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Courts as Experts in European Merger Law

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Chapter 20

COURTS AS ECONOMIC EXPERTS IN EUROPEAN MERGER LAW

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I. INTRODUCTION

The relationship between law and economics in European competition law has always been important, but it has received increasing attention during recent years. Much of this attention has focused on doctrinal aspects of the relationship and on the European Commission's use of economic analysis in its decisions.¹ In contrast, the role of economic analysis in *judicial* decisionmaking has received comparatively little attention. This essay looks at that issue more closely.

Three much-discussed opinions of the Court of First Instance ("CFI" or "the Court") in 2002 suggest the need for more thorough discussion of the issue (the "Merger Trio decisions").²

In each of these cases the Court overturned a Commission decision prohibiting a merger.³ The role of economics is central to these decisions, but so far the focus of discussion has been limited to the Commission's decisionmaking procedures. There has been little discussion of the Court's role in making decisions about economics.

This focus on the decisionmaking process of the Commission is understandable and appropriate.⁴ Together, the three opinions point to flaws in the Commission's procedures in merger cases, and some

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1. See, e.g., Temple Lang, Two Important Merger Regulation Judgments: The Implications of *Schneider/Legrand* and *Tetra Laval/Sidel* 28 Eur. L. Rev. 259 (2003); Haupt, Collective Dominance Under Article 82 E.C. and E.C. Merger Control in the Light of the *Airtours* Judgment, 2002 Eur. Comp. L. Rev. 443 (2002); Nikpay & Houwen, *Tour de Force or a Little Local Turbulence? A Heretical View on the Airtours Judgment*, 2003 Eur. Comp. L. Rev. 193 (2003).

2. Case T-342/99, *Airtours v. Commission* 2002 E.C.R. 5 C.M.L.R. 317 (hereinafter "*Airtours*"); Case T-310/01, *Schneider Electric SA v. Commission* 2002 E.C.R. (October 22, 2002) (hereinafter "*Schneider Electric*") and Case T-5/02, *Tetra Laval v. Commission*, 2002 E.C.R. (October 25, 2002) (hereinafter "*Tetra Laval*").

3. One of the decisions, *Tetra Laval*, is on appeal to the European Court of Justice. A decision is expected in 2004.

4. For discussion of criticism of the Commission (in the context of the *GE/Honeywell* case), see Edward T. Swain, "Competition, Not Competitors," *nor Canards: Ways of Criticizing the Commission*, 3 U. Penn. J. Intl Econ. L. 597 (2002).

commentators have even seen them as a fundamental rejection of those procedures.⁵ The Commission has responded to these criticisms. Mario Monti, European commissioner for competition policy, has acknowledged that they were a factor in a recent review by the Commission of the merger review process.⁶

As influential as these opinions have been in relation to administrative decisionmaking, however, their implications for judicial decisionmaking may be at least as significant. In this essay, I look at some of the issues the decisions raise about the relationship between economic analysis and judicial roles in European competition law cases. The Merger Trio decisions reflect conceptions of that relationship that in some ways conflict with the role that Community courts usually play in competition law cases, and possible changes in that role may have significant consequences for the evolution of competition law in Europe and perhaps for European integration itself.

In these cases, the Court at times plays the role of an economic expert. I use that term to refer to the function of making decisions about economic causality based on the superiority of the decisionmaker's analytical skills or knowledge. In merger cases, expertise relates to analysis of the economic effects that are produced — or are likely to be produced — by mergers. Where the CFI relies on its own economic expertise in rejecting economic analysis performed by the Commission, it performs the same function that the Commission performs, but implicitly claims that its expertise in performing that function is superior to that of the Commission. Given that economic analysis was the key component of these cases and that it is often central to merger cases, the set of assumptions on which this claim is based needs to be identified and its implications explored.

My objective in this brief essay is to explore the role of the CFI as an "economic expert" and to suggest potential implications of increased prominence for that role. I use examples from the Merger Trio decisions in

5. See, e.g., Thomas W. Wessely, *EU Merger Control at a Turning Point — the Court of First Instance's "Schneider" and "Tetra" Judgments*, 1 J. of Comp. L. 317 (2003).

6. See, e.g., speech of Prof. Mario Monti European Commissioner in charge of Competition Policy *European Competition Policy : Quo Vadis? XX. International Forum on European Competition Policy Brussels, April 10, 2003*. According to Monti, "Last year's case law of the CFI represents the most far-reaching judicial 'feedback' that the Commission has received on its merger enforcement policy since 1990: the judgements deal with fundamental substantive, procedural and systemic aspects of merger review at the EU level. In particular, it is clear that the CFI is now holding the Commission to a high standard of proof, and this has clear implications for the way in which we conduct our investigations and draft our decisions. I guess I do not have to emphasise that our reform was not triggered by these judgements. Nevertheless, we were able to feed some of the conclusions we drew from the judgements into our reform project." (available at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettext=gt&doc=SPEECH/03/195).

discussing the central issue, which is "To what extent, if at all, should Community courts function as economic experts in competition law cases, particularly merger cases?"

II. ECONOMIC EXPERTISE AND THE EUROPEAN COURTS

The separate components of a court's analytical role are seldom carefully analyzed, and little attention has been paid to the specific issue of how Community courts treat economic expertise. This makes it important to clarify what I mean in referring to the role of "economic expert." Basically, I use that term to refer to economic analysis performed on the basis of particular assumptions about the superior analytical capacity of the analyst (here, the Court).

A. Components of Economic Analysis

The central task of economic analysis in merger cases is to draw conclusions about the economic consequences of the merger — i.e. to interpret the procedurally available economic data. This involves two distinct components. One is the application of the analyst's interpretive tools to the available data; the other is a determination as to what factual material is or should be considered in the litigation.

Economic analysis is the process of applying a set of intellectual tools to economic data for the purpose of interpreting that data. This means that each analyst brings his own tools to the analysis. These tools consist primarily of propositions, assumptions and expectations about economic causality. They may be explicit or implicit, and they may be made on the basis of extensive training in economic science or on the basis of general experience. Where, for example, the issue is whether the elimination of one producer's supplies from a market will lead to an increase in the price of the goods on that market, the analyst will draw conclusions by using a set of expectations about causality that may refer to factors such as the size of the market, the existing and potential capacity of other suppliers and so on. These assumptions and expectations shape the conclusions the analyst reaches.

These interpretive tools range from specific (as above) to general. An analyst may believe, for example, that barriers to entry into markets are typically unstable and transitory. This expectation is likely to lead to results that differ significantly from those that would be produced by an analyst who expects barriers to entry to be generally stable and durable. The analyst may or may not be consciously aware of the assumptions that he is employing.

These tools are applied to a data set that is largely determined by the institutional context in which the analysis is performed. An independent academic analyst may choose the data set, subject to budgetary,

computational and other constraints. Where a court performs economic analysis, however, the rules and procedures that control the litigation also shape the data set. The court can apply its analysis only to the data that are made available within the litigation. The issue of whether the procedurally available data support the claims being made is, therefore, often central to the outcome of a case.

These two components of economic analysis are often closely related. Where a single analyst such as a court performs both the interpretive function and the fact-fixing function (i.e. the function of determining which data are or should be made available in the litigation) a cognitive bias may be created that influences the way the data set is constituted. This means that a court's decisions about the sufficiency of data to support a particular economic claim will be based on the same assumptions and expectations about economic causality that it employs in *interpreting* that data set. Put another way, the court's interpretive tools will influence *both* the interpretation of the data *and* the assessment of factual sufficiency. Where a court considers a particular causal relationship improbable, it is likely to require more data to conclude that that relationship has been established in a particular case than if it considers such a relationship likely. Conversely, if it considers a particular causal relationship to be highly probable, it is likely to require less data to confirm that proposition. The combination of these operations can have a powerful influence on decisional outcomes.

An example illustrates this "confirmation bias." Where a court believes that economic power in one market generally cannot or will not be used to enhance a firm's power in another market (so-called "leveraging"), it is likely to require more evidence in support of a leveraging claim than it would demand if it believed that leveraging was commonly successful in harming competition.⁷ In this situation, "not enough" in relation to the issues of factual sufficiency means, in practical effect, the same thing as "wrong" in the interpretation of the facts. Both are produced by the same interpretive tools.

B. From Analysis to Expertise

For our purposes, an economic expert is an economic analyst who considers his capacity for economic analysis to be "superior" in some sense to some reference point that we can call "normal" analytical capacity. Where an analyst makes decisions on the basis of confidence in the superiority of his own analytical ability, he is acting as an economic expert.

7. There is a vast and ongoing controversy about the analytical utility of the concept of "leveraging." See, e.g., 3 P. Areeda & H. Hovenkamp, *Antitrust Law*, §652 (rev. ed. 1996).

Claims to expertise may be explicit or implicit. A court is not likely to state that it is acting as an economic expert, but assumptions of economic expertise can be inferred from the manner in which it performs economic analysis and the value that it attaches to its analysis.

Two factors are necessary to indicate that a court is acting as an economic expert. The first relates to the characteristics of the claim. Where a court makes a claim about economic causality that typically calls for specialized knowledge or is generally known to involve the use of such expertise, this may indicate that it considers itself to possess that specialized knowledge. For example, if a court states that a firm's access to a particular form of financing will increase barriers to entry into a particular market, this is an economic conclusion that normally calls for the use of specialized knowledge and analytical capacity.

Assuming that the claim is one that calls for economic expertise, however, we need to look at additional factors related to the process of decisionmaking in order to determine if a court is acting as an economic expert. If a court acknowledges the need for specialized knowledge and defers to that knowledge where it is available, then it clearly is not acting as an economic expert. Similarly, where the appropriate expertise is not available to the court, but the court must nevertheless make a decision, there is no basis for inferring that the court is acting as an economic expert.

Where, however, a court makes a claim about economic causality that is generally recognized as calling for specialized knowledge and where such knowledge is or can be made available to the court, its failure to seek such knowledge or take it into account where it is presented indicates that it is acting as an economic expert. In other words, the combination of these factors justifies the inference that the court considers its knowledge and analytical capacity to be sufficiently specialized to make the claim.

C. Economic Analysis and General Fact-finding

The economic expert's function is seldom carefully distinguished from other components of the judicial role, largely because the incentives to draw those distinctions are usually weak. For our purposes, however, it is necessary to distinguish that function from two other functions with which it is often confused.

Economic analysis differs from legal analysis in that it does not ask a legal question, but an economic one: "What happened and what were the consequences?" Legal concepts and categories play no role in this type of analysis. Assessing whether an economic result has been or is likely to be produced is a matter of analyzing and evaluating economic data, and the better the economic knowledge and skills of the analyst, the better the analysis is likely to be.

This analysis differs fundamentally from the application of legal concepts to data.⁸ Where, for example, a Community court decides the issue of whether a "market-dominating position" has been created, it is applying a legal concept to the economic facts. Where the legal concept (here, dominance) is related to an economic concept, the distinction may become complex and difficult. Nonetheless, it is necessary for understanding how a court reasons and what the implications of its reasoning are likely to be. It is the difference between relating facts to legal concepts, on the one hand, and assessing what those facts are, on the other hand. One is legal analysis; the other is economic analysis, even where they are related.

Where a court acts as an economic expert, it is also not engaged in its normal fact-finding role. By definition, normal fact-finding is based on the general knowledge that courts are expected to have. It utilizes analytical capacities that courts are expected to possess — sound judgment, judicial experience, general analytical ability and the like. Where, however, a court makes claims about economic causality that presuppose specialized skill or knowledge (and it does not seek such knowledge or take it into account where it is available), it is claiming specialized knowledge rather than general knowledge. To that extent, it goes beyond the kind of fact-finding normally entrusted to courts. The line between the two is not always clear, but the distinction is critical.

III. THE MERGER TRIO DECISIONS: THE COURT AS ECONOMIC EXPERT?

The Merger Trio decisions provide examples in which the CFI functioned as an economic expert. It did not, of course, function exclusively as an economic expert in these or any other decisions. It considered many issues, both legal and economic, and even where it dealt with issues of economic causality, it did not uniformly operate on the assumptions of expertise noted above. Only in some situations did it shift into the role of economic expert.

Those decisions sent one clear message — i.e. that the Court was not impressed by the decisionmaking process of the Commission in them. In each of them, the CFI concluded that the Commission's lengthy analysis of the effects of a proposed merger was inadequate to justify prohibition of the merger, and it accordingly rejected the Commission's prohibition decision. It is this message that has been the focus of attention.

Our concern, however, is with those specific situations in which the Court assumed the role of economic expert. The Court's claims about its role and about the standard it is applying are sometimes inconsistent with what it actually did, and thus we need to look at both.

8. This analytical process is often referred to in civil law jurisdictions as the "subsumption" of facts under legal concepts.

A. Stated Roles and Standards

On one level, the Court was acting in accordance with the traditional judicial role in competition law cases. Formally, it reviewed the decisions of the Commission for their conformity to applicable legal standards and found that the Commission did not meet those standards.

Our area of concern lies, however, below this formal surface. It is with *how* the Court reached its conclusions. A court may reject a Commission decision for several kinds of reasons, some of which are present in the Merger Trio decisions. It may, for example, find procedural irregularities regarding the acquisition or use of data or it may find errors in legal reasoning or inconsistencies in the presentation of arguments. These are accepted bases for overturning Commission decisions. They are not our concern here. Our focus is on how the Court handled the issue of economic analysis and what assumptions it made about the value to be attached to its own economic analysis.

With regard to claims of economic causality, the Court says that the standard is whether the Commission has committed a "manifest error of assessment" in its analysis.⁹ This standard reflects the distinction noted above between the use of "general knowledge" that is normally attributable to courts and the assumption of economic expertise by the court. "Manifest" means "obvious" — i.e. readily apparent to some group on the basis of general knowledge within that group. In the context of courts, the reference group to which it must be obvious cannot be economic experts, because courts are not generally considered to be economic experts. It must, therefore, refer to the general knowledge and capacities attributable to courts (or, perhaps, Community courts).

In referring to this standard, the CFI also recognizes an established component of the relationship between the courts and the Commission — i.e. that the Commission is entitled to a "margin of appreciation" in its factual determinations. According to the Court in *Tetra Laval*, "...the substantive rules of the Regulation, in particular Article 2, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature."¹⁰ Framing the same basic issue in another way, the Court specifically acknowledges that it should defer to the expertise of the Commission in evaluating economic issues, subject to some unspecified limits. These are basic principles that the Community courts have developed regarding the institutional (or "constitutional") structure of EU institutions.

9. See, e.g., *Tetra Laval*, at para. 141. See also *Cableuropa SA v. Commission*, 2003 E.C.R. (Sept. 30, 2003) at para. 119 and *ARD v. Commission*, 2003 E.C.R. (Sept. 30, 2003) at para. 194.

10. *Tetra Laval*, at para. 119.

B. Implicit Roles and Standards

What the Court actually does, however, is not always consistent with this standard and this stated relationship. At a number of points in the decisions, it implicitly adopts the role of economic expert by assuming that it has sufficient skill and knowledge in economic analysis to reject the Commission's conclusions on the basis of its own skill as an economic analyst. In those situations, it looks at the same data on which the Commission based its decision, but it draws different economic conclusions from the data, relying only on its own analytical capacity to make those determinations.

A few examples illustrate situations in which the Court moved into the role of economic expert. In them, the Court makes claims regarding issues of economic causality that are appropriate for the application of economic expertise and does so on the basis of its own analytical capacity. Despite acknowledging that it should accord the Commission a margin of discretion, there is little indication in these examples that it is doing that to any significant degree.

In the *Airtours* decision, the Court drew the following conclusions from its own analysis of the Commission's position: "It follows from all of the foregoing that the Commission made errors of assessment concerning the development and predictability of demand, demand volatility and the degree of market transparency...."¹¹ Factors such as the "predictability of demand, demand volatility and the degree of market transparency" are the kinds of issues normally entrusted to economic experts. Adequate analysis invites economic expertise, because the issues of economic causality can be complex. They require 1) awareness of numerous factors that may influence economic outcomes as well as 2) the capacity to relate those factors to each other to produce a sound analytical conclusion.

Recognizing the interrelationships among causal factors is particularly important in providing sound economic analysis. The hallmark of expert analysis is the capacity to evaluate individual factors in relation to each other and to the overall data field. A trained economic analyst typically seeks to identify the interplay of factors in a particular causal relation and to relate them to each other in order to draw a conclusion about what happened. In the examples just mentioned, however, the Court found fault with specific elements of the Commission's analysis of these issues and based its rejection on those specific issues, leaving unclear the extent to which it engaged in this kind of integrated analysis.

The Court also assumes its own expertise in making more specific factual claims. For example, in *Tetra Laval* it makes the following statement in rejecting the Commission's claim that economic leveraging

11. *Airtours*, at para. 181.

could be used to secure a market dominating position: "...large-scale customers, who for the most part are the only ones to use both carton and PET packaging, would be able to resist any leveraging."¹² This claim is made without support and without any apparent deference to the Commission's analysis. It is a conclusion about the likelihood that firms in a market will respond in particular ways to specific stimuli. It is the kind of claim that an economist can be expected to make, because predicting the way in which market participants are likely to react to particular pressures and incentives may require a highly developed understanding of the nature of the market relationships involved. The Court rejects the Commission's analysis without giving reasons and without stating why its analysis is better than the Commission's analysis. It appears to pay little, if any, attention to the Commission's analysis, but rather to make its claims with no basis other than its own economic analysis.

In *Schneider* the opinion does not state directly that the Court disagrees with the Commission's interpretation of economic statistics, but it would be difficult to read the language any other way. It states that "[t]he Court cannot accept the assertion that if ABB's and Siemens' integrated sales were taken into account in calculating their market shares, that would in any event have only a slight effect on the assessment of relative strength on the relevant markets."¹³ This sounds very much like a claim of expertise on the part of the Court: the Commission has interpreted the data one way, but the Court disagrees with that interpretation and decides on the basis of confidence in its own economic analysis.

Assertions that the Commission did not provide adequate evidence to prove its claims of economic causality are related, as noted above, to claims about economic interpretation itself. In each of the Merger Trio cases, but particularly in *Tetra Laval* and *Schneider*, the Court frequently finds that the Commission has failed to produce information that the Court considered sufficient to support a claim of economic causality.

In *Tetra Laval*, for example, the Court states that the Commission failed to provide an analysis of a particular market (for glass containers) and continues: "In the absence of such an analysis, the Court is unable to ascertain the accuracy of the Commission's forecasts for juices. An analysis of that kind would have been indispensable to enable the Court to determine the likely level of switch from glass to carton ... [emphasis added]."¹⁴ The Commission had concluded that such an analysis was not necessary to make its point, but the Court took the position that it (the Court) was to make an independent analysis of the likelihood that consumers would change the kind of packaging containers they wanted. Again, assessing such a likelihood can involve complex economic analysis

12. *Tetra Laval*, at para. 167.

13. *Schneider*, at para. 288.

14. *Tetra Laval*, at para. 213.

that requires considerable expertise, but the Court assumes the expertise to make that assessment on the basis of its own analytical ability.

These instances could be read as merely reflecting closer judicial scrutiny and the application of a higher standard of proof to the Commission's claims. They are that, but they also represent a willingness on the part of the Court to assume in specific instances that its ability to analyze economic causality issues is superior to that of the Commission. That willingness is demonstrated in a case such as *Tetra Laval*, where the Court claims that the Commission has made dozens of errors in assessing factual sufficiency involving issues of economic causality. In general, a court's willingness to accept a factual claim related to economic analysis is likely to be inversely related to its confidence in its own capacity to analyze that type of issue.¹⁵

In any event, these few examples indicate that the Court does not always apply a "manifest error" standard. As noted above, that standard would require the Court to apply its general knowledge and its normal analytical tools (such as, for example, logical analysis). Where it relies on its own economic expertise in determining the sufficiency of the Commission's economic analysis, however, it is performing a different task using different tools.

In the above examples, the Court implicitly assumed that its economic expertise was sufficient to override the findings of economic causality made by the Commission. It did not, however, distinguish between these situations and others in which it applied legal categories to economic facts or in which it analyzed the logical strength of the Commission's position. This suggests that the judges may not have been fully aware of the distinction. Given that this distinction has seldom been sharply drawn, this would not be surprising, and it further highlights the need to bring the distinction into sharper focus.

IV. JUDICIAL ROLES AND THE DEVELOPMENT OF COMMUNITY COMPETITION LAW

The Court's role as an economic expert has potentially important implications. The role that Community courts have played in developing competition law does not feature them acting as economic experts.¹⁶ In order to assess the potential consequences of altering that role to include greater prominence for the economic expertise component, therefore, we

15. It is important to underscore that this analysis refers exclusively to claims of economic causality and does not refer to other issues as to which a court may determine that factual support for legal conclusions is inadequate.

16. I do not here claim that Community courts have never before acted as economic experts. Such instances have, however, been generally marginal. The Merger Trio decisions have helped to move issues of economic expertise toward center stage.

need to look briefly at its current characteristics and how they have influenced competition law development.

A. The Courts' Role in the Competition Law System

Formally, the role of EU courts is to apply the European treaties and secondary legislation. Where a decision of the Commission is challenged, a court must determine whether the Commission has acted according to the legal standards set out there. In doing this, it interprets and applies those provisions and thereby gives substantive content to the law.

In competition law cases, this gives the Community courts two main roles. One is to develop and explain principles of substantive law that implement the expressed will of EU institutions and the Member States. Such principles provide standards of conduct for private economic actors. The other is to ensure that Commission decisions conform to Community legislation, general legal standards and Community and Member State political expectations. Here the standard the courts have generally applied is whether the Commission has abused its discretion or made obvious mistakes. This reflects the concern that abuse of discretion and obvious errors tend to undermine support for the EU legal regime.

Neither of these roles calls for a Community court to act as an economic expert. They were constructed within a context in which it has been generally assumed that the Commission is the repository of economic expertise and that the courts should generally respect this division of responsibility and competence among European Union institutions.

B. The Impact of Judicial Roles

This judicial role has shaped the development of European competition law and contributed both to its effectiveness and to its impact on European integration. I develop this point at length elsewhere, but several aspects of that role are particularly important here.¹⁷

First, it supports the Commission's compliance efforts, both their enforcement and their educational components. By generally deferring to the Commission's economic expertise, the courts allow the Commission to pursue its enforcement objectives with relatively little judicial "interference." Provided only that it acts in accordance with established political and legal expectations regarding appropriate administrative conduct and that it does not commit obvious errors, the Commission is permitted to pursue its enforcement objectives as it wishes. This role also bolsters the Commission's position in negotiating with and influencing businesses. In dealing with the Commission, firms assess the potential costs and benefits of violating competition law norms and of resisting

17. D. Gerber, *Law and Competition in Twentieth Century Europe* 351-91 (1998).

Commission pressure to change their conduct, and there is less incentive to challenge the Commission where firms know that the Commission's economic analysis is likely to be supported by the courts.

This judicial role also supports the Commission's function of "educating" legal and business communities in Europe about competition law and competition "culture." The courts have supported that function by focusing their attention on articulating competition law principles that are generally accepted and reasonably clear and thus valuable to business decisionmakers (or at least their advisors). The Commission has often seen its educational function as central to its compliance mission, and each wave of new member states reinforces its prominence.

In addition to supporting the Commission's compliance efforts, this conception of the judicial role contributes to competition law's legitimacy and generally high status. It has led the courts to elaborate and clarify a normative framework for an integrated European market. They have performed this task with sensitivity to the needs of business and attention to the needs of integration, and this has often served those political interests that pursue integration.¹⁸ Moreover, this judicial role is consistent with the roles generally assigned to courts in European national legal systems, and this further enhances the status of the decisions the Community courts make.

Both these functions, in turn, tend to further the goal of European integration. The function of enunciating principles and creating an accepted "language" for competition law is in itself integrative, because it represents the creation of a normative framework that applies throughout the territory of the Union. Moreover, the competition law principles themselves have been developed with specific reference to the goal of integration. They have not been developed solely on the basis of economic efficiency considerations. Finally, this conception of the relationship between the courts and the Commission has been seen as cooperative rather than competitive, thereby engendering confidence in the EU's institutional arrangements.

C. Evolutionary Change

The European Court of Justice developed this conception of its role (and thus of the role of Community courts) early in the process of European integration, and its basic features and the effects associated with them remain in place. There have, however, been gradual changes in the contours of that role, especially during the last decade. These changes help to explain the greater prominence of the Court's role as economic

18. This is not to suggest that there has never been criticism of the role played by the courts in the development of competition law principles, but that their performance in this area has been generally well accepted.

expert that appears in the Merger Trio cases. They may also have obscured that role and its implications.

One of those changes has been a reaction against "formalism" in Community competition law. During the late 1980s, and especially during the 1990s, dissatisfaction with certain aspects of competition law that were understood as "formalistic" became more prominent.¹⁹ Calls increased for greater attention to the economic consequences of transactions and less concern for the form of the transactions that produced those consequences.

This was accompanied by a tendency for the Community courts to require more "facts" from the Commission in competition law cases. Given prominence first by the *Remia* case in 1985,²⁰ this tendency continued to strengthen during the 1990s, as the courts insisted that the Commission provide a firmer factual basis for its claims.²¹ One reason for the creation of the CFI in 1989 was the perceived need to free the ECJ from the need to assess the factual component of complicated competition law cases and to expand the Community's judicial resources for evaluating Commission claims.

A third development has been the growing centrality and prominence of merger law within Community competition law.²² Merger law requires that economic analysis play a central role, because the focus is on predicting the economic effects of a merger. This is also a somewhat speculative and imprecise form of economic analysis, because predicting the consequences of economic transactions in highly complex situations is never an easy or straightforward intellectual task.

Together, these three factors have led to greater concern in Community courts with economic issues and a greater willingness to demand factual support from the Commission. The increased prominence for the role of economic expert that appears in the Merger Trio decisions can be seen as an extension of these trends, and this may also help to explain the relative lack of critical analysis of the Court's role in these cases.

These developments do not necessarily, however, call for the CFI to function as an economic expert. Where substantive competition law principles refer to the economic effects of transactions, the Court must, of course, assess whether the legal requirements have been met, but this does not by itself change the basic structure of responsibilities within the EU system. Similarly, to require that the Commission adequately support its claims does not require that the Court assume that its own economic expertise is superior to that of the Commission.

19. See, e.g., Korah, *From Legal Form Toward Economic Efficiency - Article 85(1) of the EEC Treaty in Contrast to US Antitrust*, *Antitrust Bull.* 1009 (1990).

20. Case 42/84, *Remia and Nutricia v. Comm'n* [1985] ECR 2545, 75 (*Remia*).

21. For discussion, see Gerber, *supra* note 17, at 371-91.

22. For discussion, see Gerber, *The Transformation of European Community Competition Law*, 35 *Harv. J. Int'l L.* 97 (1994).

V. IMPLICATIONS FOR COMPETITION LAW DECISIONS

A tendency for the CFI to function more frequently and aggressively as an economic expert may have implications both for the characteristics of its decisions (and thus the substantive content of competition law) and their influence. The more extensive the use of that function, the more likely it is to influence the quality of competition law decisions as well as the role and the status of competition law in Europe. This section discusses the first set of implications; the following section discusses the second.

A. The Institutional Context

The institutional context in which a court operates is a major factor in determining the impact of the roles it plays. The analysis here thus relates specifically to the CFI and its particular role and institutional context, not to courts generally. This institutional context is also important in comparing the CFI's role as an economic expert with that of other courts, such as, for example, the U.S. federal courts, which operate in an institutional context that is vastly different from that in which the CFI operates. These differences in institutional context mean that inclusion of the economic expertise function in the role of courts in one system may have consequences that differ significantly from inclusion of the same function in the role of courts in another system. The institutional framework will change significantly for many types of cases when modernization plans go into effect in 2004, but the changes will have little effect on the CFI's role in the merger law area.²³

For purposes of this analysis, two aspects of the CFI's position in the European competition law system are particularly salient — its power and its isolation. The CFI's power derives in part from the fact that it is the court to which competition law decisions of the Commission must normally be appealed.²⁴ Although its decisions are generally subject to review by the ECJ, the procedural obstacles to appeals make them rare. Moreover, the CFI does not appear to be significantly constrained or influenced by the decisions of other courts, because there are few opportunities for other courts to apply these provisions. In merger cases, a further disincentive to appeal is the fact that mergers are time-sensitive. Their economic viability is threatened by court delays, and for this reason firms frequently are unwilling to appeal CFI decisions. Finally, in contrast to systems such as

23. For discussions of many aspects of the modernization process, see Ehlermann & Atanasiu (eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (2001).

24. Art. 225, EC Treaty.

that of the United States,²⁵ there is little direct political constraint by other institutions. Community institutions such as the Council or the European Parliament rarely respond to the CFI's decisions. As a result of these factors, the CFI has not only the last judicial word, but usually the only judicial "word" in merger cases. How it uses that power is thus a major issue.

The factors that give it power also tend to isolate it, at least in the merger area. It has a very limited dialogue with other courts (other than, to a limited context, the ECJ) that could provide feedback and a difference of perspective. It also receives little input from other EU institutions. It thus operates with limited opportunity to receive informational feedback.

B. Analytical Capacity and Knowledge

The CFI's conception of its role in relation to economic analysis can influence the characteristics of its decisions. One central issue here is whether the Court is likely to produce economic analysis of a sufficiently high quality to justify increased reliance on the Court to perform that function. In this context, the quality of economic analysis depends on both the analytical capacity and knowledge of the Court and the factors that are likely to influence the way it uses that capacity.

Its capacity for economic analysis is limited by several factors. Most obvious is the lack of economic training of the judges. Community court judges are not chosen for their capacity to perform economic analysis and seldom have significant economic training. Moreover, they typically do not have extensive opportunities to compensate for this lack of training in economics through judicial experience. They do not spend their entire careers on Community courts, and many have not been judges in their own national systems.²⁶ Finally, there is no formal specialization on the CFI. Although competition cases represent a significant part of its case load, that court also handles other types of cases. This situation contrasts with that of the Commission, where the directorate general for competition has economists and other officials who are specialized in particular forms of economic analysis.

The CFI also has limited opportunity to draw on other institutions for assistance in economic analysis. It cannot seek assistance either from the ECJ or from other Community institutions in a litigation context. The Commission is a repository of economic expertise, but in relation to particular litigation before the Court it is a litigant and cannot perform as an advisor to the Court. The institutional system in which the Court is

25. It is not uncommon in the United States for legislators and administrators to comment on major antitrust decisions by U.S. courts.

26. Few serve more than two terms (12 years) and a single term of six years is common.

embedded thus provides little, if any, assistance to the Court in performing economic analysis.²⁷

C. Potential Distorting Factors

That institutional system also creates incentives and interests that can affect how the Court uses its analytical tools. Those interests and incentives can have a conscious impact on judges, but in a court such as the CFI this is highly unlikely. They may, however, also influence decisions without the conscious awareness of the judges — by shaping the way they think about the issues. I emphasize that I do not claim that such incentives have ever played any role in the decisions of the CFI or that they are likely to do so in the future. From the standpoint of analyzing institutions, however, it is important to ask what the incentives are, regardless of whether their impact can be measured.

All institutions have incentives to enhance their own status. In the case of the CFI, the role of economic expert provides opportunities for status enhancement. Competition law is a highly visible and prominent area of EU law, and it is one of the relatively few areas in which private business enterprises are regularly involved in litigation with the Commission. Merger law is particularly high profile: few actions of EU courts are likely to garner more attention and headlines than those in which a court overturns a Commission prohibition of a major merger.

Status incentives may also be generated by relationships among institutions. Institutions may compete with each other for status and influence, and this competition can influence decisions within those institutions. The CFI's relationship with the European Court of Justice is in some ways competitive. The ECJ is "superior" to the CFI in the two-position judicial hierarchy, and its members are generally thought to have more status and perhaps benefits than the judges of the CFI. The two courts also compete for resources in some situations.

The CFI also stands in a potentially competitive relationship with the Commission. Because the CFI is the court that normally reviews Commission decisions, the two institutions confront each other directly, and this can also create competitive incentives. Again, these incentives may have no effect, but they may tend to influence some kinds of decisions without the judges being fully aware of that influence.

This brief review suggests that a conception of the judicial role that features the CFI acting as an economic expert is unlikely to contribute to better decisions or otherwise positively influence the characteristics of its merger decisions. There is little reason to expect that the CFI is likely to

27. The procedural rules of the Court also tend to limit the Court's access to economic expertise. They provide limited opportunities for the adversaries to reveal their opponent's claims and investigate the bases for them.

provide consistently higher quality economic analysis than that produced by the Commission.

VI. IMPLICATIONS FOR THE DEVELOPMENT OF COMPETITION LAW

The role of Community courts as economic experts also has implications for the development of European competition law and its relationship to European integration. Extensive use of that role may lead to consequences that differ significantly from those that have thus far accompanied the development of European competition law and shaped its role in European integration.

One such implication involves compliance with competition law. As noted above, the role that the European Court of Justice has shaped for itself (and, derivatively, for the CFI) in competition law has generally supported enforcement and other compliance efforts. But if Community courts increasingly act as economic experts, this could produce the opposite effect. That role will, for example, increase the Commission's costs in preparing and bringing merger cases (as well as other kinds of competition law cases). Where a reviewing court acts as an economic expert, this fact alone creates a higher and less predictable standard of proof, because the range of decisions the court can make expands beyond the range traditionally available to courts. As the Merger Trio decisions show, that range has few natural limits. In the role of economic expert, the Court may fault the Commission for failure to provide sufficient evidence to support virtually any claim involving economic causality.

Where a court operates as an economic expert, it may examine many different lines of economic causation, and the Commission must, therefore, cover as many of those lines as possible and acquire data to support each. The greater the likelihood that the Court will reject the Commission's assessment of economic causality, the more resources the Commission must expend to acquire economic data and to secure independent outside interpretations of that data. These additional costs are likely to reduce the number of potential violations the Commission can pursue and generally reduce its enforcement capacity.

Such an expansion of the range of Commission claims that are subject to detailed judicial scrutiny may tend to inhibit some particularly important kinds of enforcement efforts. It may, for example, discourage the Commission from pursuing complex cases, even where it is convinced that a serious violation has occurred. Where each economic issue may have to be supported by extensive research and data, the potential cost of pursuing such cases increases dramatically, while the likelihood of successfully defending a merger prohibition decision is reduced. Similarly, this situation may lead the Commission to avoid cases that involve new kinds of legal issues, again because it may be required to

spend substantial resources in acquiring data and outside interpretations without any basis for confidence that it can predict the results of the Court's economic analysis.²⁸

To the extent that it increases the costs of enforcement efforts, the Court's role as economic expert is also likely to reduce the resources available for compliance efforts that are directed at educating the business and legal communities about competition law. Moreover, that role is likely to increase uncertainty about what the law is and thus hamper the Commission's efforts to clarify conduct standards and make them more accessible to business. This impact could be particularly important in the context of the impending expansion of the Union, not only because there will soon be ten new Member States, but also because their history has generally provided less experience with economic competition than has been the case with prior entrants. In these states, competition law often remains little known and poorly understood.

Another concern is the possibility that where the CFI frequently acts as an economic expert, it may tend to undermine the status of competition law (and perhaps its own legitimacy as well). That status depends on the general recognition not only that the standards of conduct are fair and appropriate, but also that they are reasonably understandable to European businesses and that they are enforced and interpreted in ways that are predictable and generally acceptable. To the extent that greater prominence for the economic expertise function in the Court increases uncertainty regarding the outcome of litigation, it may also reduce confidence in competition law decisions. In addition, European national legal systems seldom consider it appropriate for courts to act as economic experts, and this may generate skepticism about the CFI's role as economic expert and the decisions its reaches in that role. Finally, economic analysis is often perceived to have ideological associations, and this may tend to undermine the legitimacy of court decisions.

Both types of effects may, in turn, create risks for European integration. An increasingly fact-oriented role may tend to obscure rather than clarify principles and standards of conduct, and the perception that there are major conflicts between two central institutions of the Union is likely to reduce confidence in those institutions.²⁹ This risk is likely to be

28. See, e.g., Daniel Dombey, *All at sea: after another setback in court, a chastened Mario Monti may choose his fights with more caution*, *Financial Times* (Oct. 1, 2003) p. 13.

29. In this context, the fact that European competition law is embedded in a rapidly changing institutional and political framework differentiates it from situations (such as in the United States) in which the institutional structure is stable. EU institutions must still strive to gain and maintain support from many constituencies, especially in light of the eastward expansion of the EU and of the potentially significant "constitutional" changes that are now under consideration, and this needs to be taken into account in evaluating both the roles that specific institutions play and the relationships among those institutions.

particularly high with new member states, where knowledge of competition law and principles of market behavior are less well-established. It may also be intensified by the fact that the "modernization" of competition law will go into effect in 2004 at the same time as the new states will be admitted to membership, creating further uncertainties and potential instability within the Community competition law system.

VII. CONCLUSION

The Merger Trio decisions have focused attention on the relationship between economics and competition law. They have raised important issues about the decisional process of the European Commission, leading the Commission to reflect on that process and to respond to perceived defects in it. Administrative decisionmaking is, however, only part of the issue. The broader issue is "Who should make decisions based on economic expertise, how should they be made, and in what institutional and procedural contexts?" It thus implicates judicial as well as administrative decisionmaking — the EU courts as well as the European Commission.

The CFI's decisions in the Merger Trio cases provide an occasion for looking critically at this issue. In them, the CFI at times acts as an economic expert, implicitly claiming for itself a superior expertise in economic analysis. I have suggested here that it is important to identify that element of the role of the Community courts and to consider its implications. As competition law becomes more economics oriented and as merger law becomes more prominent, the need for that attention increases.

Our review suggests that it may be worthwhile to consider changes in the way Community courts conceive and treat the issue of economic expertise. For example, a competition law court could be created to handle some (for example, merger) or all competition law cases. The resulting increase in the specialization of judges would tend to increase the capacity of the court for economic analysis by increasing the frequency with which judges dealt with those issues (although some might fear that it could lead to "too much" economics in competition law cases). The Nice Treaty provides for the possibility of creating such a court. Whether or not such a court is created, a group of economic advisers could be established that could provide economic expertise for Community courts (either automatically or only at a court's request). As a minimal response, the CFI could decide that wherever it rejects the economic analysis submitted by the Commission, it must fully explain why it considered its own analysis superior to that of the Commission. The court often does this, but it could decide to do it more regularly and self-consciously. Each of these measures would be a response to the specific issue of economic expertise identified in this Article.

I do not, however, argue for any of these changes, and I do not claim that the CFI's analysis in the Merger Trio decisions was in any way wrong or inappropriate. The sole objective of this Article has been to identify the issue and explore some of its implications. Whether changes should be made is a matter for the judges of the CFI and the ECJ as well as for those within the Council and the Commission who are responsible for the courts and for the development of competition law and its role in European economic integration. The complex, learned and often brilliant opinions in the Merger Trio cases are of great value, and they may be in all respects correct, but their importance and prominence require that their implications be fully explored.