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Judicial Interference: Redefining the Role of the Judiciary within the Context of U.S. and E.U. Merger Clearance Coordination

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NOTES

Judicial Interference: Redefining the Role of the Judiciary within the Context of U.S. and E.U. Merger Clearance Coordination

ABSTRACT

In December 2003, Sony and Bertelsmann AG (BMG) sought approval from the Federal Trade Commission and European Commission to effectuate a joint venture between the two companies. Remarkably, almost two years after both antitrust authorities had cleared the Sony-BMG joint venture, the Court of First Instance annulled the European Commission's decision to approve the transaction. This groundbreaking decision by the Court of First Instance has the potential to undermine coordination efforts between antitrust authorities in the United States and the European Union, as well as to frustrate the predictability and efficiency that businesses need in merger regulation. Using the regulatory review of the Sony-BMG transaction as a starting point, this Note examines judicial review of merger clearance decisions in the United States and the European Union. The Note then suggests that judicial standards of review should recognize successful multinational coordination as a reason to defer to antitrust authority decisions and require increased transparency to facilitate such review.

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I. INTRODUCTION

In December 2003, Sony and Bertelsmann AG (BMG) announced a proposed joint venture.[1] In what could be considered a success story in bilateral coordination, the Federal Trade Commission (FTC) and European Commission (Commission) worked closely together during their investigations and came to a uniform result: both granted clearance to Sony and Bertelsmann in July of 2004.[2] However, upon petition by Sony-BMG competitors in the European Union, the Court of First Instance (CFI) annulled the Commission decision two years after it was handed down.[3] The annulment was the first of its kind; the CFI had never annulled a Commission merger clearance

1. Press Release, Bertelsmann AG and Sony Corporation Agree on Music Merger (Dec. 12, 2003), *available at* http://www.sony.net/SonyInfo/IR/news/2003/qfhh7c000000avs4-att/bertels.pdf.

2. Commission Decision 2005/188/EC of 19 July 2004 Declaring a Concentration Compatible with the Common Market and the Functioning of the EEA Agreement, 2005 O.J. (L 62) 30, ¶ 36 (EC) [hereinafter Commission Decision 2005/188/EC of 19 July 2004]; Press Release, Federal Trade Commission, FTC Closes Investigation of Joint Venture Between Bertelsmann AG and Sony Corporation of America (July 28, 2004), *available at* http://www.ftc.gov/opa/2004/07/sonybmg.htm; *Sony, BMG Merger Receives Green Light*, ABC NEWS (Austl.), July 29, 2004, *available at* http://www.abc.net.au/news/stories/2004/07/29/1164358.

3. Press Release, The Court of First Instance Annuls the Decision Authorising the Creation of Sony BMG (July 13, 2006), *available at* http://curia.europa.eu/en/actu/communiques/cp06/aff/cp060060en.pdf.

decision.[4] Through the groundbreaking exercise of its annulment authority in this merger matter, the CFI struck down regulatory approval of a merger almost two years after the deal's completion, a scenario that is undesirable from the point of view of the regulated entities.[5] The events unfolding in the Sony-BMG case beg one question: is there a way to prevent judicial review in Europe from frustrating attempts at coordination between antitrust authorities across the Atlantic? If so, is there a way to reconcile the two systems to further legitimize the goal of coordination?

This Note answers both questions in the affirmative. It compares judicial review of merger clearance in the United States and Europe, using the Sony-BMG joint venture as an instructive example of how the allowance of judicial review after coordination between European and U.S. antitrust authorities has the potential to undermine such attempts at transatlantic coordination. Part II of this Note discusses the background of the Sony-BMG joint venture, the non-reviewability doctrine applicable to FTC decisions in the United States, judicial review of Commission decisions in the European Union (E.U.), and standing issues relevant to both. Part III discuses the importance of transnational coordination, explains the divergence between the European model of reviewability and the U.S. model of non-reviewability, and reveals problems of deference on the European side and transparency on the U.S. side that frustrate coordination attempts. Part IV offers a solution to move towards sensible and workable coordination of competition law in the U.S. and E.U. To give credence to these values, this Note posits that both the U.S. and European judicial standards of review should reflect the fact that successful coordination on a multinational level is itself reason to defer to antitrust authority decisions. Specifically:

(1) both the Commission and the FTC should be required to make any relevant information about coordination on a transnational level public in its decisions;
(2) the 1998 cooperative agreement currently in place between the U.S. and the E.U. should be reformulated to provide for required cooperation in merger review;
(3) the CFI's standard of review should recognize coordinative efforts as a reason to defer to Commission decisions; and
(4) U.S. federal courts reviewing private antitrust challenges to mergers should defer to FTC clearance decisions that stem from transnational reconciliations.

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4. *EU & Competition: A Round-Up of Major European Cases: Sony/BMG, Meca-Median, FENIN, and Volkswagen*, SIMMONS & SIMMONS, July 1, 2006, www.simmons-simmons.com/docs/66aroundupofmajor.pdf.

5. Keith Regan, *EU Says Sony-Bertelsmann Merger Approved in Error*, E-COMMERCE TIMES, July 13, 2006, http://www.ecommercetimes.com/story/51752.html.

Many would argue that non-reviewability of FTC decisions already confers supreme deference on the FTC, making disclosure of the reasons for clearance decisions unnecessary. However, because private litigants in the U.S. have the potential of upsetting efforts at coordination by challenging FTC clearance decisions indirectly, it is necessary to require the publication of reasons for clearance decisions on the U.S. side.

II. BACKGROUND

A. *The Sony-BMG Transaction*

In December 2003, Sony, a global music recording and publishing company, and Bertelsmann AG, an international media company, proposed a joint venture between the two companies to be operated under the name "Sony BMG."[6] At that time, both Sony and Bertelsmann Music Group (BMG), a wholly owned subsidiary of Bertelsmann, were active participants in the music recording industry. The joint venture between the two companies would discover artists, develop them, and engage in the marketing and sale of recorded music.[7]

On July 28, 2004, the FTC closed its investigation of the joint venture, allowing Sony and Bertelsmann to proceed with their plan.[8] While closing an investigation is not necessarily conclusive in today's world of retrospective enforcement actions against consummated mergers, the negative inference to be drawn from the close of the FTC's investigation is that the agency found no actionable violations of Section 7 of the Clayton Act or Section 5 of the FTC Act.[9] The FTC, which is under no obligation to explain its decision not to challenge the joint venture, declined to do so.[10]

During its investigation, the FTC worked closely with the Commission of the European Communities, which was conducting a similar investigation of Sony-BMG with respect to the European common market.[11] This cooperation between the FTC and the

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6. Press Release, Bertelsmann AG and Sony Corporation, *supra* note 1.

7. Commission Decision 2005/188/EC of 19 July 2004, *supra* note 2, ¶ 1.

8. Press Release, FTC Closes Investigation, *supra* note 2; *Sony, BMG Merger Receives Green Light*, *supra* note 2.

9. Press Release, FTC Closes Investigation, *supra* note 2. For two examples of recent retrospective enforcement actions, see *In re* Evanston Northwestern Healthcare, 2005 FTC LEXIS 146, 146 (2005), and *In re* Chicago Bridge & Iron Co., N.V., 2004 FTC LEXIS 250, 250 (2004).

10. 15 U.S.C.S. § 46 (LexisNexis 2006).

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

Commission stemmed from a 1991 agreement to coordinate in competition law enforcement.[12] Under the agreement, U.S. and European competition authorities notify each other of cases of common interest, exchange information, cooperate on related cases, and to the extent legally possible, take account of the other's regulatory interests.[13] A subsequent 1998 agreement that currently does not apply to mergers (due to investigatory timetables) expanded this notion of comity in competition law, gave further guidelines for comity requests, and raised the presumption of bilateral cooperation.[14]

On May 24, 2004, the Commission provisionally decided that the joint venture "would reinforce a collective dominant position on the market for recorded music" and initiated a second-phase investigation.[15] Two months later, the Commission's Antitrust Advisory Committee approved a draft opinion granting clearance of the Sony-BMG joint venture.[16] On July 19, 2004, the Commission concluded that the joint venture "does not create or strengthen a single or collective dominant position in the national markets for recorded music, licenses for online music, or distribution of online music" so as to impede competition in the common market.[17] Finding the joint venture to be compatible with the common market, the Commission, like the FTC, granted clearance.[18] Sony and Bertelsmann consummated their joint venture on August 5, 2004.[19]

On December 3, 2004, Impala, an international association of independent music production companies, challenged the Commission's decision in the CFI.[20] After expedited proceedings, the

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12. Agreement on Application of Competition Laws, Sept. 23, 1991, U.S.-E.C., Nov. 23, 1990, *reprinted in* 30 I.L.M. 1491 (1991) [hereinafter 1991 Cooperative Agreement]. The agreement was signed by Sir Leon Brittan for the E.C., and William Barr (then U.S. Attorney-General) and Janet Steiger (then FTC chair) for the U.S. This particular agreement was invalidated on August 9, 1994, by the European Court of Justice because the European Commission did not have the power to conclude the antitrust agreement. However, a subsequent 1998 agreement, discussed *infra* note 14, largely furthered the 1991 agreement's goals.

13. *Id.* arts. II-IV.

14. Agreement Concerning the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, U.S.-E.C., art. 3, June 4, 1998, 1998 O.J. (L173) 28 [hereinafter 1998 Cooperative Agreement]; Charles W. Smitherman III, *The Future of Global Competition Governance: Lessons from the Transatlantic*, 19 AM. U. INT'L L. REV. 769, 810–12 (2004).

15. Press Release, The Court of First Instance Annuls the Decision, *supra* note 3.

16. Commission Decision 2005/188/EC of 19 July 2004, *supra* note 2, ¶ 4.

17. *Id.* ¶ 36.

18. *Id.*

19. Press Release, Sony Music Entertainment and BMG Unite to Create Sony BMG Music Entertainment (Aug. 5, 2004), *available at* http://blog.sonymusic.com/sonybmg/archives/007012.html.

20. Press Release, The Court of First Instance Annuls the Decision, *supra* note 3.

CFI annulled the Commission's earlier decision on July 13, 2006.[21] In a "scathing judgment,"[22] the CFI found that the Commission's decision was based upon "inadequate reasoning," a "manifest error of assessment," and insufficient data.[23] The Commission was ordered to reevaluate the joint venture in light of the CFI's opinion. In March of 2007, the Commission issued a Press Release stating that it had "decided to open an in-depth investigation into the merger of the global recorded music businesses" of the two parties.[24] In October 2007, after performing what Competition Commissioner Neelie Kroes called "one of the most thorough analyses of complex information ever undertaken by the Commission in a merger procedure," the Commission confirmed approval of the joint venture.[25]

B. *The Law of Agency Inaction in the United States*

1. Reviewability Doctrine in the United States: The FTC as an Untouchable Authority

In the United States, the FTC is not subject to review when it exercises prosecutorial discretion. While APA § 701 establishes a presumption for judicial review unless it has been withheld (1) by statute or (2) when "agency action is committed to agency discretion by law,"[26] the Supreme Court has subsequently given amnesty to agency decisions not to take action.[27] In *Heckler v. Chaney*, the Court found that when an agency does not take enforcement action, that decision is committed to agency discretion by law.[28] Consequently, agency inaction falls under the second exception to § 701.[29] The Court offered three reasons to support its conclusion: (1) the agency's expertise makes it better situated to understand the complicated factors that comprise a decision not to take action; (2) agency inaction does not give rise to the same threats to individual liberty and

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21. *Id.*

22. *EU & Competition*, *supra* note 4.

23. Case T-464/04, Indep. Music Publishers & Labels Assoc. v. Comm'n, 2006 E.C.R. II-02289, ¶ 542.

24. Press Release, Mergers: Commission Opens In-Depth Investigation into Sony-BMG Recorded Music Joint-Venture (Mar. 1, 2007), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/272.

25. Press Release, Mergers: Commission Confirms Approval of Recorded Music Joint Venture Between Sony and Bertelsmann After Re-assessment Subsequent to Court Decision (Oct. 3, 2007), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1437%20%20&format=PDF&aged=0&language=EN&guiLanguage=en.

26. 5 U.S.C. § 701(a) (2007).

27. Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1667 (2004).

28. 470 U.S. 821, 831 (1985) (citing 5 U.S.C. § 701(a)(2)).

29. *Heckler*, 470 U.S. at 846; 5 U.S.C. § 701(a)(2).

property that agency enforcement actions do; and (3) separation of powers requires the Judiciary to heed the Executive Branch's discretion to "take Care that the Laws be faithfully executed."[30] In short, *Heckler* "insulate[s] from judicial review an entire class of administrative decisions—namely, agency inaction."[31] While Congress could presumably abrogate this judicial rule, it has not done so with respect to the FTC's regulation of mergers.[32] For this reason, agencies in "the United States . . . generally refrain[] from disclosing the basis for clearance decisions (unlike the European Commission), and rarely elaborate[] upon . . . decisions to settle."[33] Thus, while the FTC must apply for a preliminary injunction with a district court in order to block a merger, the agency is not obligated to justify its actions or to answer challenges from affected parties when clearing a merger.[34]

However, one could argue that private rights of action to pursue antitrust claims ameliorate the possible ill-effects of *Heckler v. Chaney* when the FTC fails to act. Section 7 of the Clayton Act provides for pre-emptive measures to curtail corporate business combinations that may "substantially lessen competition" or create a monopoly.[35] Sections 4 and 16 of the Clayton Act allow private litigants to obtain relief from a Section 7 violation.[36] Section 4 awards treble damages to those injured in business or property as a result of an antitrust violation and Section 16 provides for injunctive relief against threatened loss or damage stemming from a violation of the antitrust laws.[37] The private rights of action allow proper plaintiffs to obtain review of a merger clearance indirectly.[38] A party seeking Section 16 injunctive relief from a merger previously cleared by the FTC is *not* alleging a direct harm from agency inaction. Rather, when the agency has failed to take action with respect to a merger, a subsequent challenge by a proper plaintiff is grounded in

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30. *Heckler*, 470 U.S. at 832 (quoting U.S. CONST. art. II, § 3).

31. Bressman, *supra* note 27, at 1667. In the context of an antitrust challenge, however, third-party standing to challenge mergers, even those cleared by the FTC, has been made possible by statute. *See infra* notes 35–39 and accompanying text.

32. *See* 15 U.S.C.S. §§ 41–58 (LexisNexis 2006) (failing to provide review under the Clayton Act or the FTC Act).

33. Edward T. Swaine, *Against Principled Antitrust*, 43 VA. J. INT'L L. 959, 981 (2003).

34. 15 U.S.C.S. §§ 21, 25; Swaine, *supra* note 33, at 981.

35. 15 U.S.C.S. § 18.

36. *Id.* §§ 15, 26.

37. *Id.*

38. For Section 4 cases, the Supreme Court has stated that an antitrust plaintiff must prove that an injury resulted from the violation, that the injury was causally related to the violation, and that the injury was one of the type the antitrust laws were intended to prevent and that flowed from that which made defendant's acts unlawful. Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 535–46 (1977).

harms stemming from the merger or the anticompetitive conduct itself.[39]

Who is a proper plaintiff in such situations? Any competitor or consumer capable of showing a threat of antitrust injury may bring suit.[40] However, competitors have found that standard difficult to meet. The Supreme Court answered this question in *Cargill v. Monfort of Colorado*.[41] In *Cargill*, the country's fifth-largest beef packer sought to enjoin the acquisition of the country's third-largest beef packer by the country's second-largest beef packer.[42] The Court denied standing to the competitors because a plaintiff only alleging a "loss or damage due merely to increased competition," without more, is not injured under the meaning of the antitrust laws.[43] *Cargill* effectively fences out competitors from private antitrust claims, but leaves an opening for consumers to pursue such claims. In sum, while the FTC is not directly accountable for its merger clearance decisions, affected or aggrieved parties (primarily consumers) may seek relief through private action.

2. The Sony-BMG Investigation at the FTC

Little is known about the reasoning behind the FTC's decision to close its investigation of the Sony-BMG joint venture and, in fact, the FTC is not required to make its reasons public.[44] With respect to the close of the Sony-BMG investigation, three documents are available

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39. *Id.* at 552.

40. *See, e.g.*, Cargill v. Monfort of Colo., Inc., 479 U.S. 104, 115 (1986) (noting, in an antitrust context, that a competitor has the ability to recover).

41. *Id.* Seventeen years before, in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 129–31 (1969), *rev'd on other grounds*, the Supreme Court found that a plaintiff seeking injunctive relief under Section 16 need only show a significant threat of injury from the violation. Ten years after *Zenith*, the Supreme Court advocated a multi-factor test to determine standing in a Section 4 antitrust case: the causal connection between the antitrust violation and the harm to plaintiff and whether that harm was intended, the directness or indirectness of the injury and whether the damages are speculative, the potential for duplicative or windfall recoveries, the existence of more direct victims of the alleged violation, and the nature of the injury. *Assoc. Gen.*, 459 U.S. at 535–46. Another five years later, the D.C. Circuit decided *Chrysler Corp. v. General Motors Corp.*, 589 F. Supp. 1182 (D.C. Cir. 1984). Chrysler, an automobile manufacturer, brought suit under Section 7 of the Clayton Act, alleging injuries stemming from an impending joint venture between General Motors and Toyota to manufacture a car. *Id.* at 1184. The FTC had reviewed the proposed joint venture and authorized the final plan with several modifications. *Id.* With respect to the plaintiff's standing, the D.C. Circuit held that Section 16 "extends to 'threatened as well as actual injuries and is not limited to injuries to a party's business or property.'" *Id.* at 1188 (quoting Optivision, Inc. v. Syracuse Shopping Ctr. Assoc., 472 F. Supp. 665, 671 (N.D.N.Y. 1978)).

42. *Cargill*, 479 U.S. at 106.

43. *Id.* at 122.

44. Warren S. Grimes, *Transparency in Federal Antitrust Enforcement*, 51 BUFFALO L. REV. 937, 953–54 (2003).

to the public: a press release stating that the FTC had decided not to take enforcement action, the closing letters sent by the FTC to the parties, and a statement by one of the Commissioners regarding the joint venture.[45] Champions of the administrative process may presume that the FTC followed the Merger Guidelines in analyzing the joint venture: that the FTC defined the relevant product and geographic markets, calculated market shares, and measured possible efficiencies that could result from the joint venture.[46] However, in contrast to the extensive disclosures that the Commission must make in clearing a merger in Europe (as shown in Subpart (C)(3)(i) below), the FTC is under no obligation to explain its reasoning.[47] Consequently, little is known about how important international considerations were to the FTC's decision to clear the Sony-BMG joint venture.

C. *Reviewability Doctrine in the European Communities*

Reviewability and standing doctrine are different in the European Communities for two reasons. First, the Commission must create a record of reasons for review regardless of whether the Commission blocks or clears a merger.[48] Second, a Commission decision to clear a merger is reviewable and subject to challenge by proper plaintiffs.[49] Particularly in the realm of competition law, the CFI tends to scrutinize the Commission's reasons for validity and thoroughness.[50] The CFI reviews both determinations of law and fact, although in theory, determinations on factual findings are limited to whether the Commission's findings are justified on the record.[51] As a result of these two differences in European competition law, it is much easier for third-parties "direct[ly] and individually concerned" by the Commission's failure to challenge a merger to obtain review from the CFI.

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45. Press Release, FTC Closes Investigation, *supra* note 2.

46. *See generally* 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41, 552 (U.S. Dep't of Justice and Fed. Trade Comm'n 1992), rev. 4 Trade Reg. Rep. § 13104 (Apr. 8, 1997).

47. Swaine, *supra* note 33, at 981.

48. Consolidated Version of the Treaty Establishing the European Community, art. 253, 2002 O.J. (C 325) 135, *available at* http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E_EN.pdf [hereinafter Consolidated EC Treaty 2002].

49. José Manuel Cortés Martín, *At the European Constitutional Crossroads: Easing the Conditions for Standing of Individuals Seeking Judicial Review of Community Acts*, 12 MICH. ST. J. INT'L L. 121, 129–30 (2003).

50. Case T-342/99, Airtours v. Comm'n, 2002 E.C.R. II-2585; Case T-310/01, Schneider Electric v. Comm'n, 2002 E.C.R. II-4071; Case T-80/02, Tetra Laval v. Comm'n, 2002 E.C.R. II-4381; Jürgen Schwarze, *Judicial Review of European Administrative Procedure*, 68 LAW & CONTEMP. PROBS. 85, 100 (2004).

51. Smitherman, *supra* note 14, at 788.

1. Duty to Give Reasons

As the executive arm and "principal administrative organ" of the European Communities, the Commission must ensure "the proper functioning and development of the common market" and work to achieve the European Communities' objectives as expressed in Treaties.[52] The Commission is empowered by Council Regulation to institute legal proceedings to determine whether a violation of competition law exists and conduct investigations either on its own initiative, or upon application by a Member State or a natural or legal person claiming a legitimate interest in a matter.[53] The European Commission is under a continual obligation to explain both its enforcement and clearance decisions. If the Commission moves into a Phase II investigation of a transaction, it is required to set forth and make publicly available a written statement of objections, detailing the competitive concerns leading to a more rigorous investigation.[54] Article 253 EC also requires the European Commission to "disclose in a clear and unequivocal fashion the reasoning [that it] followed" when making its decision after such an investigation.[55] This rule applies regardless of the Commission's ultimate determination to clear or block a joint venture or merger.[56] An inadequate Commission

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52. Treaty Establishing the European Community, art. 230, 1992 O.J. (C 224) 1, 59 [hereinafter EC Treaty 1992]; *see generally* Virpi Tiili & Jan Vanhamme, *The "Power of Appraisal" (Pouvoir D'Appreciation) of the Commission of the European Communities Vis-à-vis the Powers of Judicial Review of the Communities' Court of Justice and Court of First Instance*, 22 FORDHAM INT'L L.J. 885 (1999) (quoting EC Treaty 1992, *supra* note 52, art. 155).

53. Smitherman, *supra* note 14, at 786–88.

54. Keith R. Fisher, *Transparency in Global Merger Review: A Limited Role for the WTO?*, 11 STAN. J.L. BUS. & FIN. 327, 336 (2006). It is of note that, while the statement of objections is merely a preparatory document, the findings set out in the final decision of the Commission must be compatible with the findings of fact made in the statement of objections, unless the Commission establishes that its previous findings were incorrect. *EU & Competition*, *supra* note 4. In Sony-BMG, the CFI commented on Sony-BMG's lack of further market investigation following hearings with the parties, as well as its subsequent provision of data by the parties, which was the basis on which the Commission changed its views regarding the joint venture. *Id.* Some may claim that the CFI's annulment was justified, because without finding the former objections in error, the Commission could not justifiably take a different position in its final decision from that taken in its statement of objections. *Id.* However, in defense of the Commission's actions, it should be noted that the Commission have been following a prior decision in which the ECJ proposed that in cases of doubt, the Commission should always err on the side of clearing a merger. Matteo F. Bay, Javier Ruiz Calzado & Andreas Weitbrecht, *Judicial Review in EU Merger Control: Recent Developments*, EUR. ANTITRUST REV. 27, 28 (2007), *available at* http://lw.com/upload/pubContent/_pdf/pub1672_1.pdf.

55. EC Treaty 1992, *supra* note 52, art. 253.

56. *Id.*

explanation results in annulment by the CFI, and subsequent reexamination by the Commission.[57]

2. Reviewability

All acts adopted by the E.U. institutions are subject to judicial review.[58] The CFI "shall" ensure that "the law is observed" by the Commission by examining the content of the Commission's measure, the nature of the reasons given, and the parties' interest in obtaining an explanation.[59] The EC Treaty allows the CFI to review Commission opinions for "lack of jurisdiction, procedural error, error of law and misuse of power."[60] Since ratification of the Treaty, however, CFI precedent has expanded its powers of review by adding three more grounds: error of fact, error of appreciation, and absence of reasoning.[61]

Although European Courts have "traditionally granted broad discretionary powers to the administration, especially [in competition law cases] when complex economic analysis is involved," the CFI expressed a new willingness to scrutinize Commission reasoning with respect to competition law questions in 2002.[62] That year, the CFI annulled the Commission's merger prohibition (as opposed to clearance) decisions in *Airtours*,[63] *Schneider Electric*,[64] and *Tetra Laval*.[65] The CFI found problematic the "legal definitions, treatment of the evidence, and the factual and economic analysis of that evidence."[66] It is this more exacting standard that has survived to the present: the CFI looks at the evidence anew, weighs it for soundness, and confirms the logical link between the Commission's conclusions and its factual findings.[67] If the CFI annuls a Commission decision, the Commission must reexamine the merger.[68]

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57. EC Treaty 1992, *supra* note 52, art. 21; Mark Clough, *The Role of Judicial Review in Merger Control*, 24 NW. J. INT'L L. & BUS. 729, 730 (2004); Tiili & Vanhamme, *supra* note 52, at 891.

58. Damien Geradin, *The Development of European Regulatory Agencies: What the EU Should Learn From American Experience*, 11 COLUM. J. EUR. L. 1, 31 (2004–2005).

59. Schwarze, *supra* note 50, at 93; Tiili & Vanhamme, *supra* note 52, at 886.

60. Clough, *supra* note 57, at 730.

61. *Id.*

62. Schwarze, *supra* note 50, at 100. That year alone, the CFI annulled the Commission's decisions to prohibit mergers in *Airtours*, *Schneider Electric*, and *Tetra Laval*. Case T-342/99, Airtours v. Comm'n, 2002 E.C.R. II-2585; Case T-310/01, Schneider Electric v. Comm'n, 2002 E.C.R. II-4071; Case T-80/02, Tetra Laval v. Comm'n, 2002 E.C.R. II-4381.

63. Case T-342/99, 2002 E.C.R. II-2585.

64. Case T-310/01, 2002 E.C.R. II-4071.

65. Case T-80/02, 2002 E.C.R. II-4381.

66. Clough, *supra* note 57, at 730.

67. *Id.* at 751-52.

68. *Id.*

Even more significantly, in a recent groundbreaking CFI decision, the CFI ordered the Commission to compensate Schneider Electric for losses sustained when the Commission illegally prohibited its transaction in 2001.[69] One must wonder if there is any room for deference in a system where scrutiny is so commonplace and the stakes for illegally prohibiting a transaction are so high.

Who may challenge a Commission decision? Article 230(4) of the EC Treaty allows "[a]ny natural or legal person" to challenge "a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former."[70] Section 4 thus permits a third-party to challenge a Commission decision any time a decision is of a "direct and individual concern" to him or her.[71] The ECJ has since narrowed the types of parties that are proper in its *Plaumann v. Commission* decision.[72] In *Plaumann*, the ECJ interpreted Article 230 to fence out any plaintiffs not "peculiarly" affected by a Commission decision or "differentiated from all other potential plaintiffs."[73] With little exception, the CFI and the ECJ have applied the *Plaumann* doctrine to restrict citizens seeking annulment of Commission decisions.[74]

While citizens are less likely to successfully challenge the Commission, in competition cases the CFI allows industry participants (in both a horizontal and vertical relationship with the parties at issue) to challenge Commission decisions.[75] A competitor "is distinguished individually because his competitive position in the market has been affected."[76] For example, in *Demo-Studio Schmidt v. Commission*,[77] a retailer entitled by law to report anticompetitive

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69. Renee Cordes, *European Commission Suffers Historical Setback in Court Loss*, DAILY DEAL, Jul. 11, 2007, at 1.

70. EC Treaty 1992, *supra* note 52, art. 230.

71. *Id.*

72. Case 25/62, Plaumann v. Comm'n, 1963 E.C.R. 95.

73. *Id.* at 107. In *Plaumann*, a German importer of clemetines challenged the Commission's refusal to allow Germany to charge lower import duties on clementines. However, the importer did not meet the requirements of Article 230(4) because he was not "peculiar[ly]" affected by the decision or "differentiated from all other [potential plaintiffs]." *Id.*

74. Recently, the CFI deviated from the *Plaumann* doctrine in *Jego-Quere et Cie SA v. Commission* when it found "no compelling reason" to require that a prospective plaintiff have a concern that is differentiated from all others. *See* Danny Nicol, *Rights of Judicial Protection before the EC Courts*, 7 J. C.L. 147, 148 (2002) (citing Case T-177/01, Jego-Quere et Cie SA v. Comm'n, 2002 C.M.L.R. 44). However, shortly thereafter, the ECJ reaffirmed the applicability of the *Plaumann* standing requirements to prospective plaintiffs in its *Unión de Pequeños Agricultores v. Council of the European Union* decision. *See id.* (citing Case T-173/98, Unión de Pequeños Agricultores v. EU Council, 1999 E.C.R. II-3357).

75. *See, e.g.*, Case 75/84, Metro v. Comm'n, 1986 E.C.R. 3021.

76. Martín, *supra* note 49, at 130.

77. Case 210/81, 1983 E.C.R. 3045.

conduct under Articles 85 and 86 of the EC Treaty (governing selective distribution contracts) filed a complaint against a distributor.[78] When the Commission refused to cite the distributor for the allegedly violative conduct, Demo brought suit to vindicate its indirect interest in seeing the laws enforced against the distributor.[79] The CFI allowed the suit and found that the distributor's alleged violations of Articles 85 and 86 in refusing to grant the retailer a dealership were "capable of affecting [the retailer's] legitimate interests."[80]

Two years later, in *Metro v. Commission*,[81] the CFI conferred standing on Metro, a distributor harmed by a Commission decision to exempt an electronics manufacturer from Article 85 of the EC Treaty, and allowed the manufacturer to enter into a selective distribution contract.[82] Metro had properly submitted objections during the Commission's deliberations, was recognized by the Commission as having a legitimate interest, and thus was undeniably "directly and individually concerned" with the Commission's decision.[83] Commission decisions are thus at a minimum subject to challenge by competitors, and Impala's challenge of the Commission's clearance of the Sony-BMG joint venture was welcome due to the organization's direct and individual competitive concerns.

3. The Sony-BMG Investigation in the European Community

i. The European Commission's Decision

Under the Treaty establishing the European Community (EC Treaty), the Commission must block concentrations (mergers or acquisitions) that are "incompatible" with the common market.[84] To be incompatible, a merger or acquisition must "create[] or strengthen[] a dominant position" so as to significantly impede effective competition.[85] Consequently, the Commission's inquiry in the Sony-BMG case began with the question of market power.[86] First, the Commission defined the relevant product markets (recorded music, wholesale licensing of online music, retail for distribution of

78. *Id.*
79. *Id.*
80. *Id.*
81. Case 75/84, 1986 E.C.R. 3021.
82. *Id.* ¶ 1.
83. *Id.* ¶¶ 20–23.
84. Council Regulation 139/2004, Control of Concentrations Between Undertakings, 2004 O.J. (L 24) 1, ¶ 7.
85. *Id.*
86. Commission Decision 2005/188/EC of 19 July 2004, *supra* note 2, ¶ 12.

online music, and music publishing) and the relevant geographic market (national in scope).[87]

The Commission next examined whether the joint venture would strengthen an already-existing collective dominant position held by the five major players in the music recording market in the member nations.[88] To discern whether a coordinated price policy existed between the players, the Commission considered the following factors: (1) the historical average net prices of the top-selling 100 records in member nations; (2) whether published prices to dealers facilitated price coordination; and (3) the effect of discount systems on prices and market transparency.[89] While several of these factors indicated that the market was susceptible to price coordination, the Commission did not find sufficient evidence to prove that such coordination was actually occurring.[90]

Moreover, other factors—the homogeneity of the product at issue, the transparency of pricing of albums in the market, and whether market players had ever attempted to discipline market "mavericks"—also weighed against existing collective dominance.[91] The products were heterogeneous on an album level; the need to monitor pricing on an album-by-album basis reduced market transparency; and insufficient evidence existed to show prior attempts to discipline mavericks in the markets.[92] Based on its consideration of each of these factors, the Commission concluded that a collective dominant position did not exist between the five players.[93] For all the same reasons, the Commission found that the joint venture would not create a position of collective dominance in the market.[94]

The Commission also examined the possibility of a single dominance in the recorded music markets in smaller member nations resulting from the vertical integration of Bertelsmann media interests with the joint venture's recorded music interests.[95] The

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87. *Id.* ¶¶ 6–11. Despite the fact that the Commission examined all four relevant markets, this Note will only discuss the recorded music market because the CFI limited its review to that market. Case T-464/04, Indep. Music Publishers & Labels Assoc. v. Comm'n, 2006 E.C.R. II-02289, ¶ 543. While the Commission believed that the recorded music and music publishing product markets might merit further delineation, it did not believe that further investigation was warranted, given its overall decision that the joint venture would not create or strengthen an existing collective or single dominance in any markets. Commission Decision 2005/188/EC of 19 July 2004, *supra* note 2, ¶¶ 7, 11.

88. Commission Decision 2005/188/EC of 19 July 2004, *supra* note 2, ¶ 13.

89. *Id.* ¶¶ 17–19, 24–29.

90. *Id.* ¶ 20.

91. *Id.* ¶¶ 20–25.

92. *Id.*

93. *Id.* ¶ 26.

94. *Id.* ¶ 27.

95. *Id.* ¶¶ 28–29.

Commission found such dominance unlikely because BMG's market shares would not hit an undetermined threshold. The Commission also found no evidence "that it could be a profitable strategy" for Bertelsmann to block competitors from use of its media outlets.[96] Thus, the transaction raised no red flags for the Commission and challenging the joint venture was not necessary.

ii. The Decision of the Court of First Instance

Impala's challenge prompted the CFI to annul the Commission's decision.[97] First, the CFI disagreed with the Commission's position that discount systems would reduce the transparency of the market to the point of preventing the existence of a collective dominant position, and demanded more data and reasons from the Commission for its decision.[98] The CFI also found that evidence of efforts to discipline other market participants is not necessary, because the mere existence of such disciplining mechanisms is sufficient to find that a collective dominant position exists.[99] Finally, the CFI "criticised the Commission for having carried out an extremely cursory examination and for having presented in the decision only a few superficial and formal observations" with respect to the possible creation of a collective dominant position.[100] In short, the CFI annulled the Commission's decision for "inadequate reasoning," a "manifest error of assessment," and insufficient data.[101]

III. THE IMPORT OF TRANSNATIONAL COORDINATION, RATIONALE FOR DIVERGENT MODELS, AND RESULTING PROBLEMS OF DEFERENCE AND TRANSPARENCY

In the current global market, cooperation across the Atlantic is necessary and desirable. As barriers to trade decrease, each nation's restraints on competition take on new significance. Entry into markets must be reevaluated. Regulatory overlap imposes substantial transaction costs on parties seeking to merge.[102] Positive externalities from a transaction in one economy often create negative externalities for another.[103] It is for this reason that European and U.S. antitrust authorities currently work closely on many pre-merger

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96. *Id.*
97. Press Release, The Court of First Instance Annuls the Decision, *supra* note 3.
98. *Id.*
99. *Id.*
100. *Id.*
101. Case T-464/04, Indep. Music Publishers & Labels Assoc. v. Comm'n, 2006 E.C.R. II-02289, ¶ 543.

reviews and have entered into agreements that reach far beyond predecessor agreements on regulatory cooperation.[104] For example, "the 1991 Agreement reflects transatlantic consensus that 'sound and effective enforcement of competition law is a matter of importance to the efficient operation of both markets.'"[105] Coordination ensures that domestic regulators will account for the impact of their own regulations on foreign consumers and markets, as well as differences in regulatory strategies and consumer preferences.[106]

Coordination is itself a struggle: the European and U.S. systems are said to strive for the related but sometimes conflicting goals of maximizing business rivalry on the European side, and maximizing consumer welfare on the U.S. side. This divergence may lead to contrary positions in particular cases.[107] Notwithstanding that potential hurdle, in the case of the Sony-BMG joint venture, U.S. and European regulators came to a consistent solution.[108] The availability of judicial review in Europe has thrown a proverbial wrench into that cooperation, however. The CFI's decision in Sony-BMG has caused "considerable concern" for industry participants in Europe because it undermines the ability of those participants to depend on clearance decisions that have been made after extended investigation.[109] By extension, such concern is likely shared by any large corporation operating globally that may seek clearance from the Commission (and the FTC) in the future. Part III of this Note will attempt to explain the divergence between the European and U.S.

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102. Edward T. Swaine, *The Local Law of Global Antitrust*, 43 WM. & MARY L. REV. 627, 629–30 (2001); Smitherman, *supra* note 14, at 774–75. Indeed, in this case, Sony and Bertelsmann could not be certain that the Commission would approve the joint venture until almost four years after the two companies initially sought approval. Press Release, Mergers: Commission Confirms Approval, *supra* note 25.

103. Smitherman, *supra* note 14, at 777.

104. *Id.* at 822–23.

105. *Id.* at 810–11 (quoting 1991 Cooperative Agreement, *supra* note 12, pmbl).

106. *Id.* at 822.

107. The United States determined that a merged General Electric and Honeywell would have given its competitors an incentive to improve their products by delivering better products at cheaper prices. In contrast, the European Commission believed that any efficiencies and lower prices produced by the General Electric-Honeywell transaction would force competitors out of the market, or reduce their market shares to an uncompetitive point. *See generally* Eric S. Hochstadt, Note, *The* Brown Shoe *of European Union Competition Law*, 24 CARDOZO L. REV. 287, 289–90 (2002) (noting that U.S. regulators conditionally accepted the merger, while EC regulators prohibited it).

108. Commission Decision 2005/188/EC of 19 July 2004, *supra* note 2, ¶ 36; Press Release, FTC Closes Investigation, *supra* note 2; *Sony, BMG Merger Receives Green Light*, *supra* note 2; *see also* Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT'L L. 478, 482 (2000) (stating that "inconsistent substantive outcomes of investigations by competition authorities in different nations" may result in "unnecessary burdens" on international competition).

109. Bay et al., *supra* note 54, at 28.

models in the area of clearance, and discuss the problems inherent in both.

A. *Why Some Form of Judicial Review of Commission Clearance Decisions Is Necessary in the European Union*

1. The U.S. and the E.U. Seek to Vindicate Related but at Times Conflicting Substantive Goals that Necessitate Judicial Review in the E.U. but not in the U.S.

Differences in competition policy in the U.S. and the E.U. give a partial explanation for the European allowance of judicial review and competitor standing to challenge Commission decisions. While coordination between EC and U.S. competition authorities since the 1980's has eased the burden on regulated entities and led to more comprehensive and consistent policymaking in an increasingly global market,[110] the U.S. and EC follow "considerably different approaches to competition policy."[111] While the U.S. pursues an antitrust policy to maximize consumer surplus by placing a high value on efficiency, the E.U. "often appears to promote business rivalry more than the maximization of consumer surplus."[112] Under this view of competition law, certain market structures involving greater concentrations are inherently suspicious because they create opportunities for the exercise of market power.[113] Thus, the EC will often block mergers or require divestitures to guarantee that less efficient rivals will not be driven from the market.[114] In the struggle not merely to maintain, but also to create a competitive common market, merger clearance that will promote oligopolistic market structures are taboo.[115]

The CFI's decision in Sony-BMG reflected this concern. The CFI worried that allowing the joint venture might create "a situation" that would enable market oligopolists to engage in tacit price

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110. John J. Parisi, *International Regulation of Mergers: More Convergence, Less Conflict*, 61 N.Y.U. ANN. SURV. AM. L. 509, 515–16 (2005).

111. Daniel J. Gifford & Robert T. Kudrle, *Rhetoric and Relaity in the Merger Standards of the United States, Canada, and the European Union*, 72 ANTITRUST L.J. 423, 424 (2005).

112. *Id.*

113. *Id.*; *see* Aditi Bagchi, *The Political Economy of Merger Regulation*, 53 AM. J. COMP. L. 1, 4, 6 (2005) (recognizing that European regulators of competition focus on the effect of mergers on competitors to a greater degree than their counterparts in the United States, and that European regulators would "normally disapprove" a merger that would significantly enhance the market position of a dominant firm even in the face of increased efficiency).

114. Gifford & Kudrle, *supra* note 111, at 458–59.

115. Fisher, *supra* note 48, at 344.

coordination.[116] The court indicated that the historically close alignment of industry net prices could be the result of "tacit price coordination" rather than effective competition, and that the transparency of the market would make average prices predictable and deviation from pricing apparent to all major market participants.[117] The paramount concern expressed in each of these points is that price coordination would frustrate the ultimate goal of promoting business rivalry.

Why should this difference in European antitrust policy lead to different doctrines of standing and judicial review than exist in the United States? When a competitor seeks to challenge a clearance decision in Europe, it is more likely that the competitor is vindicating a policy that is allied with E.U. competition policy.[118] Competitors fearing that they will be driven out of the market will find a sympathetic ear in any system that values business rivalry as the European one does.[119] Consequently, allowing Impala—a group of smaller independent music producers that would likely be at the margins of the market—to challenge the joint venture may best further the E.U. interest in maximizing business rivalry.[120] Just as the CFI vindicated European competition interests by regulating the anticompetitive effects of selective distribution contracts in *Demo* and *Metro*, the E.U.'s interests are furthered by granting Impala standing to sue Sony-BMG.[121]

The role of competitors in other aspects of the E.U. merger clearance process demonstrates this key difference between the European and U.S. systems. The European model not only affords competitors an opportunity to appeal to the CFI, but also a platform to voice concerns and a significant role in investigations.[122] For example, during EC investigations, third party competitors may participate in an otherwise closed oral hearing.[123] Parties to a transaction are obligated to respond to the concerns of competitors as much as they are to respond to the Commission's concerns.[124]

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116. Case T-464/04, Indep. Music Publishers & Labels Assoc. v. Comm'n, 2006 E.C.R. II-02289, ¶ 522.

117. *Id.* ¶¶ 70, 253, 528.

118. Bagchi, *supra* note 113; Gifford & Kudrle, *supra* note 111.

119. Bagchi, *supra* note 113, at 4–5.

120. Press Release, The Court of First Instance Annuls the Decision, *supra* note 3.

121. Case 75/84, Metro v. Comm'n, 1986 E.C.R. 3021; Case 210/81, Demo-Studio Schmidt v. Comm'n, 1983 E.C.R. 3045, ¶ 1.

122. *See* James S. Venit & William J. Kolasky, *Substantive Convergence and Procedural Dissonance in Merger Review*, *in* ANTITRUST GOES GLOBAL: WHAT FUTURE FOR TRANSATLANTIC COOPERATION? 79, 95 (Simon J. Everett et al. eds., 2000) (noting that complainants play a major role in merger clearances in the EU due to procedures that improve transparency and increase access for interested parties).

123. *Id.*

124. *Id.*

Competitor-participants also have access to relevant investigatory documents, such as the EC's Statement of Objections and responsive documents.[125] Hearings are otherwise closed to the general public.[126]

While industry input is also important to FTC investigations, competitors do not play such a central role in U.S. merger clearance decisions. Instead, the U.S. system's commitment to consumer welfare necessitates the exclusion of competitors, who would likely have a perverse incentive to bring suit.[127] As *Cargill* recognizes, competitors seeking the injunction of a merger fear that they will lose profits when the merged entity "lower[s] its prices to a level at or only slightly above its costs."[128] However, in the U.S. system, such "vigorous competition" could only serve to increase the quality and decrease the price of the good sold.[129] That a smaller group such as Impala might be marginalized by the Sony-BMG joint venture is of less concern to the FTC than the probability that the merger would be efficient.[130] If Sony-BMG raised its prices post-merger instead, the U.S. system would expect new entrants and consumers incentivized with the promise of treble damages to fill the void.[131]

Furthermore, while a merger's future effect on industry competitors is best discerned from industry input, efficiencies to be generated by a merger are more readily discernible by agency experts with less input from third parties.[132] As the Merger Guidelines suggest, the majority of "the information relating to efficiencies is

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125. *Id.*

126. *Id.*

127. Gifford & Kudrle, *supra* note 111, at 458–59, 462; E. THOMAS SULLIVAN & HERBERT HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE 1 (2003); *see* Cargill Inc. v. Monfort of Colo., Inc. 479 U.S. 104, 116 (1986) ("To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result . . . .").

128. *Cargill*, 479 U.S. at 114.

129. *Id.* at 116.

130. *See* SULLIVAN & HOVENKAMP, *supra* note 127 ("Current antitrust analysis suggests that courts interpret the law so as to promote the maximization of consumer welfare.").

131. *See* 15 U.S.C.S. § 15(a) (LexisNexis 2006) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold damages . . . ."). This does not mean, however, that competitors are left without recourse. As *Cargill* notes, in a predatory pricing scheme, competitors would have standing to sue. *See Cargill*, 479 U.S. at 118 (stating that predatory pricing is "a practice 'inimical to the purposes of [the antitrust] laws'" (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977))).

132. *See generally* Edward T. Swaine, *"Competition, Not Competitors," Nor Canards: Ways of Criticizing the Commission*, 23 U. PA. J. INT'L ECON. L. 597, 625–26 (2002) (noting that while there are "obvious risks" to heeding the claims of third parties in investigations, the participation of third-party competitors may have its advantages, including providing supplemental information consumers may lack, and acting as a foil to the merging parties who may also have merging interests and influences).

uniquely in the possession of the merging firms."[133] Logically, these firms, rather than third-parties, must present and substantiate their efficiencies claims for the agency; allowing third-party access or input in this process might result in the disclosure of competitively sensitive information.[134] By definition, integration involves information that would be of great utility to competitors, such as information relating to restructuring or shifts in production.[135] In sum, the U.S. and the EC have at times divergent default rules of competition that may lead to the need for competitor participation in one model, but not in the other.[136]

2. *Heckler*'s Reasoning May Be Less Appropriate As Applied to the Commission

The European model does not fit neatly into the reasoning given by the Supreme Court for non-reviewability of non-enforcement decisions in *Heckler*. This might be an alternative explanation for the resulting differences in reviewability between the U.S. and E.U. According to the Supreme Court, judicial review is unavailable for FTC merger-clearance decisions for three reasons.[137] First, the Court found that the agency's expertise makes it better situated to make judgment calls on enforcement.[138] Second, the Court found that agency inaction does not give rise to the same concerns of individual liberty and property that agency enforcement actions do.[139] Finally, the Court concluded that the Judiciary need not interfere with the Executive Branch's discretion to enforce laws.[140] This Note will

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133. *Id.*; *see* 1992 Horizontal Merger Guidelines, *supra* note 46, § 4.

134. 1992 Horizontal Merger Guidelines, *supra* note 46, § 4.

135. *See id.*

> The Agency has found that certain types of efficiencies are more likely to be cognizable and substantial than others. For example, efficiencies resulting from shifting production among facilities formerly owned separately, which enable the merging firms to reduce the marginal cost of production, are more likely to be susceptible to verification, merger-specific, and substantial, and are less likely to result from anticompetitive reductions in output. Other efficiencies, such as those relating to research and development, are potentially substantial but are generally less susceptible to verification and may be the result of anticompetitive output reductions. Yet others, such as those relating to procurement, management, or capital cost are less likely to be merger-specific or substantial, or may not be cognizable for other reasons.

136. Gifford & Kudrle, *supra* note 111, at 423–24. *Cf.* Heckler v. Chaney, 470 U.S. 821 (1985) (holding that judicial review is unavailable for the decision of the Food and Drug Administration not to exercise its enforcement authority over drugs used in a lethal injection).

137. *Heckler*, 470 U.S. at 832.

138. *Id.* at 831–32.

139. *Id.* at 832.

140. *Id.*

examine whether the first and the third of these reasons could justify non-reviewability or a rule of nondisclosure at the Commission.[141]

First, it is worth exploring whether *Heckler*'s expertise argument is less appropriate in the European context. The Commission's unique obligation to give reasons even when it declines to enforce a treaty provision against a party may be justified by the fact that the Commission is a more generalist body than its U.S. counterpart.[142] The twenty-seven members of the Commission are each in charge of one area of the Commission's activity, as opposed to the U.S. model containing a multi-member Commission for each area of expertise.[143] Moreover, while the E.U. may establish agencies to "take individual decisions in specific areas" where the "tasks to be carried out require particular . . . expertise," it may not delegate tasks involving areas such as competition law because the E.U. Treaty has conferred a direct power of decision on the Commission.[144]

This theory would explain why the CFI has been reluctant to defer to the Commission since 2002, the year it annulled three Commission decisions in the area of merger control.[145] In those three decisions, the CFI challenged the Commission's economic analysis despite the complexity of the subject matter involved.[146] The CFI's decisions were remarkable given the fact that "usually, an issue's high complexity results in significant administrative discretion . . . and reduced judicial review."[147] The CFI's thoroughness did not wane over the four years separating those three cases from Sony-BMG. In its Sony-BMG decision, the CFI went beyond simply asking for more data or additional reasons, concluding that, contrary to the Commission's clearance decision, "the [Sony-

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141. As Professor Bressman notes, "[f]ew have found [the Supreme Court's second argument that agency inaction is noncoercive] persuasive." Bressman, *supra* note 27, at 1694. This Supreme Court argument flies in the face of the reality discussed by Justice Marshall in *Heckler*: that the creation of the administrative state was prompted by "the reality that governmental refusal to act could have just as devastating an effect upon life, liberty, and the pursuit of happiness as coercive governmental action." 470 U.S. at 851 (Marshall, J., concurring). Surely when the FTC decides to clear a merger, the rights of competitors as well as consumers may be affected by the prosecutorial discretion exercised.

142. Delegation to a more specialized body is also less likely in Europe because the Commission is thought by some to be reluctant to delegate its existing powers to more specialized agencies. Geradin, *supra* note 58, at 11.

143. Jason M. Sullivan, Note, *European Union Antitrust Enforcement: A Distinct Prosecution or a More Principled Approach?*, 15 TRANSNAT'L L. & CONTEMP. PROBS. 457, 476–77 (2005).

144. *Commission White Paper on European Governance*, at 24, COM (2001) 428 final (July 25, 2001) *available at* http://eurlex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf.

145. Schwarze, *supra* note 50, at 99.

146. *Id.*

147. *Id.*

BMG] concentration raises serious problems."[148] In contrast to the CFI's high level of scrutiny over Commission decisions, the FTC is given jurisdiction over a limited and highly technical subject matter, and its clearance decisions enjoy the highest degree of deference—no explanation is necessary.[149]

If the Commission is more of a generalist institution than the FTC, judicial review serves as a check to test the soundness of Commission competition decisions that represent one portion of a spectrum of areas over which the Commission exercises authority. The explanation for the duty to give reasons in Article 253 reinforces this claim.[150] According to Article 253, the reasons requirement provides a metric for the reviewing court to "exercise its *supervisory* jurisdiction."[151] In clear contrast with the European system, the job of supervising the FTC is left to the Executive Branch, and deference is appropriate due to agency expertise.[152]

However, the idea that the Commission may somehow have less expertise than the FTC is a difficult pill to swallow. In fact, several problems with this argument exist, making *Heckler*'s first point, if sound, just as applicable to the Commission as it is to the FTC. Competition law is a large part of the Commission's concern, and the impetus for the formation of the European Union was unification and strengthening of a common market, of which competition law is an integral part. Moreover, Neelie Kroes, the Commissioner of Competition in the E.U., oversees a Directorate General for Competition that is charged with administering and enforcing E.U. competition policy.[153] In fact, the Sony-BMG decision was made after the appointment of the first Chief Competition Economist for the Directorate, who is charged with ensuring that Commission decisions are based on sound economic reasoning.[154] Finally, allowing judicial review does not solve the problem of a lack of expertise: in fact, the opposite may be true.[155] Consequently, of all European Union institutions, the Commission (and the Directorate General) appears to be the locus of expertise in competition matters, and the

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148. Case T-464/04, Indep. Music Publishers & Labels Assoc. v. Comm'n, 2006 E.C.R. II-02289; ¶ 528.

149. Geradin, *supra* note 58, at 24.

150. Consolidated EC Treaty 2002, *supra* note 48.

151. *Id.*; Tiili & Vanhamme, *supra* note 52, at 891.

152. The FTC is an Independent Agency. 15 U.S.C.S. § 41 (LexisNexis 2006). Nevertheless, Commissioners may be removed by the President "for inefficiency, neglect of duty, or malfeasance in office." *Id.* Consequently, it may be said that the FTC is supervised by the Executive Branch.

153. LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 996 (2000).

154. *EU & Competition*, *supra* note 4.

155. *See* Swaine, *supra* note 33, at 986 (noting that too much judicial review may rob the law of its expertise).

appointment and removal mechanisms in place for Commissioners may make them just as insulated as executive actors at the FTC.[156]

Second, *Heckler*'s separation of powers argument may be less applicable in the European Union. In the U.S., executive branch actors are thought to answer to other politically accountable officials or to the President, thus obviating the need for judicial interference.[157] However, the European model seeks to avoid majoritarian pressures on Commissioners, which may create a need for judicial review.[158] Commissioners are proposed by national governments and approved by the European Parliament to serve five-year terms, rather than being directly elected by citizens.[159] Actions taken by the Commission are monitored by committees to prevent Commissioners from acting in the interests of member state governments rather than the Commission as a whole.[160] Because it is undesirable for Commissioners to do the will of both the public and the governments in their home nations, judicial review and a duty to thoroughly explain clearance decisions may be particularly necessary.[161]

Furthermore, there may be a more pressing need in the European context for both judicial second-guessing and reasoned explanation for clearance because the Commission gets only one opportunity to diagnose the possible anticompetitive effects of a merger.[162] Unlike U.S. enforcement of antitrust laws, which can occur after a merger's anticompetitive effects are apparent, the Commission cannot intervene after a merger's consummation.[163] This reality alone may incentivize greater scrutiny during an initial investigation, lengthier investigations in Europe than in the United States, risk-averse decision-making with respect to whether a

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156. *See* The European Commission at Work—Basic Facts, http://ec.europa.eu/atwork/basicfacts/index_en.htm#comm (last visited Oct. 14, 2007).

157. *See* Bressman, *supra* note 27, at 1659 (discussing both the "accountability theory," which "seeks to subject agency decisionmaking to the control of politically accountable officials" and the "presidential control model" in which an "agency's failure to act should be subject to the scrutiny of the President" as a figure "more majoritarian than even Congress").

158. *See generally* George A. Bermann, *Regulatory Cooperation Between the European Commission and the U.S. Administrative Agencies*, 9 ADMIN. L.J. AM. U. 933, 938–39 (1996) (discussing the role of the European Commission in regulation).

159. The EU at a Glance—Europe in 12 Lessons—Lesson 4: How does the EU work?, http://europa.eu/abc/12lessons/lesson_4/index_en.htm (last visited Oct. 14, 2007).

160. Bermann, *supra* note 158, at 941, 946–47 (discussing the structure of the European Commission, including the network of committees supporting its work).

161. *See id.* at 938 (emphasizing that Commission members are bound to "act in the Community interest . . . without instructions . . . from the member State[s]").

162. Stefan Schmitz, *How Dare They? European Merger Control and the European Commission's Blocking of the General Electric/Honeywell Merger*, 23 U. PA. J. INT'L ECON. L. 325, 355–56 (2002).

163. *Id.*

business combination creates a dominant position, and a need for judicial review regardless of whether a merger is cleared or blocked.[164] In contrast, judicial interference may be less necessary in the U.S. context because the FTC can always revisit a prior decision, even after a merger has been consummated.[165]

Even if judicial review of Commission decisions is prudent, the problem of judicial review's interference with coordination still exists. If cooperation is truly sought by the U.S. and Europe, the Commission's coordination efforts with other national antitrust authorities such as the FTC, pursuant to multinational agreements, should not go wholly ignored by the CFI (as it did in Sony-BMG). On the contrary, such coordination should lend support to the soundness of Commission decisions. In sum, although a wholesale adoption of U.S. non-reviewability is not workable in the E.U. A middle ground, in which greater deference is given to the Commission in an acknowledgment of its coordination efforts with other national antitrust authorities, is more appropriate.

B. *Problems Undermining the Optimization of Coordination Efforts Between the E.U. and the U.S.*

1. The CFI Does Not Consider or Give Deference To Commission Coordination Efforts

As shown above, for substantive and prudential reasons, it is necessary to have judicial review and competitor standing in the European model. Reviewability and standing doctrine are more effective at vindicating European competition law values (such as promoting business rivalry, checking the executive body, and preventing mistakes) in a process where the E.U. institutions have only one opportunity to reach the optimal result. Nevertheless, allowing judicial review of Commission decisions still has the potential to derail transnational coordination efforts. As one scholar has noted, "[T]he Courts must not redo the Commission's work, but must nevertheless do something, so they solely check for manifest mistakes in the Commission's assessments, thereby cutting the separation of powers knot nicely through the middle."[166] To achieve this balance, coordination must be promoted to a greater position of importance in the E.U. scheme.[167]

Coordination in competition cases has become much more difficult in the wake of recent developments that foreshadow more

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164. *Id.*
165. *Id.*
166. Tiili & Vanhamme, *supra* note 52, at 898 (emphasis omitted).
167. Case T-464/04, Indep. Music Publishers & Labels Assoc. v. Comm'n, 2006 E.C.R. II-02289, ¶ 543.

rigorous review of Commission decisions. First, since ratification of the EC Treaty, the CFI has expanded its own powers of review.[168] In addition to the four grounds listed in the Treaty,[169] the CFI may now review for error of fact, error of appreciation, and absence of reasoning.[170] Second, while significant discretion has traditionally been afforded the Commission in competition cases, the *Airtours*, *Schneider Electric*, and *Tetra Laval* cases demonstrate that the CFI is willing to "rigorous[ly] review" Commission competition decisions.[171]

Certainly the CFI's Sony-BMG decision reflects this rigorousness. In the more than five hundred paragraphs detailing its decision, the CFI seemed to question the Commission's inferences at every discretionary turn. When the Commission found that the market was opaque enough to discourage price coordination, the CFI disagreed.[172] Whereas the Commission found that market disciplining mechanisms would not be used, the CFI found that the existence of such mechanisms was enough to send up a red flag.[173] Consequently, it appears that the CFI has taken a step away from deference to the Commission. The CFI's less deferential stance, coupled with the fact that the Commission is not required to disclose information about its efforts at coordination with any other national antitrust authorities, create a system in which efforts at coordination are swept under the rug and not considered.[174] Moreover, the system currently in place allows the judiciary to make policy decisions—decisions that the Commission alone has the authority to make and that undermine bilateral coordination efforts. Requiring additional disclosures about collaboration, and forcing those disclosures to be relevant to judicial determinations, facilitates and upholds coordination as a paramount value.

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168. Clough, *supra* note 57, at 730.

169. The Treaty lists "lack of jurisdiction, procedural error, error of law, and misuse of power" as grounds for annulment. *Id.*

170. *Id.*

171. *Id.* at 753; DAMIAN CHALMERS ET AL., EUROPEAN UNION LAW 436–37 (2006). *But see* Bay et al., *supra* note 109, at 29 (suggesting the possibility that some Chambers of the CFI "follow a theory of judicial restraint, in line with the Commission's view that it has a wide margin of discretion in assessing complex matters of an economic nature, whereas others are willing to subject the Commission's decisions to a more thorough scrutiny").

172. *Indep. Music Publishers*, 2006 E.C.R. II-02289, ¶¶ 532–33.

173. *Id.* ¶¶ 534–35; Press Release, The Court of First Instance Annuls the Decision, *supra* note 3.

174. Such was the case in the Sony-BMG merger review process. *See generally* Commission Decision 2005/188/EC of 19 July 2004, *supra* note 2.

2. The U.S. System is not Transparent, Which May Undermine the Perceived Commitment to Coordination in the U.S.

While the U.S. model does not afford competitors a right to challenge the FTC's decisions, the potential for judicial disruption of agency decisions still lurks in the shadows due to the private right of action created by Section 16 of the Clayton Act.[175] Any consumers or competitors meeting the rigorous antitrust-injury requirement can seek an injunction—and, in fact, are incentivized to do so by the promise of treble damages.[176] Consequently, a district court might find itself in the unenviable position of reviewing a merger previously cleared by the FTC. Such a court would lack any information about the FTC's compelling justifications for granting merger clearance, including information about bilateral coordination attempts. Because of that, private claims challenging mergers in the U.S. also have the potential of frustrating attempts at coordination between the European Commission and the FTC.

Moreover, the importance of bilateral coordination both to FTC policymaking and its adherence to its agreements is nothing more than a matter of conjecture. On the one hand, the FTC purports to represent U.S. and European interests (when they do not conflict) under its current cooperative agreement with the European Commission.[177] On the other, the FTC is never accountable to that agreement.[178] The agency alone determines the necessity of action and the appropriateness of allocating resources to challenge a merger. Because no judicial review of FTC clearance decisions is allowed by *Heckler*, the agency has no incentive to make the reasons for its decisions public.[179] To lend further legitimacy to U.S. attempts at transnational coordination, an optimal U.S. policy would acknowledge

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175. 15 U.S.C.S. §§ 15, 26 (LexisNexis 2006).

176. For Section 4 cases, the Supreme Court has stated that an antitrust plaintiff must prove that an injury resulted from the violation, that the injury was causally related to the violation, and that the injury was one "of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." Cargill v. Monfort of Colo., Inc., 479 U.S. 104, 109 (1986) (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977)); *see also* Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 537–38 (1983) ("The factors that favor judicial recognition of the Union's antitrust claim are easily stated. The complaint does allege a causal connection between an antitrust violation and harm to the Union and further alleges that the defendants intended to cause that harm.").

177. 1991 Cooperative Agreement, *supra* note 12, art. VI; *see also* 1998 Cooperative Agreement, *supra* note 14, art. VI (incorporating the 1991 Agreement).

178. *See* Heckler v. Chaney, 470 U.S. 821, 832 (1985) (concluding that "an agency's decision not to take enforcement action should be presumed immune from judicial review under [5 U.S.C.] § 701(a)(2)").

179. *Id.*

the importance of transparency to international relations, and either incentivize or require the FTC to disclose any international influences on its decisionmaking.

i. The Benefits of Transparency

Numerous scholars and practitioners have suggested that greater transparency in the administrative system would benefit the U.S. public.[180] However, there are also a significant number of international benefits to requiring greater transparency for FTC merger-clearance decisions. From an international relations standpoint, requiring greater transparency on the part of the FTC when making clearance decisions would reinforce relationships with other national antitrust authorities; make the FTC more involved in enforcing its own bilateral agreements; alleviate concerns outside of the U.S. that coordinating with it means getting strong-armed; encourage additional bilateral agreements from countries that would have more confidence in the predictability of U.S. antitrust policy; and reveal the role that other national antitrust interests play in making clearance decisions.[181] Finally, and most importantly, requiring disclosure might provide insight into the similarities and differences between the U.S. and European systems' substantive policies, and lay the groundwork for possible harmonization efforts in the future.

Regulated entities would also benefit from a more transparent process. Requiring additional disclosure from both the U.S. and E.U. antitrust authorities would establish regulatory predictability. This would encourage efficient merger review, provide additional knowledge of the process to regulated entities, and help those entities comply with regulations across multiple borders.[182] More disclosure would inform present and future regulated entities that there may be considerations other than the Merger Guidelines that are factored into an FTC or Commission decision to act in one way or another—such as those included pursuant to cooperative agreements in closed-door discussions between the FTC and the Commission. Mr. Gonzalez-Diaz, the head of the European Commission's Merger Task

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180. *See, e.g.*, William E. Kovacic, *Evaluating Antitrust Experiments: Using Ex Post Assessments of Government Enforcement Decisions to Inform Competition Policy*, 9 GEO. MASON L. REV. 843, 849 (2001) ("Enforcement officials also could use speeches or formal statements to explain why they decided not to intervene to challenge or modify specific transactions.").

181. *Id.*

182. *See id.* at 851–52 ("Overseas, the development of new competition policy systems and the enhancement of older regimes, particularly the E.U.'s competition policy apparatus, means that individual mergers or other forms of commercial activity are likely to attract attention from a variety of national or regional competition bodies.").

Force, has noted that the existing transparency in the European system provides guidance to industry as to the type of competition-law analysis an antitrust authority is likely to carry out.[183] For regulated entities, this guidance helps alleviate uncertainty and makes it cheaper to anticipate potential antitrust concerns.[184]

ii. The Drawbacks of Transparency

Several arguments against transparency exist, but most—if not all—fail to outweigh the need for such transparency. First, some argue that agency resources may be too limited to achieve public disclosure of the reasons for all clearance decisions.[185] This argument ignores the fact that considerations of cost or resource allocation do not currently prevent agencies from giving reasons when they so choose.[186] Second, some argue that the solicitation of public comments when consent orders are issued obviates the need for mandatory administrative checks like requiring a statement of reasons.[187] However, solicitation of public comments for consent orders is done selectively, not wholesale, and such comments are generally limited to discussions of remedies recommended by the agency.[188]

The third argument commonly offered against transparency is that requiring reasons may disincentivize the voluntary disclosure of confidential information by companies who fear that it will be made public accidentally.[189] The prospect of inadvertent disclosure disincentivizing voluntary disclosure, however, is not a complete bar to disclosure.[190] Instead, it is merely a risk to be negotiated on a case-by-case basis, akin to creating public versions of pleadings in civil court cases.[191]

Finally, some argue that prior disclosures from the agency may bind the agency's hands in future enforcement decisions, or that requiring disclosure may increase political or interest-group pressure on staff.[192] In reality, this risk is minimal if the agency explains the basis of prior decisions carefully and makes certain to note that

183. Jeremy Grant & Damien Neven, *The Attempted Merger Between General Electric and Honeywell: A Case Study of Transatlantic Conflict* 37–38 (Graduate Inst. of Int'l Studies, Working Paper No. 05/2005, 2005), *available at* http://hei.unige.ch/sections/ec/pdfs/Working_papers/HEIWP05-2005.pdf.

184. *Id.* at 38.

185. Symposium, *Transparency in Federal Antitrust Enforcement*, 51 BUFF. L. REV. 937, 948, 950, 963 (2003).

186. *Id.* at 950.

187. *Id.* at 963–64.

188. *Id.* at 954–61.

189. *Id.* at 948, 951.

190. *Id.* at 951–53.

191. *Id.*

192. *Id.* at 948.

merger investigations are done on a case-by-case, fact-intensive basis.[193] Thus, it is difficult to see why requiring the FTC to disclose reasons for its clearance decisions would be anything but a net benefit to U.S. efforts to coordinate its competition law with the E.U.

IV. MOVING TOWARDS SENSIBLE AND WORKABLE COORDINATION OF COMPETITION LAW: REEVALUATING NOTIONS OF TRANSPARENCY AND STANDARDS OF JUDICIAL REVIEW

If coordination of competition decisions is to be achieved through transatlantic efforts—which is certainly the message to be gleaned from current international agreements and coordination efforts—transnational agreements, organic statutes, and judicial review of merger clearance processes in the E.U. and the U.S. must each be reevaluated.[194] It is clear that judicial review, a duty to give reasons, and competitor standing are each necessary in the E.U., both to achieve the antitrust policy goal of fiercely competitive markets, and to ameliorate concerns over checks and balances and the ability to cure mistakes in the process of merger clearance. On the other hand, the European model is inefficient because it increases transaction costs and is unfriendly to parties to the transaction.[195] Furthermore, it is far from clear that industry participants are concerned with anything other than their own competitive positions when they challenge Commission decisions. In such a system, some consideration of international coordination is necessary to offset the effects of allowing review after coordination.

Across the Atlantic, the U.S. system condones nondisclosure, which results in a significant deficit of information about merger-clearance decisions and threatens the perceived legitimacy of coordination efforts.[196] Moreover, although such challenges are rare, private antitrust challenges to mergers in the U.S. have the potential to derail efforts at coordination whenever those mergers cross national boundaries and are approved by the FTC with the assistance and cooperation of the Commission.

In effect, it is difficult to take coordination agreements seriously under either system. To safeguard the significant progress that has been made towards coordination by European and U.S. antitrust authorities, judicial decisionmaking must support coordination.

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193. *Id.* at 950–52.

194. 1998 Cooperative Agreement, *supra* note 14; 1991 Cooperative Agreement, *supra* note 12; Press Release, Commission Decides Not to Oppose, *supra* note 11.

195. Hochstadt, *supra* note 107, at 300–01.

196. *See generally* Kovacic, *supra* note 180, at 847–50 (arguing that enforcement mechanisms are insufficiently transparent).

This Note proposes several possible starting points. First, both the Commission and the FTC are able to and should publicize information about their work together.[197] Second, the current cooperative agreements between the U.S. and the E.U. should be amended to require cooperation whenever there is overlap in merger review processes. Third, when the CFI presides over claims for annulment of Commission competition decisions, information about coordination should be a consideration that would mitigate a decision to annul. Finally, district courts presiding over private antitrust challenges to mergers previously cleared by the FTC should also consider inter-institutional coordination between the FTC and the Commission as a mitigating factor that would cause it to defer to such a clearance decision.

A. *The Feasibility of Mandating Disclosure and Crafting Standards of Review*

1. Modifying Disclosure Rules and Standards of Review in the U.S.

The legitimacy and success of transnational coordination efforts hinges on transparency. A change to the standard of deference in the context of U.S. and E.U. merger review would require antitrust authorities on either side to disclose relevant information regarding transnational cooperation. On the U.S. side, such disclosure can be mandated legislatively through an amendment to the Administrative Procedures Act. The FTC may also take voluntary action to create guidelines for such disclosure that would be least burdensome for the agency and allow the agency to best safeguard its own prosecutorial discretion.[198] Finally, a third option, which Professor Bressman suggests for judicial review of any agency inaction, may be applied here: courts may simply compel agencies to provide additional information about its cooperative efforts when the occasion arises.[199] While the second method of gaining disclosure seems most flexible for the FTC, the third would also meet the goals of disclosure without imposing an unnecessary burden on the FTC. On the European side, the duty to give reasons already obligates the Commission to "disclose in a clear and unequivocal fashion the reasoning [that it] followed."[200]

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197. On the U.S. side, this would require an amendment to the FTC Act. However, on the European side, such explanations easily fall into Article 253's duty to give reasons.

198. *See* 5 U.S.C.S. § 553(b)(3)(A) (LexisNexis 2006) (explaining that no formal rulemaking is required for rules of "agency organization, procedure, or practice").

199. Bressman, *supra* note 27, at 1717.

200. Case T-464/04, Indep. Music Publishers & Labels Assoc. v. Comm'n, 2006 E.C.R. II-02289, ¶ 176; *see* Consolidated EC Treaty 2002, *supra* note 48, art. 253 ("[D]ecisions adopted . . . by the . . . Commission, shall state the reasons on which they are based . . . .").

Requiring the disclosure of transnational coordination efforts already falls within a permissible reading of Article 253 EC.

Moreover, whenever a court is in a position to second-guess policy made through coordinative efforts, an acknowledgment of and deference to FTC-Commission coordination is critical to protect the progress that has been made by the two institutions. For any case on the margins, deference is appropriate, and judicial second-guessing should only take place when there is an egregious misconstruction of the law. On the U.S. side, *Heckler*'s non-reviewability doctrine protects FTC nonenforcement decisions. However, an additional and minor necessary safeguard to the integrity of FTC coordination efforts is to require federal courts hearing Section 16 claims to defer to the FTC's international division whenever relevant. Because the FTC may always revisit prior decisions and respond to third-party complaints to ameliorate the harsh effects of any mistakes it may have made in the past, federal courts may defer without worrying about forlorn plaintiffs.[201] Moreover, because clearance decisions are "committed to agency discretion by law" under the APA, judicial review of a prior agency decision that completely ignores prior FTC decisions could be construed as contrary to the APA.[202]

2. Modifying Disclosure Rules and Standards of Review in the E.U.

On the European side, the CFI's mechanical evaluation of Commission decisions would not change: the duty to give reasons remains the source of the Court's information. However, information about coordination would receive deference, which would most workably take the form of a "factor" in a multi-factor test. Moreover, the more stringent review of Commission decisions under *Airtours*, *Schneider*, and *Tetra Laval* has no place in a deferential inquiry into international coordination because the Court does not have authority to make policy.[203] For the same reason, additional grounds for annulment advanced by the CFI in recent years (error of fact, error of appreciation, and absence of reasoning) should not be used to question coordination efforts.[204] No justification exists for allowing the Court to second-guess CFI judgments regarding coordination in this context. The Commission is optimally positioned to see that it meets its obligations under its international agreements with the FTC.

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201. *See, e.g.*, *In re* Chicago Bridge & Iron Co, N.V., 2004 FTC LEXIS 250 (Dec. 21, 2004).

202. 5 U.S.C. § 701(a)(2); Heckler v. Chaney, 470 U.S. 821, 832 (1985).

203. The Treaty lists "lack of jurisdiction, procedural error, error of law, and misuse of power" as grounds for annulment. Clough, *supra* note 57, at 730.

204. *Id.*

Furthermore, current checks in the European system provide reassurances that the Commission will continue to prioritize the goals of the E.U. over those of the U.S. For example, the Commission is already monitored by committees to prevent Commissioners from acting in the interests of member state governments.[205] Certainly, such committees may also serve as watchdogs to ensure that, in those circumstances in which U.S. interests differ from those of Europe, U.S. interests do not undermine European competition policy. Moreover, increased transparency by the FTC would likely assuage such concerns, because the extent of the give-and-take between the U.S. and E.U. antitrust authorities would become more obvious to all.

3. Memorializing the Commitment to Coordination and Confronting Problems of Harmonization

Another necessary component of the legitimization of merger-review coordination through transparency is to memorialize through "hard" transnational agreement what, according to at least one FTC official, the FTC and the Commission already routinely accomplish.[206] The goals of the 1991 Cooperative Agreement, which are largely furthered by the subsequent 1998 Cooperation Agreement, lack coverage with respect to mergers, primarily due to perceived "merger-timetable" difficulties. Although the 1998 Agreement between the U.S. and the E.U. does not currently govern merger review due to these difficulties, the Sony-BMG investigation demonstrates that time constraints do not hamper FTC and Commission coordination when the two parties choose to expedite that process and coordinate.[207] Amending the 1998 Agreement to set out additional concrete terms for coordination in the realm of merger review and clearance would further legitimize the process already in place for merger review.

The final question left unanswered by these starting points is: what should a court do when it believes that efforts at coordination have superseded the laws that the court seeks to apply? Because harmonization is outside of the scope of this Note, this solution maintains that there are times when antitrust authorities in the U.S. and E.U. will have divergent positions on the same matter—but that this reality should not stop authorities on either side of the Atlantic from striving towards cooperation for the myriad of other instances in which it is feasible. These suggested steps do not propose a covert way of allowing European substantive law to supplant that of the U.S. (or vice versa) through a doctrine of deference. Instead, it

205. Bermann, *supra* note 158, at 938.

206. *See* Parisi, *supra* note 110, at 515–16 (discussing the enforcement cooperation agreement between the U.S. and the EC).

207. 1998 Cooperative Agreement, *supra* note 14.

proposes deference to a *procedure* of coordination—to which the U.S. and the E.U. have already become committed through agreement and practice.

V. CONCLUSION

After the FTC and the Commission granted clearance to the Sony-BMG joint venture, but prior to the CFI's decision in the case, an official at the FTC's International Division noted that, in his view, the day-to-day cooperation and coordination between the FTC and the Commission had been "exemplified . . . by the concurrent FTC and EC reviews of the Sony/BMG . . . merger[]."[208] Indeed, despite what may appear to be fundamental substantive differences in the antitrust law of the U.S. and the E.U., the FTC and the Commission reached a consensus. Ironically, soon after the FTC official's statement, the CFI's decision sent the Commission back to the proverbial drawing board. The CFI's scrutiny of the Commission's Sony-BMG decision makes dialogue on the standards for and possible flaws of judicial review in the U.S. and the E.U. appropriate and timely.

In both the U.S. and the E.U., mergers have the potential to bring about numerous social benefits, such as synergies for businesses, lower prices for consumers, and greater resources for research and development (which in turn promotes innovation). Absent transatlantic cooperation, transaction costs for merging may be higher for corporations operating on a global scale. Sony and Bertelsmann endured almost four years of uncertainty pending a final decision from the Commission just one month ago.[209] Without coordination, in the future, firms may find themselves jumping through numerous overlapping regulatory hoops and facing inconsistent requests and concerns over their attempts to reorganize. Furthermore, without coordination, antitrust authorities—with less information and fewer resources than they would have had if they had coordinated with other authorities—may find themselves reinventing the wheel with each merger clearance review.

Consequently, as this Note observes, the need for transnational cooperation in the antitrust arena is elementary to all—including regulatory beneficiaries, policy-making bodies that have encouraged transatlantic agreements through delegation, and the antitrust authorities that have entered into such cooperative agreements. The one branch of government in both the U.S. and the E.U. that is left out of this formulation is the judiciary. Yet cooperation will inevitably fail whenever comprehensive approaches to such

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208. Parisi, *supra* note 110, at 522.
209. Press Release, Mergers: Commission Confirms Approval, *supra* note 25.

cooperation are lacking. Any attempts to reach consistent transatlantic statements on antitrust policy must take into account the judiciary's role in shaping U.S. and E.U. antitrust policy.

The necessary steps towards a workable solution begin with the acknowledgment that international coordination of merger review is intrinsically valuable and should be treated as more than an afterthought in the judicial scheme. As the world becomes smaller, the need for global antitrust policy only becomes more obvious. This Note suggests two small steps towards such a goal. First, more information should be available to the judiciary. Increased transparency on both sides of the Atlantic would give additional teeth to the idea of coordination and send a signal of international support. Second, standards of review for clearance decisions must consider and defer to coordination whenever issues of substantive law do not stand in the way of such a determination. To the extent that: (1) the CFI's annulment of the Commission's decision in Sony-BMG marks a trend in the E.U. or (2) mergers previously cleared by the FTC will be challenged in the future by consumers, judicial recognition of the value of transnational coordination will prevent the frustration of that coordination.

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