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Democratic Deficits in Comparison: Best (and Worst) Practices in European, US and Swiss Merger Regulation*

THOMAS D. ZWEIFEL
Columbia University

Abstract

Policy-makers and scholars continue to express concerns that the EU suffers from a 'democratic deficit'. But most democratic deficit arguments are not based on recent empirical research; and seeing the EU as *sui generis*, they fail to compare the EU to other polities. This article compares the European 'regulatory state' with two federal democracies, the United States and Switzerland, in recent merger regulation. Its main finding is that European merger regulation is less democratic than American, but more democratic than Swiss regulation. If the EU suffers from a democratic deficit, it is hardly alone.

Introduction

The idea that the European Union (EU) suffers from a 'democratic deficit' resurfaced during the Maastricht referenda in Denmark and France and was made a fundamental objection by Germany's constitutional court in its Maastricht ruling that the EU cannot be integrated further unless its institutions are made more democratic (Weiler *et al.*, 1995; Scharpf, 1997). The issue becomes ever more salient as the Union prepares for further enlargement and the European Convention led by former French President Giscard d'Estaing debates how to make the EU more democratic.

Democratic deficit arguments have been classified and examined elsewhere (Zweifel, 2002a). Five main arguments are: that the EU lacks legitimization by a European *demos* or constitution; that it is overly secretive; that its increasingly majoritarian decision-making procedures under qualified majority

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voting (QMV) crush minorities; that it compounds a 'race to the bottom' where Member States lure multinationals with ever-lower taxes and ever-fewer regulatory obstacles; and finally that major European institutions such as the European Court of Justice or the European Central Bank are unaccountable. One key argument used to emphasize the weak powers of the European Parliament, the only supranational EU institution that is directly elected. Since Amsterdam, when the Parliament became a fully-fledged co-legislature with the Council of Ministers, and particularly since Parliament forced the wholesale resignation of the European Commission in 1999, the focus of the arguments has shifted to the democratic deficit of European regulation. Above all, only every second European trusts the Commission, the EU's executive branch, according to a November 2001 *Eurobarometer* survey. Commission regulators make many new rules every year and do so largely away from the public eye. In this context, democratic deficit means defects of public policy-making: lack of transparency, insufficient public participation, insufficient reason-giving, excessive technical and administrative discretion, and inadequate mechanisms of accountability (Majone, 1998, p. 21).

How bad is the democratic deficit of the EU? We cannot answer by looking at the EU in a vacuum or comparing it to an ideal democracy (Moravcsik, 2002). Instead, I compare the accountability and independence of merger regulation in the European 'regulatory state' (Majone, 1996; Pollack, 2000) to those of the US and Switzerland, since both are federal states and both consistently get top marks in classifications of democracy.

But can the EU, obviously not a nation-state, be compared to national polities? The three polities vary widely, not only in their internal heterogeneity, but also in their culture and type of political institutions (two federal nation-states versus a union of nation-states). Wallace wrote two decades ago that the Community was less than a federation but more than a regime (Wallace, 1983). However, seen as a system of government, the EU resembles federal states such as Germany, Switzerland, Canada and the US in important respects (Scharpf, 1988, p. 42; Peterson, 1994; Hix, 1994). Its Competition Directorate is not unlike a federal agency (Gerber, 1994). The distribution of powers between EU Member States and Brussels is remarkably similar to Switzerland's structure, where canton governments enjoy vast policy-making powers and the vast majority of taxation revenue. Recent comparative research (Sbragia, 1992; Greenwood *et al.*, 1992; Andersen and Eliassen, 1993; Majone, 1996; Goldstein, 1997) demonstrates the value of comparing the EU to other systems of government. Comparative politics tools, rather than those of international relations, can be gainfully deployed to explain system change in the EU (Peterson, 1995).[1]

Why merger regulation? First, mergers can affect thousands of workers, shareholders, and pension fund members in many countries, and their regulation should be consistent with the public interest. Recent merger decisions by the Commission, for example its prohibition of the Sprint–MCI and GE–Honeywell mergers, were hotly debated in the media and the business community on both sides of the Atlantic. Second, the indirectly elected Commission has enjoyed much broader discretion in competition policy than in other fields (Bulmer, 1994; Schmidt, 1998; Bannerman, 2002). The Competition Commissioner himself concedes that 'the Union only has similarly broad supranational powers in trade policy and, more recently, since the creation of the European Central Bank, in monetary policy' (Monti, 2000, p. 2).

I. Bureaucratic Democracy

Normally, democracy requires that governments can be voted in and out of office. Schumpeter wrote that 'the democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote' (Schumpeter [1942]1976, p. 269). But thinner definitions avoid the criterion of elections: 'Democracy is a system in which the demos can expect to play at least some causal role, sooner or later, in the activity by which changes in their leaders are engineered' (Dunn, 1999). There are four reasons why governments might represent the people's interests (Manin *et al.,* 1999, p. 1):

1. because only those persons who are public-spirited offer themselves for public service and they remain uncorrupted while in office;
2. because, while individuals who offer themselves for public service differ in their interests, motivation and competence, citizens use their vote effectively to select either those candidates whose interests are identical to those of voters or those who are and remain devoted to the public service while holding office;
3. because, while anyone who holds office may want to pursue some interests or values different from, and costly to, the people, citizens use their vote effectively to threaten those who would stray from the path of virtue with being thrown out of office;
4. because separate powers of government check and balance each other in such a way that, together, they end up acting in people's best interest.

Possibility (1) can only be hoped for but not assumed because institutions cannot guarantee moral virtue. Neither (2) nor (3) is given in the modern

[1] Besides, the adjective *democratic* in democratic deficit implies that the EU is seen as a polity, including a *demos* to rule it or not rule it. Otherwise the term would lack a referent.

administrative state, where much law-making is no longer done by elected law-makers but delegated to agencies not directly selected by or accountable to voters.

Who is better at policy-making – elected majoritarian bodies or independent non-majoritarian bureaux? Scholars have debated this question ever since the early 1940s, when Finer asserted that only elected officials can assure the legitimacy of bureaucratic policy-making, since policy must be based on what the public *wants* and not what the expert thinks the public *needs* (Finer, 1940–41), while Friedrich countered that expertise is more important to policy-making than is politics (Friedrich, 1940; see Sutherland, 1993). In the modern administrative state, Friedrich's view seems to have carried the day: delegation to independent agencies is commonly accepted because of the complexity, quality and expertise needed for policy decisions. Precisely because regulatory agencies are separate from government and partisanship, and precisely because they are not subject to election pressures, they should be more committed to policy continuity, more flexible in policy formulation and execution, and more able to tackle controversial issues than politicians who care all too often about their short-term re-election.

But delegation to independent agencies poses problems. One is that legislators delegate also to improve perception of programme benefits and avoid or disguise their responsibility for failure (Fiorina, 1985). Another is a principal–agent problem: elected officials struggle to control agencies that possess superior information about the effects of their policies (Wildavsky, 1964; Schultze, 1968). And 'when governments know what voters will be satisfied with and voters do not know what governments can do for them, room is opened for moral hazard' (Manin *et al.*, 1999, pp. 9–10) Delegation adds more information asymmetries to an already long chain: from voters to the legislature, from the legislature to the executive, from the executive to the bureaucracy, and perhaps from the bureaucracy to a separate agency. Without information asymmetries between firms and regulators, there would be no rents for captured agencies to distribute; without asymmetries between regulators and the public, it would be much easier to ensure that regulators fulfil mandates – though the public might still bear the costs of organizing enforcement (Neven *et al.*, 1993, p. 170). Delegation to independent agencies makes sense only if its benefits outweigh all these agency costs.

This cumbersome arrangement leaves only possibility (4) in Manin *et al.*'s list of four possibilities on the previous page: are agencies subject to checks and balances that ensure their acting in citizens' best interests? Unfortunately, traditional scales of democracy that code regimes along indicators of accountability have been designed solely for electoral democracies (Zweifel, 2002b).

We need a new model that can be applied to indirectly- or non-elected bureaucrats. Based on earlier works (Horn, 1995; Majone, 1998), we can distil seven indicators of effective 'bureaucratic democracy':

One mechanism of checking bureaucratic discretion is *appointment* and removal power (Moe, 1985). Who gets to say who will make the rules? How are key agency personnel appointed, and what is the agency's governance structure (single-headed agency, multi-headed commission, self-regulatory organization, etc.)? Does the executive appoint key prospective agency officials quietly, or are they subject to public vetting by the directly elected legislature? If the agency moves away from agreed-upon programmes or does not deliver the expected results, do principals have a 'club behind the door' to throw agents out for failure to perform (Laver and Shepsle, 1997)?

A second criterion is *participation*: in a 'democracy', the public – you and I – need to be able to participate in shaping the rules. 'Policy networks' of actors with a stake in a policy must involve public scrutiny (Héritier, 1999, pp. 24–7). Of course, public policy cannot keep interest group pressures from affecting regulation (a virtual impossibility), but it should ensure that the pressures to which regulators respond are representative of society at large. Decentralization can reduce the likelihood of regulators being captured by particular interest groups (Neven *et al.*, 1993, p. 166). An effective competition authority must help enfranchise under-represented interests such as shareholders, consumers and employees, and must team up with groups excluded from the alliance of managers and politicians in the modern state. What are the requirements for public participation in decision-making? Does the system amplify signals from the electorate (Sutherland, 1993)? For example, is the agency required to hold public hearings, and does it encourage and/or financially sponsor the participation of diffuse, weakly organized interests? Is the power to decide on a policy decentralized – devolved to some mechanism of local public choice (Seabright, 1996)?

A third criterion is *transparency*. Being ruled is discomfiting as it is; secret government is tantamount to Kafkaesque autocracy. Regulators can and must strengthen their 'output legitimacy' by granting individual rights and access to policy information. How can the public observe government behaviour under incomplete information (Minford, 1997)? What are the decision-making procedures? Are they clear and accessible to the public? For example, does the agency hold votes on its decisions, and is it required to make these votes public? Transparency is necessary for the agency's credibility; its aim is not to banish political pressures, but to make them visible (Neven *et al.*, 1993, p. 219).

A fourth condition for public accountability is *reason-giving* (Majone 1998, pp. 13–14). 'Giving reasons is a device for enhancing democratic influences on administration by making government more transparent. The reason-giving administrator is likely to make more reasonable decisions than he or she otherwise might and is more subject to general public surveillance' (Shapiro, 1992, p. 183). Paradoxically, an agency committed to objective analysis has an interest in *increasing* the potential for embarrassment by making its procedures as clear as possible: this signals to firms its unwillingness to be manipulated (Neven *et al.,* 1993, p. 205). Is the agency required to publish reasons for its decisions (Shapiro, 1997)? Are these reasons widely and easily accessible, for example on the internet?

A fifth key indicator is *overrule:* one or several branches of government must have the power to check the agency's discretion, especially in competition policy (Bulmer, 1994). What are the checks and balances – the procedures for agency decisions being overruled by principals or by judicial review (Sutherland, 1993), and which principals have powers to overrule? Are political decisions to overrule the agency taken transparently and under clearly defined and generally known rules?

Since specialists are usually better informed than principals, a key agency problem – and my sixth criterion – is *monitoring*: the probability that the legislature, an interest group or another affected party, discovers that the agency has not carried out the legislative intent (Bendor, 1988). What is the extent of *ex post* monitoring through ongoing legislative and/or executive oversight (Finer, 1940–41), the budgetary process, citizens' complaints, or peer review (Shapiro, 1997)? How directly can the legislature monitor the agency? Are there institutionalized meetings and reports where the agency must regularly account for its work?

But these six criteria by themselves may not be enough to assure bureaucratic democracy. John Stuart Mill had written that, in a perfect agency relationship, 'the rulers should be identified with the people, their interest and will should be the interest and will of the nation' (Gray and Smith, 1991, p. 24). But is such perfect accountability desirable? Madison saw that a complete, one-to-one congruence between the popular will and policy decisions by rulers may not be in the best interests of the people, since public opinion can be uninformed and fickle. If representatives are 100 per cent accountable, then the exact same passions and transient interests that affect the people will be transmitted to their delegates, the representatives (Sanchez de la Cuenca, 1997).

Also, accountability need not imply democratic accountability. Executive influence may deepen bureaucratic accountability, but to whom? To the executive, not to diffuse interests. A strong political leader might single-handedly exert influence on an agency's policies, as happened in France, Spain or Germany (Majone, 1996). Such influence would increase accountability but reduce bureaucratic democracy. As we saw, the bureaucracy and its expertise can be a corrective that produces policy more consistent with the public good, and checks abuses of power by politicians (Wood and Waterman, 1994, p. 144).

Therefore we need a seventh criterion of bureaucratic democracy: *independence*. Politicians in democracies have few incentives to make policies whose success might not be recognized by voters before the next election. And since one legislative majority cannot bind a subsequent majority, public policies lack credibility because they can always be overturned – hence the move to independent agencies not subject to election cycles. A similar dynamic might be at work when national policy-makers delegate policy-making to European agencies (Majone, 1997, 1998, pp. 3–4).

Agencies also need to be independent of undue influence by special interests: in this sense, independence is the opposite of capture by private interest groups (McConnell, 1966) whose lobbying power is likely to increase more than proportionately with resources spent on lobbying, thereby disadvantaging other interest groups whose members have less at stake per capita (Krueger, 1974). Regulators can be captured by the regulated industry, by government, even by the bureaucrats themselves (Noll, 1989). To what extent has the principal delegated decisions to the independent agent (Persson and Tabellini, 1993)? How independent is the agency from political processes? For example, does it depend on government funding or is it self-reliant?

The values of these seven bureaucratic democracy dimensions must be assigned judiciously to achieve both accountability and independence – which can be complementary rather than mutually exclusive (Sutherland, 1993; Majone, 1998, p. 13). We can now apply the indicators to merger regulation in the three polities.

II. Merger Regulation in the Three Polities

European competition policy, codified in Article 3(g) of the Treaty on European Union in Articles 81–9 (formerly 85–94), is the EC's 'first truly supranational policy' (McGowan and Wilks, 1995, p. 142). Competition policy can be divided into cartel (or restrictive practices), monopoly and merger policy. Merger control was already part of the 1951 Treaty of Paris establishing the European Coal and Steel Community (Article 66 ECSC) – not surprisingly, given concerns with industrial concentrations in West Germany and the destruction German heavy industry wrought in the Second World War.

While the Paris Treaty established a *traité-loi* specifying the regulatory content, the 1957 Treaty of Rome, or European Economic Community (EEC) Treaty, was a *traité-cadre*, a framework that needed further legislation to apply the principles (Bulmer, 1994). Merger control was absent from the EEC rules, probably because of a consensus that scale economies were good for industrial competitiveness and growth. Lacking clear rules, the Commission made do with Article 82 to control mergers, and was backed in 1973 by the Court's *Continental Can* judgment (Case 6/72, [1972] ECR 215) (Hölzler, 1990, p. 10). But Article 82 permitted the Commission to investigate concentrations only given a clear abuse of dominance, meaning *after* a merger had already taken place. Realizing this, the Commission drafted a merger regulation in 1973, but met stiff resistance from Member States, especially the UK, France and Germany. Given declining merger activity over the next decade, merger control was low on the agenda, and the Council rejected three further Commission proposals in 1982, 1984, and 1986. But the 1980s merger boom and the 1986 Single European Act made a 'level playing field' and a 'one-stop shop' a priority. In *Philip Morris/Rothmans* (Case 156/84 [1987] ECR 4487), the Court ruled that even Article 81 was under certain circumstances appropriate for controlling mergers. In fact, the Court's 1973 and 1987 precedents persuaded Member States that a Council regulation was needed for legal certainty and a coherent merger regime. Less than two weeks after the 1987 ruling, the Council gave the Commission a green light to draft a merger regulation which came into force in 1990 (Cini and McGowan, 1998, pp. 27, 119).

Why was the Commission able to push through this extraordinary regulatory competence? First, the Commission has been very lenient in permitting mergers (Neven *et al.*, 1993). Since 1990, when the regulation entered into force, the Commission has cleared 1,832 cases and prohibited only 18.[2] Second, some companies found that the Commission's rules proved more predictable than the frequently politicized decisions of up to 15 national authorities. Multinationals even favoured *lowering* the thresholds for Commission intervention further, triggering intervention more easily.

Articles 81 and 82 are remarkably similar to Articles 1 and 2 of the US Sherman Antitrust Act,[3] but not identical. Article 81 is weaker than the US instrument, since it requires firms to be in a dominant position before it can be invoked, and does not cover hostile takeovers. Similarly, Article 82 does not apply unless there is dominance; and it prohibits only the *abuse* of dominance, not the dominant position *per se* (see Table 1).

The European timetable is more predictable than in the US, where cases tend to go to court and be more open-ended. Except for two cases since 1990, the College always went along with the Competition Directorate's recom-

[2] Commissioner Monti, Press release, 11 December 2001; speech, 7 November 2002.
[3] Evidence suggests that US representatives insisted on the precise wording of the European Coal and Steel Community (ECSC) competition provisions in 1951 (Berghahn, 1986, p. 118).

Table 1: The European Merger Procedure

1. Where worldwide turnover of all entities exceeds €2.5 billion and EU-wide turnover of at least two of the concerned undertakings exceeds €100 million (Council Regulation No. 1310/97), mergers have a 'Community dimension' and are handled by Directorate B (formerly Merger Task Force) of the Commission's Directorate Competition. Merging parties must notify the Commission (and may also notify their Member State government). Below these thresholds, mergers fall under the jurisdiction of national authorities. The Council may revise these thresholds by qualified majority (Article 145, Rome Treaty).
2. The Commission distributes a copy of the notification to all member governments, and allocates the file to a rapporteur. The agreement is approved unless the Commission raises objections within six months ('opposition procedure').
3. The Directorate Competition decides whether the case falls under the regulation. If yes, it conducts a phase I investigation for one month. If it has no concerns, its *cabinet* grants fast track approval.
4. If the Directorate has concerns, the case goes into a phase II investigation for four months. During phase II, the Commission may issue a Statement of Objections, hold oral or third party hearings, and consult the Advisory Committee on Concentrations (an intergovernmental committee).
5. An agreement qualifies for exemption under Article 81(3) if it meets four conditions: it must benefit the whole EU and its advantages must outweigh its disadvantages; consumers must share fairly in the benefits; any restriction to competition must be indispensable for achieving the agreement's objectives; and there must be no substantial elimination of competition. Agreements can also be granted by 'group' or 'block' exemption (Regulation 1475/95).
6. Directorate B makes a recommendation to the College of Commissioners.
7. The College votes in private (Merger Regulation, Article 8) – possibly with informal leaks, but no formal record of the vote. Neither Parliament nor Council hold binding votes.
8. The Commission rules: approval or prohibition, or approval with conditions or obligations.
9. The parties may appeal to the European Court of Justice.

Source: Council Regulation (EEC) No 4064/89 of 21 December 1989.

mendation.[4] Most competition decisions are made with little or no debate: written proposed decisions are circulated to the *cabinet* of each Commissioner and adopted unless objections are made within a limited period (Laudati, 1996, p. 236).

In contrast to Europe, the US antitrust tradition began as an attempt to protect citizens from the overweening power of corporations (Neven *et al.*,

[4] Commission interview, 22 September 2000.

Table 2: The US Merger Procedure

1. Merging commercial parties must notify the Department of Justice (DOJ) and the Federal Trade Commission (FTC) on merger plans if the proposed merger exceeds certain thresholds.[a] The agencies split responsibility for merger cases between them.
2. The Attorney General and/or the Federal Trade Commission may take administrative action against violations of the Sherman Act, of the Clayton Act, or other violations of competition.
3. Private persons may also seek injunctive relief against anti-competitive practices.
4. Merging parties must provide information, then wait for a prescribed period (usually 30 days). The agencies may ask for further information and extend the waiting period by 20 more days. The agencies are empowered to subpoena information (e.g. through the Federal Bureau of Investigation and cross-examination of officers and employees).
5. The Antitrust Division of the DOJ or the FTC and the respective state attorney(s) general with jurisdiction over the merging parties jointly investigate the merger or antitrust violation. They collaborate closely and jointly agree on strategy.
6. The Antitrust Division and/or the FTC provide certain otherwise confidential information with the consent of the merging parties to the state attorneys general.
7. The decisions of US antitrust authorities are subject to judicial review.

Source: DOJ and FTC Antitrust Guidelines of 5 April 1995; Section 7, Clayton Act; Hart-Scott-Rodino Act.
Note: [a] Unless exempted under the Act, parties must notify the agencies pre-merger if bodies of $10+ million sales are being acquired by bodies of $100+ million sales – or *vice versa* if the acquiring person would hold 15 per cent or $15 million of the acquired person (15 U.S.C. 18a(a) (1988)), but 'the HSR [Hart-Scott-Rodino] rules are necessarily technical, contain other exemptions, and should be consulted, rather than relying on this summary' (DOJ and FTC Guidelines, April 1995).

1993, p. 195) during massive capitalist concentration in the early twentieth century. In 1909, the 200 largest non-banking corporations owned about one-third of all corporate assets; in 1928 they owned 48 per cent; by 1940, 55 per cent. Unaccountable economic power in the hands of monopolists ran counter to the 1890 Sherman Antitrust Act and its American ideology: individualism, fairness and free enterprise (Neale and Goyder, 1980, p. 16; Whish, 1989, p. 16). Free and fair competition was seen as the economic equivalent of political freedom and democracy. With the increasing influence of the Chicago School since the 1970s and the Reagan administration's initiative to roll back the state in the 1980s, US competition policy focused on market impact and efficiency (Cini and McGowan, 1998, p. 7) (see Table 2).

Unlike in Europe, private parties bring 96 per cent of US civil antitrust suits (Boner and Krueger, 1991), so the process takes much longer – usually five to ten years – and costs both plaintiffs and defendants millions of dollars.

Switzerland was relatively late in introducing a competition law. The first law of 1962 was revised in 1985 and again in 1995. The revised law (Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen SR 251) is relevant here.[5] It applies whenever cartels have an impact on competition in Switzerland, even if these cartels originate outside the country (Kartellgesetz KG, Article 1.2) (see Table 3).

Much like the European Commission, the Federal Council (the Swiss executive), acts as ultimate arbiter in competition matters, but has delegated this function to the Competition Commission. Unlike under US or European rules, responsible persons cannot be prosecuted. Sanctions against Swiss cartels cannot be imposed retroactively: no fines equivalent to the economic damage can be imposed. Penalties can be imposed only if a monopoly has

Table 3: The Swiss Merger Procedure

1. For undertakings other than banks and insurance carriers, the Competition Commission must be notified of concentrations before they are carried out when: (a) the enterprises concerned reported joint turnover of at least 2 billion Swiss francs or turnover in Switzerland of at least 500 million Swiss francs, and (b) at least two of the enterprises concerned reported individual turnover in Switzerland of at least 100 million Swiss francs.
2. The Secretariat of the Competition Commission ('commission') opens an evaluation whether effective competition is suppressed, notifies the public, and invites interested parties to come forward within 30 days.
3. The commission may hold public hearings and must complete its investigation within four months.
4. If the commission finds no suppression of effective competition, it examines economic efficiency criteria and decides. It may require the parties to propose remedies for reestablishing competition.
5. The merging parties either accept the commission's decision, or appeal to the Federal Court or to the Competition Appeals Commission.
6. If the parties accept the commission's decision, the Federal Council evaluates and can overturn the commission's decision based on the public interest.
7. If the Federal Council overturns the commission's decision, the procedure is closed. If the Federal Council backs the commission, the merging parties may appeal to the Federal Court.
8. If merging parties appeal to the Federal Court in 5., the Court can overrule, or back, the commission.

Source: Bundesgesetz über Kartelle und andereWettbewerbsbeschränkungen SR 251 [Federal Act on Cartels and Other Restraints of Competition (Act on Cartels, Acart)] of 6 October 1995.

[5] The Swiss merger law of 1936, in the process of revision, is not.

been certified as illegal and continues nonetheless. While the European statute considers 'significant impediments ' to effective competition, Swiss law insists on a higher threshold of effective competition being 'suppressed' and is likely to be more permissive, as the freedom of contract is deeply rooted in the Swiss constitution. Thus, Swiss cartel law loses effectiveness not least in preventing cartels.[6]

With the differences between the three regulatory regimes in mind, we can now compare them along the seven bureaucratic democracy dimensions.

Appointment. In Europe, Directorate B (formerly Merger Task Force) in the Competition Directorate has been specifically charged with merger control since 1995, but the Commission decides competition cases collectively. The Commissioners are political appointees of the Member States governments (EC Treaty, Articles 157–8). After approving the President individually, Commissioners are now vetted, and approved collectively, by Parliament. The 2000 Nice Treaty also submitted the Commission to designation by the Council acting under QMV, but gave the Commission President the power to shuffle Commissioners' portfolios and dismiss them if they fail to perform satisfactorily.[7]

In the US, in contrast, no single body handles antitrust policy. Cases are divided between the FTC, an administrative regulatory agency, and the Department of Justice, a division of the executive, on a loosely sectoral basis. The Attorney General (a cabinet member who heads Justice), the FTC Commissioner, and their immediate deputies are not civil servants as in European agencies, but political offices appointed by the President and vetted individually by Congress.

Switzerland's Competition Commission is an executive agency that issues binding decisions. Key agency officials are appointed by the executive and not subject to vetting or approval by the legislature.

Participation. The actors at the heart of EC competition policy are the Commission and the European Courts; and since the revised Merger Regulation of 1997, the Council of Ministers has had the key power to legislate thresholds for Community intervention. The Parliament has long been on the sidelines, although not entirely: its Committee on Economic and Monetary Affairs has grown in influence. It was Parliament that persuaded the Commission to publish an annual competition report beginning in 1972 (Cini and McGowan, 1998, pp. 38–9). Parliament has powers of appointment over the

[6] Federal Council website«http://www.admin.ch», 1999.
[7] The Commission does not prohibit 'revolving door' appointments, where Commission officials may go on to the private sector. For example, the first head of the Merger Task Force left the Commission in 1993 to work for the Brussels office of a British law firm (Neven *et al.*, 1993, p. 228).

Commission and budgetary powers over the European budget as a whole, but all it can do in merger policy is to issue non-binding resolutions or question the Competition Commissioner.[8]

Member State competition authorities and courts are empowered to apply Community competition law under the doctrine of direct effect ever since the 1963 precedent of *Van Gend en Loos* (Laudati, 1996, pp. 246–8). In 1969, the Court established the *de minimis* rule: 'an agreement falls outside the prohibition in Article [81(1)] where it has only an insignificant effect on the market' (Case 5 [1969] ECR 295). *De minimis* is effectively a decentralization vehicle, dividing responsibility between European and national cases. Realizing in the 1980s merger boom that it alone could never decide, let alone enforce all competition cases, the Commission began involving national courts in enforcement (Cini and McGowan, 1998, p. 35). The controversial prohibition (the first under the Merger Control Regulation) of the DeHavilland merger prompted amended rules.[9] Article 19 of the Merger Regulation requires the Commission to stay 'in close and constant liaison' with Member State authorities during an investigation and to copy them in on all relevant documents. The regulation gives states the right to express their views 'at every stage of the procedure' and to attend hearings in phase II. The Commission must submit draft decisions for all phase I cases to the Member States' Advisory Committee on Concentrations, take 'utmost' account of the opinion of the Committee, and inform it how it has taken its opinion into account (Laudati, 1996, pp. 237–40). In 2001, the Commission proposed an overhaul of the Merger Regulation which would involve national authorities even further: it would empower them to apply the Community's Articles 81 and 82 directly, eliminate the Commission's sole jurisdiction over Article 81(3) to grant exemptions (long a German criticism), and free the Commission to emphasize subsidiarity – meaning the Community should enjoy only those competencies that would be better exercised at the European level (Commission, 2001, 2002).

Third parties (consumer groups, unions, competitors, distributors, media) have only limited access to Competition Directorate officials and information (Laudati, 1996, p. 241). This was not always so. In the 1960s the Directorate (then DG IV) was still marked by a consumer ethos (Goyder, 1988, p. 121), much like in the US populist antitrust tradition. But this public-interest commitment diminished when consumer relations were transferred in 1967 to the Health and Consumer Protection Directorate-General (Cini and McGowan, 1998, pp. 24, 108). Today, the speed of the procedure gives third parties scant

[8] Commission interview, 21 October 2002.
[9] Interestingly, had merger control stayed in Member States' hands, the DeHavilland merger would probably have been approved (Neven *et al.*, 1993, p. 209).

time for representations, let alone discussion of remedies negotiated between the parties and the Commission (Neven *et al.*, 1993, p. 226). In oral hearings at the end of phase II investigations, the parties can make their case and call expert witnesses, but members of the public cannot attend.

The US agencies, the DOJ and the FTC, are not required to involve the public either, except in tele-communications, where the Federal Communications Commission must also approve mergers and hold public hearings. If violations are deemed criminal, a Grand Jury is appointed to inquire whether the evidence warrants prosecution. Like European consumers, US consumers participate less in antitrust policy today than in the 1970s. But unlike in Europe, cases seem to originate mostly in complaints by members of the public (Neale and Goyder, 1980, pp. 376–83).

The Swiss constitution, not unlike the European treaties, gives law-making power to the cantons unless a specific provision grants this power to the Confederation. But even where the Confederation is empowered to enact the law, it often restricts itself to general principles and leaves detailed regulations to the cantons. Swiss cartel law reflects this decentralization: it grants the cantonal courts jurisdiction (Article 14.1), but does not provide for public participation.

Transparency. Many aspects of the European procedure are opaque, not least because the law gives Directorate officials ample discretion in prohibiting or exempting agreements. Notifications tend to follow informal meetings between officials and the companies to anticipate possible issues, speed up the evaluation of non-controversial cases, and minimize the sunk costs of proceeding with mergers that will be prohibited anyway. Most cases are settled informally, which deepens legal uncertainty. Critics also charge that the public does not have sufficient information on the Commission's rationale for fines (House of Lords, 1993, p. 7; Korah, 1997).[10] The Advisory Committee may ask the Commission to publish its opinion (Merger Regulation, Article 19(7)), and though the Commission is not legally obliged to do so, it usually does – months later (Cini and McGowan, 1998, p. 123). In fairness, the Commission must strike a delicate balance between transparency and business confidentiality: disclosure of competitive intelligence might severely damage the companies' viability. The Commission and national competition authorities are prevented from using the information for any purpose other than the case at hand.

[10] If undertakings intentionally or negligently fail to notify a concentration within the prescribed time period, the Commission may impose fines up to €50,000 or 10 per cent of aggregate annual turnover (Fiebig, 1998). In the 1990s, the Commission began imposing increasingly heavy fines on restrictive practices. The unprecedented fine of €75 million on TetraPak was appealed against by the firm because of a lacking precedent; but the Court of First Instance (CFI) ruled that the Commission needed not have apportioned the fine between alleged abuses, which made it difficult to say it was excessive (Korah, 1997).

The Merger Regulation provides some safeguards for transparency. The Commission must publish notifications falling under the regulation. But its only other publication before a final decision is a press release when it opens proceedings (Merger Regulation, Articles 4, 20). The process by which a Directorate B judgment is transmuted into a political compromise in the Commission lacks transparency and risks distorting the investigation (Neven *et al.*, 1993, p. 221). Moreover, votes in the Court of First Instance are secret.

In the US, rules about whether and when regulators may meet with representatives of the industries concerned are much more restrictive than in Europe. Also, US parties resort to adversarial procedures such as courts more often than seeking negotiated solutions (Neven *et al.*, 1993, p. 169). This is good for transparency.

The 1995 revision of Swiss cartel law streamlined the work of the Competition Commission, and its specific criteria became more transparent and less prone to manipulation. The Federal Council's 1996 ordinance on merger control charged the commission's secretariat with collecting and periodically publishing rulings of the cantonal courts which must furnish complete copies of their antitrust judgments for publication. The Competition Commission now also has the right and duty to announce the initiation of an inquiry publicly; previously the economics minister could block publication. But the commission is still not obliged to publish its analysis.

*Reason-giving***.** In Europe, reason-giving was already ensconced in the 1951 Treaty of Paris: 'the Community shall … publish the reasons for its actions' (Article 5), and 'Decisions, recommendations, and opinions of the High Authority shall state the reasons on which they are based' (Article 15).[11] The Commission's decisions are not only legal documents, but also statements of its thinking and intentions – regulatory tools that shape rules and norms. It has sought to make its publications more accessible and explain whenever its decision departs from the Advisory Committee's opinion (Commission Merger Report, 1993, pp. 24, 28). Since 1996 it has agreed to the Parliament's request to include in its annual competition report a chapter on future policy initiatives (Commission, 1997a, p. 81), and has published guidance notices on important jurisdictional and substantive issues (Commission, 2001, p. 54). But there is no case analysis independent of the Commission's rationale (Neven *et al.*, 1993, p. 224), which has been criticized as too juridical. Economic analysis would be sharper: it would 'suggest that there has been price fixing, where parallel prices have been charged over a long period in what would seem to be a competitive market' (Whish, 1989, p. 224).

[11] These reason-giving requirements were – and to some extent still are – not only different from, but also more advanced than national laws (Hartley 1988).

While the overriding European aim is the integrity of the common market, the basic concern in the US has been with illegal market power *per se*, regardless of whether such market power brings advantages to the economy as a whole. When the Clayton Act was passed, US President Wilson himself called for legislation 'in such terms as will practically eliminate uncertainty' (Neale and Goyder, 1980. p. 182). Unlike in Europe, a Bureau of Economics assists the FTC's Bureau of Competition in its economic analysis. The agency issues 'industry guides' and advisory opinions, omitting only the names of the parties and any trade secrets, to clarify trade regulation rules (Neale and Goyder, 1980, pp. 390, 493). But reason-giving in the US depends on the agency heads' ideology. From its inception to the 1970s, the FTC had used a case-by-case approach to regulation. This changed in the 1980s, when the Reagan administration installed a *laissez-faire* economist at its head who believed that any regulation inhibited the free market. Requirements for evidence not only of dominance but also of reduced consumer welfare became steep; to justify even pursuing a case, attorneys had to present *prima facie* evidence (Wood and Waterman, 1994, p. 45).

In Switzerland, the Competition Commission must scrutinize a merger if it is concerned about dominance by the merged entity, or if the parties cannot show that the disadvantages of dominance are outweighed by benefits for competition in another market (Article 4.2). The commission can either prohibit the merger or admit it while stipulating conditions (Article 10.2). This provision is identical to EC competition law. But the criteria for reviewing and evaluating a concentration suggest that the Swiss treatment of mergers is significantly more lenient than in the EU or US. The concept of competition is rather vague and leaves much discretion to the agency.

Overrule. The European Court of Justice (ECJ) and the Court of First Instance (CFI), which began in 1989 as a European-level tribunal, mainly to reduce the ECJ backlog, have the power to overrule Commission decisions. The ECJ's influence on competition policy was minimal until the mid-1960s, but ever since the landmark *Etablissements Consten and Grundig* v. *Commission* (Cases 56 and 58/64 [1966] ECR 299) it has subjected Commission decisions to judicial review.[12]

Both courts have been criticized for being too lenient with the Commission. Indeed, the ECJ has often supported the Commission's discretion in reaching settlements (Cini and McGowan, 1998, pp. 55, 114) and been reluctant to engage in the Commission's limited economic analysis (Whish, 1989, p. 279). Worse, in 1995 the CFI upheld a Commission decision that left Nestlé

[12] Even the Commission's authority (under Regulation 17, Article 11) to request and then demand written information and carry out unannounced 'dawn raids' is subject to judicial review and to consulting national authorities beforehand (Cini and McGowan, 1998, p. 103).

and BSN with more than 65 per cent market share (Cini and McGowan, 1998, p. 126). But the ECJ and CFI have overridden some Commission decisions, especially since the mid-1990s.[13] In June 2002 the CFI overturned a Commission decision to block the merger of two British travel companies – the first time in 12 years of Commission merger review that its merger-blocking decision was overturned. In October 2002 the ECJ overturned yet another Commission decision, ruling that it had overstepped its boundaries by prohibiting the merger between the two leading French manufacturers Legrand and Schneider.

Unlike in Europe, judicial review in the US is not occasional but common, since distrust of unchecked power is likely to be a more deep-rooted source of antitrust policy than economic or political ideologies (Neale and Goyder, 1980, p. 442). The courts can overrule the agencies, and already in *Federal Trade Commission* v. *Gratz* (1920) the Supreme Court held that 'it is for the courts, not the Commission, ultimately to determine as a matter of law' what constitutes unfair competition. Nevertheless, until the late 1960s, government and agencies hardly lost a Section 7 case (under the US Competition Act). As Justice Stewart complained in *Von's Grocery*, 'the sole consistency that I can find is that under section 7 the Government always wins'. But from the 1970s, Chief Justice Burger applied much more detailed case-by-case economic analysis and was less quick to presume illegality based on market share (Neale and Goyder, 1980, p. 186).

The Swiss Federal Council can overrule the Competition Commission on the basis of a wider criterion, 'the public interest' (Articles 8, 11); but the legislature implicitly anticipates this step in exceptional circumstances only. Since 1995, a single minister can no longer overrule the commission; only the whole Federal Council can, making it much harder for parties to persuade the collective seven-head executive than a single individual who traditionally catered to right-wing parties and corporate interests (Neven and Ungern-Sternberg, 1997).

Court decisions are not binding on cantonal courts. Although rulings by Switzerland's highest court and by one of the cantonal appellate courts are generally followed, intentional deviation from such case law is not infrequent and at times even prompts the higher courts to revise their positions. Alternatively, the merging parties may appeal against decisions of the Commission or its secretariat to the Competition Appeals Commission, whose decisions may in turn be taken to appeal in the Federal Court.

Monitoring. The European Parliament can monitor the Commission through resolutions in response to the Commission's annual competition reports, regular discussions with the Competition Commissioner, and the strategic use of ques-

[13] Commission interview, 1 February 2002.

tions that can approach 200 in number and are permitted whenever Parliament is in session. But these parliamentary actions hardly constitute systematic scrutiny (Cini and McGowan, 1998, pp. 39–40). Unlike Parliament, which is largely bypassed by Commission decisions, Member States can monitor and constrain the Commission in the Council, but only if they reach consensus on a treaty revision (Schmidt, 1998).

In the US, the FTC's discretion was a contentious matter until the Supreme Court in *Federal Trade Commission* v. *Sperry and Hutchinson & Company* (1972) reversed a Fifth Circuit Court of Appeals decision, ruling that the agency was entitled to 'define and proscribe an unfair competitive practice even though the practice does not infringe either the letter or the spirit of the antitrust laws … '. This ruling gave the FTC vast discretion; but Congress monitors both agencies through oversight committees.

One Swiss institution is unique among the three polities. *Preisüberwacher* – price supervisor – is a government watchdog agency in the Department of Economics whose mandate is to observe consumer prices and 'to inhibit or eliminate abusive price increases or maintenance' and to inform the public about its activities (Preisüberwachungsgesetz [PüG] 942.20, 1985). The Rekurskommission – the Swiss appeals body – has virtually always backed the watchdog agency's decisions.[14] But there is no provision under Swiss law for the Swiss Parliament or any other directly elected officials to monitor or check the Commission's discretion – or budget.

Independence. Article 157 EEC provides that the European Commissioners shall be 'completely independent in the performance of their duties' and 'shall neither seek nor take instructions from any government nor any other body'. The Commission has fought hard for its autonomy from national interests in competition policy – perhaps rightfully: it has been 'prepared to proceed against alleged cartels where the domestic competition authorities might fear to tread' (Whish, 1989, p. 223). But is the Commission independent? Some decisions suggest that concerned firms or Member States had a strong hand in informal negotiations, and the Commission has been keener to clear deals than its criteria for analysis indicate. One rapporteur reportedly said, 'I sometimes get only ten minutes to present the outlines of a case analysis to the Commissioner; and I know that after I've done so the firms will get half an hour to talk to him'. Another reported,'We often learn about the remedies after the handshaking has taken place' (Neven *et al.*, 1993, pp. 160, 218, 223). Member States have also exerted informal influence, for example when the Commission, under pressure from France and Italy, struck a deal with both parties in the *Alcatel/Telettra* strategic alliance (*OJ* [1991] L122/48, [1991] 4 *CMLR* 778) against its own Directorate Competition. The controversial deci-

[14] Price Supervisor Werner Marti, *SonntagsZeitung*, 7 November 1999.

sion, probably based on the strategic value of creating a globally competitive European telecoms player that would surpass AT&T, resulted in the first conditional merger under the Merger Control Regulation (Cini and McGowan, 1998, p. 128).

On the other hand, the Commission narrowly prohibited the DeHavilland merger, as we saw, the joint venture MSG Media Service GmbH of two media companies and the German state telecoms company (*OJ* [1994] L364/1), and five additional mergers in 1995 and 1996 (Cini and McGowan, 1998, p. 129), as well as others including MCI-Sprint in 2000 and General Electric-Honeywell in 2001. But these prohibitions happened because of the leadership of charismatic Competition Commissioners, not because of institutional independence.[15]

Independence from corporate capture is one pitfall; government capture is another. Even as the importance of independence for policy credibility has become clear, agencies in some Member States are less free from state intervention than are EU agencies. Even in Germany, which grants the *Bundeskartellamt* the most extensive powers of all national cartel offices, the government retains considerable powers of intervention. The Minister of Economics can overrule the cartel office at the request of the parties (but overturned only six of 108 cases from 1973 to 1994). For example, in the merger of Daimler-Benz with MBB, the Economics Minister overruled the *Bundeskartellamt*'s rejection and ignored the Monopoly Commission (Baake and Perschau 1996, p. 144). But the European Commission's independence leaves much to be desired, too. A single enforcement body with multiple functions: investigator, prosecutor, policy-maker, decision-maker, detective, judge and jury, its procedure has judicial or quasi-judicial features. If a single individual or institution acts as rapporteur, then develops a case file – and often prosecutorial zeal – then acts as objective decision-maker, these multiple roles make objectivity or protecting parties' rights difficult.[16]

In the US, the wide discretionary authority under the FTC's vague statutory mandate (Katzman, 1980) led some to see it as a prime example of agency capture (e.g. Stone, 1977). But the evidence is mixed: some found that the agency's case selection co-varied with congressional ideology – a pro-business Congress meant pro-business cases (Weingast and Moran, 1983). Others found that the average level of FTC complaints was continually lower under the Reagan administration's appointee (Wood and Waterman, 1994, p. 46).

[15] Even if the Commission is independent, the current bargaining process leads to firms making strongly uncompetitive opening proposals, knowing that by making concessions later, they can 'buy' concessions from the Commission (Neven *et al.*, 1993, p. 225).

[16] On the other hand, since much information must remain confidential, this conflation of roles may be necessary: the only way for the Commission to be sure of a fair analysis is to do it itself (Neven *et al.*, 1993, p. 182).

Yet other studies found either no presidential effects (Yandle, 1985) or even counter-intuitive ones – Republican administrations correlating with more FTC complaints against businesses (Moe, 1990). The effect of political influence is unclear.

But are US agencies susceptible to capture by special interests? Interest groups operating through congressional committees were unable to rein in the FTC and its activist policies (Wood and Waterman, 1994, p. 46) and, based on anecdotal evidence, the Justice Department seems to withstand lobbying pressure[17] and has pushed for heavy deterrent sentences in hard-core cases, including jail terms of up to 18 months and fines of up to $1 million or 10 per cent of sales during an illegal agreement.

The Swiss Competition Commission is independent of the administrative authorities, but 'attached for administrative purposes' to the Federal Department of Public Economy (Article 19). Although one could argue from a majoritarian standpoint that this attachment makes the agency accountable to an indirectly elected government, majority rule is not the only pathway to democratic legitimacy. The non-majoritarian model instead aims to limit and disperse power among different institutions. From the non-majoritarian standpoint, a conflation of regulatory functions in the executive is hardly good for democracy (Majone, 1996, p. 285). The Federal Council need not even explain when it overrules the Commission, which makes the Swiss executive vulnerable to capture. Worse, the Competition Appeals Commission is a *judicial* body, but is *also in* the economics ministry – a red flag for the missing independence of Swiss competition agencies.

There is no hard evidence that the Commission's decisions were closely associated with the views of particular interest groups. But one example should give pause: national retailers MIGROS and COOP have market shares of some 40 per cent and 30 per cent respectively – a concentration unmatched in other national retail markets. The Commission has never sought to prevent the dominance of these two firms. This is hardly surprising since both corporations have always had their representative in the Commission (Neven and Ungern-Sternberg, 1997).

III. Findings: Who is Without Guilt …

It is now clear that electoral democracies make their inhabitants better off than do non-democracies because they provide their citizens with opportunity – the power to shape their own destinies (Zweifel and Navia, 2000, Navia

[17] In an interview, one Department of Justice official recalled only one attempt by politicians to pressurize him directly into lenient treatment of a case. He had ignored the intervention without too much difficulty. But he added that politicians did not need to put pressure on Justice Department officials when they could do so directly via their political representative, the Attorney General (Neven *et al.*, 1993, p. 227).

Table 4: Bureaucratic Democracy Ratings

Bureaucratic Democracy Indicators	*Merger Policy European Union*	*Merger Policy United States*	*Merger Policy Switzerland*
Appointment	2	3	1
Participation	2	1	1
Transparency	2	3	2
Reason-giving	2	2	2
Overrule	3	3	1
Monitoring	2	3	1
Independence	1	3	1
Cumulative points = Average = Ranking	14 points = 2.00 average = 2nd	18 points = 2.57 average = 1st	9 points = 1.29 average = 3rd

Notes: Weak = 1, medium = 3, strong = 3.

and Zweifel, 2003). But classical theories of electoral democracy are no longer fully applicable to the modern regulatory state. Bureaucratic democracy must be measured with a different yardstick. Table 4 shows the ratings for each polity in each dimension.

This ratings system is at best a rough approximation to reality. My ratings are subjective and weighted equally. Although both rating and weighting can surely be improved, they give us a comparative impression of democratic weaknesses and strengths – democratic deficits and surpluses, and perhaps worst and best practices – in each merger regime.

US merger control gets high marks in most but not all dimensions. Its appointment, transparency, overrule, monitoring and independence indicators are all strong, because the heads of the antitrust agencies are each individually approved by Congress; the adversarial, court-based system enhances disclosure; US courts act as strong checkers of agency discretion through judicial review; congressional oversight committees monitor the agencies, whose budgets are subject to congressional approval; and the FTC (but not the Justice Department) is independent of the executive. US merger regulation is the most democratic among the three regulatory regimes.[18] But all is not well in the US: in reason-giving, US regulation is only medium, because criteria for agency decisions are influenced by the ideological bias of either

[18] This is not so in other policy fields. A comparison of the US with the EU and Switzerland in biotech policy showed a significant democratic deficit of US regulation compared to EU and Swiss regulation (Zweifel, 2002a).

Congress or the administration, although a Bureau of Economics assists in economic analysis. US participation receives only a weak rating, since neither Justice nor the FTC is required to involve the public in their decision-making.

Swiss merger policy, by contrast, is neither very accountable nor very independent. In appointment, participation, overrule, monitoring and independence, it receives weak ratings because the executive appoints key Competition Commission officials while the legislature plays no role in appointments; the Commission need not seek public participation; the legislature has no financial leverage over the agency, and the agency's independence is questionable – organized interests are over-represented and it reports to the economics ministry, not to the legislature. Swiss transparency and reason-giving receive medium ratings: while its laws are precisely defined, the Swiss government has largely adopted a *laissez-faire* policy towards mergers. The agency need not publish its decisions, or even give reasons; and the executive can override the agency without justification.

The bureaucratic democracy of EC merger policy lies between US and Swiss policy. The Commission's appointment, participation, transparency, reason-giving and monitoring are all medium, because Parliament can vet only the President and the College of Commissioners as a whole, not individually; diffuse interest groups are not given as much voice as in the US; the bureaucratic process is still opaque; the Commission's criteria for decisions are overly juridical and unclear; and the Council of Member States and Parliament can monitor but not sanction the Commission. The Commission's independence gets a weak rating, because of its financial dependence and because it has not delegated merger control authority to an independent agency; executive and agency are one in the EU. Its only strong rating is overrule, because both European courts have exercised judicial review more forcefully of late. Arguments for making the Competition Directorate into a separate agency independent of the Commission should be seriously considered (Bannerman, 2002).[19] But while the EU is clearly less democratic than the US in its merger regulation, it is clearly more democratic than Switzerland. If EU policy-making suffers from a democratic deficit, it is hardly alone.

[19] A European Cartel Office, modelled after the German Bundeskartellamt, might introduce a much-needed separation of powers; but the European Cartel Office is not without opponents, who argue that competition policy is dependent on other Commission policies and must not be cut off from them.

Correspondence:
Thomas D. Zweifel
CEO, Swiss Consulting Group
101 West 23 Street, No. 2422
New York, NY 10011, USA
Tel: 00 1 212 288 4858 Fax: 00 1 212 744 3654
email: tdz@swissconsultinggroup.com tdz2@columbia.edu

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