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CONGLOMERATING ANTITRUST POLICY BY COMPARATIVE EXAMPLE:
A CONCEPTUAL ANALYSIS OF MERGER REGULATION IN THE UNITED STATES, JAPAN, AND THE EUROPEAN UNION

Jonathan T. Trexler*

It is all too easy to allow the cry of "cultural differences" to become the universal apologetic that permanently sheathes the status quo against criticism based upon comparative example.


I. INTRODUCTION

United States jurisprudence has profoundly impacted Japanese and European Union antitrust laws since their incipiency.1 Where American competition law fails or falters, however, there are lessons that the United States too can draw from its foreign counterparts. Hence, the mutual and reciprocal exchange of merger policies will improve enforcement in all three regions and strengthen market competition overall. In the aftermath of the Enron debacle, America's eyes must be wide open to corporate abuses of industrial power; its current mechanisms of accountability result in some disappointment and it must look for alternatives to make certain that past failures do not recur.

* Jonathan Trexler is an attorney with Thomas & Associates, P.A., practicing in the areas of commercial litigation and real estate law. Mr. Trexler received a B.A. from Gustavus Adolphus College and a J.D., magna cum laude, from Hamline University School of Law, where he was Managing Editor of the Hamline Law Review. The author would like to thank his mother, Theresa A. Trexler.

1 MITSUO MATSUBISHI, INTRODUCTION TO JAPANESE ANTIMONOPOLY LAW 2 (1990). But see Spencer Weber Waller, Understanding and Appreciating EC Competition Law, 61 Antitrust L.J. 55 (1992) (explaining how the parallels drawn between the EC Treaty and American antitrust law are overstated, and that the two regulatory schemes lie on fundamentally different principles).
Admittedly, it is unreasonable to transplant an entire body of law from one country to another and expect the results to be the same. Law does not exist in isolation from the cultures and societies that it governs, so any comparative approach to solving societal problems must be viewed with adequate skepticism, or at least with due regard for the fundamental differences among cultures and societies.\(^2\)

Provincial notions of “natural law” as a brooding, omnipresent body of absolute rights and ideals of justice are increasingly being rejected,\(^3\) as pragmatists demonstrate that law serves primarily as a tool to effectuate necessary social changes.\(^4\) Some of the benefits of comparative law include access to a diverse pool of ideas and policy considerations, better institutional cooperation among different societies (which invariably results from the increased borrowing and lending of ideas), and more globally informed lawyers, judges, legislators, and citizens.\(^5\)

\(^2\) Taken to the extreme, Savigny urged that law is peculiar to each nation and cannot be realistically compared. W. Friedmann, Legal Theory 210–11 (5th ed. 1967). However, this blanket premise is almost universally rejected in the international legal community. See Julius Stone, Legal System and Lawyers’ Reasonings 53 (1964); H. J. Berman, The Comparison of Soviet and American Law, 34 Ind. L.J. 559, 559 n.2 (1959).

\(^3\) See, e.g., Guaranty Trust Co. v. York, 326 U.S. 99 (1945) (interpreting the Erie doctrine, which acknowledged state common law as a distinct legal entity, rather than as the mere application of universal reason to cases and controversies). This articulation comes from Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (“The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign . . . .”).


\(^5\) For an example of how many countries’ laws can be examined to arrive at a just result, see Greenspan v. State, 97 A.2d 390 (N.J. Sup. Ct. 1953) (holding that a parent is liable for the necessaries of her minor child, after examining the German, French, and Italian civil codes, among others).
Antitrust law presents an especially valuable opportunity for international cooperation and borrowing because of the importance of comity in enforcement and the need to avoid inconsistent standards. Multinational corporations are frequently the targets of merger regulations because of their potential of acquiring a monopoly (or a “dominant position” in EU jargon). These companies may not be able to operate competitively if faced with varying or inconsistent directives from the regulatory agencies of several different countries or blocs.

The first three sections of this article will provide a historical and theoretical background of merger regulation in the United States, the European Union, and Japan, respectively. They will also outline the standards to which mergers are held and the institutional mechanisms to which the enforcement of merger regulation is entrusted. Throughout, this article will draw comparisons and make distinctions between these systems. Finally, this study offers lessons

6 See British Nylon Spinners, Ltd. v. Imperial Chem. Indus., 1953 Ch. 19 (U.K. C.A.) (refusing to defer to a U.S. judgment, which had adjudicated a U.K. patent unenforceable for violating Sherman Act section 1, on the grounds that the District Court of New York had asserted extraterritorial jurisdiction under the “effects doctrine”); Otto Kahn-Freund, Note, English Contracts and American Anti-Trust Law—The Nylon Patent Case, 18 MODERN L. REV. 65, 67-70 (1955) (arguing that the enforcement of U.S. antitrust law extraterritorially “cannot be justified from an international point of view”). But see RESTATMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987) (setting forth a scheme under which a U.S. court may, in certain situations, have legitimate jurisdiction to prescribe its law to conduct outside the territory of the United States “that has or is intended to have substantial effect within its territory”).


8 Because of the internationalization of commerce, partially attributable to the WTO and GATT, there has been extensive advocacy for an international antitrust regime or “World Competition Code.” See LEON BRITAIN, EUROPE: THE EUROPE WE NEED 163 (1994); Yun-Peng Chu, Towards the Establishment of an Order of Competition for the International Economy: With References to the Draft International Antitrust Code, the Parallel Imports Problem, and the Experience of Taiwan, ROC, in INTERNATIONAL HARMONIZATION OF COMPETITION LAWS 453 (C.-J. Cheng et al. eds., 1995); Eleanor M. Fox, Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade, 4 PAC. RIM L. & POL’Y J. 1 (1995); Ernst-Ulrich Petersmann, Proposals for Negotiating International Competition Rules in the GATT-WTO World Trade and Legal System, 49 AUSSENWIRTSCHAFT 231 (1994).
that each system can take from the others, and points out areas that require special attention in all three merger regimes.

II. MERGER REGULATION IN THE UNITED STATES

Antitrust law in the United States began as a result of a political movement aimed at restraining the power of large trusts, which were seen as a form of factionalism that posed a threat to liberty. This fear of large businesses that were unaccountable to the general public stemmed from the beginning of the Union. Such concerns came to the forefront in 1890, when the Sherman Act was promulgated in response to unprecedented trends toward wealth concentration, corporate mismanagement, and the unethical exercise of corporate power.

9 After the American Revolution, Virginia and other states included in their bills of rights such statements as: "[N]o man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community." Va. Bill of Rights § 4 (1776); "[N]o man, or set of men are entitled to exclusive public emoluments or privileges from the community." CONN. CONST. art. 1, § 1 (1818); "No man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community." MASS. CONST. pt. 1, art. 6 (1780). Thomas Jefferson advocated the inclusion of similar language in the federal Bill of Rights. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 5 THE WORKS OF THOMAS JEFFERSON 368, 371 (Ford ed., 1904). For a more thorough legislative history of the Sherman Act and its philosophical and populist underpinnings, see William L. Letwin, Congress and the Sherman Antitrust Law: 1887-1890, 23 U. Chi. L. Rev. 221 (1956).

10 This issue has not been resolved. See The Role of Giant Corporations in the American and World Economies: Part 2 Corporate Secrecy: Overviews: Hearings Before the Subcomm. on Monopoly of the Select Committee on Small Business, 92d Cong. 1042 (1971) (statement of Senator Nelson) (noting that some corporations are much larger in economic terms than the states in which they are incorporated, like Standard Oil Co. of New Jersey, the annual revenue of which is more than four times the combined revenues of that state and all its local governments); RICHARD J. BARBER, THE AMERICAN CORPORATION: ITS POWER, ITS MONEY, ITS POLITICS 19-21 (1970) (demonstrating in 1970 that the one hundred largest manufacturing firms represent about as much wealth and economic activity as the 300,000 next largest firms).

11 See Louis K. Liggett Co. v. Lee, 288 U.S. 517, 548 65 (1933) (Brandeis, J., dissenting) (describing the historical concern that unrestricted corporations would lead to "encroachment upon the liberties and opportunities of the individual," "the subjection of labor to capital," monopoly, "scandals and favoritism," or some other "insidious menace inherent in large aggregations of capital," and pronouncing that:

The typical business corporation of the last century, owned by a small group of individuals, managed by their owners, and limited in size by their personal wealth, is being supplanted by huge concerns in which the lives of tens or hundreds of thousands of employees and the property of tens or hundreds of thousands of investors are subjected, through the corporate mechanism, to the control of a few men, the effects of which "lead [able, discerning] scholars to compare the evolving 'corporate system' with the feudal system; and to lead other men of insight and experience to assert that this 'master institution of civilised life'
As illustrated in *United States v. Winslow*, however, section 1 of the Sherman Act was insufficient as a check on mergers because a showing of resultant overwhelming market concentration alone did not create a sufficient bar without an overt anticompetitive act. Section 7 of the Clayton Act was passed in 1914 and covered the acquisition of the another company’s stock. This was amended in 1950 by the Celler-Kefauver Act and again in 1980 and 1984, making it illegal for any “person” (whether natural or legal) to:

[acquire] the stock or ... the whole or any part of the assets of one or more persons engaged in commerce [where] in any line of commerce [in] any section of the country [the effect of the merger may be] substantially to lessen competition, or tend to create a monopoly.

This language gives courts the power to analyze the effects of a merger on the market and thoroughly weigh relevant policies to adjudicate in the public interest.

**A. Prima Facie Illegality Under Clayton Act Section 7**

Questions arising under section 7 usually turn on the definition of the relevant market, requiring courts to decide what “line of commerce” in which

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12 227 U.S. 202 (1913) (holding that Sherman Act section 1 did not prohibit mergers and the consequent wealth concentration without a showing of an overt anticompetitive act).

13 See id.

14 See infra note 49.

“section of the country” might be affected, or on the substantiality of the competitive restraint that would ensue from allowing the merger.

As in other areas of antitrust law, an affected “line of commerce,”\(^{16}\) can be defined by looking to the reasonable interchangeability of products. However, less showing of interchangeability is required under section 7 than under typical Sherman Act cases.\(^{17}\) One of the problems inherent in the interchangeability test is what has become known as the “cellophane fallacy,” to which the majority decision in United States v. E.I. du Pont de Nemours & Co.\(^{18}\) originally fell victim. In that case, the United States Supreme Court found that E.I. du Pont’s exclusive manufacturing of cellophane did not constitute a monopoly in any relevant market because if it were to raise its price, many consumers would switch to competing packaging materials as shown by market data.\(^{19}\) The error in the Court’s reasoning is based on the fact that there is some point at which the price of a monopolized product is high enough that consumers will switch to other products, even if those alternative products are not reasonably interchange-

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\(^{16}\) For example, the Sherman Act section 2 requires an in-depth definition of the product market relevant to the alleged monopolization. See, e.g., United States v. Grinnell Corp., 384 U.S. 563 (1966) (finding that “central station” security services operated in a separate market from other property protection services); Int'l Boxing Club v. United States, 358 U.S. 243 (1959) (finding that the championship boxing market was distinguishable from the general boxing market and was being separately monopolized); United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956) (finding that cellophane was interchangeable with other flexible packaging products and did not constitute its own product market); Syufy Enters. v. Am. Multicinema, Inc., 793 F.2d 990 (9th Cir. 1986), cert. denied, 479 U.S. 1031 (1987) (finding that a rational jury could conclude that industry anticipated top-grossing films constitute a distinct market from other first-run films); United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945) (finding that virgin ingot and secondary ingot were not in the same market for purposes of calculating monopoly power).

\(^{17}\) Compare United States v. Cont'l Can Co., 378 U.S. 441 (1964) (barring a can manufacturer’s acquisition of a jar manufacturer, in spite of the obvious limitations to the interchangeability of the products), with Grinnell, 384 U.S. at 563 (making fine market distinctions between types of security services in applying the Sherman Act).

\(^{18}\) 351 U.S. 377 (1956).

\(^{19}\) See id.
able.\textsuperscript{20} So long as a defendant company’s price for its product is set just below this level, market studies show that consumers will switch products if the price increased.\textsuperscript{21} This, of course, gives the impression that these products are interchangeable and there is no domination of the market by the company when in reality the company is already reaping monopoly profits.

The Department of Justice (DOJ) utilizes the “hypothetical monopolist” approach to define the relevant line of commerce in merger analysis.\textsuperscript{22} The DOJ’s Guidelines ask whether a hypothetical monopolist in a proposed market could profitably impose a small but significant and nontransitory increase in price (SSNIP).\textsuperscript{23} If a monopolist could raise the price by five percent without the entry of new competitors or product substitution by consumers, the market is correctly defined.\textsuperscript{24} This test is flawed for the same simple reason as is the test ordained by the Supreme Court in \textit{E.I. du Pont}; it contemplates a rise in price from the current rate, which may already be a monopolistic one.

The Supreme Court treats the “section of the country” inquiry of Clayton Act section 7 as the relevant geographic market, or “within the area of competitive overlap, [where] the effect of the merger on competition will be direct and immediate.”\textsuperscript{25} The Court has, in some cases, found that there is more than one

\textsuperscript{21} See id.
\textsuperscript{22} See U.S. Department of Justice \\& FTC Joint Horizontal Merger Guidelines § 1.0 (1992) [hereinafter \textit{Merger Guidelines}].
\textsuperscript{23} See \textit{id.} § 1.11.
\textsuperscript{24} See \textit{id.}
relevant geographic market for the product in which competition may be lessened by the acquisition. The trend, however, seems to be toward finding a single geographic market for each product.

Section 7 was enacted to attack potentially anticompetitive combinations in their incipiency, rather than fragmenting an already concentrated or monopolized market (a task for which the Sherman Act was designated). Since United States merger regulation is designed to work preventatively, courts must work with probabilities instead of certainties. While this method is often criticized for its tendency to allow judges and enforcement agencies to engage in conjecture and economic speculation when deciding how markets will function after a merger, some educated foresight is necessary for the preventative regulatory mechanism that Congress intended to create. Section 7 therefore applies whenever there is a “tendency toward monopoly” or a “reasonable likelihood of a substantial lessening of competition.”

B. Affirmative Defenses

In the United States, even mergers that have effects prohibited by the aforementioned tests may not be restrained if the defendant successfully argues

28 See infra note 49.
30 Merger regulation, especially when it deals on a theoretical level with fostering future “potential-competition,” is criticized for relying on “ephemeral possibilities” as grounds for invalidating a merger agreement. See Marine Bancorp., 418 U.S. at 602, 623 (refusing to bar a merger on the grounds of a potential future oligopoly).
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any one of a number of affirmative defenses, including the “small company doctrine,” the “failing company doctrine,” lack of competitive harm, or economic efficiencies.

The “small company doctrine” is one way in which companies have convinced courts that strict application of the prophylactic Clayton Act section 7 would be draconian because the net effect of the merger is to benefit competition. This typically applies when small companies combine with the purpose of competing with larger, more dominant firms. In the years immediately after the Celler-Kefauver Amendment, companies proffering this defense did not fair well in the Supreme Court. This is changing, however.


33 Cf. United States v. Phila. Nat’l Bank, 374 U.S. 321 (1963) (rejecting an argument similar to the “small company defense,” when defendant bank asserted that a merger would allow competition in a larger banking market, because that defense would allow firms to merge until every firm is as large as the industry leader).


35 The Supreme Court, in dicta, acknowledged the potential validity of this defense. See Brown Shoe Co. v. United States, 370 U.S. 294 (1962). Brown Shoe Co. is a landmark case that demonstrates U.S. merger regulation, both in theory and practice. Brown Shoe, the nation’s third largest seller of shoes, acquired Kinney, the eighth largest seller. Id. at 297. Kinney’s retail outlets accounted for less than two percent of the nation’s retail sales, but it was the largest distributor dealing with brands other than its own. Id. Prior to the merger, Brown Shoe manufactured about four percent of the nation’s shoes. Id. After the merger, the twenty-four largest manufacturers produced approximately thirty-five percent of the nation’s shoes, with the top four producing twenty-three percent. Id. The district court found a definite trend in shoe manufacturers purchasing retail outlets. Id. This had the effect of lessening the available outlets in which independent shoe manufacturers could sell because the parent-manufacturers were supplying an ever-increasing percentage of their retail outlets’ needs. Id. The district court enjoined the merger, finding that it may substantially lessen competition, in violation of section 7 of the Clayton Act. Id. The Supreme Court affirmed in an opinion given by Chief Justice Warren, enjoining the merger. Id. First, the Court determined the relevant product market, in order to decide whether there was a substantial lessening of competition within the area of effective competition. Id. at 299. It did this first by observing the reasonable interchangeability of use (“cross-elasticity of demand”) between the product itself and substitutes for it. Id. It found the relevant lines of commerce to be men’s, women’s, and children’s shoes. Id. Although there were certain price and quality differences among the various product lines, the Court found effective competition within each of the product markets. Id. The parties agreed that the relevant geographic market was the entire United States. Id. The Court said that Congress attached particular importance to the purpose of the merger—therefore, mergers between small companies or of a failing company
The “failing company doctrine” provides that a merger between a failing company and one of its competitors should be allowed if there are no other viable purchasers. There is some evidence that Congress intended for the availability of this defense, at least to a very limited extent, and its use is growing, as it occupies a significant position in the DOJ’s Merger Guidelines. This defense has three basic requirements: (1) the acquired company must face “imminent danger of failure,” (2) it must have “no realistic prospect for a successful reorganization,” and (3) it must be without any “viable alternative purchaser.”

This defense is defined narrowly, the company claiming it having a strong burden of proof to show that it is nearly entering bankruptcy court at the time of the acquisition, with some courts requiring present insolvency.

is not threatening; however, in this industry, the Court found that no merger could involve a larger potential foreclosure because Brown would use its ownership of Kinney to force its shoes into Kinney stores, creating a “vertical” arrangement. Id. There was also a trend toward concentration in the industry, so enjoining this merger would preserve what vigor was left and allow independent manufacturers to compete. Id. at 305. The Court responded to the argument that efficiencies resulting from the elimination of wholesalers and integrated manufacturing operations would save the merger as follows:

Of course, some of the results of large integrated or chain operations are beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress’ desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.

Id. at 344. Of course, this language runs contrary to the Chicago School approach that focuses exclusively on the immediate effects on consumers, rather than on the long-term effects on the structure of the industry and aggregation of capital. In fact, Brown Shoe Co. would likely be decided differently today because of heavy reliance on that approach. However, that case deserves credit for its superior understanding of statutory intent and the broader policy of antitrust law.

Although this defense is not squarely addressed in section 7, its legislative history refers approvingly to a prior case that allowed it as a very limited exception. Int’l Shoe Co. v. FTC, 280 U.S. 291 (1930) (in which the company “faced the grave probability of a business failure” and no other prospective purchasers); see also Derrick Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 339–47 (1960).

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37 MERGER GUIDELINES, supra note 22, ¶ 5.

38 Dr. Pepper/Seven-Up Cos. v. FTC, 991 F.2d 859, 864–65 (D.C. Cir. 1993).

After a prima facie case has been made against a defendant under Clayton Act section 7, that defendant may rebut the presumption of illegality by showing that no competitive harm flows from the merger. For instance, in United States v. General Dynamics Corp., the Supreme Court found that the acquired company, a coal mining business, had depleted its coal reserves and would not be an effective competitor even if the merger were blocked. In another case, a flooding of competitors into the market subsequent to the merger showed that market power could not be maintained under the circumstances, and that the merger had not been a detriment to competition. The narrowness of this "weak company" defense was illustrated, however, by the Seventh Circuit Court of Appeals when it explained that such an acquisition can interfere with market forces and create a barrier to market entry for potential competitors.

Although evidence of economic efficiencies resulting from a merger has historically been looked at unfavorably by courts, the recent trend gives this defense substantially more credence. Additionally, the 1992 DOJ Horizontal Merger Guidelines allow for the economic efficiencies defense in horizontal mergers, and prominent commentators have suggested that more attention be

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41 See id. at 506.
42 See United States v. Syufy Enters., 903 F.2d 659 (9th Cir. 1990). As a general rule, post-acquisition evidence showing no harm to competition is not considered as a defense because it is mostly within the control of the defendant and may be only temporary. See United States v. Cont'l Can Co., 378 U.S. 441 (1964).
43 See Kaiser Aluminum & Chem. Corp. v. FTC, 652 F.2d 1324 (7th Cir. 1981) (explaining how such an acquisition effectively hands over customers to a stronger company, preventing others from competing for those customers in a way that is characteristic of a purely free market).
46 MERGER GUIDELINES, supra note 22, § 4.
given to plausible efficiencies and other pro-competitive, nonrestrictive motivations for mergers and acquisitions.\(^\text{47}\)

This conceptual overview of the U.S. merger regulatory scheme and Clayton Act section 7 in particular will allow for comparison with merger law in the European Union and Japan. For present purposes, it is fundamental to recognize that this merger regulation scheme has developed over a substantial span of time, its application requires extensive analysis of market functionality, and conjectural effects that often likely to ensue from increased concentrations of market power. Furthermore, many mergers are now passing muster under the revised standards because of a growing willingness to allow affirmative defenses, especially under the DOJ merger guidelines.

III. MERGER REGULATION IN THE EUROPEAN UNION

From the vantage point of the United States, European Union merger regulation is a new and rapidly developing body of law.\(^\text{48}\) Even in these demanding times, the EU’s doctrines and enforcement institutions have been surprisingly effective in analyzing the social and economic ramifications of business consolidation, with sophistication that greatly surpasses the early years


\(^{48}\) The EC Treaty established the European Economic Community and was signed on March 25, 1957, including as one of its goals “the institution of a system ensuring that competition in the common market is not distorted.” EC Treaty, supra note 7 (incorporating changes made by the Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, O.J. (C 340) 1 (1997) [hereinafter Treaty of Amsterdam]).
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of Clayton Act section 7 adjudication, the predominant U.S. merger regulation scheme.\(^{49}\)

The European Union’s Directorate-General for Competition of the Commission of the European Communities (commonly known as the “Competition Commission”) serves as the nerve center of all EU antitrust enforcement,\(^{50}\) although there have been proposals that the power to enforce the merger regulations be diffused to the national courts.\(^{51}\)

\(^{49}\) Section 7, as enacted in its original form in 1914, provided:
That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce . . . .

\(^{50}\) See Valentine Korail, An Introductory Guide to EC Competition Law and Practice 18 (6th ed. 1997). The European Commission is divided by policy areas into twenty directorate generals (DGs). The Competition Commission was the fourth DG established. Therefore, it was formerly known as the fourth Directorate General, or DGIV. \(\textit{id.} \) “The Competition Commission is now composed of 20 members (two each from the five largest member states and one each from the remainder). Each member of the Commission is responsible for one or more policy areas.” \(\textit{id.}\) The Competition Commission is subject to substantial appellate review, however, by the Court of First Instance and then the European Court of Justice. See EC Treaty art. 233 (“The institution or institutions whose ... act has been declared contrary to this Treaty shall be required to take the necessary measures to comply with the judgment of the Court of Justice.”); Case T-110/95, Int’l Express Carriers Conf. v. Comm’n, 1998 E.C.R. II-3605, para. 33 (finding that Article 233 of the Treaty of Amsterdam requires the Competition Commission to comply with an ECJ decision, although that court cannot issue orders to the Commission. “According to settled case-law, it is not the function of the Community judicature to issue directions to the Community institutions or to substitute itself for those institutions when exercising its powers of review. It is for the institution concerned, under Article 176 of the Treaty, to adopt the measures required to give effect to a judgment delivered in an action for annulment”); Case T-7/89, SA Hercules v. Comm’n, 1991 E.C.R. II-1711 (stating that a reason for having the Court of First Instance is detailed review of fact and law on appeal from the Competition Commission).

Commission has generated much attention, especially in recent years, for occasionally invoking competition regulations more substantial than the firmly-established enforcement mechanisms utilized in the United States, including the Antitrust Division of the DOJ, the FTC, and the FCC. In 2001, for example, the Competition Commission blocked the proposed merger of General Electric and Honeywell, which had already been approved by the United States Department of Justice, because the Commission determined that the resultant conglomerate would utilize its market dominance to bundle dissimilar products and thereby severely reduce competition and increase prices in the aerospace industry.

Competition law in the European Union was not founded on the populist principles of its counterpart in the United States. Rather, the leading goal in

52 See, e.g., Case 91/619, Aerospatiale-Alenia/de Havilland, 1991 O.J. (L 334) 42 (blocking the de Havilland/Boeing merger, although the “failing company defense” was arguably applicable); Handler, supra note 49, at 99-105.

53 Case COMP/M.2220, General Electric/Honeywell, 2001 O.J. (L 4064) 89 (basing the rejection of the merger proposal, in large part, on the conglomerate’s ability to force competitors out of the market and raise prices by bundling dissimilar products). The Competition Commission stated in its decision:

The proposed merger will extend GE’s incentive and ability to influence airframe manufacturers to select GE engines to Honeywell systems, and thereby foreclose Honeywell’s competitors while strengthening its position on the engine markets. The merged entity’s ability to offer packaged deals, GECAS’s demonstrated and rational purchasing bias, the relative indifference of other aircraft customers regarding systems selection and GECAS’s ability to place huge aircraft orders are among the main factors that will enable the merged entity to effectively and successfully place Honeywell products and bundle them with GE products when appropriate.

Id. One commentator favoring the merger declared:

The merger proposal sailed through the U.S. Department of Justice, which concluded that the plan did not raise competitive concerns because of the lack of overlapping markets. The department also found that the merged company would likely offer bundles of products (e.g., engines and radar systems) for less than what the companies already charged for the products separately—hence customers would clearly benefit. When the proposal came to Brussels, the EU competition directorate shared this view on the economic effects of the merger. But it then conjectured that the lower prices would eventually drive GE-Honeywell rivals from the market—and that this outcome could lead to an increase in prices in the future.


The creation of the European competition law can be traced back to two chains of reasoning. The first fundamental reason for its creation was that a common competition
promulgating it was to foster a more cohesive market with fewer barriers and facilitate a better, more affordable movement of goods and services. The focus is more on economic progress, efficiency, and overall material benefit than on the redistribution of power and corporate accountability. In effect, along with other provisions of the EC Treaty, the competition law was intended to play a role similar to the Commerce Clause and the Article IV Privileges and Immunities Clause of the United States Constitution.

law would lead to a greater unity among the Member States, a moral imperative after the bloody conflicts of the past. An economic imperative provided the second reason. The enterprises of the Member States of the European Economic Community ("EEC"), in a very weak state after the Second World War, needed to improve their position in order to be better able to compete with their competitors outside the Community, especially in the United States.

Id. (citations omitted); see also RICHARD MAYNE, THE RECOVERY OF EUROPE: 1945-1973, 235 304 (1973) (detailing post-war attempts to integrate Europe economically after political solutions had failed); David J. Gerber, The Transformation of European Community Competition Law, 35 HARV. INT'L L.J. 97, 102 (1994).

55 See EC TREATY Art. 2.

The Community shall have as its task, by establishing a common market and an economic and monetary union ... to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

Id.

56 See Terhorst, supra note 54, at 353 (stating that the "twin goals set out by the Treaty for its antitrust regulations are economic integration within the EC and the creation of a common market," and avoiding the weakening of the competition that is created thereby).

57 See, e.g., EC TREATY art. 14 (setting out the internal market, in which there are to be no barriers to the free movement of "goods, persons, services and capital").

58 U.S. CONST. art. I, cl. 3; see also Dean Milk Co. v. Madison, 340 U.S. 349 (1951) (striking a city ordinance that required all milk sold in Madison, Wisconsin to be pasteurized within five miles of the city, on the grounds that it regulated interstate commerce). Justice Cardozo summarized the integrationist philosophy of Dormant Commerce Clause jurisprudence in Baldwin v. G. A. F. Seelig, Inc.:

To give entrance to [protectionism] would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.

294 U.S. 511, 523 (1935). Members of the EU are far from adopting a framework of political unity that requires that they "sink or swim together," as embraced in Dormant Commerce Clause analysis, but the notion of economic cooperation that reciprocally benefits each state individually has been appealing enough to result in comprehensive antitrust law.

59 U.S. CONST. art. IV, cl. 2; see also United Bldg. & Constr. Trades Council v. Camden, 465 U.S. 208 (1984) (determining whether a city ordinance that favored residents in government hiring was valid).
The Competition Commission makes a two-step inquiry in determining whether a merger violates Articles 81 and 82 of the EC Treaty. The first is whether the "undertaking's" proposed merger would create or strengthen a dominant position in the Common Market (a company is commonly referred to as an "undertaking" in EU jargon). After it is determined that there is such an

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1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
   (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
   (b) limit or control production, markets, technical development, or investment;
   (c) share markets or sources of supply;
   (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
   (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
   - any agreement or category of agreements between undertakings,
   - any decision or category of decisions by associations of undertakings,
   - any concerted practice or category of concerted practices,
   which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
   (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
   (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

See EC Treaty art. 81. Article 82 of the EC Treaty provides:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:
   (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
   (b) limiting production, markets or technical development to the prejudice of consumers;
   (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
   (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

See id. art. 82.
effect, the Commission asks whether the dominant position of the undertaking would adversely affect competition.61

A. Creating or Strengthening a Dominant Position

The test for dominance is a wavering standard,62 viewed on a sliding scale that depends on such factors as the influence that the undertaking exerts on the market and its ability to act independently of consumers’ demands or competitors’ actions.63 From a purely economic standpoint, an undertaking with a dominant position can influence the market without having its actions substantially constrained either by competing undertakings or by consumers.64 The Competition Commission considers market share to be a leading indicator of an undertaking’s dominant position.65 This is similar to the modern practice in the United States.66 In Hoffman-La Roche,67 the European Court of Justice (ECJ)

61 See Council Regulation 4064/89 Establishing the Merger Control Regulation, art. 1(2), 1990 O.J. (L 257) 14, 16 (listing the factors that the Competition Commission considers when evaluating a merger) [hereinafter European Merger Regulations].
63 Compare Case C-250/92, Gottrup-Klim c.a. Grovvarefornering v. Dansk Landbrugs Grovvarelskad AmbA, 1994 E.C.R. 1-5641, para. 47 (stating that a dominant position is “a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately its consumers”), with United States v. Aluminum Co. of Am., 148 F.2d 416, 426 (1945) (finding monopoly power under Sherman Act section 2 because defendant corporation “was free to raise its prices as it chose,” regardless of a lack of specific intent to violate the Act).
66 Compare Hoffman-La Roche, 1979 E.C.R. 461, para. 41 (discussing the importance of market power on the issue of dominance), with United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945): (“Over ninety percent market share is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four per cent would be enough; and certainly thirty-three per cent is not.”).
found that there are very few cases in which a very large market share does not automatically signify a dominant position.\textsuperscript{68} Otherwise, dominant market share definitions will vary considerably, depending on the nature of the market in question.\textsuperscript{69} In such cases, additional factors will be considered, including the distance in market share to the next largest competitor, market turnover, and technological advances.\textsuperscript{70} Some of these considerations also require assessment when defining the relevant market and understanding how that market will operate in the future.\textsuperscript{71}

Much like merger analysis in the United States, a significant part of the dominance inquiry in the EU entails definition of the relevant products and geographic markets.\textsuperscript{72} The Competition Commission’s analysis of the supply and demand of products or services\textsuperscript{73} appears to be quite similar to its American counterpart’s cross-elasticity analysis.\textsuperscript{74} While the Commission also looks to

\begin{itemize}
  \item \textsuperscript{68} See \textit{Hoffman-La Roche}, 1979 E.C.R. 461, paras. 40–41 (discussing the role of market share).
  \item \textsuperscript{69} See id. paras. 42–48 (explaining that a number of considerations in the case at bar indicated a dominant position, rather than market share alone). In the \textit{Hoffman-La Roche} case, patents and size in relation to the nearest competitor were factors that, when considered in conjunction with market share, indicated a dominant position. \textit{Id.}
  \item \textsuperscript{70} Id.
  \item \textsuperscript{71} See \textit{Cook}, \textit{supra} note 64, at 128–31.
  \item \textsuperscript{72} See Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law, art. 2, 1997 O.J. (C 372) 5 [hereinafter Commission Notice] (setting forth the guidelines for market definition as notice to companies); \textit{Cook}, \textit{supra} note 64, at 132–33 (discussing the necessity to narrowly define the market in order to foster competition and overcome legal attempts to eschew regulation). \textit{cf.} United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956) (defining the market rather broadly, in effect saying that wax paper, ployd film, glassine, foils, greaseproof paper, and other packaging materials were interchangeable because the cross-elasticity of demand was high at the current price).
  \item \textsuperscript{73} See Commission Notice, \textit{supra} note 72, art. 8.
  \item \textsuperscript{74} See id. For an analysis of the “cellophane fallacy” or the deceptive character of using cross-elasticity as a determinant of monopolization, see Krattenmaker, \textit{supra} note 20, at 256. The Fifth Circuit articulated a common sense alternative to cross-elasticity analysis:

  \begin{quote}
  Antitrust law recognizes that economically significant submarkets may exist which themselves constitute relevant product markets. The fact finder may determine a submarket exists by “examining such practical indicia as industry or public recognition of the sub-market as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.”
  \end{quote}
\end{itemize}
where competition is reasonably uniform and distinguishable from other markets, the EU’s geographic and product markets appear to be more enmeshed than those found in the United States. Rather than each being determined in isolation of the other, the analysis consists of a single inquiry of effective competition. Most importantly, the Competition Commission does not rely on cross-elasticity alone (or other market data in isolation) to determine whether there is competition in the market, as opposed to a dominant position. The Alenia/de Havilland decision shows that the Commission will ultimately rest its decision on the practical similarities and differences in products, from the point of view of the consumer rather than the economist.

B. Adverse Effect on Competition

Taken alone, creating and/or strengthening a dominant position does not violate Articles 81 and 82 of the EC Treaty. To fail under the standards applied

Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 487-88 (5th Cir. 1984) (citation omitted). Essentially, the court looked at the product and its putative competition from the perspective of the consumer choosing what to buy in a competitive market with competitive prices, rather than as an economist. See generally id. Miraculously, the EU seems to have realized the practicality of this “submarket” approach, rather than entrenching itself in the Serbonian Bog of cross-elasticity analysis and its fallacies. See Cook, supra note 64, 132–33 (discussing the Commission’s use of narrow market definitions). If markets are defined with an eye toward preserving competition and minimizing market dominance even in narrow contexts (product and geographic submarkets), antitrust policy will be best served. Cross-elasticity is too subject to manipulation to serve this purpose, especially when the economic factors considered by the courts come from a market in which the defendant exerts substantial control.

75 See Commission Notice, supra note 72, art. 8.

76 Compare id. art. 7 9 (deriving the compound inquiry for synthesized case law and other opinions), with United States v. Grinnell Corp., 384 U.S. 563, 576, 587 (1966) (deciding that the geographic market is national and that the product market is “insurance accredited central station protection services,” in separate sections of the opinion).

77 See Case 91/619, Aerospatiale-Alenia/de Havilland, 1991 O.J. (L 334) 42 (“A relevant product market comprises in particular all those products which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use. It would not appear, for example, that a 60-seat commuter is interchangeable or substitutable with a 30-seat commuter. They are used on routes with a significantly different density. The prices vary significantly . . . .")
by the Competition Commission a proposed merger must also adversely affect competition in the common market.\(^78\)

With the exception of a few unusual cases, undertakings in the common market generally have little fear that their mergers will be invalidated under the Competition Commission’s standard of scrutiny.\(^79\) Even when a merger fails the test, the undertakings generally negotiate a settlement with the Competition Commission by making a few modest concessions.\(^80\) Merger applications of undertakings in the EU are similar to those filed in the United States (in

\(^78\) See European Merger Regulations, supra note 61, art. 10-11 (establishing the impact on the Community required for the merger law to apply). There is a Community impact if: (i) the worldwide value of the merger exceeds five billion European Currency Units (ECUs). Id. However, if over two-thirds of the EU industry value is concentrated within one of the EU countries, then that country’s competition laws control. Id; see also Case 27/76, United Brands Co. & United Brands Cont’l BV v. Comm’n, 1978 E.C.R. 207 (finding that the necessity to expend enormous capital to enter a market constituted a barrier to entry). Compare Case 65/89, BPB Indus. Plc & British Gypsum Ltd. v. Comm’n, 1993 E.C.R. II-389 (finding that an exclusive purchasing contract for plasterboard was abuse of a dominant position), with SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958 (10th Cir. 1994) (finding that Visa’s exclusive dealing arrangement that excluded Sears did not constitute an agreement in restraint of trade, in violation of Sherman Act section 1). Compare Case 114/96, ITT Promedia NV v. Comm’n, 1998 E.C.R. II-2937 (finding that predatory pricing constituted abuse), with Brooke Group v. Brown & Williamson Tobacco, 509 U.S. 209 (1993) (finding that predatory pricing could be an attempt to monopolize under Sherman Act section 2, but that two threshold requirements must be met: pricing below cost and a reasonable prospect of recouping the expense of predation); see also Utah Pie Co. v. Cont’l Baking Co., 386 U.S. 685 (1967) (seemingly holding that intent of predation is enough under section 2, without meeting the threshold requirements later ordained in Brooke Group).

\(^79\) See LENNART RITTER ET AL., EUROPEAN COMPETITION LAW: A PRACTITIONER’S GUIDE 117 (2d ed. 2000) (stating that the Commission overwhelmingly approves merger applications and that this permits a systematic derogation of the regulations). The Competition Commission is also hesitant to temporarily enjoin a merger in its incipiency before a detailed review of the merits. See Case 79/79, Camera Care Ltd. v. Comm’n, 1980 E.C.R. 119 (1981) (finding that the Competition Commission did have the power to impose such measures, although it had found that it did not).

\(^80\) See, e.g., Commission Decision of 8 July 1998 Declaring a Concentration to be Compatible with the Common Market and the Functioning of the EEA Agreement. (Case IV/M.1069- WorldCom/MCI), 1999 O.J. (L 116) 1 (permitting the WorldCom/MCI merger upon condition of divestiture of internet backbone service from MCI); Commission Decision of 17 July 1996 Relating to a Proceeding Pursuant to Council Regulation (EEC) No. 4064/89 (IV/M.553- RTL/Veronica/Endemol), art. 12, 1996 O.J. (L 294) 14 (requiring a television station not to change its format for five years without obtaining approval from the Competition Commission beforehand); see also Case 327/91, French Republic v. Comm’n, 1994 E.C.R. I-3641 (finding that the European Council had the power to enter into agreements with foreign countries, rather than the Competition Commission). But see Joined Cases 43/82 & 63/82, Vereinigung ter Bevordering van het Vlaamse Boekwezen, VBVB, & Vereeniging ter Bevordering van de Belangen des Boekhandels, VBBB v. Comm’n, 1984 E.C.R. 19 (holding that the Competition Commission is not required to make settlement offers).
accordance with the Hart-Scott-Rodino Act, but the process in which they are reviewed is more ministerial and less adversarial. When an application seems to violate the standards of review, the Competition Commission usually first looks to see what modest concession it can request in order to achieve basic, minimal conformity, rather than assessing its ability to trump the entire combination after protracted litigation.

The Competition Commission aims to prohibit the possibility of collective dominance, or the ability of a small number of undertakings in a market to

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84 See Joined Cases C 68/94 & C 30/95, France v. Comm'n, 1998 E.C.R. I-1375 (finding that collective or oligopolistic dominance was covered by the competition law).
conduct business in an anticompetitive manner. This is tantamount to the fear of oligopolistic conduct that reverberates throughout United States antitrust law, including interdependent conscious parallelism, price leadership, and other collusive tendencies among a few parties, against which merger control is aimed. In assessing the likelihood of collective dominance after a merger, the Competition Commission looks to the “degree of concentration, price transparency, product homogeneity, cost symmetry, slow market growth, barriers to entry, [and] structural links.” These factors are nearly identical to those considered by Professor Stephen C. Salop in assessing the potential for price coordination in an oligopolistic market, in the context of American antitrust law.

The concept of collective dominance is controversial because it presupposes that undertakings will act in an anticompetitive manner. Additionally, the

85 “In an oligopoly market . . . each [firm] must consider the effect of his output on the total market and the probable reactions of the other sellers to his decisions; the results of their combined decisions may approximate the profit-maximizing decisions of a monopolist.” Report of the White House Task Force on Antitrust Policy (1968), 2 ANTITRUST LAW & ECON. REV. 11, 22 (Win. 1968-69) [hereinafter White House Report]. But see SERFER, supra note 47, at 151 (“Some oligopolistic industries appear to maintain prices approximating those a pure monopolist would find most profitable. Others gravitate toward price warfare”).

86 See White House Report, supra note 85, at 22-30; Scherer, supra note 47, at 266.

87 See Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir. 1977); Donald F. Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 HARV. L. REV. 655, 663-66 (1962). This is defined as the “conduct of a party who has knowledge of a competitor’s course of action and who makes a decision to take the same actions . . . .” BLACK’S LAW DICTIONARY 126 (3d ed. 1998). The net effect is that the firms will systematically raise prices because each trusts that the others will do the same for collective profit maximization.


89 Commissioner Mario Monti, The Main Challenges for a New Decade of EC Merger Control, Address at EC Merger Control Tenth Anniversary Conference, Brussels (Sept. 15, 2000).

90 See Handler, supra note 49, at 520-27.
concept allows for a merger to be enjoined when merging companies have a combined market share that is less than monopolistic (dominant) by itself.91 Nevertheless, it is evident that the Competition Commission is less willing than United States enforcement agencies to assume that companies will collude if given the chance.92

C. Affirmative Defenses

In sharp contrast to modern merger regulation in the United States, the Competition Commission does not consider possible efficiencies that will result from a merger.93 It is generally thought that regardless of the definition of "dominant position," there is no place for efficiency considerations in the inquiry.94 This doubtlessly saves time and expense in the litigation process, but subjects the review to criticism by firms that proffer substantial cost-saving reasons for merger.95

The European Union’s closest equivalent to the United States’ “small company defense” is the delegation of local antitrust enforcement to member
states according to each state’s own competition laws. Similarly, the United States historically left local antitrust matters to its individual states when they were of wholly local concern, not affecting interstate or foreign commerce. Therefore, the small company defense is functionally unavailable in the EU as even the smallest companies must comply with the merger regulations, so long as a respective localities’ threshold for community impact warrants Competition Commission intervention.

Likewise, a “failing company defense” is not available as a separate affirmative defense; however, it could be difficult for the Competition Commission to show that a firm occupies a dominant position or that a larger firm’s dominant position is strengthened by a merger involving a practically insolvent firm.

The above analysis of EU merger regulation shows that the analysis is quite literal in determining the existence and abuse of a dominant position, with less willingness to imply a right to any affirmative defenses that merging firms might proffer. However, the Competition Commission seems eager to reach a settlement with the interested parties and looks to the harm done directly to

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96 The Merger Regulation applies only to mergers of “Community dimension.” Id. at 1043. The combined aggregate worldwide turnover of all the undertakings concerned must be more than five billion ECUs (over $6.25 billion), and where the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than 250 ECUs, unless each of the undertakings concerned achieves more than two-thirds of its turnover in only one member state. Id. at 1043–44.


98 See supra notes 36–39 and accompanying text. Establishing dominance is a threshold inquiry, rather than an affirmative defense. See id.
consumers and smaller competitors in the marketplace, rather than to strict economic data, to find an acceptable compromise.

IV. MERGER REGULATION IN JAPAN

Japanese competition law began at the end of World War II as part of an attempt to reconstruct the economy and make commerce fair and dependable. Before that time, the government actively promoted monopolies and cartels, encouraging the aggregation of capital in large businesses which were, coincidentally, often closely connected with the government. Zaibatsu, Japan’s giant, politically powerful conglomerates, were popularly considered to be the driving force of the economy. The four largest zaibatsu, Mitsui, Mitsubishi, Sumitomo, and Yasuda, controlled about one fourth of all the paid-up capital in the Japanese economy before the Second World War. “What’s good for Mitsubishi is good for Japan” was all the justification that conglomerates gave for pushing out competition and making their market domination more comfortable.

100 Id.
102 ANTIMONOPOLY LEGISLATION OF JAPAN 301 (Masanao Nakagawa ed., 1984).
103 During the 1950s, the phrase “what’s good for General Motors is good for America.” was enough to appease the United States public, even in light of monopolization, corporate welfare, and other unfair trade practices. See ROBERT REICH, THE WORK OF NATIONS: PREPARING OURSELVES FOR 21ST-CENTURY CAPITALISM 42 (Vintage ed. 1992) (1991). “Gradually, the top executives of America’s largest corporations would come to view themselves as ‘corporate statesmen,’ responsible for balancing the claims of stockholders, employees, and the American public. Surprisingly, the public would come to share this view.” Id. at 43. When President Eisenhower appointed Charles Wilson to be the Secretary of Defense, Wilson stated at the Senate confirmation hearing:
A. History of the Antimonopoly Act

Japan’s remedy to the anticompetitive nature of the conglomerates was the “economic constitution,” 104 the Antimonopoly Act of 1947 (AMA), 105 which was based specifically on the American Sherman Act, Clayton Act, and Federal Trade Commission Act. 106 The AMA strictly controlled mergers and acquisitions, prohibited Japanese firms from unreasonably aggregating economic power in the market, and only contained a few narrow exemptions. 107 The Act made cartels illegal per se and created the Japanese Fair Trade Commission (JFTC), a largely independent agency charged with administering the law across the country. 108

However, the JFTC relaxed its enforcement soon thereafter, 109 and in 1953 the government amended the AMA in a program called “Reverse Course,” which loosened the per se cartel prohibition, relaxing merger and acquisition provisions, abolishing the prohibition of unreasonable differences in economic power, while only prohibiting substantial cartels. 110 The major impetus for this

104 MITSUO MATSUSHITA, INTRODUCTION TO JAPANESE ANTIMONOPOLY LAW 2 (1990).
105 Id.; Shiteki Dokusen no Kinshi oyobi Kousei Torihiki no Kakuko ni Kansuru Houritsu [AMA], Law No. 54 of 1947.
106 MATSUSHITA, supra note 104, at 2.
107 Id.
108 Id. MICHIKO ARIGA, COMPETITION LAWS OF THE PACIFIC RIM: JAPAN at JAP § 3.01 (1991).
109 MATSUSHITA, supra note 104, at 3.
110 Id. MICHAEL SCHALLER, ALTERED STATES: THE UNITED STATES AND JAPAN SINCE THE OCCUPATION 16-17 (1997). In 1952 and 1953, the Japanese politicians and businesses were securing various exemptions from the Antimonopoly Act, including those for small and medium enterprise cartels, depression cartels, natural monopolies, resale price maintenance agreements, export and import cartels, transportation cartels, insurance cartels, and cartels dealing with one of many commodities. See AMA §§ 21-23.
relaxation was the United States government's use of its political clout to revive the zaibatsu in an effort to create internal stability instead of competition, to combat communist forces in the region.\textsuperscript{111} Although the United States was the original proponent of the AMA,\textsuperscript{112} its goal shifted to centralizing economic power, "even at the cost of reducing living standards"\textsuperscript{113} for the Japanese people.

Of course, these amendments resulted in price manipulation, collusion and all of the detriments that antitrust law is supposed to prevent. In response, the government again amended the AMA in 1977 to control monopolistic conditions in the market and to require that reports be filed with the JFTC to justify price increases in oligopolistic markets.\textsuperscript{114} Since these amendments, the AMA has helped to foster more of the competitive fairness that was its original aim.\textsuperscript{115} More recently, Japan established a department in the Ministry of Economy, Trade and Industry (METI) in 2000, making the department responsible for strengthening competition policy. One commentator explained how this came about:

The more than decade-long economic slump following the collapse of the bubble economy in 1989 induced these attitudinal changes. Japanese businesses and the government both realized that the structural weakness in Japan's economy lies in the industrial sectors secluded from competition (most notably the financial, construction, retail, and electricity

\textsuperscript{111} Matsushita, supra note 104, at 3; Mitsuo Matsushita, International Trade and Competition Law in Japan 79 (1993).

\textsuperscript{112} After World War II, the U.S. Departments of War and State instructed General Douglas MacArthur, the Supreme Commander of the Allied Powers in Japan (SCAP), to increase competition in the market in the reconstruction effort. See Schaller, supra note 110, at 12.


\textsuperscript{114} Matsushita, supra note 104, at 4.

\textsuperscript{115} Id.
sectors). In this regard, Michael Porter observed in an influential book: "Few roles of government are more important to the upgrading of an economy than ensuring vigorous domestic rivalry." Japan's government and a large portion of its business community finally have come to share this view.116

From an analysis of the foregoing history of Japanese antitrust law, it appears that Japanese antitrust law falls somewhere between the politically motivated foundations of the American scheme and the economically oriented European one. Although the Antimonopoly Act was originally enacted to dismantle politically powerful industrial giants, the zaibatsu, lackluster enforcement clearly indicated that the popular momentum of the Sherman Act never existed in full force in Japan. Consumer protection and allocative efficiency ideals have only entered the Antimonopoly Act in the last decade or so, but they have pushed that law to the forefront of commercial policy in a more significant way than the political motivations ever could.117

B. Modern Regulatory Framework

Today, the AMA regulates the following commercial activities: (1) it prohibits private monopolization and the unreasonable restraint of trade; (2) it prohibits cartels unless a certain exception applies;118 (3) it generally prohibits


117 See Robert Thomson, Japan’s Cartel Busters Start to Get Tough, FIN. TIMES, Apr. 3, 1991, § 1, at 6 (quoting Tsuyoshi Motonaga, director of the JFTC’s cartel investigation division, as saying: “People are afraid of us now. We, the police, and the tax agency are the bodies that Japanese companies don’t want to antagonise [sic].”).

118 The number of exempted cartels has drastically fallen as Japanese competition law has become more sophisticated. In 1966 there were 1079 exempted cartels, compared to fifteen in 1999. See INTERNATIONAL BAR ASSOCIATION, GLOBAL COMPETITION FORUM, at http://www.globaleconomicforum.org/ (last visited March 14, 2005).
unfair business activities; and (4) it restricts holding companies, interlocking directorates, stockholdings, and the merger or acquisition of business assets which may substantially restrict competition.\textsuperscript{119}

The AMA will restrain a merger or acquisition of stock\textsuperscript{120} if the transaction will substantially restrain competition in a particular field or trade, or if the securing of the merger entailed unfair business practices.\textsuperscript{121} The JFTC defines a “substantial restraint” quantitatively, using twenty-five percent as a guideline for an allowable post-merger market share. If the market share is anticipated to be above twenty-five percent of the industry, the JFTC will subject it to the review process.\textsuperscript{122}

As far as market analysis and affirmative defenses are concerned, Japan seems to follow, in large part, the American model.\textsuperscript{123} Specifics are not entirely clear because the summaries published by the JFTC often lack detail and leave companies with little understanding of what is prohibited and what is not.\textsuperscript{124}

\textsuperscript{119} ARIGA, supra note 108, at JAP § 4.02; IYORI & UESUGI, supra note 99, at 41; MATSUSHITA, supra note 104, at 5.

\textsuperscript{120} MATSUSHITA, supra note 104, at 36.

\textsuperscript{121} IYORI & UESUGI, supra note 99, at 85 (citing AMA § 15(1)).

\textsuperscript{122} MATSUSHITA, supra note 104, at 16. The AMA sets a pre-merger notification requirement under which every company in Japan, regardless of its size, must notify the JFTC thirty days before it intends to merge. Id. (citing AMA § 15(2)). The following factors will be reviewed most with each notification: (1) whether the post-merger market share will be over twenty-five percent of the relevant market; (2) whether the post-merger company will be ranked first in the industry and have a market share of fifteen percent or more; and (3) whether the post-merger company will have the largest market share in the industry with “a conspicuously large market share relative to the second and third ranked companies.” Id. at 35–36.

\textsuperscript{123} See Toshiaki Takigawa, The Prospect of Antitrust Law and Policy in the Twenty-First Century: In Reference to the Japanese Antimonopoly Law and Japan Fair Trade Commission, 1 WASH. U. GLOBAL STUD. L. REV. 275, 279–81 (comparing the analyses under the Sherman Act and the AMA, but noting that the JFTC does not condemn a collaboration until significant market power is actually found).

Japanese companies, however seem to proffer a broad range of justifications for increasing market share, which are either accepted or at least taken into account for mitigation purposes.\textsuperscript{125}

Similarly, the JFTC has not fully avoided falling into the trap of the cellophane fallacy. It makes cursory reference to the use of cross-elasticity of demand in the market analysis area of its review process:

Any particular field of trade means the market. It is generally defined by the extent to which a merger may affect competition, taking into consideration specific factors found in the cases such as the types of goods and services handled by the merged company, the geographical extent to which such goods and services are to be traded, and the specific phase of transaction (manufacture, wholesale, retail, etc.). Competition is substantially restrained by a merger when the market structure changes as a result of a merger and specific companies can control the market by freely influencing to a certain extent the price, quality, quantity and other terms with their own intention. The judgment on whether a particular merger is unlawful is made by comprehensively taking into account various competitive factors.\textsuperscript{126}

Of course, because so few mergers have been subjected to the full public transparency of the courtroom, it is difficult to tell how much importance cross-elasticity actually plays in the analysis.\textsuperscript{127} At least it appears, from the language of the above policy statement, that the JFTC will account for the whole gamut of considerations in defining the relevant market and will not, as the U.S. Supreme


\textsuperscript{126} See \textit{International Bar Association}, \textit{supra} note 118.

\textsuperscript{127} See Milhaupt, \textit{supra} note 124, at 29.
Comparative Analysis of Merger Regulations

Court did in United States v. E.I. du Pont de Nemours & Co.,\(^{128}\) or as the FTC Guidelines do as a matter of course, stop the analysis simply because cross-elasticity of demand exists.

\section*{C. The Commission’s Struggle to Enforce}

AMA section 17(2) allows the JFTC to take “necessary measures” to eliminate mergers and acquisitions regulations violations.\(^{129}\) One such measure is to declare null and void a merger or acquisition that violates the Act;\(^{130}\) in fact, unless the combination is entered into in good faith, it is automatically null and void, even without JFTC action.\(^{131}\) Additionally, monetary and criminal penalties are available, including sentences up to one year of imprisonment.\(^{132}\) Finally, the AMA provides private parties with standing to bring a civil suit if they have been injured by violations of the AMA.\(^{133}\) Injured parties have an automatic right of indemnity from a violator of the Act\(^{134}\) but do not have the right to collect treble damages.

While enforcement may sound serious enough to effectuate the competitive policies of the Antimonopoly Act, the penalties lack real substance and bite.

\begin{footnotes}
\footnotetext[128]{351 U.S. 377 (1956).}
\footnotetext[129]{IYORI \& UESUGI, supra note 99, at 88. The JFTC investigates approximately two hundred cases per year and applies at least some quantum of enforcement against approximately thirty cases per year. Shogo Itoda, Remarks at a Meeting Organized by the Royal Institute of International Affairs 3 (Feb. 22, 2000), http://www.jftc.admix.go.jp/e-page/speech/20000222.htm (last visited Feb. 25, 2005).}
\footnotetext[130]{IYORI \& UESUGI, supra note 99, at 88 (citing AMA § 18).}
\footnotetext[131]{Id. (citing Yokoi Sangyo Co. v. Shirokiya Co., 3 KTIS 537 (Tokyo High Ct. 1955)). However, it appears that if there is no action or court decision that nullifies a merger or acquisition, there is no other means of eliminating it. See MINGCHO YANG, COMPETITION LAWS OF THE PACIFIC RIM: REPUBLIC OF KOREA (SOUTH KOREA) SK 5 17 (1991).}
\footnotetext[132]{IYORI \& UESUGI, supra note 99, at 88 (citing Yokoi Sangyo, 3 KTIS 537).}
\footnotetext[133]{ARKIA, supra note 108, at JAP 17-1; see also AMA § 25. The right to claim damages based on this section cannot be pursued until after the JFTC reaches a conclusive decision. Id. §§ 25, 84–85.}
\footnotetext[134]{Id. (citing AMA § 25(1)).}
\end{footnotes}
Indeed, businesses may look at the fines as merely the cost of doing business rather than something that will substantially affect the structure of their industries. If the assets of the post-merger company total less than twenty-three million U.S. dollars, the JFTC will, as a matter of practice, not challenge it. Furthermore, the penalty for a violation by a company of that size cannot exceed ninety thousand U.S. dollars.\textsuperscript{135} Companies with such extraordinary assets obviously would consider that amount of money to be both insignificant and irrelevant in deciding whether to proceed with a merger. In addition, there have been very few private actions in Japan against violators because, quite simply, the claimant never wins.\textsuperscript{136} There are no treble or even punitive damages available, there are no class action suits, discovery is extremely limited,\textsuperscript{137} the amount of proof needed to show a violation is prohibitive, and litigation costs are exceptionally high.\textsuperscript{138} Some commentators opine: “A business executive considering fixing prices in Japan has practically nothing to lose.”\textsuperscript{139} Enforcement is such a problem that in the last twenty years the JFTC has only challenged a few mergers and prohibited none of them, allowing increased concentration of

\textsuperscript{135} Matsushita, supra note 104, at 36.

\textsuperscript{136} J. Mark Ramseyer, \textit{The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan}, 94 \textit{Yale L.J.} 604, 617 (1985) (“No private antitrust damage claimant has ever prevailed in court in Japan.”).


\textsuperscript{139} Ramseyer, supra note 136, at 635.
market power in the country’s largest companies and the consequent suppression
of competition.\textsuperscript{140}

Japan presently faces a decisive moment in time. It must decide whether it is going to take the difficult steps of revitalizing competition by breaking up and trimming down the conglomerates that survive from the zaibatsu era, or whether it will continue to shelter them and persist with the sluggishness that the Japanese economy exudes as a result. Investor confidence and innovative forces depend on Japan’s ability to secure new sources of competition and they will not reappear until the JFTC delivers on its commitment.

V. LESSONS BY COMPARATIVE EXAMPLE

The foregoing background information is not enough to comprehensively evaluate the benefits and shortcomings of all methods of merger regulation. However, a few crucial lessons are evident.

\textit{A. The Dual Purpose of Antitrust Law is Political and Economic in Scope}

The historical and philosophical underpinnings of these divergent systems cannot be changed by a simple act of Congress or by an amendment to the Commission’s Merger Regulations or Japan’s Antimonopoly Act. However, the purpose of any legislation may change over time and refined policy is useful in creating new laws and interpreting old ones to meet present-day needs. The JFTC, the Competition Commission, and the appellate EU courts must all understand the importance of antitrust law, not only in preserving low prices, market competition, and consumer welfare, but also in assuring that large

\textsuperscript{140} \textit{Matsushita, supra} note 104, at 35-36.
businesses, which are generally unaccountable to various constituencies, do not exercise unbridled control in markets upon which the public is dependent.\textsuperscript{141}

Moreover, the United States should renew its commitment to these goals (including the responsible distribution of industrial power and the diversification of national wealth) after more than a generation of deference to the Chicago School approach, which supposed that economic policy alone was sufficient to protect public interests.\textsuperscript{142} In spite of the 1890 legislative intent, businesses have primarily grown in size rather than in number, creating a perpetual "bigness" that results in large, unmanageable abuses. United States courts usually appreciate the necessity of fostering competition in a market economy; it is the political underpinnings that must be revisited.

\textbf{B. Searching for Abuse of a Dominant Position or a Substantial Lessening or Restriction of Competition}

United States courts usually appreciate the necessity of fostering competition in a market economy; it is the political underpinnings that must be revisited. United States courts have simply been outdone by the Competition Commission in the market power inquiry. EU competition law has mostly avoided the cellophane fallacy by combining geographic and product market analysis, utilizing market data, and searching for "areas of effective competition" from the perspective of consumers.\textsuperscript{143} Indeed, data that indicates that consumers

\begin{footnotesize}
\begin{enumerate}
\item[141] See \textit{supra} notes 10-11 and accompanying text (discussing the importance of corporate accountability and its role in antitrust policy).
\item[142] See Herbert Hovenkamp, \textit{Antitrust Policy After Chicago}, 84 Mich. L. Rev. 213, 213-16 (1985) ("The Chicago School model of antitrust policy dictates that allocative efficiency as defined by the market should be the only goal of the antitrust laws.").
\item[143] See \textit{supra} notes 76, 77, and accompanying text (demonstrating how the Competition Commission has avoided the Cellophane Fallacy and refined its market definition analysis).
\end{enumerate}
\end{footnotesize}
would change products if cellophane increased in price by five percent is relevant and worthy of consideration, but pretending that this settles the market power question is pure sophistry. The whole business context must be incorporated into the analysis.\textsuperscript{144}

Japan’s position on this issue is unclear, mostly because of the lack of transparency in JFTC decision-making, which is a problem in itself. However, the JFTC policy statement shows that a diverse array of factors are important to it, so it probably resembles the superior EU approach more than the American one.

Reluctance of U.S. courts to engage in independent market analysis, united with elasticity data, seems to come from a fear of judicial activism. Economists’ expert opinions are preferred over common sense determinations of effective competition between products because resting a decision on the former is ostensibly more objective. Judges are appointed, however, to exercise judgment. It is simply a dereliction of this responsibility to eschew these important questions and rely instead on data that is patently misleading. Economists rely on assumptions in formulating models so that their subject matter is more understandable, assumptions for which courts must be watchful when entrusted with cases that are “among the most important in public law.”\textsuperscript{145}

Cross-elasticity analysis relies on the assumption of an uncontrolled market so it

\textsuperscript{144} See supra notes 78, 92 and accompanying text (discussing market EU market analysis in the context of collective dominance).

\textsuperscript{145} Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 652 (1985) (Stevens, J., dissenting) (“The Sherman and Clayton Acts reflect Congress’ appraisal of the value of economic freedom; they guarantee the vitality of the entrepreneurial spirit. Questions arising under these Acts are among the most important in public law.”).
is of little use when control over the market is the crux of the inquiry. Courts in the United States, Japan, and the EU all probably realize this, but EU courts exercise judgment in deciding practical interchangeability, rather than evading that task for fear of being labeled subjective or judicially active.

Conversely, the Competition Commission must be watchful for “collective dominance.” It has been careful not to assume that abuse will ensue automatically from an oligopolistic market, but this runs contrary to what is known about that kind of market structure.\textsuperscript{146} United States courts generally assume that market concentration among a few firms will have anticompetitive consequences, which results in a policy of forestalling market concentration in its incipiency, even before explicit abuses arise.\textsuperscript{147} The Commission must consider a standard that prevents potential abuse of a dominant position, rather than actual abuse. While this requires it to forecast the condition of future markets, merger regulation is inherently conjectural; when these questions go unanswered it is at the expense of consumers, small competitors, and the public at large.\textsuperscript{148}

Japan’s broad analysis of market structure provides an essential starting point for reasoned competition analysis because it welcomes a host of important wealth concentration and consumer welfare considerations. This is refreshing, but what the JFTC gains in open-endedness upfront, it surely lacks in substan-

\textsuperscript{146} See supra note 72 and accompanying text.
\textsuperscript{147} See id.
\textsuperscript{148} See supra notes 28-31 and accompanying text (demonstrating the necessarily conjectural nature of merger regulation).
Comparative Analysis of Merger Regulations

tive standards against which mergers are subsequently required to measure up. More specificity should be a paramount goal, both in the policy statements and published decisions, which will aid predictability and competition over the long run.

C. Efficiencies and Other Affirmative Defenses

In the last few decades in the United States, the efficiencies defense has led to an approval of mergers that substantially increased market concentration and has made enforcement of merger regulations exponentially more expensive. Indeed, most enforcement efforts require extensive compilation of market information and protracted litigation. This begs two questions in the United States: (1) whether Congress intended such efficiencies to supersede its explicit policy against mergers that “may substantially lessen competition;” and (2) whether the expense and complexities of this defense should be accommodated when already overcomplicated analysis makes merger regulation so onerous. Only the latter is relevant to the EU in deciding whether to entertain the efficiencies defense in the future. Many commentators opine that market power fragmentation is more valuable than creating efficiencies in numerous cases, and that in all other cases the efficiencies hardly justify the misleading and costly effects that the defense has on merger litigation.

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149 See supra notes 44-47 and accompanying text (discussing the efficiencies defense in the United States); supra note 94 and accompanying text (citing an article that argues that this defense should not be available in the EU).

150 See id.
One practical solution to this problem is to allow courts and agencies to consider efficiencies after the prima facie case is made against the merger, but also to require the defendant company to absorb the financial expenses associated with that defense, including, inter alia, the gathering of necessary information, court costs, and costs incurred by the enforcement agency in evaluating the information. Companies would likely incur these expenses only when the efficiencies are meritorious and substantial, rather than using the defense to deter law enforcement when the real objective of the merger is the acquisition of market power.

The U.S. Congress intended to strike the balance in favor of competitive forces, even at the expense of some efficiencies, a fact largely forgotten by U.S. courts. The EU seems to have embraced the same policy and has adhered to it more devotedly. While this avoids the extensive costs and convoluted litigation that typically flows from the defense, there is a legitimate fear that highly efficient conglomerations will be enjoined from mergers when their effect on the competitiveness of the marketplace is de minimis. The EU would do well to reconsider its policy, but only to an extent that does not significantly impair the Commission’s ability to enforce the plain language of its regulations.

151 See supra note 35 (discussing the Brown Shoe case, which articulated this principle). Judge Learned Hand articulated the unequivocal mandate of Congress as follows:

True, it might have been thought adequate to condemn only those monopolies which could not show that they had exercised the highest possible ingenuity, had adopted every possible economy, had anticipated every conceivable improvement, stimulated every possible demand. No doubt, that would be one way of dealing with the matter, although it would imply constant scrutiny and constant supervision, such as courts are unable to provide. Be that as it may, that was not the way that Congress chose; it did not condone “good trusts” and condemn “bad” ones; it forbade all.

United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (2d Cir. 1945).
The "small company" and "failing company" defenses have played similar roles in the United States and the European Union, although the EU seems to have approached both of them more pragmatically by looking to the entire business context rather than merely at the firm’s particular disposition. The merger of a small company into a gigantic one, for instance, can obliterate any remaining competition in a highly concentrated market, while the merger of two small companies in a market with vigorous competition can be mutually beneficial and efficient, while having no appreciable effect on market prices and market power. Likewise, even a failing company may have recapitalization options that will provide needed competition in future markets, while the assets of a purely insolvent firm may best be used by a former competitor through the merger process.

The EU system allows these defenses to arise in the prosecutorial discretion of the Competition Commission, while the U.S. courts entertain them as an affirmative defense after finding a possible substantial lessening of competition. The latter approach is probably superior because it applies the standard evenhandedly, although the FTC and DOJ doubtlessly have wide discretion in deciding which cases to pursue, and consider these defenses in that process. In summary, merger regulations must give all companies an equal opportunity to submit these arguments, but must not construe them broadly enough that opportunistic accounting firms might create financial statements to sustain such defenses when they do not reasonably apply.
The JFTC can learn, especially from the American experience, that all companies will use these defenses to avoid enforcement; in fact, it has already had a similar experience and responded by cutting cartel exemptions to a significant extent. This is one lesson worth remembering.

D. Enforcement Procedure

All three systems confront a common endeavor in the enforcement of their respective merger regulations: none can enforce the law in all cases to which it is applicable because enforcement agencies lack the resources to review and challenge all suspect proposals. Private enforcement of merger regulations is difficult because no one individual is likely to incur significant financial damage from the merger itself, only from consequent abuses of market power. Litigation of these issues burdens the agencies with significant expense and no opportunity for recuperation, a set of circumstances that is particularly conducive to apathy and ineffectiveness.

In addition, post-merger lawsuits based on monopolization are hardly effective because of the inherent difficulty of untangling two merged companies. Understandably, courts are often unwilling to cause the kind of disruption that accompanies disjoining conglomerates, and often prefer the course of permissiveness rather than strict enforcement of the law.

Prior to the consummation of a merger is the decision to merge, which generally constitutes a conspiracy in restraint of trade or an agreement to abuse a dominant position, provided that it violates the merger regulations of the relevant nation. Each system might consider the imposition of monetary
penalties for such conspiracies or agreements in order to recoup enforcement expenses. Such penalties might be based upon the size of the proposed merger or the degree of market concentration potentially created by it.\textsuperscript{152}

Additionally, such penalties might be available only to agencies that are presently entrusted with merger regulation or private firms with the entrepreneurial spirit to enforce the law privately. This is not an unknown concept in the United States, notably in the context of section 16 of the 1934 SEC Act, the prohibition on short swing trading of securities.\textsuperscript{153} To be a plaintiff in the context of section 16(b), one only need be a shareholder at the time of the lawsuit.\textsuperscript{154} Fears that plaintiffs’ firms will meet this opportunity with frivolous lawsuits might be quelled by securities-for-expense statutes, which would require them to post a bond that would satisfy the defendant’s expenses in the event that the court finds that the case is either without merit or brought in bad faith.

\begin{footnotes}
\item[152] This is a relatively easy calculation, known as the Herfindahl-Hirschman Index ("HHI"), used extensively by the FTC and DOJ in deciding whether to challenge a merger. \textit{See Merger Guidelines, supra} note 22 §§ 1.5, 1.51.
\item[154] \textit{See id. at} 1450 n.18. In the United States at least, there is an issue regarding the constitutionality of allowing a cause of action to proceed when monetary damages, as opposed to injunctive relief, are constructed on this basis, rather than on a measure of loss actually suffered. The Supreme Court has indicated that although Congress might express its intention to confer a cause of action, a statutory grant of standing does not excuse a plaintiff from demonstrating injury in fact. \textit{See Lujan v. Defenders of Wildlife}, 504 U.S. 555, 559 (1992). In \textit{Lujan}, the Court rejected plaintiffs’ claim of standing in environmental litigation based on the statutory provision that entitled “any person [to] commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this Act.” \textit{Endangered Species Act}, 16 U.S.C. § 1540(g)(1) (2000). The Court reasoned:

To permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an “individual right” vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to “take Care that the Laws be faithfully executed.” \textit{Lujan}, 504 U.S. at 577 (Scalia, J.); \textit{see also Allen v. Wright}, 468 U.S. 737, 750 (1984) (stating that the doctrine of standing defines separation of powers for the judicial branch); Antonin Scalia, \textit{The Doctrine of Standing as an Essential Element of the Separation of Powers}, 17 \textit{Suffolk U. L. Rev.} 881 (1983); \textit{The Federalist No. 78}, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (suggesting that the judiciary is the “least dangerous”)
\end{footnotes}
The EU is unlikely to embrace any such private enforcement scheme when even the most egregious cases of price-fixing, tying, and division of markets are not subject to private enforcement. However, it may become easier for the EU to learn by example when its Competition Commission becomes increasingly overwhelmed by merger applications which it lacks the resources to appropriately inspect.

Seemingly, Japan already has in place a scheme to challenge mergers through private litigation, though damages are not available beforehand. Yet, the change required in the Japanese system to accommodate effective private suits is more fundamental. In fact, the Japanese culture itself may be the most formidable barrier, as the people do not view private litigation as a means of branch of the United States government because it “has no influence over either the sword or the purse”). Another Supreme Court opinion elaborated on the standing doctrine:

[A] party seeking to invoke a federal court’s jurisdiction must demonstrate three things: (1) “injury in fact,” by which we mean an invasion of a legally protected interest that is “(a) concrete and particularized, and (b) actual or imminent, not conjectural or theoretical.” (2) a causal relationship between the injury and the challenged conduct, by which we mean that the injury “fairly can be traced to the challenged action of the defendant,” and has not resulted “from the independent action of some third party not before the court,” and (3) a likelihood that the injury will be redressed by a favorable decision, by which we mean that the “prospect of obtaining relief from the injury as a result of a favorable ruling” is not “too speculative.”

Northeastern Fla. Chapter, Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 663-64 (1993) (citations omitted). However, a plaintiff suing under a scheme that prevents mergers and provides a monetary incentive for bringing suit might liken his case to a Tariff Act section 337 action, which does not require proof of injury to bar merchandise from importation on account of the fact that it violates a U.S. citizen’s intellectual property rights. See Andrew S. Newman, The Amendments to Section 337: Increased Protection for Intellectual Property Rights, 20 LAW & POL’Y INT’L BUS. 571 (1989). Under that statute, injury is presumed to occur if the court does not provide a remedy before the importation is allowed by U.S. Customs. Id. Standing requirements do not seem to be as prohibitive under European Union law. For example, articles 22 and 23 of the EU Privacy Directive allow private citizens to sue for civil penalties if a business violates any of the substantive provisions of the Directive. Council Directive 95/46/EC, arts. 22, 23, 1995 O.J. (L 281) 31. Article 22 provides:

Without prejudice to any administrative remedy for which provision may be made, inter alia before the supervisory authority . . . Member States shall provide for the right of every person to a judicial remedy for any breach of the rights guaranteed him by the national law applicable to the processing in question.

Id. art. 22. Presumably this applies to proactive, not just reactive, civil actions, and actual damages may be recoverable in the form of attorney fees or otherwise, which are generally available to the winning party in civil law countries.
industrial change, but as a limited and often discouraged means of private recourse for damages already suffered. Unfortunately, unless the Japanese are willing to rethink this settled public conception, they will rely indefinitely on the toothless machinery of the JFTC to bring full competition into their markets.

VI. CONCLUSION

The United States should utilize the European experience and revitalize its merger regulation by adopting the superior method of defining markets (and understanding the limitations of economic data), simplifying the efficiencies defense, and better appreciating the business context in which a merger takes place. Japan and the EU have already gained much from the American perspective but might look to the political underpinnings of the Sherman Act and Clayton Act if they seek to use antitrust law for greater purposes. This means could be used as a device to integrate politically as well as economically for the EU, and to reshape industrial markets and competition for Japan. The manner in which each system deals with other issues, such as the problems of enforcement, will provide the others with lessons in the future. Learning by example is not an affront to sovereignty or forfeiture of self-governance. It is an empowering process that presents alternatives for purposes of remedying societal ills.