Rethinking Merger Efficiencies

Daniel A. Crane
University of Michigan Law School, dancrane@umich.edu

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Merger law exhibits an unexplained and unexamined differentiation between probabilistic costs and benefits.[1] In the two leading merger systems—those of United States and the European Union—merger law implicitly requires a greater degree of predictive proof of merger-generated efficiencies than it does of merger-generated social costs. As a matter of both verbal formulation in the governing legal norms and observed practice of antitrust enforcement agencies and courts, the government is accorded greater evidentiary leniency in proving anticompetitive effects than the merging parties are in proving offsetting efficiencies.

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[1] The voluminous academic literature on merger efficiencies includes Jamie Henikoff Moffitt, *Merging in the Shadow of the Law: The Case for Consistent Judicial Efficiency Analysis*, 3 Vand. L. Rev. 1697 (2010); An Renckens, *Welfare Standards, Substantive Tests, and Efficiency Considerations in Merger Policy: Defining the Efficiency Defense*, 3 J. Comp. L & Econ. 149 (2007); Robert Pitofsky, *Efficiency Consideration and Merger Enforcement: Comparison of U.S. and EU Approaches*, 30 Fordham Int'l L.J. 1413 (2007); Malcolm B. Coate, *Efficiencies in Merger Analysis: An Institutionalist View*, 13 Sup. Ct. Econ. Rev. 189 (2005); William J. Kolasky & Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, 71 Antitrust L. J. 207 (2003); Robert Pitofsky, 7 Geo. Mason L. Rev. 485 (1999); Timothy J. Muris, *The Government and Merger Efficiencies: Still Hostile After All These Years*, 7 Geo. Mason L. Rev. 729 (1999); Gregory J. Werden, *An Economic Perspective on the Analysis of Merger Efficiencies*, 11-SUM Antitrust 12 (1997); Mark N. Berry, *Efficiencies and Horizontal Mergers: In Search of a Defense*, 33 San Diego L. Rev. 515 (1996); Joseph Kattan, *Efficiencies and Merger Analysis*, 62 Antitrust L. J. 513 (1994); Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 Cal. L. Rev. 1580 (1983); Jackson, *The Consideration of Economies in Merger Cases*, 43 J. Bus. 439 (1970).

To illustrate, suppose that the best available economic evidence holds that a horizontal merger is 40% likely to create $100 in net present value consumer welfare losses and 40% likely to create $100 in net present value efficiencies that would be passed on to consumers.[2] Putting aside enforcement costs, the expected value of the merger to consumers is zero. Therefore, all else being equal, there is no reason to challenge the merger, particularly given enforcement costs, which are high. Under prevailing norms and practices, however, the merger would likely be challenged. Superficially, at least, the articulated legal mechanism for this differentiation would be a difference in the standards of proof for the government's affirmative case and the defendant's rebuttal case.

The systemic consequences of this asymmetry are significant, in a way that has not previously been appreciated. Superficially, it might appear that the only consequence of a more stringent approach to claims of merger efficiencies is that some mergers that are close calls on the anticompetitive effects side of the ledger will be prohibited even though, on balance, they might actually benefit to society. Since merger policy has been relatively lenient overall in the past three decades, false positives in a handful of close-call merger cases might seem a relatively trivial consequence of an unexplained evidentiary asymmetry. But this view incorrectly assumes that the only consequence of stringency on proof of efficiencies falls on the efficiencies side of the ledger. There are good reasons to think that this is not true—that courts and agencies selectively compensate for not giving much weight to merger efficiencies claims by demanding too much proof of anticompetitive effects from government antitrust enforcers. In an alternative legal regime where efficiencies and risks were equally weighted and parties therefore had a greater incentive to come forward with evidence of efficiencies, some mergers that today proceed unchallenged might very well be challenged since courts and enforcers might become more credulous of anticompetitive effects theories in cases without plausible efficiencies claims. Rebalancing the weighting of efficiencies and anticompetitive effects might have a

[2] The efficiencies and harms of mergers are almost always something to be predicted, because most jurisdictions that prohibit anticompetitive mergers, including the US and the EU, require premerger notification and clearance of most categories of potentially troubling mergers. Hence, the merger review function occurs before actual harms or efficiencies are known. *See infra* text accompanying notes xxx – xxx.

significant effect on the overall mix and distribution of merger challenges.

This Article interrogates the differential treatment of costs and benefits and argues that it is unjustified and counterproductive. A potential merger efficiency should be given equal weight to an equally likely anticompetitive risk of the same magnitude. To put it more formally, the probability-adjusted net present value of merger risks should be treated symmetrically with the probability-adjusted net present value of merger efficiencies.

The proposition just advanced might seem intuitively obvious given ordinary cost-benefit analysis principles, but there are a number of reasons why symmetrical weighting might not hold in the merger context. Merger efficiencies might be disfavored because they tend to be captured by producers rather than consumers, even while the consumers bear the full weight of anticompetitive effects. They might be disfavored because short-run efficiencies can create long-run market dominance that create further inefficiencies as the merging firms eventually exercise market power. They might be disfavored because, unlike anticompetitive effects theories, efficiencies theories are inherently speculative. Relatedly, efficiencies claims may be suspect because of a general view that large corporate mergers are more often the product of kingdom-building by imperialistic CEOs than efforts to generate shareholder value or that managers proposing mergers suffer, as a class, from optimism bias.

Merger efficiencies may also be running up against the expression of political or ideological values in merger policy. Efficiency doctrine and practice may express residual manifestations of the precautionary principle, which holds that the proponents of economic changes that may pose risks to social welfare bear a high burden of ruling out the risks before the change should be allowed. Or, the veiled antipathy to merger efficiencies may be a holding place for ideological resistance to large aggregations of economic power, even when those aggregations advance short-run consumer interests.

This Article interrogates and normatively rejects each of these possible justifications for cost/benefit asymmetry. It argues in favor of a formal principle of symmetrical treatment of expected costs and benefits from future mergers. However, treating costs and benefits symmetrically does not necessarily entail a comprehensive overhaul in the way that merger efficiencies are considered or the weight they are given in merger review. Courts and agencies sometimes discount certain efficiency claims for justifiable reasons. Some efficiency claims are inherently speculative or unlikely to advance consumer welfare. Rather, adoption of the symmetry principle would add rigor and transparency to merger review and reveal circumstances where well-founded efficiency defenses may be subordinated to confused analysis or weakly articulated policy objections.

Part I of this Article sets the stage by describing the prospective context of merger review decisions, which require agencies and sometimes courts to make predictive assessments of the consequences of mergers that have not yet occurred. It then describes the asymmetrical treatment between merger costs and benefits as a positive matter in the law and practice of U.S. and European antitrust agencies and courts. Although these two leading and often competing merger control jurisdictions differ in many ways on the substance and institutional framework of merger review, they share a common and unexplained devaluation of merger efficiencies as compared to their treatment of predicted anticompetitive merger costs.

Part II analyzes the systemic consequences of the understood norm of agency and court discounting of merger efficiency arguments. While this phenomenon has generally been understood just to stand in the way of some mergers potentially beneficial to society, the asymmetry principle may in fact result in an overall suboptimal mix of approved and disapproved mergers, since the principle tends to create a suboptimal amount of information that would be useful in judging both predictive efficiencies and anticompetitive effects.

Part III identifies a number of possible justifications for asymmetrical treatment and rejects each one as normatively insufficient to justify a principle of asymmetry.

Finally, Part IV proposes a path forward for more fluid integration of efficiency concerns in merger review. It considers the role that burdens of proof should play on efficiencies questions. It also acknowledges that a principle of symmetrical treatment cannot be applied in a numerically rigid way but rather serves as mnemonic device to stimulate a rebalancing in some key drivers of merger policy. Finally, it considers the additional complexity costs that a symmetry principle might entail.

I. MERGER EFFICIENCIES' LEGAL MALAISE

A. The Predictive Context of Merger Decisions

Unlike adjudicatory decision-making, which usually involves reconstructing past facts and sorting through their legal implications, regulatory decision-making inherently involves predictions about the future.[3] When the FDA decides whether to allow the marketing of a new drug, the EPA decides whether to allow a new pesticide, or the Highway Transportation Safety Board decides on rules for new automobile safety features, the agencies must make predictions about the respective costs and benefits of the innovations.[4] Still, even in these regulatory contexts where future paths and not past conduct is in question, the agencies usually can base their decisions on a sampling of information reflecting the innovation's properties. The FDA can review clinical trials,[5] the EPA can order testing of the pesticides,[6] and the Highway Transportation Safety Board can simulate the robustness of the safety devices in crash tests.[7] The predictions are thus extrapolations from controlled experiments to real world interactions.

By contrast, most modern merger review requires predictions about the likely consequences of an event that has not yet occurred and which it is not possible to sample, study, or test. With few exceptions, merger challenges occur before mergers have closed. In the United States, this is due to the Hart-Scott-Rodino Act of 1976, which requires parties making stock or asset acquisitions that meet certain dollar thresholds to file a premerger notification document

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[3] *See generally* Michael Abramowicz, *Predictive Decsionmaking*, 92 Va. L. Rev. 69 (2006).

[4] *See generally* Richard L. Revesz & Michael A. Livermore, *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and our Health* (2008).

[5] U.S. Food and Drug Administration, *Running Clinical Trials*, http://www.fda.gov/ScienceResearch/SpecialTopics/RunningClinicalTrials/default.htm (explaining regulatory framework for running clinical trials).

[6] *See generally* 7 U.S.C. § 136 (2006) (codifying EPA's regulatory authority over pesticides).

[7] Updated Review of Potential Test Procedures for FMVSS No. 208, http://www.nhtsa.gov/DOT/NHTSA/NRD/Multimedia/PDFs/Crashworthiness/Air%20Bags/FMVSS_208_II.pdf.

with both the U.S. antitrust enforcement agencies.[8] The parties may not close the merger transaction until thirty days after filing the premerger notification.[9] If prior to the close of the thirty days whichever agency is handling the case has concerns about the transaction, it can file a dreaded "second request" for information.[10] The parties are then prohibited to close the merger until certifying substantial completion of the second request,[11] a process which can take upwards of six months.[12] Because most mergers are time sensitive, parties have strong incentives to seek resolution with the agencies by restructuring their deals to assuage any competitive concerns or else to abandon the deals rather than to litigate.[13]

The European Union follows an even stricter premerger clearance system. Subject to various exceptions, parties to a merger must file a premerger notification form and await a final decision by the European Commission before closing the transaction.[14] The review can take up to 105 days.[15] If the Commission chooses to prohibit a merger, the parties must then seek annulment of the Commission decision in the European General Court, a process than take over a year even on a "fast track."[16] As in the U.S., most firms abandon or

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[8] 15 U.S.C. § 18a.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *See* Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. Davis L. Rev. 1375, 1462 n.382 (2009) (collecting various estimates on time and expense to comply with second request).

[13] Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 Antitrust L.J. 865, 881 (1997) (noting that the FTC and DOJ have "essentially create[d] the automatic stay of a transaction that the 94th Congress explicitly refused to grant"); see also Edward T. Swaine, *"Competition, Not Competitors," Nor Canards: Ways of Criticizing the Commission*, 23 U. Pa. J. Int'l Econ. L. 597, 632 (2002) (arguing that "American companies might be slow to characterize the HSR process as one susceptible to judicial oversight" because "[v]oluminous Second Requests" act as "de facto injunctions").

[14] ELEANOR M. FOX & DANIEL A. CRANE, GLOBAL ISSUES IN ANTITRUST AND COMPETITION LAW 451 (2010).

[15] EU Competition Law: Rules Applicable to Merger Control (1 April 2010), http://ec.europa.eu/competition/mergers/legislation/merger_compilation.pdf.

[16] John Davies & Robert Schlossberg, *Once More Unto the Breach Dear Friends": Judicial Review of Antitrust Agency Merger Clearance Decisions*, 21 Antitrust 17, 21-22 (2006) (describing the European "fast-track" judicial review procedure

restructure deals that the Commission challenges rather than choosing to litigate.[17]

Further, antitrust principles prohibit "gun jumping," that is to say any pre-closing integration or coordination of the firms on such matters as price and output.[18] The upshot is that, in the horizontal cases which are by far the largest set of merger cases,[19] the firms must continue to behave as arms-length competitors during the time period during which the potential anticompetitive effects of their proposed merger are under evaluation. Thus, on neither the predictive anticompetitive effects side nor on the predictive efficiencies side do the agencies have sample data from which they can extrapolate results before they must make their decision.

In evaluating likely anticompetitive effects, the agencies generally consider one of two kinds of theories. In homogenous goods markets, they consider the possibility that the merger will increase concentration to the point that tacit or explicit collusion (such as price fixing or market division) among the remaining firms in the market will be facilitated.[20] These "coordinated interaction" theories tend to depend heavily on structural assumptions—for example, that concentration levels above a certain Herfindahl Hirschman Index ("HHI") in markets characterized by certain features (for example, high fungibility of goods, transparency of

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which can take seven to nineteen months as compared to an average of thirty-one months in for cases not on a fast track); Stephanie Bodoni, EU Judge Vesterdorf *Backs New Antitrust Court to Speed Up Cases*, Bloomberg.com, Oct. 24, 2006, http://
www.bloomberg.com/apps/news?pid=20601085&sid=afPmsLOj93rQ&refer=europe (noting that judicial review of Commission decisions in merger cases takes on average nine and eleven months).

[17] The European Commission rarely reaches a prohibition decision in merger cases since most questionable mergers are resolved by the merging parties making "commitments" that resolve any competitive concerns. The Commission's statistics show that the Commission only reached 21 prohibition decisions over the 20-year period from 1990 to 2010. http://ec.europa.eu/competition/mergers/statistics.pdf. In the same period, it allowed 93 mergers with "commitments."

[18] *See* Kathryn M. Fenton & Erin M. Fishman, *M&A Transaction Planning: Premerger Coordination, Gun Jumping, and Other Related Issues*, 1565 PLI/Corp 245 (2006).

[19] HMG § 7; *see generally* Andrew R. Dick, *Coordinated Interaction: Pre-Merger Constraints and Post-Merger Effects*, 12 Geo. Mason L. Rev. 65 (2003).

[20] HMG § 7.

pricing, entry barriers, strong mechanisms for detecting price cutting, and a history of past collusion) tend to result in increased opportunities to collude.[21]

In differentiated goods markets, collusion is far less likely to result even with increases in concentration and the agencies tend to focus on the possibility that the merger will allow the merging parties to increase price or reduce quality even without tacit or explicit collusion.[22] In these cases, the agencies apply a "unilateral effects" theory to determine whether the merged firms would be able to increase prices or decrease quality even without cooperation by the other firms in the market.[23] The key factor in such an analysis is whether consumers consider the products sold by the merging parties to be each other's best substitutes—meaning that customers tend to substitute preferentially between the goods or services of the merging parties.[24] Critical to these types of analyses are the diversion ratios between the two firms' products.[25] The agencies also pay close attention to the possibility of price discrimination against vulnerable populations of customers which a merger may facilitate even if it does not permit price increases to the market as a whole.[26]

The sources of information that the agencies consider in deploying coordinated interaction and unilateral effects models vary by the type of case. Increasingly, the agencies place priority on experience with similar cases.[27] Where the necessary market share and demand elasticity data are available, economists in the agencies run merger simulations to estimate the price effects resulting from the merger.[28]

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[21] *Id.*
[22] HMG § 6. *See generally* David Scheffman & Joseph Simons, *Unilateral Effects for Differentiated Products: Theory, Assumptions, and Research*, 9-APR Antitrust Source 1 (2010).
[23] HMG § 6.1.
[24] *Id.*
[25] *Id.* A diversion ratio is "the fraction of unit sales lost by the first product due to an increase in its price that would be diverted to the second product." *Id.*
[26] HMG § 3.
[27] HMG § 2.1.2.
[28] *See* Kai Hüschelrath, *Detection of Anticompetitive Horizontal Mergers*, 5 J. Comp. L. & Econ. 683, 694 (2009); Roy Epstein & Daniel Rubinfeld, *Merger Simulation: A Simplified Approach with New Applications*, 6 Antitrust L.J. 883 (2001); Philip Crooke, Luke Froeb, Steven Tschantz & Gregory Werden, *Effects of Assumed Demand Form on Simulated Postmerger Equilibria*, 15 Rev. Indus. Org. 205 (1999).

Only about five percent of all mergers scrutinized by the antitrust agencies in the U.S. and the EU give rise to competitive concerns.[29] Weighing against these concerns of anticompetitive effects are potential economies from the merger. Generically, merger efficiencies can include economies of scale or scope, technological complementarity, reduction in transportation or other distribution costs, reduced capital costs, product line specialization, deployment of scarce managerial talent across a wider portfolio of assets, and positive innovation effects due to the combination of research and development laboratories or intellectual property portfolios.[30] To a large extent, predictions about these efficiencies depends less on models and more on fact-specific data than is true on the anticompetitive effects side of the ledger.

The upshot is that merger control is an inherently predictive exercise. While the quality of available models and data concerning proposed mergers varies by issue, merger law is inherently about diving future industrial paths in light of the exogenous shock of firm integration. It is for this reason that probability principles play such an important role in steering the contours of merger review.

B. U.S. Legal Principles

Section 7 of the Clayton Act, as modified by the 1950 Celler-Kefauver Amendments, forms the substantive bedrock of U.S. merger policy. Its terse text, prohibiting mergers and asset acquisitions whose effect "may be substantially to lessen competition"[31] makes no reference either to a threshold of probability for a finding of anticompetitive effects nor to any possibility of an efficiencies defense.

In explicating the text of Section 7, the Supreme Court has read the word "may" as providing some indication of the threshold of proof necessary for a finding that a merger is predictively anticompetitive. In oft-repeated dictum from its 1962 *Brown Shoe* opinion, the Court observed: "Congress used the words '*may* be substantially to lessen competition' (emphasis supplied, to indicate

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[29] Pitofsky, *Efficiency Consideration*, *supra* n. xxx at 1413.

[30] PATRICK A. GAUGHAN, MERGERS, ACQUISITIONS, AND CORPORATE RESTRUCTURINGS 117-68 (2d ed. 2007) (outlining motivations for mergers and acquisitions); Fisher & Lande, *supra* n. xxx at 1599.

[31] 15 U.S.C. § 18.

that its concern was with probabilities, not certainties."[32] Reflecting on Celler-Kefauver's legislative history, the Court observed that "[s]tatutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities,"[33] thus suggesting that the threshold of necessary probability lies somewhere between the "clear-cut" and the "ephemeral." Summing up the threshold of probability question, the Court observed: "Mergers with a probable anticompetitive effect were to be proscribed by this Act."[34]

The elliptical use of "probable" evokes a commonly used, if not precisely defined, threshold in the hierarchy of American legal probability—probable cause, which is the quantum of probability necessary for the issuance of a search warrant under the Fourth Amendment. The Supreme Court has denied that probable cause is susceptible of "precise definition or quantification into percentages,"[35] but practitioners and commentators often understand it to lie in the 40-45% range.[36] A survey of federal judges found an average percentage of 46% for probable cause.[37] In any event, the Supreme Court's repeated invocation of "probability" as the relevant threshold of proof for merger harms suggests that the Government's burden in seeking to enjoin a merger is less than a preponderance of the evidence.

Complicating this assessment is the fact that most litigated merger proceedings (of which there are very few since most merger cases are resolved within the agencies)[38] are decided on preliminary injunctions rather than trials on the merits.[39] In typical preliminary injunction proceedings, the plaintiff needs to establish a "substantial

[32] *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 323 (1962).
[33] *Id.*
[34] *Id.*
[35] *Maryland v. Pringle*, 540 U.S. 366, 371 (2003).
[36] *See*, e.g., Lawrence Rosenthal, *The Crime Drop and the Fourth Amendment: Toward and Empirical Jurisprudence of Search and Seizure*, 29 NYU Rev. L. & Soc. Change, 641, 680 (2005) (reporting that a newly minted Assistant United States Attorney was informed by his supervisor that probable cause meant 40%).
[37] C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees*?, 35 Vand. L. Rev. 1293, 1325 (1982).
[38] *See infra* text accompanying notes xxx – xxx.
[39] *See* Moffitt, *supra* n. xxx at 1710 (analyzing preliminary injunction decisions from past twenty-five years).

likelihood of success on the merits," a threshold higher than probable cause and probably higher than a preponderance of the evidence.[40] But since the ultimate standard of proof is probability, not preponderance, the government's effective burden is merely to prove a "substantial likelihood" that it will eventually be able to show probable cause to block the merger—a combination that seems to make the Government's burden shrink arithmetically. Further, when the Federal Trade Commission sues for a preliminary injunction to block a merger so that it may conduct a full administrative review of the merger, courts have held that the FTC need only raise "serious, substantial, difficult, and doubtful" issues about the merger.[41] This seems to collapse the necessary threshold of probability on anticompetitive effects even further.

This bias in favor of harms over efficiencies is reflected in the text of the Horizontal Merger Guidelines (which were substantially overhauled in 2010). The Guidelines implicitly treat the efficiencies and the anticompetitive risks asymmetrically by insisting that efficiencies be proven to a very high degree of certainty in order to justify a merger whereas risks need not be proven with great certainty in order to block a merger.[42] In order to find anticompetitive effects, the Guidelines require only "reliable" evidence about the "likely effects of a merger."[43] On the other hand, the guidelines project an attitude of suspicion at the least, and hostility at the most, toward efficiencies claims. They note that "[e]ficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms.

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[40] *See*, *e.g.*, *U.S. v. Melrose East Subdivision*, 357 F.3d 493 (5th Cir. 2004) (observing that a substantial likelihood of success on the merits is presumably a higher standard than probable cause).
[41] *FTC v. Whole Foods, Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008).
[42] The same held under the recently-replaced 1992 Guidelines. Thus, for example, Section 1 of the 1992 Guidelines explained that the overall analysis is focused on whether firms "likely would" take certain actions given their economic interests. There was no requirement of a verification that the firms actually would raise prices post merger, just that doing so would be consistent with a rational actor model. On the other hand, Section 4 sternly warned that efficiencies defenses are not to made lightly. Efficiencies can't just be predicted; they must be verified through empirical evidence. When potential adverse competitive effects are expected to be "large," verified efficiencies must be "extraordinarily great."
[43] HMG § 2.2.1.

Moreover, efficiencies projected reasonably and in good faith by the merging firms may not be realized. Therefore, it is incumbent upon the merging firms to substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific."[44] They then go on to warn that "[e]fficiency claims will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means," that "[p]rojections of efficiencies may be viewed with skepticism, particularly when generated outside of the usual business planning process."[45] The Guidelines then explicitly state that the agencies will not give equal weight to efficiencies and harms:

> In conducting this analysis, the Agencies will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies. The greater the potential adverse competitive effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through to customers, for the Agencies to conclude that the merger will not have an anticompetitive effect in the relevant market. When the potential adverse competitive effect of a merger is likely to be particularly substantial, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive. In adhering to this approach, the Agencies are mindful that the antitrust laws give competition, not internal operational efficiency, primacy in protecting customers.[46]

The asymmetrical treatment between expected harms and efficiencies is not merely a function of parsing the Guidelines' text. Despite some greater sympathy toward efficiencies in recent years,

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[44] *Id.* § 10.
[45] *Id.*
[46] *Id.*

practitioners report that the agencies usually react with coolness to efficiencies arguments.[47]

C. EU Legal Principles

EU merger law derives from the EC Merger Regulation.[48] Unlike Section 7 of the Clayton Act, paragraph 29 of the Merger Regulation specifically recognizes efficiency defenses.[49] Nonetheless, the scope of the efficiencies defense and its correspondence with the threshold of proof necessary to show predicted anticompetitive effects remain subject to some doubt.[50]

Under EU case law, the Commission is accorded "a margin of discretion" in making its predictions about anticompetitive effects from mergers. [51] The courts defer to Commission decisions so long as the "evidence relied on is factually accurate, reliable and consistent" and the record "contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it."[52] On the other hand, the merging parties bear the burden of proving that efficiencies are "likely to materialize" and generally must use "precise and convincing" evidence to do so.[53]

The EC Horizontal Merger Guidelines place on the merging parties the burden of proving efficiencies and require that the

[47] *See* Muris, *supra* n. xxx at 751 ("Hostility reflects the long standing reluctance to accept fully the cost-reducing potential of mergers"); *see also* text accompanying notes xxx – xxx (FTC study).
[48] Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings.
[49] Council Regulation ¶ 29 ("In order to determine the impact of a concentration on competition in the common market, it is appropriate to take account of any substantiated and likely efficiencies put forward by the undertakings concerned. It is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers, that it might otherwise have and that, as a consequence, the concentration would not significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.").
[50] *See* Fabienne Ilzkovitz & Roderick Meiklejohn, *European Merger Control: Do We Need an Efficiency Defense*, 3 J. Indus., Comp, & Trade 57 (2003).
[51] *Rynair Holdings*, Case T-342/07 (General Court 6 July 2010).
[52] *Id.*
[53] *Id.*

efficiencies claims "be verifiable such that the Commission can be reasonably certain that the efficiencies are likely to materialize."[54] The Non-Horizontal Guidelines seem to strike a softer tone on efficiencies, suggesting that in the vertical and conglomerate context, expected efficiencies and anticompetitive effects need to be weighed.[55] However they later repeat that proving efficiencies is the parties' burden and that the same criteria of verifiability as apply under the Horizontal Guidelines apply to vertical and conglomerate mergers.[56] Read as a whole, the Non-Horizontal Guidelines "appear to suggest that the pro-competitive effects of a merger should be subject to more exacting evidentiary standards than theories of competitive harm."[57]

As in the United States, European practitioners report that efficiencies defenses are difficult to sustain, at least in horizontal merger cases. In vertical merger cases, consistently with the softer approach in the guidelines, efficiencies defenses have sometimes been accepted. For example, in TomTom/TeleAtlas, the Commission found that the vertical integration between a map supplier and a maker of navigations systems would likely reduce prices to consumers by a small amount since the vertically integrated firm would eliminate double marginalization.[58] However, as in many other cases, the efficiencies argument appears to have merely been the icing on the key finding—that the merged firms would not have an incentive to behave anticompetitively. It is unclear whether efficiencies concerns are doing substantial, independent work in

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[54] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, ¶ 86 (2004/C 31/03).

[55] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, ¶ 21 (2008/C 265/07).

[56] *Id.* ¶ 52.

[57] Linklaters and Charles River Associates International, The European Commission's Draft Guidelines on the assessment of non-horizontal mergers, Comment, at 4, available at http://ec.europa.eu/competition/mergers/legislation/files_non_horizontal_consultation/linklaters.pdf. The Linklaters and CRA comment addressed the draft guidelines, but the Commission made no modification to the text that would negate the comment.

[58] *See* Penelope Papandropoulos, *Non-Horizontal Mergers: Recent EC Cases*, (May 29, 2009), http://ec.europa.eu/dgs/competition/economist/non_horizontal_mergers.pdf.

European merger policy. At a minimum, EU law and practice, like U.S. law and practice, treats probability adjusted risks and benefits asymmetrically in merger review.

II. Systemic Effects of Formal Asymmetry

The formal position of the antitrust enforcement agencies and courts in the U.S. and the EU is that merger efficiencies count only weakly, if at all, toward sustaining the legality of questionable mergers. The most obvious implication of this coolness toward efficiency claims is that some mergers that would be cleared in a more efficiency hospitable jurisdiction would not be cleared in the U.S. and the EU. Under this assumption, a change in norms or practices resulting in a more hospitable reception for efficiencies should result in a net increase in the number of cleared mergers—in a liberalization of merger policy.

But that conclusion may be unjustified. Solicitude for efficiencies may already play a role in merger policy, but simply not at the level of individual case analysis. Part of the movement toward liberalization of merger policy in the last two or three decades may already reflect a commitment to allowing efficient mergers without undertaking an individualized look at efficiencies claims. A more particularized inquiry into merger efficiencies might not result in a further net liberalization of merger policy but only in a redistribution of the portfolios of permitted and prohibited mergers.

To set the stage for an answer to these questions, this section first surveys the incidence and intensity of efficiencies discourse in merger negotiations between the merging parties and the government agencies. It then provides a snapshot of the overall liberalization of merger policy in the U.S. and EU in the past several decades. Finally, it considers the systemic effects on the landscape of merger control that might follow from a rebalancing of merger costs and benefits.

A. Incidence, Intensity, and Effect of Efficiencies Discourse in Administrative Negotiations

Much of the academic writing on merger efficiencies assumes a decisional model in which the antitrust agencies might exercise prosecutorial discretion not to challenge questionable mergers because of efficiencies but courts would usually serve as the ultimate arbiters of mergers' legality.[59] Hence, much of the scholarly work on merger efficiencies has focused on judicial attitudes toward efficiencies.[60]

The available empirical work suggests that judges do purport to take efficiencies into account, but that efficiencies actually play little role in merger cases. In a recent empirical study of 23 U.S. merger cases litigated between 1986 and 2009, Jamie Moffitt finds that "although courts claim to be balancing merger-generated efficiencies with other negative factors affecting market competition," they are actually "making an assessment of the relevant concentration in the applicable market and then allowing that initial assessment to color their recognition of claimed efficiencies."[61] Courts may thus be "stampeding" the efficiency factor based on their conclusion on market concentration and possible anticompetitive effects.[62]

But courts are no longer significant players in the formulation of U.S. merger policy. As noted in the previous section, the Hart-Scott-Rodino Act has pushed most merger control decisions into the agencies and away from the courts.[63] For example, in 1983 when Fisher and Lande computed the "Type 3" costs of the greater complexities that an efficiencies defense would entail, they estimated twenty to twenty-five litigated merger cases a year.[64] Their estimates were based on averages from the last decade showing nine FTC cases, seven Justice Department cases, and five private cases annually.[65] Since the early 1980s, however, merger enforcement has moved increasingly in the direction of informal administration without litigation.[66] Over the period 1990 to 2009, the FTC and Justice Department only litigated approximately 39 cases in court,

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[59] *See*, *e.g.*, Kolasky, *supra* n. xxx at 82 (discussing role of efficiencies in judicial decisions regarding mergers); Fisher & Lande, *supra* n. xxx; Moffitt, *supra* n. xxx.
[60] *Id.*
[61] Moffitt, *supra* n. xxx at 1698.
[62] Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 Calif. L. Rev. 1581, 1581-82 (2006) (describing tendency of courts in trademark cases to "stampede" in multi-factor analysis by using decision on a small number of critical factors to determine remaining factors).
[63] *See supra* text accompanying notes xxx – xxx.
[64] Fisher & Lande, *supra* n. xxx at 1675, 1675 n. 312.
[65] *Id.* n. 312.
[66] *See generally*, Daniel A. Crane, *Antitrust Antifederalism*, 96 Cal. L. Rev. 1, 51-57 (2008).

fewer than a net of two per year for both agencies.[67] For the last decade, 2000-2009, the total number of litigated merger cases was only 15.[68] Private antitrust challenges to mergers are even rarer.[69]

The same is true in the EU. Litigation over merger cases has become extremely infrequent. The European Commission has only prohibited two mergers since 2002,[70] which means that most merger decisions have been made through internal administrative processes. Since a brief spurt of activity in 2002, the European courts have had little work to do on merger policy.

The upshot is that most discussions over merger efficiencies take place informally in non-public dialogue between the merger parties (or really, their lawyers and hired economists) and the lawyers and economists in the antitrust enforcement agencies. To the extent that bargaining between the parties and the government occurs, it occurs "in the shadow of the law,"[71] in the sense that it is influenced by the parties' expectations about judicial outcomes should they litigate. In most cases, however, the law's shadow is comparatively light, since most merging parties are unwilling to litigate in court should the agency decide to oppose the merger.[72] The agencies' merger guidelines set the stage for the administrative bargains, although the

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[67] This estimate is drawn from a study of data complied in the FTC and Justice's Hart Scott Rodino Annual Report, which are available on the FTC's website. http://www.ftc.gov/bc/anncompreports.shtm. The estimate of 39 is based on the reported number of cases in which the agencies filed a complaint in federal court and the court took some action. In a much larger number of cases, the agencies filed for a preliminary or permanent injunction and either the parties contemporaneously filed for a consent decree or the merging parties abandoned the transaction without a judicial decision.

[68] *Id.*

[69] Maurice E. Stucke, *Behavioral Economists at the Gate: Antitrust in the Twenty-First Century*, 38 Loy. U. Chi. L. Rev. 513, 584 (2007) (noting that "[p]rivate parties rarely challenge mergers under Section 7 of the Clayton Act").

[70] http://ec.europa.eu/competition/mergers/statistics.pdf.

[71] Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950, 978 (1979).

[72] Robert Pitofsky, *Proposals for Revised United States Merger Enforcement Guidelines in a Global Economy*, 81 Geo. L. J. 195, 225 (1992); Crane, *Antitrust Antifederalism*, *supra* n. xxx at xxx.

guidelines are not legally binding[73] and their predictive power on agency attitudes is not always strong.[74]

Despite the prohibitive odds that efficiencies will make a difference in close-call cases, merging parties usually go through the ropes and make efficiency arguments. A survey of 20 leading antitrust practitioners conducted by Jon Baker and Carl Shapiro in 2007 revealed that the antitrust agencies had become significantly more receptive to efficiencies claims than they were a decade before.[75] Still, the data suggest that efficiencies arguments are seldom dispositive in close-call merger cases. A recent study of 186 merger cases at the FTC found that internal staff memoranda reported efficiencies claims in 147 out of 186 cases.[76] In the cases in which the FTC staff reported the claimed dollar value of the claimed efficiencies, the mean figures ranged from $191 million to $237 million depending on the time period.[77] The claimed efficiencies represented an average of 8.1 percent of the transaction's reported value.[78] Efficiencies claims did not meet with particularly great success, at least in the Bureau of Competition (which is generally manned by lawyers). The Bureau of Competition discussed 342 efficiency claims (multiple efficiencies could be claimed in a single transaction), rejecting 109, accepting 29, and offering no conclusion on 204.[79] Efficiencies claims fared considerably better at the Bureau of Economics (which is generally manned by economists), which considered 311 efficiencies claims, accepting 84, rejecting 37, and making no decision as to 190.[80]

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[73] *FTC v. H.J. Heinz Co*., 246 F.3d 708, 716 n.9 (D.C. Cir. 2001) (observing that "the Merger Guidelines are not binding on the court").

[74] *See* Christine A. Varney, *An Update on the Review of the Horizontal Merger Guidelines*, http://www.justice.gov/atr/public/speeches/254577.htm ("A consistent theme running through the panels is that there are indeed gaps between the Guidelines and actual agency practice--gaps in the sense of both omissions of important factors that help predict the competitive effects of mergers and statements that are either misleading or inaccurate."}.

[75] Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, http://faculty.haas.berkeley.edu/shapiro/mergerpolicy.pdf, at 29-30.

[76] Malcolm B. Coate & Andrew J. Heimert, *Merger Efficiencies at the Federal Trade Commission*, http://www.ftc.gov/os/2009/02/0902mergerefficiencies.pdf., at 6.

[77] *Id.* at 12.

[78] *Id.*

[79] *Id.* at 16.

[80] *Id.* at 22.

Two factors are notable in these data. The first is the significant difference in perspective between the lawyer and economist classes in the agencies—an issue to which we will return in Part III. The second is the relative unimportance of efficiencies in merger analysis. The practice in the antitrust agencies seems to be liberal invocation of efficiencies arguments by the parties without a serious expectation of moving the agencies in most cases. To the extent that the agencies ultimately cite efficiencies considerations in clearing mergers, antitrust practitioners report that they are often treated as "icing on the cake" in cases where there are no serious anticompetitive effects concerns. As former FTC Chairman Tim Muris has observed, "[t]oo often, the Agencies found no cognizable efficiencies when anticompetitive effects were determined to be likely and seemed to recognize efficiency only when no adverse effects were predicted."[81] As in the courts, efficiencies discourse appears frequently in merger administration, but its influence on overall merger policy seems to be weak.

B. The Liberalization of Merger Policy

Thus far, we have been considering the efficacy of efficiencies arguments as independent factors in merger policy as though efficiencies and anticompetitive effects were the credits and debits in a tidy system of double-entry bookkeeping that only interacted when tallied at the bottom of the page. But, in fact, perspectives on efficiencies can enter merger policy at a variety of different points. A Bayesian prior belief that many mergers produce desirable efficiencies may push judges, legislators, or antitrust enforcers to take a solicitous view of mergers as a general proposition, even if they fail to credit case-specific efficiency arguments much of the time.

Indeed, one prevailing normative view is precisely this—that legal systems should take into account merger efficiencies by articulating relatively lenient merger standards across the board rather than trying to explore efficiencies arguments on a case-by-case basis. In perhaps the most influential article to make this point, Fisher and Lande argued against allowance of a merger efficiency defense on a case-by-case basis on the grounds that efficiencies,

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[81] Timothy Muris, *The Government and Merger Efficiencies: Still Hostile After All These Years*, 7 Geo. Mason L. Rev. 729, 731 (1999).

although often present in mergers, are hard to detect on a case-specific basis.[82] They also observed that allowing an efficiencies defense would increase both type 1 and type 2 error costs and what they styled type 3 error costs—the increased costs to businesses, enforcers, and decision makers from the increased complexity and unpredictability of an efficiencies defense.[83] Instead of allowing an efficiencies defense on a case-by-case basis, Fisher and Lande would "raise[] the market-share thresholds of presumptive illegality to account for potential efficiencies gains," thus recognizing an efficiency defense by liberalizing merger policy overall.[84]

It may be the case that Fisher and Lande's recommendation has been de facto accepted in the last two decades. It is certainly the case that the U.S. antitrust enforcement agencies have revised upward their presumptions on the thresholds of market concentration necessary for horizontal mergers to raise competitive concerns. Under the Horizontal Merger Guidelines in place from 1992 to 2010, markets were considered unconcentrated if the Herfindahl-Hirschman ("HHI") index[85] was below 1000, moderately concentrated if between 1000 and 1800, and concentrated if above 1800.[86] Under the 2010 Guidelines, markets are unconcentrated if the HHI is below 1500, moderately concentrated if between 1500 and 2500, and concentrated over 2500.[87] The agencies have also raised the thresholds for the increase in concentration resulting from a merger to raise competitive concerns.[88]

One should be careful about reaching the conclusion that the antitrust agencies have become generally more permissive with respect to mergers based merely on this HHI inflation. Concentration ratios have become less significant in merger analysis in the past two

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[82] Fisher & Lande, *supra* n. xxx at 1651-68.
[83] *Id.* at 1670.
[84] *Id.* at 1669.
[85] The HHI index is computed by squaring the sums of the market shares of the market participants.
[86] http://www.ftc.gov/bc/docs/horizmer.shtm.
[87] http://www.justice.gov/atr/public/guidelines/hmg-2010.html#5c.
[88] Under the 1992 Guidelines, an increase over 100 in a highly concentrated market created a presumption that the merger would create market power or facilitate its exercise. Under the 2010 Guidelines over 200 in highly concentrated markets result in a presumption that the merger will create market power or facilitate its exercise.

decades.[89] In large part, this reflects an overall shift in merger policing from homogenous goods markets—where markets are relatively easier to define, market shares easier to computer, and hence market concentration changes easier to calculate—to differentiated goods or services markets where markets are difficult to define robustly, shares are difficult to calculate robustly, and hence concentration indices are often close to meaningless.[90] This shift in focus toward differentiated goods markets and unilateral effects theories has been driven in large part by fundamental changes in the economy itself. As the economy has continued its evolution away from bricks and mortar and traditional manufacturing industries toward information and technology industries, it has moved in the direction of differentiation and heterogeneity of brands.[91] But even if the liberalization of concentration ratios does not alone signal an overall liberalization of merger policy, there is little doubt that merger policy is far more liberal today than it was twenty or thirty years ago.[92]

Not only have the agencies' relaxed their formal concentration criteria in merger cases, but the prospects for defendant victories in litigated cases have improved dramatically in the last several decades. In dissenting in *Von's Grocery* in 1966, Justice Stewart could comment sarcastically that "[t]he sole consistency that I can find in litigation under Section 7 [of the Clayton Act] is that the

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[89] Under the 2010 Horizontal Merger Guidelines, it may no longer be necessary to define a relevant market in every case. HMG § 4 ("Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition . . ."). *See also* Louis Kaplow, *Why (Ever) Define Markets*, 124 Harv. L. Rev. 437 (2010) (arguing that market definition is incoherent and unproductive in antitrust cases).

[90] Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 Antitrust L. J. 49, 54 (2010).

[91] CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY 22-23 (1999) (describing characteristics of information economies).

[92] *See generally*, D. Daniel Sokol, *Antitrust, Institutions, and Merger Control*, 17 Geo. Mason L. Rev. 1055, 1128-29 (2010) (reporting survey of antitrust practitioners reporting ambiguous views as to whether merger enforcement at the Justice Department was more lenient in the Bush administration than in the Clinton Administration and a uniform view that merger review at the FTC was not more lenient under Bush than under Clinton).

Government always wins."[93] Even as late as the early 1980s, Fisher and Lande asserted that "defendant merger victories not surprisingly have been relatively rare."[94] If anything, the trend in the last decade has been toward defendant victories in litigated merger cases, with prominent government defeats in cases like *Oracle/PeoplesSoft*[95] and *Arch Coal*.[96] During the 2000s, defendants won half of the preliminary injunction actions brought by the FTC or Justice Department.[97] To the extent that the shadow of the law plays a significant role in the regulatory administration of mergers, the calculus has shifted in a decidedly pro-merger direction.

Although the European model of merger review is quite different from the American model and European merger control generally tighter than American merger control,[98] Europe has seen a similar trend toward a more active judicial role in questioning European Commission decisions prohibiting mergers in the last decade. During the early-2000s in particular, the European Court of Justice reversed the Commission's merger prohibition decision in a surprising string of cases that departed significantly from the Court's prior willingness to accord the Commission discretion in merger cases.[99] Since those decisions, the Commission seems to have become considerably more cautious in its prohibition decisions, to the point that some academic commentators and Commission officials wonder whether it has become too lenient in merger enforcement.[100]

There is no doubt that merger policy in both the U.S. and the EU is more liberal than it was three decades ago in the U.S. or a decade

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[93] *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

[94] Fisher & Lande, *supra* n. xxx at 1583.

[95] *U.S. v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

[96] *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004).

[97] According to the agencies' joint Hart-Scott-Rodino Act annual reports, available at http://www.ftc.gov/bc/anncompreports.shtm, the agencies won six preliminary injunction cases and lost six during the period 2000-2009.

[98] Mats A. Bergman, Malcolm B. Coate, Maria Jakobsson & Shawn W. Ulrick, *Comparing Merger Policies: The European Union versus the United States*, 07-01 Potomac Papers L. & Econ. (2007) (finding that European horizontal merger policy is generally more restrictive than U.S. merger policy).

[99] *See* Francisco Todorov & Anthony Valcke, *Judicial Review of Merger Control Decisions in the European Union*, Antitrust Bulletin June 22, 2006.

[100] *See* Frank Maier-Rigaud & Kay Parplies, *EU Merger Control Five Years After the Introduction of the SIEC Test: What Explains the Drop in Enforcement Activity?*, [2009] E.C.L.R. 565.

and a half ago in Europe. What is impossible to say to any great certainty is whether solicitude over merger efficiencies has significantly influenced this trend. Whether or not it has, the comparatively liberal state of merger policy today has implications for any reconsideration of the asymmetrical treatment of merger anticompetitive risks and efficiencies. Any movement toward greater consideration of merger efficiencies could propel overall merger policy in a yet more lenient direction, which could in turn induce political backlash against the overall trend in merger policy.[101]

C. Effects on Distribution of Proposed and Challenged Mergers

The apparent implication of re-valuing merger efficiencies relative to anticompetitive effects is that courts and regulators would begin to permit some number of marginal mergers that they previously would have disallowed. To the extent that the antitrust system is currently disallowing or discouraging a significant number of beneficial mergers, a reorientation of the relevant legal and administrative norms could result in net social welfare improvement. Indeed, the mergers currently screened out by prevailing norms may be precisely the most beneficial ones. Jamie Moffitt argues that the courts' hostility to merger efficiency defenses chills businesses' willingness to propose "exactly those [deals] that have the greatest potential to enhance competition"—high-efficiency transactions in concentrated industries.[102]

On the other hand, viewed as a proposal to liberalize merger policy, the normative appeal of the symmetry principle seems to depend not merely on its internal logic but on some prior belief that contemporary merger policy in the U.S., EU, or other jurisdiction is excessively restrictive. Since many commentators believe that U.S.

[101] Significantly, as a presidential candidate, Senator Barack Obama targeted the Bush Administration's merger policy for criticism: "Regrettably, the current administration has what may be the weakest record of antitrust enforcement of any administration in the last half-century. As president, I will direct my administration to reinvigorate antitrust enforcement. It will step up review of merger activity and take effective action to stop or restructure those mergers that are likely to harm consumer welfare, while quickly clearing those that do not." Senator Barack Obama, Statement for the American Antitrust Institute 2 (Sept. 27, 2007), available at www.antitrustinstitute.org/files/aai-%20Presidential%20campaign%-%20Obama%209-07_092720071759.pdf.
[102] Moffitt, *supra* n. xxx at 1743.

merger policy in particular has already become too permissive,[103] the mere internal logic of the symmetry principle may seem an insufficient reason to recalibrate merger policy in favor of even more liberal merger review.

But revaluing merger efficiencies relative to anticompetitive effects does not require holding constant the rest of merger policy. Even without any formal adjustment to other aspects of merger law, revaluing merger efficiencies could end up having no net effect on overall merger policy liberality. Indeed, an explicit symmetry principle could induce legal decision-makers to give *greater* credence to anticompetitive effects theories in some cases than they presently do. Several possible systemic reactions to an enhanced willingness by agencies or courts to credit merger efficiencies arguments point toward neutrality in overall merger leniency.

First, assuming that Fisher and Lande's proposal to embed prior beliefs about merger efficiencies in overall leniency toward mergers captures part of the influence for merger liberalization in the last several decades, then a higher valuation of efficiencies could alter courts' and agencies' overall willingness to prohibit certain classes of mergers. Assuming that merger control institutions display an unconscious tendency to increase the threshold of proof required for anticompetitive effects theories because they are prohibited, culturally or legally, from giving significant weight to merger efficiencies arguments, then a reversal of the norm on efficiencies could also lead to a reversal of the norm on anticompetitive effects theories.

Second, alteration in the efficiencies norm could alter overall regulatory or legal decision-making processes on mergers by affecting judges or regulators' assessment of the probability of anticompetitive effects. Decision-makers asked to assign a probability value to two related events may anchor their determination of one event's probability on their assessment of the

[103] *See*, e.g., Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 235 (Robert Pitofsky, ed., 2008) (criticizing recent U.S. merger enforcement as excessively lax); William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 Geo. Mason L. Rev. 903, 915 (2009) (reporting that commentators have called U.S. merger enforcement excessively lax).

other event's probability.[104] Judges or regulators asked to decide on the absolute probability that a merger will produce anticompetitive effects might tend to low-ball the probability because of a general skeptical inclination as to proof of speculative future events, but raise their estimate of the probability of harms if asked to assess that probability at the same time that they were assessing the probability of efficiencies.

One might object that if judges or regulators systematically raised their estimates of future anticompetitive effects if faced with efficiencies defenses, then merging parties would have diminished incentives to make efficiencies claims in the first place. If that were to occur, the agencies might respond by affirmatively insisting that the merging parties in close-call cases provide the efficiencies justifications for their mergers. Then there is a question of net effects. If the only effect of adopting the symmetry principle were that judges and regulators would become less skeptical of anticompetitive effects claims, then the symmetrical treatment project would not result in a true re-valuation of merger efficiencies and, indeed, would seem pointless. But even if revaluing efficiencies defenses did not lead to an overall increase in the number of permitted mergers, it could still have a salutary effect on the selection of mergers that are permitted and prohibited. In the class of marginal merger cases—the class most likely to be affected by any adjustment in legal principle—there might well be a socially beneficial increase in permission for mergers creating net consumer (or social) benefits and a corresponding decrease in mergers creating net consumer (or social) harm.

Finally, it is possible that antitrust regulators have an exogenously determined appetite for merger prohibition decisions, in effect a "merger quota" that they need to fill regardless of the merits of individual merger applications. Within a particular political and economic context, regulators may approach merger control with a rough and perhaps unconscious sense of the number of prohibition decisions (or, more generally, requirements that parties restructure questionable deals) they need to produce in order to justify their budgetary allocations, show themselves sufficiently tough but not obstacles to business progress, and satisfy political demand for

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[104] *See generally* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 Sci. 1124, 1128 (1974); Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. Bus. S251 (1986).

"action from Washington or Brussels." Much of the ideological discourse about the stringency of antitrust activity consists of counting up merger challenges and other antitrust enforcement activity within particular administrations.[105] If even a soft and fluctuating merger quota exists, then a decision to revalue efficiencies could lead to an increase in permission for some categories of mergers and a decrease in permission for other categories.

It is impossible to demonstrate or quantify the effect of any of these factors with certainty, but it seems probable that the relative coolness to merger efficiency arguments may not simply diminish the number of procompetitive mergers with high efficiencies, but alter the overall portfolio of mergers that firms consider and propose and that agencies and courts allow and prohibit. This by itself is not a sufficient reason to adopt a symmetry principle whereby efficiencies and harms of equal weight and probability should be equally weighted. It is, however, a reason to scrutinize the set of possible justifications for the principle of asymmetry embedded in U.S. and EU law and practice and currently being emulated by the scores of merger control regimes developing around the world.[106]

III. SOURCES OF HOSTILITY TO MERGER EFFICIENCIES

Neither U.S. nor EU law—including the relevant statutory or treaty provisions, implementing regulations or enforcement guidelines, and case law—contains an explicit acknowledgment of, or justification or, the asymmetry between predictive harms and efficiencies described in the previous section. To be sure, numerous statements as to the reasons for downplaying efficiencies defenses appear from time to time, but the relevant legal sources make no effort to provide a systematic account for the asymmetry. This section identifies and critically evaluates seven possible justifications.

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[105] *See, e.g.,* Kovacic, *supra* n. xxx at 915 (responding to criticisms of Bush era merger enforcement).

[106] Fox & Crane, *supra* n. xxx 451 (discussing proliferation of merger control regimes around the globe).

A. Productive Efficiencies Do Not Always Benefit Consumers

The most probable explanation for the asymmetry is an implicit concern that any efficiencies generated by the merger will be captured by the merging firms, but not passed onto consumers. Since Oliver Williamson's seminal article in 1968,[107] it has been well understood that mergers can simultaneously generate efficiencies and consumer harm if the merging firms appropriate the efficiencies solely for themselves as cost savings and fail to pass them onto consumers. Total societal welfare may be maximized if the cost savings exceed the sum of the consumer deadweight losses (and wealth transfers, if we count those as social costs), and yet consumer welfare may fall.

Where mergers generate total welfare increases but diminish consumer welfare, the merger-control regime must decide whether to accept a total welfare or consumer welfare (or, allocative efficiency, its cognate) standard. In both the U.S. and the EU, the currently prevailing regimes seem to favor a consumer welfare standard. Under EU law, any merger efficiencies must be sufficient to offset the anticompetitive impact on consumers,[108] which means that cost savings from mergers that are not passed onto consumers normatively count for nothing. The U.S. agencies are less clear on this point, but the bottom line seems to be a commitment to a consumer welfare perspective. The current guidelines state that "[t]he Agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market" and that "the Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm customers in the relevant market, e.g., by preventing price increases in that market."[109]

By contrast, Canada explicitly follows a total welfare standard, with apparent implications for the relative weighting of efficiencies and harms. The Canadian Competition Act not only allows a merger defense, but also commits Canada to a total welfare standard for mergers under which predicted harms are to be balanced against cost

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[107] Oliver E. Williamson, *Economies as an Antitrust Defense*: *The Welfare Tradeoffs*, 58 Am. Econ. Rev. 18 (1968).
[108] EC Horizontal Merger Guidelines, ¶ 79.
[109] HMG § 10.

savings from the merger, whether or not those savings are ultimately passed on to consumers. Canadian case law calls for a 'balancing weights standard" under which "any increase in surplus arising from the efficiency gain from the merger is balanced against the deadweight loss resulting from the likely anti-competitive effects of the merger and, where appropriate, some portion (including possibly all or none) of the associated transfer of surplus from consumers to producers."[110] Canadian law places the burden of proving harms on the Competition Bureau and the burden of proving offsetting benefits on the merging parties,[111] but seems to place no greater weight on either side of the scale.

The American and European commitment to a consumer welfare criterion for merger review may provide a strong positive explanation for the asymmetrical treatment of harms and efficiencies, but not a normatively appealing one. Even assuming that normative commitment to consumer welfare rather than total social welfare is appropriate, this is no reason to discriminate against efficiencies in the probability requirement. If the commitment to the consumer welfare objective is what motivates the dismissal of certain forms of efficiency defenses, then the hostility to efficiencies claims should be limited to those that are not passed onto consumers. Instead, both the American and European guidelines cut twice against efficiencies defenses, first by insisting that only consumer-benefiting efficiencies be recognized and second by requiring heightened proof as to even consumer-benefiting efficiencies.

One might respond that the guidelines are not really double-discounting efficiencies but rather reflecting the fact that antitrust agencies will cast a jaundiced eye on efficiencies claims since efficiencies often will not benefit consumers. But casting a jaundiced eye at efficiencies writ large would only be appropriate if the agencies did not have adequate tools for predicting which merger efficiencies will be passed onto consumers and which will be appropriated by the merging firms. In fact, antitrust economics has robust predictive tools for making those determinations. Generally, it

[110] Canadian Competition Bureau Bulletin, *Efficiencies in Merger Review*, (March 2, 2009), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02982.html (citing *Canada (Commissioner of Competition) v. Superior Propane Inc.* (August 30, 2000), CT-1998/002 (Canadian Competition Tribunal)).
[111] *Id.*

is well understood that fixed cost savings are likely to be appropriated by the merging firms but that marginal cost savings are likely to be passed on, to some degree, to consumers.[112] Economists have developed models for determining the level of marginal cost reductions necessary to prevent price increases in unilateral effects cases in differentiated goods,[113] and separately in coordinated interaction cases involving homogeneous products.[114] Other economic work shows that, as a general matter, fifty percent should be the minimum pass-through for marginal cost reductions.[115]

In light of the sophistication of economic knowledge on whether merger efficiencies are likely to be passed along to consumers, there is no reason for undifferentiated hostility to efficiencies defenses even if a jurisdiction believes that only consumer-benefiting efficiencies should count. Given those priors, the appropriate approach is to require evidence of consumer-benefiting efficiencies, not to cast a pall over efficiencies claims as a class.

One institutional explanation for the asymmetry of treatment is that the lawyer class in the antitrust agencies distrusts the economist class. As a class, economists (including many of the staff economists working in the antitrust enforcement agencies) tend to support a total welfare standard for antitrust, believing that antitrust is a poor vehicle for addressing distributive concerns.[116] By contrast, the lawyer

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[112] *See* Kenneth Heyer, *Welfare Standards and Merger Analysis: Why Not the Best?*, Economic Analysis Group Discussion Paper (March 2006), http://www.abanet.org/antitrust/at-source/pdf/references/heyer-ken-06-8.pdf.

[113] G. Werden, "A Robust Test for Consumer Welfare Enhancing Mergers among Sellers of Differentiated Products," 44 J. INDUS. ECON. 409 (1996).

[114] L. Froeb & G. Werden, "A Robust Test for Consumer Welfare Enhancing Mergers among Sellers of a Homogeneous Product," US Dept. of Justice Antitrust Division, Economic Analysis Group Discussion Paper 97-1 (1997).

[115] J. Hausman and G. Leonard, "Efficiencies From the Consumer Viewpoint," 7 GEO. L. REV. 707 (1999); *but see* O. Ashenfelter, "Identifying the Firm-Specific Cost Pass-Through Rate," FTC Bureau of Economics Working Paper No. 217 (1998)(estimating 21% pass through rate for Office Depot/Staples merger).

[116] *See, e.g.*, Gregory J. Werden, *Monoposony and the Sherman Act: Consumer Welfare in a New Light*, 74 Antitrust L. J. 707, 708 n. 5 (2007) ("Many economists advocate what is termed a *total surplus* or *total welfare* standard); Kenneth Heyer, *Welfare Standards and Merger Analysis: Why Not the Best?*, Competition Pol'y Int'l, Autumn 2006, at 29 (arguing for total welfare standard); William J. Kolasky & Andrew R. Dick, 71 Antitrust L. J. 207, 230 (2003) (noting that most economists argue for a total welfare approach); Fisher & Lande, *supra* n. xxx at 1649 ("[M]ost

class—reflecting the "consumer welfare" perspective of the courts and a moralistic concern about wealth redistribution and consumer "rights—tends to prefer a consumer welfare standard.[117]

This asymmetry in perspective between the economist and lawyer classes shows up in empirical work concerning the separate analysis of efficiency claims by lawyers working in the FTC's Bureau of Competition and the lawyers working in the Bureau of Economics.[118] In the study of internal staff reports regarding 147 transactions for which a second request for documents[119] was issued, the study's authors found that the Bureau of Competition's lawyers accepted eight percent of efficiencies claimed by the merging parties whereas the Bureau of Economics' economists accepted twenty-seven percent of the parties' efficiency claims.[120] The FTC's economists seem to lend considerably greater credence to efficiencies claims than do their lawyer peers.

Empirical work has shown that the lawyer class tends to predominate in influence over the economist class in the antitrust enforcement agencies.[121] The devaluation of merger efficiencies in the merger guidelines and in case law may reflect the lawyer class's effort to prevent the emergence of an implicit total welfare standard. The mere articulation of the consumer welfare standard in guidelines

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economists argue that antitrust law are a very poor method of wealth redistribution, and that sound public policy requires one to separate redistribution concerns completely from efficiencies analysis"); Kenneth Elzinga, *The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts?*, 125 U. Pa. L. Rev. 1191 (1977) (summarizing economic arguments in favor of an efficiency standard).

[117] *See, e.g.*, John B. Kirkwood, *Buyer Power and Exclusionary Conduct: Should Brooke Group Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?*, 72 Antitrust L. J. 625, 631 n. 11 (2005) (observing that "many leading law professors" prefer a consumer welfare standard).

[118] Malcolm B. Coate & Andrew J. Heimert, *Merger Efficiencies at the Federal Trade Commission*, http://www.ftc.gov/os/2009/02/0902mergerefficiencies.pdf.

[119] *Id.*

[120] *Id.*

[121] Malcolm B. Coate, Richard S. Higgins & Fred S. McChesney, *Beaucracy and Politics in FTC Merger Challenges*, in THE CAUSES AND CONSEQUENCES OF ANTITRUST: A PUBLIC CHOICE PERSPECTIVE 213-230 (Fred S. McChesney & William F. Shughart II eds.,1995) (finding based on empirical study that a "disagreement between economists and lawyers about whether to challenge a merger is not a 'fair fight.' Lawyers have greater influence with the commission over the decision.").

and case law may be perceived (consciously or unconsciously) as insufficient to ensure that only consumer welfare enhancing efficiencies count in the relevant calculus.

B. Efficiencies Claims Are Difficult to Prove

One possible reason for the marginalization of efficiencies defenses is that efficiencies may be difficult to prove. Both the U.S. Horizontal Guidelines and the agencies' Commentaries on the guidelines note that many purported efficiencies are simply never proven or could be achieved in ways less restrictive of competition.[122] Even in cases where the merging parties prevail in court or before the agencies in arguing that merger is unlikely to create anticompetitive effects, they often lose on the question of whether they have shown offsetting efficiencies. Thus, for example, in the *Oracle-PeopleSoft* litigation, Judge Walker rejected the Justice Department's anticompetitive effects claims, but also rejected Oracle's efficiency justifications as unproven.[123]

The justification for this systematic skepticism that efficiencies claims have not been proven with adequate certainty cannot be just that the efficiencies claims concern a future event—the parties' cost curve following the consummation of the merger—and hence are inherently speculative. Predictions about anticompetitive share the same property—they rely on probabilistic efforts to divine the future.[124]

A more serious objection is that the current state of economic thinking has robust tools for establishing anticompetitive effects but not such robust models for forecasting efficiencies. Hence, one might believe that given specified demand diversion ratios, unilateral anticompetitive effects of a certain magnitude are highly likely to follow if the merging parties are the producers of each other's best substitutes. One might also believe that predictions about how combining productive inputs such as factories, machines, intellectual property, or distribution channels are inherently speculative because

[122] Department of Justice and FTC Commentary on the Horizontal Merger Guidelines, § 4 (March 2006), http://www.justice.gov/atr/public/guidelines/215247.htm#46.
[123] *U.S. v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004).
[124] *See infra* text accompanying notes xxx – xxx.

there are no tested and reliable models for predicting such effects.[125] Combining these two prior beliefs, one would then approach anticompetitive effects stories with greater credulity than efficiencies stories.

But this explanation—even if an accurate positive account—does not provide a strong normative justification for the asymmetrical treatment of costs and benefits. For one, in at least one circumstance—innovation theory—the antitrust authorities treat harms and efficiencies asymmetrically even though they derive from the identical mechanism—innovation through research and development. Under the 2010 guidelines, the agencies highlight concerns over the reduction of innovation incentives as a possible anticompetitive effect of mergers. For example, Section 6.4 of the guidelines state that "[t]he Agencies may consider whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger."[126] On the other hand, when discussing efficiencies defenses, the guidelines state that research and development synergies "are potentially substantial but are generally less susceptible to verification and may be the result of anticompetitive output reductions."[127] Some economists claim that innovation effects from mergers are too speculative to predict with anything approaching scientific rigor,[128] but that should lead to equal discounting of innovation-harm theories and innovation-enhancement defenses. The guidelines appear to give ordinary credence to innovation-harm theories even while discounting innovation-enhancement defenses. Whether or not this is justified in some way, the explanation cannot be a difference in prior beliefs about the likelihood that innovation effects can be proven to an adequate level of probability.[129]

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[125] One might simultaneously believe that there are good models for predicting whether marginal cost savings will be passed onto consumers, *see supra* xxx, and that there are not good models for predicting whether mergers will achieve marginal cost savings.

[126] HMG, § 6.4.

[127] *Id.* , § 10.

[128] *See, e.g.*, Richard Rapp, *The Misapplication of the Innovation Market Approach to Merger Analysis*, 64 Antitrust L. J. 19 (1995).

[129] Empirical work has shown, albeit weakly, that the FTC staff tend to give greater weight to dynamic efficiency claims than to static efficiency claims, suggesting an

Beyond the example of inconsistency with respect to innovation theories, the asymmetrical treatment of harms and benefits cannot be justified conceptually based on the relative differences in strength of probabilistic proof. The fact that parties may not be able to prove efficiencies *in fact* does not justify maintaining a different *standard of proof*. It is circular to say that efficiencies should not be lightly used to justify potentially anticompetitive mergers because efficiencies are difficult to prove, and then reject a particular instance of purported efficiencies because it failed to meet the high standard of proof.

C. Mergers Are Driven By Kingdom-Building Rather than Increasing Shareholder Value

A related explanation for efficiency claim scepticism may derive from a general suspicion that mergers are driven by corporate managers eager to enlarge their "fiefdoms" rather than by maximizing returns to shareholders. Various empirical studies have shown that many large corporate mergers generate negative shareholder returns.[130] For instance, Scherer and Ravenscraft showed that the massive merger wave that peaked during the 1960s resulted in manufacturing inefficiencies that reduced U.S. real gross national product by between 0.074 and 0.101 percentage points between 1968 and 1976.[131] Carl Shapiro, the current Deputy Assistant Attorney General for Economics at the Antitrust division has taken the position that "the evidence from the finance, managerial, and economics literatures shows that many mergers do not work out well . . . This evidence certainly does not support the view that merger-specific efficiencies are common or that claims of

implicit inflation in the value of dynamic efficiency claims to match the staff's overall willingness to accept dynamic inefficiency claims (*i.e.*, theories of harm to innovation incentives resulting from the post-merger exercise of market power). Coate & Heimert, *supra* n. xxx at 19.

[130] *See, e.g.*, DAVID J. RAVENSCRAFT & F.M. SCHERER, MERGERS, SELL-OFFS, AND ECONOMIC EFFICIENCY (1987).

[131] F.M. Scherer, *A New Retrospective on Mergers*, 28 Rev. Indus. Org. 327, 329 (2006) (reporting on key findings from earlier book).

efficiencies made by merging parties should generally be credited."[132]

But even assuming that this empire-building/agency cost account of merger activity is true as to some portion of mergers,[133] it does not provide a sufficient reason for a merger policy asymmetry between costs and efficiencies either. Even if large corporate mergers as a class systematically fail to generate efficiencies, that finding provides relatively little information on the likelihood that the specific class of mergers under consideration in difficult merger review decisions are inherently unlikely to create efficiencies. For instance, Scherer and Ravenscraft's study focused on conglomerate mergers, which are not generally a subject of antitrust scrutiny.[134] As Scherer has written more recently, "[o]ne might expect opportunities for cost savings and benefits from complementarity to be much stronger for horizontal and vertical mergers than for conglomerates, and so the record of widespread failure we documented may simply have become irrelevant."[135] As to the class of mergers in which the efficiency defense generally comes into play, there is no reason for strong prior beliefs as to whether efficiencies are likely or unlikely.

D. Counterattacking Optimism Bias

A possible justification related to, but analytically distinct from, the last two discussed is that governments and courts need to adjust the standard of proof because proposed mergers are systemically

[132] Jonathan B. Baker and Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement," paper presented at the Kirkpatrick Conference on Conservative Economic Influence on U.S. Antitrust Policy*, Georgetown University Law Center, October 2007, available at: http:// faculty.haas.berkeley.edu/SHAPIRO/mergerpolicy.pdf.

[133] There are, of course, competing views. *See, e.g.*, G. BENSTON, CONGLOMERATE MERGERS: CAUSES, CONSEQUENCES, AND REMEDIES (1980).

[134] Alan Devlin, *Antitrust in an Era of Market Failure*, 33 Harv. J.L. & Pub. Pol'y 557, 596 (2010) ("Conglomerate mergers, which are combinations of firms that are neither vertically nor horizontally related, do not bear the potential for unilateral or coordinated price effects and have not been an object of U.S. antitrust concern in this generation.").

[135] Scherer, *supra* n. xxx at 330.

biased toward over-optimism.[136] Generically, business managers make overly optimistic predictions about the future success of their firms, including the efficiencies that they could capture from a merger.[137] Thus, if one were to take the set of all mergers that managers consider, ask the managers to predict what efficiencies they might capture from the merger, and then track actual results post-merger, one would expect that sum of captured efficiencies would be less than the sum predicted by managers. Further, not all managers who consider mergers carry through with the idea. The ones most likely actually to propose a merger are the most optimistic ones. Hence, the set of merger proposals antitrust agencies have to screen may be skewed toward systemic over optimism.[138] Since regulators and courts lack good information on which mergers would actually generate efficiencies, they may need to respond to this systemic bias by requiring particularly compelling proof of efficiencies.

The problem with this justification for a differential standard of proof for efficiencies and harms is that it assumes that only one side of the ledger manifests bias. In order to justify a principle of legal or administrative asymmetry, it would need to be the case that the proponents of theories of harm manifest a lesser degree of systemic bias than the proponents of efficiencies. In civil litigation, for example, it is obvious that the plaintiffs are biased to see the facts most favorably to themselves and hence bring many meritless cases. This would be a good reason to require proof by a standard greater than preponderance of the evidence except for the fact that defendants are equally biased in the direction of denying liability and

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[136] Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806, 806 (1980) (describing phenomenon of optimism bias).

[137] Anand Mohan Goel & Anjan V. Thakor, *Rationality, Overconfidence and Leadership* 3-4 (Univ. of Mich. Ross Sch. of Bus. Working Paper Series, Working Paper No. 00-022, 2000), available at http://hdl.handle.net/2027.42/35648 (showing that overconfident managers are more likely to be selected as leaders than less confident managers).

[138] Jonathan B. Baker & Carl Shapiro, *Detecting and Reversing the Decline in Horizontal Merger Enforcement*, 22- SUM-Antitrust 29, 33 (2008) ("There is considerable evidence that acquiring firms are systematically over-optimistic about the efficiencies they can achieve through acquisition .... This evidence does not support the view that merger-specific efficiencies are common or that claims of efficiencies made by merging parties should generally be credited.").

seeking exculpation. The accommodation is that the fact-finder must scrutinize each side of the ledger with some degree of scepticism, although the standard of proof remains set at equipoise (except in those cases where, for collateral reasons, some higher degree of proof is preferred).[139]

Conceding that merger proponents are biased to believe that efficiencies will result, what is the evidence that merger opponents are neutral with respect to anticompetitive effects? The first class of relevant merger opponents are the business interests that sometimes mobilize to persuade the antitrust agencies to block a merger. For example, when Google announced its intention to purchase ITA Software, a provider of software services to Internet travel search sites, a coalition of rivals including Microsoft, Tripadvisor, Expedia, Kayak, and Hotwire launched a public relations campaign to convince antitrust enforcers to block the deal.[140] The European Commission's decision to block GE's acquisition of Honeywell may have been influenced by GE's competitors, concerned about a more powerful rival.[141] It is not unusual to observe competitors scrambling to oppose mergers that may diminish their relative standing in the market.

Often, the pressures against mergers are more subtle and, indeed, difficult to assess. Rivals of the merging firms have complex incentives. They may disfavor the merger because it creates a stronger competitor, favor the merger because it creates a more concentrated market in which tacit collusion is easier, disfavor the merger because it creates a more concentrated market which makes the rivals' own future acquisitions harder to justify, or favor agency approval because it sets a precedent for their own future deals (on the theory that competition in the market is robust).[142] It is impossible to capture the direction or magnitude of this bias as a class. Customers

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[139] MCCORMICK ON EVIDENCE § (Kenneth S. Broun ed., 6th ed. 2006).
[140] The coalition's website is fairsearch.org.
[141] Eleanor M. Fox, *GE/Honeywell: The U.S. Merger that Europe Stopped—A Story of the Politics of Convergence*, in ANTITRUST STORIES 339 (Eleanor M. Fox & Daniel A. Crane, eds, 2007) (reporting that teams of lawyers from United Technology, Rolls-Royce, and Rockwell Collins visited European Commission's Directorate General for Competition to complain about the GE/Honeywell deal).
[142] *See generally* HMG § 2.2.3 (discussing difficulties with relying on competitors' opinions in merger cases).

also have incentives with respect to mergers of their suppliers that are difficult to map.[143]

A second kind of bias concerns the incentives of antitrust enforcers. Public choice literature suggests that antitrust enforcers are not merely detached public servants on a truth-seeking expedition.[144] They are susceptible to all of the usual biases and influences of regulators. They may oppose mergers in order to aggrandize their own agency's influence, justify their agency's budget, get into newspaper headlines, support a political party's standing, pacify a member of Congress, advance an ideological agenda, or promote their individual careers.

This is not to say that antitrust enforcers are untrustworthy as a class. Rather, it is to acknowledge that systemic bias in merger control is not unilateral. Unless one believes that the optimism bias of merger proponents is so strong that it swamps all other influences—a proposition without substantial support—there is no reason to deviate from symmetry in the standards of proof for efficiencies and harms.

E. Efficiencies Create Undue Dominance

The previous lines of argument rested on skepticism that mergers often generate efficiencies. A different line of argument accepts that mergers often do generate efficiencies and affirmatively counts them against the merger on the theory that efficiencies acquired through merger upset the balance of the playing field and tend toward long-run dominance in the merging firms.

This suspicion of merger efficiencies as creating unwholesome competitive advantages has a storied history in U.S. case law. In *Brown Shoe*, the court found that the efficiencies created by vertical integration between a shoe manufacturing company and a shoe retailer counted *against* a vertical mergers since "by eliminating wholesalers and by increasing the volume of purchases from the manufacturing division of the enterprise, [the merging parties] can

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143 Ken Heyer, *Predicting the Competitive Effects of Mergers by Listening to Customers*, 74 Antitrust L. J. 87 (2007).

144 *See generally* THE CAUSES AND CONSEQUENCES OF ANTITRUST: A PUBLIC CHOICE PERSPECTIVE (Fred S. McChesney & William F. Shughart II eds., 1995).

market their own brands at prices below those of competing independent retailers."[145] The FTC extended this view in *In re Foremost Dairies*,[146] where it rejected a dairy industry merger that would likely have resulted in significant synergies and access to capital markets.[147] The Commission held that a showing "that the acquiring firm possesses significant market power in some markets or that its overall organization gives it a decided advantage in efficiency over its smaller rivals" demonstrates a violation of Section 7 of the Clayton Act.[148] In *Procter & Gamble*, the Supreme Court back away from the view that efficiencies could count against a merger, holding that they could count neither for nor against a merger.[149] *Procter & Gamble* remains, by virtue of inertia, the official position in Supreme Court jurisprudence, although the Court has not decided a merger case since 1976 and it is doubtful that it would follow that position today.[150]

On the European side, something similar may have happened in *GE/Honeywell*. The Commission's portfolio effects theory depended on a prediction that the combination of the resources of GE's various divisions, including GE Capital and GE's engine divisions, with Honeywell's avionics products would allow the merged firms to charge lower prices to their consumers and hence distort the level playing field.[151] Although Mario Monti—the EC's Competition Commissioner-denied that the portfolio effects theory was a rejection of an efficiency defense,[152] it is hard to understand the argument as anything other. The specific theories invoked, such as the

[145] *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 344 (1962).
[146] 60 F.T.C. 944 (1962), *modified*, 67 F.T.C. 282 (1965).
[147] *Id.* at 1083-84.
[148] *Id.* at 1084.
[149] *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967) ("Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition.").
[150] *See* AREEDA & HOVENKAMP, *supra* n. xxx ¶ 970c1 at 31 ("The Court's brief and unelaborated language cannot reasonably be taken as a definitive disposition of so important and complex an issue as the proper role of economies in analyzing the legality of a merger.").
[151] *See* Eleanor M. Fox, *GE/Honeywell: The U.S. Merger that Europe Stopped—A Story of the Politics of Convergence*, in ANTITRUST STORIES (Eleanor M. Fox & Daniel A. Crane, eds, 2007).
[152] *Id.* at 344.

elimination of double marginalization through bundling and leveraging the ability to extend credit across larger commercial enterprises, are precisely the kinds of efficiency defenses often raised in vertical and horizontal cases. The Commission also appeared to hold efficiencies against the merger in two earlier cases, Areospatiale/Havilland and Boeing/McDonnell Douglas,[153] and in a more recent case, Vodafone AirTouch/Mannesmann.[154]

Assuming for the sake of argument that merger efficiencies sometimes destabilize competition and create market dominance, this is not a reason for undifferentiated hostility to merger efficiencies. Even if some merger efficiencies harm competition, this is surely a minority of all merger cases. The merging firms may be merging simply to catch up with other firms that have already achieved particular efficiencies. Or, other non-merging firms have alternative paths for matching efficiencies generated by the merging parties and a new incentive to do so.

Moreover, the claim that efficiencies will likely occur and that, in the long run, they will destabilize competition to the detriment of consumers, is necessarily more speculative on average than a merger efficiencies defense since it relies on proof not only that efficiencies will occur but that they will subsequently destabilize competition. It makes no sense to hold defendants to a high standard of proof that pro-competitive efficiencies will result and simultaneously hold the government to a low burden of proof that anti-competitive efficiencies will result. What's sauce for the goose is sauce for the gander.

F. Status Quo Preference

Another cluster of possible reasons for a principle of asymmetry relates to a general preference for the status quo over change. The relevant phenomena could be grouped under a number of different headings, including risk aversion, endowment effect, loss aversion, status quo bias, and a precautionary principle. For simplicity, I consider them under the headings loss aversion and the precautionary principle.

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[153] Pitofsky, *Efficiency Consideration*, *supra* n. xxx at 1423-24.

[154] Philip J. Weiser, *Reexamining the Legacy of Dual Regulation: Reforming Dual Merger Review by the DoJ and FTC*, 61 Fed. Comm. L. J. 167, 188 (2008).

1. Loss Aversion

Antitrust regulators may react asymmetrically to potential losses and gains. It is well established in behavioral theory that decision makers, including regulators, sometimes weight potential losses more than potential gains of an equivalent magnitude.[155] If regulators consider the competitive status quo the relevant baseline, then anticompetitive effects may count as losses whereas merger-specific efficiencies may count as gains. This would then explain the asymmetry principle—that efficiencies must be more certain than harms in order to offset the harms.

A more particular explanation for asymmetry concerns the political consequences of prohibiting or approving a merger. An antitrust enforcement agency will face blame for price increases resulting from a merger but rarely for price decreases that did not occur because a merger was wrongly blocked.[156] Hence, the agencies have a greater incentive to block mergers that might result in gains to consumers than to approve mergers that might result in losses to consumers.

While loss aversion may explain the asymmetry principle's existence, it cannot justify the principle normatively. Even assuming that consumer loss aversion is normatively neutral,[157] regulatory loss aversion is categorically undesirable unless it channels the preferences of political constituents in a democratically legitimate way. There is no good reason to think that consumers, as a class, would exhibit loss aversion as to merger decisions as a class. To be sure, the consumers affected by a particular merger—say one involving dog food—might exhibit loss aversion as to that particular

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[155] *See, e.g.*, Roger G. Noll & James E. Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, 19 J. Legal Stud. 747 (1990).

[156] For example, commentators have blamed high oil prices on lax merger enforcement in the oil industry. See Public Citizen, *Mergers, Manipulation, and Mirages: How Oil Companies Keep Gasoline Prices High, and Why the Energy Bill Doesn't Help* 1 (2004), http://www.citizen.org/documents/oilmergers.pdf ("The United States has allowed multiple large, vertically integrated oil companies to merge over the last five years, placing control of the market in too few hands. The result: uncompetitive domestic gasoline markets.").

[157] *See* Matthew D. Adler, *Welfare Polls: A Synthesis*, 81 NYU L. Rev. 1875, 1917 (2006) (describing loss aversion as "a kind of preference distortion");

merger. But consumers who buy dog good also buy toothpaste, DVD players, and life insurance, all of which industries are also subject to merger policy. As to the class of merger activities, they are diversified and therefore should prefer a strategy that maximizes their overall wellbeing, even if it leads to occasional price increases.[158] Regulatory loss aversion in the merger context seems merely to reflect the self-preservationist biases of regulators.

2. Precautionary Principle

Another source of status quo bias or preference may derive from more general theories of cost-benefit analysis. Cass Sunstein has identified a "precautionary principle" at work in almost every legal system.[159] Under the precautionary principle, when a new behavior—such as the introduction of a new drug—creates a risk of harm, the proponents of the new behavior bear a heavy burden of disproving the likelihood of harm before the change should be allowed. Thus, for example, if a new drug might cause cancer as a side effect, it should be kept off the market until the issue is fully studied and the cancer risk ruled out. Merger harms may thus be given more weight than merger efficiencies because the merging parties—the proponents of change—bear the burden of ruling out the possibility that their activity will lead to harm.

As Sunstein notes, however, this principle can be "literally paralyzing" because it prohibits both action and inaction.[160] For example, suppose that the drug creates a 10% risk that 100 people will die but a 10% probability that 100 people will be saved. Allowing the new drug risks killing 100 people but disallowing the new drug also risks killing 100 people. What is called for in such a situation is not an application some a priori principle about avoiding risks but rather a cost-benefit analysis given the relative probabilities and magnitudes of the respective risks of action and inaction.

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[158] *See, e.g.*, Richard A. Posner, *Are American CEOs Overpaid, and, if so, What Should be Done About It?*, 58 Duke L. J. 1013, 1037 (2009) (discussing relationship between loss aversion and diversification).
[159] Cass R. Sunstein, *Beyond the Precautionary Principle*, 151 U. Pa. L. Rev. 1003 (2003).
[160] *Id.* at 1003.

Nonetheless, there may be circumstances when some version of the precautionary principle carries weight. The first strain involves changes—such as pollution leading to global warming or deregulation of nuclear facilities—that entail an uncertain probability of irreversible catastrophic consequences.[161] The second involves changes with uncertain, and potentially unjust, distributive consequences.[162] Neither of these strains of precautionary principle theory provides support for a principle of asymmetry in merger review.

The irremediable catastrophic event strain of the precautionary principle has no application to mergers. Merger policy involves calculations of risk—bounded predictions—rather than complete uncertainty.[163] The consequences of anticompetitive mergers, even if undesirable, are hardly ever catastrophic. Most significantly, mergers are not irremediable. It is possible (although difficult) to force parties to unwind an anticompetitive merger if they begin to exercise anticompetitive power because of the merger.[164]

If anything, the option to unwind mergers that turn out to be anticompetitive suggests that efficiencies should be given *more* weight than theories of harm. Once a merger is blocked, there is virtually no chance that the merger will be allowed at some future point. This is for two reasons. First, given the time-sensitivity of most mergers, deals that are not consummated quickly are usually never consummated.[165] Second, once an agency or court has blocked a merger for antitrust reasons, subsequent events will not usually provide it an occasion to rethink its position and allow the merger to transpire. If the market remains essentially static, then there will

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[161] Cass R.. Sunstein, *Irreversibility*, 9 Law, Probability & Risk 227, 235-36 (2010); Cass R. Sunstein, *The Catastrophic Harm Precautionary Principle*, *Issues in Legal Scholarship*, Catastrophic Risks: Prevention, Compensation, and Recovery (2007): Article 3, available at [ ]http:// www.bepress.com/ils/iss10/art3.; Cass R. Sunstein, *Irreversible and Catastrophic*, 91 Cornell L. Rev. 841 (2006).

[162] *See*, *e.g.*, Stephen M. Gardiner, *A Core Precautionary Principle*, 14 J. Pol. Phil. 33 (2006).

[163] Peter L. Bernstein, *Against the Gods: The Remarkable Story of Risk* 133, 219 (1996) (discussing the distinction between and explaining that “uncertainty means unknown probabilities,” while risk is measurable).

[164] *See*, *e.g.*, HMG § 2.1.1 (discussing evidence that might support unwinding of consummated merger).

[165] *See supra* text accompanying notes xxx –xxx.

usually be little reason to make a different prediction about competitive effects a few years after the initial decision. If the market changes considerably, for example because of entry or exit of firms, significant changes in consumer demand, or the introduction of new technologies, the merger review calculus of the agencies changes but so does the merger calculus of the parties. One finds very few examples of mergers initially prohibited but then allowed a few years later.

The upshot is that the option value of disallowing a merger after consummation is greater than the option value of allowing a merger after initial prohibition. Even if the option value of unwinding a merger is small given the costs to the agencies and parties, given that the option value of allowing a merger in the future is close to zero, option theory cuts in favor of either neutrality between harms and efficiencies or a slight preference for efficiencies.

The other argument sometimes made in support of some version of the precautionary principle is that because changes in social or economic structures—such as mergers—have distributive consequences, regulatory decision-makers need to rule out the possibility that the distributive changes will be unjust.[166] But that argument has little to do with merger policy, since regulatory decision-makers generally lack good information on the distribution of gains and losses from mergers as between classes of consumers.[167] They do know something about the predictive distribution of gains and losses as between producers and consumers—and in consumer welfare jurisdictions at least insist the net consumer position be predicatively positive. But this is very different from being able to predict that a merger will lead to a welfare gain for old people and a welfare loss for poorer people, or other such trade-offs within the consumer class that might be expected in other regulatory contexts, such as those dealing with the side-effects of drug therapies or changes in workplace safety rules.

The same is true of mergers. It makes no sense to give more weight to merger risks than to benefits of equal probability and magnitude. The risks and benefits simply need to be weighed given

[166] *See, e.g.*, Stephen M. Gardiner, *A Core Precautionary Principle*, 14 J. Pol. Phil. 33 (2006).
[167] Daniel A. Crane, *Technocracy and Antitrust*, 86 Tex. L. Rev. 1159, 1213-14 (2008).

the best available evidence about their relative probabilities and magnitudes.

G. Deconcentration as a Political Value

A final potential reason for discriminatory treatment of risks and efficiencies relates to what Bob Pitosfky has referred to as antitrust's "political content."[168] Perhaps mergers that increase concentration to certain thresholds should be barred for political or social reasons, even if there are efficiencies sufficient to offset any harms to consumers.

The "political content" argument could come in two different very different flavors, and distinguishing between them is essential to testing the soundness of the proposition. One version of the argument—consistent with the mid-twentieth century U.S. Congressional concern with a "rising tide of concentration" in the American economy[169]—would worry about the overall level of concentrated economic power in the private sector. The other version would be concerned about aggregations of market power in specific, culturally or politically sensitive industries.

The "rising tide" argument depends on an empirical observation that a particular nation's economy has reached a concentration danger zone that justifies condemning mergers of a certain threshold, even if those mergers are justified by consumer-friendly efficiencies. It is far from true that such a case could be made today, certainly at least for the American economy. To take one snapshot, in 1980 the U.S. economy had 2.7 million corporations, 1.4 million partnerships,

[168] Robert Pitofsky, *The Political Content of Antitrust*, 127 U. Pa. L. Rev. 1051 (1979).

[169] *U.S. v. Von's Grocery Co.*, 384 U.S. 270, 276 (1966) ("'The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy.' To arrest this 'rising tide toward concentration into too few hands and to halt the gradual demise of the small businessman, Congress decided to clamp down with vigor on mergers.") (*quoting Brown Shoe Co. v. United States*, 370 U.S. 294, 315 (1962)).

and 9.7 million non-farm sole proprietorships.[170] Two decades later, after a period generally thought to have been characterized by lax merger enforcement, the economy had 5.5 million corporations, 2.0 million partnerships, and 17.7 million non-farm sole proprietorships.[171] The top 1,000 firms accounted for a smaller share of GDP than fifty years earlier.

Further, even if one were to find "rising tide" arguments generally appealing, there is an instrumental mismatch between a deconcentration policy objective and hostility to efficiencies defenses. Many gargantuan corporate mergers raise few antitrust concerns because the merging firms have few or no competitive overlaps or because they occur in relatively unconcentrated markets. Such mergers contribute far more to an increasing consolidation of economic power in the economy as a whole than do many mergers of small companies that attract antitrust attention because they occur in concentrated markets.

The second argument, that aggregations of market power in culturally or politically sensitive industries may be undesirable even if those aggregations result in efficiencies, is also not a general justification for an asymmetrical approach to merger costs and benefits. Assuming that political or social considerations sometimes count in favor of blocking a merger, such values should not be concealed in an implicit hostility to efficiencies. Instead, they should be affirmatively expressed and weighed against other values in the context of merger review in limited set of cases to which they apply.

Suppose, for example, that a large media merger increases concentration to levels that raise competitive concerns or achieves vertical integration that could potentially be used to block competitors from access to essential inputs. Suppose that the merger would also generate large efficiencies that would be passed on to consumers. Further suppose that there is a legitimate concern that concentrating too much power over news or entertainment in single managerial hands would lead to cultural or political hegemony—concerns that were raised with respect to AOL's merger with Time

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[170] Lawrence J. White, *What's Been Happening to Aggregate Concentration in the United States (And Should We Care?)*, http://www.stern.nyu.edu/eco/wkpapers/workingpapers02/02-03White.pdf.

[171] *Id.*

Warner[172] and Comcast's acquisition of NBC.[173] Step one in the analysis should require weighing the anticompetitive risks to consumers against the efficiencies, using an equal probability burden. At a second stage in the analysis, the separate political or social concerns should be raised and addressed in a transparent and open way.

To be sure, different values—such as consumer welfare and avoidance of cultural hegemony—are often difficult to compare because they are incommensurate. But that is all the more reason to raise and explore each value separately, as opposed to burying one value in an implicit reluctance to recognize another.

IV. RE-VALUING MERGER EFFICIENCIES

The preceding section questioned the possible justifications for asymmetrical treatment of merger costs and efficiencies. Since none of those justifications is sufficient to justify asymmetrical treatment, ordinary principles of cost-benefit analysis should apply to merger review. In particular, the predicted costs of mergers from the post-merger exercise of market power presumptively should be equally weighted with the predicted efficiencies of mergers with an equal present value.[174]

In order to operationalize a symmetrical approach, attention needs to be paid to three implementation issues. The first concerns the relationship between the standard of proof and the burden of proof. The second concerns questions of commensurability and

[172] Frank Rich, *Two 21st Century Foxes Elope*, N.Y. Times, Jan. 15, 2000, at A17 ("If you believe that the Internet is the greatest explosion of free expression and cultural resources of the past century, what happens when it is merchandised as a mass-market product by the biggest corporations in history?").

[173] Gautham Nagesh, *Lawmakers Divided Over Whether NBC-Comcast Merger Would Aid Diversity*, http://thehill.com/blogs/hillicon-valley/technology/126051-nbc-comcast-merger-divides-lawmakers-on-diversity-.

[174] The present value qualifier is necessary to highlight the fact that some efficiencies may not materialize for several years. For example, if two merging firms plan to close their existing inefficient plans and open a single new and more efficient plant within three years following the merger (but only if they are able to merge—making the new plant a merger-specific efficiency), the future efficiencies resulting from the merger should be discounted to reflect the fact that the possible anticompetitive harms could begin immediately following consummation of the merger.

balancing. The third concerns the increased costs that would arise from injecting greater complexity into merger review.

A. Standards of Proof and Burdens of Proof

This paper calls for a symmetrical standard of proof for merger efficiencies and predicted anticompetitive effects. That does not mean, however, that the government should be required to disprove possible efficiencies as part of its evaluation of the case. The weighting of costs and benefits is a separate question from the allocation of the burden of proof. As a general matter, burdens of proof should be allocated to the party who can obtain the relevant information at the lower cost.[175] In a merger cases, the information validating efficiency claims is often uniquely in the possession of the merging parties, and it therefore makes sense that the merging parties should bear the burden of sustaining efficiencies claims. Conversely, the government will ordinarily bear the burden of establishing predictive anticompetitive effects.

If the government and merging parties are held to the same standard of proof—preponderance of the evidence, for example—then, conceptually, harms and efficiencies will be given equal weight despite the different allocations of burdens of proof. This does not mean, however, that the merging parties will find it as easy to prove efficiencies as the government will to prove harms. It may be the case that certain classes of efficiencies are difficult to demonstrate even to fairly low thresholds of proof on a case-specific basis, even though there is a high degree of probability that they frequently appear in mergers.[176]

If probabilities of harm are easier to demonstrate on an individualized basis than probabilities of efficiencies, even though in the aggregate both harms and efficiencies are similarly likely in the relevant categories of cases, then merger policy will display a bias in favor of theories of harm even if it adopts an explicit symmetry principle. If so, then some systematic adjustment toward leniency, of the type advocated by Fisher and Lande, might still be justified.[177] However, the first-order preference should be to treat harms and benefits symmetrically on an individualized basis and only make a

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[175] CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, EVIDENCE (2003).
[176] *See* Fisher & Lande, *supra* n. xxx.
[177] *See supra* text accompany notes xxx – xxx.

systematic correction to the extent necessary in light of the system's actual experience with a principle of symmetry.

B. Balancing and Problems of Commensurability

Many commentators assert—along with the Merger Guidelines—that the interplay between predictions of harm and predictions of efficiencies cannot come down to "balancing."[178] The influential Areda-Hovenkamp treatise argues: "'Balancing' implies an ability to assign a common unit of measurement to the two things being balanced, and determine which outweighs the other. Except in the clearest cases, this is simply not what courts are capable of doing." [179] Indeed, it is often difficult to assign specific weights to anticompetitive effects and offsetting efficiencies given (a) uncertainty in the robustness of methodological tools, (b) data limitations with respect to future events, and (c) the likely timing in which anticompetitive effects or efficiencies may take effect and their subsequent duration. Small predictive differences generated by imprecise methodological tools and imperfect data make large differences in assigning probability-adjusted values. In most cases, it will be impossible to apply the suggested formula—assign equal weight to probability-adjusted net present values—mathematically and therefore to engage in anything approaching rigorous balancing.[180] The "40% probability of a $100 loss or gain" hypothetical presented in the introduction is just that—a hypothetical.

But the failure of commensurability is not a reason to abandon symmetrical treatment as an analytical principle. Rather, it is a reason to use the principle of symmetrical treatment as a policy mnemonic device, much as we already use mathematically indeterminate concepts like probable cause and reasonable suspicion to capture probability values around identified legal decisions. At present, the

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[178] IV AREEDA & HOVENKAMP, *supra* n. xxx ¶976c, at 103-04; Conrath & Widnell, supra n. xxx at 686 (arguing that "[t]he difficult challenge presented by such an efficiencies defense is whether there is a coherent way to balance the potential anticompetitive effects against its potential efficiency benefits"); Reckens, *supra* n. xxx at 179 (arguing that balancing of efficiencies and theories of harm can only take place under a total welfare effects framework).
[179] *See* IV AREEDA & HOVENKAMP, *supra* n. xxx ¶976c, at 103-04.
[180] *But see* Coate, *supra* n. xxx at 206-07 (arguing that econometric tools have sufficiently developed to permit calculations of net effects of efficiencies and increases in market power to be computed in some cases).

U.S. merger guidelines contain a mnemonic device of asymmetry—"the Agencies will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies."[181] They do not pretend that merger review involves precise computations of the probabilities of harms and benefits and a specified discount—say 20%–on the probability adjusted net present value of expected efficiencies before efficiencies are balanced against harms. If the mnemonic device of asymmetry is insupportable, as argued in this paper, then the proper response is to implement a mnemonic device of symmetry.

Changing verbal formulations in merger guidelines or case law is, of course, not enough to effectuate meaningful change in agency or judicial practice. The real point is that agencies and courts should be asked to think about merger efficiencies (at least those likely to be passed on to consumers) and predicted harms as concepts with equal prima facie dignity. By various institutional, legal, political, and administrative mechanisms, merger efficiencies have been deflated. They deserve a more hospitable welcome.

C. Costs of Increased Complexity

The final consideration concerns the enhanced costs of revaluing merger efficiencies. Commentators, particularly Fisher and Lande, have argued against individualized efficiencies defenses on the grounds that they increase both transaction costs—to parties, agencies, and courts—and uncertainty costs, since predicting whether a court or agency will accept an efficiencies argument is difficult.[182]

To be sure, an explicit or implicit revaluation of merger efficiencies will induce parties to spend more time presenting efficiencies arguments and require courts and agencies to spend more time considering them. That in itself is not a sufficient objection unless the marginal social benefit of a more fine-tuned merger review system is less than the marginal cost of processing more information. Two observations suggest that the costs of individualized efficiencies review are not great given the status quo.

First, Fisher and Lande presented a choice between no individualized consideration of efficiencies and symmetrical

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[181] HMG § 10.
[182] Fisher &Lande, *supra* n. xxx at 1677.

treatment of efficiencies and harms.[183] In fact, both the U.S. and the EU currently allow parties to make efficiencies arguments. As noted earlier, the FTC study shows that parties usually do and that the staff responds to them.[184] Neither the agencies nor the parties spend as much time on efficiencies arguments as they would if a symmetry principle were adopted so there would be some marginal cost to putting a greater weight on efficiencies. But the marginal cost need not be large, given that much of the information is already collected and disseminated.

Second, it is doubtful that a greater receptivity to efficiencies claims would substantially increase the unpredictability of merger decisions in the agencies. Fisher and Lande expressed their concern over unpredictability costs at a time when merger review was far more predictable than it is today. Structural presumptions, such as four firm ratio tests and the HHI, still dominated merger analysis.[185] Over the last three decades, antitrust analysis has progressively de-emphasized structural factors, moved toward more sophisticated econometric tools, and increasingly emphasized anticompetitive effects in differentiated goods and services markets.[186] As the 2010 Horizontal Merger Guidelines explain, the "Guidelines should be read with the awareness that merger analysis does not consist of uniform application of a single methodology. Rather, it is a fact-specific process through which the Agencies, guided by their extensive experience, apply a range of analytical tools to the reasonably available and reliable evidence to evaluate competitive concerns in a limited period of time."[187] The analysis has become far more nuanced and technical—and therefore less predictable. Lawyers can no longer offer their clients clean predictions in many potentially close cases.

The fact that merger analysis has become less predictable is not a reason to pile on additional and unnecessary unpredictability. But

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[183] *Id.*
[184] *Supra* n. xxx.
[185] Deborah A. Garza, *Market Definition, the New Horizontal Merger Guidelines, and the Long March Away from Structural Presumptions*, 10-OCT-Antitrust Source 1, 2 (2010) (explaining importance of structural presumptions in 1968 and 1982 Horizontal Merger Guidelines).
[186] *See supra* text accompanying notes xxx – xxx.
[187] HMG § 1.

given that merger review teams—both at the parties and at the agencies—already require the involvement of economists and industry experts in close cases and that these teams already consider efficiencies to some extent, relatively little marginal cost or unpredictability would be added by directing these teams to take efficiencies more seriously.

CONCLUSION

Merger policy has long been dominated by a focus on only one side of the ledger—anticompetitive effects. The reasons offered for ignoring the other side of the ledger are weak and often contradictory. A principle of symmetrical treatment of predicted harms and efficiencies would improve merger policy, without necessarily liberalizing it in undesirable ways.

For cultural and institutional reasons, the U.S. and EU are relatively unlikely explicitly to recognize a symmetry principle in the near future. Both jurisdictions have already had to overcome a view that efficiencies should count *against* mergers. Even conceding that efficiencies should play some small role in merger analysis was a big step. The U.S. and EU are unlikely to take the final step to a symmetry principle any time soon—particularly given the maintenance of principles of symmetry in recent merger guidelines revisions.

But the evolution of norms on the ground often precedes the evolution of norms on the books. Particularly as the agencies move away from structural presumptions and focus their attention on unilateral anticompetitive effects theories in differentiated markets, there is an opportunity for greater attention to efficiencies that may offset competitive concerns.

And then there is the rest of the world. At present, at least 86 jurisdictions have premerger notification regimes, many of them instituted in the last few years.[188] In many developing countries, economic growth (as opposed to short-run consumer welfare) ranks high among the priorities for the antitrust regime. Merger-generated efficiencies may receive a more cordial reception in jurisdictions

[188] Fox & Crane, *supra* n. xxx at 302.

eager to stimulate industrial development. The symmetry principle may first take root outside the traditional antitrust regimes.