note 4, at 1.

rigorous framework based on sound and robust evidence."[182] As one of the first major cases in which the Commission sought to make more extensive use of economic evidence and to conduct a more systematic assessment of a proposed transaction, the General Court's annulment of the Commission's *Sony/BMG* decision was a significant blow to the Commission.[183]

In particular, the criticism of the Commission's reliance on the parties' data raised concerns that, in an effort to avoid similar problems in the future, the Commission would react by issuing multiple, detailed information requests in even the most straightforward of cases.[184] While the Court of Justice's *Impala* judgment may have allayed some of these fears, it is nonetheless clear to EU competition law practitioners that the Commission's demands for information—not only from the merging parties but also from third parties, including those that may have no interest in the case—have become more lengthy and demanding.[185] The Courts' requirement that Commission decisions be more thoroughly grounded in clear, quantitative evidence has thus increased the burden on merging parties (and third parties) throughout the administrative process.[186] The use of economists has also become commonplace at both an earlier stage and to a greater extent than previously.[187]

Investigatory review periods have also become longer.[188] While strict timelines govern the Commission's review of proposed mergers, the increased use of quantitative evidence has created a significant administrative burden, with the merging parties, third parties, and the Commission, alike, requiring time to gather, process, and review substantial quantities of data.[189] This has, in some cases, led to the suspension of the Merger Regulation timetable—a measure now permitted under the new Merger Regulation.[190] Other developments, such as the right of merging parties to review the Commission's file on receipt of a statement of objections and further investigative measures taken by the Commission on the basis of the parties' response to the statement of objections, have also placed greater pressure on the Commission's timeline for the review of transactions.[191]

Greater information-gathering burdens and longer, less certain review timetables may be the inevitable consequences for merging parties of the higher evidentiary requirements that the EU Courts have imposed on the Commission. As long as the Commission exercises appropriate discretion in the demands it imposes, however, these consequences may be a reasona-

182. Levy, *supra* note 9, at 149.
183. *See id.* at 125.
184. *See id.* at 150.
185. *See id.* at 150.
186. *See id.* at 150.
187. *Id.* at 151.
188. *Id.* at 151.
189. *See id.*
190. Council Regulation, 139/2004, *supra* note 164, art. 10(3).
191. *See id.* at 151–52.

ble price to pay if the result is sounder, and more transparent, decision-making.

B. United States: Responses by the Agencies

The simple fact that two U.S. enforcement agencies exist to enforce merger policy, rather than one, can lead to a perception that the agencies apply different standards to the cases they review.[192] Real or perceived divergence between the DOJ and FTC can undermine the development of a uniform approach to merger enforcement in the U.S. and add uncertainty to the review process.[193] The Antitrust Modernization Commission recognized the potential negative consequences of agency divergence and even urged Congress to ensure that the DOJ and FTC maintain a uniform approach to mergers.[194]

1. *DOJ*

In public statements announcing decisions not to challenge several significant transactions, the DOJ used reasoning similar to that used by the district courts in *Oracle, Arch Coal*, and *Whole Foods*, consistent with these courts' admonitions to apply a rigorous standard of review.[195] One can also read these statements to reflect a healthy respect for the difficulties of carrying the burden of proof to establish a likely anticompetitive effect of a transaction.[196]

First, in one of the largest telecom mergers in recent history, the DOJ approved AT&T's acquisition of Bellsouth without divestitures.[197] The DOJ considered that the merged company would continue to face vigorous competition in all markets in which AT&T and Bellsouth had formerly competed.[198] The combination had raised some fears that the merger would partially revive the former AT&T monopoly,[199] but the DOJ noted that changes in the regulatory and technological landscape had signifi-

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192. *See* COMMISSION REPORT, *supra* note 37, at 141.
193. *See id.* at 131.
194. *Id.* at 131.
195. *See, e.g.*, Thomas O. Barnett, Assistant Att'y Gen., Statement Regarding the Closing of the Investigation of AT&T's Acquisition of Bellsouth: Investigation Concludes That Combination Would Not Reduce Competition (Oct. 11, 2006) [hereinafter Barnett Statement], *available at* http://www.usdoj.gov/atr/public/press_releases/2006/218904.htm; Dep't of Justice Antitrust Div., Statement on the Closing of Its Investigation of Whirlpool's Acquisition of Maytag, (Mar. 29, 2006) *available at* http://www.usdoj.gov/atr/public/press_releases/2006/215326.htm.
196. *See* Barnett Statement, *supra* note 195; Dep't of Justice Statement on Maytag, *supra* note 195.
197. *See* Barnett Statement, *supra* note 195; Dep't of Justice Statement on Maytag, *supra* note 195; Henry M. Rivera & Edgar Class, *The Year in Wireline Communications 2006-2007*, 920 PRAC. L. INST. 7, 59-60 (2007) (discussing the magnitude of the AT&T-Bellsouth merger).
198. *See id.*
199. *See, e.g.*, *Ma Bell Revives; Watch Her with a Very Wary Eye*, USA TODAY, Mar. 6, 2006, *available at* http://www.usatoday.com/news/opinion/editorials/2006-03-06-mabell-edit_x.htm.

cantly altered the competitive situation in the telecom market.[200] In the market for residential local and long distance services, the DOJ noted that AT&T's competitive significance continued to decline and thus the transaction did not represent a threat to consumers.[201] This seems to echo *Arch Coal*, where Judge Bates conducted a similar examination of the FTC's theory that Triton was a "maverick firm" but concluded that Triton's declining performance indicated that the company was no longer as competitively relevant.[202]

Second, indications of profound changes in the competitive landscape in household appliances played a significant role in the DOJ's decision not to challenge the acquisition of Maytag by Whirlpool.[203] Even though the two companies enjoyed a relatively high market share in laundry product sales, the DOJ concluded that the combined entity would still face significant constraints that would prevent it from raising prices.[204] Domestic competitors had significant excess production capacity that could be brought online, and foreign competitors could readily increase their imports in response to any price increase by domestic firms.[205] In other words, large retailers such as Best Buy, Sears, The Home Depot, and Lowe's had sufficient alternatives available that would allow them to resist any attempt to increase price.[206] Finally, the parties presented convincing evidence that the transaction would result in significant cost savings that would ultimately benefit consumers.[207]

The closing statement issued in *Maytag/Whirlpool* also revealed some skepticism toward presumptions based on market concentration.[208] Though the DOJ acknowledges that the parties' then-current market shares were high, it concluded that the ability of both foreign and domestic competitors to quickly respond to a price increase would place significant competitive constraints on the merged firm.[209] The same line of reasoning was central to the judgment in *Arch Coal*.[210] In that case, the court noted that two competing firms would likely expand production in response to a coordinated price increase, thus mitigating any fears that the merger might result in tacit collusion. The court also rejected the presumption that increased concentration would result in reduced competition.[211]

Third, the DOJ's statement regarding the merger of Sirius and XM satellite radio provides a somewhat more detailed explanation of the DOJ's

200. Barnett Statement, *supra* note 195.
201. *Id.*
202. *See* FTC v. Arch Coal, 329 F. Supp. 2d 109, 146 (D.C. Cir. 2004).
203. *See* Dep't of Justice Statement on Closing Maytag, *supra* note 195.
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *See id.* (finding that "*despite the two companies' relatively high share of laundry product sales in the United States*, any attempt to raise prices likely would be unsuccessful") (emphasis added).
209. *Id.*
210. FTC v. Arch Coal, 329 F. Supp. 2d 109 (D.C. Cir. 2004).
211. *Id.* at 149–50.

rationale for closing an investigation into a case that, at least on its face, struck many observers as problematic.[212] The transaction involved the merger of the only two providers of satellite radio services.[213] The DOJ analyzed the market for satellite radio and concluded that Sirius and XM did not, in fact, exercise significant competitive constraint on one another.[214] The parties did not compete for existing customers—those who already owned a satellite receiver—because their equipment was incompatible with each other's broadcast service.[215] As to new customers, the DOJ's analysis showed that auto manufacturers, which install the equipment in new cars, had become one of the most important distribution channels for the two companies.[216] While XM and Sirius had historically competed for these customers, they had each entered into sole-source contracts with all of the major automobile manufacturers at the time of the transaction.[217] These contracts fixed the amount of subsidies and other incentives that the parties offered until 2012.[218] Thus, there would be no significant competition for this important part of the market over the short-to-medium term.[219]

Retailers who offered automobile aftermarket equipment and other stand-alone equipment constituted the second major distribution channel for XM and Sirius.[220] With regard to this distribution channel, the DOJ declined to adopt a narrow market definition that only included satellite radio but, instead, also examined other audio entertainment sources, such as FM/AM radio, HD Radio, and MP3 players.[221] The DOJ's analysis concluded that for a large subset of the merging parties' customers who bought one satellite radio service for specific programming content, the other satellite service was not the closest substitute.[222] The number of satellite customers who did view the two services as the closest substitutes was not large enough to make a post-merger price increase profitable, and the parties lacked the ability to effectively price discriminate among customers.[223]

The DOJ's closing statement in *Sirius/XM* underscored the critical importance of market definition. Commentators observed that if the DOJ had defined the relevant market as satellite radio services, then the merger

212. *See generally* Statement of the Dep't of Justice Antitrust Div. on Its Decision to Close Its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirius Satellite Radio Inc. (Mar. 24, 2008), *available at* http://www.usdoj.gov/atr/public/press_releases/2008/231467.htm; Elinor Mills, *FAQ: Serious Challenges for Sirius-XM Merger*, CNET News (Feb. 20, 2007), http://news.cnet.com/2100-1026_3-6160765.html.

213. *See* Statement of the Dep't of Justice on Closing XM Radio, *supra* note 212, at 1.

214. *See id.*

215. *Id.* at 2.

216. *Id.*

217. *Id.*

218. *Id.* at 2–3.

219. *See id.* at 3.

220. *Id.* at 2.

221. *Id.* at 3.

222. *Id.*

223. *Id.* at 4.

would essentially lead to a monopoly.[224] In defining a broader market, however, the DOJ pointed to evidence that many customers viewed other sources of audio entertainment as substitutes for satellite radio.[225]

The DOJ's analysis on the satellite radio case echoes the debates both in *Whole Foods*, about whether the relevant market consisted of PNOS grocery stores or all supermarkets, and in *People Soft/Oracle* about high-function business software.[226] It is, of course, difficult to determine just what effect these judicial opinions had on the DOJ's subsequent enforcement decisions, but at a minimum, it would seem that they reinforce the need for careful factual inquiry before making a court challenge in which the enforcement agency must carry the burden of proof.[227]

2. *FTC*

As noted earlier in Part I.B, while the FTC must obtain a preliminary injunction from a federal court to block a transaction, the FTC may either pursue administrative litigation within the FTC or seek a permanent injunction from the federal court.[228] In apparent response to its recent defeats in court, the FTC has modified the administrative litigation process and, at least arguably, enhanced its role and its decision-making power in merger cases.[229]

The FTC's new rules set new deadlines for the pre-hearing phase of administrative proceedings, including, in cases seeking injunctive relief, an administrative hearing within five months of the filing of the complaint.[230] The rules also reduce the overall timeline for the proceeding by requiring the FTC to decide pre-hearing motions within forty-five days of filing.[231] In addition, hearings now may not exceed 210 hours (or thirty trial days of seven hours), and the ALJ must file an initial decision within seventy days of the filing of the final merits briefs.[232] These rules largely codify the procedures adopted by FTC Commissioner Rosch when he sat as an ALJ presiding over the decision in *In re Inova Health Systems Foundation,* which

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224. *See. e.g.*, Mills, *supra* note 212.

225. *See* Dep't of Justice Statement on Closing XM Radio, *supra* note 212, at 3.

226. *See* discussion *supra*, at Parts II.B.1, II.B.4. Like the DOJ in *Sirius/XM*, the court in *Whole Foods* concluded that "fringe" customers who would respond to a price increase indicated that the market definition should be broadened, even if "core" customers would not respond to the same price increase. 502 F.Supp.2d 1, 23 (D.D.C. 2007).

227. *See* Dep't of Justice Statement on Closing XM Radio, *supra* note 212, at 5.

228. Commission Report, *supra* note 37.

229. *See* Press Release, FTC, FTC Issues Final Rules Amending Parts 3 and 4 of the Agency's Rules of Practice, (Apr. 27, 2009), *available at* http://www2.ftc.gov/opa/2009/04/part3.shtm.

230. 74 Fed. Reg. 1820 (proposed Jan 13, 2009) (to be codified at 16 C.F.R. § 3.11(b)).

231. *Id.* at 1821 (to be codified at 16 C.F.R. § 3.22(a)).

232. *Id.* at 1831, 1834 (to be codified at 16 C.F.R. at §§ 3.41(b) and 3.51, respectively).

itself generated controversy.[233] In that case, the two hospital systems interested in merging ultimately terminated their agreement, attributing the dissolution of the merger to "unusual process changes by the Federal Trade Commission [that] threatened to prolong completion of the merger by as much as two years, which both health systems believe is not in the best interest of the communities they serve."[234]

In addition to streamlining the administrative litigation process, the changes to 16 C.F.R. § 3.26 may indicate a significant change in one of the FTC's longstanding policies. Historically, the FTC did not pursue administrative litigation after a federal district court had denied a motion for preliminary injunctive relief.[235] This was reflected in the FTC's 1995 Policy Statement, which outlined the FTC's case-by-case approach to Part 3 litigation in instances where a preliminary injunction had been denied.[236] In its recent revisions to § 3.26, the FTC stated it will continue to pursue this case-by-case approach,[237] but the revisions eliminate the provision for automatic removal from adjudication after the FTC loses a motion for a preliminary injunction in federal court.[238] Some commentators have voiced concerns that these changes, along with the accompanying FTC statements, indicate that the FTC has in effect reversed its 1995 Policy statement and would pursue Part 3 administrative litigation on a more frequent basis even after it loses a preliminary injunction motion in federal court.[239] The FTC has claimed that these fears are unfounded. [240] However, the result of these changes remains to be seen.

IV. Analysis

A. Europe

Prior to the General Court's 2002 judgments, there had been concern among companies and practitioners that the Commission (and particularly DG Competition's Merger Task Force) was exercising virtually unfettered discretion in approving or prohibiting mergers, unchecked by effective judicial review.[241] The three General Court judgments of that year established clear limits on the Commission's discretion in the use of evidence in its

233. *See id.*; In re Inova Health System Foundation, No. 061-0166 (May 30, 2008) (order denying respondent's motion to stay administrative proceedings), *available at* http://www.ftc.gov/os/adjpro/d9326/080530orderdenying.pdf.

234. Press Release, Inova Health System, Statement from Inova Health System and Prince William Health System about the Proposed Merger (June 6, 2008), *available at* http://newsroom.inova.org/article_display.cfm?article_id=5135.

235. *See* Commission Report, *supra* note 37, at 141.

236. 74 Fed. Reg. 1811.

237. *Id.*

238. *Id.*

239. *Id.* (outlining concerns of comments received on proposed changes to § 3.26).

240. *See id.* at 1812.

241. *See e.g.*, Kolasky, *supra* at note 34, at 26 (commenting that "in Europe, the Commission is sometimes said to act as investigator, prosecutor, judge, and jury. Judicial review is slow and highly deferential to the Commission's factual determinations.").

decision-making process.[242] In response to the stinging, unprecedented criticism from the court, the Commission embarked on a large-scale program of institutional reform.[243] Most observers believe that the Commission now grounds its decisions more firmly in fact and economics,[244] a positive development for European merger control as a whole.

The changes observed in the Commission's practices since the General Court's 2006 *Impala* judgment (overturning a clearance decision) are perhaps less unambiguously positive. Notwithstanding its subsequent annulment by the Court of Justice, this decision appears to have pushed the Commission to further modify and lengthen its procedures in order to avoid similar confrontations with the Courts in the future.[245] As noted above, the Commission's information demands have become substantially greater.[246] In cases raising genuine issues, merging parties will probably prefer this added administrative burden over the pre-2002 alternative of potentially unchecked decision-making.[247] However, this comes as small comfort to third parties who must often devote substantial resources to answering Commission information requests in cases in which they have little or no interest.[248]

Moreover, since *Impala*, the now real threat of third-party appeals in clearance decisions means that the Commission tends to investigate even theoretical concerns thoroughly, causing undue delay (as the Commission's expectations for pre-notification discussions have grown) and imposing substantial costs on business without clear justification.[249] Companies are thus increasingly dependent on the discretion of a (naturally risk-averse) case team to avoid costly burdens in cases where no concern could reasonably arise and when the final outcome of unconditional clearance is never in question.[250]

More generally, to the extent that *Impala* increases merger litigation, it is unclear whether the EU Courts can deal quickly and effectively with a large number of complex cases.[251] These courts were over-stretched by the time the General Court handed down its 2002 judgments.[252] The "Fast-Track" procedure introduced by the General Court in February 2001 went some way toward dealing with this issue of timing.[253] Nonetheless, *Impala* could lead to a further slowing of an already slow appellate process.

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242. *See* Vesterdorf, *supra* at note 19, at 17.
243. *See* Levy, *supra* note 9, at 108.
244. *Id.* at 149.
245. *Id.* at 151.
246. *See id.* at 151.
247. *Id.*
248. *Id.*
249. *See* Aigner et al., *supra* note 48, at 331.
250. *See* Werner Berg, *The New EC Merger Regulation: A First Assessment of Its Practical Impact*, 24 Nw. J. Int'l L. & Bus. 683 (2004).
251. *See* Vesterdorf, *supra* note 19, at 17.
252. *See* Levy, *supra* note 9.
253. Rules of Procedure of the Court of First Instance of the European Communities, art. 76a (1), *available at* http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt7_2008-09-25_14-08-6_431.pdf; *see also* Court of Justice and Court of First

B. United States

1. DOJ

It has been suggested that U.S. agencies' recent litigation defeats in *Oracle, Equitable Resources*, and *Whole Foods* may have had an influence at least on the DOJ's merger enforcement policy.[254] In particular, the DOJ's closing statements in *AT&T/Bellsouth, Maytag/Whirlpool* and *XM/Sirius* suggest that litigation risks might have received substantial attention.[255] Whether or not the litigation losses affected these merger decisions, it certainly is prudent for an enforcement agency to consider whether it has a reasonable chance of prevailing in court before it undertakes to challenge a transaction that may have significant benefits to customers and shareholders. This approach to enforcement should not be attributed simply to a "more conservative" attitude toward merger enforcement—it is just as likely a reflection of a rigorous review of the facts and a realistic assessment of litigation risks.[256]

In the United States, the agencies' decisions to permit a transaction are not subject to judicial review. In contrast, the General Court's decision in *Sony/BMG* demonstrates that the EU courts have the power to overturn European Commission decisions permitting mergers, as well as those challenging them.[257] At least in theory, then, the General Court can act as a check not only on overly aggressive enforcement but also on perceived under-enforcement. On the other hand, unlike in the EU, in addition to the federal agencies, private parties and State Attorneys General can also challenge transactions under the Clayton Act if they believe that the federal agencies are under-enforcing this statute.[258]

2. FTC

The FTC's reforms to the Part 3 litigation process looked to some observers like an attempt to create greater independence from the federal courts in challenging mergers.[259] Commentators have noted with some concern the increased role that the FTC could play as both prosecutor and

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Instance Practice Directions, 2002 O.J. (L 87) 48, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:087:0048:0051:EN:PDF; Levy, *supra* note 9.

254. *See* Jonathan B. Baker & Carl Shapiro, *Detecting and Reversing the Decline in Horizontal Merger Enforcement*, Antitrust 22 (Summer 2008); Jason McLure, *Has the Antitrust Division Lost its Nerve?*, Legal Times (Jan. 11, 2007), http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1168423328747 (discussing the impact of the DOJ's loss in *Oracle*).

255. *See generally* Statement of the Dep't of Justice on XM Radio, *supra* note 212; Statement of the Dep't of Justice on Closing Maytag, *supra* note 195.

256. *See* McLure, *supra* note 254.

257. *See generally Impala*, *supra* note 46.

258. *See* 15 U.S.C. §§ 15c, 16(b)(4).

259. *See, e.g.*, Janet L. McDavid & Richard G. Parker, *Recent Federal Agency Antitrust Merger Enforcement*, *in* Practicing Law Institute: Corporate Law and Practice Course Handbook Series 153 (2009).

judge under the proposals.[260] For example, if a party files a motion to dismiss before the administrative hearing, the FTC (and not an ALJ) could itself review a decision on that motion shortly after voting to issue the complaint.[261] This system raises significant questions of whether prosecutorial bias or a conflict of interest would impact the FTC's rulings on pre-hearing motions.[262]

Of even greater concern to some is the possibility that the FTC may now more willingly pursue Part 3 litigation, even after a district court has denied preliminary injunctive relief.[263] As Whole Foods argued in its most recent lawsuit against the FTC, this raises significant questions of prosecutorial bias and constitutional due process.[264] If the FTC argues as a litigant in federal district court, it seems reasonable to question whether the FTC can possibly act as an impartial judge in subsequent Part 3 litigation.[265]

While the FTC may have disagreed with the outcomes in *Whole Foods, Arch Coal,* and *Equitable Resources*, it may not have responded appropriately with its reforms to the merger review process. Under the FTC's proposal, the FTC would only be subject to final appellate review by the D.C. Circuit after the conclusion of Part 3 litigation.[266] While the FTC would still lack the power to enjoin a merger before its completion, the prospect of such a long litigation period could well cause the parties to abandon challenged transactions.[267] Thus, the FTC might have a *de facto* power to block at least some mergers.[268]

V. Closing Thoughts: Expertise vs. Independence

In recent years, the courts in the EU and in the United States seem to have played an increasingly important role in EU and U.S. merger control policy. However, the recent disagreements between the courts and the agencies underscore the recurring question of how to balance the goal of having mergers assessed by presumably expert agencies with the need for independent judicial review. The increasing importance of economics in

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260. *See, e.g.*, A.B.A. Section of Antitrust L., *2008 Transition Report* 31 (2008), *available at* http://www.abanet.org/antitrust/at-comments/2008/11-08/comments-obama biden.pdf.
261. *See id.*
262. *See id.*
263. *See* 73 Fed. Reg. 58,837 (proposed Oct. 7, 2008) (to be codified at 16 C.F.R. pts. 3, 4).
264. *See* Complaint at 28, Whole Foods Mkt., Inc. v. FTC (D.D.C. 2008) (No. 1:08-cv-02121) [hereinafter *Whole Foods Complaint*].
265. *See id.*
266. *See* 73 Fed. Reg. 58,837 (proposed Oct. 7, 2008) (to be codified at 16 C.F.R. pts. 3, 4).
267. *See, e.g.*, Press Release, FTC, FTC Consent Order Settles Charges that Whole Foods' Acquisition of Rival Wild Oats was Anticompetitive (Mar. 6, 2009), http://www2.ftc.gov/opa/2009/03/wholefoods.shtm. It is notable that the merger between Whole Foods and Wild Oats was announced on February 21, 2007, and the parties did not settle the case until March 6, 2009. *See id.*
268. *See* Daniel A. Crane, *Antitrust Antifederalism*, 96 Cal. L. Rev. 1, 54 (2008).

merger analysis has made merger cases (and antitrust cases generally) among the most complex and difficult to bring to court.[269] It can prove daunting for even an experienced judge to deal "with questions involving merger simulations, demand elasticity, critical loss analysis, . . . [and] conflicting econometric analyses."[270] In some cases, the complexity may prove overwhelming to lay judges, resulting in higher rates of appeal.[271]

The FTC (like the European Commission) has expertise in antitrust law that many district judges lack, giving it an advantage in deciding complex merger cases. However, the FTC's recent proposals also raise concerns about prosecutorial bias and lack of effective judicial oversight.[272] These same issues arose regarding merger enforcement by the European Commission and remained unaddressed until the General Court's 2002 judgments and the subsequent institutional reforms implemented by the European Commission in response—mitigating, but not eliminating, the problem.[273] Giving even an expert agency the effective power to prohibit mergers, unconstrained by genuinely effective judicial review, is not an optimal solution.[274]

There have been suggestions, both in the United States and in Europe, to establish specialized competition courts.[275] A specialized court offers the possibility of maintaining independent judicial review, while at the same time promoting the development of judicial expertise in competition law.[276] Several jurisdictions have adopted this model with apparent success, and the basic idea is not unknown in the United States or Europe.[277] The United States has already adopted a specialized court for patent law with the creation of the Federal Circuit.[278]

The idea of a specialized competition court has been raised in the EU, with some suggesting the creation of a specialized chamber of the General Court for handling complex competition cases.[279] While the courts' influ-

269. See *generally* Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity & Judicial Training on Appeals* (George Mason University Law and Economics Research Paper Series, Paper No. 09-07), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1319888.

270. *Id.* at 2. The fact that in the EU system, the courts hear merger cases only on appeal makes this issue somewhat less difficult, but even there the challenge for lay judges to deal with antitrust cases is evident.

271. *See id.* at 28.

272. *See, e.g.*, *Whole Foods Complaint*, *supra* note 264.

273. *See* Levy, *supra* note 9, at 107.

274. *See id.* at 298–00.

275. *See, e.g.*, Baye & Wright, *supra* note 269, at 31; Vesterdorf, *supra* note 19; Monti, *supra* note 158.

276. *See id.*

277. *See* Competition Appeal Tribunal—About the Tribunal, http://www.catribunal.org.uk/242/About-the-Tribunal.html (last visited Mar. 22, 2010). For example, the United Kingdom's competition regime features a Competition Appeal Tribunal, a specialized appellate body made up of lawyers, economists, and businessmen. *Id.* The CAT hears appeals from decisions made by the U.K.'s antitrust enforcement agency (the Office of Fair Trading), as well as hearing private claims for monetary damages. *See id.*

278. Federal Circuit—About the Court, http://www.cafc.uscourts.gov/about.html.

279. *See, e.g.*, Vesterdorf, *supra* note 19, at 25.

ence over EU and U.S. merger control policy over the last decade has been for the most part positive, placing this increasing power in the hands of judges more experienced in antitrust law might reduce judicial conflict with the enforcement agencies and lead to improved decision-making.

On the other hand, it was the non-specialist judges in the EU and the United States who challenged the agencies to prove their assertions, and there exists a possibility specialist judges would have developed their own enforcement biases precisely because of their specializations. There are strong pros and cons on both sides of the "specialist court" issue, and an examination of those arguments is beyond the scope of this paper. Suffice it to say, however, that proponents of this idea will have to make a far stronger argument in the United States and in the EU than they have to date to succeed.