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## Mega Merger, Mega Problems: A Critique of the European Community's Commission on Competition's Review of the AOL/Time Warner Merger

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# MEGA MERGER, MEGA PROBLEMS: A CRITIQUE OF THE EUROPEAN COMMUNITY'S COMMISSION ON COMPETITION'S REVIEW OF THE AOL/TIME WARNER MERGER

JAMES M. TURNER\*

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## INTRODUCTION

On January 10, 2000, Internet giant America Online, Inc. ("AOL") agreed to purchase media conglomerate Time Warner Inc. in a record setting one-hundred and sixty-five billion dollar deal.<sup>1</sup> The merger represents the next generation media company, combining "new" and "old" companies into one.<sup>2</sup> Time Warner's print publications, cable television lines, and services complement AOL's online and interactive services.<sup>3</sup>

Prior to finalizing AOL's acquisition of Time Warner, the merger required approval from several regulatory agencies.<sup>4</sup> In the United States, the Department of Justice ("DOJ"), Federal Trade Commission ("FTC"),<sup>5</sup> and the Federal Communication Commission

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1. See Saul Hansell, *Media Megadeal: The Overview; America Online Agrees to Buy Time Warner for \$165 Billion; Media Deal is Richest Merger*, N.Y. TIMES, Jan. 11, 2000, at A1 (announcing the proposed merger and terms of the deal); see also Patrick McGeehan, *Media Megadeal: The Value; By Any Measure, a Big Deal*, N.Y. TIMES, Jan. 12, 2000, at C6 (indicating that most newspapers valued the deal differently, with figures as low as roughly one-hundred and fifty-six billion dollars (the Wall Street Journal) to three-hundred and thirty-five billion dollars (the Financial Times)). When the deal closed on January 12, 2001, the value of the deal had declined to one hundred and twelve billion dollars due to a decline in the stock price of AOL. See Alec Klein, *FCC Clears Way for AOL Time Warner Inc.*, WASH. POST, Jan. 12, 2001, at A1 (declaring the final value of the deal to be \$112 billion, second largest in value behind the proposed Sprint/MCI World Com deal).

2. See Martin Peers et al., *Media Blitz: AOL, Time Warner Leap Borders to Plan a Mammoth Merger*, WALL ST. J., Jan. 11, 2000, at A1 (discussing the merger between old-media Time Warner and new-media AOL, and how the combined company plans to become the standard of the next generation media business); see also Thomas J. D'Amico & Gabriela I. Coman, *Eye on Washington*, 4 E-COM. L. REP. 19, 19 (2000) (conjecturing that the terms "old media" and "new media" no longer accurately describe the state of the media scene).

3. See generally David Lieberman, *Merger Fulfills Needs of Each 'Opportunity' Now AOL Time Warner*, USA TODAY, Jan. 11, 2000, at B1 (analyzing the products and services each company brings to the merger).

4. See Julia Malone, *Regulatory Approval: Process Will Take Time, but Few Hurdles Seen*, ATLANTA J. & CONST., Jan. 11, 2000, at 4F (discussing the regulatory review processes the proposed merger will undergo).

5. See Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C.A. § 18(a) (West 1997 & Supp. 2000) (setting forth the requirements for pre-merger notification and request for approval to the Department of Justice, Antitrust Division, and the Federal Trade Commission).

("FCC")<sup>6</sup> had the authority to review the proposed merger, although only the FTC and FCC conducted in-depth reviews.<sup>7</sup> The European Union's Directorate-General for Competition of the Commission of the European Communities ("Competition Commission")<sup>8</sup> also evaluated the proposed AOL/Time Warner merger; its evaluation was similar to the review conducted by the FTC.<sup>9</sup> On October 11, 2000, the Competition Commission approved the merger, with conditions.<sup>10</sup> The FTC approved the merger on December 14, 2000,<sup>11</sup> and the merger was finalized on January 12, 2001 upon approval of

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6. See Communications Act of 1934, 47 U.S.C. §§ 214, 310 (1994 & Supp. III 1997) (establishing the procedures necessary to apply for approval from the FCC for a transfer of licenses).

7. See Malone, *supra* note 4, at 4F (discussing the fact that only one of the agencies would make the final determination as to whether the proposed merger was violative of antitrust laws); see also Letter from To-Quyen Truong, Associate Chief, Cable Services Bureau, Federal Communications Commission, to Arthur H. Harding, Esq. and Peter D. Ross, Esq., attorneys for AOL and Time Warner (June 9, 2000), available at <http://www.fcc.gov/csb/aoltw/info1.txt> (requesting the first of several expected series of documents to assist the FCC in its review of the proposed merger).

8. See VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE 18 (6th ed. 1997) (explaining why the Competition Commission used to be known as the DG IV). The European Commission is divided up into twenty directorate generals ("DGs"), each responsible for a different policy. *Id.* The Competition Commission was the fourth directorate general established, hence the name DG IV, or fourth Directorate General. *Id.*

9. See Malone, *supra* note 4, at 4F (characterizing the FCC's role as determining whether the merger would have public utility). See generally MORTEN P. BROBERG, THE EUROPEAN COMMISSION'S JURISDICTION TO SCRUTINISE MERGERS (1998) (providing an overview of the Competition Commission and the sources of law that confer its power to regulate mergers and acquisitions).

10. See Press Release, Commission Gives Conditional Approval to AOL/Time Warner Merger (Oct. 11, 2000) (announcing the Competition Commission's approval and outlining the conditions placed upon approval), available at [http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=IP/00/114510|AGED&lg=EN](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/00/114510|AGED&lg=EN). Some of the conditions include AOL severing its relationship with Bertelsmann AG, AOL transacting with Bertelsmann AG at an arm's length until the relationship is severed, and ensuring that Bertelsmann AG's music is neither made available exclusively over AOL's Internet Service Provider ("ISP"), nor is it formatted in a proprietary manner playable only by AOL's Winamp online music player. *Id.*

11. See Frank James, *AOL, Time Warner Win FTC's OK for Merger*, CHI. TRIB., Dec. 15, 2000, at 1 (announcing the FTC's approval and conditions for approval of the merger).

the FCC.<sup>12</sup>

The review process undertaken by the FCC, FTC, and Competition Commission begins with a determination of the type of merger the union between AOL and Time Warner represents, as the type of merger affects the level of scrutiny.<sup>13</sup> Strictly speaking, the AOL/Time Warner combination is neither a horizontal<sup>14</sup> nor a vertical<sup>15</sup> merger. A merger that is neither horizontal nor vertical falls within a category that is a catch-all for all other types of mergers – a conglomerate merger.<sup>16</sup> There are several types of conglomerate mergers, including a product-extension merger.<sup>17</sup> The union of AOL

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12. See Christopher Grimes, *AOL Time Warner Joins NYSE Trading Media FCC Finally Approves Dollars 106bn Deal, with Only 'Minor' Restrictions on AOL's Instant Messaging Service*, FIN. TIMES, Jan. 13, 2001, at 20 (describing the newly formed company after the proposed merger received the final regulatory approval).

13. See John W. Berresford, *Mergers in Mobile Telecommunications Services: A Primer on the Analysis of their Competitive Effects*, 48 FED. COMM. L.J. 247, 280 (1996) (distinguishing between horizontal, vertical, and conglomerate mergers).

14. See *United States v. General Dynamics Corp.*, 258 F. Supp. 36, 56 (S.D.N.Y. 1966) (discussing what constitutes a horizontal merger); see also BLACK'S LAW DICTIONARY 1003 (7th ed. 1999) (defining a horizontal merger as “[a] merger between two or more businesses that are on the same market level because they manufacture similar products in the same geographic region; a merger of direct competitors.”). See generally 27 WORDS AND PHRASES, “Merger” 179 (1961 & Supp. 2000) (providing a detailed explanation of mergers).

15. See *General Dynamics Corp.*, 258 F. Supp. at 56 (discussing what constitutes a vertical merger); see also BLACK'S LAW DICTIONARY 1003 (7th ed. 1999) (defining a vertical merger as “[a] merger between businesses occupying different levels of operation for the same product, such as between a manufacturer and a retailer; a merger of buyer and seller.”).

16. See *General Dynamics Corp.*, 258 F. Supp. at 56 (discussing what constitutes a conglomerate merger); see also BLACK'S LAW DICTIONARY 1002 (7th ed. 1999) (defining a conglomerate merger as a merger between businesses that are neither direct competitors – a horizontal merger – nor buyers and sellers – a vertical merger); Comment, *Conglomerate Mergers Under Section 7 of the Clayton Act*, 72 YALE L.J. 1265 (1962-63) (analyzing the make-up and characteristics of conglomerate mergers).

17. See *FTC v. Proctor & Gamble Co.*, 386 U.S. 568, 577-78 (1967) (establishing the standard of a product-extension merger and its effect on anti-competitive behavior); see also BLACK'S LAW DICTIONARY 1003 (7th ed. 1999) (defining a product-extension merger as “[a] merger in which the products of the acquired company are complementary to those of the acquiring company and may

and Time Warner, however, is not a product-extension merger since their products are on two different markets and media outlets.<sup>18</sup> Once the regulatory agency determines the type of merger, it can then begin the review process.

The problem of identifying the merger category manifests itself in the antitrust review process, as the type of merger affects the extent and analysis of the review process.<sup>19</sup> Horizontal mergers receive stricter scrutiny than vertical or conglomerate mergers due to the potential for monopolistic and anti-consumer behavior by the merged company.<sup>20</sup> The advances of technology also alter the way one regards companies' business and markets.<sup>21</sup> The Competition Commission had to tackle and resolve these issues during its review process. Trying to apply traditional merger classifications to the AOL/Time Warner deal exposes the problem of laws and regulations not adapting quickly enough to cope with rapid technological advances.<sup>22</sup>

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be produced with similar facilities, marketed through the same channels, and advertised by the same media.”).

18. See *supra* note 3 and accompanying text (explaining how AOL and Time Warner's products do not compete within the same markets).

19. See Horizontal Merger Guidelines, The Department of Justice, Antitrust Division, Merger Enforcement, at [http://www.usdoj.gov/atr/public/guidelines/horiz\\_book/hmg1.html](http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html) (last visited Mar. 8, 2001) [hereinafter Horizontal Merger Guidelines] (providing guidelines for evaluating horizontal mergers); Non-Horizontal Merger Guidelines, The Department of Justice, Antitrust Division, Merger Enforcement (providing guidelines for evaluating all mergers except horizontal ones), at <http://www.usdoj.gov/atr/public/guidelines/2614.htm> (last visited Mar. 8, 2001).

20. See Berresford, *supra* note 13, at 281-82 (discussing how the classification of merger effects the level of scrutiny, with horizontal mergers receiving a more thorough review). But see Mark N. Berry, *Efficiencies and Horizontal Mergers: In Search of a Defense*, 33 SAN DIEGO L. REV. 515, 516 (1996) (arguing that horizontal mergers do not always stifle competition and that horizontal mergers actually promote efficiency and benefit consumers).

21. See Lisa Blumensaadt, Comment, *Horizontal and Conglomerate Merger Conditions: An Interim Regulatory Approach for a Converged Environment*, 8 COMMLAW CONSPECTUS 291, 295-96, 306-08 (2000) (analyzing how rapid technological changes have blurred the classical distinctions of industries, customers, and media markets and proposing new guidelines for antitrust review by regulatory agencies).

22. See *id.* (exploring new regulations to address deficiencies resulting from evolving technologies and markets).

Part I of this Comment explores the formation, procedure, and philosophy of the Competition Commission.<sup>23</sup> Part I discusses Phase I and Phase II investigations by the Competition Commission and the ability to appeal decisions to the European Court of Justice. Finally, Part I examines the dominant position standard under European Union law and analyzes how and when a company's dominant position creates an adverse effect on competition.

Part II describes the merger review process employed by the Competition Commission for various types of mergers.<sup>24</sup> Specifically, it explores the rationale for applying a stricter standard to horizontal mergers than vertical mergers. Part II further discusses how the market share and barriers to market entry of the proposed merged companies influences the Competition Commission's decision whether the merger is compatible with the EU market ("Common Market").

Part III examines the manner in which the Competition Commission conducted the review process of the AOL/Time Warner merger.<sup>25</sup> Part III explores the two major concerns of the Competition Commission in conducting its review: the potential dominance by the merged company over Internet access; and the ability to become a gatekeeper in the emerging online music catalogue and player industry.

Part IV analyzes the AOL/Time Warner review process and illustrates the inherent flaws in applying traditional and outdated merger stereotypes to new media and technology companies.<sup>26</sup> The Competition Commission failed to consider and analyze the future effects of the AOL/Time Warner merger on the converging

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23. See discussion *infra* notes 30-123 and accompanying text (providing background on the European Commission on Competition, including its genesis, the procedures of its Merger Task Force, and the process for rendering decisions on appeal).

24. See *infra* notes 124-176 and accompanying text (outlining the Commission's approach to horizontal, vertical and conglomerate mergers).

25. See *infra* notes 177-220 and accompanying text (detailing an overview of the Competition Commission's process, as well as outlining its concerns).

26. See *infra* notes 224-275 and accompanying text (characterizing the Competition Commission's current standard as antithetical to the future market activity of online, interactive multimedia).



multimedia market. Additionally, Part IV explores the structural defects of the Competition Commission that prevent it from effectively enforcing antitrust concerns.

Part V provides recommendations to the Competition Commission on how to improve the structure and review process to adequately manage new and old technology mergers.<sup>27</sup> The Competition Commission should undertake a totally independent review of proposed mergers, rather than rely on competitors' input, provide for a realistic, expedited judicial review process, and allow an efficiencies defense for horizontal mergers. This Comment concludes that the proposed changes to the laws governing the Competition Commission will improve the process and results of merger reviews in the future.<sup>28</sup> A greater concentration of power, more efficiency, and applying new rules to emerging technologies will create a more independent and reliable Competition Commission.<sup>29</sup>

## I. BACKGROUND OF THE EUROPEAN UNION COMMISSION ON COMPETITION

The Amsterdam Treaty governs the Competition Commission's power to review mergers.<sup>30</sup> The purpose of the Competition Commission is to provide a consolidated, one-stop review process for mergers and acquisitions that affect the European Union ("EU") and the EU's member states.<sup>31</sup> The Competition Commission only

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27. See *infra* notes 277-327 and accompanying text (suggesting, among other things, an increase in the centralization of power within the Competition Commission and eradication of its strict time limits).

28. See *id.* (acknowledging that while the complex AOL/Time Warner merger presented the Competition Commission with an arduous task, most of the difficulties encountered were a result of the nature structure and process of the Competition Commission itself).

29. See *id.*

30. TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, 1997 O.J. (C 340) 1 [hereinafter TREATY OF AMSTERDAM].

31. See AGREEMENT ON THE EUROPEAN ECONOMIC AREA, Jan. 3, 1994, art. 57(2), 1994 O.J. (L 1) 1 (requiring that the Competition Commission shall have sole authority to review all proposed mergers having a community dimension); see also BROBERG, *supra* note 9, at 180-84 (explaining how article 57 provides a one-

has jurisdiction to review mergers that have an impact on the European Community.<sup>32</sup> The litmus test is whether or not a merger will create a “dominant position”<sup>33</sup> within the EU market (“Common Market”), whereby such “dominant position” would have a negative effect upon competition in the European Union.<sup>34</sup>

#### A. ESTABLISHING THE COMPETITION COMMISSION

The Treaty of Rome (“Rome Treaty”)<sup>35</sup> first established guidelines and principles on concentrations.<sup>36</sup> The Treaty of Amsterdam amended the Rome Treaty in 1997.<sup>37</sup> Articles 81 and 82<sup>38</sup> of the

stop shop to proposed mergers within the European Community).

32. See Council Regulation 4064/89 establishing the Merger Control Regulation, art. 1(2), 1990 O.J. (L 257) 14, 16 [hereinafter Merger Regulations] (legislating what constitutes a European Community dimension). A merger is considered to have a Community impact when: a) the combined value of the merger worldwide is greater than five billion European Currency Units (“ECUs”), and b) the value of the merger within the EU is greater than two-hundred and fifty million ECUs; unless, two-thirds of part b is concentrated in one EU country, then that country’s national competition laws shall apply. *Id.* See generally Morten B. Broberg, *Forum Shopping and the European Merger Control Regulation*, 3 COLUM. J. EUR. L. 109, 110-12 (1996) (analyzing how the European Union defines community dimension).

33. See discussion *infra* notes 90-100 (analyzing when a company has a dominant position within a market).

34. See Merger Regulations, *supra* note 32 (setting forth the factors the Competition Commission takes into account when deciding whether the merger violates the Common Market); see also DORIS HILDEBRAND, *THE ROLE OF ECONOMIC ANALYSIS IN THE EC COMPETITION RULES* 320-25 (1998) (examining the roles dominance and market strength play in the Competition Commission’s review of proposed concentrations). See generally VALENTINE KORAH, *AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE* (6th ed. 1997) (providing a framework of the economic analysis of abuse of a dominant position).

35. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter “Rome Treaty”].

36. See Merger Regulations, *supra* note 32, art. 3 (defining a concentration). A concentration is when two previously independent companies become a single company through merger or acquisition. *Id.* The terms “concentration” and “merger” are synonymous although the term “merger” is used throughout this Comment.

37. See *infra* note 37 and accompanying text (discussing the replacement of articles 81 and 82 of the Rome Treaty by articles 85 and 86 of the Treaty of Amsterdam).

Amsterdam Treaty provide the principal competition rules.<sup>39</sup> These two articles empower the Competition Commission to formulate policy and issue rulings on merger applications that effect the

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38. See TREATY OF AMSTERDAM, *supra* note 30, art. 12 (renumbering the TREATY ON EUROPEAN UNION, *supra* note 35). Articles 85 and 86 in the Rome Treaty became Articles 81 and 82, respectively, under the Treaty of Amsterdam. See Tables of Equivalencies referred to in Article 12 of the TREATY OF AMSTERDAM, 1997 O.J. (C 340) 85 (providing a reference of old-to-new article numbers).

39. See TREATY OF AMSTERDAM, *supra* note 30, art. 81, 1997 O.J. (C 340) (stating the litmus test for merger review). Article 81 declares, in part: "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 trades between member-States and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market." *Id.*

Prior to 1987, the Competition Commission did not believe that Article 81 could apply to mergers or acquisitions, although a committee of experts advised them otherwise. See Giorgio Bernini, *EEC Merger Regulation, Member State Laws, and Articles 85 and 86*, in INTERNATIONAL MERGERS AND JOINT VENTURES, 611 (Barry Hawk ed., 1991) (discussing the expert's view that Article 81 could apply to mergers and acquisitions that occurred in the form of joint ventures). The *R.J. Reynolds/Philip Morris* case confirmed the expert's view and ruled that Article 81 does apply to mergers because of the concern for anti-competitive behavior. See Joined Cases 142 and 156/82, *British-American Tobacco Co. Ltd. & R.J. Reynolds Indus. Inc. v. Commission*, 1987 E.C.R. 4487 (holding that when agreements have anti-competitive features in them, Article 81 allows the Competition Commission to block the proposed undertakings as not in the interest of the Common Market).

Article 82 provides in part: "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." TREATY OF AMSTERDAM, *supra* note 30, art. 82.

The *Continental Can* case confirmed the expert's view as the European Court of Justice ("ECJ") held that an undertaking with a dominant position that acquires a competitor could constitute an abuse that is contrary to the goals of the Common Market. Case 6/72, *Europemballage Corp. and Continental Can Co. Inc. v. Commission*, 2 E.C.R. 215 (1973). See Bernini, *supra*, at 612 (discussing how the experts believed that Article 82 applied to concentration cases whereby a competitor is acquired by an "undertaking" already enjoying a dominant position within the market and how such acquisition could have an adverse effect on competition). An undertaking is "[a] promise, engagement, or stipulation. An engagement by one of the parties to a contract to the other, as distinguished from the mutual engagement of the parties to each other." See BLACK'S LAW DICTIONARY 1369 (5th ed. 1979). Thus, undertakings are simply the companies to a proposed merger. *Id.*

Common Market,<sup>40</sup> including mergers between companies not conducting business within the European Union.<sup>41</sup> Within the Commission, the Merger Task Force is responsible for handling the daily operation of the Competition Commission concerning mergers.<sup>42</sup> When a company files a merger notice with the Competition Commission, the Competition Commission assigns the case to one of the four operating units within the Merger Task Force.<sup>43</sup> Each operating unit is responsible for a different industry.<sup>44</sup> Each unit, however, may utilize the expertise of other members.<sup>45</sup> Ultimately, the Merger Task Force makes recommendations to the Competition Commission, and the Competition Commission makes the final decision on whether a merger will have an adverse effect on competition in the European Union.<sup>46</sup>

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40. See J. DAVID BANKS, *MERGER LAW AND POLICY IN THE UNITED KINGDOM, AUSTRALIA AND EUROPEAN COMMUNITY* 147 (1999) (discussing how the Competition Commission began to rely on Articles 81 and 82 to provide protection to Community members during the merger boom in the 1960s).

41. See *infra* notes 266-268 and accompanying text (examining the Competition Commission's review of the Boeing/McDonnell Douglas merger because the merger affected Airbus, a European company, even though neither Boeing nor McDonnell Douglas had offices within the Common Market).

42. See C.J. COOK & C.S. KERSE, *E.C. MERGER CONTROL* 8-9 (3d ed. 2000) (explaining the Merger Task Force applies the Merger Regulation cited in Articles 81 and 82).

43. See *id.* at 91 (explaining the Competition Commission's procedures for delegating responsibility in approving mergers); see also Mario Siragusa, *Merger Control and State Aids Panel: Merger Control in the European Community*, 9 *CONN. J. INT'L L.* 535, 539-42 (1994) (discussing the formation, role, and procedures the Merger Task Force utilizes after receiving pre-file notification).

44. See COOK & KERSE, *supra* note 42, at 91 (explaining that each unit in the Competition Commission's Directorate is comprised of several examiners and staff with expertise in a particular industry sector).

45. See *id.* (explaining that although each team within the Merger Task Force works independently, team members with a particular expertise will often assist other teams).

46. See generally BANKS, *supra* note 40, at 199-202 (outlining the decision-making process the Competition Commission employs, and asserting that the final decision is political, as opposed to merely administrative).

## B. PROCEDURE OF THE COMPETITION COMMITTEE'S MERGER TASK FORCE

Upon receiving a case, the assigned task force unit is responsible for gathering information and making a recommendation to the Merger Task Force.<sup>47</sup> In the course of gathering information, the unit may rely upon independent experts' opinions and knowledge.<sup>48</sup> The period within which the Merger Task Force has to operate and make a decision, however, is quite narrow.<sup>49</sup> Therefore, upon notification, the Competition Commission immediately institutes initial proceedings.<sup>50</sup> During these initial proceedings, notice of the proposed merger is published in the Official Journal of the European Communities.<sup>51</sup> Any interested parties have ten days from the given notice to provide the Merger Task Force with any relevant information.<sup>52</sup> The initial proceedings typically last four weeks, but may be extended to six weeks under certain circumstances.<sup>53</sup> During

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47. See Siragusa, *supra* note 43, at 540 (explaining that the recommendation is based on whether the merger significantly impedes effective competition in the common market).

48. See *id.* (indicating that the Merger Task Force is not limited by its internal knowledge, but has the ability to consult others in formatting a decision).

49. See Merger Regulations, *supra* note 32, at art. 10(1) (outlining the time limits the Competition Commission must observe). The Competition Commission must provide copies of the pre-merger filings with the member-states within three days and must also publish notification to ensure that concerned parties have enough time to respond within the ten-day window, as allowed under the regulations. *Id.*

50. See *id.* at art. 6 (stating that the Competition Commission must examine the pre-merger notification upon receipt).

51. See, e.g., Prior Notification of a Concentration (Case COMP/M.1845 - AOL/Time Warner), 2000 O.J. (C 130) 8 (announcing the proposed merger between AOL and Time Warner).

52. See Merger Regulations, *supra* note 32, at art. 6(2) (specifying that notice must be given without delay).

53. See *id.* at art. 10(1) (setting forth a four week time limit for the Competition Commission to make a decision unless it receives notice from a member-state that the proposed merger threatens competition in that member-state, then the Competition Commission is given six weeks to make a decision); see also Commission Regulation 447/98 of 1 March 1998 on the Notifications, Time Limits and Hearings Provided for in Council Regulation No 4064/89 on the Control of Concentrations between Undertakings, art. 6-8, 1998 O.J. (L 61) 1, 4-5 (detailing the time when the review process begins to toll, when the review period ends, and

the initial proceedings, the Competition Commission determines whether the merger raises serious doubts of a negative impact on competition within the Common Market.<sup>54</sup> At the end of the initial proceedings, if the merger raises serious doubts, the Competition Committee will initiate second stage proceedings. If there are no serious doubts arising from the initial proceedings, the Competition Committee will declare the merger compatible with the Common Market.<sup>55</sup>

The Competition Commission institutes second stage, or Phase II, proceedings, when it is unsure of the extent of the merger's negative effect upon competition after the initial proceedings.<sup>56</sup> The Competition Commission then has four months to issue a final ruling on the proposed merger.<sup>57</sup> During this time, if the Competition Commission believes the merger will have a negative effect upon competition, it must prepare a written statement of objections and provide the undertakings an opportunity to respond.<sup>58</sup>

Often, the Competition Commission will approve a merger with conditions that must be met within a specified time period after the approval.<sup>59</sup> At other times, the Competition Commission will grant

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when the Competition Commission is granted extensions for holidays and incomplete or inaccurate information).

54. See Merger Regulations, *supra* note 32, at art. 6(1) (requiring the Competition Commission to declare a concentration compatible with the Common Market during the initial proceedings unless there are serious concerns about the effect of the concentration on competition).

55. See *id.* (indicating that if the concentration is compatible with the common market, the Competition Commission need not take further steps).

56. See *id.* (authorizing the Competition Commission to institute proceedings when there are serious doubts as to the compatibility of the concentration with the aim of the Common Market).

57. See *id.* at art. 10(3)(4) (noting the four month period to complete proceedings and the exceptions to the four month period). The four month window may be extended while the Competition Commission awaits replies and requests for additional information from the undertakings. *Id.*

58. See Commission Regulation 447/98, art. 13(2), 1998 O.J. (L 61) 1, 7 (detailing the procedure for the Competition Commission to provide notice of objection to undertakings and involved parties).

59. See discussion *infra* note 220 and accompanying text (describing the conditions the Competition Commission placed upon AOL/Time Warner after approving the merger).

provisional approval, with final approval predicated upon the fulfillment of certain conditions.<sup>60</sup> These conditional approvals allow undertakings to merge, while giving the Competition Commission a method to protect competition in the Common Market and encourage economic growth.<sup>61</sup> The use of conditional approvals allows the Competition Commission and the undertakings to each achieve their primary goals; the Competition Commission seeking to protect competition, and the undertakings receiving merger approval.<sup>62</sup> When the undertakings are unhappy with the Competition Commission's decisions they may look to the courts for judicial relief.<sup>63</sup>

### C. APPEALING DECISIONS OF THE COMPETITION COMMISSION

The decisions of the Competition Commission are subject to legal review by the European Court of Justice ("ECJ").<sup>64</sup> Article 230 of the Treaty of Amsterdam gives the ECJ the power to review Competition

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60. See, e.g., Thomas Mueller, *What Worries Monti: New Economy Concerns are Driving The European Union to Stricter Scrutiny*, LEGAL TIMES, Nov. 6, 2000, at 35 (describing how divestiture of an entire business unit is a common pre-approval condition).

61. See EEC Council: Regulation No 17: First Regulation Implementing Articles 85 and 86 of the Treaty, art. 8(1), 1962 O.J. (13) 204 (allowing the Competition Commission to impose conditions and obligations to an exemption decision). The difference between a condition and an obligation is the result of its breach. *Id.* A breach of a condition immediately results in the revocation of the exemption. *Id.* A breach of an obligation allows the Competition Commission to further review, and possibly withdraw, the exemption. *Id.* See also Alexander Schaub, *Modernization of EC Competition Law: Reform of Regulation 17*, 23 FORDHAM INT'L L.J. 752, 753-54 (2000) (analyzing the current status of the Competition Commission's power to grant exemptions and proposing ways to increase the effectiveness of the regulation).

62. See Schaub, *supra* note 61, at 753 (discussing the Competition Commission's use of conditions to protect competition within the Community while not overly interfering with free market principles). The use of conditions allows businesses to achieve the maximum advantage for their shareholders and allows the Competition Commission to protect competition within the Common Market. *Id.*

63. See TREATY OF AMSTERDAM, *supra* note 30, art. 230 (indicating that any undertaking or third party who has a direct and individual stake in the outcome of the Competition Commission's decision may appeal to the ECJ).

64. See *id.* (stating that the ECJ has the authority to review acts of the European Council and the Competition Commission, and take corrective action).

Commission decisions.<sup>65</sup> This appellate review power, however, is limited.<sup>66</sup>

If an undertaking decides to appeal a decision, the Court of First Instance hears the appeal.<sup>67</sup> The Court of First Instance's review is conducted *de novo*, as the Court reviews the Competition Commission's findings of fact and law.<sup>68</sup> The Court of First Instance, however, does not review the record on appeal, as an appellate court in the United States would. The Court can request the production of documents, call and examine witnesses and experts, and order further inquiries.<sup>69</sup> Once the Court of First Instance issues a ruling, that decision can be appealed to the ECJ within a two-month period.<sup>70</sup> The appeal must be based upon a point of law.<sup>71</sup>

The legal merits upon which an undertaking may appeal a decision of the Competition Commission are narrow. The first basis for an

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65. See C.S. KERSE, E.C. ANTITRUST PROCEDURE 41-42 (4th ed. 1998) (outlining the ability of the ECJ to hear appeals brought by direct and indirect parties to the original decision).

66. See TREATY OF AMSTERDAM, *supra* note 30, art. 230 (stating the grounds upon which a party may appeal a decision of the Competition Commission). The legality of Competition Commission decisions can only be challenged on the grounds of: 1) lack of competence; 2) infringement of a critical procedural requirement; 3) infringement of the Treaty of Amsterdam or any law relating to the Treaty's application; and 4) abuse of power by the Competition Commission. *Id.*

67. See KERSE, *supra* note 65, at 43 (discussing the creation of the Court of First Instance and its role in thoroughly reviewing the facts and rulings of the Competition Commission in appeals cases).

68. See TREATY OF AMSTERDAM, *supra* note 30, art. 229 (creating the ECJ's unlimited jurisdiction to review Competition Commission decisions); see also Case T-7/89, SA Hercules v. Commission, 1991 E.C.R. II-1711 (asserting that one purpose in creating the Court of First Instance was to allow it to undertake an extensive review of the facts upon which the Competition Commission based its decisions and to ensure that the facts supported the Competition Commission's decisions).

69. See LENNART RITTER ET AL., EC COMPETITION LAW: A PRACTITIONER'S GUIDE 908-09 (2d ed. 2000) (outlining the procedures utilized by the Court of First Instance to review the facts presented in the case).

70. See *id.* at 909 (discussing the right to appeal decisions of the Court of First Instance).

71. See *id.* (specifying that parties may only appeal based on lack of jurisdiction, procedural irregularity, or a violation of a European Community regulation).



appeal is a lack of competence.<sup>72</sup> Undertakings have successfully pleaded this ground on appeal in cases where the Competition Commission rendered its decision on an inappropriate legal basis.<sup>73</sup> Additionally, the ECJ voided an agreement between the Competition Commission and the United States on appeal for a lack of competence.<sup>74</sup> Second, an abuse of power by the Competition Commission is grounds for appeal.<sup>75</sup> Such an appeal rarely succeeds, as it requires evidence of overreaching or vindictive use of granted powers.<sup>76</sup>

The third basis for an appeal is an infringement of procedural standards.<sup>77</sup> A successful appeal must prove that but for the infringement of procedural standards, the decision of the Competition Commission likely would have been different.<sup>78</sup> Infringement of procedures, such as failing or delaying to provide documents<sup>79</sup> or notices,<sup>80</sup> not allowing undertakings the right to

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72. See discussion *supra* note 66 and accompanying text (outlining the grounds for appeal to the ECJ).

73. See Case 792/79, *Camera Care Ltd. v. Commission*, 1980 E.C.R. 119 [1980] 1 C.M.L.R. 334 (1981) (holding that the Competition Commission erroneously claimed it did not have the power to impose interim measures).

74. See Case 327/91, *French Republic v. Commission*, 1994 E.C.R. I-3641 (holding invalid an agreement executed by the Competition Commission because the European Council, not the Competition Commission has jurisdiction to enter into such agreements).

75. See discussion *supra* note 66 and accompanying text (discussing the grounds for ECJ appeal).

76. See, e.g., Case 53/85, *AKZO Chemie BV and AKZO Chemie UK Ltd. v. Commission*, 1986 E.C.R. 1965, [1987] 1 C.M.L.R. 231 (1987) (claiming that the Commission abused its power by subpoenaing documents that could later be used against the company in another court).

77. See *supra* note 66 (establishing the grounds upon which a Court of First Instance decision may be appealed to the ECJ).

78. See, e.g., Case 30/78, *Distillers Co. Ltd. V. Commission*, 6 E.C.R. 2229, [1980] 3 C.M.L.R. 121 (1980), para. 26 (indicating that there are procedural irregularities, but the ECJ will not consider those irregularities because the absence of such irregularities would not have led to a different conclusion); see also *Joined Cases 209-215 & 218/78, Heintz van Landewyck Srl & Others v. Commission*, 1980 E.C.R. 3125, [1980] 3 C.M.L.R. 134 (1980), para. 47 (holding that there is no evidence the procedural irregularities influenced the decision of the Commission in any manner).

79. See *Joined Cases 209/215 & 218/78, Heintz van Landewyck Srl & Others*

respond to concerns,<sup>81</sup> or failure to adequately explore settlement options<sup>82</sup> are some of the procedural violations the ECJ held as not serious enough to prove that a decision would have been different.<sup>83</sup>

The final basis for an appeal of a decision is that the Competition Commission infringed upon the Treaty of Amsterdam and governing law.<sup>84</sup> A successful appeal occurs if the Competition Commission misapplied the law to the facts presented, or if it applied the wrong legal principle.<sup>85</sup>

If the ECJ rules that the Competition Commission violated the law, it will send the case back to the Competition Commission for reconsideration or another review process.<sup>86</sup> The ECJ, however, does

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v. Commission, 1980 E.C.R. 3125 (stating that the refusal by the Commission to show company documents might be a procedural violation, although the decision in this case was upheld for other reasons).

80. See Case 48/69, *Imperial Chem. Indus. Ltd. v. Commission*, 1972 E.C.R. 619 (holding that delaying delivery of hearing minutes did not constitute a procedural violation).

81. See *id.* (holding that a delay in providing a written statement of objections did not deny the company the chance to adequately respond to the statement of objections).

82. See *Joined Cases 43/82 & 63/82, Vereniging ter Bevordering van het Vlaamse Boekwezen, VBVB, & Vereniging ter Bevordering van de Belangen des Boekhandels, VBBB v. Commission*, 1984 E.C.R. 19 (holding that the Commission may indicate possible terms to reach a settlement, but is not required to make any offers).

83. *But see* *Joined Cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-328/94 & T-335/94, Limburgse Vinyl Maatschappij NV, Elf Atochem SA, BASF AG, Shell Int'l Chem. Co. Ltd., DSM NV and DSM Kunststoffen BV, Wacker-Chemie GmbH, Hoechst AG, Societe artisanne de vinyle, Montedison SpA, Imperial Chem. Indus. plc, Huls AG and Enichem SpA v. Commission*, 1999 E.C.R. II-931, para. 1021 (holding that the Competition Commission violated appellants' rights to openly access the case file, and such infringement had a likely chance of affecting the Competition Commission's decision).

84. See *TREATY OF AMSTERDAM, supra* note 30, art. 230 (establishing the grounds upon which a Court of First Instance decision may be appealed to the ECJ).

85. See, e.g., *Case 26/75, General Motors Cont'l NV v. Commission*, 1975 E.C.R. 1367 (annulling decision by the Competition Commission for misapplying the abuse by a dominant position standard).

86. See *Limburgse Vinyl Maatschappij NV, supra* note 83, para. 7 (holding that the Competition Commission may subsequently issue a new decision addressed to the successful litigant).

not substitute its own judgment for that of the Commission.<sup>87</sup> Instead, the ECJ indicates where the Commission erred and requires the Commission to conduct proceedings applying the correct law, application, or procedure.<sup>88</sup> The Competition Commission must abide by the ruling of the ECJ.<sup>89</sup> Many of the appeals to the ECJ concern the Competition Commission's interpretation of whether a proposed merger constitutes a dominant position.

#### D. CREATION OF OR STRENGTHENING A DOMINANT POSITION

Before the Competition Commission declares a proposed merger contrary to the Common Market, it must find that the proposed merger creates or strengthens a dominant position within the Common Market.<sup>90</sup> There is no bright-line test to determine dominance; dominance is subjective and open to interpretation.<sup>91</sup> Dominance is viewed on a sliding scale, with varying degrees of dominance based upon market influence and the ability to act independently of consumers and competitors.<sup>92</sup>

On an economic level, a dominant position is the ability to

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87. See Case T-110/95, *Int'l Express Carriers Conference (IECC) v. Commission*, 1998 E.C.R. II-3605, para. 33 (stating that the ECJ does not issue orders to the Competition Commission, but the Competition Commission is required under Article 233 of the Treaty of Amsterdam to comply with the decision).

88. See TREATY OF AMSTERDAM, *supra* note 30, art. 233 (stating that the Competition Commission is required to abide by the decisions of the ECJ and must take all necessary actions to comply with the ECJ rulings).

89. *Id.*

90. See Alessandro Bertolini & Francesco Parisi, *The Rise of Structuralism in European Merger Control*, 32 STAN. J. INT'L L. 13, 20-23 (1996) (discussing the impact of collective domination under the merger regulations).

91. See Merger Regulations, *supra* note 32, at art. 2(3) (stating that mergers that create or strengthen a dominant position that significantly impede effective competition within the Common Market will not receive approval); see also Sergio Baches Opi, *Merger Control in the United States and European Union: How Should the United States' Experience Influence the Enforcement of the Council Merger Regulation?*, 6 J. TRANSNAT'L L. & POL'Y 223, 271-78 (1997) (discussing what the Competition Commission considers when determining dominance).

92. See COOK & KERSE, *supra* note 42, at 130 (indicating that, without a clear definition of dominance, many factors blur distinctions, making dominance a very subjective determination).

influence factors in the relevant market free from constraint by competitors and/or consumers.<sup>93</sup> The level of market share is a leading factor in determining dominance.<sup>94</sup> The ECJ held in *Hoffman-La Roche*<sup>95</sup> that except in extraordinary circumstances, the existence of a very large market share constitutes a dominant position.<sup>96</sup> A substantial market share, however, does not evidence a dominant position, and the issue of whether a market share is considered dominant will vary depending on the market.<sup>97</sup> Other factors considered in a dominance analysis include technological advantages, market gap between concentration and nearest competitor, and market turnover.<sup>98</sup> Determining dominance, however, also requires defining the relevant markets and projecting future market activities.<sup>99</sup>

The Competition Commission published its guidelines on how it defines relevant markets in 1997.<sup>100</sup> How vague or narrow the

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93. See Case C-250/92, *Gottrup-klim e.a. Grovwareforeninger v. Dansk Landbrugs Grovvareselskad AmbA*, 1994 E.C.R. I-5641, para. 47 (defining a dominant position as “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, its customers and ultimately of the consumers.”).

94. See *COOK & KERSE*, *supra* note 42, at 152-56 (stating that market shares have a direct correlation to market power, and market power determines dominance.)

95. Case 85/76, *Hoffman-La Roche & Co. AG v. Commission*, 1979 E.C.R. 461.

96. See *id.* para. 41 (explaining the significance of the possession of large market shares).

97. See *id.* para. 40 (commenting on the importance of substantial market share).

98. See *id.* paras. 42-48 (indicating that a combination of various factors of the Hoffman-La Roche merger constituted findings of a dominant position). The Commission noted that Hoffman-La Roche had exclusive use of patents, giving it a technological advantage. *Id.* Further, the Commission found that the large gap in market shares between Hoffman-La Roche and its nearest competitor, which continued to remain large over the years, indicated a lack of effective competition, and that Hoffman-La Roche's sales were greater than all of its other competitors combined. *Id.*

99. See *COOK & KERSE*, *supra* note 42, at 128-31 (discussing what constitutes a dominant position).

100. See Commission Notice on the Definition of Relevant Market for the

Competition Commission defines the relevant market of a proposed merger affects the likelihood of approval.<sup>101</sup> It requires assessment of the product market and geographic market.<sup>102</sup>

Relevant product markets are those markets that consist of all goods that are “interchangeable or substitutable by the consumer.”<sup>103</sup> Relevant geographic markets are those markets whereby the undertakings are involved in “the supply and demand of products or services,” where competition is fairly uniform, and the circumstances surrounding competition are appreciably distinguished from other geographic markets.<sup>104</sup> Therefore, the affected market is determined by a combination of the product and geographic markets.<sup>105</sup>

#### E. DOMINANT POSITION HAVING AN ADVERSE EFFECT ON COMPETITION

Determining that a concentration would create or strengthen a dominant position is only one step in analyzing a merger; whether the dominant position would adversely impede effective competition is the second step.<sup>106</sup> Establishing or strengthening a dominant position in the Common Market is not contrary to European Union law.<sup>107</sup> Only when the creation or strengthening of a dominant

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Purposes of Community Competition Law, 1997 O.J. (C 372) 5 [hereinafter Commission Notice] (establishing the standards for relevant market share for the notification procedures under the merger regulations). These guidelines amended previous ones issued by the Competition Commission in 1989. *Id.* The guidelines' purpose is to properly identify competitors that can provide effective competition to proposed concentrations. *Id.* at art. 2.

101. *See* COOK & KERSE, *supra* note 42, at 132-33 (explaining that the Competition Commission often defines markets narrowly in order to sustain competition and protect markets).

102. *See id.* (describing how a determination of approval is reached).

103. Commission Notice, *supra* note 100, at art. 7.

104. *See id.* at art. 8.

105. *See id.* at art. 9 (basing the definition on case law and the Competition Commission's internal decision-making process).

106. *See* Merger Regulations, *supra* note 32, at art. 2(3) (requiring a merger to create a dominant position such that the dominant position significantly impedes effective competition before nullifying the merger as incompatible with the Common Market).

107. *See* LENNART RITTER ET AL., EUROPEAN COMPETITION LAW: A PRACTITIONER'S GUIDE 77 (2d ed. 2000) (discussing that the purpose of Article 81

position would have a significant negative impact on competition in all, or substantially all, of the Common Market, will the Competition Commission reject a proposed merger.<sup>108</sup> A merger may create or strengthen a dominant position that will not have an adverse effect on competition.<sup>109</sup> It is also possible for a merger to have a negative effect on competition, where the impact is regional or insignificant, and therefore not in violation of the Merger Regulations.<sup>110</sup>

It appears that the regulations set the bar extremely high for the Competition Commission to reject a merger application.<sup>111</sup> Such a tough standard favors undertakings and their ability to merge with little fear of rejection.<sup>112</sup> The standard, however, does allow the Competition Commission to approve the mergers with conditions.<sup>113</sup> These conditions can precede approval of the merger in that the undertakings must divest certain products or services, or follow approval whereby undertakings agree not to execute any exclusive deals for a period of years.<sup>114</sup> The ability of the Competition

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is not to prevent effective business decisions that might lead to the creation of a dominant position, but to prevent the restriction on competition from abuse by a company in a dominant position).

108. *See id.* at 92 (discussing the evaluation of “object or effect” in the economic context).

109. *See id.* at 115-16 (discussing the conditions whereby the Competition Commission will grant an exemption for the creation or strengthening of a dominant position). The overall test requires that the benefits of allowing an undertaking must outweigh the detriments, such as economic benefits to customers and consumers. *Id.* But *see* discussion *infra* notes 316-317 and accompanying text (discussing how the Competition Commission has not recognized the economic benefits to a customer test because the Merger Regulations consider efficiencies as barriers to competition).

110. *See id.* (indicating that the Competition Commission is only interested, and legally allowed to regulate, mergers having a community-wide impact).

111. *See id.* at 117 (discussing the overwhelming number of merger applications approved by the Competition Commission).

112. *See id.* (believing that a tough standard for merger rejection allows undertakings to take advantage of the rules).

113. *See* Merger Regulations, *supra* note 32 (granting the Competition Commission the power to impose conditions and obligations on undertakings to make the merger compatible with the Common Market).

114. *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 (allowing

Commission to negotiate and compromise on conditions allows for a stringent standard for outright rejection.<sup>115</sup> A lower standard would allow for less compromise and would be detrimental to undertakings that have an adverse effect on competition in some markets or products, as they would face a lower chance of merger approval.<sup>116</sup> Although the conditions to approval can be so onerous that sometimes the effect is to bar the proposed merger, more often, a negotiated compromise is achieved that is acceptable to all parties.<sup>117</sup>

In addition, the Competition Commission looks at the potential for collective dominance in reviewing merger applications.<sup>118</sup> Collective dominance is the ability of a few competitors in a market to act in a manner that has the same anti-competitive effects of a single dominant company.<sup>119</sup> The Competition Commission focuses on "degree of concentration, price transparency, product homogeneity, cost symmetry, slow market growth, barriers to entry, or structural links."<sup>120</sup> Collective dominance is a controversial policy because it

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MCI/WorldCom merger upon condition that MCI divest itself of its Internet backbone service); Commission Decision of 17 July 1996 Relating to a Proceeding Pursuant to Council Regulation (EEC) No. 4064/89 (IV/M.553 - RTL/Veronica/Endemol), 1996 O.J. (L 294) 14 (ruling requiring that a television station not change format for a period of five years without first securing Competition Commission approval).

115. See Mueller, *supra* note 60, at 35 (discussing the stricter scrutiny applied by the Competition Commission in light of its widened use conditions).

116. See *id.* (indicating that the Competition Commission, with a looser standard, would have a greater ability to deem mergers not compatible with the Common Market).

117. See BANKS, *supra* note 40, at 200-02 (discussing the flexible approach taken by the Competition Commission combined with the rigid deadline encourages all parties to reach an agreement).

118. See Joined Cases C 68/94 & C 30/95, France v. Commission, 1998 E.C.R. I-1375 (holding that dominance not only applies to single firm dominance, but also to oligopolistic or collective dominance); see also Mueller, *supra* note 60, at 35 (discussing the increased use of the collective dominance standard to either block or modify proposed mergers).

119. See Mueller, *supra* note 60, at 35 (describing the activities as either an implicit agreement among the competitors or identical behavior that has the result of an implicit agreement).

120. Commissioner Mario Monti, The Main Challenges for a New Decade of EC Merger Control, Address at EC Merger Control 10th Anniversary Conference, Brussels (Sept. 15, 2000), available at [http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=SPEECH/](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/)

allows the Competition Commission to conclude that smaller market share mergers have the ability collectively to dominate, although individually they cannot.<sup>121</sup> The controversy arises due to a presupposed notion that companies will conspire with, rather than compete against, each other in a given market.<sup>122</sup> The European Union, however, seems to believe that for the most part, companies will not conspire to collectively dominate the market, which should reduce the concern of over-reliance on the collective dominance theory, unlike the policy of the United States that assumes that companies will conspire if allowed.<sup>123</sup>

## II. COMPETITION COMMISSION'S APPROACH TO HORIZONTAL, VERTICAL, AND CONGLOMERATE MERGERS

The manner in which the Competition Commission classifies a proposed merger affects the scope and depth of the review process.<sup>124</sup> The Competition Commission judges all mergers upon whether the merger strengthens or establishes a dominant position within the market and whether such a dominant position adversely affects

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00/311|0|RAPID&lg=EN [hereinafter Commissioner Monti Speech].

121. See Mueller, *supra* note 60, at 35 (explaining that the policy is controversial because of the lack of proof needed to determine that firms will collectively dominate). Commissioner Monti has acknowledged the disagreement, stating that, "analysis of collective dominance will be the analytical tool that will face the most challenges over the next decade." Commissioner Monti Speech, *supra* note 120.

122. See Mueller, *supra* note 60, at 36 (indicating that on a basic economic level it is more beneficial for companies to conspire than compete, hence the belief that companies act in their best economic interest).

123. See Thomas E. Kauper, *Merger Control in the United States and the European Union: Some Observations*, 74 ST. JOHN'S L. REV. 305, 335 (2000) [hereinafter Kauper, *Merger Control*] (stating that the United States assumes companies will attempt to collectively dominate when economically profitable, but the European Union believes that firms will attempt to compete against each other and attempt to keep prices lower).

124. See *supra* note 20 and accompanying text (explaining that the levels of scrutiny for mergers is directly related to the type of merger); see also COOK & KERSE, *supra* note 42, at 148-49 (stating that almost all cases involving horizontal mergers receive in-depth review while cases involving vertical mergers rarely receive more than a cursory review).



competition.<sup>125</sup> The Competition Commission only rejects as contrary to the Common Market those mergers that satisfy both parts of the test.<sup>126</sup> The threshold whereby the Competition Commission reviews mergers is lower for horizontal than vertical mergers.<sup>127</sup>

### A. HORIZONTAL MERGER REVIEW

A primary concern of the EU's competition law is the percentage of market share the proposed concentration will control.<sup>128</sup> A merger between competitors increases the market share of the proposed concentration and removes a competitor from the market.<sup>129</sup> Additionally, a company that controls a larger market share vis-à-vis its competitors can dominate the market through buying power, setting prices, and establishing barriers to market entry.<sup>130</sup> This ability to dominate is especially visible where a market is highly fractionalized, where no competitor controls a majority of the market.<sup>131</sup> The market leader could control as little as ten percent, although such a small percentage will not likely constitute

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125. See COOK & KERSE, *supra* note 42, at 149-50 (discussing the important considerations of the Competition Commission in determining whether a proposed merger is compatible with the Common Market).

126. See *supra* notes 87-89 and accompanying text (explaining that an undertaking can create a dominant position, but a dominant position is only contrary to the Common Market when the dominant position has the ability to negatively affect competition).

127. See Commission Regulation 4064/89 of 1 March 1998 Form CO Relating to the Notification of a Concentration Pursuant to Regulation, Annex, 1998 O.J. (L 61) 1 [hereinafter Form CO] (requiring notification for vertical mergers when the effected market share will be twenty-five percent or greater, while requiring notification of horizontal mergers when the affected market share will be fifteen percent or greater). Under such a definition, the Competition Commission only recognizes two types of mergers, horizontal and vertical. *Id.*

128. See COOK & KERSE, *supra* note 42, at 152-56 (discussing how market share is important, but only in the context of the market's overall strength and level of competition).

129. See *supra* note 14 (defining a horizontal merger as a merger between two competitors, thereby removing the competitor from the market).

130. See JONATHAN FAULL & ALI NIKPAY, *THE EC LAW OF COMPETITION* 122-36 (1999) (discussing what actions constitute an abuse of a dominant position).

131. See *id.* at 125-26 (controlling a large minority in a fractionalized market makes it easier to dominate since it would require several competitors to align to be competitive).

dominance.<sup>132</sup>

The Competition Commission requires a review process for any merger that affects the markets.<sup>133</sup> A market is affected when a proposed horizontal merger controls more than fifteen percent of the market share.<sup>134</sup> Such a low threshold reflects the Competition Commission's concern regarding horizontal mergers and their potential for negative impact upon the Common Market.<sup>135</sup>

In addition to setting a lower threshold to trigger the review process for horizontal mergers, the standard for review is stricter for horizontal than for vertical mergers due to a greater possibility that a horizontal merger will negatively affect competition than will a vertical merger.<sup>136</sup> The elimination of a competitor through a merger eliminates choice to consumers in markets.<sup>137</sup> When no other competition exists, a company has a monopoly over the market, allowing it to dictate terms and prices for the company's products or services.<sup>138</sup> These concerns are normally not present in vertical mergers, thereby allowing the Competition Commission to review vertical mergers with less scrutiny.<sup>139</sup>

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132. See, e.g., Case 75/84, Metro SB-Grossmarkte GmbH & Co. KG v. Commission, 1986 E.C.R. 3021 (holding that a ten percent market share precludes a finding of dominance and the merger was therefore compatible with the Common Market).

133. See Form CO, *supra* note 127 (defining affected markets as those markets where a concentration will control a market share of fifteen percent for horizontal mergers and twenty-five percent for vertical mergers).

134. See *id.*

135. See *supra* note 20 and accompanying text (discussing the heightened level of scrutiny given to horizontal mergers).

136. See COOK & KERSE, *supra* note 42, at 151 (explaining how a horizontal merger poses a greater threat to significantly impede effective competition than a vertical merger).

137. See *id.* at 156-58 (examining the role elimination of significant competitors plays in the competition review and the need for other companies to provide viable competition to the proposed undertaking).

138. See Sam D. Johnson & A. Michael Ferrill, *Defining Competition: Economic Analysis and Antitrust Decisionmaking*, 36 BAYLOR L. REV. 583, 591-92 (1984) (discussing the economic consequences of monopolies in markets).

139. See COOK & KERSE, *supra* note 42, at 165 (explaining that vertical mergers do not normally reduce competition or effect market shares).

Anti-competitive behavior that is present in both horizontal and vertical mergers is the establishment of barriers preventing entry into the market. These barriers consist of absolute and strategic advantages and exclusionary practices of the merged company.<sup>140</sup> Absolute advantages occur when the incumbent controls, or has access to resources only available to the incumbent.<sup>141</sup> Strategic advantages result from being the first or established participant in a market.<sup>142</sup> New entrants into a market can only overcome this advantage with time and money.<sup>143</sup> The amount of time and capital required might preclude earning profits for a long period of time, effectively creating a barrier to the market.<sup>144</sup>

The last type of barrier to entry is an exclusionary practice.<sup>145</sup> Exclusionary practices often overlap absolute advantages, however, they include such actions as predatory pricing<sup>146</sup> and exclusive dealing,<sup>147</sup> preventing potential competitors from access to necessary services and products.<sup>148</sup>

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140. *See id.* at 159-60 (stating that barriers can be classified into three types, although the types can and do overlap in some aspects).

141. *See id.* at 158-59 (discussing absolute advantages that could create a barrier to market entry). Some absolute advantages would include legal restrictions on market entry and ownership of essential assets, or intellectual property rights that give a company exclusive rights to technology or property. *Id.*

142. *See id.* at 158-60 (explaining that strategic advantages include brand name recognition and loyalty, established marketing and distribution systems, and general goodwill (intangibles)).

143. *See* COOK & KERSE, *supra* note 42, at 158-60 (discussing strategic advantages and methods to overcome this barrier to entry).

144. *See* Case 27/76, United Brands Co. & United Brands Cont'l BV v. Commission, 1978 E.C.R. 207 (holding that a requirement of large capital expenditures to enter a market constitutes a barrier to entry because the economies of scale prevent the new competitor from realizing any economic gains in the short term, risking loss of the entire investment).

145. *See* COOK & KERSE, *supra* note 42, at 158-59 (describing how exclusionary practices can act as a barrier to trade).

146. *See* Case 111/96, ITT Promedia NV v. Commission, 1998 E.C.R. II-2937 (holding that predatory pricing practices can constitute abuse).

147. *See* Case 65/89, BPB Industries Plc & British Gypsum Ltd. v. Commission, 1993 E.C.R. II-389 (ruling that the execution of an exclusive purchasing contract for plasterboard restricted competition in the market and constituted an abuse of a dominant position).

148. *See* COOK & KERSE, *supra* note 42, at 159-60 (explaining the use of

Market share and barriers to entry are the two most important criteria the Competition Commission looks to when determining whether a merger will significantly impede competition within the Common Market.<sup>149</sup> Other elements that are taken into consideration are economic and financial power of the undertakings,<sup>150</sup> the power and influence customers can exert upon the undertaking,<sup>151</sup> and the ability to freely access commodities and markets.<sup>152</sup> The Competition Commission considers all of these factors together in determining whether the proposed merger is compatible with the Common Market.<sup>153</sup>

## B. VERTICAL MERGER REVIEW

Unlike horizontal mergers, vertical mergers receive less scrutiny because they present less of a threat to competition.<sup>154</sup> The threshold to trigger a review for a vertical merger is twenty-five percent, as opposed to fifteen percent for horizontal mergers, reflecting the lesser concern for vertical mergers.<sup>155</sup> In recent years, however, the

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exclusionary practices as barriers to entry, specifically the use of predatory pricing).

149. See generally Timothy J. Dorsey, *The European Community Merger Regulation: Questions Answered, Uncertainties Remain*, 8 TUL. EUR. & CIV. L.F. 95, 110-11 (1993) (describing the various factors considered in determining whether a merger significantly impedes competition).

150. See COOK & KERSE, *supra* note 42, at 161-62 (discussing how the ability of a powerful firm to significantly increase production might pose a barrier to entry).

151. See *id.* at 160-61 (explaining that some products, such as Coca-Cola, are in such demand that consumers can force corporations to refrain from engaging in certain market abuses).

152. See *infra* notes 166-167 and accompanying text (describing the concerns over vertical mergers and the subsequent market effects taken into consideration by the Competition Commission in determining whether the proposed merger is compatible with the Common Market).

153. See Dorsey, *supra* note 149, at 108-12 (discussing how the Competition Commission considers competition factors, such as geographic market, dominant position, and significant impediment in its decisions).

154. See COOK & KERSE, *supra* note 42, at 151-52 (explaining that since a vertical merger does not remove a competitor from the market it poses a lesser threat to competition than a horizontal merger).

155. See Form CO, *supra* note 127, § 6, III. "Affected Markets" (indicating different threshold amounts that trigger a duty to report for vertical and horizontal

Competition Commission has reviewed vertical mergers with greater scrutiny.<sup>156</sup>

Although vertical mergers receive less scrutiny, they are still subject to Article 81 of the Treaty of Amsterdam. The ECJ held in *Consten and Grundig v. Commission*<sup>157</sup> that Article 81 does not make any distinction between vertical and horizontal restraints on competition, and neither would the court.<sup>158</sup> In order to limit the number of vertical mergers blocked, the Court applies a *de minimus* standard,<sup>159</sup> stating that simple restraint on competition is not enough;<sup>160</sup> the restraint must be appreciable.<sup>161</sup> The Commission, however, only needs to show that the merger has the ability to appreciably affect competition, not that it actually has had such affect.<sup>162</sup> Recently, the Commission approved the Notice on Agreements of Minor Importance<sup>163</sup> whereby it amended the *de*

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mergers).

156. See Arthur J. Burke et al., *International Antitrust*, 33 INT'L LAW. 277, 287-88 (1999) (discussing the new guidelines concerning vertical mergers and how the Competition Commission is instituting more Phase II investigations into vertical mergers than ever before).

157. Joined Cases 56 & 58/64, *Etalissements Consten SARL v. Commission*, 1966 E.C.R. 299.

158. See *id.* at 339 (ruling that the standard of significantly impeding competition in the Common Market applies equally to horizontal and vertical mergers).

159. See Notice on Agreements of Minor Importance, 1997 O.J. (C372/13) 4 [hereinafter Notice on Agreements] (declaring that certain agreements that fall below announced thresholds cannot constitute an appreciable restriction on competition and therefore are not subject to review by the Competition Commission). Under the *de minimus* standard, horizontal mergers that constitute five percent or less of the aggregate market share and vertical mergers that constitute ten percent or less are exempt from the jurisdiction of the Competition Commission; see also RITTER ET AL., *supra* note 69, at 103-09 (detailing the effects of the *de minimus* standard on vertical competition).

160. See Case 319/82, *Societe de Vente de Ciments et Betons de l'Est SA v Kerpen & Kerpen GmbH und Co. KG v. Commission*, 1983 E.C.R. 4173, 4183 (holding that a contract affecting ten percent of trade from France to Germany in a given product market is large enough to have an appreciable effect on competition).

161. See *id.*

162. See *id.* (stating that a contract that has the potential to negatively affect competition is contrary to the Common Market and is therefore null and void).

163. See Notice on Agreements, *supra* note 159, at 4 (establishing the *de*

*minimus* rule to exclude mergers that would not result in greater than ten percent of aggregate market shares (five percent for conglomerate mergers) from the application of Article 81.<sup>164</sup> Lastly, the Commission has issued block exemptions to certain vertical transactions, holding that they could never effectively restrict competition, thereby reducing the number of applications and reviews for vertical mergers.<sup>165</sup>

The concern of anti-competitive behavior in vertical mergers occurs when the undertaking creates barriers to entry into the market through exclusionary practices.<sup>166</sup> For example, Company A, involved in fruit production, buys packing and transportation companies to move the goods from the local farm to the market. Company A further acquires a marketing and distribution company to sell the goods. If any of these acquired companies, however, were providing service to several sellers and as a result of the acquisition, refuse to do business anymore except with Company A, the result would be that Company A has effectively restricted its competition.<sup>167</sup>

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*minimus* standards for Competition Commission review of horizontal and vertical mergers).

164. *See id.* (creating a safe harbor against review for undertakings that fall below the threshold).

165. *See* Communication from the Commission on the Application of the Community Competition Rules to Vertical Restraints - Follow-up to the Green Paper on Vertical Restraints, 1998 O.J. (C 365) 3 (proposing certain transactions for which an exemption is automatically granted). The current block exemptions are granted for exclusive distribution, exclusive purchasing, and franchising. *Id.* The proposed block exemptions will cover all vertical agreements for all intermediate and final goods and services, with an exception for some types of "hardcore restraints," such as minimum and fixed resale prices and absolute territorial protection. *Id.*

166. *See* COOK & KERSE, *supra* note 42, at 165-68 (discussing the concern of anti-competitive behavior in vertical mergers occurs when a company acquires a supplier, whereby such acquisition is likely to cut off a competitor from accessing the goods of the supplier). *Id.*

167. *See, e.g.,* Case 27/76, United Brands Co. & United Brands Cont'l BV v. Commission of European Communities, 1978 E.C.R. 207 (holding that a requirement that a company's distributor refuse sales to competitors under certain circumstances constitutes an abuse of a dominant position). *But see* Case 102/77, Hoffmann-La Roche & Co. AG v Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH, 1978 E.C.R. 1139 (stating that the use of a

Another concern of vertical mergers is that they are contrary to the goal of the Common Market.<sup>168</sup> The goal of the Common Market is a single, unified market, however, vertical mergers lock-up suppliers and producers to operate on in selected geographic markets, thus preventing them from operating for the good of the entire Common Market.<sup>169</sup> To limit the exclusivity of vertical mergers, the Competition Commission allows producers and distributors to accept unsolicited offers outside the territorial restriction in the merger agreement, but they cannot actively advertise in the outside territories.<sup>170</sup>

### C. CONGLOMERATE MERGER REVIEW

A conglomerate merger may contain both horizontal and vertical concerns while remaining classified as a conglomerate merger.<sup>171</sup> The definition of affected markets on Form CO (the application filed with the Competition Commission by the proposed merged companies) only differentiates between horizontal and vertical mergers.<sup>172</sup> The Notice on Agreements of Minor Importance, however, only exempts conglomerate mergers under the *de minimus* rule having an aggregate market share of less than five percent.<sup>173</sup>

Conglomerate mergers, do not combine competitors or companies

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legal trademark is not an abuse of dominant position, even if the effect is to prevent competition).

168. See Commission of the European Communities, First Report on Competition Policy 1971, 2 EEC Competition L. Rep. (MB) 1407, point 45 (1972) (discussing how exclusive vertical agreements create obstacles to complete market integration).

169. See *id.* (indicating that a condition of non-exclusive contracts for approval would be in the best interests of the Common Market).

170. See FAULL & NIKPAY, *supra* note 130, at 435 (explaining the reasons for allowing passive—but not active—sales outside of territorial exclusive agreements).

171. See Form CO, *supra* note 127, § 6 (defining horizontal and vertical mergers).

172. See *id.*

173. See *supra* note 164 and accompanying text (providing a safe harbor *de minimus* rule, exempting conglomerate mergers that affect less than five percent of the market share).

providing complimentary services.<sup>174</sup> Therefore, conglomerate mergers only pose anti-competition concerns through the horizontal or vertical aspects of the merger.<sup>175</sup> Conglomerate mergers are helpful to companies interested in diversifying and reducing their risk in case of an economic downturn.<sup>176</sup>

### III. COMPETITION COMMISSION'S REVIEW OF THE AOL/TIME WARNER MERGER

The European Commission on Competition handled its two largest merger applications in 2000 with the Sprint/MCI WorldCom<sup>177</sup> and AOL/Time Warner mergers.<sup>178</sup> The size and complexity of the AOL/Time Warner merger pushed the Merger Task Force to resolve extremely complicated issues within a short time.<sup>179</sup> The Competition Commission's review focused on three major issues, the broadband

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174. See *supra* note 16 and accompanying text (providing definitions for horizontal, vertical, and conglomerate mergers).

175. See Edmund H. Mantell, *Potential Antitrust Obstacles to a Merger and the Role of the Economist*, 97 COM. L.J. 123, 131 (1992) (discussing that although conglomerate mergers generally pose no immediate anti-competition concerns, they can be perceived as a threat to competition under certain circumstances which bear resemblance to those of horizontal or vertical mergers).

176. See Blumensaadt, *supra* note 21, at 294 (explaining that mergers are often driven by economic factors, including "economy of scale" and "economy of scope," both of which enable a company to make more efficient use of resources such as advertising, research and development, and customer service, making the company comparable to a "dominant competitor").

177. See Neil Buckley, *Brussels Launches Full-Scale Probe into MCI-Sprint Deal*, FIN. TIMES, Feb. 21, 2000, at 1 (announcing that the Competition Commission would conduct a four-month review of the merger, and that the merger would proceed to the second stage, an occurrence in only one in ten mergers reviewed by the Competition Commission).

178. See *supra* note 1 and accompanying text (stating that the value of the two mergers were the largest mergers ever announced in terms of deal value); see also Michael E. Kanell, *MCI Paying \$115 Billion to Complete a Powerhouse*, ATLANTA J. & CONST., Oct. 6, 1999, at 1D (stating that Sprint/MCI WorldCom merger turned out to be the largest corporate takeover to date, as the bidding war between MCI WorldCom and BellSouth augmented).

179. Compare *infra* notes 175-211 and accompanying text (discussing the complexity of the AOL/Time Warner merger), with *infra* notes 243-45 and accompanying text (discussing the strict time limits imposed on the Competition Commission in which to make approval decisions).



Internet Service Provider (“ISP”) market, the online music catalogue, and the online music player industry.<sup>180</sup> Ultimately, the Competition Commission decided that a merged AOL/Time Warner threatened neither competition within the broadband ISP market due to a lack of infrastructure, nor the online music player industry due to a lack of market shares.<sup>181</sup> The Competition Commission did, however, find that AOL/Time Warner could dominate the online music catalogue industry and it required structural changes and procedural guarantees prior to granting merger approval.<sup>182</sup>

#### A. OVERVIEW OF THE MERGED AOL/TIME WARNER

The announcement of the AOL/Time Warner merger shocked the world and created fear in their competitors.<sup>183</sup> AOL/Time Warner, if approved, would be, by far, the largest media company in the world.<sup>184</sup> Almost immediately, people raised concerns about the ability of AOL Time Warner to act in an anti-competitive manner, as the combined company would dwarf its nearest competitor.<sup>185</sup> AOL, with more than twenty-seven million customers, is the largest ISP in the world.<sup>186</sup> Time Warner, with nearly thirteen million cable

180. See *infra* notes 176-96 (discussing major issues in the AOL/Time Warner merger addressed by the Competition Commission).

181. See *infra* notes 198-213 and accompanying text (stating reasons for finding that the AOL/Time Warner merger did not threaten competition in the broadband ISP market, nor the online music player industry).

182. See *infra* note 213 and accompanying text (explaining the condition imposed by the Competition Commission that AOL terminate all ties with Bertelsmann AG before approval of the AOL/Time Warner merger).

183. See, e.g., Alec Klein, *FTC Likely to OK AOL Deal*, L.A. TIMES, Dec. 11, 2000, at C1 (indicating that opponents fear that approval of the merger will restrict competition and consumer choice).

184. See David Schwab, *Rewriting the Media Universe - Proposed Merger of AOL and Time Warner Heralds New Order for the New Century*, STAR LEDGER, Jan. 11, 2000, at 1, available at 2000 WL 4250728 (stating that the combined AOL Time Warner would be the largest company in the world if approved).

185. See Peter Morton, *Dose of Reality hits AOL Takeover: Share Plunge Carves \$16B off Agreement: Euphoria Evaporates as Regulatory and Accounting Concerns Surface*, NAT. POST, Jan. 12, 2000, at C1, available at 2000 WL 5360227 (announcing that several legislators had concerns over the breadth and depth of the merger, which could minimize competition and consumer choice).

186. See America Online, *at*

customers, is one of the largest fiber optic, broadband cable providers in the world.<sup>187</sup>

Each company owns the crown jewel of its respective industry. AOL controls the home page, or welcome screen, that customers see when they sign onto its service.<sup>188</sup> Not only does the home page allow AOL to advertise to twenty-seven million customers, but it also provides AOL users with an entire community of information, and provides AOL the ability to sell space within its community to retailers interested in advertising to millions of potential customers.<sup>189</sup> The greater the quantity of community information AOL controls, the less likely that users would need to go outside AOL's community to retrieve information.<sup>190</sup> By keeping users within its community, AOL receives revenue from items and information users purchase.<sup>191</sup>

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<http://www.aoltimewarner.com/about/companies/americaonline.html> (last visited Feb. 23, 2001) (providing a brief description of the company and its products and services).

187. See Time Warner Cable, *at* <http://www.aoltimewarner.com/about/companies/twcable.html> (last visited Feb. 23, 2001) (providing a brief description of the company and its products and services).

188. See America Online, *supra* note 186 (discussing its easy to use design, including its welcome screen that allows users to access all the other services and web pages within the AOL community). *But see* Alec Klein, *FCC Approves AOL-Time Warner Merger*, Jan. 12, 2001, available at <http://www.washtech.com/news/merger/6574-1.html> (announcing the details of the conditions imposed by the FCC regarding control of the welcome screen). One of the conditions the FCC imposed on AOL/Time Warner was to allow competing Internet Service Providers to have control over the welcome screen. *Id.*

189. See, e.g., *Shape of Things to Come?*, J. REC., Sept. 27, 2000, available at 2000 WL 14298661 (indicating that Volvo advertised its new S60 sedan on AOL's welcome screen rather than on television).

190. See Saul Hansell, *Now, AOL Everywhere*, N.Y. TIMES, July 4, 1999, at 1 (indicating that Internet users spend nearly forty-percent of their online time using AOL-owned services). This is almost ten times greater than its nearest rival, Microsoft, at almost four and a half percent. *Id.*

191. This concept is similar to owning a shopping mall and all the stores inside. Imagine that whenever a consumer decides to go shopping, he or she automatically starts in the mall. The greater number of stores in the mall providing everything consumers want, the less likely consumers will be to leave the mall. If they never leave the mall, buying all their necessities there the mall owner realizes high revenues.

Time Warner, on the other hand, owns various media and entertainment establishments. Time Warner's assets include major cable television programs,<sup>192</sup> print media,<sup>193</sup> music labels,<sup>194</sup> and Road Runner, an ISP.<sup>195</sup> Most importantly, Time Warner owns Time Warner Cable systems, through which Time Warner provides broadband services, including Road Runner.<sup>196</sup>

Many experts believe that cable modems will be the dominant method of Internet access in the future.<sup>197</sup> Currently, consumers primarily access the Internet through dial-up phone modems.<sup>198</sup> Cable modems offer the advantage of being able to transmit data at rates one hundred times faster than phone modems.<sup>199</sup> Although cable

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192. See Public Interest Statement from AOL/Time Warner to FCC (Feb. 11, 2000) [hereinafter Public Interest Statement] (on file with author) (listing among others, HBO (Home Box Office), CNN (Cable News Network), and TNT (Turner Network Television)).

193. See *id.* (listing, among others, Sports Illustrated, Time, Time Life, and People).

194. See *id.* (listing, among others, Atlantic, Elektra, Warner Music Group, and Warner Bros. Records).

195. See Company Profile, at <http://www.roadrunner.com/rdrun/> (last visited Feb. 23, 2001) (promoting itself as the "pre-eminent broadband service provider" of cable modem access for residential and commercial customers).

196. See Time Warner Cable, *supra* note 187 (describing the number of new broadband subscribers and the amount of upgrading done to provide additional broadband support for more customers).

197. See Deborah A. Lathen, *Broadband Today* 593 PLI/Pat 491, 507 (2000) (discussing the growing demand for cable broadband access and the estimates that cable broadband access will increase from about two million to seventy-eight million within the next seven years).

198. See Michael Bartlett, *Online Census Shows DSL Rising, Free ISPs Falling*, NEWSBYTES NEWS NETWORK, Feb. 2, 2001, available at 2001 WL 2815017 (reporting that paid dial-up Internet Service Providers account for approximately two-thirds of all Internet access accounts). Out of almost sixty-nine million people on the Internet, forty-six million use paid dial-up access, fifteen million use free dial-up (making all dial-up service almost eighty-nine percent of all Internet access), four million use cable modems, two million use DSL, and one million use Internet TV. *Id.*

199. See Daniel Shih, Comment, *Open Access or Forced Access: Should the FCC Impose Open Access on Cable-Based Internet Service Providers?*, 52 ADMIN. L. REV. 793, 795 (2000) (discussing how dial-up Internet Service Providers cannot compete with cable modems because cable modems can transfer digital information over 1,000 times faster with cable modems than with dial-up

modern Internet access costs nearly double the rates for dial-up, the disparity between access speeds is attracting large numbers of consumers to purchase cable modem access.<sup>200</sup>

It is these cable modems, and the existing broadband networks of Time Warner that attracted AOL.<sup>201</sup> AOL realized that the future of Internet access is broadband, that building its own cable lines would take too long, and the costs would be prohibitively high.<sup>202</sup> Thus, the ultimate goal of AOL's merger with Time Warner is to provide its community content to users over Time Warner's broadband service, thereby ensuring a sizable market share.<sup>203</sup>

#### B. CONCERNS OF THE COMPETITION COMMISSION WITH THE MERGED AOL/TIME WARNER

When the Competition Commission decided to conduct a Phase II investigation into the AOL/Time Warner merger, its first cited concern was over the potential domination over Internet access in Europe.<sup>204</sup> The Competition Commission pointed out that AOL is the only ISP with a presence throughout most of Europe.<sup>205</sup> Neither AOL nor Time Warner, however, has a broadband infrastructure in place

modems).

200. See Rick Overton, *Broadband or Bust*, PC WORLD ONLINE 110, May 1, 2000, available at 2000 WL 8856179 (discussing how the price of broadband Internet access has dropped in recent years, yet customers are waiting a few weeks to have their cable company install the system in their homes, due to technical complication of installment).

201. See generally Public Interest Statement, *supra* note 192 (discussing the future plans of AOL's products over Time Warner's cable systems).

202. See *id.* at 15 (inferring that AOL's realization about the future of internet as broadband was reflected in its joint statement with Time Warner that both companies believed that time and risk involved in individual pursuit would be too high).

203. See *id.* at 10 (describing AOL/Time Warner's goal of being the preeminent interactive, multimedia company).

204. See Press Release, European Commission on Competition, Commission Opens Full Investigation into AOL/Time Warner Merger (June 19, 2000), available at [http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=IP/00/634|0|AGED&lg=EN](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/00/634|0|AGED&lg=EN) (announcing the institution of a Phase II investigation into the proposed merger and the grounds for the full investigation).

205. See *id.*

within the EU.<sup>206</sup> The Competition Commission therefore concluded that AOL/Time Warner could not dominate the broadband Internet access market in Europe.<sup>207</sup>

The Competition Commission's major concern, however, was whether the merged AOL/Time Warner would become a "gatekeeper" in the emerging online music industry.<sup>208</sup> The online music industry comprises two parts: the music players and the music catalogues.<sup>209</sup> AOL developed its own music player, Winamp, through its subsidiary Nullsoft, which can play various types of online music formats.<sup>210</sup> In addition, Winamp plays streaming audio music, which allows broadcasts of radio stations over the Internet.<sup>211</sup> Winamp uses a proprietary system, while competitors<sup>212</sup> use non-proprietary systems.<sup>213</sup> Although Winamp has a minority position in

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206. See Press Release, Commission gives Conditional Approval to AOL/Time Warner Merger, *supra* note 10 (discussing that a reason behind the Commission's approval of the AOL/Time Warner was that neither company had broadband infrastructure within the EU).

207. See *id.*

208. See Press Release, Commission Opens Full Investigation into AOL/Time Warner Merger, *supra* note 204 (indicating the Competition Commission's concern of AOL Time Warner dominating the emerging online music player market).

209. See Dawn C. Chmielewski, *Napster Reaches Out for Lifelines as it Awaits Judgment*, KNIGHT-RIDDER TRIB. BUS. NEWS (San Jose), Feb. 10, 2001, available at 2001 WL 12168535 (describing the online music industry and how AOL is considering launching its own pay-for-music service in the wake of Napster's success).

210. See *What File Formats does Winamp Support?*, at <http://www.winamp.com/download/faq/index.jhtml?filenumber=20&language=english&layout=normal&prevlayout=normal> (last visited Feb. 22, 2001) (indicating that many input plug-ins are available to make Winamp support various formats).

211. See *id.*

212. See, e.g., Real Network's Realplayer, at <http://www.realplayer.com> (last visited Sept. 28, 2001); Microsoft's Windows Media Player, at <http://www.microsoft.com/windows/windowsmedia/en/software/player/v7.asp> (last visited Sept. 28, 2001); MusicMatch's Jukebox, at <http://www.musicmatch.com/info/features/index.htm?os=pc> (last visited Sept. 28, 2001) (providing examples of other online music players).

213. See Press Release, Commission Gives Conditional Approval to AOL/Time Warner Merger, *supra* note 10 (discussing the concern over the use of a proprietary system to prevent other music players from playing music coded for the Winamp system).

the market, the Competition Commission had concerns over AOL/Time Warner's ability to make Winamp the dominant market mover.<sup>214</sup> In addition to the online music player, the Competition Commission also had concerns over AOL/Time Warner's online music catalogue.

In a separate transaction outside the AOL/Time Warner merger, AOL executed a promotion and distribution agreement with Bertelsmann AG, the leading European music label.<sup>215</sup> The combination of Bertelsmann and Time Warner's music labels would give AOL/Time Warner approximately a thirty-three percent market share in music publishing rights in the EU.<sup>216</sup> Although this market share would constitute a minority, the absence of a dominant record label would leave the market highly fractured and susceptible to even a minority position, which the Competition Commission believed could establish market dominance.<sup>217</sup> In addition to the fears of AOL/Time Warner controlling the online music catalogues, the ability of AOL/Time Warner to encode all of Time Warner and Bertelsmann AG's music to only play on Winamp magnified the concern of anti-competitive behavior.<sup>218</sup> This encoding would create dominant position for AOL/Time Warner and erect barriers within

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214. See *id.* (indicating that the combination of a huge record catalogue and a proprietary player would allow AOL/Time Warner to dominate the online music market and dictate the terms and conditions for the use of audio files); see also Ben Charny, *AOL: Online Music's Next King?*, ZDNet News (Dec. 5, 2000), at <http://www.zdnet.com/zdnn/stories/news/0,4586,2661457,00.html> (discussing that although Winamp reaches only fourteen percent of computer users while RealPlayer reaches sixty four percent, Winamp has the ability to overtake RealPlayer and become the dominant online music player).

215. See Press Release, Commission Gives Conditional Approval to AOL Time Warner Merger, *supra* note 10 (stating that one of the conditions for merger approval is AOL severing all structural links with Bertelsmann).

216. See *id.* (discussing the ramifications on the European music market if Time Warner and Bertelsmann's music libraries consolidate).

217. See *supra* notes 131-132 and accompanying text (describing how, in a market without any companies holding a large market share, a minority market share can be dominant and have anti-competitive abilities).

218. See Press Release, Commission gives Conditional Approval to AOL Time Warner Merger, *supra* note 10 (showing that there was no way of preventing AOL/Time Warner from dominating the online music player industry and imposing Winamp as the dominant music player, if the Competition Commission approved the merger as proposed).

the emerging market, forcing competitors to deal with AOL/Time Warner to access their expansive music library.<sup>219</sup> Therefore, the Competition Commission approved the AOL/Time Warner merger, provided AOL/Time Warner terminated all joint agreements with Bertelsmann AG.<sup>220</sup> The severance of ties between AOL and Bertelsmann AG alleviated fears of AOL/Time Warner dominating the online music catalogue industry.

#### IV. PROBLEMS WITH THE COMPETITION COMMISSION'S REVIEW PROCESS

The Competition Commission's review process is good, but not perfect. In analyzing the review of the AOL/Time Warner merger, the Competition Commission committed a critical mistake in failing to consider the future market activities of a merged AOL/Time Warner. Specifically, the convergence of new and old media and technology companies requires the Competition Commission to analyze mergers more diligently to prevent merged companies from dominating emerging markets.<sup>221</sup> Additionally, there are problems ingrained within the procedures and standards that establish and guide the Competition Commission.<sup>222</sup> Some of these structural problems presented themselves in the AOL/Time Warner merger.<sup>223</sup>

##### A. PROBLEMS WITH THE AOL/TIME WARNER MERGER

Whether the Competition Commission reached the proper

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219. See *supra* notes 90-123 and accompanying text (explaining what constitutes a dominant position and anti-competitive behavior within a market).

220. See Press Release, Commission Gives Conditional Approval to AOL/Time Warner Merger, *supra* note 10 (indicating that AOL/Time Warner will phase out all current agreements with Bertelsmann and agrees that until such time, the companies will transact business at arm's length). The Competition Commission further conditioned its approval of the merger by requiring Bertelsmann's music from formatting Winamp in a manner that would allow it to only work on Winamp. *Id.*

221. See Blumensaadt, *supra* note 22, at 306 (stating that new markets will be significantly impacted by mergers of converging companies).

222. See *infra* notes 250-264 and accompanying text (analyzing the structural and procedural problems of the Competition Commission).

223. See *infra* notes 224-249 and accompanying text (analyzing the problems in the Competition Commission's review of the AOL/Time Warner merger).

conclusion by approving the AOL/Time Warner merger is beyond the scope of this Comment.<sup>224</sup> This Comment focuses on the problems with the Competition Commission's review process. The greatest problem with the Competition Commission's review of the AOL/Time Warner merger was its failure to analyze the future impact of the merger on the multimedia markets.

### 1. AOL/Time Warner's Future Vision

AOL/Time Warner plans to revolutionize the marketing and distribution of its multimedia content through broadband access.<sup>225</sup> Many of the forms of multimedia entertainment and interactive services that AOL/Time Warner expects to provide are still in their nascent stages.<sup>226</sup> Time Warner's content provides AOL with very attractive opportunities to utilize the content in an exclusive online manner.<sup>227</sup> The ultimate goal of the merger, however, is to combine Time Warner's content and broadband connections with AOL's Internet customer base, which desires quality media.<sup>228</sup> AOL has already begun to provide multimedia content to users who connect through high-speed Internet connections.<sup>229</sup>

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224. See, e.g., Joseph P. Reid, Note, *Content and Broadband and Service . . . Oh My! Will a United AOL-Time Warner Become the Wicked Witch of the Web, or Pave a Yellow Brick Road*, 26 J. LEGIS. 377 (2000) (analyzing the potential effects of a merged AOL/Time Warner on the competitive markets and concluding that the merger should be rejected).

225. See Public Interest Statement, *supra* note 192, at 11 (discussing how the merged companies will create new forms of digital multimedia and provide access to the content over broadband cable lines).

226. See *id.* at 14-15 (discussing the potential for next generation products and services and their ability to deliver these benefits to the marketplace more quickly as a merged entity).

227. See *id.* at 4-5 (listing well known Time Warner entities including WTBS Superstation, TNT, Cartoon Network, CNN News Group, Home Box Office, Time, People, Sports Illustrated, Warner Books, Time Life, Warner Music Group, Atlantic, Elektra, Rhino, Sire, Warner Bros. Records, Warner Music International, New Line Cinema, and the WB Network).

228. See *id.* at 13 (indicating that the merger between new and traditional media will maximize a renowned source of journalistic talent, technology and expertise, providing customers with significant benefits).

229. See AOL Plus FAQs, *What is AOL Plus?*, available at <http://free.ad.com/adplus/faq.html> (last visited Oct. 8, 2001) (describing the



## 2. *The Competition Commission's Current Standard*

The Competition Commission Commissioner Mario Monti has often said, "the competition rules governing the Old Economy will apply equally to the New Economy."<sup>230</sup> Unfortunately, Commissioner Monti is trying to fit a square peg into a round hole. Instead of forcing the new economy to adhere to the current regulations based on an old economy, the Competition Commission needs to recognize the need for flexibility of regulation, since the new economy's technological innovations and methods of thinking are different than the old economy ever thought possible.<sup>231</sup>

## 3. *The Competition Commission Failed to Consider the Future Market Activity of Online, Interactive Multimedia*

One of the aspects of dominance the Competition Commission should have considered is future market activity.<sup>232</sup> The concerns over the Time Warner/EMI merger centered on future market activity of online music content.<sup>233</sup> A merged AOL/Time Warner/EMI would control a large music catalogue and could dominate the emerging industry.<sup>234</sup> The Competition Commission was heavily concerned with the potential merger of Time Warner

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advanced services and content provided to AOL subscribers who connect to AOL's Internet service with a high speed connection).

230. Mueller, *supra* note 60, at 35.

231. See David S. Evans, *Antitrust and the New Economy*, SF 63 A.L.I.-A.B.A. 41, 49-53 (Sept. 14, 2000) (arguing that old economy rules do not apply to new economy industries); see also David Teece & Mary Coleman, *The Meaning of Monopoly: Antitrust Analysis in High Technology Industries*, 43 ANTITRUST BULL. 801, 857 (1998) (stating that "despite the confidence displayed by agency lawyers and economists, we do not believe the agencies are at present well equipped to deal with competition policy in high technologies industries.").

232. See *supra* note 99 and accompanying text (discussing how future market activity is taken into consideration to determine dominance).

233. See *infra* notes 236-237 and accompanying text (blocking the proposed merger over fears that a combined AOL/Time Warner/EMI would control a large enough share of music records to dominate online music).

234. See *id.* (warning that the integrated company could dominate the online distribution market and music players). See also discussion *supra* notes 208-13 and accompanying text (discussing the promotion and distribution agreement with Bertelsmann AG, an additional music catalogue, that would be part of the merged company).

with EMI Group because of the potential for AOL/Time Warner<sup>235</sup> to dominate the delivery of music via the Internet.<sup>236</sup> The overwhelming concern caused Time Warner and EMI Group to abandon the proposed merger.<sup>237</sup> The emerging online music industry, however, is only one aspect of future online multimedia.<sup>238</sup>

AOL and Time Warner acknowledged that converging these media platforms would put them at the forefront of the technological revolution.<sup>239</sup> The merger would give AOL/Time Warner an opportunity to exploit their market share of several media platforms with exclusive access to online content. For example, live streaming video of CNN,<sup>240</sup> a sneak preview of the latest Natalie Merchant<sup>241</sup> album, the online trailer to the Harry Potter movie,<sup>242</sup> or the latest

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235. See Molly S. Boast, *Report From the Bureau of Competition*, 1251 PLI/CORP. 567,584 (2001) (indicating that the result of the merger would be AOL acquiring both Time Warner and EMI Group).

236. See Press Release, Commission Opens Full Investigation into Time Warner/EMI Merger, June 14, 2000, at [http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=IP/00/617|0|RAPID&lg=EN](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/00/617|0|RAPID&lg=EN) (discussing the concerns that prompted the Competition Commission to institute a full inquiry into the proposed merger).

237. See John Tagliabue, *Time Warner and EMI Halt Venture Plan*, N.Y. TIMES, Oct. 6, 2000, at C1 (announcing that the companies cancelled the proposed merger). It was believed that Time Warner abandoned the merger in order to allay the Competition Commission's concerns and allow for passage of the AOL/Time Warner merger. *Id.*

238. See Public Interest Statement, *supra* note 192, at 13 (outlining additional opportunities for growth in media forms, such as entertainment, publishing, news, online services, and film distribution).

239. See *id.* at 14 (discussing the amalgamation of previously independent media sources).

240. See CNN.com Multimedia Showcase, at <http://www.cnn.com/interactive/#av> (last visited Oct. 7, 2001) (making available audio and video control).

241. See Elektra Artists, at [http://www.elektra.com/home\\_frame.asp](http://www.elektra.com/home_frame.asp) (last visited Sept. 4, 2001) (listing the artists under contract with Elektra).

242. See Harry Potter Movie, at <http://www.warnerbros.com/pages/link/external.jsp?url=http%3a%2f%2fsharrypotter.warnerbros.com%2f%23&frompage=movies> (last visited Sept. 4, 2001) (indicating that Warner Bros., a division of Time Warner, produced the Harry Potter movie).

articles from People magazine<sup>243</sup> could all be made available only to AOL/Time Warner customers.

Unfortunately, the Competition Commission never seriously considered the potential of AOL/Time Warner dominating these other forms of multimedia content.<sup>244</sup>

In the summer of 2000, AOL/Time Warner took its first large step in making interactive multimedia a reality.<sup>245</sup> If the beginning product is an example of what the future holds, the failure of the Competition Commission to further investigate the convergence of multimedia content is troublesome for AOL/Time Warner's competitors.<sup>246</sup> The online content and links heavily favor Time Warner content.<sup>247</sup> Similar to when Time Warner blocked Disney's ABC television stations last year,<sup>248</sup> competitors fear that AOL/Time Warner will prevent customers from accessing competitors web sites.<sup>249</sup>

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243. See People.com Home, at <http://people.ad.com/people/index.html> (last visited Oct. 7, 2001) (providing online excerpts of cover stories and exclusive online features).

244. See Press Release, Commission Gives Conditional Approval to AOL/Time Warner Merger, *supra* note 10 (discussing how the Competition Commission never addressed concerns involving these other forms of multimedia content).

245. See Jared Sandberg, *AOL Rolls Out Interactive TV with Time Warner Links; Rivals Complain of Bias*, WALL ST. J., Nov. 3, 2000, at B1 (announcing that AOL unveiled its first interactive unit for public use); see also George Avalos, *AOL Time Warner Merger Marks Convergence of TV, Computer*, KNIGHT-RIDDER TRIB. BUS. NEWS, Jan. 13, 2001, available at 2001 WL 2838769 (reviewing AOLTV, the first interactive appliance that converges a television and computer, giving users the ability to access interactive products and multimedia content).

246. See Sandberg, *supra* note 245 (indicating that almost all of the initial content on the interactive site is owned by either AOL or Time Warner).

247. See *id.* (stating that the online service provides links to Entertainment Weekly magazine, CNN's web site for current news, CNN/SI's web site for sports news, and a link to program your VCR to record a movie on TBS, with all content sites under Time Warner ownership).

248. See Jim Cooper, *Fading to Black (Time Warner Dropped the Signal of Walt Disney-Owned Stations)*, BRANDWEEK, May 8, 2000, available at 2000 WL 13262371 (discussing how Time Warner dropped ABC television stations during sweeps week because of a contract dispute).

249. See Avalos, *supra* note 245 (pointing out that almost all of the links from AOLTV is to Time Warner content). AOL counters that the reason why Time Warner has most of the content links is that Time Warner was the first company to

## B. PROBLEMS WITH THE COMPETITION COMMISSION'S RULES, GUIDELINES, AND PROCESS

The EU member states severely limited and precisely defined the powers of the Competition Commission, largely because the merger regulations granting the Competition Commission exclusive jurisdiction were a product of compromise among the states. This limited power causes problems with the rules, guidelines and processes that govern the Competition Commission's review of merger applications.

### 1. *Lack of Effective Oversight Power*

As a result of the compromise between the Competition Commission and EU member states, the Competition Commission did not receive enough power to oversee all mergers.<sup>250</sup> At a time when the Competition Commission needs more power to ensure a consistent policy, there has been a recent proposal to decentralize power to enable the Competition Commission to concentrate further on policy and handle only the most prestigious merger cases.<sup>251</sup> Under such a policy, local competition authorities would handle more merger reviews, thereby reducing the number of notifications that the Competition Commission would handle.<sup>252</sup> Decentralization of power and the elimination of prior approvals, however, could result in, "greater unpredictability, inconsistent rulings, duplicative proceedings, and varying results."<sup>253</sup> Further, problems with the

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sign an agreement with AOLTV. *Id.*

250. See *supra* notes 127, 133-135 and accompanying text (describing the threshold and minimum requirements to trigger European Union review).

251. See White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, 1999 O.J. (C 132) 1, at 15 [hereinafter White Paper] (proposing that EU member states handle more merger review cases); see also Henriette Tielemans, Chares Lister, & Theodore Voorhees, Jr., *A Changed System: Proposed Reform of European Commission Review has Foreseeable Problems*, LEGAL TIMES, Nov. 6, 2000, at 42 (describing how the proposed changes could have a negative effect upon the operation of the Competition Commission).

252. See Tielemans, et al., *supra* note 251, at 42 (stating that enforcement would be decentralized and national authorities would handle more matters).

253. See *id.* (discussing negative implications of decentralizing the Competition Commission's current power).

proposed changes could arise, because several EU countries have inexperienced competition review procedures and staff, which could ultimately lead to forum shopping among EU member states.<sup>254</sup>

## 2. *Time Limits are Too Narrow for Effective Review*

One strictly defined rule of the Competition Commission is the time limits imposed to conduct preliminary and in-depth reviews.<sup>255</sup> The time limits ensure that the Competition Commission makes decisions timely and efficiently, providing as little disruption to the proposed undertaking as possible.<sup>256</sup> It is estimated, however, that increased workload might prevent the Competition Commission from adequately reviewing and testing proposed concessions by the undertakings.<sup>257</sup> Rather than focusing on achieving a correct solution, the Competition Commission is forced to negotiate hasty settlements or block mergers instead of making informed decisions.

## 3. *Inability to take Post-Decision Corrective Action*

Another problem with the review process is the lack of specific facts upon which the Competition Commission makes decisions.<sup>258</sup> Proposed mergers must accept the Competition Commission's conclusions without any proof.<sup>259</sup> The lack of required proof is brought about by the ineffective judicial review of Competition

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254. *See id.* (commenting that a disparity in the experience of national agencies could encourage forum shopping).

255. *See supra* notes 49-57 and accompanying text (describing the one month time limit for preliminary investigations and four month time limit for Phase II investigations).

256. *See supra* notes 48-49 and accompanying text (indicating that the Competition Commission has a narrow time period to make a decision).

257. *See* Burke et al., *supra* note 156, at 286-87 (estimating that changes will result in an increased workload of nearly twenty-five percent, causing members of the Merger Task Force to become increasingly cautious and not as agreeable to accepting practical solutions).

258. *See* Mueller, *supra* note 60, at 35 (indicating that the Competition Commission makes decisions with "sparse" factual basis).

259. *See id.* (explaining that the Competition Commission's Statement of Objections is accepted without proof and the burden falls upon the parties to prove otherwise).

Commission decisions.<sup>260</sup> It takes two years for a company to appeal a decision rejecting a merger, thus making it unfavorable for companies to challenge the Competition Commission.<sup>261</sup> Supposing the Competition Commission approves the merger at the end of the two-year review period, market and company conditions may have changed significantly, thus altering the character of the original deal.<sup>262</sup>

The Competition Commission's power to oversee and enforce compliance after approval is also limited in scope and effectiveness. The inability of the Competition Commission to act after the merger is approved, such as through divestiture, forces it to lengthen the review process.<sup>263</sup> This lack of post-approval review motivates the Competition Commission to overreact, making deeper concessions than necessary, in order to perform its duties.<sup>264</sup> The front loading of action, combined with the absence of a requirement that the Competition Commission support its conclusions with solid proof, and the deficient judicial review of decisions, makes the Commission susceptible to abuse.

#### 4. *The Competition Commission is Viewed as Biased*

Since the European Commission is largely responsible for most economic policies in the European Union, actions of the Competition

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260. *See id.* (opining that judicial review is not a real solution to providing an external check on the Competition Commission's decisions). The reason for this lack of effective judicial review is that it takes two years for a case to work its way through the system, thus tying up the business and operations of the undertakings for too long of a period of time. *Id.*

261. *See id.* (explaining that the amount of time it takes to appeal a Competition Commission decision eliminates judicial review as an effective option).

262. *See* Burke et al., *supra* note 156, at 286-87 (estimating increased workloads as a result of changes to the Competition Commission, which may serve to increase complications that are inherent in a quickly changing market).

263. *See* Mueller, *supra* note 60, at 35 (stating that since post-merger approval investigations are more difficult, and divestiture after merger approval is prohibited, the Commission exhibits little or no post approval scrutiny). The Commission's limited ability to scrutinize mergers after approval results in a time-consuming pre-merger review process. *Id.*

264. *See id.* (indicating that the EC is reluctant to react during the review process until emerging markets develop, due to a lack of post-approval review).

Commission are seen as enforcing policy instead of law.<sup>265</sup> The notion of the Competition Commission exerting protectionist policies to favor European based companies became a real concern in connection with the Boeing/McDonnell Douglas merger.<sup>266</sup> Many believed that the Competition Commission's actions were a direct attempt to protect Airbus, a European company, from the American firms.<sup>267</sup> Even if the Competition Commission did not base its decision upon a desire to protect Airbus, the ability of the Competition Commission to interpolate economic and political policies in merger decisions is a serious problem in need of correction.<sup>268</sup>

##### 5. *The Competition Commission Fails to Recognize an Efficiencies Defense*

The Competition Commission's concern for companies is evident in that the purpose of the Merger Task Force is to prevent harm to competition.<sup>269</sup> In other countries, such as the United States, the

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265. See Kauper, *Merger Control*, *supra* note 123, at 335 (discussing the possibility that the Competition Commission's decisions are based upon trade policy and not the merger guidelines established).

266. See Commission Decision 97/816/EC, 1997 O.J. (L336) 16 [hereinafter, Boeing/McDonnell Douglas Decision] (declaring that the Competition Commission approved the merger contingent upon concessions granted by Boeing and McDonnell Douglas); see also Mueller, *supra* note 60, at 35 (quoting an Oct. 5, 2000 letter from Senators DeWine and Kohl to the European Commission, stating their concern that European decisions might be influenced by "pan-European protectionism rather than by sound competition policy.").

267. See, e.g., Harry First, *The Intersection of Trade and Antitrust Remedies*, 12 ANTITRUST 16, 18-19 (1997) (quoting President Clinton's criticism of Competition Commission's actions); *Interview with Thomas L. Boeder & Benjamin S. Sharp, Attorneys for Boeing*, 12 ANTITRUST 5 (1997) (discussing the concern the Competition Commission had regarding Airbus); Michael L. Weiner, *Conflict and Cooperation: Meeting the Challenge of Increasing Globalization*, 12 ANTITRUST 4 (1997) (discussing Boeing's concern about the Competition Commission's protectionist actions).

268. See Kauper, *Merger Control*, *supra* note 123, at 318-19 (discussing the potential problems of the European Commission utilizing Competition Commission decisions as a vehicle for policy pronouncements).

269. See Merger Regulations, *supra* note 32, art. 2(3) ("[a] concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the Common Market or in a

purpose of antitrust review is to prevent harm to the consumers.<sup>270</sup> While the United States recognizes that efficiencies can benefit consumers through reduced prices and higher quality goods, the European Union does not.<sup>271</sup> In fact, because efficiencies almost always result from the creation or strengthening of a dominant position, it is possible that efficiencies are *per se* incompatible with the Common Market.<sup>272</sup> Accordingly, a failure to recognize efficiencies harms consumers by preventing mergers with pro-consumer benefits, while protecting European corporations in the name of competition.<sup>273</sup>

### 6. *Lack of Independent Analysis*

A final concern regarding the review process is its reliance upon testimony and concerns expressed by the proposed undertakings competitors.<sup>274</sup> Competitors will act in their own self interest,

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substantial part of it shall be declared incompatible with the Common Market”).

270. *Compare* Merger Regulations, *supra* note 32, art. 2(3) with Horizontal Merger Guidelines, *supra* note 19 (stating that “[t]he unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise.”). The Horizontal Merger Guidelines further state that “[m]arket power to a seller is the ability profitably to maintain prices above competitive levels for a significant period of time.”). *Id.*

271. *See* Horizontal Merger Guidelines, *supra* note 19, § 4 - Efficiencies, available at [http://www.usdoj.gov/atr/public/guidelines/horiz\\_book/4.html](http://www.usdoj.gov/atr/public/guidelines/horiz_book/4.html) (discussing the benefits efficiencies provide to consumers). *But see* Thomas L. Greaney, *Not for Import: Why the EU Should Not Adopt the American Efficiency Defense for Analyzing Mergers and Joint Ventures*, 44 ST. LOUIS U.L.J. 871, 884-889 (2000) (arguing that it is impossible to properly define what constitutes an efficiency and therefore an efficiency defense only leads to protracted litigation and incompatible agency decisions).

272. *See* Kauper, *Merger Control*, *supra* note 123, at 321-22 (commenting that regardless of how the term “dominant position” is defined, the Merger Regulations appear to preclude efficiencies).

273. *See id.* (noting that the United States measures the potential harm of a merger by predicting output and price effects felt by consumers, whereas the Competition Commission is primarily concerned with the ability of competitors to compete).

274. *See* Commission Decision 96/204/EC, 1996 O.J. (L 66) 17 (indicating that the Competition Commission can and does give weight to competitors opinions on the potential competitive effects if the proposed merger is allowed); *see also* Thomas E. Kauper, *The Problem of Market Definition Under EC Competition Law*, 20 FORDHAM INT’L L.J. 1682, 1732-33 (1997) [hereinafter Kauper, *The*



objecting to a larger, better financed competitor or to settle an old grudge.<sup>275</sup> This reliance on competitors data within the market is probably a result of the insufficient time allocated for independent fact-finding and analysis in which to evaluate merger petitions.<sup>276</sup> This is dangerous because the process becomes the proverbial fox guarding the chicken coop.

## V. RECOMMENDATIONS TO IMPROVE THE COMPETITION COMMISSION'S MERGER REVIEW PROCESS

Even though the Competition Commission is unable to cure the specific problems with the AOL/Time Warner merger because it is prevented from taking post-merger corrective action,<sup>277</sup> there are several changes it can make to ensure that the process operates correctly in the future. These changes can be broken down into rules governing the structure of the Competition Commission<sup>278</sup> and the rules governing the review process of the Competition Commission.<sup>279</sup>

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*Problem*] (commenting that it is common for the Competition Commission to solicit information about market definitions and shares from competitors). Throughout the entire merger process, Boeing/McDonnell Douglas objected to the views, statistics, and input the Competition Commission solicited from Airbus. See Boeing/McDonnell Douglas Decision, *supra* note 266 (indicating that the Competition Commission relied upon market share statistics provided by Airbus).

275. See Kauper, *The Problem*, *supra* note 274, at 1733 (indicating that reliance on competitors' input is dangerous to the review process).

276. See *id.* (citing the Boeing/McDonnell Douglas merger as an example of the Competition Commission's dependence on interested party's data in making a decision).

277. See discussion *supra* Part IV. A and accompanying text (detailing the problems of the Competition Commission's review of the AOL/Time Warner merger).

278. See discussion *infra* Part V. A (proposing changes to improve the structure of the Competition Commission).

279. See discussion *infra* Part V. B (recommending changes to improve the rules governing the review process used by the Competition Commission).

## A. IMPROVING THE STRUCTURE OF THE COMPETITION COMMISSION

### 1. *Increase the Central Power of the Competition Commission*

The ability of the Competition Commission to institute a uniform competition policy throughout the European Union requires greater central control.<sup>280</sup> More centralized power will allow for a more uniform policy, expedited service and review, and greater efficiency.<sup>281</sup> Decentralization of power removes the advantage of one-stop shopping<sup>282</sup> and makes future competition decisions prone to inconsistent decisions.<sup>283</sup> Although the number of merger applications is growing, the Competition Commission should be capable of handling the increasing volume, or it should hire more employees.<sup>284</sup> Alternatively, in order to maintain a consistent competition policy, the European Commission should allow European countries to handle more mergers, but apply the laws of the

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280. See White Paper, *supra* note 251, at 15 (proposing changes to the Competition Commission that would shift power from the Competition Commission to individual member-states' antitrust regulators); see also Tielemans, et al., *supra* note 251, at 42 (arguing that decentralization of power might impede the goal of market integration).

281. *But see* Howard W. Fogt Jr. & Melinda F. Levitt, *Will Proposed Reform of EU Rules Undermine Antitrust Enforcement?*, LEGAL TIMES, May 15, 2000, at 41 (stating that the work of the Competition Commission has slowed significantly as a result of handling large numbers of required but unnecessary notices).

282. See *supra* note 31 and accompanying text (commenting that the merger regulations provide the Competition Commission with sole authority to review certain mergers with a Community dimension).

283. See Tielemans, et al., *supra* note 251, at 42 (expressing concern that different countries might apply different analyses to the same issues, thus yielding conflicting results); see also Fogt, et al., *supra* note 281, at 41 (opining that some national court systems may not have the resources or ability to handle competition cases). There is additional concern that decentralization of power might lead to forum shopping by companies looking for favorable precedents and rights. *Id.*

284. See Kauper, *Merger Control*, *supra* note 123, at 312 (indicating that the Competition Commission reviews a substantially smaller number of mergers than its American counterparts). The Competition Commission also received fewer notifications of proposed mergers in eight years than American antitrust officials received in six months. *Id.* at 316.

Competition Commission.<sup>285</sup> Such a solution would actually strengthen the role of the Competition Commission while decentralizing power, allowing the Competition Commission to focus on policy while leaving minor mergers to national jurisdictions.<sup>286</sup>

## 2. *Remove the Strict Time Limits for Merger Review*

The expedited time limit imposed on the Competition Commission actually causes more harm than good.<sup>287</sup> Although there are exceptions to the time limits,<sup>288</sup> the extended time is minimal and only affects the preliminary investigation stage.<sup>289</sup> Instead of establishing a time limit, the Competition Commission should set a hybrid system of proposal limits followed by a time limit. Under such a system, the undertakings will be allowed to submit a maximum of three written proposals in response to Competition Commission concerns.<sup>290</sup> This will grant undertakings the time needed to fully respond to objections of the Competition

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285. See Rebecca Schoenfeldt, Comment, *Competition Laws of the European Union in the Face of the New Single Currency Market*, 33 J. MARSHALL L. REV. 715, 738-39 (2000) (proposing expanding the Merger Regulations to apply in European national courts).

286. See *id.* (allowing the Competition Commission to establish the guidelines that national courts will apply to mergers). *But see* Tielemans, et al., *supra* note 251, at 42 (arguing that while decentralization of power is problematic, allowing national courts to apply European Community competition law is not the answer because exemptions are not legal standards, but community interest considerations, and therefore could vary from each jurisdiction).

287. See *supra* notes 53-57 and accompanying text (describing the four week limit for the preliminary investigation followed by a four month time limit for a Phase II investigation, after which, the Competition Commission must either block or accept the proposed merger).

288. See Merger Regulations, *supra* note 32, art. 10(1) (allowing a two week extension of the four week preliminary investigation under certain limited circumstances).

289. See *id.*, art. 10 (providing time limits for initiating proceedings, making decisions, and exemptions for exceptional circumstances).

290. See Michael Barnert, *EU Merger Control*, 13 INT'L L. PRACTICUM 4 (2000) (explaining that the Competition Commission is under strict statutory guidelines of when it can accept proposals from the undertakings).

Commission without time restraints.<sup>291</sup> To prevent the Competition Commission from dragging its feet in the review process, it will have one month from receipt of each written proposal, to either accept the proposal or submit a written statement of objections.<sup>292</sup>

### 3. *Increase the Competition Commission's Post-Merger Enforcement Powers*

To effectively regulate and enforce its decisions, the Competition Commission needs the ability to investigate and, if necessary, sanction companies in violation of competition laws. Unfortunately, the Competition Commission currently does not have that power.<sup>293</sup> This lack of review causes the Competition Commission to make overly aggressive decisions during the merger review process.<sup>294</sup> Post merger review ability would prevent the Competition Commission from having to speculate too much about future market activity and allow it to correct mistakes and shortcomings.<sup>295</sup> The ability to seek

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291. *See id.* A major frustration of the Competition Commission is that companies often do not submit their best proposals until later in the review process, hoping to gain acceptance with the least amount of concessions. *But see* Kauper, *Merger Control*, *supra* note 123, at 318-19 (presenting the opposing viewpoint that the Competition Commission may utilize final decisions in the review process as vehicles for furthering policy goals). Although the undertakings will be under no time restriction from the Competition Commission, they will have internal pressure to reach a settlement as soon as possible in order to allow the companies to get back to managing the business.

292. *Cf. Barnert*, *supra* note 290, at 6 (stating that the last day the Competition Commission currently accepts proposals from undertakings is three months into a Phase II investigation, allowing one month to review the proposal and make a decision). Since the Competition Commission is now able to make a decision on proposals in a month, there is no reason to doubt that it could reach decisions in a month in the future. The failure by the Competition Commission to either object in writing or block the merger (only after the final written proposal by the undertakings) in the month period will result in the approval of the proposed merger. *See id.* at 7 (indicating that a merger shall receive approval if the Competition Commission fails to block the merger at the end of the four months).

293. *See supra* notes 263-264 and accompanying text (discussing how the lack of post merger enforcement ability leads the Competition Commission to take action prematurely based upon flimsy data).

294. *See id.* (discussing how the lack of post-approval review motivates the Competition Commission to act aggressively).

295. *See id.* (explaining that the inability of the Competition Commission to

divestiture after the fact also reinforces the notion that merger approval is not a permit to violate competition laws.<sup>296</sup>

Another enforcement power that the European Union should grant to the Competition Commission is a treble damages remedy, as used in the United States.<sup>297</sup> The ability to sue companies for treble damages is compelling motivation for companies to not violate the competition laws.<sup>298</sup>

## B. IMPROVING THE MERGER REVIEW PROCESS EMPLOYED BY THE COMPETITION COMMISSION

From the time the Competition Commission receives notice of a proposed merger,<sup>299</sup> until it renders a decision,<sup>300</sup> the Competition Committee can make improvements to ensure that the process is consistent and fair.

### 1. *Institute an Independent, Objective Review Process*

A starting point would be to eliminate the Competition Commission's reliance upon competitors' input.<sup>301</sup> Requiring the Competition Commission to evaluate the market independently prevents competitor bias from corrupting the process.<sup>302</sup> Further the

seek divestiture after approving a merger weakens it and "creates an incentive [for the Competition Commission] to act prophylactically.").

296. *See id.* (discussing how post merger approval powers will prevent companies from acting with utter disregard to competition laws).

297. *See* Clayton Act, 15 U.S.C. § 15A (1994) (allowing for a recovery of an amount equal to three times the damages suffered).

298. *See* Fogt, et al., *supra* note 281 (indicating that treble damages would help promote compliance, but such an idea would not likely be accepted in the European Union).

299. *See* Merger Regulations, *supra* note 32, art. 4(1) (stating that any merger with a Community dimension must file notice with the Competition Commission within one week of reaching an agreement).

300. *See id.* at art. 10 (establishing the time period in which the Competition Commission must reach a decision).

301. *See supra* note 274 and accompanying text (describing how the Competition Commission relied on Airbus' input and statistics in the Boeing/McDonnell Douglas merger).

302. *See* Kauper, *Merger Control*, *supra* note 123, at 338 (discussing how competitor input in a merger unfairly disadvantages the merging parties). Judge

public sees the process as fair, accusations of protectionism will not taint the decisions. In order to ensure fairness, the Competition Commission must act independent of the European Commission, which formulates economic policy.<sup>303</sup> Removing the Competition Commission from direct control by the European Commission allows it to operate as an independent entity, free from meddling.<sup>304</sup>

## 2. Provide Effective, Efficient Judicial Review

There is a great need to provide effective judicial review of Competition Commission decisions. Although the ECJ has the power to review the decisions of the Competition Commission, it has rarely done so.<sup>305</sup> This is a result of undertakings not appealing decisions because of the length of time required to resolve an appeal.<sup>306</sup> The European Commission should make judicial review of Competition Commission decisions easily attainable, thus providing a check against an abuse of discretion.<sup>307</sup>

Additionally, providing a legitimate and accessible judicial review process will require the Competition Commission to provide support for its decisions. Currently, the Competition Commission makes

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Posner has said that a complaint by a competitor is the strongest argument that a proposed merger increases competition. *Id.* Additionally, competitors can also stand to gain from decreased competition, thus making any input from them suspicious. *Id.*

303. See *id.* at 318 (indicating that in the United States, the FTC and the DOJ's Antitrust Division are viewed as non-political because the FTC acts independently of the Executive Branch). Additionally, the Supreme Court declared that the sole purpose of the antitrust laws is to prevent anti-competitive behavior, and therefore requires the DOJ to prevent any economic policy from affecting its decisions. *Id.*

304. See *id.* (explaining the importance of having the Competition Commission act as an independent body). Thus, making the Competition Commission independent of the European Commission would render its operational procedures equivalent to those of the FTC, and free the Competition Commission from the suspicion that policy considerations dictate agency decisions. *Id.*

305. See *id.* at 316 (stating that "[u]ntil mid-1998, when the ECJ decided the Kali + Salz case, the [Competition] Commission had formulated its approach to mergers virtually without judicial involvement.") (footnote omitted).

306. See Mueller, *supra* note 60 (explaining that it takes about two years for judicial review of decisions and therefore appeal is not a viable option).

307. See *id.* (proposing that quick and thorough judicial review will create a superior and fairer system).

decisions using little to no factual records or substantiation.<sup>308</sup> This is due to the lack of judicial review and the inability to structure post-effective merger remedies.<sup>309</sup> This is not to say that the Competition Commission should not use future predictions when evaluating mergers. The primary goal of the Competition Commission is to protect competition within the Common Market.<sup>310</sup> Preventing mergers that harm competition is preferable to breaking up harmful mergers after approval. Requiring factual proof before blocking a merger improves competition by ensuring that helpful mergers are not blocked, and it allows for a solid basis of precedent to ensure stability.<sup>311</sup>

### 3. Allow an Efficiencies Defense for Horizontal Mergers

Along with the need to recognize that new technologies need new rules, the Competition Commission must realize the potential advantages of horizontal mergers. The prevailing attitude is that most horizontal mergers are anti-competitive in nature because they remove a competitor from the market.<sup>312</sup> Acquisitions of competitors, though, can lead to efficiency, cheaper costs, and lower overhead.<sup>313</sup> This efficiency leads to lower prices for consumers of products and services.<sup>314</sup> Efficiencies also spur research and development, which

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308. *See id.* (discussing how the procedures allow the Competition Commission to “act on a sparse factual record”).

309. *See id.* (explaining that the Competition Commission acts proactively due to an inability to act reactively).

310. *See* TREATY OF AMSTERDAM, *supra* note 30, art. 3(f) (stating its objective of creating “a system ensuring that competition in the [common] market is not distorted”).

311. *See* Kauper, *Merger Control*, *supra* note 123, at 312-13 (explaining that future predictions must be understandable and thorough to make future decisions predictable).

312. *See, e.g.*, Boeing/McDonnell Douglas Decision, *supra* note 266 (stating that removing a competitor lessens competition and creates a larger risk of collective dominance by the remaining competitors).

313. *See* Robert M. Vernail, Note, *One Step Forward, One Step Back: How the Pass-On Requirement for Efficiencies Benefits in FTC v. Staples Undermines the Revisions to the Horizontal Merger Guidelines Efficiencies Section*, 7 GEO. MASON L. REV. 133, 134 (2000) (detailing the efficiencies benefits gained from horizontal mergers).

314. *See id.*

in turn, spurs innovation.<sup>315</sup> Although the Merger Regulations provide for a protection of “technical and economic progress,”<sup>316</sup> it has yet to give a basis for approving a merger. Requiring that the technical and economic progress not create a barrier to competition prevents an efficiency defense because efficiency creates a dominant position, which the Competition Commission views as a barrier to competition.<sup>317</sup> The European Community needs to recognize an efficiencies defense to mergers, especially in light of the rapid technological revolution and the innovation and advances it brings with it.<sup>318</sup> By not recognizing the advantages of an efficiencies defense, the European Community may lag behind the rest of the world in rapid technological transformation.

### C. THE COMPETITION COMMISSION SHOULD ADAPT ITS RULES TO RESPOND TO THE NEW ECONOMY

The time has come for the Competition Commission to review and update its view on the competitive nature of mergers. The great technological revolution is blurring the line between horizontal and vertical mergers.<sup>319</sup> The Competition Commission needs to realize that the new economy needs new rules. The old rules do not apply.<sup>320</sup>

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315. *See id.* at 135 (explaining how efficiencies allow a pooling of resources, including knowledge and capital, thus expediting time commitments required to develop new technologies).

316. *See* Merger Regulations, *supra* note 32, art. 2(1)(b) (allowing the merger as long as it is to the benefit of the consumer and is not a barrier to competition).

317. *See* Kauper, *Merger Control*, *supra* note 123, at 354-55 (explaining that, whereas an efficiency “form[s] an obstacle to competition,” it follows that an efficiencies defense is *per se* a violation of the Merger Regulations).

318. *See id.* (providing an explanation as to why an efficiencies defense is beneficial to technology). *But see* Greany, *supra* note 271, at 893 (arguing that the adoption of an efficiencies defense in the European Union will create greater confusion and uncertainty due to an inability to establish clear guidelines of what constitutes an efficiency).

319. *See supra* notes 238-239 and accompanying text (examining how convergence of mediums and methods of delivery are distorting the difference between competitors and suppliers).

320. *See* Maurits Dolmans, *Restrictions on Innovation: An EU Antitrust Approach*, 66 ANTITRUST L.J. 455, 465 (discussing how regulations stifle innovation and produce results opposite those desired); *see also* Mueller, *supra* note 60, at 35 (examining how behavioral remedies, instead of promoting long-



Instead of looking at technological mergers in terms of what these companies currently do, the Competition Commission should consider what the companies propose to do in the future.<sup>321</sup> This approach also evaluates new or emerging ideas, such as interactive multimedia content, which is the future of AOL/Time Warner.<sup>322</sup> Taken separately, AOL and Time Warner acted more on vertical than horizontal planes.<sup>323</sup> The convergence of their products, however, and their future plans, in reality reflects horizontal concerns.<sup>324</sup>

Consider another example of why old rules do not apply to new technologies. If AOL/Time Warner acquired a telephone company, the Competition Commission, under the current merger guidelines, would not have competition concerns since AOL/Time Warner is not involved in providing telephone services.<sup>325</sup> New technologies, however, are beginning to transmit voice transmissions over high-speed, broadband connections.<sup>326</sup> In the future, broadband cables are

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term competition, actually harm innovation and reduces competition).

321. See *supra* notes 232-249 and accompanying text (discussing the role of future market activities in dominance evaluation). Although the Competition Commission considered the future market activity of online music players, it failed to consider the potential of AOL/Time Warner to dominate interactive, multimedia products in the future. *Id.*

322. See *supra* notes 238-244 and accompanying text (describing the next generation products and services AOL Time Warner will offer customers).

323. See Seth Schiesel & David Leonhardt, *Justice Dept. Moves to Block Merger of Two Phone Giants*, N.Y. TIMES, June 28, 2000, at A1 (discussing how the AOL/Time Warner merger has few horizontal concerns, unlike the Sprint/MCI WorldCom merger, which was blocked due to horizontal concerns).

324. See, e.g., Press Release, Commission Opens Full Investigation into Time Warner/EMI Merger, *supra* note 236 (discussing the concern over the proposed merger of Time Warner and EMI in that the combined company (AOL Time Warner and EMI) could dominate the online music player industry). Although neither EMI nor Time Warner have music players, the Competition Commission had a valid concern due to the potential of the converged products. *Id.*

325. See Public Interest Statement, *supra* note 192 (listing all of the services AOL and Time Warner provide, which do not include telephone services).

326. See Ilene Knable Gotts, *Antitrust Review of Telecommunications Industry Mergers*, 14 ANTITRUST 58, 58-59 (2000) (detailing the different possible methods of transmitting voice communications that are – or will be – alternatives to landline services currently in use). The ability to transmit voice data over broadband can be done through fiber optics owned by utility companies. *Id.* See also Sean Parham, *Voice Over Broadband: Expanding Network Capabilities*, RURAL TELECOMMS., Jan. 1, 2001 (explaining that broadband technologies have developed to allow

likely to carry cable television, telephone, video conferencing, Internet, closed circuit television, interactive video games, and radio signals.<sup>327</sup> The failure of the Competition Commission to adapt its rules to new technology will either fail to protect competition or stifle innovation.

## CONCLUSION

The Competition Commission is a very young antitrust organization that is still learning from its mistakes.<sup>328</sup> At a time when it should be growing stronger, the Competition Commission faces the potential of decentralizing its power.<sup>329</sup> This would be a mistake of epic proportions, threatening competition rules in the European Union. Instead of giving up on the Competition Commission, reforms can streamline the process, create greater efficiency, and provide new guidelines to properly evaluate new economy companies.

The year 2000 provided the Competition Commission with its two largest merger reviews.<sup>330</sup> Unfortunately, the antitrust review of the AOL/Time Warner merger illuminated problems within the Competition Commission. Some of these problems were specific to

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voice data transmissions over the network, including carrying multiple phone lines over one broadband connection); Martin J. Moylan, *Telecommunications Firm Buys 2-year-old Massachusetts Company*, KNIGHT-RIDDER TRIB. BUS. NEWS, Sept. 21, 2000, available at 2000 WL 26754475 (quoting a report by Cahners In-Stat Group predicting cable phone subscribers will multiply from less than one million in 1999 to over twenty million in 2004).

327. See Deborah A. Lathen, *Broadband Today* (PLI ed. 2000), at 507 (examining the future potential for broadband); see also Telephone Interview with David M. Webster, Lead Multi-Product Technician, Cablevision Systems Corp. (Mar. 1, 2001) (discussing new and emerging technologies being developed for future implementation on broadband cable systems).

328. See Schoenfeldt, *supra* note 285, at 727 (explaining that the Competition Commission evolved from the Treaty of Rome and has only been in charge of preventing the creation of dominant concentrations since 1990, when the European Commission passed the Merger Regulations).

329. See White Paper, *supra* note 251, at 24 (proposing giving national courts greater jurisdiction to review merger applications).

330. See Press Release, Commission Gives Conditional Approval to AOL/Time Warner Merger, *supra* note 10 (providing the Competition Commission's review of the AOL/Time Warner merger).

the merger, others were a result of the structure and process employed. With the right changes and guidance, the Competition Commission can learn from its mistakes. A company's future may just depend on it.