“COMPETITION, NOT COMPETITORS,” NOR CANARDS:
WAYS OF CRITICIZING THE COMMISSION

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1. INTRODUCTION

Unless and until an international competition law emerges, important differences will remain among national antitrust regimes. How we evaluate those differences can be important and revealing. Cataloging discrepancies, by itself, is useful as an exercise in continuing legal education but aspires to little more. Examining whether two regimes are more alike than different seems equally unproductive, since similarities and differences appear incommensurable.¹ And considering whether regimes are growing more similar over time is not much of an improvement, unless one carefully evaluates whether the shared course is one toward enlightenment or instead a race to the bottom.²

The most manageable strategy may be to identify some desirable feature of antitrust policy—usually one derived from a favored regime—and critically evaluate another regime in those

¹ But see, e.g., Thomas E. Kauper, Merger Control in the United States and the European Union: Some Observations, 74 St. John’s L. Rev. 305, 307 (2000) (seeking to “demonstrate that the similarities [between U.S. and EC merger laws] far outweigh the differences, and that even the differences will diminish over time as enforcement officials in both the United States and the EC adapt to the needs of firms to be competitive on a global scale”).

² But see, e.g., Alexander Schaub, Antitrust Law Enforcement—A Shared Trans-Atlantic Vision, Speech before the Bi-Annual Conference of the Council for the United States and Italy (Jan. 25, 2002) (transcript on file with the author) (explaining how U.S. and EC merger laws have increasingly paralleled one another over time).
terms. This is the tack favored by many critics of the European Union's decision last year to block the proposed merger between General Electric ("GE") and Honeywell. That merger was cleared by the U.S. Department of Justice after it required the parties to divest Honeywell's helicopter engine business and to authorize a new third-party provider of heavy maintenance, repair, and overhaul services for certain Honeywell products. While the European Commission analyzed the same geographic markets, it reached a very different conclusion, determining that the transaction would create complementarities within the GE and Honeywell product lines that would create or enhance the parties' dominant positions in several products.

The intervention by a European agency against predominantly American firms, as well as the transaction's objective magnitude and its personal significance for outgoing GE Chairman Jack Welch, make it unsurprising that the Commission's decision

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5 See Charles F. Rule, When Authorities Collide, DAILY DEAL, July 9, 2001 ("What makes this case seem even more troubling is that both would-be merging parties are American companies."); Peter Spiegel & Andrew Hill, Senator Attacks EU over GE's Bid for Honeywell, FIN. TIMES, June 22, 2001, at 1 (quoting letter from Sen. Ernest Hollings to Pascal Lamy, European trade commissioner, as arguing that the anticipated rejection of the GE/Honeywell merger "gives credence to those who suspect that the EC is using its merger review process as a tool to protect and promote European industry at the expense of its US competitors"). Assistant Attorney General Charles James, who was highly critical of the Commission's decision, nonetheless took care to disclaim any suggestion that nationalism was involved. See Peter Spiegel, US Urges Europe to Rethink Approach to Antitrust Rules, FIN. TIMES, Oct. 15, 2001, at 1.

On the other hand, it appears that GE might have been banking on the fact that the nationality of the merging parties would make it more difficult for the Commission to intervene. See, e.g., Andrew Ross Sorkin, A Rare Miscalculation for Jack Welch, N.Y. TIMES, July 3, 2001, at 1 (citing "executive close to G.E." as stating that even in May 2001, "we thought it would be impossible that the Europeans would try to block a U.S.-U.S. deal that had been given the go-ahead by Washington," since "[t]he conventional wisdom was that the political pressure would be too great").


https://scholarship.law.upenn.edu/jil/vol23/iss3/5
would be controversial. But these features were overshadowed in public discussion by a seemingly more substantive criticism: namely, that the Commission had failed to recognize that antitrust policy was supposed to protect "competition," not "competitors." Many voicing this criticism were pundits\(^7\) or interested parties,\(^8\) but apparently disinterested lawyers\(^9\) and economists\(^10\) made sub-

\(^7\) See, e.g., Competition Policy Should Be Focused on Consumers, INDEP. (LONDON), July 5, 2001, at 3 ("[W]here US law is based on protecting consumers, EU competition policy focuses primarily on protecting competitor companies."); No Time for Protectionism, Bus. Wk., July 23, 2001, at 98 ("The EU's focus on competitors rather than consumers makes the Bush Administration suspicious.").

\(^8\) See, e.g., William J. Kolasky & Leon B. Greenfield, A View to a Kill: The Lost GE/Honeywell Deal Reveals a Trans-Atlantic Clash of Essentials, LEGAL TIMES, July 30, 2001, at 28 (claiming that the "range effects" doctrine applied by the Commission "prohibits mergers that the United States views as pro-competitive for the very same reason that the EC opposes them: because they will generate lower prices for consumers and require competitors to work harder to keep up"); accord Donna E. Patterson & Carl Shapiro, Transatlantic Divergence in GE/Honeywell: Causes and Lessons, 16 ANTITRUST 18 (2001) (explaining that the European Union's application of the portfolio effects theory blocks mergers that they feel will cause top firms to become more effective competitors, while the United States welcomes the lowering of prices that result from such mergers); Neal R. Stoll & Shepheard Goldfein, . . . In with the New, N.Y. L.J., Aug. 21, 2001, at 3.

\(^9\) See Alastair Gorrie, Opinion, LAW., Aug. 13, 2001, at 15 ("The decision appears to confirm what has long been suspected by our US cousins: that the EU test takes more account of harm to competitors than to competition—a process, it should be noted, that US companies are willing to take part in if it suits their interests."); George L. Priest & Franco Romani, Antique Antitrust: The GE/Honeywell Precedent, WALL ST. J. EUR., June 20, 2001 ("When the European Commission states that politics will be irrelevant to its decision, it means the political efforts of the U.S. and other countries wanting economic progress, not the politics of Rolls-Royces and Thales, which hope for regulatory action to save them from the effects of aggressive competition. It has taken 110 years of antitrust enforcement for the U.S. to learn the simple truth that maximizing competition enhances value for consumers. We can only hope that the learning process at the European Commission will be shorter."); Rule, supra note 5 (concluding that Commission's conclusions were "not a concern for the Justice Department, because U.S. law emphasizes a merger's impact on consumers").

\(^10\) See, e.g., Gary S. Becker, What U.S. Courts Could Teach Europe's Trustbusters, Bus. Wk., Aug. 6, 2001, at 20 (concluding, after critically comparing Commission decision to U.S. processes, that "[g]lobal antitrust policy would be consistent, and it would encourage efficiency if business practices were universally judged by their effects on consumers rather than on competitors with political power"); David S. Evans, The New Trustbusters, FOREIGN AFF., Jan./Feb. 2002, at 14 (arguing that in contrast to the U.S. approach, "EU competition officials seem to seek the 'right' market structure, sometimes placing the interests of competitors over those
stantially the same point. U.S. officials, not wholly disinterested themselves, were of a like mind. Taking a page from other high-ranking officials—including the President, the Secretary of the of consumers”); Lester C. Thurow, *Irreconcilable Differences*, BOSTON GLOBE, July 10, 2001, at D4

(“In America, a merger can only be viewed as damaging if there is reason to believe that the consumer might be hurt. In Europe, a merger can be viewed as damaging if there is reason to believe that other companies might be hurt. In the GE-Honeywell case, both sets of antitrust authorities are correct—given their own viewpoints.”);

cf. Jeffrey E. Garten, *The GE-Honeywell Fiasco: Where to Go From Here*, Bus. Wk., July 23, 2001, at 28 (noting criticisms by “[s]ome U.S. antitrust experts” that the Commission decision favored local competitors over consumers, but suggesting that such differences are deeply embedded, and that arguments to that effect are “a political dead end”).

If the decision by European politicians and bureaucrats to block the transaction was viewed with suspicion, much the same might be made of American protests; one should assume that the U.S. decision to clear the merger was done in good faith, but given that decision, the prospect seems vanishingly small that American officials would let pass without comment a contrary decision by overseas officials concerning U.S. companies. Some U.S. officials also forged their views in circumstances that make them sympathetic to the parties’ situation. For example, William Kolasky represented GE and Honeywell during the proceedings before the Commission, then was appointed the Deputy Attorney General for International Enforcement. A sharp critic of the Commission’s decision on behalf of his clients, he did not modify his views upon assuming office. As he subsequently explained:

We [the Justice Department] concluded that the merged firm would have offered improved products at more attractive prices than either firm could have offered on its own, and that the merged firm’s competitors would then have had a great incentive to improve their own product offerings. This, to us, is the very essence of competition, and no principle is more central to U.S. law than that antitrust protects competition, not competitors.

In stark contrast, the EC focused on how the merger would affect European and U.S. competitors, essentially concluding that the very efficiencies and lower prices the transaction would produce would be anti-competitive because they might ultimately drive some of those competitors from the market or reduce their market shares to a point where they could no longer compete effectively.

In other words, the EC determined that the fact customers would be “induced” to purchase more attractive and lower-priced GE/Honeywell products, rather than those of its competitors, was a bad thing of a sort that its antitrust law ought to prohibit.

Treasury, the Secretary of Commerce, the U.S. Trade Representative, Members of Congress, and even the Federal Reserve Chairman—Assistant Attorney General Charles A. James declared that while “[c]lear and longstanding U.S. antitrust policy holds that antitrust laws protect competition, not consumers,” the EU’s decision “reflects a significant point of divergence.” As James later opined, “What led the United States to clear the transaction—the prospect that it would make the combined firm a more effective competitor—was the very reason the EU opposed it.”

12 See Michael Elliott, How Jack Fell Down, TIME, July 16, 2001, at 40 (describing remarks by President Bush and Treasury Secretary Paul O’Neill); Jaret Seiberg, GE-Honeywell Rupture May Lead to Tension, DAILY DEAL, June 14, 2001 (describing intervention by Robert Zoellick, U.S. Trade Representative); Al Hunt & Robert Novak, Robert Zoellick Discusses International Trade Environment, Evans, Novak, Hunt & Shields (June 23, 2001), No. 062300CN.V38 (noting, after disclaiming antitrust expertise, that the differing evaluations of the merger “goes to the fact that today most U.S. antitrust focuses on the consumers of the product and whether they feel they’re disadvantaged by the merger. And at least in this antitrust case, the Europeans were looking more at how the competitors related to one another in more of a theoretical position”), available at http://www.cnn.com/transcripts/01061231en.00.html; CNBC News Transcripts, Business Center (6:00 PM ET, June 15, 2001) (quoting President George W. Bush and Commerce Secretary Evans).

13 See Robert Lea, Retaliation Threat by US over GE Deal, EVENING STANDARD (LONDON), June 21, 2001, at 42 (citing remarks by Senator Gramm and quoting similar remarks in correspondence by Senator Rockefeller); cf Seiberg, supra note 12 (quoting a statement from pre-GE/Honeywell correspondence from Sen. Herb Kohl and Sen. Mike DeWine that “[w]e are troubled by the possibility that your analysis and outcomes have been influenced in part by pan-European protectionism rather than by sound competition policy”).

14 See Hearing of the Senate Banking, Housing, and Urban Affairs Committee, June 20, 2001 (remarks of Alan Greenspan) (explaining that while the U.S. focus was solely on competition or the consumer, rather than on competitors, “[t]hat’s not true in Europe”).


16 Charles A. James, Reconciling Divergent Enforcement Policies: Where Do We Go from Here?, 2001 FORDHAM CORP. L. INST. 1, 3 (2002). Some time later Charles A. James appeared to back off that claim. See Charles A. James, Antitrust in the Early 21st Century: Core Values and Convergence, Speech at a seminar sponsored by the European Commission’s Directorate General for Competition and the U.S. Mission to the European Union in Brussels, Belgium (May 15, 2002) ("But the Commission now has made it clear, even to us, that it shares our view that the ul-
As might be expected, Commission officials and their sympathizers resist such criticisms.\textsuperscript{17} Their defenses are ambivalent. One recurring observation is that GE/Honeywell is unrepresentative of the dose relationship and substantive alignment between the United States and the EU. But this is hardly the first time these accusations have been leveled,\textsuperscript{18} and the prevailing view seems to be that the decision reflects a fundamental difference between the two

\textsuperscript{17} See Mario Monti, The Future for Competition Policy in the European Union (Commission Speech/01/340), Extracts from a Speech at Merchant Taylor’s Hall (July 9, 2001) (posing question whether, “in applying merger control, the Commission cares more about competitors than customers,” and replying that “[a]ctually, the goal of competition policy, in all its aspects, is to protect consumer welfare by maintaining a high degree of competition in the common market”); Commission Press Release IP/01/855, Monti Dismisses Criticism of GE/Honeywell Merger Review and Rejects Politicisation of the Case (June 18, 2001) (declaring that Commission merger review employing the dominance test invariably asked “whether or not the market would remain sufficiently competitive so that consumers would continue to have products to choose from at competitive prices” and that “[t]he nationality of the companies and political considerations have played and will play no role in the examination of mergers, in this case as in all others”); Mario Monti, Antitrust in the US and Europe: A History of Convergence (Commission Speech/01/540), Speech before the General Counsel Roundtable of the American Bar Association (Nov. 14, 2001) [hereinafter Monti, Antitrust]; see also OECD Directorate for Financial, Fiscal and Enterprise Affairs, Competition Comm., Portfolio Effects in Conglomerate Mergers 11, DAPFE/Comp (2002)\textsuperscript{25} (Jan. 24, 2002) [hereinafter Portfolio Effects] (reporting remarks of roundtable Chairman that “all competition authorities emphasized the need to protect competition rather than competitors and were concerned to promote efficiencies”), at http://www.oecd.org/pdf/M0025000/M0025127.pdf.

regimes. In this context, belated attempts to depict the dispute as aberrational come across as a truce: transatlantic antitrust is a diplomatic enterprise, both for private enterprise and public officials, and it is unsurprising that regular players would avoid unnecessarily prolonging controversy.

A related tack is to suggest that Europe is still learning and may be forgiven youthful trespasses. The United States, it is commonly observed, went through a similar dark flirtation with small-is-beautiful antitrust in the 1960s, before economic analysis began to be harnessed in earnest. It is unsurprising, some suggest, that the Commission might make the same missteps, and perhaps the best we can hope for is that it will cut some corners in catching up. European officials sometimes make similar noises. Even so, the claim seems strikingly deterministic about the course of European antitrust, which clearly enjoys its own intellectual and politi-

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19 See, e.g., Spiegel, supra note 5, at 1 (quoting Charles A. James as characterizing differences relating to the portfolio theory as an “absolutely fundamental disagreement”).

20 See, e.g., Rule, supra note 5 (”It is easy to forget that the Commission ... has been in the merger review business for only a little more than a decade. The Commission’s fatal objections to the GE-Honeywell deal ... indicate that the upstarts in Brussels are not about to defer to their antitrust elders in Washington”).

21 For a recent example of this evolutionary theme, which is pervasive, see James, Antitrust in the Early 21st Century, supra note 16; see also Priest & Romani, supra note 9 (stating that “[w]e can only hope that the learning process at the European Commission will be shorter”); William J. Kolasky, Comparative Merger Analysis: Six Guiding Principles for Antitrust Agencies—New and Old, Speech before the International Bar Ass’n, Conference on Competition Law and Policy in a Global Context (Mar. 18, 2002) (“After a brief detour and frolic during the 1960’s, we in the United States have now fully integrated efficiencies into our analysis of the likely competitive effects of mergers. We were pleased last July when Commissioner Monti signaled that the European Commission intended to do likewise, treating efficiencies as a reason for approving a merger even where those efficiencies might make it more difficult for rivals to compete.”), available at http://www.usdoj.gov/atr/public/speeches/10845.htm.

22 In a speech this past fall, for example, Commissioner Monti apparently referred to U.S. antitrust policy as the Commission’s “guiding star.” EU’s Monti Says U.S. Is ‘Guiding Star’ on Antitrust, Bloomberg News, Nov. 13, 2001, 7:01 PM E.T. (Lexis News Group File, Most Recent Two Years). For the most part, however, Commissioner Monti’s description of convergence carefully avoids indicating which party is evolving more. See, e.g., Interview with Professor Mario Monti, European Commissioner for Competition Policy, 15 ANTITRUST 6, 7 (2001); Monti, Antitrust, supra note 17.
cal pedigree,\textsuperscript{23} and positively Whigian in its perception that any antitrust regime ceaselessly evolves by incorporating ever-improving tools of economic analysis.\textsuperscript{24}

Even if this vision is a defensible one—and we are doomed to repeated mud-slinging over significant transactions, followed by the papering over of differences, while convergence gradually rises, triumphant, from the ooze—it seems unwise to discount the effect that antitrust rhetoric may have in the interim. The claim that the Commission inappropriately concerns itself with competitors, not competition (in shorthand, the "competitor claim") purposefully invokes what has been described as "[p]erhaps the single most quoted aphorism in U.S. antitrust jurisprudence,"\textsuperscript{25} and has emerged as the high concept criticism of European antitrust. As such, it has the power to contribute to the misdiagnosis of European (and American) antitrust, and to retard progress toward a mutual and pacific understanding. The language chosen for such criticisms may be significant in and of itself. If metaphors may occasionally be used to cloak departures from economic analysis, as then-Professor Boudin argued,\textsuperscript{26} surely it is equally plausible that economic rhetoric—the language of efficiency, consumer welfare, and so forth—may be used to accomplish divergent objectives as well.

I propose to examine the merits of the competitor claim in two dimensions. Section 2 very briefly describes the Commission decision in \textsc{GE/Honeywell}. Section 3 then considers the substantive dimension of the competitor claim as applied to the Commission's

\textsuperscript{23} For a sustained discussion of this point, see \textsc{David J. Gerber, Law and Competition in Twentieth Century Europe: Protecting Prometheus} 431 (1998) (summarizing argument that "competition law in Europe is fundamentally European") (emphasis in original); see also \textsc{Stefan Schmitz, How Dare They? European Merger Control and the European Commission's Blocking of the General Electric/Honeywell Merger}, 23 \textsc{U. Pa. J. Int'l Econ. L.} 325, 337-38 (2002) (linking European merger law to German ordoliberalism).

\textsuperscript{24} For a similarly skeptical note about U.S. doctrine, see \textsc{Jonathan B. Baker, A Preface to Post-Chicago Antitrust} 21 (June 2001 draft), \textsc{at http://papers.ssrn.com/sol3/delivery.cfm/SSRN_ID296119_code020107140.pdf?abstractid=296119}.

\textsuperscript{25} Portfolio Effects, supra note 17 (U.S. Submission); see United States v. Syufy Enters., 903 F.2d 659, 668 (9th Cir. 1990) (Kozinski, J.) ("It can't be said often enough that the antitrust laws protect competition, not competitors.").

\textsuperscript{26} \textsc{Michael Boudin, Antitrust Doctrine and the Sway of Metaphor}, 75 Geo. L.J. 395, 421 (1986) (arguing that even as "analysis becomes more deeply and technically economic, judges and lawyers will resort to metaphor in order to simplify new abstractions and even to insinuate other values that can no longer be openly acknowledged").
controversial exploration of portfolio theory. Section 4 then brings
the legal and institutional context—itself subject to the competitor
claim—back in. As one might surmise from the title, I conclude
that the claim sheds more heat than light, and might profitably be
expunged from the transatlantic dialogue.

Two caveats are important. First, I do not discuss comprehen-
sively what is right or wrong with the Commission decision, or
even whether the merger should have been blocked (though I am
of the mind that the Commission decision to do so was inade-
quately justified). My more limited objective is to address a par-
ticular kind of claim that has been made about the decision, one
that risks transcending the transaction at hand. This critical dis-
tance is related to a second caveat—namely, I assume the accuracy
of the facts as they are portrayed in the public version of the Com-
mission decision, having neither participated in the transaction nor
enjoyed access to the parties’ submissions. As the decision has
been appealed to the Court of First Instance, we should before too
long have insight into that assumption’s significance.

2. THE COMMISSION DECISION

To understand what is being said about the Commission’s de-
cision, we have to briefly review what was decided. According to
the Commission itself, its analysis of the proposed merger differed
from that of the parties in two major areas—first, in its depiction of
the parties’ strength in the affected markets, and second, in its
analysis of the merger’s effects.27

The parties’ strength in affected markets. According to the Com-
misson, the merger could be anticipated to have adverse effects in
several different markets. GE manufactures, sells, and services air-
craft engines, which the Commission regarded as falling into sev-
deral different categories relating to the type of aircraft.28 Honey-
well was particularly active in avionics equipment—essentially,
that used to control and navigate aircraft, maintain communica-

27 This summary is drawn from the public version of the Commission deci-
sion, as supplemented by a helpful summary prepared by several of its officials.
See Dimitri Giotakis et al., General Electric/Honeywell—An Insight into the Commis-

28 The Commission distinguished between engines for large commercial air-
craft, those for regional aircraft (which fell into distinct product markets for large
and small versions), and those for corporate aircraft (which fell into distinct mar-
kets for heavy, medium, and light forms). GE/Honeywell, supra note 4, paras.
935.
tions, and assess flying conditions—that it distributed within parts-
specific markets, and within those to distinct segments again de-
pending aircraft type. Honeywell also participated in markets for
non-avionics products such as auxiliary power units, wheels,
brakes, and lighting. 29 The Commission further disaggregated the
avionics and non-avionics markets (together, for sake of conven-
ience, “aerospace equipment”) into those in which the buyer se-
lected the equipment at the time of purchase (dubbed buyer-
furnished equipment, or “BFE”), those where aircraft manufactur-
ers did the selecting while developing a new platform (dubbed
supplier-furnished equipment, or “SFE”), and those where the
manufacturer certified several options from different sources and
allowed the buyer the final choice (dubbed “SFE-option”).

As to engines, GE was deemed to have a dominant position in
the market for large commercial aircraft engines (in which Honey-
well had not participated) and for large regional aircraft engines
(in which Honeywell was the only other supplier presently certi-
fied), and Honeywell was characterized as the leading supplier of
medium corporate jet aircraft engines. GE was also credited with a
strong position on the market for maintenance, repair, and over-
haul. Among the factors cited as contributing to GE’s dominance
were its consistently high market shares, especially when meas-
ured as a proportion of the installed base of engines on aircraft still
in production; 30 the financial strength afforded it by GE Capital,
which also promoted exclusivity arrangements with airframe
manufacturers and investment in airlines, all benefiting GE en-
gines; 31 the inimitable advantages afforded by its GE Capital Avia-
tion Services (“GECAS”), which purchased ten percent of total air-
craft sold, with an almost invariable bias toward aircraft with GE
engines; 32 and the economies offered by providing purchasers with
commonality across engine types. 33 GE’s actual and potential
competitors, as well as its customers, were seen as creating little
constraint on its behavior. 34

Within the many markets for aerospace equipment, Honeywell
consistently managed over half of worldwide sales, and was char-

29 id. paras. 230-39.
30 id. paras. 38-106.
31 id. paras. 107-20.
32 id. paras. 121-45.
33 id. paras. 146-62.
34 id. paras. 174-228.
ac terized as holding a particularly strong position in key avionics products. The Commission also emphasized Honeywell's product range, its strengths in services, product integration, and packaged deals, and the limited capabilities of its competitors. Finally, it emphasized Honeywell's position as the largest independent supplier of engine starters, an input to jet engines, and concluded that the parties overlapped and would together dominate a market for small marine gas turbines.

Competitive effects of the proposed merger. The Commission found that "the transaction [would] strengthen GE's position on the markets for large commercial aircraft engines and for large regional jet aircraft and engines and will create a dominant position on the markets for corporate jet engines," and further would make Honeywell "dominant in the BFE, SFE, and SFE-option avionics markets".

With respect to SFE aerospace equipment, the Commission emphasized the prospect that GE would strategically employ GECAS and GE Capital to favor Honeywell products. Equally important, at least on the face of the decision, the Commission also claimed that the merged company could for every category of customer foreclose competition through packaged offers: namely, pure bundling, in which the company would only offer a bundle of

35 Id. paras. 241-330.
36 Id. paras. 331-40.
37 Id. paras. 468-77.
38 Id. para. 341.
39 Commission officials have since downplayed this aspect of the decision to one degree or another. Thus Götz Drauz, Director of the Merger Task Force, sought to "shak[e] [his] audience a little bit" by declaring that "in its effects, the GE/Honeywell merger, as analysed by the Commission, is not a 'portfolio effects' case." Götz Drauz, Unbundling GE/Honeywell: The Assessment of Conglomerate Mergers Under EC Competition Law, 2002 FORDHAM CORP. L. INST. 183, 192. The point of the disavowal seems to have been that GE/Honeywell was not solely, or primarily, about portfolio effects; in elaborating, Drauz did not say that portfolio analysis played no role, but only that it was inapt to criticize the Commission for "having applied 'off-the-wall' theories—undoubtedly referring to a 'portfolio effects' analysis—which... the Commission has already used in certain circumstances." Id.; see also Schmitz, supra note 23, at 378 (questioning the controversial decision to include portfolio analysis, since "it was not a major component of the actual Commission decision, constituting only two pages out of the 130 page document, and the merger would most likely have been stopped if the Commission had omitted the issue altogether because of the horizontal and vertical effects of the merger"). For our immediate purposes, though, the question is not whether bundling theory accounted for the bulk of the decision, but only whether that element of the Commission's reasoning is fairly subject to the competitor claim.
complementary products, and refuse to sell them individually on a stand-alone basis; *technical* bundling, in which the individual components could not function effectively with the products offered by other manufacturers; and *mixed* bundling, in which the complementary products would be offered together at a price less than the sum of the parts.\(^{40}\)

The Commission acknowledged that the economic analysis of bundling practices was controversial, but (rather suspiciously) claimed that it was unnecessary to rely on any particular theory in order to conclude that the merged companies' ability to package their products would foreclose competitors from engines and aerospace equipment markets.\(^{41}\) It further asserted that the precise bundling strategy that would be employed might change over time.\(^{42}\) The upshot, in any case, was that the parties would be able to achieve cross-subsidization and reduce packaged prices to a degree competitors could not match. Within the markets for aerospace equipment, the Commission predicted:

This is likely to lead to market exit of existing competitors and market foreclosure both over the short term, insofar as price is below average variable cost, and over the longer term, insofar as competitors would be unable to cover their fixed costs if they were to remain active and to proceed with the new investment in R&D so as to compete viably and in the future.\(^{43}\)

This foreclosure effect would be accelerated, the Commission contended, due to GE's financial strengths and integration into financing, aircraft purchasing and leasing, and aftermarket services, in which GE could be expected to favor Honeywell's products just as it had favored its own. For airline manufacturers, differences among aerospace equipment were relatively minor, and would be overshadowed by any additional appeal a Honeywell-equipped plane might have to GECAS as an aircraft purchaser.\(^{44}\)

\(^{40}\) GE/Honeywell, *supra* note 4, para. 351.

\(^{41}\) *Id.* para. 352.

\(^{42}\) *Id.* para. 354.

\(^{43}\) *Id.* para. 398; see also *id.* paras. 354-55. While the relevant section addressed BFE- and SFE-option avionics and non-avionics products, the analysis appeared to be intended to address SFE products as well. *Id.* para. 349.

\(^{44}\) *Id.* paras. 405-11.
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With respect to engines for large commercial aircraft, the Commission again relied upon the advantages that bundling would confer on the merged entity, as well as the elimination of Honeywell as a participant in a collaborative project with other engine manufacturers and vertical integration with Honeywell's leading position as a supplier of engine starters. Within the markets for large regional jet aircraft engines and corporate jet aircraft engines, the Commission found a more traditional (if minor) horizontal overlap, again influenced by the potential for bundling and vertical integration. Finally, horizontal overlap between the parties, coupled with the foreclosure due to the vertical integration of Honeywell products with GE services and conflicts between GE and a confidential, was regarded as creating a dominant position in the market for small marine gas turbine engines.

3. CONGLOMERACY AND THE COMPETITOR CLAIM

One premise of the competitor claim, at least in its substantive dimension, is that antitrust decisions can be compared based on underlying economic criteria and without regard to the prevailing legal regime. Assuming for the moment that is possible—as discussed in Section 4, another dimension of the competitor claim suggests that there are meaningful institutional and legal differences that bear on the comparison—it is in fact difficult to characterize the differences in economic analysis as having had anything to do with the relative favoring of competitors.

3.1. The Substantive Dimensions of the Competitor Claim

In order to relate the competitor claim to the substance of GE/Honeywell, one has to make sense of the intended distinction between "competitors" and "competition," which is more difficult than might be supposed. Indeed, given the origins of the underlying aphorism, it is tempting to regard contemporary invocation as being purposely ironic. The phrase emerged, surprisingly enough, in Brown Shoe v. United States, in which the Supreme

45 Id. paras. 412-16.
46 Id. paras. 417-18.
47 Id. paras. 419-27.
48 Id. paras. 428-44.
49 Id. paras. 459-84.
50 Brown Shoe is best known for its highly criticized endorsement of submarkets, which lend themselves to the defense of particular competitors in market
Court observed that the legislative history of the Clayton Act "illuminates congressional concern with the protection of competition, not competitors, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition." The use of the new nostrum in that opinion hinted at its potential versatility (or, put less kindly, its malleability). The Court noted that integrated operations might benefit consumers, and would not be "rendered unlawful by the mere fact that small independent stores may be adversely affected," since [i]t is competition, not competitors, which the Act protects." "But," the opinion went on, we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.53

Brown Shoe thus provides a strong indication that the competition maxim is not the kind of undimensional inquiry common to modern antitrust analysis.54 What then do we mean when we say that antitrust law should protect "competition, not competitors?" We are spared some reflection on what "competition" might mean because of the intended antinomy between the two terms.55 Because the nostrum is American in origin, we might also defensibly assume that American notions of competition should govern—though the idea is in part socially constructed, and one could always try to defend the Commission from the competitor claim by

52 Id. at 320.
53 Id. at 344.
54 That is not to say, however, that its reformist potential was not also appreciated. See United States v. Von's Grocery Co., 384 U.S. 270, 282 & n.2 (1966) (Stewart, J., dissenting) (citing aphorism in taking the majority's decision to task).
saying that it is simply addressing a different notion of competition.66

Even so restricted, at least four variants remain. First, and least controversially, we might be suggesting that antitrust law principles do not require intervening on behalf of a particular competitor. It is insufficient, accordingly, for a business to allege harm to itself alone, without taking into account the broader effects on competition within the relevant market.67 Second, and only slightly more broadly, antitrust ought not intervene to protect existing, as opposed to potential, competitors—or, for that matter, potential, as opposed to existing, competitors—since the identity of market participants is irrelevant so long as conditions for competition are maintained. Though one might imagine exceptions to either principle, they seem uncontroversial in virtually every circumstance.

What is generally meant by the aphorism, though, is probably that antitrust ought not protect competitors at the expense of com-

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57 See Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 338 (1991) (Scalia, J., dissenting) (arguing that jurisdictional requirement of impact on interstate commerce was not satisfied by virtue of injury to individual physician within geographic market, since “the effect of a restraint of trade must be gauged according to its effect on ‘competition, not competitors’”) (citations omitted).

58 See Seacoast Motors of Salisbury, Inc. v. DaimlerChrysler Motors Corp., 271 F.3d 6, 10 (1st Cir. 2001) (distinguishing state dealer protection statute from antitrust laws, which protect “competition, not competitors,” and noting that “[i]n all events, nothing in [the plaintiff’s] complaint has to do with a threatened dealer cut-off; [plaintiff] simply does not want to face a new competitor”) (citations omitted); Valley Prods. Co. v. Landmark, 128 F.3d 398, 406 (6th Cir. 1997) (noting that, given their goal of protecting “competition not competitors,” there is in principle “no reason for reading the antitrust laws as giving defendants greater freedom to exclude prospective market participants than to exclude existing market participants”) (citations omitted); Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986, 997 (9th Cir. 1979) (signaling doubt that alleged damages resulting from “plaintiff’s damage claim for lost profits allegedly resulting from the entry of an additional competitor into the market during the pendency of the infringement suit is the type of injury for which antitrust recovery is appropriate,” since antitrust laws “were enacted for ‘the protection of Competition, not Competitors [sic]’”) (citations omitted).

59 See Nat’l Football League v. N. Am. Soccer League, 459 U.S. 1074, 1079 (1982) (Rehnquist, J., dissenting from the denial of certiorari) (denying that, as relevant to covenants not to compete, that “businesses must arrange their affairs so as to make it possible for would-be competitors to compete successfully,” since “[t]he antitrust laws ... were enacted for ‘the protection of competition, not competitors’”) (citation omitted).
petition. Even this, however, has its nuances. The third variant, therefore, might be that competitors should not be protected, without more, from acts that are the quintessence of competition. A firm’s nonpredatory price cuts may injure a competitor by depriving it of a valued customer, but that is precisely the kind of activity in which we want business to be engaged. The clearest articulation of this point, and its classic application in the merger setting, was in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., where the Court observed that:

[T]he antitrust laws are not merely indifferent to the injury claimed here. At base, respondents complain that by acquiring the failing centers petitioner preserved competition, thereby depriving respondents of the benefits of increased concentration. The damages respondents obtained are designed to provide them with the profits they would have realized had competition been reduced. The antitrust laws, however, were enacted for "the protection of competition, not competitors." It is inimical to the purposes of these laws to award damages for the type of injury claimed here.

The fourth, more question-begging, variant is that competitors ought not be protected, even with the objective of preserving competition in the relevant market, where doing so is at the expense of other, more valuable features of a competitive market. Pricing practices are again a good example. There may be evidence, for example, that low but nonpredatory prices will not only harm a competitor, but also drive it and other inefficient competitors to the cost-cutter out of the market. The problem with an unfettered attack on such conduct would not be that competitors are being protected without

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60 See, e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993) ("That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for 'the protection of competition, not competitors.'") (citation omitted); Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338 (1990) (holding that competitors suffering from nonpredatory price cuts lack standing to sue under Section 4 of the Clayton Act, since "cutting prices in order to increase business often is the very essence of competition," and "[t]he antitrust laws were enacted for 'the protection of competition, not competitors'") (citations omitted).


62 Id. at 488 (citation omitted).
regard to competition, since competition's prerequisite—an adequate number of actual or potential market participants—might be the motivation. The reason for cost and recoupment screens, instead, has to do with measuring relative harms to competition; prices above cost, or pricing without rational prospect for recoupment, might damage competition, but we are reluctant to deter price reduction or to create what might amount to price controls.63

This fourth, balancing variant of the aphorism is far more opaque than its kin, and could serve as the tag line for virtually any debate about appropriate antitrust policy. It may be appropriate, therefore, to ask not only whether the competitor claim is appropriately leveled at the GE/Honeywell decision, but also which claim is being made.

3.2. Applying the Substantive Competitor Claim

One should begin by acknowledging the general latitude for attributing to EU antitrust policy diverse and, relative to the United States, divergent goals. Following the "dominance" focus of EC Article 82 (ex 86),64 Article 2 of the Merger Regulation directs a broad-ranging inquiry into whether a proposed merger does or does not "create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it." In making that appraisal, the Commission is to take into account:

(a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or without the Community;

(b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or mar-

63 See Brooke Group, 509 U.S. at 221-27.
64 See EC Article 82 (proscribing "[a]ny abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States").
kets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.65

One can also find statements of enforcement philosophy that would be alien to modern U.S. doctrine.66 But the potential for difference is largely unrealized. European antitrust law has indeed moved toward the U.S. mean in many respects, and in some regards, such as the positive consideration of efficiencies defenses and the indulgent attitude toward mergers, arguably led the charge toward purer economic reasoning.67 In that spirit, the


66 In 1993, for example, Karel Van Miert, Mario Monti's predecessor as the commissioner in charge of competition policy, declared:

The aims of the European Community’s competition policy are economic, political and social. The policy is concerned not only with promoting efficient production but also achieving the aims of the European treaties: establishing a common market, approximating economic policies, promoting harmonious growth, raising living standards, bringing Member States closer together, etc. To this must be added the need to safeguard a pluralistic democracy, which could not survive a strong concentration of economic power.

If competition policy is to reach these various goals, decisions must be made in a pragmatic fashion, bearing in mind the context in which they are to be made: the realization of the internal market, the globalisation of markets, economic crisis, technological development, the ratification of the Maastricht Treaty, etc.


67 See Kauper, supra note 1, at 306-07; see also Robert Pitofsky, Proposals for Revised United States Merger Enforcement in a Global Economy, 81 GEO. L.J. 195, 214-15
Commission is considering the possibility of renouncing the dominance test in favor of one looking for a substantial lessening of competition, like the test preferred by the United States, and has more definitively recommitted itself to the consideration of efficiencies—albeit at the risk of increasing the room for discretionary application and divergence.

Somewhere between the more regulatory past and a future as a U.S. simulacrum lies GE/Honeywell. While the Commission decision is unconvincing in a number of regards, some of those difficulties plainly have nothing to do with the competitor claim. For example, its assessment of whether GE was dominant in large commercial aircraft engines seems ill-adapted to bidding markets, and it arguably drew the wrong conclusions from GE’s behavior—emphasizing, for example, that GE was able to offer price concessions in order to wrest business from its rivals, without considering that the rivals were somehow driving it to offer such concessions. The Commission may also be criticized for adopting an unduly forward-looking, and speculative, approach to market definition. On these questions, though, antitrust authorities on both sides of the Atlantic have a predominantly “competitor”-oriented focus, and any errors committed by the Commission are difficult to attribute to its misunderstanding of the competition maxim.


See Green Paper, supra note 68, at 40 (noting relative lack of legal rigidity, and potential legal uncertainty, attending substantial lessening of competition test); Editorial, EU Merger Policy, Fin. Times, June 5, 2002, at 12 (suggesting that proposed merger reforms “would increase the scope for discretion in merger decisions,” when “it is that discretion which is the greatest cause of complaint”).

See, e.g., Patterson & Shapiro, supra note 8, at 20 (arguing that the EU’s reasoning regarding market foreclosure is deeply flawed).

This was self-conscious. See Commission Notice on the Definition of Relevant Market for Purposes of Community Competition Law, § 12, 1997 O.J. (C372) 5 (distinguishing between market definition in cases under Articles 81 and 82 and in merger cases on the ground that the latter markets are analyzed on a prospective basis).
The heart of the substantive competitor claim, instead, has to do with the Commission’s embrace of portfolio theory. Subsequent to the Commission’s decision, the OECD conducted a roundtable of members’ views on portfolio theory, and the Secretariat itself endorsed what was essentially the U.S. view. As the Secretariat explained, the probability that conglomeracy effects will facilitate behavior like tying or bundling, and reduce overall welfare, depends on the presence of a number of identifiable factors. The Secretariat further elaborated, with the complete agreement of the United States, a set of seven apparently indispensable conditions that needed to be established for “the possibility [that buyers will suffer net harm] to materialize.”

It will be immediately apparent to anyone who has read GE/Honeywell that the Commission did not systematically apply any such test, and that where it focused expressly on a stipulated condition, its analysis was far more impressionistic, subjective, and

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73 As noted previously, see supra text accompanying note 39, the Commission denies relying on the theory, sort of, but those denials indirectly acknowledge that its apparent reliance on the theory accounted for a great deal of the criticism leveled against it. See, e.g., Drauz, supra note 39, at 192; see also Schmitz, supra note 23, at 378; supra text accompanying notes 7-16 (citing criticisms).

74 Specifically, the probability becomes higher when: (1) the merged entities have “a high degree of market power in . . . one of the bundled products”; (2) “rivals’ costs are significantly increased”; (3) “a large number of buyers are interested in purchasing only the tied product (or a subset of the bundled products)”; (4) “rivals find it impossible or unprofitable to match the tying/bundling strategy”; (5) “prices will eventually rise above pre-merger levels in the markets where rivals’ costs are raised (i.e., buyers will be unable to prevent a price rise, firms will be unable to profitably enter or re-enter after prices have risen, and the tying firm will have an incentive to raise prices above pre-merger levels)”; (6) “price increases will be sufficiently large, quickly realised and durable that the tying/bundling firm will be able to re-coup any opportunity losses it might incur in reducing its rivals’ sales”; and (7) “buyers as a group will suffer a net loss despite any initial post-merger drop in prices.” Portfolio Effects, supra note 17, at 19-20.

75 These conditions are: (1) “the merged firm will enjoy such significant efficiencies and/or internalised complementary pricing (or analogous) effects from the merger that it finds it profitable to drop prices below pre-merger levels in at least one market whether or not it expects that price drop to induce competitors to exit (i.e. the price drop cannot be prohibited as predatory pricing)”; (2) “neither rivals nor new entrants can match the merged firm’s new costs”; (3) “rivals will exit”; (4) “buyers cannot use countervailing power to hold prices at or below pre-merger levels”; (5) “firms will not enter or re-enter the market in response to price increases above pre-merger levels”; (6) “the merged entity finds it profitable to raise prices above pre-merger levels”; and (7) “what buyers initially gain through prices set below pre-merger levels is less than what they later lose through paying higher than pre-merger prices.” Id.; see also id. at 214 (U.S. submission).
WAYS OF CRITICIZING THE COMMISSION

speculative than would have been ideal. What should be made of this? Perhaps the problem is partly one of exposition. It would be surprising, after all, if the decision matched every particular of an after-promulgated, consensus-oriented OECD declaration. It may also be unfair to require that the Commission’s decision meet such a standard in a particular transaction, while the Justice Department’s conclusion that the merger could go forward is held to no standard at all—an imbalance surely occasioned by the fact that the Commission’s decision is judicially reviewable, while the Justice Department’s is not.

Nonetheless, it is worth asking whether the Commission’s errors and omissions, taken at face value, are so profound as to suggest not only that their decision was mistaken, but also that it reflects a misplaced emphasis on competitors. Competition might be damaged in some regard even where the OECD’s stringent conditions were not satisfied, but intervening under those circumstances would neglect other considerations—particularly the benefits that buyers might enjoy from the initial lowering of prices, if the conglomerate were to exercise its market power on the basis of price. If the Commission ignored this sort of countervailing benefit, or exaggerated the relative significance of the threat to competition, it might well be vulnerable to the competitor claim, at least in its fourth variant.

Such a claim is not wholly implausible. Commission officials insisted, in post-hoc discussions of the merger, that they were sensitive to the benefits that lower prices and other entailments of bundling might have for buyers. But it is quite difficult to find

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76 For example, the Commission failed to identify (in the publicly available version of the decision, at any rate) any examples of significantly discounted mixed bundles; those examples it cited were instances in which customers were in fact able to buy individual components without losing the discount. See Barry Nalebuff & Shihua Lu, A Bundle of Trouble—Bundling and the GE Honeywell Merger 16 (unpublished manuscript on file with author).

77 The difference may also be warranted because we subject decisions to intervene in the market to a greater degree of scrutiny. But see infra text accompanying notes 84-90 (critically evaluating that explanation).

78 Other benefits might include convenience and interoperability, especially where what the Commission termed “technical” bundling was at issue.

79 See, e.g., Monti, The Future for Competition Policy in the European Union, supra note 17 (explaining that the goal of competition policy is to protect consumer welfare by leading to lower prices, a wider choice of goods, and technological innovation).
that in the decision.\textsuperscript{80} The closest it comes is where the Commission, responding to the claim that customers would constrain the merged entity, argues that airframe manufacturers will tend to accept long-term vulnerability to price increases for the sake of short-term cost reductions.\textsuperscript{81} Implicit in this reasoning is the assumption that long-term price increases will outweigh the sum of short-term gains, but the Commission does not say so directly, and its more explicit reasoning is conclusory (for example, the supposition that manufacturers are acutely more cost-sensitive in the short term than they are in the long term).

If the Commission \textit{did} consider the potential offsetting benefits, it is rather harder to conclude that it struck the wrong balance, and that it did so in a manner betraying the focus on consumer welfare. The ultimate question is one of risk assessment: is it likely that the merger's effects on competitors would be so profound, and persistent over time, that the short-term benefits to buyers would be outweighed?\textsuperscript{82} Such assessments are partly a matter of risk aversion. U.S. officials emphasized not only that anticompetitive effects should not be unduly speculative,\textsuperscript{83} but also that regulators should be certain that no harm will result, since doing otherwise

\textsuperscript{80} See Nalebuff & Lu, \textit{supra} note 76, at 13-14.

\textsuperscript{81} GE/Honeywell, \textit{supra} note 4, paras. 448-49 (outlining the reasons why airframe manufacturers do not have much incentive to preserve competition in all instances, but do have incentive to keep input costs low). The Commission elsewhere indicates that initial costs, at least for engine sales, may be a misleading indication of final costs of operation, since maintenance and spare parts costs have to be considered. \textit{Id.} para. 113. One would have to employ some heroic assumptions, however, for that to mean that buyers would not benefit on balance from the merged entity's initial discounts.

\textsuperscript{82} The OECD assessment of portfolio effects recognizes this issue for the most part, but occasionally loses sight of the prize. For example, the stringent prerequisite for net harm to buyers that "[f]irms will not enter or re-enter the market in response to price increases above pre-merger levels" has, to my knowledge, no basis in economic theory or legal practice; the relevant question, instead, should be whether entry or re-entry will be sufficient to deter or offset (together with other positive effects) the merged entities' abusive pricing. Such an approach is the one taken, in any event, in the 1992 Horizontal Merger Guidelines, which rely on a much more sympathetic and fact-sensitive inquiry into entry sufficiency, potentially including whether entry is likely to involve a sufficiently substitutable product. U.S. Department of Justice and FTC Joint Horizontal Merger Guidelines, §§ 3.0, 3.4 (1992).

\textsuperscript{83} See, e.g., Portfolio Effects, \textit{supra} note 17, at 214 (U.S. submission) (arguing that blocking mergers based on concern over certain kinds of bundling "does so . . . on the basis of a theory of competitive harm that depends on a highly attenuated chain of causation that invites competition authorities to speculate about what the future is likely to bring").
WAYS OF CRITICIZING THE COMMISSION violates "a sort of Hippocratic oath: before intervening, we should be confident that our actions will not cause harm." 84 Whether or not Hippocrates believed this, U.S. antitrust law seems more aggressive in character. Though small increases in concentration are no longer regarded as a credible reason to block a merger, 86 the Clayton Act requires blocking acquisitions "the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly," 87 and the entire pre-merger notification regime is premised on the notion that it is not inappropriate to speculate about competitive outcomes. 88 It seems odd, moreover, to establish a strong bias against intervention irrespective of the transaction's upside (and particularly to emphasize the cost to thwarting mergers to conglomeracy). 89 Reasonable minds (even American minds)

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84 Kolasky, Comparative Merger Analysis, supra note 21; accord Portfolio Effects, supra note 17, at 235-36 (remarks of William Kolasky); James, Antitrust in the Early 21st Century, supra note 16, at 25.

85 Despite this popular maxim, Hippocrates in fact seems to have been more interested in a standard cost-benefit analysis—at least according to the mainstream translation of his famous oath, which imposed a "system of regimen which . . . I consider for the benefit of my patients, and abstain[s] from whatever is deleterious and mischievous." See James D. Shelton, The Harm of "First, Do No Harm," 284 (21) J. AM. MED. ASSN 2687, 2687-88 (Dec. 6, 2000), at http://jama.ama-assn.org/issues/v284n21/full/jpo00064-1.html. His Epidemic exhorted "[d]eclare the past, diagnose the present, foretell the future; practice these acts. As to diseases, make a habit of two things—to help, or at least to do no harm." See Hippocrates, Epidemics, Bk. I, Sect. XI, at http://www.geocities.com/everwild7/noharm.html (emphasis added).


87 Clayton Act, § 7, 15 U.S.C. § 18 (emphasis added); see Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962) ("Congress used the words 'may be substantially to lessen competition', to indicate that its concern was with probabilities, not certainties.") (emphasis supplied); S. REP. NO. 1775, at 6 (1950) ("The use of these words ['may be'] means that the bill, if enacted, would not apply to the mere possibility but only to the reasonable probability of the proscribed effect . . . ."); BORK, supra note 55, at 48 (criticizing the Clayton Act's innate incipiency).

88 For an account of how Hart-Scott-Rodino was the last gasp of the "old" antitrust, but has exceeded even its sponsors' expectations, see Joe Sims & Deborah P. Herman, The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation, 65 ANTRUS L.J. 865 (1997).

89 Explaining the U.S. retreat from blocking mergers based on entrenchment theories—which bears a resemblance to the Commission's amalgam of conglomerate financing and bundling—the U.S. submission to the OECD cited the poor track record of conglomerate mergers, which not infrequently wound up unprofitable and abandoned. Portfolio Effects, supra note 17, at 217. If that is right, and
may differ, in any event, about the best balance between type one and type two errors.90

It may be the case, however, that particular caution is required in connection with portfolio-related theories like bundling. One reason might have to do with the nature of the theory. It does seem relatively nascent and equivocal, particularly as to the kind of "mixed" bundling that the Commission's discussion appeared to presume.91 It is also noteworthy that the premise for any harm involves assuming efficiencies. Lower-priced bundles may be the natural consequence of real savings—either in terms of economies of scope, Cournot effects (by which the merged firm is able to internalize pricing externalities for the bundled goods, as opposed to setting prices that more or less inadvertently diminish demand for a complementary good), or buyer-side efficiencies realized through more convenient purchasing.92 Even if some efficiencies claims require careful assessment,93 where a case against a merger presumes conglomerates often fail, the long-term welfare effects of barring such mergers—the risk that the Commission's approach will generate false positives, in other words—is not so disturbing. Cf. C. Frederick Beckner III & Steven C. Salop, Decision Theory and Antitrust Rules, 67 ANTITRUST L.J. 41 (1999); Keith N. Hylton & Michael Salinger, Tying Law and Policy: A Decision-Theoretic Approach, 69 ANTITRUST L.J. 469 (2001).

90 Compare Frank H. Easterbrook, The Limits on Antitrust, 63 TEX. L. REV. 1, 1-9 (1984) (contending that though costs and benefits are incommensurable, intervention is more costly, and irreversible, than nonintervention), with Jonathan B. Baker & Steven C. Salop, Should Concentration Be Dropped from the Merger Guidelines?, 33 UWLA L. REV. 3, 15 (2001) (quoting excised comments by Professor Michael Porter) ("If careful analysis shows that the probability of a 'bad outcome' is 'greater than . . . 0.2,' . . . then I would say stop' to the merger absent 'a pretty compelling counterargument in terms of the productivity benefits'").

91 This criticism is advanced by Nalebuff and Lu, though Nalebuff's earlier work was indirectly employed by the Commission. See Nalebuff & Lu, supra note 76, at 2. In a subsequent work reacting to GE/Honeywell, they emphasize that predictions of anticompetitive effects from bundling are predicated on the assumption that all buyers are charged the same price, as opposed to the negotiated prices that characterize aviation markets, and that the bundling firms are alone in the market. See Nalebuff & Lu, supra note 76, at 3-4. For a very limited defense, including the claim that the theory involved is not novel, see Frontier Economics, Unbundling the Arguments: Economic Issues Raised by the Proposed GE-Honeywell Merger, Competition Bulletin (Aug. 2001), at http://www.frontier economics.com/news%20and%20publications/frontier%20publications /competition%20bulletins/competition%20bulletin%20august%202001%20 (unbundling%20the%20arguments).pdf.

92 Portfolio Effects, supra note 17, at 222 (U.S. submission).

93 They may, for example, be less credible (e.g., those promising benefits from new management), less likely to ameliorate competitive harms (e.g., by reducing fixed rather than marginal costs), or more likely to produce harms to competition
lower pricing, most reservations should be satisfied. The Commission decision appears to assume that Cournot effects, at least, will enable the merged entity to lower prices, but either regards these as something categorically different than efficiencies or that these and other savings are the wrong kind of efficiency.

Even if this reasoning seems unduly solicitous of competitors, the United States may be faulted for its part for being unduly dismissive. While the Justice Department has noted the need to assess whether competitors can attempt similar practices, it simply asserts of their own accord (e.g., by anticipating reductions in output). See Horizontal Merger Guidelines, § 4 (as amended Apr. 8, 1997); Pitofsky, supra note 67, at 216-18.

94 Patterson & Shapiro, supra note 8, at 21.

95 See Roundtable on Transatlantic Antitrust: Convergence or Divergence, 16 ANTITRUST 5 (2001) (remarks of Francisco-Enrique Gonzalez-Diaz) (suggesting, seemingly with reference to GE/Honeywell, that “[a] completely different question arises when one is confronting a transaction with respect to which the merging parties are not claiming, let alone quantifying, any type of efficiencies”); Drauz, supra note 39, at 199-200 (describing claimed efficiencies as more like “strategic pricing behavior”). But see Panel on Mergers and Acquisitions, 2001 FORDHAM CORP. L. INST. 219, 226 (2002) (comments of Richard Gilbert) (puzzling at rejection of pricing complementarities as efficiencies).


[S]pecifically in the GE/Honeywell case, the merging parties have consistently argued that the merger would not create the type of efficiencies that antitrust authorities have to rely upon—that is, a long-term and structural reduction in the marginal cost of production and distribution, which comes as a direct and immediate result of the merger, which cannot be achieved by less restrictive means and which reasonably will be passed on to the consumer on a permanent basis, in terms of lower prices or increased quality.

On the contrary, the merging parties explained that the merger would create cost savings, which can be naturally expected from any merger, as a result of the elimination of duplication. However, cost savings should not be equated to merger-related efficiencies. They do not automatically lead to sustainable and structural price reductions, but rather to increased margins for the firm, which cannot automatically be expected to be passed on to consumers.

The kind of savings that would qualify as “long-term and structural reduction in the marginal cost of production and distribution” is not wholly clear, but the difference between those and “cost savings” should not turn on the whether they are less likely to be passed on; their principal and differentiable value, instead, derives from the way they differentiate the merged entity from other firms with which it might maintain an oligopoly.
that it is an "unusual event" where "narrow-line firms are unable
to replicate these efficiencies through teaming arrangements, internal
growth, or counter-merger." It does not disclose the basis for
that conclusion, which might surprise Honeywell’s several suitors;
the possibility of equally viable non-merger options also seems
counter to the conglomeracy strategy many firms have adopted in
other markets, and oblivious to the business (and antitrust) risks
that teaming may pose. The problem, in any case, lies in explain-
ing why the Commission’s failure to document merger risks and
offsetting benefits is different from the Justice Department’s blithe
assumption of third-party alternatives, which essentially posit that
the merger is economically dispensable. Such an approach seems
inconsistent with the Horizontal Merger Guidelines, which place
on merging parties the burden of showing that efficiencies are
merger-specific.98

A second reason for caution in portfolio cases might be that the
predicted conduct offenses are sufficiently addressed through
other means. The position has considerable appeal: why guess as
to whether the merged entity will misbehave, when you can inter-
vene if it does? Waiting allows regulators to see if the wrongful
conduct actually materializes, and to better assess whether its net
effect is negative.100

The counterarguments—including the basic fact that the harm
must then first be suffered—are largely practical in nature. The
conduct standards being relied upon are themselves sensitive to
the risk of false positives, and so will systematically excuse some
conduct that might, with perfect information, be regarded as anti-
competitive. There are also institutional limits to deferred en-
forcement. These are not especially substantial in the United
States, where either the Justice Department or the Federal Trade
Commission may seek to block a merger (and may even seek to

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97 Portfolio Effects, supra note 17, at 222.
98 See Horizontal Merger Guidelines, supra note 93, § 4.
99 Assuming we lack reliable information about the future intentions and ac-
     tions of the merged entity. But cf. MINORITY REPORT (20th Century Fox, 2002)
     (imagining world in which law enforcement officials arrest individuals before
     they commit crimes).
100 Portfolio Effects, supra note 17, at 9; see also id. at 223 (U.S. submission); id.
     at 237 (remarks of William Kolasky).
101 See Drauz, supra note 39, at 200-01 (emphasizing interim harm as warrant
     for ex ante controls).
unwind a transaction after the fact), and the states and private parties wait in the wings. In Europe, in contrast, the Commission alone is empowered to review transactions with a Community dimension, cannot challenge them again afterwards, and regards itself as unable to impose behavioral remedies by consent decree. All this suggests that assertions regarding the sufficiency of ex post measures require careful attention to differing institutional contexts, and do not in any event fairly open an agency wielding greater authority to the competitor claim.

A final, peculiar argument for a higher standard for portfolio theory is that it "threatens to undermine the broad consensus that now supports vigorous antitrust" by politicizing it. If concern arises only where differences "regularly lead mergers to be disapproved in Europe that would be approved in the United States," it perhaps suffices to observe that such a pattern is unlikely. Otherwise, the plainer causes of politicization are those in the U.S. executive and legislative branches who sought to intervene with the Commission and criticized the decision in intemperate terms afterward. Simplifying comparative antitrust analysis through the competitor claim seems likely to encourage the politicization of antitrust that is nominally feared.

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103 See infra text accompanying notes 133-35.


105 Neal R. Stoll & Shepard Goldfein, A Tale of Two Regulators, N.Y. L.J., July 17, 2001, at 3 (suggesting that divergent results in U.S. and Europe in cases of speculative harm are due in part to differing ex-post remedies available); accord Michael Harrison, GE Poised to Scrap $42 Bn Takeover of Honeywell, Indep. (LONDON), July 3, 2001, at 17; Stoll & Goldfein, supra note 8, at 3. The question of whether behavioral undertakings would be sufficient to stave off any potential harm is clearly a related one. In addition to taking the position that such remedies are legally inappropriate, see supra note 104, Commission officials stressed the difficulty they would have had in single-handedly monitoring the commitment. See Panel on Mergers and Acquisitions Roundtable, supra note 95, at 229-30 (colloquy between Joel Davidow and Götze Drauz).

106 See Portfolio Effects, supra note 17, at 237 (remarks of William Kolasky).

107 Id.
4. THE COMMISSION, COMPETITORS, AND CONSUMERS IN CONTEXT

The Brown Shoe aphorism that "antitrust laws were passed for 'the protection of competition, not competitors'" speaks, potentially, not just to the goals of enforcement policy, but also to the means for its enforcement. Read as a procedural or institutional edict, it suggests not only that antitrust should not be enforced on behalf of competitors, but also that it should not be enforced at their behest. The most obvious application to GE/Honeywell concerns the role played by the merging parties' competitors before the Commission. As I note below, however, the competitor claim also calls into question any independent functioning of the Commission in administering Community competition policy.

4.1. The Role of Third Parties

One of the most frequent complaints about the way the Commission rendered GE/Honeywell, and about the resulting decision as well, concerned the role played by third parties. According to one particularly scathing appraisal, the Commission "subcontracted their investigation to United Technologies." Such influence, many suggested, came at the expense not only of the merging parties, but also of consumers.


109 For these purposes, I put to one side more singular episodes, such as the mistaken affidavit submitted by a witness at the behest of a competitor, United Technologies. See Michael D. Goldhaber, Deal Breaker, AM. LAW., Sept. 2001.

110 Laurie P. Cohen, GE Was Outsmarted by Rival's Legal Team—United Technologies Swayed Regulator, WALL ST. J. EUR., July 2, 2001 (quoting competition attorney Christopher Bright, who represented GE in the Commission proceedings).

111 See Becker, supra note 10, at 20 (citing Commission decision in GE-Honeywell, and contrasting decision by D.C. Circuit in United States v. Microsoft, in concluding that "[g]lobal antitrust policy would be consistent, and it would also encourage efficiency if business practices were universally judged by their effects on consumers rather than on competitors with political power"); Elliott, supra note 12, at 40; Saeed Shah, Fraudulent Ramping of Internet Investments Was "Fifty Times Worse than Enron," Says Welch, INDEP. (LONDON), Feb. 27, 2002, at 18; see also Welch Squelched, ECONOMIST, June 23, 2002 (suggesting that Commissioner Monti gave more weight to GE and Honeywell competitors and less to customers); Deborah Hargreaves & Andrew Hill, How Monti Turned G.E.-Honeywell into a Flight of Fancy, FIN. TIMES, July 6, 2001, at 25 (quoting "person close to GE" as asserting that "I have never been in a situation where my word meant so little and our customers' word meant so little, and our competitors' word meant so much").
The allegation is not unprecedented. As James Venit and William Kolasky observed in 2000:

Another very important difference between the U.S. and EU approaches is the far greater importance attached to competitors by the European Commission during the course of its merger investigations .... [I]t is related to the commission's tendency to view competition law issues from the perspective of competitors and not solely from the perspective of consumers.112

There are obvious risks to indulging the claims of third parties. Competitors may perceive participating in the merger process as a low-cost means of raising rivals' costs.113 The evidence they proffer may also be suspect, and depending on even ostensibly reliable information exposes the agency to accusations of capture and reputational costs.114 Finally, protecting the identity of complainants arguably interferes with the parties' rights of defense, undermines the integrity of administrative fact-finding, and further impairs the quality of judicial review.

At the same time, competitors may provide probative information that consumers lack the incentive or ability to obtain, or that otherwise would be prohibitively difficult for the agency to obtain on its own.115 Their participation also counteracts the merging parties, who are scarcely disinterested or lacking in influence.

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112 Venit & Kolasky, supra note 18, at 79, 87. The concern is also voiced on a non-comparative basis. See Rachel Brandenburger & Thomas Janssens, European Merger Control: Do the Checks and Balances Need to Be Re-Set, 2001 FORDHAM CORP. L. INST. 135, 159-65 (2002).

113 Microsoft suggested that this motivated the EU complaints by Sun and others against it. Stephen Baker, Monti's World, Bus. Wk., Mar. 25, 2002, at 30 (quoting Microsoft attorney's statement that "[i]f you want to harass competitors on the cheap, you hit them in Brussels").

114 In Boeing/McDonnell-Douglas, for example, the Commission's final decision apparently bore an unfortunate resemblance to submissions by two of Boeing's rivals. See Kovacic, supra note 18, at 849-50.

115 See Joseph F. Brodley, Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals, 94 MICH. L. REV. 1, 47-48 (1995); Kovacic, supra note 18, at 850; cf. 3 AREEDA & HOVENKAMP, ANTITRUST ¶ 723d32 (citing advantages and disadvantages to competitors as predatory pricing plaintiffs).
themselves; particularly for the resource-starved Commission, third parties may be indispensable to the adequate scrutiny of self-serving submissions. So long as the process of soliciting and considering submissions is transparent—a criterion on which the Commission fares relatively well as compared to the U.S. agencies—there is no reason to believe that hearing from others will be corrupting.

Whether the United States agencies place too much emphasis on the parties' submissions, or whether the Commission relies too heavily on third-party complainants, may be examined by assessing the evidence upon which each has relied stands up in relation to subsequent events. This is one more argument for empirically evaluating merger decisions. But U.S. skepticism about third party participation goes much deeper: third-party complaints tend to *disprove* the case that a merger will have anticompetitive effects, the argument goes, because those competitors stand to profit from an oligopolistic market. If they're complaining, they must not expect to reap the benefits of a noncompetitive market.

This argument has appealed to so many U.S. commentators, judges, and officials that I hesitate to diverge. But the theory presupposes a curiously sanguine competitor, one apparently un-

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117 Venit & Kolasky, supra note 18, at 92; *Roundtable on Transatlantic Antitrust*, supra note 95, at 12 (remarks of John DeQ. Briggs).


119 Mike France, *Europe: A Different Take on Antitrust*, BUS. WK., June 25, 2001, at 40 ("The EU doesn't believe in the U.S. view that if a competitor complains, it must be good for consumers.") (quoting Eleanor Fox); accord Mike France, *Trust-busting's Top Cop*, BUS. WK., Apr. 30, 2001, at 88 (citing antitrust lawyer Glenn B. Manishin); Portfolio Effects, supra note 17, at 222 (noting, in considering whether the bundling of products is intended to soften competition through product differentiation, that "[a]n easy way to detect whether softening competition is the motivation for bundling is to look at competitors' reactions to the bundle: If competitors are complaining about the possibility, we can be pretty sure that it is not serving to soften competition").

120 See, e.g., Hosp. Corp. of Am. v. FTC, 807 F.2d 1381, 1392 (7th Cir. 1986) (Posner, J.), *cert. den.*, 481 U.S. 1038 (1987); Easterbrook, supra note 90, at 34-37. For a rare exception, see Brodley, supra note 115, at 28 (1995) ("Critics of merger suits by competitors and takeover targets often exaggerate the conflict between the incentives of merger plaintiffs and antitrust goals. Nevertheless, private enforcement clearly raises incentive compatibility risks.").
concerned that it might be put out of business as the target of collusive, exclusionary behavior or by predatory practices prior to benefiting from the oligopoly.\textsuperscript{121} It seems more realistic to suppose that a firm would be uncertain about the future health of competition, risk-averse concerning its own longevity, and focused on protecting itself against a powerful competitor. Even collusion-minded competitors, moreover, may want to scavenge leftovers from any agency-directed divestiture, and so may complain even if their second-best option would be the consolidation originally envisaged by the merging parties.\textsuperscript{122} Finally, competitors must reckon with the potential consequences of their intervention: at least to the extent that their own market position is non-trivial, any attempt to evidence the merged entity’s dominance may involve pleading a narrow market definition, and a theory of anticompetitive behavior, that may come back to haunt them.\textsuperscript{123} On balance, we seem well advised to accept and scrutinize carefully competent evidence from third parties, without presupposing either that they are omniscient about the merger’s long-term effects (and their own staying power)\textsuperscript{124} or that we understand precisely their self-interested motives.

\textsuperscript{121} Cf. Brodley, supra note 115, at 47-55.

\textsuperscript{122} In GE/Honeywell, it was thought that United Technologies and Rockwell Collins might be more interested in picking up assets that the parties might be forced to sell off in order to win approval than they would be in having the deal blocked outright. See Kevin Done et al., Going Home, Alone, FIN. TIMES (LONDON), June 18, 2001, at 18; Elliott, supra note 12, at 40 (observing that “[s]ome of the opponents wanted the deal weakened, not killed,” so that Honeywell businesses might be purchased, and quoting one competitor as commenting after the Commission decision that “I feel like a golfer who’s just overshot the green”); Shah, supra note 111 (“Mr. Welch said the only way of getting the deal through, after rivals such as Rolls-Royce and Thales were given their say, would have involved huge divestments. ‘Once we would have finished plucking, the chicken wasn’t worth having,’ he said.”). See generally Brandenburger & Janssens, supra note 112, at 162 (asserting that the “self-interest [of third parties] may be at least as much related to desires to acquire part of the merged group as to any competition issues as such”).

\textsuperscript{123} As an example of the latter point, it has been suggested that in the GE/Honeywell proceedings, UTC attorneys steered clear of developing economic evidence of the bundling claim for fear that such a claim might be made against them if UTC were later to pursue the purchase of Honeywell on its own behalf. See Cohen, supra note 110.

\textsuperscript{124} Thus, having billed as an acquiring party’s “most telling point” its argument that a competitor complainant must have supposed that the transaction would have the effect of lowering prices, rather than facilitating collusion, Judge Posner noted that “this is just one firm’s opinion.” See Hosp. Corp. of Am. v. FTC, 807 F.2d at 1392.
This is consistent with the Commission's stated decision, and it is difficult to evaluate whether they in fact betrayed it, or otherwise erred, in GE/Honeywell. Secondary accounts of the proceedings suggested that the Commission worked closely with third parties in developing its case against the merger, but occasionally rebuffed them, too. There are also some encouraging signals about its relative interest in hearing from customers, who also benefit from the Commission's willingness to act on confidential submissions that might not be admissible in U.S. courts. The surest complaint that might be leveled against the Commission is that it was insufficiently concerned with avoiding the appearance of impropriety, though U.S. political intervention on behalf of the merger might also be faulted on that score.

The above-commended approach is also consistent with the practice of U.S. authorities, which may simply be more opaque when it comes to indulging complainants. The potential embar-
rassement for the United States, instead, concerns the opportunities for competitors to make an impact outside the federal government. Competitors enjoy a limited ability to sue to enforce Section 7 against mergers likely to give to genuinely anticompetitive practices, as do other third parties; the objections they have standing to raise are less broad than in the European Union, which has recognized that competitors may be "individually concerned" for reasons that would not pass muster in the United States, but the U.S. right to judicial recourse seems more substantial. Private parties also have the opportunity to obtain injunctive relief and treble damages after a merger is realized. State attorneys general

Id. See also Seiberg, supra note 12 (quoting Albert Foer, president of the American Antitrust Institute, as concluding that "The EC has a more protectionist flair than Americans when it comes to small and medium-sized businesses. They give competitors a larger role in their analysis. They give competitors an opportunity to comment on remedies in a way that does not happen as openly here.") (emphasis added).

See 1 ABA ANTITRUST LAW SECTION, ANTITRUST LAW DEVELOPMENTS 382-85 (4th ed. 1997); see e.g., Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 121 (1986) (refusing standing to competitors objecting to nonpredatory price cutting, but also rejecting proposed rule that standing should be barred per se even for possible future price predation, noting that "[i]t would be novel indeed for a court to deny standing to a party seeking an injunction against threatened injury merely because such injuries rarely occur").


Not only is European access to courts less generous, but those with standing to challenge Commission decisions may find the standard of review daunting. See BELLAMY & CHILD, supra note 104, at § 6-252. In contrast, though the numbers are now out of date, and include a period of uncommonly lax government enforcement, one U.S. survey reported in 1995 that:

Competitors obtained six of eleven preliminary injunctions granted against mergers between 1977 and 1990, with targets obtaining almost all of the balance. Competitors have been the most important class of merger litigants, and together with targets, they have brought eighty-two percent of the reported private cases during the above fourteen-year period.

See Brodley, supra note 115, at 48.

It should be recognized, however, that private parties will generally have an inadequate incentive to enforce antitrust laws with respect to phenomena like mergers, because (as noted previously) the effects may be hard to assess and quantify. See RICHARD A. POSNER, ANTITRUST LAW 274 (2d ed. 2001).
have similarly broad opportunities for interference, both pre- and post-merger, given that they enjoy the opportunity to obtain injunctive relief and damages under the Clayton Act\textsuperscript{134} and under state law as well.

One might argue, in sum, that the U.S. federal agencies are relatively insulated largely because competitors are diverted into other channels. Indeed, one of the leading academic condemnations of competitor influence specifically heralded the then-EEC as relatively immune to the rent-seeking that plagues the U.S. administration of antitrust policy.\textsuperscript{136} Microsoft, for one, would be quick to identify the vital role competitors play not only in Europe,\textsuperscript{137} but also in inspiring scrutiny by the Justice Department,\textsuperscript{138} the state attorneys general,\textsuperscript{139} and judges charged with administering private suits.\textsuperscript{140} And Judge Posner recently, and controversially, advocated that the U.S. states be stripped of their authority to bring antitrust suits save in defense of their own propriety interests, in part because "they are excessively influenced by interest groups that may represent a potential antitrust defendant's competitors."\textsuperscript{141} The question, therefore, may be less whether European antitrust errs in permitting third-party participation, but rather whether it has chosen the wrong means for it.

4.2. The Institutional Position of the Commission

The role of third parties before the Commission may be especially significant if the Commission itself is unchecked. Gary Becker, for example, considered that both the complaint against Microsoft in the United States and the GE-Honeywell merger review involved significant and problematic involvement by com-

\textsuperscript{134} Antitrust Law Developments, supra note 130, at 385-86; id. at 729-41.
\textsuperscript{135} Id. at 741-44.
\textsuperscript{136} See William J. Baumol & Janusz A. Ordover, Use of Antitrust to Subvert Competition, 28 J. L. & Econ. 247 (1985).
\textsuperscript{137} See supra text accompanying note 113.
\textsuperscript{138} John Heilemann, The Truth, the Whole Truth, and Nothing but the Truth, Wired, Nov. 2000, at 261 (describing campaign by Netscape and its attorneys); id. at 270 (noting Microsoft's invocation of the aphorism that antitrust is concerned with competition, not competitors).
\textsuperscript{140} See Chris Gaither, Unhappy with Settlement, Sun Sues Microsoft, N.Y. Times, Mar. 9, 2002, at Cl.
\textsuperscript{141} Posner, supra note 133, at 280-82.
petitors. “But,” he continued, “in these two cases, Europe appears to be guilty of caving in to special interests, whereas the appeals court in Washington rose above special pleading,” by focusing on “whether Microsoft’s practices helped or harmed the consumer.”

If the relative thrust of the competitor claim is to be sustained, it would appear, it requires looking at the respective agencies within the legal system as a whole. If the Commission is more interested in competitors than in competition—either because of its independent orientation, or because it has been captured—it surely matters if it is the sole and final voice.

Several features of the EU antitrust regime may be cause for concern. Access to the courts is generally more difficult than in the United States. To be sure, given that nearly fifty percent of the mergers blocked by the Commission are presently before the Court of First Instance. But any judicial intervention is likely to be tardy: even if recent reforms speed up the judicial process, the fact remains that the Commission is entitled to prohibit mergers without obtaining a court order, leaving the parties able to seek judicial relief only after the fact. While they might, in theory at least, obtain interim measures suspending the operation of the Commission’s decision, in practice no one ever seems to have availed itself of this option. One result, arguably, is that Commission decisions are less objective and economically rigorous than they would otherwise be—even if, in many cases, the result might be the same. Perceptions of unfairness may also be magnified. As

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142 See Becker, supra note 10, at 20.
143 According to a recent report, seven of the fifteen outstanding merger prohibitions are before the [Europe Court of Justice]. Christopher Huhne, Mergers for the Greater Good, EVENING STANDARD (LONDON), Mar. 28, 2002, at 82; Roundtable on Transatlantic Antitrust, supra note 95, at 12 (remarks of Gonzalez-Diaz) (indicating that “roughly 50 percent of the very limited number of cases blocked by the Commission end up in court”).
144 See Brandenburger & Janssens, supra note 112, at 178 (noting revisions to Court of First Instance procedures).
145 Roundtable on Transatlantic Antitrust, supra note 95, at 13 (remarks of Gonzalez-Diaz).
146 See Brandon Mitchener, EC Antitrust Authority Draws Criticism for Appeals Process, WALL ST. J. EUROPE, June 21, 2001; see also Brandenburger & Janssens, supra note 112, at 179-80 (explaining failure to seek interim relief as due to demanding requirements placed on movants).
147 Cf. Deborah Hargreaves, Monti’s Burden, FIN. TIMES, Jan. 18, 2000, at 16 (quoting Nicholas Levy, competition practitioner, as saying that “The Commission’s reasoning might be more consistent and carefully justified, even if identical in substance, if its decisions were taken with independent critical review”).
Jack Welch complained in an interview after the merger was blocked, "There is no recourse to the (Brussels) decision. That is outrageous. This is a kangaroo court. There's no one (to turn to) who has an impartial view. They're judge and jury."\(^{148}\)

The balance of considerations was tellingly illustrated in the \textit{Airtours} decision recently rendered by the Court of First Instance.\(^{149}\) On the one hand, as Commissioner Monti emphasized in a Panglossian moment, the court's sharp rebuke of the Commission's collective dominance finding at least served to demonstrated that judicial review of merger decisions was no dead letter. On the other hand, as other commentators noted, the fact that the decision was rendered three years after the deal was announced meant that its result was cold comfort to the merging parties.\(^{150}\)

The difference between the EU and the United States is, again, slightly overstated. American companies might be slow to characterize the HSR process as one susceptible to judicial oversight. Voluminous Second Requests have been characterized as de facto injunctions,\(^{151}\) and such a small proportion of merger reviews wind up in court that the judicial influence must be attenuated.\(^{152}\) When in court, the FTC may obtain injunctions more easily than would a private party subject to ordinary equitable tests.\(^{153}\) The stilted and


\(^{150}\) \textit{Will the Real Mario Monti Please Stand Up}, ECONOMIST, June 15, 2002, at 69.

\(^{151}\) \textit{See} Sims & Herman, supra note 88, at 881 (explaining that voluminous Second Requests operate as de facto injunction).

\(^{152}\) \textit{Roundtable on Transatlantic Antitrust}, supra note 95, at 12 (remarks of John DeQ. Briggs)

(“Ninety-plus percent of all the transactions that are subject to challenge in whole or in part are resolved by consent decree or abandonment long before the courthouse is in sight. As a practical matter, the U.S. agencies have virtually the same authority to stop or modify a transaction without intervention of a federal court as is the case in the European Commission.”);

\textit{accord} Mitchener, supra note 146.

\(^{153}\) 15 U.S.C. § 53; \textit{see} FTC v. Heinz, 246 F.3d 708, 714 (D.C. Cir. 2001) (citing cases). The Department of Justice appears to face a more demanding test when
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one-sided character common to Commission decisions, including GE/Honeywell, is regrettable, but the Justice Department and FTC are not immune from advocacy when the opportunity presents itself, and the character of their decisions when clearing mergers has only the marginal advantage of being inscrutable. The result, in short, is that complaints of "unreviewable agency discretion" are not limited to those made against the Commission.

If we put these caveats aside—and the possibility that judicial review might lead to less responsible agency decision-making, or put matters into the less expert hands of the courts, which were surely complicit in the U.S. antitrust policy in the 1960s—we might assume that the Commission's performance in assessing economic evidence would be improved, and that this would reduce its vulnerability to the competitor claim. But this may again be missing a larger point. Judicial review is principally about ensuring fidelity to law, and on this score, the Commission does measurably better. Its claim to consistency with its case law, the Merger Regulation, and Article 82 are largely ignored, or at most considered as a counterweight to the claim that it is acting out of sheer politics. But we should be wary of encouraging any change in policy, however economically enlightened, if it is at the expense of the Commission's legal mandate.

On this front the Commission does at least as well, if not better, than its American peers. While the Commission's dominance test, whatever its frailties, can be traced to Article 82, the United States arguably ignores the command of Section 7 to not only be on guard

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154 Kovacic, Evaluating Antitrust Experiments, supra note 118, at 848 ("Press releases and competitive impact statements that accompany the announcement of the Department of Justice's (DOJ) Antitrust Division or FTC consent decrees usually contain statements of the facts that favorably portray the enforcement agency's decision to prosecute.").

155 See Sims & Herman, supra note 88, at 888-89.

156 Analogous uncertainty is reflected in the debate within the United States as to whether judicial review makes Congress more or less mindful of legislating in accordance with the Constitution. See Richard A. Posner, Appeal and Consent, New Republic, Aug. 16, 1999, at 36 (reviewing Mark Tushnet, Taking the Constitution Away from the Courts (1999)).

for effects that may "substantially . . . lessen competition," but also those that may "tend to create a monopoly." There is also the most tenuous statutory argument for letting efficiencies creep into merger analysis, but that has not deterred the federal agencies from effecting a sea-change in enforcement policy in the 1980s and 1990s. And with respect to the issue of judicial control, the sprawling U.S. judicial system offers far more opportunities for administrative nonacquiescence and intransigence than does the more limited universe of the Commission, the Court of First Instance, and the Court of Justice—particularly once the liberal venue provisions applicable to merger enforcement are considered. One evaluation in the late 1990s asserted that "the Supreme Court has essentially disappeared from the field," given that more than two decades had passed since its last substantive decision, and that "there have been only eight substantive appellate court merger decisions in the last ten years . . . and half of those involved hospital mergers." For these and other reasons, the U.S. system may just as easily be characterized as one dominated by regulators, such that little solace may be taken from the judicial function—and continued scrutiny placed on the performance of agencies and their understanding of competition.

5. CONCLUSION

The Commission is now in the throes of considering important reforms to address the competitor claim and other criticisms. Among the measures being considered are some that would bring it much closer to what its critics have portrayed as the golden mean: changing the substantive standard and adopting a more determinate approach to considering efficiencies; raising money through fees so that a larger and still more professional staff might be maintained; adopting more flexible deadlines so as to im-

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159 See Pitofsky, supra note 67, at 212 & n.59 (noting that Clayton Act showed no solicitude for efficiencies).
161 Sims & Herman, supra note 88, at 881.
163 Green Paper, supra note 68, at 38-41.
164 Id. at 53.
prove review;\textsuperscript{165} diluting the Commission's power by permitting
national competition authorities to more readily obtain control
over cases;\textsuperscript{166} and considering the reform of judicial review.\textsuperscript{167}

For American observers concerned with (among other things)
the expense and length of U.S. proceedings,\textsuperscript{168} the evolution to-
ward U.S. procedure may cause misgivings. It is also critical that it
be evaluated in context. For example, Article 21(3) of the Merger
Regulation permits Member States to take appropriate measures to
take legitimate interests into account "other than those taken into
consideration by this Regulation and compatible with the general
principles and other provisions of Community law." It would ap-
pear, accordingly, that to the extent reforms narrow the range of
matters the Commission can consider as bearing on merger review,
the broader the potential scope of national regulation looms.\textsuperscript{169}

This division of labor might itself be defended as consistent
with the American model—witness not only the populist function
of state attorneys general, but also the industrial policy hat that
other federal agencies occasionally don\textsuperscript{170}—but the problem is a
broader one. The ultimate concern is not whether antitrust regimes
favor "competitors," rather than "competition," but instead
whether each of the regimes has an optimal approach to preserving
competition within its political and legal context, reckoned in its
entirety. We should also be concerned with how to make those re-
gimes mutually compatible and advantageous. But we can safely
exclude that the best means of doing so is by exporting aphorisms
having little determinate value and incomplete acceptance on their
own terrain.

\footnotesize{\textsuperscript{165} Id. at 48-50.}
\footnotesize{\textsuperscript{166} Id. at 20-24.}
\footnotesize{\textsuperscript{167} Id. at 57-58.}
\footnotesize{\textsuperscript{168} Sims & Herman, supra note 88, at 885-89.}
\footnotesize{\textsuperscript{169} Cf. Bellamy & Child, supra note 104, at § 6-263 (describing relevant provi-
sions).}
\footnotesize{\textsuperscript{170} See, e.g., Peter Spiegel, Pentagon Seeks Scrutiny of Big Foreign Deals, Fin.
Times, Apr. 5, 2002, at 1 (describing Defense Department initiative to subject all
large foreign acquisitions of U.S. companies to be approved by "a secretive na-
tional security committee"). The report quotes an observer as remarking, "This is
incredibly ironic, when this is the type of overly broad merger review that the U.S.
has criticized the EU for." Id.}