COMMENTS

Agreeing To Disagree?: Continuing Uncertainties in Transatlantic Merger Clearance Post-EC Merger Regulation

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I. INTRODUCTION

The significance of antitrust law to the global legal regime has changed dramatically within the last century. Where few countries once

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considered antitrust laws necessary or beneficial to the economy and society, and even fewer had antitrust laws on the books, nearly all of the world's developed national economies are now regulated to one degree or another by national antitrust regimes.[1] In large part, this has been prompted by staggering transnational economic growth.[2] A significant dimension of most of these regimes is merger review, the process by which regulatory agencies approve, prohibit, or modify business combination. Nowhere is this more important than when considering the case of the world's two largest economies, the United States and European Community. The business of America has become the business of the European Community due to the size of these economies[3] and their long-standing relationship. The corollary to this platitude in merger clearance is that any large merger involving multinational entities must receive the blessing of regulators on both sides of the Atlantic. While such blessing is usually granted, examples of divergent merger decisions and rulings have fostered considerable scholarship and debate on the state of transatlantic merger clearance.

Much of the recent discussion has focused on whether or not merger clearance regimes in the United States and European Community are becoming more similar. While a spate of decisions in the late 1990s and early 2000s generated a firestorm of conflicting coverage,[4] a number of subsequent changes in EC merger clearance policy seemed to suggest convergence. On the heels of both of these developments, in early 2006, Sony and Bertelesmann Music Group (BMG) were poised to finalize the consolidation of their music divisions.[5] The 2004 merger had been

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1. As one author notes:

> [W]hen the author of this book first started practicing antitrust law, in 1959, only one nation on the continent of Europe had an "antitrust" agency: Germany's Bundeskartellamt. In 2006 such agencies stretch from Ireland and the U.K. to the Soviet Union, and beyond to Asia, and exist on all the continents.

KY P. EWING, COMPETITION RULES FOR THE 21ST CENTURY: PRINCIPLES FROM AMERICA'S EXPERIENCE 19 (2d ed. 2006).

2. As an indirect reflection of this fact, Ewing concludes from an informal survey that the business of antitrust "undoubtedly exceeds *$15 to $20* billion today." *Id.* at 38.

3. The European Community is the largest economy in the world; it recently overtook the United States. CIA World Factbook, Rank Order—GDP, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html (last visited Aug. 27, 2008) (purchasing power parity).

4. Some prominent examples of contentious antitrust decisions include *Boeing/McDonnell Douglas* in 1997, *WorldCom/Sprint* in 2000, *AOL/Time Warner* and *Warner/EMI Music Group* in 2000, *GE/Honeywell* in 2001, and *Microsoft* in 2004.

5. Doreen Carvajal, *Europeans Again Approve Sony's Merger with BMG*, N.Y. TIMES, Oct. 4, 2007, *available at* http://www.nytimes.com/2007/10/04/business/worldbusiness/04music.html.

approved by the United States Federal Trade Commission (FTC) and the European Commission.[6] All that remained was a third-party challenge by Impala, an independent label organization, before the European Court of First Instance (CFI).[7] When the decision in that case overturned the Commission's approval, the merging parties were forced to retool their proposal and go before the Commission again, significantly delaying their merger.[8] This decision, considered in greater detail later, illustrates many of the significant structural and procedural differences in the regulatory mechanisms through which merger review decisions are made in the European Community and United States.

This Comment will comparatively address one such difference in the context of transatlantic antitrust regulation: judicial review. Specifically, it will argue that the role of judicial review has contributed substantially to the development of the transatlantic merger clearance discourse and will be of growing importance in understanding the transatlantic merger review going forward. Part II begins by briefly considering the unique circumstances in which antitrust regulation and merger clearance were born and evolved in each system. It then explains the development and contemporary processes of merger review in the United States and Europe, including both the administrative and judicial components, and focuses particularly on the nature and limitations of judicial review in each system. Part III compares the effects judicial review has had on merger review in the two systems, proceeding from analysis of the Sony/BMG transaction to consideration of the outcome of that decision in relation to judicial review in merger clearance. Part IV concludes the Comment with an analysis of the significance of the extrapolation conducted in Part II to judicial review and merger clearance in the future, concentrating on what effects judicial review will have on transatlantic merger review in light of recent developments including the Sony/BMG transaction.

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6. *U.S. Agency Clears Sony-BMG Music Merger*, N.Y. TIMES, July 29, 2004, *available at* http://query.nytimes.com/gst/fullpage.html?res=9402E6D6133DF93AA15754C0A9629C8B63&scp=2&sq=sony+bmg+merger+&st=nyt.

7. Carvajal, *supra* note 5.

8. Doreen Carvajal, *Regulators in Europe Will Review Sony-BMG*, N.Y. TIMES, Mar. 2, 2007, *available at* http://www.nytimes.com/2007/03/02/business/worldbusiness/02music.html?scp=7&sq=sony%2Fbmg+merger&st=nyt. European regulators approved the merger for the second time on October 3, 2007. Commenting on the second approval, Neelie Kroes, the competition commissioner, expressed confidence in the fact that the "long and very thorough investigation," undertaken after the Court of First Instance chastised the Commission for "an extremely cursory examination," had revealed no competition issues. Carvajal, *supra* note 5.

II. DOCTRINES OF JUDICIAL REVIEW AND MERGER REVIEW IN THE UNITED STATES AND EUROPEAN COMMUNITY

The steady globalization of commerce has spawned vast transatlantic economic networks and myriad multinational entities doing business in the United States and Europe. With the rise to prominence of the single market in Europe, and particularly since the Maastricht Treaty was signed in 1993, the United States and European Community have striven to provide adequate regulation of these shifting networks and entities and the body of relevant law has grown. It remains important to consider where each of these systems came from, who they were originally designed to serve, and how their roles have changed over the years. In the most general terms both systems seek to foster competition or, as one author has described it, "competitive commercial and industrial conduct that constrains and reduces the economic power exercised by any single firm or combination of firms."[9] Each system has arrived at that goal by its own path and means.

A. *Historical Antecedents: Wisdom vs. Youth*

Merger review in the United States is based on a general antitrust framework contained in a mere handful of federal statutes. National antitrust regulation in the United States has its roots in the era of populist sentiment and mistrust of centralized industry and government that characterized the late 1800s.[10] Prior to the enactment of any federal antitrust statutes, a number of states passed competition laws based on English common law and statutory prohibitions against anticompetitive business practices.[11] It was clear from the platforms of both Democratic and Republican party candidates in the 1888 presidential election, both of which included antitrust elements, that there was general apprehension among the populace about business consolidation and, thereby, a national mandate for antitrust legislation.[12] The federal government responded in 1890 with the passage of the Sherman Act, very generally declaring "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . illegal."[13] The second essential piece of American antitrust legislation, the Clayton Act, was also the result of antitrust playing

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9. Lawrence A. Sullivan & Wolfgang Fikentscher, *On the Growth of the Antitrust Idea*, 16 BERKELEY J. INT'L L. 197, 227 (1998).

10. Ilene Knable Gotts et al., *Nature vs. Nurture and Reaching the Age of Reason: The U.S./E.U. Treatment of Transatlantic Mergers*, 61 N.Y.U. ANN. SURV. AM. L. 453, 455-61 (2005).

11. *Id.* at 460.

12. *Id.* at 455-56; *see also* Sullivan & Fikentscher, *supra* note 9, at 199-200.

13. 15 U.S.C. § 1 (1890).

prominently in a presidential campaign and sought to provide more extensive protection to consumers.[14] The Clayton Act, as it has been interpreted since passage, broadly prohibits any action the effect of which "may be substantially to lessen competition, or to tend to create a monopoly."[15] Since the creation of the FTC, which also took place in 1914,[16] mergers have been subject to the concurrent jurisdiction of the FTC and the United States Department of Justice (DOJ).[17]

Congressional augmentation and amendment, numerous executive enforcement prioritization strategies, a litany of judicial decisions, and dramatic change in the nature of business have turned a *sui generis* U.S. institution into a uniquely well-developed U.S. institution. The Hart-Scott-Rodino Act (HSR), for example, supplements the Clayton Act by requiring companies which intend to merge to notify U.S. enforcement agencies for approval purposes, adding a whole new layer to U.S. antitrust law.[18] Antitrust policy and merger review in the United States has also been significantly affected by prevailing economic wisdom in the country as its goals have changed. As a general trend, antitrust policy and merger control has largely shifted from its populist roots and consumer protection rationale to rely on a significant amount of economic analysis.[19]

The lengthy history of antitrust enforcement in the United States spans more than a century and the role of U.S. courts in antitrust and merger review has changed dramatically over that period. To begin with, it took nearly twenty years for the Supreme Court to begin enforcing the statutes.[20] As economic paradigms came and went over the next century,

14. Eventually President Woodrow Wilson made antitrust a pillar of his presidential campaign. After he was elected, Congress responded by passing the Clayton Act. *See* Gotts et al., *supra* note 10, at 458 (noting that President Wilson dropped much of the populist rhetoric that had been associated with the passage of the Sherman Act). The Clayton Act has been amended or supplemented by the 1936 Robinson-Patman Act, dealing with price discrimination; the 1950 Celler-Kefauver Act, dealing with mergers; and the Hart-Scott-Rodino Act, requiring premerger notification.

15. 15 U.S.C. § 18.

16. *Id.* §§ 41-58. Mergers may also be challenged under section 5 of the FTC Act, which proscribes "unfair methods of competition in or affecting commerce."

17. Gotts et al., *supra* note 10, at 479-82.

18. 15 U.S.C. § 18(a).

19. *See, e.g.*, Gotts et al., *supra* note 10, at 482. These legal scholars note the source of this shift, be it complete or partial, to the Chicago School of Economics, which rose to prominence in the 1970s and 1980s. This shift can be seen not only in decisions before federal courts but also in the enforcement guidelines of federal agencies.

20. In *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895), for example, the Court allowed ninety-eight percent of the sugar industry to be consolidated under the control of the Sugar Trust. It was not until the Court prevented the Great Northern and Northern Pacific railways merger in *Northern Securities Co. v. United States*, 193 U.S. 197 (1904), that the Court

and the impetus for antitrust in American society shifted from populist protection to consumer protection, courts did their best to keep the pace.[21] In its current incarnation, antitrust and merger reviews force the federal judge to wear the cap of the economist along with his robes. Generally speaking, the American system has evolved a relatively well-settled body of law on which regulators may safely base their decisions and an institutionalized judicial hesitancy to interfere in merger review in the United States.

In comparison, competition law and merger review in the European Community has had substantially less time for its genesis but was born into and of a world of mature principles and structures in the area of competition law. While EC antitrust law finds its most direct origins in the 1951 Treaty of Paris, establishing the European Coal and Steel Community (ECSC),[22] and the 1958 Treaty of Rome, its early development is somewhat murky. Some historians ascribe a greater influence to the American system and some to the German system.[23] The inclusion of antitrust provisions in the Treaty of Rome can be understood in the same context as the Treaty itself: as a means to achieve a common European market.[24] As such, antitrust regulation in the European Community began with a very different goal than the reining in of increasingly dominant business enterprises at the behest of a fearful populace. Mergers and acquisitions, however, were not specifically addressed in the Treaty of Rome.[25]

Read in the context of the numerous relevant EC Treaty articles, EC antitrust subordinately seeks also "to prevent the accumulation of

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began to rely on the legislation to block mergers. The decade after the railroad decision saw antitrust begin to come into its own with cases such as *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

21. As a number of commentators have noted, the shifting economic and social influences and goals lead to widely divergent standards. *See, e.g.*, Gotts et al., *supra* note 10, at 478-83. One such economic debate, that between the structural school and the efficiency school, is still prominent in judicial decisions. Ewing, *supra* note 1, at 23.

22. EINER ELHAUGE & DAMIEN GERADIN, GLOBAL COMPETITION LAW AND ECONOMICS 36 (2007). The ECSC was designed to foster closer cooperation between Belgium, Italy, Luxemburg, France, and the Netherlands in the hope of normalizing relations and preventing future animosity. It included provisions prohibiting cartels and banning the misuse of economic power, as well as a system designed to control mergers. *Id.*

23. Sullivan & Fikentscher, *supra* note 9, at 226-27. The authors note that the sources of EC antitrust law can be traced all the way back to the postwar Havana Charter of 1948. The disagreement over the predominant influencing regulatory regime on the Treaty of Rome is based on the fact that only Germany and the United States had well-developed antitrust traditions at the time the Treaty was signed.

24. Gotts et al., *supra* note 10, at 470; *see also* MAHER M. DABBAH, THE INTERNATIONALISATION OF ANTITRUST POLICY 86 (2003).

25. Gotts et al., *supra* note 10, at 467.

dominant economic power, and to promote efficiency."[26] These goals, as a means to realize a common market, have focused EC antitrust and merger clearance on preserving a vibrant market via emphasis on the protection of competitors. The basic institutional engines of antitrust regulation and merger review in contemporary EC regulation are articles 81 and 82 of the EC Treaty. Respectively, these articles prescribe actions "which have as their object or effect the prevention, restriction or distortion of competition within the common market" and prevent abuse of a dominant position.[27] These articles have been supplemented by a number of legislative and administrative decisions which will be addressed in the Parts to come.

The involvement of EC courts in the field of merger clearance began with the decision of the Court of Justice of the European Communities (ECJ) in *Continental Can*, resulting in the application of article 82 to the strengthening of a dominant position.[28] In 1987, the ECJ's application of article 81 to already concluded combinations generated enough pressure from the business sector on Member States to create the first EC Merger Regulation.[29] While the ECJ had a dramatic affect on the creation of early EC merger law, the record of participation by EC courts has run hot and cold. Prior to 2002, the CFI had not disagreed with the Commission for a period of twelve years.[30]

B. Contemporary Regulatory Frameworks: Bipolar Disorder

Contemporary transatlantic doctrines of merger review have evolved into complex analytical systems involving extensive economic analysis and large bureaucracies supporting the various functions with which regulatory agencies are tasked. While it is not within the ambit of this Comment to describe in lengthy detail the mechanisms by which merger approval and review take place in the United States and the European Community, some general remarks will hopefully suffice to provide background from whence to proceed to a closer analysis of the role judicial review plays in each system and the outputs thereby

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26. *Id.* at 465.

27. Treaty Establishing the European Community, arts. 81-82, Dec. 24, 2002, 2002 O.J. (C 325) 33 [hereinafter EC Treaty].

28. Case 6/72, Europemballage Corp. v. Comm'n, 1973 E.C.R. 215.

29. Gotts et al., *supra* note 10, at 468-69. The first EC Merger Regulation was Council Regulation 4064/89, 1989 O.J. (L 395) 1.

30. Barbara Crutchfield George et al., *Increasing Extraterritorial Intrusion of European Union Authority into U.S. Business Mergers and Competition Practices: U.S. Multinational Businesses Underestimate the Strength of the European Commission from* G.E.-Honeywell *to* Microsoft, 19 CONN. J. INT'L L. 571, 595 (2004).

generated. It should be noted that in the contexts of both antitrust regulation and judicial review, the general character of the transatlantic systems is quite similar, but the devil is in the details. Despite these general similarities, recent history and some high profile transactions have proven that the outputs of the systems can conflict. Setting the stage for the following Part, in which the role of judicial review will be considered, this Part will describe the process of U.S. and EC merger clearance in greater detail with an eye toward explaining some of the variability in outputs.

1. The EC Regulatory Framework

With regard to EC merger review, extensive implementation legislation comprised of a variety of legal acts has filled in the regulatory framework provided by the relevant Treaty articles.[31] Of these, one of the most important is Regulation 139/2004, which centralizes merger regulation with the European Commission.[32] As a result of this "one-stop shop" system, the Commission has plenary jurisdiction over the merger proposals that meet certain turnover thresholds relating to impact on the Community as a whole.[33] In 2003, the system was modernized to shift some of the burden of competition enforcement pertaining to transactions without overwhelming community-wide effect down from the Commission to national regulators and national courts.[34] Recent years have seen an increase in the use of soft law mechanisms as a nonbinding and less confrontational means of influencing the actions of firms in the merger process.[35] The legal ramifications of the many soft law mechanisms have yet to be determined.[36] The power of EC administrative agencies exceeds that of U.S. agencies, in large part because their determinations regarding violations and penalties require

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31. In addition to articles 81 and 82 of the EC Treaty, articles 83 through 88 of that same Treaty deal with competition law in the European Community. EC Treaty arts. 83-88.

32. Council Regulation 139/2004, EC Merger Regulation, 2004 O.J. (L 24) paras. 1-19, at 1-3 [hereinafter EC Merger Regulation]; *see also* Council Regulation 17/62, Main Implementing Regulation, 1959-1962 O.J. SPEC. ED. 87 (locating review and enforcement authority under articles 81 and 82 in the Commission and granting the Commission broad investigative and regulatory authority).

33. For a more detailed description of the structure of antitrust regulation in the European Commission, see RAJ S. CHARI & SYLVIA KRITZINGER, UNDERSTANDING EU POLICY MAKING 93-98 (2006).

34. ELHAUGE & GERADIN, *supra* note 22, at 39.

35. *Id.* at 38.

36. *See generally* Damien Geradin & Nicolas Petit, *Judicial Remedies Under EC Competition Law: Complex Issues Arising from the Modernization Process*, 2005 FORDHAM CORP. L. INST. 393.

no court approval before being enforced.[37] Yet, as one author states, "judicial review by the European Courts remains the essential safeguard for parties involved in EC Merger Control."[38]

The process of EC merger review in the antitrust context involves a number of authorities. Within the Commission there is a Directorate General (DG COMP) made up of lawyers and economists in charge of antitrust enforcement. One of the Commissioners from the College of the Commissioners, the body that adopts or rejects DG COMP decisions, is responsible for competition policy.[39] The Commission is also the only body with the power to create block grant exceptions under article 83.[40] Within the more specific Merger Control Regulation (MCR) field, the Merger Task Force (MTF) within the DG COMP has virtually unlimited investigative authority to evaluate proposed business combinations.[41]

DG COMP merger clearance applies to all traditional mergers and takeovers, be they horizontal, vertical, conglomerate, or some combination thereof,[42] as long as they meet certain thresholds that establish the combination as having a "Community dimension."[43]

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37. ELHAUGE & GERADIN, *supra* note 22, at 39-40.

38. Mark Clough, *The Role of Judicial Review in Merger Control*, 24 N.W. J. INT'L L. & BUS. 729, 731 (2004). Others agree, basing their conclusion on the dominance of the Commission in the field of EC merger review and competition law. *See, e.g.*, Tony Reeves & Ninette Dodoo, *Standards of Proof and Standards of Judicial Review in European Commission Merger Law*, 29 FORDHAM INT'L L.J. 1034, 1035-36 (2006).

39. ELHAUGE & GERADIN, *supra* note 22, at 36.

40. *Id.* at 36-37. Block grant exceptions exempt certain business agreements within defined sectors from the article 81(1) EC prohibition. These exceptions are not of significant relevance in the merger review context.

41. *Id.* at 37.

42. Horizontal mergers involve a combination of two companies competing in the same market. Vertical mergers are those between a buyer corporation and a seller corporation. Conglomerate mergers apply to all other combinations. CHARI & KRITZINGER, *supra* note 33, at 93-94.

43. Council Regulation 139/2004, 2004 O.J. (L 24) 1 lists the thresholds triggering Commission review as applying to any "concentration" with a "Community dimension." EC Merger Regulation, *supra* note 32, art. 10. According to the Regulation, this applies where

> the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5,000 million and [where] the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

Id. art. 1(2). If that threshold is not met, the concentration still has a Community dimension if the combined aggregate worldwide turnover of all the undertakings concerned is more than €2500 million; in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than €100 million; in each of at least three Member States, the aggregate turnover of each of at least two of the undertakings concerned is more than €25 million; the aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than €100 million, unless each of the undertakings concerned generates more than two-

Merging firms that meet one of the thresholds must notify the Commission after concluding the merger agreement.[44] Prior to implementation of the merger, it must be approved by the Commission.[45] Within a prescribed number of days of initial notification, the Commission may approve the merger without investigation, or, in cases where the nature of the combination "raises serious doubts as to its compatibility with the common market," the Commission "shall decide to initiate proceedings."[46]

Investigative proceedings generally take place in two phases. In Phase 1 the combination will either be found compatible, compatible subject to certain commitments by the merging parties, or requiring further investigation.[47] This phase can last up to one month from notification.[48] Assuming further investigation is required, a Phase 2 investigation will be concluded within four months, resulting in approval, conditional approval, or dismissal.[49] Between 1990 and 2008, 3732 notified cases were considered by the Commission, resulting in 3206 Phase 1 compatible determinations, 159 Phase 1 compatible with commitments determinations, 39 Phase 2 compatible determinations, and 84 Phase 2 compatible with commitments determinations.[50] One hundred ten cases were withdrawn at either stage, and there were only 20 Phase 2 prohibitions.[51] These statistics reveal two salient points. First, as we will later see with U.S. agencies, the Commission approves the vast majority of all mergers with a Community dimension. Second, and of greater comparative relevance, the Commission is the final actor in nearly all merger review proceedings. This presents a dramatic contrast

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thirds of its aggregate EU-wide turnover in one and the same Member State. *Id.* art. 1(3). In addition to the turnover criterion, the document notes the "3+ criterion," which provides the Commission with jurisdiction over the combination where at least three Member States make a referral to the Commission. *Id.* paras. 1-19, at 1-3.

44. *Id.* art. 4.

45. *Id.*

46. *Id.* art. 6. The period for the Commission to respond with approval or initiation of proceedings is generally twenty-five days but may be longer and can be extended in the presence of certain circumstances. *Id.* art. 4.

47. CHARI & KRITZINGER, *supra* note 33, at 95.

48. *Id.*

49. *Id.* at 94-95.

50. European Merger Control—Council Regulation 139/2004—Statistics, 21 September 1990 to 31 January 2008, *available at* http://ec.europa.eu/comm/competition/mergers/statistics.pdf (last visited Mar. 3, 2008) [hereinafter Statistics]. The numbers included in this Comment do not reflect notified cases which the Commission dealt with by other means. Regarding the withdrawn cases, it has been suggested that a self-selection process takes place whereby firms fearing a prohibition withdraw their notification prior to an adverse determination being reached. *See* CHARI & KRITZINGER, *supra* note 33, at 97.

51. Statistics, *supra* note 50.

with the U.S. system, in which antitrust authorities must often have their conclusions sanctioned in federal court.

Two fundamental principles of EC law that have significant bearing on Commission merger review are the right of access to the file and the obligation of EC decisions to state the reasons on which they are based. The first requirement is based on two fundamental EC Treaty principles, the right to fair process and the rights of the defense.[52] In the words of one author, "[d]ue observance of this principle requires that the undertakings concerned must have been afforded the opportunity during the administrative procedure to make known their views on the truth and relevance of the facts and circumstances alleged by the Commission."[53] Concomitantly, the Commission is obliged to publicly state its reasons for coming to a particular conclusion.[54] This includes providing the legal conclusions at which the Commission arrives as well as the specific facts on which the conclusions are based.[55] In the merger context this principle applies not only to final decisions but also decisions to progress from one stage of an investigation to the next.[56]

EC antitrust law also provides a significant role for third-party participation in the merger review process, allowing parties who can demonstrate that they will be affected to participate in the review process and even challenge any final decision before the courts.[57] Prior to hearings, third parties are provided with access to the Commission's "Statement of Objections" and the merger parties' responses.[58] During hearings, third parties are allowed to participate.[59] While parties to the proposed combination always have standing, third parties wishing to challenge the Commission's merger decisions before the CFI must demonstrate that they are directly affected by the decision and individually concerned.[60] As a result of the generous standing

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52. Koen Lenaerts, *Some Thoughts on Evidence and Procedure in European Community Competition Law*, 30 FORDHAM INT'L L.J. 1463, 1474-75 (2007).

53. *Id.* at 1475.

54. *Id.* at 1480.

55. *Id.* at 1480-83.

56. Yasmine (Becky) Carson, Note, *Judicial Interference: Redefining the Role of the Judiciary Within the Context of U.S. and E.U. Merger Clearance Coordination*, 40 VAND. J. TRANSNAT'L L. 1543, 1553 (2007).

57. Third-party participation occurred to prominent effect in the *GE/Honeywell* merger review. Eric S. Hochstadt, *The Brown Shoe of European Union Competition Law*, 24 CARDOZO L. REV. 287, 305-06 (2002).

58. *Id.* at 308.

59. *Id.* at 305-09.

60. *See, e.g.*, Case T-177/04, easyJet Airline Co. v. Comm'n, 2006 E.C.R. II-1931, 5 C.M.L.R. 11, para. 32 (finding that a party was directly affected when the merger would cause "an immediate or imminent change in the state of the market" in which the party was a

interpretation typical to EU law, third parties play a much more significant role in the EC merger review process than in the U.S. process which limits the use of third-party evidence.[61]

2. The U.S. Regulatory Framework

In the United States, merger review is conducted by the DOJ and the FTC with additional participation from injured private parties or states.[62] At the federal level, the relevant statutes are section 7 of the Clayton Act, sections 1 and 2 of the Sherman Act, and section 5 of the FTC Act.[63] Within the FTC, the Bureau of Competition and the Bureau of Economics handle merger review, with the Bureau of Competition solely responsible for merger litigation.[64] Within the DOJ, the Antitrust Division handles merger review and litigation. Although both agencies receive and review all premerger filings, when a decision to move beyond initial review is taken, the agency with the most relevant expertise will eventually receive clearance to proceed with the investigation.[65] In sharp contrast to the EC Treaty requirements imposed on the Commission, neither agency is required to publish notice of the reasoning behind its decision if it decides to approve a merger.[66] From a statistical standpoint, the United States has spent 3.3 times as much money in recent years (as a percentage of gross domestic product) on antitrust as the European Community,[67] but U.S. enforcement agencies have challenged less than half as many intended mergers, percentagewise, of which they were notified.[68] In the few cases that U.S. enforcement agencies do end up litigating, federal courts in recent years

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participant and individually concerned where it took an active part in the administrative approval procedure and was a major competitor of one of the merging parties in one market).

61. Hochstadt, *supra* note 57, at 306-07.

62. In the antitrust context, private parties seeking damages are a more common source of antitrust cases than the enforcement agencies. ELHAUGE & GERADIN, *supra* note 22, at 4.

63. ABA SECTION OF ANTITRUST LAW, THE MERGER REVIEW PROCESS: A STEP-BY-STEP GUIDE TO FEDERAL MERGER REVIEW 1-7 (Ilene K. Gotts ed., 3d ed. 2006).

64. *Id.* at 29-30.

65. *Id.* at 22.

66. Carson, *supra* note 56, at 1550.

67. Ewing, *supra* note 1, at 30, 36. Gotts and her coauthors note that U.S. agencies have, to a limited degree, begun to increase transparency by issuing statements when they decide not to oppose combinations. Gotts et al., *supra* note 10, at 496-97.

68. Ewing, *supra* note 1, at 490. *But see* Margaret Bloom, *The U.S. and EU Move Towards Substantial Antitrust Convergence on Consumer Welfare Based Enforcement*, ANTITRUST, Summer 2005, at 18 (breaking the increments considered into two-year blocks and concluding, on that basis, that "the Commission is now no more likely than the U.S. agencies to find a merger anticompetitive").

have handed the agencies a string of high profile defeats.[69] Perhaps as a result of this, U.S. agencies have been challenging fewer and fewer mergers, instead relying heavily on consent decrees.[70]

In the U.S. system, merger review proceeds by a number of well-defined and often-tread steps. The merger review process begins with the involvement of the Premerger Notification Office, which is responsible for handling the HSR premerger notification program for both the FTC and the Antitrust Division of the DOJ.[71] As soon as the FTC or Antitrust Division determines that an investigation should be opened, the clearance process determines which agency will handle the first stage of the investigation, including notification, requests for information, and voluntary interviews.[72] Based on the results of the first request a second request may be issued, at which point the agency has until the end of the extended waiting period[73] to determine whether it will attempt to block the merger in court, seek voluntary agreement not to conclude the transaction until further investigation can be completed, or allow the merger to proceed.[74] A denial of judgment in favor of the agency will generally result in the challenge to the merger being dropped.[75]

As noted above, the role of third parties in U.S. merger review is very different from that in EC merger review.[76] While the nature of most

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69. While U.S. enforcement agencies are litigating fewer cases than ever, courts in recent years have seemed less willing to simply follow the lead of the agencies. *See* Deborah L. Feinstein, *Recent Trends in U.S. Merger Enforcement: Down but Not Out*, ANTITRUST, Summer 2007, at 74, 76-77. For some prominent examples, see *FTC v. Foster*, 2007-1 Trade Cas. (CCH) ¶ 75,725 (D.N.M. May 29, 2007) (denying an injunction sought by the FTC); *FTC v. Equitable Resources, Inc.*, 2007-1 Trade Cas. (CCH) ¶ 75,716 (W.D. Pa. May 21, 2007) (denying the FTC a preliminary injunction); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 160 (D.D.C. 2004); and *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1175-76 (N.D. Cal. 2004) (denying the DOJ and a number of state attorneys general a permanent injunction against Oracle's effort to acquire PeopleSoft). *But see* United States v. Dairy Farmers of Am., 426 F.3d 850, 852 (6th Cir. 2005) (reversing district court's dismissal of a DOJ challenge).

70. The author notes that 2006 was an exception to the trend in recent years based on increased activity by the DOJ. Feinstein, *supra* note 69, at 75-77.

71. The Hart-Scott-Rodino Act, which constitutes section 7A of the Clayton Act, provides statutory guidelines for investigation, notification requirements, and penalties for noncompliance. 15 U.S.C. § 18a (1976).

72. ABA SECTION OF ANTITRUST LAW, *supra* note 63, at 27.

73. The extended waiting period is usually thirty days from the date of compliance with the second request but may be extended under certain circumstances or voluntarily by agreement of the merging parties. *Id.* at 28-29.

74. *Id.* at 29.

75. This is a well-established policy at the Antitrust Division but the FTC will seek administrative relief on a case-by-case basis. *Id.* at 30-31.

76. While private third-party action in the merger review context is much more prevalent in the European Community, the opposite is true in the larger antitrust context where "private

merger transactions makes the participation of third parties at one or another stage nearly inevitable, their influence in merger clearance—as opposed to their role in other fields of antitrust—is diminished in the American system. Prominent third parties sometimes involved in U.S. merger review include foreign governments, state attorneys general, and other U.S. agencies.[77] Of these, foreign governments are normally only involved when they are required to offer approval of the merger.[78] State attorneys often investigate and challenge mergers based on either their state law authority or as *parens patriae* under federal law,[79] but play "a role [in merger review] that mostly ensures that any remedies sought by the federal agencies adequately protect their interests."[80] Other U.S. agencies become involved when they are customers of a merging party or regulate the industry of one of the merging parties.[81] Finally, while the decision to challenge or approve a merger rests in the hands of the Antitrust Division or FTC and can rarely be challenged by private third parties because of standing requirements, both agencies have become increasingly willing to listen to third-party objections.[82]

3. Closer Cooperation: Coming Together, Right Now?

Since the European Community became a powerful economic entity, merger regulators on both sides of the Atlantic have sought to cooperate more closely with each other in the hope of lending more predictability to their determinations and more efficiency to the merger clearance process overall. This effort began in 1991 with an executive agreement focusing on cooperation in the procedural aspects of antitrust regulation and was followed by a subsequent expansion of the dialogue in 1998.[83] Additional agreements have been reached, typically after particularly divisive merger clearance decisions, and include a 2002

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enforcement of the antitrust laws is far more prevalent in the United States than in any other country or jurisdiction having a set of competition laws." The most common explanation for this fact is the availability of treble damages. Hochstadt, *supra* note 57, at 313-14.

77. ABA SECTION OF ANTITRUST LAW, *supra* note 63, at 273.

78. *Id.* at 274.

79. *Id.* at 281.

80. Gotts et al., *supra* note 10, at 487.

81. ABA SECTION OF ANTITRUST LAW, *supra* note 63, at 285. When industry competition is an aspect within the purview of the regulatory agency, such as the transfer or granting of federal licenses overseen by the Federal Communications Commission (FCC) or Securities and Exchange Commission (SEC) oversight of companies who distribute certain utilities to consumers under the Public Utilities Holding Company Act (PUHCA), merging parties must obtain oversight agency approval, either in fact or by law. Gotts et al., *supra* note 10, at 487-88.

82. ABA SECTION OF ANTITRUST LAW, *supra* note 63, at 295.

83. Charles W. Smitherman III, *The Future of Global Competition Governance: Lessons from the Transatlantic*, 19 AM. U. INT'L L. REV. 769, 809-10 (2004).

"Best Practices" guide resulting from the collaborative efforts of officials of the DOJ, FTC, and Commission.[84] This document provided for extensive cooperation between the transatlantic regulatory agencies and merger parties.[85]

C. *Judicial Review in the Respective Merger Review Frameworks: Do You Trust Your Bureaucrats?*

1. Judicial Review in EC Merger Review

In the EC merger review system all challenges to Commission decisions go directly to the CFI, with any subsequent appeal heard, on points of law only, by the ECJ. The CFI has had jurisdiction over competition law cases since it began hearing cases in 1989.[86] The burden of proof for establishing a violation of articles 81 or 82 EC lies solely with the Commission and the evidence compiled by the Commission must be sufficient in this respect.[87] In the larger antitrust context, after the Commission has made a merger decision, the decision can be annulled, fines revised, interim relief provided, or the decision challenged as illegal.[88] The most commonly sought remedy in the merger context, and the form of judicial review this Comment will mostly focus on, is the article 230 EC annulment. Annulment actions can be brought by "privileged" applicants, meaning EU institutions and Member States, or by "individual" applicants, meaning legal and natural persons.[89] In the case of "individual" applicants, the party must be the addressee of the decision or directly and individually concerned.[90]

An act may be challenged by an individual who is not the addressee of the act under article 230 EC when three conditions are met.[91] First,

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84. George et al., *supra* note 30, at 613-14.

85. Smitherman, *supra* note 83, at 812-13.

86. THOMAS FISCHER, THE EUROPEANIZATION OF AMERICA 60 (1995).

87. Lenaerts, *supra* note 52, at 1470-72. The author also notes that economic studies frequently play a pivotal role in Commission decisions. *Id.* at 1467-68.

88. ELHAUGE & GERADIN, *supra* note 22, at 47-49. The legal basis of these challenges can be found in, respectively, article 230 EC, article 31 of Regulation 1/2003, articles 242 and 243 EC, and article 288(2) EC. EC Treaty arts. 230, 242-243; Council Regulation 1/2003, 2003 O.J. (L 1) 1, 20 (EC).

89. EC Treaty art. 230.

90. *Id.*

91. Generally speaking, EC courts have been accommodating when it comes to third-party standing. *See* John Davies & Robert Schlossberg, *"Once More unto the Breach, Dear Friends": Judicial Review of Antitrust Agency Merger Clearance Decisions*, ANTITRUST, Fall 2006, at 17, 22.

only acts adopted by Community institutions may be challenged.[92] In merger review, this generally means the Commission's final decision to approve or prohibit a merger, regardless of the phase in which the decision is taken.[93] Second, the act must legally affect the individual's situation in an adverse manner.[94] Again, Commission approval or prohibition of a merger has been found to meet these criteria, even when the applicant was not one of the merger parties.[95] Finally, the act must be final and not merely provisional.[96] An exception to this last requirement is that acts that are considered discreet from progression toward the final decision can be challenged.[97]

Article 230 EC annulment actions have enjoyed a particularly high profile in the last seven years in the merger clearance context. As Elhauge and Geradin demonstrate, the explanation for this recent prominence is partially procedural and partially political.[98] Prior to the end of 2000, the length of the average challenge before the CFI was so long as to effectively prevent the renewal of any merger transaction once it was prohibited by the Commission.[99] After the procedural problem was dealt with, the CFI issued a number of decisions making it clear that it was serious about engaging in careful review of Commission decisions regardless of impact on transatlantic relations.[100] Under the current rules, a fast-track procedure allows the CFI to suspend its normal rules of priority at the request of either party.[101] Fast-track cases have taken between seven and nineteen months, compared with an average of nearly thirty-one months under the old system.[102]

The CFI has competency to review Commission decisions on any of the grounds set out in the EC Treaty, which are lack of competence, infringement of an essential procedural safeguard, infringement of the

92. Geradin & Petit, *supra* note 36, at 396. The authors remark that the decisions of national competition authorities, the consultative committee, or the network of competition authorities cannot be challenged under article 230 EC.

93. *Id.*

94. *Id.* This has been interpreted to include acts which are not formally decisions but nevertheless result in binding legal effects. In the merger approval context, many such acts take place, some of which have been interpreted to qualify as decisions.

95. *See, e.g.*, Case T-177/04, easyJet Airline Co. v. Comm'n, 2006 E.C.R. II-01931, 5 C.M.L.R. 11, paras. 30-39.

96. Geradin & Petit, *supra* note 36, at 398.

97. *Id.* at 399. The merger review process includes a number of steps which might qualify as exceptions such as the different phases or the preliminary investigation.

98. ELHAUGE & GERADIN, *supra* note 22, at 47.

99. *Id.*

100. *Id.*

101. Davies & Schlossberg, *supra* note 91, at 22.

102. *Id.*

"Treaty or of any rule of law relating to its application," and misuse of power.[103] In addition, the court may rely on any of three somewhat overlapping grounds for review of Commission merger decisions established by case law.[104] These are error of fact, error of appreciation, and absence of reasoning.[105] The standard of proof the Commission must meet in proving a violation of articles 81 or 82 EC is that the evidence relied on must be "factually accurate, reliable and consistent."[106] Acts that clearly may be challenged under article 230 EC in the merger context include findings of an infringement,[107] binding commitment decisions,[108] rejection of complaints,[109] and other Commission acts for which the right of appeal is provided in Commission Regulation 1/2003.[110] Annulment by the CFI renders the challenged act null and void as required by article 231 EC, subject to appeal to the ECJ.[111] However, partial annulment may be granted where severability is found and the Commission may renew its investigation for the point in error.[112] The role of the CFI is essentially

103. EC Treaty art. 230. Geradin and Petit consider each of these grounds for review in the competition law context. They find that lack of competence has only rarely been invoked; in one case, on the basis of the fact that the merging parties' operations took place outside of the European Union. Geradin & Petit, *supra* note 36, at 420; *see also* Case T-102/96, Gencor Ltd. v. Comm'n, 1999 E.C.R. II-753, II-773-74. Infringement of an essential procedural safeguard challenges are common in EC competition law and involve allegations of improper application of the rules covering procedure and form of acts. Infringement of the "Treaty or of any rule of law relating to its application" is also common and is raised when the Commission "commits errors of law or when it erroneously assesses the facts to which it applies the law." Geradin & Petit, *supra* note 36, at 21-22. Misuse of power has, according to the authors, never succeeded in competition law challenges, predominantly because the Commission has virtually unfettered competence in the field. *Id.*; *see also* Reeves & Dodoo, *supra* note 38, at 1055-61.

104. Clough, *supra* note 38, at 730.

105. *Id.*

106. Case C-12/03, Comm'n v. Tetra Laval, 2005 E.C.R. I-987, I-1069.

107. As provided for in article 7 of Commission Regulation 1/2003. Council Regulation 1/2003, *supra* note 88, art. 7.

108. As provided for in article 8 of Commission Regulation 1/2003. *Id.* art. 8. Commitments are the conditions merging parties must fulfill for their merger to pass review such as divestitures.

109. Geradin & Petit, *supra* note 36, at 400. Article 7 of Commission Regulation 773/2004 authorizes such complaints and case law has demonstrated that rejection of such complaints can be challenged. Commission Regulation 773/2004, 2004 O.J. (L 123) 18, 20.

110. Geradin & Petit, *supra* note 36, at 400. These relate to the Commission's power to request information (article 18), power of inspection (articles 20 and 21), and power to impose fines (articles 23 and 24). Council Regulation 1/2003, *supra* note 88. The authors add that a number of other acts might be challengeable under article 230. These include the Commission's right to recall cases from national competition authorities, guidance letters, reallocation of cases, findings of inapplicability, and refusals of interim relief. Geradin & Petit, *supra* note 36, at 400. For the purposes of this Comment, only guidance letters are of relevance.

111. Geradin & Petit, *supra* note 36, at 422 n.138. The authors note that the Court may not replace the judgment of the Commission with its own.

112. C.S. KERSE & N. KHAN, EC ANTITRUST PROCEDURE 491 (5th ed. 2005).

to determine the legality of a Commission decision and not to perform merger review de novo, substituting its judgment for that of the Commission.[113]

2. Judicial Review in U.S. Merger Review

As in the European Union, the vast majority of merger agreements in the United States are either uncontested or, if contested, are resolved prior to the litigation phase via prelitigation remedies such as restructuring or entering into a consent decree.[114] This, however, does not remove federal courts from the equation, as DOJ consent decrees must still be approved by a district court.[115] In virtually all contested mergers that reach the litigation stage, the contesting party will first seek a preliminary injunction.[116] While the contesting party in such cases will generally be the FTC or DOJ, state attorneys general have shown increasing willingness to challenge mergers approved by the federal government.[117] Private parties that can meet the standing requirements may also seek preliminary injunctive relief.[118] It also should be noted that administrative relief is rarely sought in the event that a judicial determination is made against the regulatory agency.[119] U.S. courts not

113. Davies & Schlossberg, *supra* note 91, at 21. Despite its prescribed role, the CFI frequently conducts complete reviews, considering all aspects of the Commission's decisions.

114. ABA SECTION OF ANTITRUST LAW, MERGERS AND ACQUISITIONS: UNDERSTANDING THE ANTITRUST ISSUES 428 (Robert S. Schlossberg ed., 2d ed. 2004).

115. The fact that a settlement is reached prior to the litigation stage does not mean it is entirely exempt from judicial review. Consent decrees reached between the Antitrust Division and merging parties are, under the Tunney Act, subject to judicial review and third parties are often afforded some participation as amici curiae or, much more rarely, intervention. In reviewing DOJ consent decrees under the Tunney Act, the district court must determine whether it is "in the public interest." John Davies, Robert Schlossberg & Alasteur Mordaunt, *Getting the Deal Through Merger Control 2008: Judicial Review of Antitrust Agency Merger Clearance Decisions* 3, http://www.gettingthedealthrough.com/narrative_pdf.php?id=61 (last visited Sept. 3, 2008). This standard has been interpreted narrowly and, as one article describes, "it is exceedingly rare for a district court judge to fail to approve a [DOJ] merger settlement." *Id.* Complaints that judicial review of settlements has functioned merely as a rubber stamp for the DOJ have resulted in slight revisions to the Tunney Act. While settlements by the FTC are not reviewable by a court, they can be challenged via private litigation. *Id.* at 3-5.

116. Preliminary injunctions are statutorily authorized in section 15 of the Clayton Act, 15 U.S.C. § 25 (1914), section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and section 16 of the Clayton Act, 15 U.S.C. § 26, where the contesting party is a private party or state attorney general. *See* ABA SECTION OF ANTITRUST LAW, *supra* note 114, at 435.

117. ABA SECTION OF ANTITRUST LAW, *supra* note 63, at 283.

118. Private-party standing varies depending on the relationship between the plaintiff (competitor, target, consumer) and the merger parties or acquisition parties. ABA SECTION OF ANTITRUST LAW, *supra* note 114, at 434-44.

119. While this has always been policy in the case of the Antitrust Division, the FTC only recently revised its policy from one of frequently seeking administrative relief to choosing whether to do so on a case-by-case basis. ABA SECTION OF ANTITRUST LAW, *supra* note 63, at 31.

only typically follow the lead of antitrust regulators, but judicial review of merger review is relatively rare.[120]

In cases where injunctive relief is sought, a plaintiff must generally prove (1) irreparable harm in the absence of the injunction, (2) that the harm suffered will outweigh any harm caused to the defendant by the injunction, (3) that the plaintiff has a good chance of succeeding on the merits, and (4) that the injunction is in the public interest.[121] The burden of proof on the FTC (and sometimes the DOJ) as a plaintiff is somewhat lower, requiring no showing of irreparable harm.[122] Alternatively, and in some cases where the burden of proof for a preliminary injunction cannot be met, a plaintiff may seek a "hold separate" order.[123] If granted, such an order results in the completion of the merger transaction with respect to all assets not held separate by the court's order or voluntary agreement.[124]

Whether preliminary injunctive relief is sought or not, the DOJ and FTC may seek permanent injunctive relief when it is in the public interest of restoring competition.[125] Permanent relief is also available to private parties.[126] The form of relief sought will vary depending on the nature of the contested merger but the general forms are divestiture,[127] rescission,[128] disgorgement,[129] and damages. The possibility of a plaintiff obtaining treble damages for injuries sustained as the result of an antitrust violation

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120. Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement*, 77 ORG. L. REV. 1383, 1394-95 (1998) ("Legality [of a transaction] is determined in accordance with internal guidelines rather than case law. The agencies then negotiate complex consent decrees with the private parties in which the courts play only a largely symbolic role . . . ."); *see also* Davies, Schlossberg & Mordaunt, *supra* note 115, at 5 ("FTC consent decrees or final judgments are not subject to the Tunney Act or to any form of independent judicial review.").

121. ABA SECTION OF ANTITRUST LAW, *supra* note 114, at 445. For a detailed discussion of what each of these factors requires, see *id.* at 449-70.

122. *Id.* at 445-46.

123. *Id.* at 471.

124. *Id.* at 471-74.

125. Section 15 of the Clayton Act authorizes the DOJ to seek permanent injunctive relief. 15 U.S.C. § 25 (1914). Section 13(b) of the FTC Act authorizes the FTC to do the same. *Id.* § 53(b).

126. Clayton Act § 16, 15 U.S.C. § 26.

127. Where a court finds that an acquisition will violate section 7 of the Clayton Act by increasing concentration to a degree which threatens to lead to anticompetitive pricing, the court will require the combining parties to divest whatever assets necessary to prevent the illegal concentration by sale to a third party. ABA SECTION OF ANTITRUST LAW, *supra* note 114, at 475-81.

128. Rescission is the forced reacquisition of an asset at the price for which it was originally sold. Rescission is rarely sought and courts, while preserving their right to order rescission as a remedy, are wary of doing so. *Id.* at 481-82.

129. Disgorgement is typically ordered where a merger in violation of antitrust laws has resulted in illicit profits. *Id.* at 483.

and attorney's fees under section 4 of the Clayton Act is a significant departure from competition law in the European Community which does not provide private parties with any similar remedy. While this makes contesting mergers an attractive option to plaintiffs in the United States, the difficulties of successfully doing so make the award of damages relatively uncommon.[130]

III. EFFECTS OF JUDICIAL REVIEW ON MERGER REVIEW

A. *Commonalities and Divergences: The Case of* Sony/BMG

The logical starting point in an analysis of the effects of commonalities and divergences is case law. In this Part, the Sony/BMG merger will be considered with an eye toward establishing the direction in which judicial review is guiding merger review in the European Community. In particular, this analysis will seek to determine whether it is bringing merger clearance across the pond closer to merger review in the United States. This case will be focused on primarily because it was decided after the EC Merger Regulation and other ancillary changes in the EC merger clearance framework. These changes were widely considered a turning point toward convergence, especially after the prominent disagreement represented by GE/Honeywell[131] and Microsoft.

Prior to delving into the case of the Sony/BMG merger, a brief analysis of the EC Merger Regulation, and why it was seen by some as an effort at convergence, is necessary. As noted above, the Regulation became EC law on January 20, 2004,[132] and followed the procedural revisions which included the fast-track mechanism for annulment actions against Commission decisions.[133] The element of the reform most prominently suggesting convergence was the new substantive standard by which the legality of mergers in the European Community would be assessed.[134] The EC Merger Regulation also included procedural changes

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130. Not only must a plaintiff prove standing and an "antitrust injury" based on their relationship to the defendant, they must also prove the amount of damages. *Id.* at 482. Because mergers are typically challenged before they are consummated, and before any damages are likely to have occurred, treble damage awards are infrequent. *Id.*

131. The *GE/Honeywell* decision received particularly harsh criticism, especially from American commentators. As one such commentator remarks, the decision indicated that "the EC has a far greater degree of confidence in its ability to predict post-merger market behavior, than the DOJ and the FTC have in their crystal balls." Hochstadt, *supra* note 57, at 328.

132. EC Merger Regulation, *supra* note 32, paras. 1-19, at 1-3.

133. Amendments to the Rules of Procedure of the Court of First Instance of the European Communities, art. 76a, 2000 O.J. (L 322) 4, 6.

134. Article 2(3) of the new EC Merger Regulation provides: "A concentration which would significantly impede effective competition . . . in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market."

to the notification process which increased flexibility and generally made notification more similar to the U.S. process than it had been under the old EC Merger Regulation.[135] In addition to the new Regulation, the Commission established a Chief Economist post, a move that was also viewed as a potential point of convergence.[136] Finally, the Commission released EC Horizontal Merger Guidelines that, as another scholar states, "bring the European Union into line with the U.S. model by specifying that efficiencies will be considered in the overall assessment of a proposed merger."[137] These changes set the stage for the *Independent Music Publishers & Labels Ass'n v. Commission of European Communities* (*Sony/BMG*) decision.

After agreeing to a joint venture which would have created the second biggest music company in the world, Sony and BMG sought regulatory approval from agencies in the United States and Europe, and, in July 2004, the Commission cleared the merger after completing a Phase 2 investigation.[138] A week later, the FTC, the U.S. agency that received clearance to review the merger, approved it, finding no violations of U.S. antitrust law.[139] The Commission decision, however, was then challenged at the end of 2004 by a third party: International Organization of Independent Music Producers.[140] The CFI, after fast-track proceedings, ordered the Commission to reconsider its opinion, stating that "the decision is vitiated by, first, inadequate reasoning and, second, a manifest error of assessment."[141] This decision represented the

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EC Merger Regulations, *supra* note 32, art. 2(3). For commentary suggesting convergence with U.S. law, see, for example, Michael G. Egge et al., *The New EC Merger Regulation: A Move to Convergence*, ANTITRUST, Fall 2004, at 37, 39-40; Smitherman, *supra* note 83, at 796 ("The move away from 'dominance' towards the SIEC test indicates a shift closer to the United States' 'substantially lessening of competition' test . . . .").

135. Egge et al., *supra* note 134, at 38.

136. *Id.*

137. James Calder et al., *Milton Handler Annual Antitrust Review: Supplement to the 2003 Milton Handler Annual Antitrust Review Proceedings: Committee on Antitrust & Trade Regulation: Ass'n of the Bar of the City of N.Y.*, 2004 COLUM. BUS. L. REV. 379, 417; *see* Commission Notice of 5 February 2004, Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2004 O.J. (C 31) 5.

138. Press Release, Commission Decides Not To Oppose Music JV Between Sony and Bertelsmann (July 20, 2004), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/959.

139. *U.S. Agency Clears Sony-BMG Music Merger*, *supra* note 6.

140. Case T-464/04, Indep. Music Publishers & Labels Ass'n v. Comm'n, 2006 E.C.R II-02289, 5 C.M.L.R. 19.

141. *Id.* para. 542. The CFI went on to state that "the elements forming the basis of the decision do not constitute all the relevant data that must be taken into consideration and are not sufficient to support the conclusions drawn from them." *Id.*

first time that the CFI had annulled an unconditional merger clearance decision.[142] Over a year later, after "one of its largest and most complex econometric analysis [sic] so far in the context of a merger investigation," the Commission reapproved the combination.[143]

B. The Effects of Judicial Review in the Two Systems: Sony/BMG *and Beyond*

In the context of the foregoing analysis, what does this case have to offer in terms of a comparison between the effects of judicial review in the United States and European Union and indications for the future? First, the Sony/BMG transaction means that attention, and in some cases ire, will continue to follow merger review on both sides of the Atlantic, particularly with regard to judicial review in the European Community. The relative novelty of the system in relation to the U.S. antitrust regulation, and the significance of the recent changes to it, suggest that substantial and controversial rulings will continue to be handed down. An additional explanation for this may be that the EC system is currently more difficult to navigate for multinational corporations accustomed to dealing with the requirements of U.S. merger regulation.[144] As one antitrust scholar suggests, the rarity of Commission merger review decisions being evaluated before an independent court, plus the fact that the judges of the CFI and ECJ hold only renewable six-year terms, changes the dynamics of the approval process for the merging parties and the Commission.[145]

The decision also draws attention to the fact that FTC merger approvals in the United States are not subject to judicial review, and highlights what the consequences of that fact may be. Had the FTC been required to make the reasons for their decision public, it might have guided the Commission in its review of the merger and defense before the CFI. From a broader perspective, the fact that federal courts have been less inclined to closely scrutinize the decisions of U.S. regulatory

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142. Davies & Schlossberg, *supra* note 91, at 20.

143. Press Release, Mergers: Commission Confirms Approval of Recorded Music Joint Venture Between Sony and Bertelsmann After Reassessment Subsequent to Court Decision (Oct. 3, 2007), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1437.

144. In the *GE/Honeywell* case, for example, the merging parties missed the deadline for filing their notification to the Commission and were granted a less-than-favorable reception by the Commission. George et al., *supra* note 30, at 596. Microsoft has had a particularly confrontational relationship with the Commission, resulting in the well-publicized imposition of hefty fines. *Id.* at 600-01. Some scholars have suggested that former Commissioner Monti may also have been one factor in the seemingly adverse treatment of U.S. businesses. *Id.* at 615.

145. Hochstadt, *supra* note 57, at 298-300.

agencies, and less likely to surprise the regulatory agencies in doing so, leaves the agencies largely responsible for determining and meeting their own standard of proof. This conclusion is complicated to some degree by the lack of success U.S. agencies have had before the courts in recent years but supported by the fact that fewer cases seem to be challenged in the United States.

The decision also suggests a prominent role for third-party participation in merger review, especially in the European Community. One aspect of this is that third parties may be encouraged by the decision to challenge the mergers of competitors, thereby increasing the participation of the CFI in merger review. The other aspect is that third parties may be increasingly drawn into premerger negotiations in an effort by the merging parties to test the waters and postmerger review by the Commission. Such a development would increase the burden on merger parties as they might seek to reach premerger agreements with third parties and prepare rebuttals to the objections of contesting competitors.[146] Additionally, this might make it more difficult for merger parties and the Commission to negotiate an acceptable commitment plan when the merger is likely to be challenged by a third party.[147]

Fourth, it suggests that the CFI will not be cowed by criticism from the Commission or rulings which conflict with regulatory agency determinations in the United States or elsewhere. In *Sony/BMG*, intervenors raised the fact that the transaction had been approved by every other nation's regulatory body that had considered it, but to no avail, as the CFI found it irrelevant.[148] This could potentially complicate the agreements between U.S. and EC regulators as both become increasingly frustrated with the decisions of the CFI.

Finally, a likely result of *Sony/BMG* is that the Commission will not wait for the CFI to pillory its merger clearances and will make future investigations more complete, time consuming, and taxing on the parties, thereby essentially raising the burden of proof on itself. This line of argument suggests that the relish with which the CFI has picked apart Commission merger decisions in recent cases such as *Sony/BMG*, and earlier cases such as *Commission v. Tetra Leval BV*, has foisted a higher

146. Davies, Schlossberg & Mordaunt, *supra* note 115, at 7-8.

147. *Id.* As the authors also explain, Warner Music Group, in preparing for a potential combination with EMI, made a deal with Impala. *Id.* at 8.

148. Case T-464/04, Indep. Music Publishers & Labels Ass'n v. Comm'n, 2006 E.C.R. II-02289, 5 C.M.L.R. 19, para. 229. The competition authorities mentioned were those of the United States, Australia, Canada, the Czech Republic, Hungary, Poland, Romania, Russia, Switzerland, Mexico, and South Africa.

de facto standard of proof on the Commission.[149] The practical consequences of such a development could be many, but at a minimum it would likely increase the use of procedural time-extending steps and increase the specificity and number of requests for information, thereby increasing the burden and expense on the parties.[150]

IV. Conclusion: What of the Trend Toward Convergence?

A number of factors point to the likelihood of increased convergence in U.S. and EC merger clearance, many of which relate to transatlantic judicial review. One such element is the speed with which the CFI and the Commission are coming to an understanding via the decisions of the CFI and the procedural and substantive revisions of merger clearance law that have followed. An inevitable result of the growing number of CFI decisions relating to merger clearance is that legal norms will be established and aspects of merger law will become more firmly settled. Eventually, this should result in fewer judicial interventions in Commission decisions. Furthermore, merger parties will likely become better adapted to dealing with the Commission, perhaps reducing the number of opportunities the CFI will have to review merger decisions.

Additionally, it is likely that the pace of cooperation and interaction between regulators on either side of the Atlantic will continue or increase in response to continued outcry over regulatory and judicial divergence and pressure from other interested parties. The stakes in most merger decisions are enormous and demand for the maximum amount of legal certainty will be correspondingly high. As cooperation develops and standards of proof and review become well understood, some sharing of legal analysis and reasoning between federal courts and the CFI and ECJ could result. U.S. merger clearance could also benefit from the adoption of some of the features of the EC system, particularly in the area of transparency. If transparency were to approach the level currently required in the EC system, federal courts in the United States would be provided with additional criteria by which to evaluate regulatory decisions.

On other issues, courts in both the United States and the European Community might benefit from moving in an entirely different direction

149. Reeves and Dodoo suggest that in the EC context this has occurred, noting that in the *Tetra Laval* case the Commission, in its appeal before the ECJ, went so far as to defend its decision on the grounds that it was being held to a standard created by the CFI and higher than that provided by EC law. Reeves & Dodoo, *supra* note 38, at 1037-38.

150. Davies, Schlossberg & Mordaunt, *supra* note 115, at 7.

together toward a third way. The increasing complexity of merger clearance is currently taxing the abilities of federal judges and the judges of the CFI to produce economically accurate decisions. It might, therefore, be wise for each system to consider strengthening specialized legal knowledge in a discrete legal arbiter more focused on antitrust or merger clearance.

This does not mean, however, that there will be a sudden quieting of the recent challenges in the near future. As transnational antitrust stands today, significant divergence exists in the field of merger clearance.[151] One must keep in mind that if transatlantic disagreements are rare, even increasingly rare, the value of many of today's mergers makes even the occasional disagreement between EC and U.S. regulators a very expensive one for all parties involved. At a fundamental level, the systems have tended to view the role of judicial review in merger clearance in terms of different goals and the courts within each system will continue to be affected by this fact. Furthermore, judges in the United States and European Community will always be individuals, representing a variety of social and political mores. Finally, the courts which rule on merger clearance decisions occupy distinct positions within their respective legal frameworks and this fact is unlikely to change in the near future.

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151. Daniel J. Gifford & Robert T. Kudrle, *Rhetoric and Reality in the Merger Standards of the United States, Canada, and the European Union*, 72 ANTITRUST L.J. 423, 425 (2005) ("The disparity between the antitrust regimes of the United States and the European Union is most acute in the area of merger control.").