UNREST IN THE EUROPEAN COMMISSION: THE CHANGING LANDSCAPE AND POLITICS OF INTERNATIONAL MERGERS FOR UNITED STATES COMPANIES

I. INTRODUCTION

U.S. companies planning significant mergers now have more to worry about than just the U.S. Justice Department and the Federal Trade Commission.[1] The European Commission (EC) asserts the right to investigate any merger involving a company with a significant presence in EU markets.[2] There is growing concern among companies, particularly in the United States, about the accountability of the EC's merger review procedure, the changing environment of the merger review process, and the opportunity given to companies to present their case.

Increasingly, companies face overlapping authority from the United States' two trust-busting agencies: the Justice Department and the Federal Trade Commission, from the EC, and even from individual U.S. states.[3] Today, some eighty countries have competition laws and more than half of these laws were enacted in the last ten years.[4] Many additional countries are currently drafting competition laws.[5] Any company contemplating a merger of any significance will be forced to pay a small fortune on antitrust attorneys.[6] Given the uncertain outlook for global economies and markets, companies may become more cautious about launching future bids, particularly when there may be regulatory problems.[7]

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1. *See* Bert Roughton & Marilyn Geewax, *Europe's Sway on Mergers: Corporate Combinations No Longer Just a Concern of U.S. Regulators*, AUSTIN AM.-STATESMAN, Oct. 8, 2000, at K1.

2. *Spaghetti Monti*, ECONOMIST, Oct. 7, 2000, at 81.

3. *Trust and Antitrust*, ECONOMIST, Oct. 7, 2000, at 21.

4. Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781, 1783 (2000).

5. Int'l Competition Policy Advisory Comm., U.S. Dep't of Justice, Final Rep. No. 33 (2000), *available at* http://www.usdoj.gov/atr/icpac/icpac.htm (last visited Nov. 4, 2001). As of the end of 1996, 70 countries had drafted competition laws. Mark R.A. Palim, *The Worldwide Growth of Competition Law: An Empirical Analysis*, 43 ANTITRUST BULL. 105, 109 (1998).

6. *Trust and Antitrust*, *supra* note 3, at 21. *See also* Andre Fiebig, *A Role for the WTO in International Merger Control*, 20 NW. J. INT'L L. & BUS. 233, 242 (noting that one observer estimates the legal fees associated with obtaining clearance under the European Merger Regulation to be between 76,000 and 152,000 euros).

7. Charles Pretzlik et al., *Betrothals Blighted by Markets and Regulators*, FIN. TIMES (LONDON), Dec. 28, 2000, at 16.

In September of 1999 "Super Mario"[8] Monti was appointed the European commissioner in charge of competition policy.[9] In the year following Monti's appointment, the EC struck down three mergers, though it blocked only ten in the prior decade.[10] Making his presence felt immediately, Monti blocked a deal between British package-holiday operators in his first week at work.[11] In June 2000, Monti upstaged U.S. antitrust departments by rejecting WorldCom, Inc.'s $115 billion merger with Sprint Corp. one day before the U.S. Justice Department filed suit to block the deal.[12] It was the first time the EC had vetoed a deal involving two non-European companies.[13] Just over one year later, Monti again made headlines as the EC blocked General Electric Co.'s proposed $41 billion takeover of Honeywell International, Inc.[14]

Although the EC approved the $106 billion merger of Time Warner, Inc. and America Online, Inc. in October 2000, Time

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8. "Super Mario" is the nickname given to the Italian former university professor by the European press. Roughton & Geewax, *supra* note 1, at K1.

9. *See Super Mario,* ECONOMIST, Feb. 26, 2000, at 78.

10. *See* Anita Raghavan & Brandon Mitchener, *U.S. Executives Learn the Hard Way About Mario Monti*, WALL ST. J. EUR., Oct. 2, 2000, at 1.

> A competition commissioner can go only so far by his own lights: his actions must conform with a weighty corpus of law and policy deriving from the EU's founding treaties, from the case law of the European Court of Justice, and from rules issued by the commission itself. But a commissioner can set his priorities. And he can be more or less receptive to arguments about what might constitute a "dominant position" or an abuse of market power.

Super Mario, supra note 9.

11. *Spaghetti Monti*, *supra* note 2, at 81.

12. Raghavan & Mitchener, *supra* note 10, at 1.

13. *Id*. WorldCom has since appealed the European Commission's decision. The appeal has been described by some as purely symbolic, an effort to ensure the EC's decision does not become the basis for future commission actions or initiatives. *See* Matt Moore, *WorldCom Files Merger Appeal*, AP ONLINE, Sept. 28, 2000, *available at* 2000 WL 27212398.

14. *See Honeywell, GE Appeal EU's Verdict*, ARIZ. REPUBLIC, Sept. 13, 2001, at D2. On September 12, 2001, General Electric and Honeywell filed separate appeals in the European Court of Justice appeals division, which restricts reviews to procedural questions. The court has never overturned a commission merger ruling. None of the six companies that have appealed the veto of mergers in the past ten years has prevailed. General Electric's aircraft-leasing unit was at the center of Monti's objections to the purchase. Regulators cited the leverage the unit could exert if the company gained Honeywell's avionics business. *Id*.

Warner was forced to discontinue its attempt to merge with EMI Group PLC, a move that would have joined two of the world's five biggest music companies.[15] Additionally, America Online was forced to cut ties with Bertelsmann AG, a German media conglomerate, and Vivendi SA to stop the merged company from dominating online music delivery in Europe.[16]

The EC's increasing action has raised eyebrows in the United States. On October 9, 2000, the EC dismissed suggestions from two U.S. senators[17] that its merger review process discriminated against U.S. companies in favor of European firms.[18] The senators explained that they were troubled by the possibility that the EC's analysis and outcomes have been influenced in part by "pan-European protectionism rather than by sound competition policy."[19] The senators cautioned the commission to steer clear of "protectionist sentiments."[20] Less than a week after the date of the letter, on October 13, 2000, the EC approved France's Vivendi SA's $34 billion merger with Seagram Co. of Canada.[21] That deal was cleared with apparent ease, as opposed to the five-month probe by the EC concerning America Online's merger with Time Warner.[22]

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15. *See* Brandon Mitchener, *EU Approves Merger of AOL, Time Warner with Proviso*, WALL ST. J., Oct. 12, 2000, at A18.

16. *See id.*; *see also* William Drozdiak, *EU Approves Merger of AOL, Time Warner*, WASH. POST, Oct. 12, 2000, at E1 (noting that the EU officials said their action was not motivated by fears of American cultural domination, but rather cutting the ties "will prevent AOL from having access to Europe's leading source of music publishing rights, thereby eliminating the risk of dominance in the emerging markets for online delivery of music over the Internet and software-based music players").

17. *No Bias, European Watchdog Insists*, TORONTO STAR, Oct. 10, 2000, at E06 (explaining that the EC was responding to a letter from U.S. Republican Senator Mike DeWine of Ohio (chairman of the Senate's judiciary subcommittee on antitrust) and Democrat Senator Herb Kohl of Wisconsin (the subcommittee's Democrat)).

18. *Id*.

19. *Id*.

20. *Id.*

21. Brandon Mitchener et al., *EU Clears $34 Billion Merger Between Vivendi and Seagram*, WALL ST. J. EUR., Oct. 16, 2000, at 9.

22. *Id*. Senators DeWine and Kohl cited a recent story in which the chief executive of a major German record company said that Europeans are "a little afraid of Americans taking over," but unconcerned about Vivendi's acquisition of Seagram. Alec

In 1990, when the EC began to regulate mergers, of the twelve cases it considered, five involved U.S. companies.[23] By 1999, 129 U.S. companies were involved in the 292 mergers reviewed by the EC.[24] The pace of European mergers and acquisitions slowed in 2000 (due in part to a tougher regulatory climate).[25] However, the EC's policies must remain at the forefront of any merger discussions.[26]

Part II of this Comment discusses and analyzes how protectionism guided the development of the European Union and the formation of the European Merger Regulation. Part III discusses the how the Merger Regulation has functioned, including historical incidents of European protectionism, how European protectionist policy affects U.S. companies, and current shortcomings of the Merger Task Force. Part IV assesses the possible effects of proposed legislation currently under review in various legislative bodies in Europe. Part V looks at the need for solution in light of the protectionist atmosphere in Europe.

II. THE DEVELOPMENT OF THE EUROPEAN UNION

A. *From the European Coal and Steel Community to the European Commission*

The European Union is the result of a practice of cooperation

Klein & Peter S. Goodman, *Senators Warn Europe on Protectionism: Letter Says Opposition to Transatlantic Mergers Discriminates Against U.S. Firms*, WASH. POST, Oct. 6, 2000, at E3.

23. Roughton & Geewax, *supra* note 1, at K1.

24. *Id*.

25. Anita Raghavan, *Pace of European Mergers Slows: Regulations, Euro Make Deals Tougher*, WALL ST. J., Nov. 16, 2000, at C1 (noting that the number of European merger and acquisition deals announced from January to November of 2000 stood at 12,958, with a total value of $888.3 billion, well behind 1999's 13,590 deals valued at $1.2 trillion).

26. Minutes into a September 4, 2001 news conference announcing a merger of Hewlett-Packard and Compaq Computer Corp., executives from the companies were asked when they would "see Monti." D.C. Denison, *Super Mario EU Official, Fresh From Felling GE's Honeywell Bid, Looms as Key for HP-Compaq*, BOSTON GLOBE, Sept. 9, 2001, at G1.

and assimilation that began in 1951 among six countries.[27] The European Coal and Steel Community (ECSC), established in 1952, included the six founding countries and focused on combined price and output controls, investment subsidies, tariff protection, and competition rules.[28] The European Community was formed by the signing of the Treaty of Rome on March 25, 1957, thus creating the Common Market.[29] The six member countries aspired to build on the ECSC's success and use the organization to economically advance all of the members without sacrificing their own individuality, culture, or sovereignty.[30]

Article 2 of the European Community Treaty states the goals of the community:

> It shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an

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27. *The ABC of the European Union*, *at* http://www.europa.eu.int/abc-en.htm (last visited Nov. 1, 2001). Although historic precedents for economic integration can be traced back as far as Charlemagne, the devastation of Europe in World War II and efforts to rebuild were the major forces in bringing the original six European countries—Belgium, West Germany, France, Italy, Luxembourg, and the Netherlands—together to form the Common Market or European Community, the forerunner of the EU. RICHARD SCHAFFER ET AL., INTERNATIONAL BUSINESS LAW AND ITS ENVIRONMENT 81 (3d ed. 1996).

28. SCHAFFER, *supra* note 27, at 83; *see also* TREATY BETWEEN THE FEDERAL REPUBLIC OF GERMANY, THE KINGDOM OF BELGIUM, THE FRENCH REPUBLIC, THE ITALIAN REPUBLIC, THE GRAND DUCHY OF LUXEMBOURG AND THE KINGDOM OF THE NETHERLANDS INSTITUTING THE EUROPEAN COAL AND STEEL COMMUNITY, Apr. 18, 1951, 261 U.N.T.S. 140. On May 9, 1950, Robert Schuman, the French Foreign Minister, launched an idea to permanently end the risk of war between France and Germany over coal and steel resources. Thomas P. O'Toole, Comment,*"The Long Arm of the Law"—European Merger Regulation and its Application to the Merger of Boeing & McDonnell Douglas*, 11 TRANSNAT'L LAW. 204, 210 (1998). Schuman proposed steel and coal resources be placed under the jurisdiction of a High Authority. *Id*. He believed this High Authority would provide the basis for economic union, thereby establishing the first concrete instruments of a European federation indispensable for the safeguard of peace. *Id*. These efforts led to the ECSC. *Id*.

29. SCHAFFER, *supra* note 27, at 83; *see also* TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 297 U.N.T.S. 11 [hereinafter EEC TREATY].

30. SCHAFFER, *supra* note 27, at 83.

> accelerated raising of the standard of living and closer relations between its Member States.[31]

The goal of the European Community was the achievement of the free movement of people, goods, services, and capital and the eradication of the barriers to the establishment of business through the establishment of a single, integrated common market.[32]

However, as these ambitious goals were not realized, members of the European Community enacted the Single European Act (SEA) in 1987.[33] The SEA paved the way for further integration of the European Community, although leaders of the member countries remained divided in their vision of Europe.[34] Eventually, the member nation leaders met in Maastricht, the Netherlands and hammered out the historic agreement known as Maastricht Treaty,[35] which went into effect November 1, 1993.[36] The treaty has been described as having three pillars. The first is the expansion of the existing Treaty by

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31. EEC TREATY, *supra* note 29, art. 2.

32. SCHAFFER, *supra* note 27, at 83.

33. *Id*. at 85; *see also* SINGLE EUROPEAN ACT, *done* Feb. 17, 1986—Feb. 28, 1986 O.J. (L 169) 1 (1987) [hereinafter SEA]. The purpose of the SEA was to strengthen the EC institutions and enable them to act and thus to achieve the goals of the Treaty of Rome. SCHAFFER, *supra* note 27, at 85.

34. SCHAFFER, *supra* note 27, at 86 (noting that Great Britain saw a limited role for the EC and zealously guarded the autonomy of members, while other countries, notably Germany, pressed for a more unified Europe). This debate continues today as some members want the EU to move toward a federal system—a so-called European super state—while others insist it remain a looser grouping of sovereign states. Ray Moseley, *EU, Seeking to Expand, First Must Try to End Quarreling in Its Ranks*, CHI. TRIB., Dec. 6, 2000, News, 6.

35. TREATY ON EUROPEAN UNION, Feb. 7, 1992, O.J. (C 224) 1 (1992) [hereinafter TEU]. *See* TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, O.J. (C 340) 1 (1997) [hereinafter TREATY OF AMSTERDAM].These amendments were incorporated into the TEU, and the articles of the TEU were renumbered in EUROPEAN UNION: CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION AND CONSOLIDATED VERSION OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Oct. 2, 1997, 37 I.L.M. 56, 67 [hereinafter CONSOLIDATED TEU], incorporating changes made by TREATY OF AMSTERDAM, *supra*. Throughout the text, all article references (and the use of "EC TREATY") will be to the new renumbered articles that took effect May 1, 1999. Specifically, articles 85, 86, 90, 92 and 93 of the TEU are renumbered as articles 81, 82, 86, 87, and 88 of EC Treaty, respectively.

36. SCHAFFER, *supra* note 27, at 88.

bolstering the role of the Community and establishing a timetable and conditions for economic and monetary union in certain specific phases.[37] The second and third prongs address a common foreign and security policy and justice and home affairs.[38]

The Treaty of Rome, as amended by the Treaty on European Union, established five institutions to act on behalf of the Community—a European Parliament, a Council, a Commission, a Court of Justice, and a Court of Auditors.[39] The European Commission is the EU's competition law enforcement agency and the body that has the right to initiate legislation.[40] Presently, the EU has fifteen Member States and is looking to enlarge, possibly in eastern and southern Europe.[41]

B. *Development of the European Merger Regulation*

Articles 81 and 82 of the European Community Treaty[42] and the more recent Merger Regulation set forth the principal rules of competition.[43] Article 81(1) generally prohibits concerted market behavior that restricts or prevents competition within the Common Market.[44] Article 82 prohibits the abuse of a dominant position within the Market.[45]

The shortcoming of Articles 81 and 82 was a lack of express

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37. *Id*.

38. *Id*.

39. DERRICK WYATT & ALAN DASHWOOD, EUROPEAN COMMUNITY LAW 19 (3d ed. 1993).

40. *The ABC of the European Union, supra* note 27; William M. Hannay, *Transnational Competition Law Aspects of Mergers and Acquisitions*, 20 NW. J. INT'L L. & BUS. 287, 288 (2000).

41. *The ABC of the European Union, supra* note 27 (explaining that the fifteen Member Countries are Belgium, Germany, France, Italy, Luxembourg, the Netherlands, Denmark, Ireland, the United Kingdom, Greece, Spain, Portugal, Austria, Finland and Sweden).

42. EC Treaty, *supra* note 35, arts. 81, 82.

43. Hannay, *supra* note 40, at 288 (referring to Council Regulation (EEC) 4064/89, 1989 O.J. (L 395) 1, as amended by Council Regulation (EC) 1310/97, 1997 O.J. (L 180) 1 [hereinafter Merger Regulation]).

44. EC Treaty, *supra* note 35, art. 81(1).

45. *Id*. art. 82.

language applicable to corporate mergers.[46] Over time, the EC and the European Court of Justice succeeded in compensating for this deficiency by broadly interpreting articles 81 and 82.[47]

Attempts by the EC to enact merger control legislation date back to 1972, when negotiations began to solve the dissatisfaction with the way in which articles 81 and 82 dealt with mergers.[48] The Council of Ministers adopted Regulation 4064/89 on December 21, 1989[49] and it became effective on September 21, 1990.[50] This regulation was created to replace

46. O'Toole, *supra* note 28, at 212. The framers of the EC Treaty believed competition would be best preserved through regulation of mergers after the fact, rather than before. *See* Alessandro Bertolini & Francesco Parisi, *The Rise of Structuralism in European Merger Control*, 32 STAN. J. INT'L L. 13, 16 (1996). The framers viewed mergers as a critical step toward the integration of Member State's economies. *Id*. This view led to reduced concerns for the impact that mergers would have on the maintenance of competitive market structures. *Id*. Since the founders did not oppose the acquisition of market power through mergers, articles 81 and 82 were not written as primary instruments for the control of mergers. *Id*.

47. Bertolini & Parisi, *supra* note 46, at 17. The goal of articles 81 and 82 is to preserve competitive market structures. *Id*. The Commission and the Court of Justice interpreted these provisions to provide corrective, rather than preventive, measures for regulating mergers. *Id*. Given the size of the typical European firm, cost savings derived from the achievement of economies of scale often led to a presumption in favor of corporate mergers. *Id*.

48. O'Toole, supra note 28, at 215; *see also* William Elland, *The Mergers Control Regulation (EEC) No. 4064/89*, 3 EUR. COMPETITION L. REV. 111, 112 (1990) (noting the seven pressing reasons for the Merger Regulation: (1) article 82 could only be applied *ex post facto* as illustrated by the Commission's intervention in the British Airways takeover of British Caledonian; (2) exemption under Regulation 17 (implementing articles 85 and 86, renumbered as articles 81 and 82) could not apply indefinitely; (3) an exemption under Regulation 17 could not necessarily be retrospective, leaving the merger open to challenge in the domestic courts while it was being considered by the Commission; (4) the law pending the mergers regulation was confused and uncertain; (5) industry would be at the mercy of differing national rules in respect to cross-frontier takeovers; (6) it was necessary to make European industry more competitive with the American and Japanese conglomerates; (7) the 1992 programs made such a measure a major political objective).

49. O'Toole, *supra* note 28, at 216. The first draft merger regulation introduced by the European Commission in 1973 required unanimous approval from all Member States before becoming effective. The draft regulation was not well received by Member States and was blocked for over fifteen years primarily as a result of the Member States' reluctance to relinquish jurisdiction over mergers that could have local consequences. *Id*. at 215–16.

50. Merger Regulation, *supra* note 43.

articles 81 and 82 as the only instrument that applied to concentrations at the Community-wide level.[51]

During negotiations, however, it became clear that Member States had different ideas about how much control the Merger Regulation should possess over them.[52] Smaller states wanted a tough, low threshold regulation, as those countries had no effective merger controls in place and the Community mergers regulation would therefore have been of great assistance.[53] In contrast, the states with highly developed domestic regulatory control were reluctant to see their control of mergers transferred to a supranational organization.[54]

As a basic principle, if it is applicable, the Merger Regulation will preempt any national merger rules, i.e., the Merger Regulation provides "one stop shopping" for the approval of any given transaction.[55] This regulation requires prior notification be given to the Commission and control by the Commission of mergers, acquisitions, joint ventures, and other business combinations that fall within the scope of the Merger Regulation.[56] The EC has an initial thirty days to determine whether the transaction is subject to the Merger Regulation, and if it finds that it indeed is, the Commission has another four months to investigate and possibly invalidate the proposed concentration.[57]

The main conditions that must be fulfilled for EU merger

51. Rebecca Schoenfeldt, Comment, *Competition Laws of the European Union in the Face of the New Single Currency Market*, 33 J. MARSHALL L. REV. 715, 727 (2000).

52. *See* Elland, *supra* note 48, at 111; *see also* Michael Barnert, *EU Merger Control*, 13 INT'L L. PRACTICUM 4 (2000) (noting that the issue was so controversial that it took fifteen years before the regulation was adopted when progress toward completing the internal market and a new political environment provided impetus for its approval).

53. Elland, *supra* note 48, at 111.

54. *Id*.

55. Barnert, *supra* note 52, at 5.

56. O'Toole, *supra* note 28, at 216; *see also* SCHAFFER, *supra* note 27, at 704. The European Commission uses "concentration" as a term of art which designates all the operations resulting in one corporation taking control of another. Jean-Marc Le Bolzer, *The New EEC Merger Control Policy After the Adoption of Regulation 4064/89*, 14 WORLD COMPETITION L. & ECON. REV. 31, 32 n.6 (1990). However, because of its broad meaning, this article will use the term "merger" concurrently. *Id*.

57. Schoenfeldt, *supra* note 51, at 727.

control to apply are twofold.[58] First, the potential transaction must constitute a "concentration."[59] According to the Merger Regulation, "a concentration shall be deemed to arise when two or more previously independent undertakings merge or one or more undertakings acquire direct or indirect control of the whole or a part of one or more other undertakings."[60] Second, the turnover of undertakings concerned has to meet the turnover thresholds described in the Merger Regulation.[61]

The Commission can veto mergers involving companies with significant revenues in Europe or worldwide.[62] The threshold for review is worldwide annual revenues of 5 billion euros (about $4.5 billion at the current exchange) or European revenues of 250 million euros (about $225 million at the current exchange).[63] Meeting this threshold will give the EC power over the proposed concentration unless each of the participating organizations achieves more than two-thirds of its aggregate Community-wide turnover within a single Member State of the EU.[64]

EC and U.S. officials took steps soon after the Merger Regulation was adopted to clarify policies and promote "complementarity."[65] A formal cooperation agreement "to promote cooperation and coordination and lessen the possibility or impact of differences between the parties and their

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58. Barnert, *supra* note 52, at 5.

59. *Id*.

60. *Id*. (noting that the Merger Regulation aims to catch changes in control of companies).

61. *Id*.

62. Roughton & Geewax, *supra* note 1.

63. *Id*.; *see also* Merger Regulation, *supra* note 43, art. 1, para. 2. Current exchange rates based on Euro Foreign Exchange Reference Rates as of Oct. 18, 2001 (on the spot market) *at* http://www.ecb.int/home/eurofxref.htm. (last visited Oct. 18, 2001).

64. *See* Merger Regulation, *supra* note 43, art. 1, para. 2. "Turnover" refers to "the amounts derived from the sale of products and the provision of services." Commission Notice on Calculation of Turnover Under Council Regulation (EEC) No. 4064/89 on the Control of Concentrations Between Undertakings, para. 9, 1998 O.J. (C 66) 1, 4. In this paper, "turnover" and "revenue" are used interchangeably.

65. Robert Pitofsky, Chairman, United States Federal Trade Commission, EU and U.S. Approaches to International Mergers—Views from the U.S. Federal Trade Commission, Remarks at the EC Merger Control 10th Anniversary Conference, (Sept. 14–15, 2000) *available at* http://www.ftc.gov/speeches/pitofsky/pitintermergers.htm.

application of competition laws" was signed in 1991.[66]

III. MERGER REGULATION IN THE EUROPEAN COMMISSION: HISTORY OF PROTECTIONISM AND FUTURE OF UNCERTAINTY

A. Historical Incidents of European Protectionism

Nations tend to make competition law decisions based on what is good for the nation, often at the expense of good worldwide economic policy.[67] The main goal of competition policy in the European Union is not to protect competition, as it appears to be in the United States.[68] Rather, the primary goal of European competition policy is described in the purpose of the Treaty of Rome: to integrate the European community.[69]

The letter sent from two U.S. Senators in October 2000, was not the first time the EC was confronted with accusations that its policies were anti-American.[70] In mid-1981, the U.S. Congress tabled two bills seeking to block demands made by a foreign nation requiring an American company to supply confidential information to a foreign affiliate.[71]

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66. Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, U.S.-EU, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,504.

67. Fox, *supra* note 4, at 1803.

68. *See* Scott Morton, *Antitrust Laws in Countries Other than the United States*, *at* http://www.antitrust.org/law/EU/foreign.html (last visited Nov. 3, 2001) (noting that this goal stems in part from traditional European skepticism about the ability of competition to lead to an ideal allocation of resources; instead a more typical European view might be that competition will either not achieve a desirable objective, or will do so only at an unacceptably high social cost); *but see* Fox, *supra* note 4, at 1798 (noting that European competition law is based on an eclectic set of objectives: to integrate the common market, to protect firms from abusive domination, to provide openness and access, to level the playing field, to foster efficiency and competitiveness, and to serve citizens as consumers).

69. Morton, *supra* note 68, at I.B.; *see* EEC TREATY, *supra* note 29, art. 2.

70. *See supra* text accompanying notes 17–22.

71. JOHN ROBINSON, MULTINATIONALS AND POLITICAL CONTROL 34 (1983). The bills were proposed in response to the EC's crusade for greater corporate disclosure. *Id.* at 32. *See* H.R. 4339, 97th Cong. (1981) (directing the Securities and Exchange Commission to promulgate regulations protecting persons subject to U.S. jurisdiction, in appropriate circumstances, from the extraterritorial imposition of requirements to

The EC has gained importance as the chief regulator of economic matters within the fifteen-member European Union.[72] In the early 1980s, the EC expressed the view that the increasing grasp of multinational firms on the economic, social, and political life of the countries in which they operate gives rise to anxiety in areas of competition.[73] The EC saw corporate "bigness," or market power, as a political threat to European society at large.[74] Signs indicated that the EC dealt more harshly—or at least with less political restraint—with multinational companies controlled abroad than those of the homegrown variety.[75]

Even in recent years as the impact of antitrust law has declined in the United States, its importance has increased in Europe.[76] In the last decade, the Commission's Directorate-General IV (DG-IV)—the European Union's version of a combination of the Federal Trade Commission and the U.S. Department of Justice in antitrust enforcement matters—has prepared a number of regulations for adoption by the European Council of Ministers and has issued numerous decisions and exemptions.[77]

In 1998, the United States and the EC fought a highly politicized battle involving Boeing's acquisition of McDonnell

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disclose confidential business information by foreign nations); *see* S. 1592, 97th Cong. (1981) (proposing the "Protection of Confidential Business Information Act of 1981" that would have authorized the Attorney General to: (1) require any person subject to U.S. jurisdiction to give notice of any requirement imposed upon him by a foreign nation concerning the disclosure of confidential business information; and (2) order that the information required not be disclosed; it further proposed that no sanction for nondisclosure imposed by a foreign nation shall be enforceable in a U.S. court if an order of the Attorney General was promulgated).

72. Roughton & Geewax, *supra* note 1, at K1.

73. ROBINSON, *supra* note 71, at 74.

74. *Id*.

75. *Id*. at 94. For example, the vigor with which the EC was pursuing IBM in the early 1980's can be explained by "an industrial policy priority for creating a viable European computer industry which has seen leading data-processing companies—Siemens, ICL, CII-Honeywell Bull, Nixdorf—foregather regularly with European Commission policy officials in meetings that would have been improbable under the strict anti-collusionary laws of American antitrust." *Id*.

76. *See* SCHAFFER, *supra* note 27, at 696.

77. *Id*.

Douglas.[78] Although the EC eventually approved the merger, Boeing agreed to make several concessions.[79] Prior to the merger's approval, Congress passed a joint resolution indicating, "that any disapproval by the [EC] of the merger of the Boeing Company and McDonnell-Douglas would constitute an unwarranted and unprecedented interference in a [U.S.] business transaction that would threaten thousands of American aerospace jobs."[80] More recently, the EC arguably showed signs of protectionism by rejecting the proposed merger of New York's Time Warner and EMI Group while approving France's Vivendi SA's acquisition of Seagram Co.[81]

B. How European Protectionist Policies Affect U.S. Companies

In recent years, as the geographical focus of cross-border mergers has transferred to Europe, companies are attempting to strengthen product and geographical market positions in Europe.[82] U.S. firms, by virtue of their ownership benefits through economies of scale and their lengthy experience as multinationals, have been at the forefront of assimilating markets and production within the EU.[83]

Despite the booming merger and acquisition activity in Europe, there remains resistance to change, as the size and

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78. *See* Fiebig, supra note 6, at 235.

79. O'Toole, *supra* note 28, at 235; *see* Commission Decision of 30 July 1997 Declaring a Concentration Compatible with the Common Market and the Functioning of the EEA Agreement (Case No. IV/M.877-Boeing/McDonnell Douglas), Case No IV/M.877, 1997 O.J. (L 336) 16.

80. H.R. Con. Res. 117, 105th Cong. (1997) (enacted). The resolution further urged the President to take appropriate actions to protect U.S. interests, if necessary. *Id*.

81. *See supra* notes 21–22 and accompanying text.

82. Jim Hamill & Pam Castledine, *Foreign Acquisitions in the UK: Impact and Policy*, *in* INTERNATIONAL BUSINESS AND EUROPE IN TRANSITION 87, 87 (Fred Burton et. al. eds., 1996). In 1999, the value of mergers and acquisitions in Europe exceeded those in the United States. *Europe's Regulatory Muddles: A Single Market and a Single Currency Demand a Single Set of Financial Rules*, ECONOMIST, June 10, 2000, at 18. In 2000, European firms acquired more United States and Canadian companies than they did in 1999. *Mergers Snapshot/Cross-Border Deals*, WALL ST. J., Nov. 21, 2000, at C21. North American companies are buying fewer foreign firms, but European firms make up a greater percentage of those buys. *Id.*

83. NICHOLAS A. PHELPS, MULTINATIONALS AND EUROPEAN INTEGRATION: TRADE, INVESTMENT AND REGIONAL DEVELOPMENT 14 (1997).

global nature of the transactions seems to be too much for the Europeans.[84] That said, under the current system, national merger and acquisition authorities have an incentive to advance their own industrial policies in an attempt to increase their national welfare vis-à-vis other countries.[85] The European Community has an incentive to advance regional industrial policy[86] due to the political sensitivity of the EC.[87] These incentives could lead EC enforcement authorities to use merger control for the wrong reason: to protect and promote domestic industry.[88] Arguably, the merger of U.S.-based firms creates incentives for EC opposition.[89] By changing competition policy into a type of regional industrial policy, the merger enforcement authorities would no longer solely consider benefits to the global market as a whole; instead, they would shift focus to benefiting their relative economies.[90]

While the EC is certainly justified in investigating any merger that falls within the turnover requirements set out in the Merger Regulation, the only limiting issue may be the notion of comity.[91] When applying its own law, there is great incentive for a European State or the European Community to block a merger, even though it is good for the global economy.[92] The EC has the incentive to promote industry in the European Community by protecting European competitors.[93]

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84. Ashraf Laidi, *M&A Activity in the Eurozone*, DISMAL SCIENTIST, Mar. 30, 2000, *at* http://www.economy.com/dismal/dsp/article.asp?aid=580.

85. David Snyder, *Mergers and Acquisitions in the European Community and the United States: A Movement Toward a Uniform Enforcement Body?*, 1997 LAW & POL'Y INT'L BUS. 115, 116.

86. *Id.* at 116. "Industrial policy is shorthand for any economic or social concern, other than competition policy and efficiency, that influences antitrust law enforcement." *Id*. at 115 n.2.

87. *Id.* at 116.

88. *See id.*

89. *See id*.

90. *Id*.

91. *Id.* at 139. Such considerations did not, however, stop the European Community from scrutinizing the Boeing merger. *Id*.

92. *Id*.

93. *See id*. By blocking such mergers, the Commission can protect domestic companies' competitive position. The European Community can keep the jobs that other countries would gain through the merger and EC member states would retain the tax

Furthermore, the EC has jurisdiction over U.S. companies through the Merger Regulation.[94] Although the Merger Regulation does not speak directly to the issue of extraterritorial enforcement, the EC has invoked its jurisdiction in many recent cases.[95] Conveniently, there are no territorial requirements for jurisdiction. The Merger Regulation bases its jurisdiction solely on the fact that substantially large mergers will affect the European Community market, which in turn will have a significant effect on the European Community.[96]

The EC's exclusive reliance on turnover liberally expands the jurisdictional reach of the merger control regime.[97] The EC is forced to expend administrative resources on transactions that, by the Commission's own admission, have no potential effect on competition within the European Community.[98] Other merger control regimes, including the United States, rely on a combination of assets and sales to identify which transactions must be reviewed by authorities.[99] Finally, the scope of the merger control regime is expanded by not requiring any assets to be located in the jurisdiction.

Once the Commission has decided to evaluate a merger, this process is subject to considerable political pressures from Member States who may try to influence the Commission's decision.[100] Even though such social factors are not supposed to be considered under the Merger Regulation, it is impossible for the Commission to remain completely isolated from all political

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revenue from the domestic companies' operations. *See id*.

94. *See id.* at 122.

95. Thomas L. Greaney, *Not For Import: Why the EU Should Not Adopt the American Efficiency Defense for Analyzing Mergers and Joint Ventures*, 44 ST. LOUIS U. L.J. 871, 889 (2000).

96. Snyder, *supra* note 85, at 122.

97. Fiebig, *supra* note 6, at 239.

98. *See id*. (citing, *e.g.*, Commission Decision of 20 July 1998 Declaring a Concentration to Be Compatible with the Common Market (Case No. IV/M.1224–TPM/Wood Group), 1998 OJ (C 280) 4; Commission Decision of 30 June 1993 Declaring a Concentration to Be Compatible with the Common Market (Case No. IV/M.346–JCSAT/SAJAC), 1993 OJ (C 219); Commission Decision of 6 Oct. 1999 Declaring a Concentration to Be Compatible with the Common Market (Case No. IV/M.1689–Nestle/Pillsbury/Haggen-Dazs US), 1999 OJ (C 316) 9).

99. *See id*. at 239.

100. *See* Snyder, *supra* note 85, at 136.

pressure.[101] If, in fact, these considerations are taken into account, regulation of mergers and acquisitions is not as efficient as it should be.[102]

Intra-EU mergers, acquisitions, and cooperative ventures make possible a greater degree of cross penetration of European markets, and increases the ability of EU firms to compete against U.S. rivals by constructing pan-European strategies.[103] Consequently, the EU has recently attempted to encourage the formation of globally competitive EU multinationals through a combination of initiative, competition, and industrial policies.[104]

Getting a merger approved by the EC has been said to consist of two processes—legal and political.[105] The process involves both official and unofficial maneuvering.[106] For example, competitors of merging firms are given many opportunities to object to proposed deals, a practice that has evolved into intense commercial lobbying by firms attempting to make objections whose resolutions would be in their own self-interest.[107]

The political nature of the merger review process in Europe is evident in the fact that, unlike in the United States where a court has the power to break up a company, the EC acts as

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101. *Id*. In a similar way, the U.S. Federal Trade Commission and the Department of Justice are both politically influenced and thus use national industrial policy as a factor in their decisions as well. *Id.* The Attorney General and the FTC Commissioners are appointed officials. *Id*.

102. *See id*.

103. Mo Yamin, *Mergers, Acquisitions and Cooperative Ventures*, *in* INTERNATIONAL BUSINESS AND EUROPE IN TRANSITION 83, 83 (Fred Burton et al., eds., 1996).

104. *See* PHELPS, *supra* note 83, at 16.

105. Michael Learmonth, *Time Warner, EMI Sit by the Phone*, INDUSTRY STANDARD, Oct. 3, 2000, *available at* http://www.thestandard.com/article/0,1902,19062,00.html.

106. *Id*.

107. *See Europe's Merger Morass*, ECONOMIST, Sept. 23, 2000, at 73. *See also* Bill Kolasky, Letter to Editor, *Trust in Antitrust*, ECONOMIST, Oct. 28, 2000 (arguing that the European Commission relies too heavily on competitor complainants in blocking mergers or imposing onerous conditions designed to benefit competitors, not consumers; the problem is compounded by an absence of effective judicial oversight, which gives the commission virtually unchecked discretion).

"judge, jury, and executioner."[108] If the U.S. Federal Trade Commission wants to stop a merger, it has to go in front of a federal judge to do it.[109] There, merging parties have the opportunity to examine witnesses and present arguments in front of a court of law.[110] In Europe, mergers are subject to no such judicial procedure as EC staff members collect facts and act as judge and jury.[111] The fact that the same officials both investigate and adjudicate individual cases makes it difficult to ensure objectivity.[112]

The EC has considerable power; once it makes a decision about a merger, the only route of appeal is to the European Court of Justice, a process that could take up to two years.[113] This process is expensive and time-consuming, and by the time the appeal is heard, any deal that may have existed is effectively dead.[114]

Currently, Europe's takeover landscape is extremely varied at the Member State level.[115] If a transaction falls within the scope of the Merger Regulation, the EC has exclusive jurisdiction, and the merger is not subject to proceedings at the same time under national competition laws.[116] Transactions that fall below the Regulation's thresholds are subject to review under the merger control laws of Member States.[117] Whether a transaction falls under the EC's jurisdiction or an individual member nation's jurisdiction greatly affects the strategy

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108. Pete DuPont, Editorial, *Antitrust Cooperation Needed? No: Sharing with Europe Could Throw U.S. Economy Into Reverse*, SUN-SENTINEL (Ft. Lauderdale), Dec. 4, 2000, at 23A.

109. Learmonth, *supra* note 105.

110. *Id*.

111. *Id*.

112. *Europe's Merger Morass*, *supra* note 107, at 73.

113. Roughton & Geewax, *supra* note 1, at K1.

114. *See Competition Policy in the European Union*, CHEMICAL MARKET REP., Aug. 6, 2001, *at* http://www.findarticles.com/cf_0/m0FVP/6_260/77288051/p1/article.jhtml.

115. *See* Anita Raghavan, *In Europe, a New Storm Over Takeover Rules—Draft Law Faces Changes that Some Argue Make Mergers More Difficult*, WALL ST. J., Dec. 5, 2000, at A21.

116. Hannay, *supra* note 40, at 290.

117. *Id.*

companies will follow when planning a transaction.[118] For example, Gucci Group NV was able to fend off a takeover bid from LVMH Moet Hennessy Louis Vuitton SA by selling a 42% stake in itself to French retail group Pinault Printemps Redoute SA without shareholder consent.[119] In Britain, such a tactic would have required shareholder approval.[120]

As the standards for review at the Merger Regulation level are based on sales figures, and not territoriality, mergers that could conceivably have effect on the entire European community might be reviewed by one nation.[121] Although recently the Merger Regulation thresholds for review were raised allowing more mergers to qualify,[122] U.S. companies may face a variety of European national authorities if the merger fails to qualify under the Merger Regulation.[123] The increasing review by the

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118. *See, e.g.,* Raghavan, *supra* note 115, at A21 (noting that there is potential for an uneven playing field between the U.S. and Europe and within Europe).

119. *Id*. Note that the battle between Gucci Group NV and LVMH Moet Hennessy Louis Vuitton finally reached a settlement on September 10, 2001. *France: Corsican Autonomy Bill Passes; Other Developments*, FACTS ON FILE WORLD NEWS DIGEST, Dec. 18, 2001 at 1045A1. "Under the deal PPR would buy eight million Gucci shares from Vuitton, raising its 42% stake to 53.2%, and would buy Gucci's remaining shares by 2004." *Id.*

120. Raghavan, *supra* note 115, at A21.

121. *See supra* text accompanying notes 62–64.

122. Council Regulation 1310/97 Amending Regulation (EEC) No 4064/89 on the Control of Concentrating Between Undertakings, 1997 O.J. (L 180) 1 (amending article 1, para. 3 of the Merger Regulation, among others).

123. Hannay, *supra* note 40, at 290.

> Present day cooperation between national competition authorities works well with mergers but is surprisingly limited with respect to . . . anti-competitive practices. . . . It seems plain . . . that there is nothing approaching the level of interstate cooperation that has been achieved in the United States. Specifically, the U.S. National Association of Attorneys General ('NAAG'), established in 1997, has no counterpart in Europe. . . . The NAAG holds a meeting concerning management issues for all Attorney Generals each December and convenes for two full membership meetings each spring and summer. It organizes federal-state workshops, sponsors seminars and conferences, publishes reports and monographs on a wide range of topics, and serves as a liaison with the federal government, and assists State Attorneys with appellate advocacy. The NAAG thus provides a forum for states to discuss common issues, coordinate, and assist in investigations and enforcement of antitrust prohibitions. Its Multi-state Antitrust Task Force, a permanent subcommittee of the Antitrust Committee of NAAG, coordinates

EC involving mergers of companies solely operating in the United States will remain a cause of concern for U.S. businesses.

C. Deficiencies of European Commission's Merger Task Force

The Merger Regulation begins by requiring notice be given to the EC of any business combination falling within the scope of the regulation.[124] The relevant product and geographic markets must be defined by the EC.[125] After making those determinations, the focus shifts to the market structure and what impact the proposed business combination will have on competition.[126] This usually consists of consideration of both market share and market concentration.[127] Next, the EC reviews a number of other factors, including both barriers to entry and efficiencies to be gained or lost from the business combination.[128] If the EC rules that the merger is anticompetitive, it most often enforces this decision through some kind of settlement with the parties.[129] A settlement would generally require some kind of divestiture or other competitive covenant.[130]

Increased scrutiny has been applied to the EC's Merger Task Force, an organization set up ten years ago to scrutinize big mergers and was "given near-absolute power to make or break them."[131] Merger officials in the EC are not accountable for their decisions and a firm's only resort is via the European Court of

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> multi-state investigations and litigation. If EU national competition authorities had a similar permanent body through which to coordinate actions, share costs, facilitate investigations, and assist in enforcement, transnational enforcement would have arrived. Regional cases that encompass several Member States could be addressed effectively by national cooperation.

Ian Forrester, Modernization of EC Competition Law, 23 Fordham Int'l L.J. 1028, 1050–52 (2000).

124. Merger Regulation, *supra* note 43, art. 4.

125. Snyder, *supra* note 85, at 124–25 (citing Henriette K.B. Andersen, *EC Merger Control Regulation as Applied in de Havilland Case*, 7 N.Y. INT'L L. REV. 25, 30–32 (1994)).

126. *Id*. at 125.

127. *Id*.

128. *Id*.

129. *Id*.

130. *Id*. at 124.

131. *Europe's Merger Morass*, *supra* note 107, at 73.

Justice, "a two-year marathon with uncertain prospects."[132] Monti has even said that he thinks the European merger review system is "stronger" and "more effective" than the Unites States' because its final decisions are "not dependent on a court."[133]

The theory of "collective dominance" has been embraced by Monti and is often at the heart of the EC's approach to mergers.[134] Collective dominance assesses whether one company or a group of companies can effectively control a market and thereby potentially harm consumers.[135] Determining whether collective dominance exists requires extensive market analysis and may be beyond the capabilities of the Merger Task Force because the group has limited resources and imposes rigid timetables.[136] Monti has stepped up the pace, but with a staff of around eighty investigators, it is doubtful his Merger Task Force has the necessary size or expertise to accurately assess the implications of so many cross-border deals of such huge complexity.[137] Although Monti must pick his shots carefully, he and the Task Force have "plunged ferociously into many of the world's biggest and most complex deals."[138]

Monti has issued public warnings that today's business combinations are becoming more difficult to approve.[139] Any flexibility Monti has for pursuing new priorities will depend, to a great extent, on having sufficient staff.[140] Here the omens are not good.[141] The amount of significant cross-border mergers requiring the commission's attention has been increasing

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132. *See id*.

133. Raghavan & Mitchener, *supra* note 10, at 4.

134. *See Europe's Merger Morass*, *supra* note 107, at 73.

135. *Id*.

136. *Id*.

137. *See id*.

138. Edmund L. Andrews, *Why U.S. Giants Are Crying Uncle*, N.Y. TIMES, Oct. 11, 2000, at W1.

139. Brandon Mitchener, *Does EU Apply Old Thinking to New Deals?*, WALL ST. J., May 31, 2000, at A21. Mitchener quotes Monti as saying, "As deals grow bigger and more complex, there may be cases when it is impossible to obtain the necessary undertakings so as to eliminate the concerns of consumers." *Id*.

140. *Super Mario*, *supra* note 9.

141. *Id*.

exponentially,[142] as both the European and international business communities adjust to the single European market, the euro, and the internet and other new technology.[143] Additionally, the accession of new member countries and possible further integration of European markets will surely increase the number of mergers the EC will be responsible for reviewing.[144]

As the size and complexity of transactions increase, the 250 million euro threshold Community turnover will be satisfied more often and the likelihood that the existing two-thirds rule would apply will decrease.[145] Meanwhile the EC's resources have scarcely changed[146] and it appears doubtful the size of the Task Force will increase any time soon.[147] Some companies say the EC's time and resource pressures, along with the involvement all fifteen EU governments in its decisions, create the impression that local regulators would rather block a deal—especially if it involves non-EU companies—than approve the deal.[148]

IV. PROPOSED CHANGES TO THE EUROPEAN COMMISSION'S POWERS AND THEIR RAMIFICATIONS

The European Conference held in December 2000 was the most momentous conference in nearly a decade.[149] As the European Union prepares for an expansion—possibly up to twenty-seven or more members—the internal structures of the

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142. *Id.* The number of corporate deals being scrutinized by the European Commission is rising steadily. Accounting and consulting giant PricewaterhouseCoopers predicted that the Commission would consider 347 cases in 2000 (3.1 % of all European merger agreements). That was up from 118 (1.7 % of all European merger agreements) in 1995. Juliana Ratner, *PwC Warns on Mergers*, FIN. TIMES (London), Nov. 22, 2000, at 20.

143. *Super Mario*, *supra* note 9, at 78.

144. Barnert, *supra* note 52, at 7.

145. *Id*.

146. *Super Mario*, *supra* note 9, at 78.

147. *See Europe's Merger Morass*, *supra* note 107 (noting that Monti has called for more resources but "there is no sign he will get them quickly").

148. Brandon Mitchener, *EC Regulators Leave Deal Makers Bitter: WorldCom-Sprint Rejection Fuels View U.S. Firms Don't Get a Fair Shake*, WALL ST. J., June 29, 2000, at A21.

149. Moseley, *supra* note 34, at News, 6.

European Union need to be updated "to accommodate a larger, less manageable club."[150] Several ongoing debates have recently become heated: the amount of power the individual nations are willing to yield to the European Union, how large the EC should be, how its Member States should be chosen, and how each Member State should be represented.[151] In particular, the EC's policy for reviewing mergers has come under intense scrutiny.[152]

Recently, the EC proposed changes to the overall structure of the Merger Regulation.[153] These plans could hinder the ability of U.S. companies to expand globally because there would be increased potential for unnecessary burdens on international economic activity as duplicative or conflicting regulations will increase risks to companies and discourage foreign investment.[154]

Proposals that have been presented with respect to merger activities in Europe include Commissioner Monti's proposed overhaul of the European Union's antitrust powers[155] and efforts by MEPs[156] to effectively end U.S. firms' hostile bids for EU companies.[157]

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150. *See id.*

151. *See id.*

> At present the fifteen-member EU has twenty commissioners, each charged with a specific responsibility such as foreign affairs and social welfare. The five biggest nations each choose two commissioners and the rest choose one. . . . Big nations are willing to give up one commissioner each if they can get more voting strength. Rather than have a twenty-seven nation EU with twenty-seven or more commissioners, they would like to reduce the commission to just twelve members.

Id. Smaller nations, however, are proposing one commissioner per nation, however unwieldy that might be. *Id*.

152. *See Europe's Merger Morass*, *supra* note 107.

153. *See* Brandon Mitchener, *Trustbusting Dreams: The EU Competition Chief Covets Breakup Power Wielded Across the Atlantic*, WALL ST. J., Oct. 20, 2000, at A15; *see infra* notes 154–57 and accompanying text.

154. *See* Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT'L. L. 478, 482 (2000).

155. *See* Mitchener, *supra* note 153, at A15.

156. MEP stands for "Members of the European Parliament." *See Overview of the European Parliament*, *at* http://www.europarl.eu.int/presentation/default_en.htm (last visited Jan. 13, 2001).

157. *See* Deborah Hargreaves, *Euro-MPs Deal Blow to Takeover Law*, FIN. TIMES (London), Dec. 14, 2000, Europe, at 10.

A. The European Commission's Proposed Increased Powers

In many ways, EU antitrust powers are lacking when compared to those of the Department of Justice and Federal Trade Commission.[158] Commissioner Monti has compensated for this shortcoming by stepping up merger reviews and by seeking to increase his organization's powers.[159] As noted above, Monti has proposed an overhaul of the European Union's antitrust enforcement powers.[160] In a news conference publicizing the release of the draft law, Monti indicated the reforms would allow the EC to strengthen fines for certain infringements of EU competition law.[161] Currently the EC can conduct searches of company premises for evidence that would point to monopoly or cartel activity; Monti would have them conduct raids in private homes and offices as well.[162] This increase in power could seriously affect the EC's merger review process, because the Commission staff conducts its own investigation by both collecting facts and acting as judge and jury.[163]

More importantly, the draft includes the power to force divestures or even break up companies that abuse their power.[164] The proposal is not specific to European countries and this power could apply to any company with significant market power in Europe.[165] Currently, unlike the U.S. Justice Department, the EC does not have the power to split up a company that is violating antitrust laws.[166] Hence, the EC appears to have good reason for taking a stringent stance on mergers: it cannot undo them.[167] Monti and the EC team believe they have to be more vigilant about monitoring proposed

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158. Matthew Freedman, *Busting Borders*, DISMAL SCIENTIST, Oct. 5, 2000, *at* http://www.economy.com/dismal/dsp/article.asp?aid=841.

159. *Id*.

160. Mitchener, *supra* note 153, at A15.

161. *Id*.

162. Freedman, *supra* note 158; Mitchener, *supra* note 155, at A15.

163. Learmonth, *supra* note 105; *see also supra* text accompanying notes 108–12.

164. Mitchener, *supra* note 153, at A15.

165. *Id*.

166. Raghavan & Mitchener, *supra* note 10, at 1.

167. *See id*.

mergers to head off antitrust concerns.[168]

If the EC also gains the power to "break up" companies due to monopolistic practices, it will be interesting to see how the EC plans to conduct "searches" of companies with no assets in Europe, or even individual's homes. Would the Commission simply be able to issue a search warrant based on its own findings? The lack of a system of checks and balances would be worrisome to say the least.[169]

While these proposed amendments are at least two years from adoption, and they require the blessing of the European governments and the European Parliament,[170] U.S. companies have reason to be worried.

B. The European Parliament's Anti-takeover Legislation

Recently, several corporations in the European Union have faced hostile takeover attempts.[171] Some commentators think that "the introduction of the 'euro' . . . has inspired a new form of capitalism . . . that includes the use of 'previously foreign techniques,' such as the hostile takeover."[172]

On December 13, 2000, the European Parliament approved controversial amendments to a long-awaited takeover directive that, for all intents and purposes, could end hostile bids in the European Union.[173] These changes "are certain to open the legislation to months of political haggling" and the possible defeat of the directive altogether, even though it has survived eleven years of debate.[174] The amendments appeared to represent compromises and trade-offs between a wide range of political interests.[175] The parties on the left attempted to step up protection of employees during takeovers and have pursued

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168. *See id*.

169. *See* Mitchener, *supra* note 153, at A15.

170. *See id*. (noting that companies and lawyers have long criticized the seemingly unchecked power of the EC in many facets of EU competition law).

171. *See* Schoenfeldt, *supra* note 51, at 717.

172. *Id*. at 717–18.

173. Hargreaves, *supra* note 157, at 10.

174. Victorya Hong, *EU Takeover Changes Approved*, THEDEAL.COM, Dec. 14, 2000, *at* http://www.thedeal.com.

175. *Id.*

amendments such as one that compels targets to act in the interest of safeguarding jobs.[176] Center-right parties have increased their support for changes that would assist in protecting national industries from foreign hostile takeovers.[177] These changes have been called "bad for Europe."[178]

Klaus-Heiner Lehne, a German Christian Democratic MEP who was concerned that EU companies should have the chance to defend themselves against hostile bids from the United States, put many of the changes forward.[179] The amended law includes a "poison pill" provision that would allow the corporation's directors and officers to block hostile takeover bids without consulting shareholders.[180] This poison pill provision, which has been called a loophole by some, would allow target companies to evade a rule mandating shareholder approval if the target obtained approval from competent national supervisory authority.[181] However, the provision contains a clause giving employees an advance say in takeover bids, which appears to conflict with insider trading rules, and would make it much harder to restructure under-performing firms.[182]

The poison pill has become the mainstay of many U.S. firms' defensive tactics as it stops a hostile tender offer and does not require shareholder approval.[183] Such tactics have been successfully used by many U.S. companies to ward off takeover

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176. *Id*.

177. *Id*.

178. *Id*.

179. Hargreaves, *supra* note 157, at 10. The amendments were added by German MEPs under intense pressure from German business groups to erect barriers after the failure of the Dusseldorf industrial giant, Mannesmann AG, to block a hostile takeover by Vodafone Group PLC in 2000. Ambrose Evans-Pritchard, *New Law Makes Hostile Bids "Impossible,"* DAILY TELEGRAPH (London), Dec. 14, 2000, at 39.

180. Evans-Pritchard, *supra* note 179, at 39.

181. Hong, *supra* note 174.

182. Evans-Pritchard, *supra* note 179, at 39.

183. RONALD J. GILSON & BERNARD S. BLACK, THE LAW AND FINANCE OF CORPORATE ACQUISITIONS, 10 (2d. ed. Supp. 1999) (excerpting a memorandum explaining the operation of this technique, written by Wachtell, Lipton, Rosen & Katz, the law firm that originally devised it in the 1980s). "A poison pill is a plan designed to make a threatened takeover prohibitively expensive by issuing huge amounts of stock." Raghavan, *supra* note 115, at A21.

bids.[184] A substantial majority of Fortune 500 corporations have adopted poison pill plans, and even those that have not, could do so if a hostile bid is on the horizon.[185]

Despite the fact that U.S. companies can adopt these defensive measures without shareholder approval, these measures do not come into play as much because most takeovers are friendly.[186] In the case of unsolicited, hostile offers, most boards ultimately cave in to shareholder pressure and dismantle their anti-takeover defenses.[187] Would such shareholder pressure exist to force a European company to put down its guard for a U.S. hostile bidder? The politics of a cross-border merger may play differently.

Although the European Parliament seems to be simply adopting the potential use of a tool that U.S. companies already enjoy, reaction has been divisive.[188] While the European Commissioner for the Internal Market, Frits Bolkestein, indicated that this proposal allows management to act "to defend their own, potentially narrower interests rather than being obliged to act in the interests of the target company's shareholders as a whole."[189] Christopher Bright, head of European competition and regulation at Clifford Chance LLP in London, argued that the changes "will put the clock back by a decade and frustrate the fundamental goal of the EU to create a single market in takeovers."[190]

It is commonly believed that this proposed anti-takeover amendment will force the legislation into a process known as conciliation, which will bring Parliament and EU member countries together to come to a compromise.[191] The EC, the

184. Raghavan, *supra* note 115, at A21 (noting that such large multinational corporations Pennzoil Co. and Wallace Computer Services, Inc. have successfully used the poison pill as a takeover defense).

185. GILSON & BLACK, *supra* note 183, at 10.

186. Raghavan, *supra* note 115, at A21. A friendly takeover is one in which the transaction is a cooperative effort between the acquiring and the target company. GILSON & BLACK, *supra* note 183, at 1009.

187. Raghavan, *supra* note 115, at 21.

188. *See* Hong, *supra* note 174.

189. *Id*.

190. Raghavan, *supra* note 115, at A15.

191. Hong, *supra* note 174.

European Union's executive agency and the body in charge of proposing legislation, is the mediator for such procedures.[192] The European Council of Ministers[193] is expected to reject the changes, as the Council wants to foster competitiveness and consolidation of Europe's industry, and this amendment would create barriers to mergers.[194] Once rejected by the Council of Ministers, the directive will undergo the conciliation process, which could last up to four and one-half months.[195] If the EC fails to broker a deal between European Union governments and parliament, the measure will drop, meaning the EU will have to start from scratch in drafting a new one.[196] This would mean throwing away "more than ten years' worth of work . . . . The European economy would have to pay the opportunity cost . . . of being unable to restructure."[197] A stalemate would be disastrous: the hodgepodge of national codes that currently exists across the fifteen-member European Union would remain in place.[198]

Additionally, MEPs rejected a proposal that would have instituted more clarity into the compromise text reached among EU governments.[199] The amendment would have specified the lead regulator in a hostile bid, while the current text calls for shared responsibility among regulators regarding jurisdiction for a cross-border bid—a measure that those in the financial community deem unworkable.[200]

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192. *Id*.

193. The Council is essentially the legislative branch of the EU and it is composed of the EU Ministers of every member state). Matthew H. Wexley, Note, *The Impact of Sweden's Accession into the European Union on Its Social and Labor Policies*, 4 CARDOZO J. INT'L & COMP. L. 189, 192 (1996).

194. Hong, *supra* note 174.

195. *Id*.

196. *See* Hargreaves, *supra* note 157, at 10.

197. Hong, *supra* note 174 (quoting Bolkestein, the EU's internal markets commissioner). Bolkestein further noted that "the amendments wreck a ten-year effort to develop takeover rules aimed at restoring Europe's economic dynamism." Evans-Pritchard, *supra* note 179, at 39.

198. Paul Meller, *Europe Move on Hostile Takeovers Is Faulted*, N.Y. TIMES, Dec. 14, 2000, at W1.

199. Hargreaves, *supra* note 157, at 10.

200. *Id*.

V. PROPOSED SOLUTIONS FOR A THORNY PROBLEM: ARE THEY CURRENTLY ACHIEVABLE?

Many observers agree that there has been substantial convergence in both the method and content of merger enforcement in the EC and the United States, and significant progress has been made with regard to coordination and cooperation between the two enforcement authorities.[201] Late in 2000, the Chairman of the Federal Trade Commission indicated, "it is hard to imagine how day-to-day cooperation and coordination between enforcement officials in Europe and the United States could be much improved."[202]

However, even perceived European protectionism and negative publicity could cause an unfortunate reaction among U.S. public opinion, antitrust regulators, and key policymakers that would be contrary to the goal of free trade and open markets.[203] There are no winners with protectionism. Protectionist measures are not beneficial to Europe, as European industry cannot compete in world markets if it is fenced in by protectionist measures.[204]

An atmosphere of uncertainty is not beneficial for any multinational company; the goal of any proposal for merger review should be to increase the confidence of business leaders. But business leaders complain that there is too much uncertainty and a lack of international coordination in the current merger review system.[205]

What are multinational companies supposed to do if they get approval in the United States, but not in Europe (or vice versa)?[206] Although high profile, highly politicized cases such as

201. Pitofsky, *supra* note 65.

202. *Id*.

203. *See* Klein & Goodman, *supra* note 22, at E3.

204. Hong, *supra* note 174.

205. *See* Jaret Seiberg, *World Wide Merger Rules Spread*, May 7, 2001 *at* http://www.thedeal.com (arguing that regulating cross-border mergers is becoming more complex as more countries are requiring premerger notifications and there is little convergence in the type of information they want).

206. *See* Fiebig, *supra* note 6, at 233–35 (noting the potential public and private benefits of an international merger control regime and that the controversy between the United States and the European Union over antitrust approval of the Boeing/McDonnell

that involving The Boeing Company and McDonnell Douglas Corporation have arisen, they are the exception, not the rule.[207] Some disagreement in antitrust enforcement is inevitable, and even good-faith efforts at competition enforcement by one polity will be interpreted by some people in the other as strategically motivated.[208] However, inescapable disagreement does not necessarily mean there is a problem in need of a solution.[209]

Misuse of national competition law has led to efforts to establish a worldwide antitrust code.[210] The EC has suggested that the Member States of the World Trade Organization (WTO) agree on a binding competition code.[211] This idea has been rejected by the United States, which has in turn proposed increased bilateral cooperation between national competition authorities and continued study of the issue.[212] Additionally, other countries would probably reject the concept of merger review at a supranational level unless they were convinced that the supranational authority would protect their narrow interests.[213] In particular, anti-takeover issues have differing

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Douglas merger is often cited to support arguments in favor of the creation of such a regime).

207. *See* Tarullo, *supra* note 154, at 481. The Boeing-McDonnell Douglas merger was highly unusual and such conflicts are doubtful to arise regularly. *Id.* In fact, "on most premerger reviews, European and American antitrust authorities work closely together." *Id*. With respect to the Boeing merger, it is important to remember that in the end both the United States and the EC concluded that the merger itself did not deserve to be blocked. Pitofsky, *supra* note 65. Additionally, a top Department of Justice official recently indicated that the United States might be willing to defer to foreign regulators on some multinational mergers. Jaret Seiberg, *DOJ Might Defer to Foreign Antitrust Agencies*, Oct. 14, 2000, *at* http://www.thedeal.com. Creating a global competition forum for regulators "would increase cooperation and trust among antitrust agencies worldwide." *Id*. (quoting Douglas Melamed, acting assistant attorney general for antitrust at the Justice Department).

208. *See* Tarullo, *supra* note 154, at 481.

209. *Id*. at 481–82.

210. Snyder, *supra* note 85, at 116; *see International Antitrust Code Will Be Studied by GATT Members,* 65 Antitrust & Trade Reg. Rep. (BNA) No. 1628, at 259, 259 (Aug. 19, 1993) (noting that one such antitrust code was proposed by the International Antitrust Code Working Group).

211. Tarullo, *supra* note 154, at 478.

212. *Id*.

213. *See* Douglas H. Ginsburg & Scott H. Angstreich, *Multinational Merger Review: Lessons From Our Federalism*, 68 ANTITRUST L.J. 219, 225 (2000).

ramifications on the international scene. Principles of comity that may cause domestic corporations to avoid making hostile bids against one another may not arise internationally. Without such restraint, the "poison pill" could become widely used in international transactions, stifling economic moves that would be good for consumers and the world economy.

While the creation of some type of international code is a worthy goal, it is less important than creating uniform enforcement.[214] In 1993, the then-head of the Directorate IV for Competition Policy stated, "when we talk about convergence, it's probably more important to talk about procedures than substantive law to make sure the policies are the same . . . ."[215] In 2000, both Monti and U.S. Department of Justice antitrust official Joel Klein recommended separately the formation of "a committee to examine ways to establish sweeping, non-binding standards that would harmonize the myriad procedural regulations governing mergers throughout the world."[216]

However, the Chairman of the Federal Trade Commission recently indicated that even procedural convergence might not be easy to achieve: "Procedures in merger cases reflect the nature of judicial and administrative structures in each jurisdiction. As these structures differ, therefore, so do the procedures. As these enforcement structures often apply to enforcement beyond the realm of merger control, they are difficult to change."[217] Coordinating international reviews of megamergers is a problem that will not become any easier as

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214. Snyder, *supra* note 85, at 116.

215. *Id*. (quoting *Conferees Address Harmonization of U.S., EC Competition Regimes*, 65 Antitrust & Trade Reg. Rep. (BNA) No. 1635, at 499 (Oct. 14, 1993)).

216. Victorya Hong & Josh Karlen, *Klein Pushes Global M&A Rules*, Sept. 14, 2000, *at* http://www.thedeal.com.

> The body would lack the power to enforce the guidelines, said Klein, who conceded that nations' sovereignty concerns would prevent accession to binding rules. But the body would seek to streamline merger procedures such as filing requirements and would attempt to set uniform time limits on regulators' rulings to provide certainty and efficiency for a rising wave of companies involved in alliances beyond national borders.

Id.

217. Pitofsky, *supra* note 65.

deals grow larger[218] and national competition authorities feud both internally and externally. Additionally, while Monti was able to build a cooperative relationship with the U.S. Justice Department and the Federal Trade Commission under President Clinton,[219] whether this relationship continues under President Bush remains to be seen.

VI. CONCLUSION

The extent to which concentrations should be reviewed at the European Community, as opposed to the national level, remains controversial. As long as Member States cannot agree on what and how much authority the European Union should have, its authority will be fraught with chaos. Countries with effective competition policies in place that serve their own interests will be reluctant to relinquish sovereignty over competition decisions (in particular merger approval decisions) to a supranational body.[220] Smaller Member States want the structure and clout that come with being a member of the European Union and equal voting strength within the EC.[221] EU hopefuls, already impatient due to the delays in the application process, "are becoming disillusioned and losing their appetite for membership.[222]

The fifty states of the United States embody "a unique laboratory of experimentation for federal policy."[223] Could the fifteen Member States of the European Union, each with its own interests and competition laws, operate this way? There is not a chance. The United States took recently settled colonies and politically united them, laying the foundation for future

218. Roughton & Geewax, *supra* note 1, at K1 (quoting Stephen Axinn, a prominent New York antitrust lawyer).

219. *See* Mario Monti, *The Next Step*, Speech at the Fordham Corporate Law Institute Conference (Oct. 30, 2000), excerpt, *at* http://www.thedeal.com.

220. *See* Fiebig, *supra* note 6, at 245–46.

221. *See* Moseley, *supra* note 34, at News, 6 (discussing the European states' controversy over the allocation of voting power).

222. *Id*. (noting that while three-fourths of Czechs were enthusiastic about joining the European Union in the early 1990s, recent polls show that little more than half favor the idea today).

223. Spencer Weber Waller, *Bringing Globalism Home: Lessons From Antitrust and Beyond*, 32 LOY. U. CHI. L.J. 113, 136 (2000).

economic cooperation.[224] The European Union, on the other hand, faces the challenge of starting from "the opposite direction: beginning with economic cooperation and moving into political cooperation and possible unification."[225]

Decisions in business combination cases have significant political value.[226] Until feuding within the EC ends and both Member States and the European Union give up their protectionist policies, businesses within the United States will be forced to sit on the sidelines, or risk a lengthy, politically charged process. If the European Union cannot agree on a unified merger policy, how can the United States or any other country even begin to think about forming a supranational merger review process that involves super-powers from around the world? The uncertainty surrounding the future of the EC's power and the merger regulations in Europe, combined with any perceived pan-European activism by the EC, will undoubtedly continue to have a chilling effect on economically beneficial international merger activity.

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224. SCHAFFER, *supra* note 27, at 82.

225. *Id.*

226. Fiebig, *supra* note 6, at 246 (noting that such decisions can be used to impose costs on companies from outside a politician's jurisdiction or prevent unemployment associated with the downsizing that almost invariably follows a merger).

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