

MERGER CONTROL AND THE RULE OF LAW

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Abstract

This article asks whether competition law, in particular the law on mergers, should always be called law. It concentrates on merger control in the European Union but draws on US experience and history to provide ideas and to contribute to the framework for the analysis. The starting point is that competition law is increasingly located not in courts but in agencies: in the EU, the European Commission. These agency regulators take decisions based allegedly on economic theory, but which are non-predictable and non-replicable; they do not provide a tight enough reasoning process to serve as a guide to action in future cases. Yet they are only marginally reviewable by courts. Finally, even insofar as identifiable and coherent rules exist for agency behaviour, their rule-like character is undermined by a culture of negotiation and compromise, which means that the link between rule and decision becomes even more tenuous and even less apparent to the non-party. Over-reliance on questionable economics, as well as inadequately constrained agency behaviour, suggests that merger control is now the domain of ad-hoc decision making as much as it is of law.

1 Introduction

This article asks if competition law, in particular the law on mergers, should (always) be called law. It concentrates on merger control in the European Union, but draws on US experience and history to provide ideas and

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contribute to the framework for the analysis. The starting point is that competition law is increasingly located not in courts but in agencies, in the EU the European Commission. These agency-regulators take decisions based allegedly on economic theory, but which are non-predictable and non-replicable; they do not provide a tight enough reasoning process to serve as a guide to action in future cases. Yet they are only marginally reviewable by courts. Finally, even insofar as identifiable and coherent rules exist for agency behaviour, their rule-like character is undermined by a culture of negotiation and compromise, which means that the link between rule and decision becomes even more tenuous and even less apparent to the non-party.

These points have been made by others, but overwhelmingly in the context of efficiency critiques of competition law, and with the aim of making it quicker and more economically rational. We are simply concerned about whether 'law' is still the right name for what is going on, or whether the EU merger regulation process in particular is better described in terms of a personal authority vested in the Commission and controlled via the appointment of Commissioners. Is the Commission still the enforcer of competition law, or rather its King, albeit a puppet King whose strings are ultimately pulled by political masters?

In the first part of our main argument, we look at the nature of competition law and the emergence of the agency-regulator – in the EU, the Commission – and the ouster of the courts. We then consider three specific criticisms of EU merger regulation – each of which could be extrapolated to other areas of competition law – which are connected with this agency centrality. One is the reliance on economic theory and the way this is used to give an aura of objectivity and rationality to decisions, while there is a consensus among economists that a diversity of competing economic approaches exists, and none are confining enough that they actually determine decision outcomes.¹ Preaching economics, therefore, neither explains nor justifies specific decisions. The second criticism is that despite excitement surrounding some recent cases, judicial review remains marginal and procedural, and cannot be otherwise. The Commission can be called to account for process errors, but cannot be constrained to reach any particular result nor prevented from reaching any particular one of the many plausible results. Finally, we consider the role of negotiation in merger control, and whether this further undermines what may be left of the rule of law.

To prove our case would require empirical research beyond the scope of this article. The potential transparency and predictive power of economic theory applied to competition cases is a substantive – and

¹ See D.L. Prychitko (ed.) *Why Economists Disagree – An Introduction to the Alternative Schools of Thought* (New York: State University of New York Press 1998).

contested – question of economics, business theory, and consumer psychology, while the actual process and effects of negotiation on competition law can only be established after empirical research, which we have not done but would like to see done by others. However, we think we can establish by reference to the work of others that there is every reason to believe that genuine problems exist, and that further investigation of them is worthwhile. Whether and to what extent competition law has the characteristics that are associated with law remains an open question, but what follows aims to show that there is good reason to be concerned that it does not.

As a preliminary, we outline how we understand the rule of law as well as the sense in which we will be using it in this article.

2 The rule of law²

The rule of law is commonly associated with – among other things – predictability. If rules do not provide a sufficiently precise framework that outcomes in the future can be predicted, then they do not deserve the name ‘law’. The decision-maker is not in reality constrained. We accept this, and also want to emphasise one element of predictability: the role of law in providing guidance to actors. If law is so unclear that individuals or their lawyers cannot use it to guide their actions because they cannot determine what actions would be lawful and which would not be, then we question whether it is meaningful to talk of law. This is captured in the term replicability, and we draw on Eisenberg’s discussion of this in the following paragraphs, which attempt to show how replicability is relevant to the problems of merger control.³

Eisenberg points out that the law is in reality usually too complex to be accessible to non-lawyers. When they need to make plans and to be certain of the legality of future actions they consult a lawyer. As well as the intricate nature of much written law, the fact that law is de facto also contained in judgments means that individuals need legal advice to know what the law really is. This is particularly so in a complex area such as economic regulation.

A consequence of this is that the legal profession occupies an important role in determining the law in practice. Most legal questions are determined by lawyers, not by courts, and most individuals will be guided by lawyers rather than judges as to what the law actually is. Eisenberg argues

² See generally on the rule of law, B.Z. Tamanaha, *On the Rule of Law – History, Politics, Theory* (Cambridge: Cambridge University Press 2004).

³ M.A. Eisenberg, *The Nature of the Common Law* (Cambridge, Massachusetts: Harvard University Press 1988) at 8.

that to a large extent this is desirable, because determination of the law by a lawyer is generally a less expensive and quicker process than legal proceedings, as well as being less risky and threatening. The sheer numbers of lawyers mean that they can disseminate much more effectively and communicate the law to society than judges could alone.

This central role of lawyers in determining law makes it critical that they should be able to replicate the process of legal reasoning that decision-makers use. This in turn means that binding decision-makers – courts or other tribunals or agencies – must use a replicable process of reasoning. Not only does this allow lawyers to advise their clients but the replicable reasoning process allows lawyers to communicate with each other. It ‘creates a channel through which the reasoning of the profession can flow’, allowing private actors to define relationships and agreements with each other, via their lawyers, without the need for governmental intervention.

Use of a replicable process of reasoning also ‘alleviates the retroactivity dilemma’, as Eisenberg puts it. A common legal problem is that the judicial contribution to law is essentially retroactive: every time a judge ‘interprets’ a law in a new way, he is essentially changing the rule at that moment, yet his judgment applies to actions that have already taken place. Case law is, in this sense, always retroactive. However, when such developments in the law are predictable because they are the natural consequence of replicable processes of reasoning, lawyers can then mitigate this retroactivity problem by advising their clients in advance of what is ‘likely’ to happen. Individuals can determine the legal rules that will apply to a transaction even if those rules have not yet received official recognition in the courts.

Additionally, decisions depend on findings of fact and value. In some areas of law, such as competition law, the way of proving these facts may itself be controversial. The question of whether two products are potential substitutes for each other is different from the question of whether Mr X was in the bar on Saturday night: even with all the factual evidence in the world, opinions might differ on the first question because it depends on judgments about consumer and commercial behaviour in the future, which no area of science is yet developed enough to settle beyond doubt. Mr X’s presence may be difficult to establish because it may rely on witnesses, who may be unreliable. However, certainty on the issue is not a ridiculous goal, and with concurring witnesses, or a video camera, may be achievable. By contrast, there is no hope of reaching certainty on future hypotheticals about market behaviour and preferences. However expert the witnesses, however much they agree, and however transparent their methods,⁴ any rational

⁴ The authors are grateful to an anonymous referee for pointing out that Dutch proposals on expert witness regulation attempt to address this problem by requiring expert witnesses to indicate their methods and judges to explain why they consider

observer will be aware that it is not currently within the powers of mankind to predict with anything close to certainty how markets will develop.⁵ A number of very highly educated guesses remain just that.

Other questions of fact, such as whether competition would be harmed, depend on the balancing of numerous factors, estimates of how firms, countries, economies, and consumers will behave, and value judgments about ‘harm’: are fewer but better products more desirable than a greater number of cheaper but worse ones? Some of these judgments are ‘irreducible’ in that, as with ‘reasonableness’ in the common law, they are not practically amenable to further analytic reduction. This is the point at which we hand over authority to the wisdom of the decision-maker.

The result of such multi-factor balancing situations is that systems of law are rarely entirely predictable. Whether they are therefore deserving of the name ‘law’ is a question of degree, of how much uncertainty can be tolerated. Some discretion and uncertainty is unavoidable, but at some point it undermines the rule of law.

The importance of replicability here is that it confines areas of irreducible wisdom, and thus uncertainty, to a clear and defined place in a transparent reasoning process. This both mitigates the uncertainty they cause, and reduces it, by making it easier to compare cases and so extract guidance as to how judges may decide.

In our view, if a scheme is incapable of serving as a guide to conduct it is not law. Is the process of reasoning that leads to decisions apparent enough that lawyers can reproduce it for the clients? Is the weight given to various ‘irreducible’ factors apparent enough that a serious prediction can be made? We suggest that it should be possible to make predictions that are right significantly ‘more often than not’, and that if the predictability and replicability of an area of law are significantly different from other areas of law then we may have a rule of law problem. The standard for tolerable uncertainty is measurable in the legal system as a whole. Competition law should not leave this too far behind.

evidence relevant. (It is disturbing that this is not already the case.) This must increase transparency, and is certainly a step forward, but it will not increase predictability if the lack of this comes from the limitations of science, rather than from individual scientists; and this is the case, since market development is as much dependent on psychology, scientific innovation, and creative product development as on the rules of economics.

⁵ See here section 5.5 below, especially text to footnote 62 et seq.

3 The story in the US

3.1 The contrast between regulation and competition law

Competition law has often been seen as the antithesis of traditional regulation of the economy, particularly in the US. Traditional regulation is a mechanism for the control of industrial actors, dictating the terms on which they may enter the market, price their product, or select their customers. It is a positive enterprise, through which public bodies exercise influence and steer economic activity. It will entail and embody public choices and preferences about the nature and form of industry. In return for giving up a considerable degree of freedom, firms are offered, implicitly or explicitly, a 'regulated fair rate of return'.⁶

The traditional view of competition law is that it contrasts with this regulatory activity by being primarily negative and using only 'second order' incentives. Opting for competition law entails some belief that in most cases the market will produce the correct amount of competition and innovation, and competition law does not need to concern itself with substantive industrial policy but simply ensure that the market functions reasonably well. As such, competition law does not embody decisions about whether firms should build plants or distribution mechanisms, or about the nature of their products. It simply sets a few global limits to behaviour, based not on the substance of commercial activity but on abstract notions of economic decency, and reactively enforces these. Hence the 'second-order' label that has been attached: competition law steers industrial activity indirectly, via non-specific market rules.

It can be seen that while the contrast has some explanatory power, it is also vulnerable to collapse in the middle. Positive traditional regulation and negative hands-off competition law differ considerably in their style and language, and in their density. A very loose traditional regulatory system would leave as much commercial freedom as 'traditional' competition law, while a dense and restrictive set of competition laws could be an effective tool for public steering of the economy and for control of economic actors. The contrast really resides in the choices that the two forms of regulation have tended to reflect; choices for positive regulation of specific industries have tended to result from a desire to steer those industries in particular directions. Choices for competition law as primary regulator have tended to result from a belief that the market makes the best industrial policy.

Numerous American commentators have noted that the contrast has

⁶ S.W. Waller, 'Prosecution by Regulation: The Changing Nature of Antitrust Enforcement' (1998) 77 *Oregon Law Review* 1383.

become unconvincing in the contemporary US.⁷ Hovenkamp suggests that antitrust (American for competition) laws should be seen as part of traditional regulation,⁸ one of many different regulators of competition and innovation. Intellectual property laws and market-specific regulations for such areas as telecommunications or energy also pursue the same ends. One can think of antitrust as a ‘residual regulator’. As he comments, much of antitrust decision making is concerned with the proper allocation of regulatory power between the antitrust laws and other legal regimes, such as intellectual property laws, industry-specific regimes, and land-use regulation.

Spencer Weber Waller also argues that ‘the traditional distinction between competition laws and regulation has not been convincing for some time.’⁹ Increasingly, the general and the scholarly press refer to antitrust ‘regulations’ and to its key enforcers as ‘regulators’. He quotes McChesney:

Antitrust is economic regulation. Its essence is the regulation of certain kinds of economic relations: horizontal agreements to fix prices, agreements between competitors to combine (by mergers or otherwise) and so forth. Antitrust thus regulates the same things that other forms of regulation have traditionally covered.¹⁰

E. Thomas Sullivan has argued in detail in the particular context of mergers and acquisitions that the current merger appraisal process employs the interventionist and activist forms and techniques of classical positive regulation.¹¹ Thus, while the antitrust agencies originally cultivated an image as ‘cops on the beat’ who simply enforced a few strict rules,¹² and this image continues to play a role in both their self-perception and public views of their role, in reality they have become active managers and regulators of

⁷ See for analogous comments on the EU: M. Cini and L. McGowan ‘Discretion and Politicization in EU Competition Policy: the Case of Merger Control’ (1999) 12 *Governance* 175; R.J. van den Bergh and P.D. Camesasca, *European Competition Law and Economics: A Comparative Perspective* (London: Sweet & Maxwell 2006, 2nd ed.).

⁸ H. Hovenkamp, *The Antitrust Enterprise* (Massachusetts, London: Harvard University Press 2005) at 13.

⁹ See Waller, above n. 6.

¹⁰ F.S. McChesney and W.F. Shughart II (eds.) *The Causes and Consequences of Antitrust: the Public-Choice Perspective* (Chicago: The University of Chicago Press 1995) at 328.

¹¹ E.T. Sullivan, ‘The Antitrust Division as a Regulatory Agency: An Enforcement Policy in Transition’ (1986) 64 *Washington University Law Quarterly* 997.

¹² A phrase coined in this context by the influential former head of the Antitrust Division, Thurman Arnold. See Waller, above n. 6.

economic activity, pursuing what sometimes looks like industrial policy.¹³

Others will disagree with the strength of the assertion by these writers that antitrust law has become no more than industrial regulation. However, such disagreement does not detract from the convincing theoretical kernel of their argument: there is no necessary type difference between industrial regulation and competition law, and at the boundaries they flow into each other. A conceptual model that opposes them to each other is without logical basis.

3.2 Agency guidelines as law-making

A classic law enforcement agency relies on interpretation and development of the law by judges in court cases, or by the legislature. The agency itself is reactive and subservient to the boundaries defined by the other branches of the state. As Weber Waller observes, the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission no longer fit this template. Firstly, they have published a proliferation of guidelines on important aspects of antitrust and merger control, which while formally not legally binding have in substance eclipsed other sources of law and become the primary regulation of the field.¹⁴ Secondly, the system has developed to

¹³ See P. Areeda, 'Antitrust Law as Industrial Policy: Should Judges and Juries Make It?' in T.M. Jorde and D.J. Teece (eds.) *Antitrust, Innovation, and Competitiveness* (Oxford: Oxford University Press 1992) at 29.

¹⁴ See H. Greene, 'Guideline Institutionalization: the Role of Merger Guidelines in Antitrust Discourse' (2007) 48 *William and Mary Law Review* 771. The centrality of guidelines to merger control is paralleled and implicitly confirmed by their centrality to academic critique, and largely taken for granted. See for example B.A. Facey and H.Huser, 'Convergence of International Merger Control: A Comparison of Horizontal Merger Control in Canada, the EU and the US' (2004) 29 *Fall Antitrust* 43; J. Harkrider 'Proving Anticompetitive Impact: Moving Past Merger Guidelines' Presumptions' (2005) *Columbia Business Law Review* 317, treating guidelines as the legal basis on which further developments should build. Also of interest is this comment from a member of the New York bar: 'For as long as anyone can remember, judicial decisions have been the principal source of the "law" for those who strive to provide antitrust advice in the United States. This case law never has been a perfect instrument for furnishing guidance to foot soldiers of antitrust, but it least it enjoys the benefit of stare decisis. Administrative guidance likewise serves to provide direction to practitioners, but it can be subject to abrupt change depending on which way the political winds blow. To compound the problem, the reasoning behind such guidance is not always articulated, nor is it passed through the filter of successive level of appeal. There are no dissenting opinions to spawn opposing schools of thought in most instances. There are no case notes in law reviews to suggest criticisms and alternative approaches. There are no headnotes, no key numbers and no Shepards. Instead of judicial opinions there are advisory opinions and guidelines. Instead of appeals there are speeches. Instead of thirteen circuits

the point where most major transactions are notified in advance to the agencies, to achieve certainty for the parties involved. Even where not obligatory, this is encouraged by the agencies; they issue advisory opinions and business review letters indicating where they see problems and what needs to be amended, and negotiate with the parties on the basis of these, further establishing the agency perspective as the one defining the issues and the outcome.¹⁵

This is made possible because, as a result of considerations of both time and cost, neither the government nor the parties to a transaction want to push cases into court. They both have an interest in speedy and consensual settlement. This means that the opinions of the agencies are generally treated by parties as the last word, and the guidelines upon which they are based have come to be seen as the relevant law. The theoretical possibility that appeal through the court system might ultimately result in a successful challenge to an agency opinion is of marginal interest to the business party operating in real time. They need to know whether the agencies will challenge their actions, and to address that issue they need to speak the language of the agencies themselves – of the guidelines.¹⁶ As Weber Waller says:

The guidelines set forth the language and framework that the agencies will use to make the critical determination of whether to bring an action. This is hardly surprising given their intended use as a statement of the enforcement policy of the antitrust agencies. The Merger Guidelines speak more to economic analysis and policy decisions than case law and legal doctrine. Counsel for both the government and private parties will use the text of the guidelines and other forms of soft law to frame their arguments. Arguments framed in terms other than those found in the guidelines are simply off the mark and are omitted from any serious presentation by the sophisticated advocate.¹⁷

Thus the agencies have become central to the antitrust legal process. Not only do they make the rules but via premerger notification provisions, advisory opinions, business review letters, and negotiation with the notifying parties, they have also become the interpreter and applier of the rules.¹⁸

funneling into one Supreme Court there are two federal agencies and fifty state attorneys general funneling through the court of public opinion [...] The U.S. economy is undergoing dramatic changes and the antitrust issues being confronted are new and different. The resolution of those issues is often new and different as well, but the standards being applied and the reasoning behind such resolution are seldom articulated. This is the hidden law of antitrust.' R.M. Steuer, 'Counseling without case law' (1995) 63 *Antitrust Law Journal* 823.

¹⁵ See Harkrider, *id.*, noting that 'agency actions are determinative'.

¹⁶ *Id.*

¹⁷ See Waller, above n. 6.

¹⁸ See Greene, above n. 14.

4 Explaining the US move to regulation

Weber Waller offers two competing jurisprudential theories to explain the emerging centrality of the agencies and their guidelines to US antitrust, and the relative marginalisation of the courts.¹⁹ They deserve consideration here because of the feelings of recognition that they will evoke in European lawyers. It is beyond the scope of this paper to examine whether such explanations are in fact also descriptive of the EU, but it is immediately apparent that the possibility cannot be ignored.

4.1 The legal process

Legal process jurisprudence has its roots in Hart and Sacks' book *The Legal Process*,²⁰ but it is Fuller's development of their ideas in 'The Forms and Limits of Adjudication'²¹ which is of most use here. He refers to 'polycentric' decision-making involving the balancing of multiple and incommensurable values, and argues that courts are ill-equipped to deal with this kind of situation. Writers following Fuller have

noted the migration of polycentric decisions away from the courts towards the use of negotiation, specialized decision-makers, managerial techniques, informal bureaucracies, and other non-adjudicatory solutions [...] courts are ill-equipped to handle antitrust disputes requiring industry reorganization or similar remedies.²²

The problematic concepts at the heart of antitrust are typical polycentric issues. The rule of reason, dominance, and the effects of mergers rely precisely on the distinctive mix of multi-faceted technicality and apples-and-pears-type value balancing that cannot be reduced to clear rules, and so courts quite rightly shy away from them. As the US courts have failed to bring clarity to these areas, the gap has been filled by the agencies, who, even if they are equally unsuccessful in reducing such issues to law, by being accessible and open to negotiation are able to bring day-to-day comfort and security to business partners. The legal process approach argues that in a context such as antitrust, bargaining between experts outside of the court room is a more efficient and transparent approach than official adjudication based on irredeemably opaque concepts. The move to agency regulation is not only inevitable but probably thus desirable.

¹⁹ See Waller, above n. 6.

²⁰ H.M. Hart, jr. and A.M. Sacks *The Legal Process*, prepared for publication by W.N. Eskridge, jr. and P.P. Frickey (Westbury, New York: The Foundation Press 1994).

²¹ L.L. Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353.

²² See Waller, above n. 6.

4.2 Public choice

Public choice analysis proceeds from the perception that people behave with the same rational self-interest in a political context as they are often believed to do in economic markets. Shughart notes:

The model of public choice insists that the same rational, self-interest-seeking motives that animate human action in ordinary markets be applied to decision making in the public sector as well. The assumption that all individuals, in or out of the government, pursue their own self-interest is the fundamental tenet of public choice. Just as consumers want to maximise their utility and firms want to maximise their profits, public policy makers want to maximise their welfare.²³

In the public choice model, as Weber Waller puts it,

government actors are producers of laws and regulations. Interest groups and individual voters are consumers of such laws and regulations. Law producers seek to maximize their interests by behaving in such a way that promotes their long term retention in office and their overall influence. Bureaucratic interests act in such a way to aggrandize their power and influence.²⁴

Applying public choice theory to antitrust produces a somewhat cynical but enlightening picture:

Using the standard tools of economic theory, antitrust activity is analysed as the outcome of decisions made by rational, self-seeking politicians, bureaucrats, and judges.²⁵

Looking through this lens of self-interest, the apparent judicial acceptance of their pre-emption by agencies looks like an understandable and rational retreat from an area of jurisprudence where judges can never be masters anyway, an area steered by technical and economic arguments, which risks taking up huge amounts of judicial time and resources while offering little room for the legal reasoning and wisdom that judges have to offer, and that their prestige and status requires them to exercise. Why spend months on economic cases that do not really need judges as much as they need industry specialists? From another perspective, the agencies of course act with institutional self-interest, seeking to maximise their staff, budget, and power. They are not committed like courts to any particular form of reasoning or expression, but will adapt their way of working to extend their scope and influence; hence, their embrace of the positive regulatory model of antitrust,

²³ See McChesney and Shughart II, above n. 10 at 7.

²⁴ See Waller, above n. 6.

²⁵ See McChesney and Shughart II, above n. 10 at 8.

and the ditching of the role of hands-off policeman, which was originally conceived for them.

Both legal process and public choice theory can explain the changes in antitrust. However, they lead to slightly different views of the future. Legal process analysis says that courts are simply not capable of adjudicating antitrust cases adequately, and offers a structural and permanent move to agency-centric regulation, and a growing place for informal processes and guidelines. By contrast, public choice suggests that the changes are less a response to the needs of the policy than the desires of the institutions. The obvious conclusion here is that agencies will extend their empire until, like all empires, it collapses under its own unmanageability or provokes a destructive backlash.²⁶

5 The European Union

5.1 Rules and standards in EU competition policy

The European Commission's competition policy has been described as 'part

²⁶ See E.S. Rockefeller: 'Decisions do not follow from principles on a case-by-case basis as they do in the development of English common law. Decisions do not clarify marginal ambiguities in statutory prohibitions or make rules precise. Instead, Supreme Court decisions are compromises over differing personal predilections and individual members of the Court as to what is evil. Lawyers and law professors search in the opinions for rules. Most court opinions simply muddy the water [...] Reformers are attempting reform, not abolition [...] They have to believe that, if federal judges are taught enough microeconomic theory, antitrust law will achieve "a high degree of rationality and predictability" and "become a branch of applied economics." Economics will not turn antitrust into law enforcement. Theoretical discussion of markets and market power is based on static analysis, not on facts in the real world. The definition in the analysis assumes a world standing still. Belief in market power requires ignoring the long run. In the antitrust world there is no long run. It's all about an imaginary now [...] Antitrust judgments are subjective choices of the judge about public policy. Law students should be taught that antitrust is not law enforcement [...] Although today's antitrust community is alive and well, antitrust is atrophying. It is becoming a relic, an anachronism, the irrelevant debris of past political demagoguery. Education in the antitrust facts of life could accelerate this process.' *The Antitrust Religion* (Washington: Cato Institute 2007) at 99. Alan Greenspan, former Chairman of the Board of Governors of the Federal Reserve of the USA simply described antitrust as 'utter nonsense in the context of today's economic knowledge', in 'Antitrust' in A. Rand, *Capitalism: The Unknown Ideal* (New York: Signet 1967) at 66. Mr Greenspan's essay is available online at <<http://www.polyconomics.com/searchbase/06-12-98.html>>.

jurisprudence and part political realism'.²⁷ Whatever this phrase may mean, if it results in arbitrariness and a serious lack of guidance because the policy is not replicable this may lead to a system that cannot properly be called a legal system.

The problems of replicability and predictability in the EU merger system are often discussed in terms of the choice between rules and standards, and the benefits of each.²⁸ Rules have what Monti refers to as

formal realisability: a determinate set of facts triggers the application of a law. For example, the rule that a minor is not entitled to vote, or a rule that states that all mergers where the combined market share exceeds 50 percent shall be blocked, is easily applicable because one fact is needed to trigger the rule. Rules maximise certainty by constraining discretion.²⁹

Rules provide certainty and practicality, but can result in over- and under-inclusion: a merger of firms resulting in a market share above 50 per cent may sometimes not in fact endanger competition, while in other market circumstances a merger resulting in a lower combined market share might well have such an anticompetitive effect.³⁰ Thus, despite the clarity of rules, they are sometimes not effective for achieving substantive goals, such as protecting competition. Where rules are over-inclusive, that is to say that they prevent behaviour that is in fact desirable – or in the competition context, 'efficient' – this is called a Type 1 error (a false positive), whereas when a rule is under-inclusive and therefore does not prevent inefficient behaviour it is called a Type 2 error (a false negative). A single rule can result in both kinds of error, depending on the circumstances. An example is the rule discussed above, which would block mergers only where the joint market share is above 50 percent: some of those mergers may be beneficial, and some mergers below that market share may be harmful.³¹

²⁷ See L. Briet, a member of Jacques Delor's cabinet, in G. Ross, *Jacques Delors and European Integration* (Oxford: Oxford University Press 1995) at 130 (also cited in Monti, below n.29 at 18).

²⁸ For the US perspective on this issue, see for example, D.A. Crane, 'Rules versus Standards in Antitrust Adjudication' (2007) 64 *Washington and Lee Law Review* 49 for the advantages of rules in antitrust adjudication; M.A. Lemley and C.R. Leslie, 'Categorical Analysis in Antitrust Jurisprudence', *Stanford Law School Working paper No. 348* (November 2007) available on www.ssrn.com.

²⁹ G. Monti, *EC Competition Law* (Cambridge: Cambridge University Press 2007) at 16.

³⁰ *Id.*

³¹ *Id.* On the balance between rules and standards, see A. Christiansen 'The "more economic approach" in EC merger control – a critical assessment' (2006) *Deutsche Bank Research Working Paper Series*, Research Notes 21, available at <<http://www.dbresearch.com>>; A. Christiansen and W. Kerber 'Competition policy with optimally differentiated rules instead of "per se rules versus rules of reason"'

The inability to express the goals and substance of competition theory in rules that can be applied to real world facts leads to the suggestion that perhaps standards are a better way of regulating competition. A standard is a more general norm, such as ‘effective competition must not be unduly restricted’. These have the advantage of capturing perfectly the purposes of the law but the disadvantage that it is difficult to know when they are actually satisfied. Adjudicating on standards cannot be done in any fully objective or non-controversial way, because they require the decision-maker to assess facts against an open and value-laden norm, and that assessment is inherently opaque – or at least, if it is not inherently opaque, then there is no reason to have the standard. The matter can then be expressed in rules.

This means that standards-based decisions are vulnerable to claims of arbitrariness, and can lead to expensive and slow adjudication. At some point, the inefficiencies resulting from such an imprecise body of norms outweigh the efficiency costs from the Type 1 and Type 2 errors that would be caused by rules. Hence, although we can almost guarantee that regulation by rules will result in errors and efficiency costs, it is by no means self-evident that standards are ultimately more efficient. Sometimes investigation and exploration of the facts on a case-by-case basis is so unwieldy that it would be better to pick a sensible-sounding rule and live with the cost. There is an extensive body of scholarship on precisely when this is the case, and if it is the case where merger control is concerned.³² While it is clear that in principle the application of relatively open standards accords, if done well, with the combination of economic theory, political sensitivity, and industrial policy that comprises EU competition law better than any given rule would, the wide-ranging market and business analysis that merger decisions call for may make the operational cost of a standard-based system so excessively high that it is not only undesirable but in fact self-defeating in terms of the goal it aims to serve, namely: efficiency.³³

While the standards-rules dichotomy is illuminating, it is important to note that there is no need to choose between extremes. The best solution may lie in a combination of the two, or in addressing the degree of openness of the standards or the degree of specificity of the rules. Standards can be made more rule-like, while rules can be made more standard-like. The question facing competition policy today concerns what the optimum position is and how close the current model is to that position. In deciding that, the goals of competition law are important – efficiency and a hint of industrial policy. However, competition law also needs to be seen as a body

(2006) 2 *Journal of Competition Law and Economics* 215; O. Budzinski, ‘Monoculture versus diversity in competition economics’ *Cambridge Journal of Economics*, advance access publication 27 October 2007.

³² *Id.*, especially Christiansen and citations therein.

³³ *Id.*

embedded in a wider social and legal framework. Predictability, replicability, and enforceability in the courts have a value because they maintain respect for the law and social and legal stability, which may mean that they should be prized more than an analysis based exclusively on market efficiencies in the case at hand would suggest.

5.2 The institutional component of decision-making

The reform of competition law in 2004 resulted in many decisions being decentralised to national courts and competition authorities.³⁴ One aspect of the reforms was the move away from prior notification of anti-competitive agreements towards ex-post enforcement, through actions in national courts, potentially brought by competitors. This part of the story seems fundamentally different from the agency-centric picture that the US commentators paint, as if there is a move within the EU back towards rule-based decentralised policing.³⁵

However, other aspects of the system tell a different tale. Some mergers are now handled at national level, but above the threshold they remain the exclusive domain of the Commission,³⁶ which in its management of the merger portfolio does display something of the move away from 'law' described earlier in this paper. Monti puts it nicely when he claims that competition authorities seem bent on making the law dull by publishing guidelines on every substantive and procedural topic,³⁷ going on to suggest that guidelines are probably the most problematic manifestations of a competition authority's powers today. Sometimes in reality they are attempts to make new law, in contrast to their stated purpose, which is always just to

³⁴ Regulation 1/2003, 2003 OJ L1/1

³⁵ The authors are grateful to an anonymous referee for pointing out that even where enforcement is decentralized, this may amount to less than it appears: The Commission often intervenes as amicus in national proceedings; the European Competition Network ensures co-operation between National and Community Competition Authorities; and Community law binds national judges to follow European Commission and Court decisions. See S. Wilks 'Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy' (2005) 18 *Governance* 431.

³⁶ EC Merger Regulation 139/2004 (ECMR), OJ 2004 L 24/1. The qualifying threshold is EURO 5000 million. However, the threshold is more complex, requiring (a) a combined aggregate turnover of € 5000 million *and* (b) aggregate Community turnover of each of at least two of the undertakings of more than € 250 million. And if each of the undertakings achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State, the Commission does not have jurisdiction, Article 1(2) ECMR.

³⁷ See Monti, above n. 29, at Preface x-xi.

explain and clarify.³⁸

As in the US, these guidelines function as the major part of the relevant law. In practice, a business will be likely to follow the guidelines to avoid being investigated by the competition authorities. Yet while the guidelines are presented as a clarification and working-out of the law, in reality the steps they outline rely in places on subjective and non-transparent assessments. As Monti suggests, guidelines hide the conflicts and inconsistencies within competition law without resolving them.³⁹ The following sections elaborate on this.

5.3 Competitive assessment of horizontal mergers

The broad substantive framework for assessing mergers is summarised in Article 2(1) of the EC Merger Regulation (ECMR):

2.1 Concentrations within the scope of this Regulation shall be appraised in accordance with the objectives of this regulation and the following provisions with a view to establishing whether or not they are compatible with the common market. In making this appraisal the Commission shall take into account:

- a. the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community;
- b. the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

2.2 A concentration which would not significantly impede effective competition in the common market or a substantial part of it, in particular as the result of the creation or strengthening of a dominant position, shall be declared compatible with the common market.

2.3 A concentration which would significantly impede effective competition in the common market or a substantial part of it, in particular as the result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.

³⁸ On EU competition guidelines generally, see H.C.H. Hofmann 'Negotiated and non-negotiated administrative rule-making: the example of EC Competition policy' (2006) 43 *Common Market Law Review* 153.

³⁹ Making the same point in a specific (EU) context, P. Yde 'Non-horizontal merger guidelines: A solution in search of a problem' (2007) 22 *Antitrust* 74.

The regulation is further worked out in notices and guidelines, and the Commission outlines its ‘analytical’ approach to the competitive assessment of a concentration with horizontal effects in its Horizontal Merger Guidelines of 2004.⁴⁰ First it identifies the relevant market and then it applies market share and concentration thresholds to preliminarily identify problematic mergers. It then looks at these problematic cases in more detail, to decide whether the result of the merger will in fact be anti-competitive. First it looks at the effect of the merger as if all other factors remained equal. It then considers whether possible harmful effects of the merger are counterbalanced by countervailing effects that may occur. New entrants to the market and efficiencies are examples of countervailing factors. A further consideration is whether without the merger one of the firms involved would fail. This is seen as a partial ‘defence’ to a criticism that the merger reduces competition – that reduction would have been brought about anyway by the failure and so it is not entirely attributable to the merger.

The detailed guidelines covering this process of analysis emphasise that the primary consideration in determining what is anti-competitive is consumer welfare, as reflected in prices, choice, or product quality. Only mergers that are harmful for consumers, in this sense, are likely to be prohibited.

The guidelines also make clear that the evaluation of all this is based on ‘sound economics’ and a careful examination on a case-by-case basis. There are some ‘rules’, but these are essentially the rules of economics. For example, where the Herfindahl-Hirschman index (the HHI) is below a certain level, the Commission is very unlikely to interfere.⁴¹ However, as will be outlined below,⁴² such economic rules are not dispositive of the case on their own. They rest on factual assessments that are less precisely constrained by either law or economics, and that are at the root of the problem of predictability.⁴³ Thus the ‘rule’ that the HHI index must be above

⁴⁰ EC Horizontal Merger Guidelines of 2004 OJ 2004 C 31/5. In November 2007 the Commission adopted Guidelines for the assessment of mergers between companies that are in a vertical or conglomerate relationship. These complement the Guidelines on horizontal mergers.

⁴¹ It is well known that the HHI has serious drawbacks: see Hovenkamp, above n. 8 at 213: ‘Use of the HHI has added an appearance of great rigor to merger analysis. The HHI gives superficially precise “readouts” of market concentration, and also of the amount by which the HHI is increased as a result of a merger. But this ostensible rigor belies the extent to which our merger analysis relies on assumption, conjecture, and even speculation.’ See also Christiansen and Kerber, above n. 31.

⁴² See section 5.5.

⁴³ See A. Schmidt and S. Voigt ‘The Commission’s guidelines on horizontal mergers: improvement or deterioration?’ (2004) 41 *Common Market Law Review* 1583; S. Bishop and D. Ridyard ‘Prometheus Unbound: Increasing the Scope for Intervention in EC Merger Control’ (2003) 24 *European Competition Law Review*

a certain amount to attract intervention is less clear and rule-like than it seems, given that determining when this is the case is dependent on a subjective and discretionary (it will be argued below in section 5.5) data assessment.

5.4 Procedure and publication

If a merger is notified to the Commission, Article 6 of the Merger Regulation then allows a number of paths to be followed.⁴⁴ For over 90 per cent of cases, a decision is issued stating that the merger is compatible with the common market, sometimes after negotiations between the Commission and the parties, and following commitments made by the parties.⁴⁵ These first-phase clearance decisions are usually brief and to the point. While a version is made public on the internet, confidential data are removed, and the decisions are not published in the Official Journal. They do not contain a complete picture of the facts, and are certainly not complete enough to engage in an independent analysis in order to understand precisely why these mergers raised no difficulties.

It might be thought that the brevity of these published decisions is not problematic, since the outcome is welcomed by all parties. There is no problem, no dispute, and so no need for a full explanation. However, this brevity prevents a body of useful ‘case law’ from accumulating, which could serve as a guide for other actors.⁴⁶ There is nothing so helpful as to be able to

357; J. Schmidt ‘The new ECMR: “Significant impediment” or “significant improvement”?’ (2004) 41 *Common Market Law Review* 1555; Also Harkrider, above n. 14, on the assessment of evidence; F.M. Rowe, ‘The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics’ (1984) 72 *The Georgetown Law Journal* 1511.

⁴⁴ See generally L. Ritter and W.D. Braun, *European Competition Law: A Practitioner’s Guide* (The Hague, London: Kluwer Law International 2004, 3rd ed.) at 664.

⁴⁵ *Id.*

⁴⁶ On the US situation: ‘The agencies [DOJ and FTC] often decide, after a thorough review of a proposed merger, not to seek any relief and to allow a merger to be completed. In the vast majority of cases, when either agency decides to close a merger investigation, it provides no explanation as to why it did not seek relief. In many of those investigations, the decision not to seek relief is non-controversial; over 95 percent of mergers that are notified to the FTC or the DOJ are determined not to pose competitive problems sufficient to warrant an extended investigation. Nonetheless, in the instances when the FTC or the DOJ closes the investigation of a merger after an extended investigation, the public and antitrust bar may be left to speculate why the agency declined to seek relief. Although the agencies are not required to explain why they decided not to challenge a merger, they have in recent years issued such explanations with respect to a limited number of transactions. For example, the FTC and the DOJ have issued explanations as to why they closed

compare one's own case with others, and if decisions where no problem was identified were fully reasoned it would be easier for other merging parties to see what they would have to do to avoid problems with their own transaction. However, this would also impose severe constraints on the Commission. As every common lawyer knows, the requirement to ensure that every decision is compatible with all others is demanding and results in fine and lengthy legal argument. The more that the Commission can be called upon to justify why case X is being treated differently from apparently similar case Y, the more the balance of power shifts away from it and towards the merging parties. Instead of being able to examine each notification on a 'case by case' basis – which if it means anything must be shorthand for 'without constraint by rules or comparison' – the Commission would have to consider whether the balancing of factors in a case is being done in the same way as in other cases.⁴⁷ Essentially keeping a large part of the cases 'secret', to put it melodramatically, preserves the Commission's freedom of movement, at the expense of its constraint by law or consistency demands.

Around 5 per cent of cases are referred to the second phase, for more thorough consideration.⁴⁸ Of these, most will either be prohibited or cleared only after significant concessions or commitments from the parties. Second-phase decisions can be lengthy documents with references to many different aspects of the markets and firms involved, their competitors, their products, their production processes, and so on. They consist of a detailed economic analysis of the market and the merger, essentially a term paper in economics, with conclusions predicting the future effect of the merger on competition, and the decision following from this. The economic tools vary from case to case,⁴⁹ but come from the standard toolbox of contemporary economics. However, there is no a priori structure to the analysis, no published protocol

investigations without seeking relief in the cruise line, airline, media, and telecommunications industries. This increased use of closing statements has benefited the merging parties, interested observers, and the agencies themselves, by reducing uncertainty, increasing predictability, and promoting voluntary business compliance.' American Antitrust Modernization Report and Recommendations of April 2007 available at <<http://govinfo.library.unt.edu/amc/>> at 65.

⁴⁷ The emphasis on 'case by case' analysis, and deciding each case 'on its own facts', is indicative of sloppy thinking. Of course every case has unique facts. But if one is to speak of the rule of law, or of a scientific method (lest the economists think this is legal pedantry), those facts should be subject to common rules that, at least largely, determine the outcome of the case. Since the open nature of the written laws and guidelines is not even close to determinative, legal authority can only be established by extracting rules from earlier decisions, à la common law.

⁴⁸ See Ritter and David Braun, above n. 44.

⁴⁹ J. Faull and A. Nikpay (eds.) *The EC Law of Competition* (New York, Oxford: Oxford University Press 1999) at 1.04.

of the form ‘the market will be established following economic theory ABC’. While the Commission commits to economics, it does not commit to any particular economics, not even within a given case.⁵⁰

5.5 Economics and predictability

In finally deciding whether a merger is prohibited, the Commission relies on a number of intermediate decisions, on matters such as the appropriate product and geographical market, substitutability, dominance, and potential efficiencies resulting from a merger. The relevant factors in determining these are well known, from market share, to customer preferences and the cost of transport, and so on. However, as the Commission has said, these cannot be applied ‘in a mechanical way’, and what is not deducible from law or guidelines or previous decisions is how these factors should be weighed to come to an intermediate conclusion.⁵¹ There is no clear process of reasoning, rather a list of relevant bits of argument without any chain that links them. When does an efficiency count for more than an increase in dominance?⁵² When is a consumer preference decisive and when can we conclude that it can be changed in the future? How much dominance is necessary to be dominant? What is ‘to an appreciable extent’, the words that define the degree of independence that a firm must enjoy to be dominant? We can possess information on all the bits of the case, but not know what they add up to.⁵³

The response that defenders of the system would make to these criticisms is that assessments of all these market factors is rooted in economics, and it is by using that economics that the Commission or lawyers are able to determine each factor and how it should be weighed against the others. Thus, it would be argued, economics provides both the economic rationale for the law, and its objectivity and predictability, and the steps of the economic analysis provide the replicability for lawyers and their clients. Competition law is, in this view, the laws of economics.⁵⁴

⁵⁰ *Id.*

⁵¹ See Schmidt and Voigt, above n. 43.

⁵² On the particular issue of weighing efficiencies there seems to be a consensus that there is no adequate economic method for balancing them, with the result of an open-ended Commission discretion. See Schmidt, above n. 43, D. Gerard ‘How to give meaningful consideration to efficiency claims?’ (2003) 40 *Common Market Law Review* 1367.

⁵³ A. Jones and B. Sufrin *EC Competition Law* (Oxford: Oxford University Press 2004, 2nd ed.) at 45.

⁵⁴ For background on the much discussed ‘move to economics’, the increasing reliance on economic theory by the Commission, see for example Christiansen, above n. 31; S. Voigt and A. Schmidt *Making European Merger Policy More Predictable* (Berlin: Springer 2005); Van den Bergh, above n. 7.

We can only sketch a full response to this, but a survey of the literature reveals no support for the idea that there is (a) a single consensus on an economic theory that could serve this function⁵⁵ or even (b) a clear choice by the Commission for a particular consistent and identifiable economic theory and process of analysis.⁵⁶ Such a choice, even if an arbitrary one from an economic point of view, could at least provide legal certainty. A choice that provides not only legal certainty but is also economically regarded as consensually appropriate would of course be preferable, but appears to be impossible in the current stage of economics.

This absence of a statement of theory, and of publication of its clear and complete application to the facts in each case, is understandable. Firstly, any choice would involve taking a stance on ongoing economic debates, and would essentially invite ridicule for the law.⁵⁷ It makes no sense to rely on a branch of science for authority and even legitimacy, while simultaneously rejecting all its controversies, ambiguities, and gaps. If economists do not claim they have a definitive theory that is complete enough to provide confident and unique answers in specific cases, then it is unconvincing for the Commission to claim that in its hands economics can provide such satisfying guidance. The difficult fact is that if the experts disagree or are uncertain – in this case the economists – they can no longer be used to provide authority or objectivity.⁵⁸

Thus, from a legal point of view, stating that economic theory is to be relied upon is useless unless the content and process of that theory is spelled out in a way that ensures it determines outcomes, instead of simply being an additional ingredient in the decision-making soup. This is not the

⁵⁵ See Christiansen, above n. 31; J. Burton 'Competition over competition analysis: a guide to some contemporary economic disputes' in J. Lonbay (ed.) *Frontiers of Competition Law* (London: Wiley Chancery Law Publishing 1994); Budzinski, above n. 31; F.M. Fisher 'Games economists play: a noncooperative view' (1989) 20 *Rand Journal of Economics* 113; Voigt and Schmidt, above n. 54; Gerard, above n. 52; there is also the concrete criticism that the economic theories relied on are too general, and do not take enough account of the specificities of particular markets; see L. Vandezande and others 'Evaluation of economic merger control techniques applied to the European electricity sector' (2006) 19 *The Electricity Journal* 49.

⁵⁶ Faull and Nikpay, above n. 49 at 1.01; Christiansen, above n. 31; Van den Bergh, above n. 7; Voigt and Schmidt, above n. 54. The Commission appears to use a wide and varying range of economic tools, drawn to some extent from different schools of thought.

⁵⁷ See Gerard, above n. 52.

⁵⁸ Christiansen, above n. 31, refers to the risk of a 'battle of the experts' in which a line-up of academics and consultants on both sides has the result that they 'neutralise' each other, essentially rendering the use of expert economists pointless. Budzinski, above n. 31, points out that 'a "neutral" basis for an unequivocal "scientifically-true" antitrust policy cannot be derived' (at 19).

case.⁵⁹ From an economic point of view, stating that economic theory is to be relied upon is only sensible if there is an economic theory that economists believe provides the answers to individual merger decisions.⁶⁰ That is highly contested, with multiple theories competing, and the situation being sufficiently far from a consensus that one may rationally conclude as a non-economist that it is in fact not yet possible to know what is economically 'right'; hence, any dogmatic choice to adhere to a particular theory is essentially arbitrary.⁶¹

However, there is a far more serious criticism. Even if economists agreed on a theory of mergers, any theory's output depends on the data fed into it.⁶² Decisions ultimately turn just as much on questions of fact.⁶³ In the case of mergers, here we are talking about matters such as the appropriate market definitions and dominance, and whether competition will be reduced by the elimination of competitors. These depend on the way in which consumers and firms would behave if the merger occurred or did not occur. What would they switch to? Could they obtain finance? Would they take risks? Would they expand? Would new innovation result and fundamentally change the market?

It is quite clear that the answers to such questions depend on – among other things – individual and mass psychology, new technology and the nature of research, and on broader economic trends and perceptions. Insofar as the firm's behaviour is central, it has been argued that the appropriate theories to look at here, if any, are business theories, not economic ones: namely, the management methods taught in business schools.⁶⁴ These are what guide the behaviour of CEOs and firms to a greater extent than does economic theory. Know what Harvard teaches on its MBA and you may – perhaps – know something about how firms will react to a situation and what the effect on competition is. Know what economics says will happen in a situation where all the human and social oddities and

⁵⁹ See Jones and Sufirin, above n. 53; Christiansen, above n. 31; Schmidt and Voigt, above n. 43.

⁶⁰ This is an important point. There is a greater consensus on the general factors relevant to merger assessment and influence on competition than there is on precisely how those general factors should be used to reach a particular conclusion. However, without this latter consensus any over-arching theory is no more than philosophical background.

⁶¹ See Burton, above n. 55; Fisher, above n. 55; Budzinski, above n. 31; Jones and Sufirin, above n. 53.

⁶² See Faull and Nikpay, above n. 49; Christiansen, above n. 31; Harkrider, above n. 14.

⁶³ *Id.*

⁶⁴ See S.W. Waller 'What should antitrust learn from the business schools? The use of business theory in antitrust litigation' (2003) 47 *New York Law School Law Review* 119; Voigt and Schmidt, above n. 54.

individualities are glossed away, as economic theory tends to have to do, and you know nothing very useful about the individual case.⁶⁵

In making its decisions, the Commission relies on what are referred to as ‘future hypotheticals’ or counterfactuals,⁶⁶ predictions about what businesses would or will do. It provides no information on why the assumptions or reasoning process that it uses, or its interpretations of the data, are the only or best ones. Essentially, it is guessing.⁶⁷ If one wished to be cynical, one would remark that someone able to predict how firms will behave or how competition will look a year from now is far more likely to be reclining on their yacht than working in a greystone office in Brussels. The Commission is, to put it bluntly, engaging in interesting but academically indefensible futurology, of essentially the same intellectual depth as tips on share prices or horse racing.

None of this is to suggest that the Commission is dishonest or less competent than others. It is merely that its decisions in merger cases are not the result of objectively measurable, observable, or enforceable rules, and insofar as there are rules, they do not determine the outcomes.⁶⁸ They provide instead a post-fact rhetorical tool for justification of those conclusions. Any economic theory will give variable outcomes according to the premises fed into it. In the case of merger control, these premises consist of statements about the future behaviour of firms, and the state of competition, which even if founded on masses of data remain subjective and unpredictable, for the simple reason that there is no accepted theory that indicates precisely and clearly how such data should be interpreted. Economic theories can give us an answer if we can input what firms and consumers will do, but they cannot yet tell us the answer to these preliminary questions. Hence, reliance on economics leaves a ‘gap’ in the decision-making process that is not filled by any binding or constraining

⁶⁵ Particularly in the light of the theory of the Second Best; approximate one variable and the whole outcome becomes unreliable – R.G. Lipsey and K. Lancaster ‘the general theory of Second Best’ (1956) 24 *Review of Economic Studies* 11. As mathematicians know, if you are permitted to tell just one tiny untruth, you can prove anything you want. On the problems with individual cases see K. Bagwell and A. Wolinsky ‘Game theory and industrial organisation’ in R.J. Aumann and S. Hart (eds.) *Handbook of Game Theory with Economic Applications* vol 3 (Amsterdam: North Holland 2002) at 1851.

⁶⁶ A. Bavasso and A. Lindsay ‘Causation in EC merger control’ (2007) 3 *Journal of Competition Law and Economics* 181.

⁶⁷ Counterfactuals are particularly problematic where the ‘efficiency defence’ or ‘failing firm defence’ is involved. See C.R. Fackelmann ‘Dynamic efficiency considerations in EC merger control’ *Oxford Centre for Competition Law and Policy Working Paper 09/06*, available on www.ssrn.com.

⁶⁸ See Jones and Sufrin, above n. 53; Budzinski, above n. 31; Bishop and Ridyard, above n. 43; Voigt and Schmidt, above n. 54.

reasoning process. The Commission simply ‘interprets’. However, since these premises are crucial to outcomes, this means that the final outcomes are not in fact constrained by economics, but rather by the Commission’s intuition.⁶⁹ Not only economic rationality but predictability is gone; or rather it is reduced to knowing people in the Commission well and having a good instinct for what they feel about different industrial, political and economic issues. Replicability is of course eliminated. There is no transparent process for the interpretation of data that can be reproduced. Economics may be the law, but it is not yet ready to be law.⁷⁰

Thus, even in the lengthiest published decisions, there is nothing that convinces. There is extensive reference to statistics and reports and investigations, by the Commission and other parties, but no sense that all this data settles matters. Phrases have an authoritative and neutral tone; ‘the Commission’s investigation reveals that’

... ‘producers of X would be unable to enter the market for Y without significant investment in technology and production facilities.’... ‘the report concludes that they would be unlikely to consider this profitable’... ‘market research indicates that consumers do not consider X to be a substitute for Y’.

However, the kinds of things being discussed are not such that they can be settled on the basis of a few reports. It is the ability to think of a new and surprising way to enter a market, or to persuade consumers to change their habits, or to adapt a product to give it an unexpected new use, that brings persons to the top of firms and firms to the top of their markets. Such talents are subtle and various, relying on intuition and psychology and imagination as well as on market perception and economic rationality. We find the Commission’s decisions, which provide a calm and measured analysis of the future on the basis of only the most accessibly quantifiable aspects of the past, to border on self-parody. They provide a primarily static and

⁶⁹ S. Bishop and D. Ridyard ‘Prometheus unbound: increasing the scope for intervention in EC merger control’ (2003) 24 *European Competition Law Review* 357; Voigt and Schmidt, above n. 54, who describe the assessment of dominance as ‘subjective’; Van den Bergh, above n. 7; Schmidt and Voigt, above n. 43; Gerard, above n. 52; Schmidt, above n. 43; D. Ridyard ‘The Commission’s new horizontal merger guidelines – an economic commentary’ *College of Europe GCLC Working Paper 02/05*; Budzinski, above n. 31, states that there is no ‘objective, unified competition theory’ which ‘makes normative assessments superfluous.

⁷⁰ ‘Industrial organization is hardly an exact science’ – R. Schmalensee, ‘Horizontal Merger Policy: Problems and Changes’ (1987) 1 *Journal of Economic Perspectives* 41; see also G. Brennan and J.M. Buchanan *The Reason of Rules* (Cambridge: Cambridge University Press 1985); V. Vanberg *Rules and Choice in Economics* (New York: Routledge 1994).

quantitative analysis of what is dynamic and qualitative,⁷¹ and all the numbers in the world do not therefore make them into reasoned conclusions.

More formally, and for the purposes of this article more troublingly, they are not structured as arguments. Facts do not speak to each other, but across each other. Even if all the data led convincingly to the sub-conclusions claimed, the reports do not show why a particular degree of market power is just too much, or just too little, or why this much efficiency justifies but that much does not. Conclusions are finally of the form ‘in the light of the above the Commission considers that...’. We simply have an amassing of data, but no explicit – or implicit – framework that shows in any replicable way where the boundaries are between yes and no. In other words, no rule.⁷²

5.6 Judicial review

The EU system of competition law contrasts with that in the US in that the European guarantee of legality is provided by judicial review of decisions. In the US, however, the courts are potentially involved in initial decisions, as the competition agency is required to go to court to obtain an order prohibiting a merger. The Commission may initially function not just as prosecutor but as judge as well, under the ultimate supervision of the courts.

It may be queried whether courts can ever be a match for the regulator in a highly technical area. However, in the US system they can play the role of arbiter between the agency and the opposing party, which may submit its own technical evidence. They are then forced to engage with the substance of the question and take a view. By contrast, in a system of judicial review it is never the intention that they second guess substantive decisions. The judicial role is primarily to ensure that correct procedure has been followed and that the boundaries of reasonable plausibility have not been transgressed. Within that broad plausible field, the Commission’s legal

⁷¹ See Ridyard, above n. 69; Fackelmann, above n. 67; Voigt and Schmidt, above n. 54.

⁷² See Voigt and Schmidt, above n. 54, describe predictability in merger control as ‘almost non-existent’. The position is worsened insofar as even after the move to economics-based competition law non-competition factors may be taken into consideration. Views vary on whether this is the case. It has been noted that although competition law and industrial policy are largely at odds with each other, DG Competition and DG Industry meet regularly to discuss individual cases, and also that decisions are formally ultimately taken by the – diverse and political – college of Commissioners rather than the individual DG. See Cini and McGowan, above n. 7; A. Bagchi ‘The international political economy of merger regulation’ (2005) 53 *American Journal of Comparative Law* 1; Christiansen, above n. 31; J. Galloway ‘The pursuit of national champions: the intersection of competition law and industrial policy’ (2007) 28 *European Competition Law Review* 172.

constraints are of procedure, not substance.

Tetra Laval caused considerable excitement as an apparent move towards more penetrating review, and as a display by the courts of willingness to engage with the substance of merger control and its economic basis.⁷³ The Commission's decision to prohibit a merger was annulled by the Court of First Instance (CFI), which required it to have 'convincing' evidence for its position, which it found, after surveying that evidence, was not the case. The Court of Justice then upheld this. It seemed as though the substance of decisions was subject to meaningful control after all.⁷⁴

On closer inspection, this illusion vanishes. The Advocate General said explicitly that judicial review could not go so far as to substitute the Court's economic assessment for that of the Commission's, and the judgments appear to accept this. While the CFI allowed the Commission only 'a certain discretion' in assessing economic data, which was seen by many as a significant step away from previous mentions of 'wide discretion', it is clear that even this 'certain' discretion is significant. Moreover, the very existence of discretion here is part of the problem. The issues involved are essentially ones of fact, not policy; they concern what will happen to competition if a merger goes ahead. To speak of discretion in this context is like saying that a judge has 'a certain discretion' to decide whether the accused fired the gun or not. It is an inappropriate context for the term. Discretion is appropriate where policy interests are being balanced. Of course this is a part of merger control, but if it is a substantial part then this discretion itself is enough to remove the illusion that we are talking about law. If perhaps it was a contained and defined part, within a broader context of rule-like economic theory, a tie-breaker where the theory led to specific either-way results, then legality would not be a problem. However, if it is a trump-card, which can be played in more or less any case to achieve the desired result, then legality is lost.

While the courts in *Tetra Laval* emphasised 'convincing evidence', the ECJ understood this to mean that the evidence must be 'capable of substantiating' the Commission's conclusion.⁷⁵ The strictness of this demand depends on the degree to which it is possible to substantiate different conclusions from the same data. This is precisely the problem: the absence of any strictly defined, public, and prescriptive process of economic analysis,

⁷³ Case C-12/03 P *Commission v. Tetra Laval* [2005] ECR I-987; T-5/02 *Tetra Laval v. Commission* [2002] ECR II-4381; Commission decision 2004/124/EC of 30/10/01 COMP/M.2416 *Tetra Laval/Sidel*.

⁷⁴ See Bavasso and Lindsay, above n. 66; M. Bay and J.R. Calzado 'Tetra Laval II: The coming of age of judicial review of merger decisions' (2005) 28 *World Competition* 433; D. Bailey 'The standard of proof in EC merger proceedings: a common law perspective' (2003) 40 *Common Market Law Review* 845; P. Craig *EU Administrative Law* (Oxford: Oxford University Press 2006) at 453.

⁷⁵ Para 39 of the judgment.

and the room for discretion and policy balancing, mean that in all cases where conflict is likely to arise the Commission has enough room to ‘assess’ the data in different ways and to come to different conclusions.⁷⁶ In some cases, where it is manifest that a merger is of no importance to the market as a whole, or manifest that a market is being replaced by a monopoly, this may not be the case, but these are not the situations with which lawyers should be concerned, since there will be no reasonable disagreement. Instead, it is the cases where it is possible to argue for different positions that raise the problem, and precisely these where the data will not in fact constrain the Commission to any particular view, but will be usable for the substantiation of different views.⁷⁷ This is particularly so when one considers that the question is often not a simple yes or no but concerns exactly what conditions should be imposed on a merger. This sliding scale of possibilities makes evidence even less determinative of results and discretion even more powerful. The Commission is master of the evidence, not the other way round.⁷⁸

Cases like *Tetra Laval* should be seen as training for the Commission. Decisions were overturned because of the way they were presented. The right evidence was not attached to the right conclusions, and bits of evidence were ignored. The procedural and presentational conditions attached to a decision are now very strict. The Commission must be very careful to ensure that all the evidence it gathers is marshalled and logically organised and that a sufficient mass is attached to every sub-conclusion for which it is used, that contrary evidence is addressed and dismantled.⁷⁹ However, provided it does this, the substantive question of whether the interpretation of that evidence really is the best or the only interpretation, a matter of economics, business theory, psychology, and futurology, will be outside the reach of the courts wherever there is more than one plausible interpretation,⁸⁰ which is usually the case.⁸¹ We may expect the Commission

⁷⁶ See Jones and Sufrin, above n. 53; Faull and Nikpay, above n. 49.

⁷⁷ See above n. 69.

⁷⁸ *Id.*

⁷⁹ B. Vesterdorf ‘Certain reflections on recent judgments reviewing Commission merger control decisions’ in M. Hoskins and W. Robinson (eds) *A True European, Essays for Judge David Edward* (Oxford: Hart Publishing 2003) at 143, also cited in Craig, above n. 74.

⁸⁰ *Id.* Although Judge Vesterdorf uses strong language, and appears to emphasise the role of the Courts in holding the Commission accountable, if one looks at his words carefully, as with the Court judgments, the substance is that there will be no tolerance of Commission arguments that are not supported by evidence or where evidence is ignored or improperly used, but where there are multiple plausible interpretations of that evidence, the Courts will not second-guess. The judicial role is thus somewhat less than it at first seems, given the nature of the evidence in question and its inherent open-endedness.

to become ever more polished in its presentation, and therefore in substance ever more immune from challenge.

Other recent cases may accord subtle differences to this picture, although it is too early to tell. In *Schneider*, *Airtours* and *Impala*, the Commission again had decisions overturned by the Courts, and the CFI engaged in what seemed to be a thorough analysis of the evidence before concluding that the Commission had got it wrong.⁸² There is the suggestion that these cases indicate a heavier burden of proof on the Commission when it wishes to prohibit mergers, and they display an increased willingness by the CFI to assess evidence.⁸³ Yet, although *Impala* is being appealed to the ECJ, none of these cases can or do challenge the ECJ's analysis in *Tetra Laval*, which was subsequent to *Schneider* and *Airtours*. These cases may turn out not to be the beginning of a trend. Perhaps more importantly, the Community courts are no more able than the Commission – probably less able in fact – to create certainty and predictability out of economic analysis and the mesh of open guidelines. Were they to go so far as to substitute their own economic analysis for that of the Commission's, the problem of predictability would simply acquire a new venue. In fact, in these cases they emphasised that they were not doing so, but rather that the Commission had made egregious errors of omission and analysis. This attracts headlines, but makes the cases less interesting. There will always be moments of silliness, and authorities will always be caught out in these occasionally, but it is the decisions that might plausibly have gone either way that are of interest, and there is no reason to think that these would not pass the *Schneider*, *Airtours* and *Impala* level of scrutiny. These are the cases where considering all the factors and applying the economics still leaves room for 'discretion' or 'balancing' or 'assessment as a whole'. That privilege remains the Commission's alone.

Finally, one may note the importance of time. Whatever the quality and nature of review, firms often cannot wait for years for certainty about their deals. Despite expedited procedures before the CFI, the possibility of appeal to the ECJ means that litigation delays certainty for longer than most market transactions can tolerate.⁸⁴ This is probably the greatest single reason that what the Commission says is in practice most often the final word. The fact that occasionally a major firm does pursue a challenge does not detract

⁸¹ See above n. 69.

⁸² Case T-351/03 *Schneider Electric v. Commission* [2007] ECR II- ; Case T-342/99 *Airtours v. Commission* [2002] ECR II-2585; Case T-464/04 *Impala v. Commission* [2006] ECR II-2289.

⁸³ See Bailey, above n. 74; S. Volcker, 'The CFI's *Impala* judgment: a judicial counter-revolution in EU merger control' (2006) 27 *European Competition Law Review* 589; K Wright, '*Impala v Commission* and the Standard of Proof in Mergers' (2007) 32 *European Law Review* 408.

⁸⁴ See Christiansen and Kerber, above n. 31.

from the fact that in most merger cases this will not be a practical solution to an undesired or unexpected Commission opinion.⁸⁵

5.7 The culture of negotiation

In practice in the US, few merger cases go to court. Many matters are brought to the agencies' attention for advance review, and their legality is assessed in accordance with internal guidelines. The agencies sometimes negotiate complex consent decrees with the private parties, with the courts playing only a symbolic role in reviewing these decrees.

The centrality of this negotiation process means that the agency guidelines are a more important form of 'law' than case law for most firms and parties, and the advisory opinions that the agencies issue are taken seriously. These give an initial view of the legality of a transaction, and although not a formal requirement before proceeding with a transaction, they are a thriving part of antitrust practice both for the agencies and the private sector. Approval of borderline transactions is often sought in order to obtain agency review and establish the agency position before, rather than after, the commitment of major resources. These requests represent a welcome opportunity for the agencies to make their views known without the necessity for litigation. The agency responses are then studied carefully by the parties and are normally outcome determinative.

As well as such voluntary advance review, most significant mergers and acquisitions must be reported in advance to the enforcement agencies. Only a tiny handful of these are subsequently challenged in court. In practice, the law provides a system whereby the agencies and the parties negotiate their way to a resolution and a consent order.⁸⁶ This is seen by both

⁸⁵ See D. Chalmers and others, *European Union Law* (Cambridge: Cambridge University Press 2006) at 1089; 'While it may be in the public interest to ensure that there is effective judicial review of administrative action, in many cases parties are under such pressure to ensure a merger clearance that they will accept whatever commitments are necessary to gain regulatory approval. In the bargaining that goes on between the Commission and merging parties, the Commission still retains the upper hand.'

⁸⁶ See B. Wasserstein, *Big Deal: The Battle for Control of America's Leading Corporations* (New York: Warner Books 1998) at 759: '[G]iven the uncertainty surrounding most antitrust issues, an acquirer typically demands that transaction documents contain a provision that allows the acquirer to pull out of the deal if it is challenged [...] In addition to negotiating an antitrust provision in the deal documents, an acquirer should be prepared to spend considerable time and energy on the review process. [A]n acquirer should not treat the review process as a black box that will take care of itself. Rather the acquirer should seek to create an ongoing negotiation with the reviewing agency. An alternative to the whole process under Hart-Scott-Rodino is for the parties to a deal to negotiate a voluntary settlement with

sides as an efficient and welcome approach, in which both sides are more inclined to take into account each other's interests and move to a satisfactory compromise than they would be in the polarising context of a courtroom contest.

A similar position is emerging in the EU.⁸⁷ The Commission encourages early contact by notifying parties, and often engages in discussions with them at various stages, from before the formal notification, to 'state of play' discussions where problems have been identified.⁸⁸ The most legally interesting and significant mergers are those around the border of legality, where the issue is not just yes or no but is precisely what commitments or concessions should be made for the merger to be permitted. The decisions on this are not reached in isolation in Brussels but after sometimes intense discussion and debate with the notifying parties, with the importance of particular concessions for each side being brought to the other's attention.⁸⁹ The Commission may wish to see a subsidiary sold to prevent a local monopoly emerging, while the parties may emphasise how vulnerable and short term that monopoly in fact is and will be, as a result of competitive pressures, and how vital the subsidiary is to the efficiencies of the merger. The mergers are important to allow the Commission and merging parties to fully understand each other's position,⁹⁰ and the outcome is often in substance almost consensual, not a million miles in spirit from the US consent orders. These are two powerful parties, circling each other, assessing each others' strengths and weaknesses, and finally usually agreeing that battle would be mutually destructive.

We do not take issue here with the advantages of negotiation. It may in fact be highly efficient. Law may not be the best way to deal with all situations. Our question is whether this diminishes the legal quality of the process, and we suggest that the already wobbly rule-like element of merger control is rendered even less rule-like by the negotiation trend. Instead of striving for clearer and more predictable frameworks, the shared energy of

the government. Such settlements typically are reached during the review process. The government then files a complaint together with a proposed consent decree. Though a consent decree must be approved by a federal judge, the court in most cases merely validates the terms of the existing agreement.'

⁸⁷ See Voigt and Schmidt, above n. 54, who have tracked trends in contact between the Commission and parties, note that negotiation between the Commission and firms increased during the 1990s and the early years of the first decade of the new century. See also above n. 83.

⁸⁸ See Ritter and Braun, above at n. 44 at 664.

⁸⁹ See Cini and McGowan, above n. 7, refer to intense negotiations; D. Neven and others, *Merger in Daylight: The Economics and Politics of European Merger Control* (1993) Centre for Economic Policy Research, refer to a 'complex bargaining game'; see also Christiansen, above n. 31.

⁹⁰ See Cini and McGowan, *id.*

Commission and private parties is channelled towards good co-operation and working relationships. The personal, and the understanding of each other's concerns and interests, is prioritised at the expense of the predictability and replicability of the decision-making process.

6 Conclusion

The Commission in its merger control function looks more like a public authority exercising political discretion under procedural constraints than an enforcement body applying law. One may compare it with a municipal council deciding where to allow commercial activities and which zones to designate as residential. The decision is made on the basis of complex and multiple factors, balancing different interests and policies, and in no sense would one say that it is simply an 'application of the law'. The law is certainly involved in control. Ultimately there will be an obligation to consult relevant parties and to follow certain procedures, and it must be possible to demonstrate to a judge that the decision is basically rational: namely, that the relevant pros and cons have been considered and are capable of being interpreted to lead to the conclusion reached. However, provided the authority behaves in this rational and procedurally correct way, its political interpretation of what the best assessment of the pros and cons are will not be second guessed. It has a discretion, and in this sense there is no law – usually, though some jurisdictions may of course regulate such matters differently – requiring it to reach particular conclusions on particular streets or blocks. Although it must follow the law in deciding its zoning rules, it would not be said to be applying it.

Then we may compare, for example, a body granting licences, say driving licences, or permissions to practice medicine. Here there will be rules determining who is entitled to a licence, which tests they must have passed, and so on. The authority in question applies these rules, and is essentially an applicator or enforcer of the law, not a political decision-maker. That is not to say that there is no discretion – there may be a 'good character', or 'no disabling disease' requirement that requires some interpretation, but rules will typically attempt to define these concepts as precisely and transparently as possible, listing various diseases, what kinds of criminal offences will be unpardonable and which forgiven, and so on. The remaining area of irreducible judgment will be but a small and clearly defined island within a distinctly legal context. Anyone going to a legal advisor will be able to hear with reasonable certainty whether they are in fact entitled to the licence they seek, and to know exactly what process of reasoning leads to this conclusion, what factors are involved, and how they weigh against each other. If the discretionary element of a decision is challenged in court, the matters concerned will be clear and accessible to the

judge – is a person in this physical state able to control a vehicle, should this crime, this long ago, be seen as undermining good character – and even if there is no inclination to second guess, the judicial control is potentially real and effective. It is not the case that an authority will be able to reach whatever decision it wants on the basis of the medical or legal evidence.

The Commission looks much more like the municipal council when it considers mergers. The substance of its decision is not a matter that is regulated by what one could describe as law. Competition law is law in its procedural aspects, but the substantive question of whether mergers are permitted is primarily a personal discretion granted to an authority appointed by political masters. This raises the question of the extent to which this is true of other branches of competition law, to which many of the same considerations of economic analysis and negotiation are relevant.

We do not say that this necessarily matters. Firstly, merger control may grow into law. Competition regulation is a relatively new and changing field, and perhaps one should not be too hasty in demanding legal maturity. Secondly, law is not always the most appropriate way to deal with substance. In both personal and political life, considerations are too complex to be bounded by explicit rules. We expect our parliaments to think, rather than just apply rules, and we do the same in most aspects of our own lives. Perhaps competition regulation, since it has become regulation of the future economy – which is to say therefore also of the future society – rather than just enforcement of certain outer limits of commercial behaviour is also too complex for rules.

One is reminded of the origins of European competition law, in the desire by public authorities to control concentrations of private power and to prevent them being able to challenge or even usurp the state.⁹¹ Efficiency and consumer considerations are a relative innovation, and perhaps they are more a mask than is often claimed, and the public-private power relationship remains at the heart of the system. After all, in the difficult cases, where different views are possible, and conflict is likely, the economists are divided, and therefore as a group unable to agree on what should be done. What rational person would then base their regulation on economic theory? It may be suggested that the very claim that a decision is based on ‘sound economics’ should be enough to have it annulled;⁹² it shows either a lack of understanding of the state and scope of economics, or a total lack of sense.

The most plausible interpretation of the operation of merger control is that the state wishes to be involved in regulating and managing

⁹¹ See D. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford: Oxford University Press 1998).

⁹² Reference to a ‘sound economic framework’ is found in recital 28 of the ECMR. The Commission often refers to the basis of its competition policy in ‘sound economics’.

concentrations of private power, particularly in these times when international firms may seem able to escape the control of particular jurisdictions, but wishes to do so on terms that are relatively neutral and that do not structure the issue so as to necessarily create public-private opposition or conflict. Economics is a shared language, and what it does is provide a medium for negotiation and compromise that is balanced and accessible to both parties. A language of power and authority and political interests would immediately put firms on the defensive. On the contrary, the broad economic, sometimes policy-based, language of competition allows both sides to express their interests without it being 'owned' by either. The role of economics in competition law is not to determine results but to facilitate communication.

The policy of non-legal competition regulation may therefore be good. Nevertheless, lawyers will not be happy at the idea of a hole in the rule of law. It may be that the best response to this is not to change competition regulation to a rule-based system but instead to increase political control over the Commission, to impose on it the accountability that usually goes with political discretion. The appointment of Commissioners for a limited period – especially of course the Competition commissioner – already offers a potential mechanism for politically controlling the direction of competition policy, but perhaps there is a need to develop such control further. In any case, lawyers should be comforted by the fact that this is an area where the most basic rights are rarely an issue. The right to merge or not to merge hardly touches on fundamental human rights, and is a decision addressed to powerful and privileged parties.

We would be interested in research on whether a rule-like system would tend to work in favour of merging parties or the Commission. We suspect it would make it easier for private parties to assert rights and to shoot holes in decisions. The nebulous discretion that currently exists shifts the balance of power to the Commission, the public authority. We think that this is the essence of competition law – a quasi-legal framework to ensure that public authority always has the upper hand over commercial power, without going so far that firms feel humiliated, threatened, or unable to function, or that their interests are ignored.