TRANSPARENCY IN MERGER REVIEW:

A LIMITED ROLE FOR THE WTO?

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This article addresses certain competition-related issues that parties to a transnational merger and acquisition (M&A) transaction must face, preferably during the strategic planning phase. The ultimate focus will be on the suitability *vel non* of the World Trade Organization (WTO) serving, as has been proposed by some scholars and political bodies, as a form of supranational competition law authority with respect to merger clearance. Part I will focus on

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premerger notification and consideration of merger remedies that the parties can propose in order to alleviate possible competitive problems and defuse time-consuming and costly second phase merger review. Part II contains a brief primer on merger review in the United States and the European Union. Part III is a case study illustrating the divergences in antitrust analysis conducted by two competition regulators even when ostensibly employing the same or similar concepts: the much discussed denial in 2001 by the European Commission of the proposed merger between General Electric and Honeywell, a transaction in which the EU rejected the party-proposed remedies. Part IV identifies legal and practical problems with existing suggestions for using the WTO as a supranational competition authority. Finally, Part V offers some suggestions for a considerably more modest role that the WTO could usefully play in streamlining multi-jurisdictional review of transnational mergers.

I. INTRODUCTION: GLOBALIZATION AND MERGER REVIEW

A wave of transnational mergers and acquisitions has surged significantly during the past decade, a wave as significant in its frequency (*i.e.,* sheer numbers of transactions)[1/] as in its amplitude (the size of those transactions).[2/] Reductions in trade barriers have enabled increased foreign investment, and many multinational enterprises (MNEs) have found it easiest or most expedient to expand overseas operations by acquisition of existing businesses rather than *de novo*. By the 1990's, with business being characterized by ever-more-rapidly evolving

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[1/] *See* U.S. Department of Justice, Final Report of the International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust [hereinafter ICPAC Report] 43-46 (2000) (discussing merger wave of the 1990's), *available at* http:// www.usdoj.gov/atr/icpac/finalreport.htm (last visited October 30, 2004).

[2/] *See, e.g.,* Frederic L. Pryor, *Dimensions in the Worldwide Merger Boom,* 35 J. ECON. ISSUES 825 (2001). *See also* n.5, *infra.*

technology, and with timeliness of entry or expansion in a given market becomingly increasingly crucial, this trend toward increased transnational M&A activity had greatly accelerated.[3/] Total

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[3/] An interesting contrast was offered by former FTC Chairman Robert Pitofsky, who noted, in connection with a speech (though not as part of his prepared remarks) to the Antitrust Section of the A.B.A. at that organizations's 1998 annual meeting, that during the Carter Administration (late 1970's), the FTC reviewed only one transaction with an international dimension. *See Mergers and Acquisitions: ABA Section Examines Consequences of Proliferation of Premerger Notification*, 75 ANTITRUST & TRADE REG. REP. (BNA) 163 (1998) (reporting Pitofsky's remarks). The text of Pitofsky's prepared remarks (which do not contain the preceding observation) is available on the FTC's website. *See* Merger and Competition – The Way Ahead, Prepared Remarks of Robert Pitofsky, Chairman, U.S. Federal Trade Commission, Before the American Bar Association Annual Meeting, Toronto, Canada (August 4, 1998), *available at* http://www.ftc.gov/speeches/pitofsky/canada.sp2.htm (last visited October 28, 2004).

dollar amounts of global M&A activity[4] rose dramatically during the period 1995-1999,[5] with approximately eighty percent of those transactions involving American and European firms.[6]

In response, there has been a veritable explosion of national competition laws, resulting in a massive increase in review of individual transactions by the competition authorities of multifarious jurisdictions.[7] Thus transnational mergers, while affording large corporations

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[4] If the theory of potential competition has any validity, then global M&A activity, with its propensity to produce transnational behemoths, has a tendency to eliminate whatever restraining effect such potential competition might have. The theory arises, after all, "as a negative implication from the perception that, in a market that would otherwise permit monopoly pricing, the existence of potential competition dampens the ability to price in that manner, just as the existence of substitute competition increases the elasticity of the monopolist's demand curve and thereby reduces the level and the social costs of monopoly." KEITH R. FISHER, MERGERS AND ACQUISITIONS OF BANKS AND SAVINGS INSTITUTIONS § 3.10.2 (1993). Marked diminution in the number of competitors who *could* enter the market *de novo* would tend to vitiate any vestigial market discipline the theory of potential competition might contribute. This tendency would, as a theoretical matter, only be exacerbated by high barriers to entry occasioned by technology and technology licensing or by high levels of industry-specific sunk costs.

[5] One estimate of this increase was from $199 billion to $498 billion. *See* Simon J. Evenett *et al*, *Antitrust Policy in an Evolving Global Marketplace,* in ANTITRUST GOES GLOBAL: WHAT FUTURE FOR TRANSATLANTIC COOPERATION? 1, 4 (Simon J. Evenett *et al.* eds. 2001) (furnishing statistics). That appears relatively modest compared with other estimates. *Cf.* Judy Radler Cohen, *Blockbusters, Nonstop! Global M&A Hits $3.4 Trillion as Europe Takes Off and Telecom Soars,* INVESTMENT DEALER'S DIGEST, Jan. 17, 2000 (citing data from Thomson Financial Securities and asserting an increase in global merger activity from $2.5 trillion in 1998 to $3.4 trillion in 1999). These numbers seem at first blush to be inordinately large, but then one must remember the types and magnitudes of transactions announced during those years (*e.g.,* in 1998, Travelers-Citicorp, WorldCom/MCI, NationsBank/BankAmerica, SBC/Ameritech, Norwest/Wells Fargo, and in 1999, Vodafone/Mannesmann, Sprint/MCI WorldCom, Olivetti/Telecom Italia). *See* ICPAC Report, *supra* note 1, at 45 n.9. The impact of rapidly evolving technology can be seen in the industries witnessing the most consolidation: telecommunications and financial services.

[6] The aggregate amount of European M&A transactions in 1999 was more than double that of the preceding year. *Id.* at 45.

[7] *See* ICPAC Report, *supra* note 1, at 33 (noting that by 2000, approximately sixty nations had adopted antitrust laws, mostly in the early 1990s, and that twenty more were in the
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significant business opportunities, also present challenges because of the occasionally daunting task of compliance with a multiplicity of competition law regimes.[8]

These merger review schemes either prohibit or assert governmental controls over transactions running the gamut from the incorrigibly anticompetitive to the competitively neutral or benign, with important way stations in between for transactions that, while anticompetitive, confer economic advantages upon the reviewing nation (such as job creation or preservation, investment in infrastructure, etc.) that are deemed to outweigh the anticompetitive effects.[9] Along this spectrum, not only are the applicable legal standards somewhat different, with the

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process of drafting laws). According to more recent estimates, over 100 countries had competition laws as of the summer of 2004, and nearly 70 had pre-merger notification laws. *See* R. Hewitt Pate, *Securing the Benefits of Global Competition*, Address At the Tokyo American Center, Tokyo Japan (Sept. 10, 2004), *available at* http://www.usdoj.gov/atr/public/speeches/205389.htm (last visited October 30, 2004). For some late 1990's perspectives on this phenomenon, see William E. Kovacic, *Merger Enforcement in Transition: Antitrust Controls on Acquisitions in Emerging Economies*, 66 U. CIN. L. REV. 1075 (1998).

[8] For example, according to one commentator, when MCI merged with WorldCom even back in 1997, over 30 agencies reviewed the transaction. Adam Frederickson, *A Strategic Approach to Multi-jurisdictional Filings,* 4 EUR. COUNSEL 23 (Dec. 1999/Jan. 2000). *See also* Notification and Procedures Subgroup, Int'l Competition Network, Report on the Costs and Burdens of Multijurisdictional Merger Review 10-12 (2002), *available at* http://www.internationalcompetitionnetwork.org/costburd.pdf (last visited February 12, 2004). *See also* Ariel Ezrachi, *The Role of Voluntary Frameworks in Multinational Cooperation over Merger Control,* 36 GEO. WASH. INT'L L. REV. 433, 435 n.5 (2004) (asserting that the Exxon/Mobil merger was subject to review in "roughly forty jurisdictions").

[9] The variations on this theme are as many and multiform as there are individualistic national customs or priorities that animate competition policy. Some competition laws, for example, concern themselves in particular with the impact of a transaction on local small- to medium-sized business. *E.g.,* South Africa, Competition Act of 1998, ch.3, § 16(3).

two most prominent[10] being "dominance" (as used in the EU) and "substantial lessening of competition" (as used in the United States),[11] but the substantive legal content accorded those standards, as well as the remedies prescribed, can be widely divergent in countries purporting to apply the identical standard.[12] Such disparities can result from changes in personnel or changes in antitrust enforcement profiles attributable to the winds of political change.[13]

Globalization has created challenges for a variety of legal regimes, and competition law is certainly one of them. Regulators will, with considerable justification, assert authority to

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[10] A third, oft-cited, is the nebulous "public interest" standard, which used to be the test under the U.K.'s competition law. Recognizing that this standard facilitates the substitution of non-antitrust goals for rigorous analysis of the effects of a particular transaction on competition, the U.K. has replaced its overtly politicized public interest approach with an explicitly competition-oriented standard. *See generally* U.K. Department of Trade and Industry, Productivity and Enterprise: A World Class Competition Regime 23-24 (2001), *available at* http://www.dti.gov.uk/ccp/topics2/pdf2/compwp.pdf (last visited October 28, 2004); Enterprise Act 2002, Ch. 40, § 35 (adopting as basic framework "substantial lessening of competition" test), *available at* http://www.legislation.hmso.gov.uk/acts/acts2002/20040-d.htm#36 (last visited Oct. 28, 2004).

[11] Antitrust regulators in both the United States and the European Union provide training programs and other assistance for those in charge of establishing and enforcing competition laws in other countries. *See* Fed. Trade Comm'n, A Positive Agenda for Consumers: The FTC Year in Review (2003), *available at* http://www.ftc.gov/reports/aba/gpra2003.pdf (last visited October 16, 2004) (describing FTC program); Kathleen E. McDermott, *Antitrust Outreach: U.S. Agencies Provide Competition Counseling to Eastern Europe,* ANTITRUST, Fall/Winter 1991, at 4-7 (describing Antitrust Division's initiative in Eastern Europe); Juan Antonio Rivière Martí, *Competition Policy in Latin America: A New Area of Interest for the European Union,* EC COMPETITION POL'Y NEWSL. (Spring 1997), *available at* http://europa.eu.int/comm/competition/speeches/text/sp1997_014_en.html (last visited Oct. 16, 2004) (describing EU initiative in Latin America).

[12] *See* Evenett, *supra* note 5, at 16.

[13] This is a familiar phenomenon in the United States. Contrast the profile of antitrust enforcement under the Carter Administration with that under the Reagan Administration; a similar comparison can be made with the Administrations of Bill Clinton and George W. Bush (as Microsoft can readily attest).

subject to antitrust[14/] scrutiny merger transactions that arguably may have an anti-competitive effect on the territory subject to their jurisdiction, regardless of whether either the legal situs or the "center of gravity" of any party to the transaction falls within that jurisdiction. By the same token, a blanket assertion of authority to scrutinize transactions with little or no actual (or even potential) effect within that territory not only is incompatible with recognized principles of international law[15/] but often results in political conflicts. In connection with the merger of Boeing and McDonnell Douglas, for example, U.S. politicians expressed outrage at the prospect that the European Commission[16/] would block a quintessentially American merger and threatened to file a complaint with the WTO or impose unilateral trade sanctions in retaliation.[17/]

[14/] At least where there are no differences in nuance, the terms "antitrust" and "competition" (in the sense of regulation of competition or competition policy) will be used interchangeably herein. *Cf.* Wolfgang Pape, *Socio-Cultural Differences and International Competition Law,* 5 EUR. L.J. 438, 444 (1999) (noting that in bilateral discussions between the United States and the European Community, European negotiators agreed that "competition" should be interpreted as meaning "antitrust" in the American sense).

[15/] Competition law jurisdiction is generally based upon the territoriality principle. *See, e.g.,* Cases 89, 104, 114, 116-7, 125-9/85, Ahlström v. Commission, 1988 E.C.R. 5193 ¶ 18.

[16/] To avoid confusion, in this article the abbreviation "Commission" will be used to refer to the European Commission but not the U.S. Federal Trade Commission, which shall only be abbreviated by its acronym, "FTC."

[17/] *See generally* Alison Mitchell, *Clinton Warns Europeans of Trade Complaint on Boeing Deal*, N.Y. TIMES, July 18, 1997, at D2; William E. Kovacic, *Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy*, 68 ANTITRUST L.J. 805, 826 (2001). A common view in the United States was that the position taken by the European Commission in the Boeing/McDonnell Douglas matter was pure and simple protectionism of its aerospace industry in general and of Airbus in particular. *See* Interview with Thomas L. Broeder and Benjamin S. Sharp, Attorneys for Boeing, 12-Fall ANTITRUST 4, 5 (1997); Catherine Yang, *When Protectionism Wears Camouflage,* BUSINESS WEEK, June 2, 1997, at 60. Predictably enough, the Commission's position was that its concerns were exclusively of a legal nature and absolutely legitimate under applicable EC competition laws. *See, e.g.,* European Commission, Press Release IP/97/400 (May 13, 1997) (quoting former EC

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Though the Commission ultimately cleared that transaction, the subsequent blocking of the GE/Honeywell merger led to additional rancor from U.S. politicians and officials.[18]

That same year, competition policy was placed on the World Trade Organization agenda for the Ministerial Round in Doha, Qatar.[19] In anticipation of the next GATT/WTO negotiating agenda, the Doha Ministerial Declaration mandates clarification of world competition rules on "core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels."[20] The question whether to vouchsafe antitrust law, which concerns itself with *private* restraints of trade, to the tender care of an international body that

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Competition Commissioner Karel Van Miert: "Our analysis of this case is strictly conducted along the lines and criteria which have been spelled out in the legal framework of the European Merger Regulation, and nothing else.").

[18] Democratic Senators John D. ("Jay") Rockefeller, IV and Ernest F. ("Fritz") Hollings warned of possible retaliatory action by Congress. *See* William Drozdiak, *European Union Kills GE Deal*, WASH. POST, Jul. 4, 2001, at A1 ("U.S. Senators... warned that thwarting the merger would... compel retaliatory action by Washington."). U.S. Treasury Secretary Paul H. O'Neill derided the Commission's decision as "off the wall" and said that something needed to be done to bring the EU back in line. Brian M. Carney, *Loggerheads: Mario Monti, Central Planner,* WALL ST. J. EUR., Jul. 6, 2001, at 6. *See also* Brandon Mitchener & Philip Shiskin, *The Honeywell Deal: Who Asked Monti, Anyway?*, WALL ST. J., June 19, 2001, at A14.

[19] Ministerial Declaration, WT/MIN(01)/DEC/1, ¶¶ 23-25 (Nov. 14, 2001), *available at* http://www.wto.org/english/thewto_e/minist_ e/min01_e/mindecl_e.htm (last visited August 8, 2004) [hereinafter "Doha Ministerial Declaration"]. This Declaration announced a "work programme" rather than a "round" of negotiations, a somewhat murky distinction but one that was doubtless significant for those countries, such as India, that are skeptical of antitrust negotiations in this forum. *See* Press Release, Government of India Press Information Bureau, Major Gains for India at Doha Ministerial Conference (Nov. 15, 2001), *available at* http://commin.nic.in/doc/nov01_release.htm (last visited August 8, 2004) ("India has also succeeded in warding off any commitments for negotiations in the important areas of Investment, Competition Policy and Transparency in Government Procurement. This has been made possible through extremely hard bargaining on India's part during the Doha Ministerial Conference.").

[20] Doha Ministerial Declaration, *supra* note 19, ¶ 25.

concerns itself with *public*restraints of trade [21/] has been the subject of academic discussion and debate pro[22/] and contra.[23/] Complicating that issue further is the optimal degree of WTO involvement, if any.

I DIFFERENTIAL ASPECTS OF MERGER CONTROL REGIMES

[21/] Though there are many proponents of this view, it was actually Sir Leon Brittan, one of the principal contemporary architects of the European Union, who first suggested that a trade dispute mechanism (then under GATT auspices) might be used in transnational M&A situations. *See, e.g., EC Commissioner Recommends Larger Role for GATT in Developing Competition Policy,* BNA ANTITRUST & TRADE REGULATION DAILY (Feb. 10, 1992).

[22/] *E.g.,* Eleanor M. Fox, *Toward World Antitrust and Market Access,* 91 AM. J. INT'L L. 1, 13 (1997); Eleanor M. Fox, *Competition Law and the Millennium Round*, 2 J. INT'L ECON. L. 665, 670- 72 (1999); Andre Fiebig, *A Role for the WTO in International Merger Control*, 20 NW. J. INT'L L.& BUS. 233, 247-251 (2000).

[23/] *E.g.,* ICPAC Report, *supra* note 1, at 279; Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy,* 94 AM. J. INT'L L. 478, 487-94 (2000).

Pre-merger notification regimes[24] give enforcement agencies enormous leverage during the pendency of their investigation of the competitive impact of a proposed M&A transaction. This is something the U.S. and EU competition regimes have in common. Both systems give antitrust regulators considerable leeway to negotiate with the parties and discretion to craft solutions to competitive concerns. If, however, negotiations break down or fail, U.S. regulators must prove in court that the merger will likely have anticompetitive effects, whereas the Commission can block a merger without proving in an adjudicative setting that it will be anticompetitive.

The fact that European regulators face only *ex post* review of their decisions means that they have greater negotiating power to impose novel or unusual remedies on parties to a proposed merger and can rely on more speculative theories of anticompetitiveness than their U.S. counterparts, who must justify their decisions in a judicial forum before they will be enforced. This gives EU authorities considerably more freedom, not merely to identify creative solutions (though they may have little incentive to do so) but to press the parties to accept them (far more likely).

Regardless, however, of one's assessment of which regime grants greater leverage, the fact remains that to the vast majority of private parties to a negotiated merger -- and *a fortiori* in

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[24] Nearly 70 nations now have some form of pre-merger notification laws. R. Hewitt Pate, *Securing the Benefits of Global Competition*, Address At the Tokyo American Center, Tokyo Japan (Sept. 10, 2004), *available at* www.usdoj.gov/atr/public/speeches/205398.htm (last visited Oct. 27, 2004). Of these the one with the longest pedigree and the broadest impact has been the United States's Hart-Scott Rodino Antitrust Improvements Act of 1976 ("H-S-R Act"), § 201, as amended, 15 U.S.C. § 18a (2003) (Section 7A of the Clayton Act). *See also* Commission Regulation (EC) No. 802/2004 implementing Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, 2004 O.J. (L/133) 1 (April 7, 2004), *available at*http://www.europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_133/l_13320040430en00010039.pdf (last visited Nov. 8, 2004).

the case of a hostile takeover -- the degree of delay and uncertainty will be sufficiently intolerable to force abandonment of the transaction. Therefore it behooves the merger parties, as part of their pre-filing strategic planning, to give consideration to a broad array of possible merger remedies they would be willing to offer to palliate (if not entirely eliminate) competitive concerns that the relevant authorities might identify.

That would be complex enough in a bilateral world. With multi-jurisdictional review of transnational mergers, however, the task is bedeviled by the necessity of interacting with, negotiating with, and ultimately satisfying[25/] a bevy of national competition authorities.

Merger Remedies

On December 21, 2000, the EU adopted a Notice on merger remedies[26/] that establishes both substantive and procedural requirements for proposing remedies intended to alleviate competitive concerns identified by the Commission and to obtain clearance for a transaction.

[25/] The only practical alternative to satisfying a national authority that a merger subject to its jurisdiction is consistent with that country's competition law is simply to withdraw unilaterally from doing business in that country. In some situations, that alternative could well prove attractive.

[26/] Notice on remedies acceptable under Council Regulation No. 4064/89 and under Commission Regulation No. 447/98, 2001 O.J. (C68/3) 3, *available at* http://www.europa.eu.int/eur-lex/pri/en/oj/dat/2001/c_068/c_06820010302en00030011.pdf (last visited Oct. 16, 2004) [hereinafter the "Remedies Notice"]. The first cross-reference in the title to the Remedies Notice is to the core Merger Regulation document. *See* Council Regulation 4064/89 EEC of 21 December 1989 on the Control of Concentrations Between Undertakings, 1990 O.J. (L 257) 13, *amended by* Council Regulation 1310/97 EC of June 30, 1997, 1998 O.J. (L 180) 1, *amended by* Council Regulation (EC) 139/2004 of January 20, 2004, 2004 O.J. (L24/1) 1, *available at*http://www.europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_024/l_02420040129en00010022.pdf (last visited Nov. 8, 2004) [hereinafter the "ECMR" or the "Merger Regulation"]. Presumably, the Remedies Notice, though not in its title referencing the new regime announced by Council Regulation (EC) 139/2004, applies in full, *mutatis mutandis*, to the ECMR as amended in 2004.

The Remedies Notice also provides an overview of the principal categories of remedies[27] the Commission has been willing to accept in merger cases to date and, in so doing, reveals the Commission's rather obvious preference for *structural* remedies over *behavioral* remedies.[28]

From the regulators' point of view, the disadvantage of behavioral remedies is the need for devoting significant personnel hours to ongoing monitoring of compliance and the consequent burden on scarce agency resources. On the other hand, structural remedies entail potentially greater risk, because if they are ineffective they are not easily undone -- rather like the proverbial attempt to unscramble an omelette.

Each of the various merger remedies that U.S. and EU enforcement agencies have deemed acceptable has its own weaknesses and shortcomings. These, in turn, have led to a degree of unpredictability as to whether or not a particular party-proposed remedy will be accepted by one merger authority or the other in a given case. Worse yet is the scenario -- by no means hypothetical after the General Electric - Honeywell transaction ("GE/Honeywell") -- in which one authority finds a particular remedy acceptable but the other does not.

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[27] *E.g.,* divestitures, termination of exclusive agreements, technology and infrastructure licensing agreements, etc.

[28] The Remedies Notice identifies structural and behavioral remedies but does not define them. Essentially, a structural remedy results in an asset reallocation, sometimes accompanied by the creation of a new entity; examples include both partial and total divestitures. A behavioral remedy, in contrast, constrains the manner in which the merged firm may use its assets; examples include commitments not to use certain assets in an abusive manner and contractual undertakings providing access (by license or otherwise) to certain types of assets, such as intellectual property. *But cf.* Richard G. Parker and David A. Balto, *The Evolving Approach to Merger Remedies,* ANTITRUST REP., May 2000, at 2, *available at* http://www.ftc.gov.speeches/other/remedies.htm (last visited February 12, 2004) (distinguishing between behavioral and contractual measures).

From a strategic planning perspective, that unpredictability is intolerable, particularly in large, multinational M&A transactions. Such transactions tend to be time sensitive, which makes them particularly susceptible to regulatory uncertainties. Few merger parties have the stomach for (much less the desire to fund) potentially protracted antitrust litigation against a government authority, which gives the latter enormous leverage to impose (or, in extreme cases, extort) remedies with transborder effects, even where no genuine intra-border competition concerns exist. In this area, as in others relating to the competition law applicable to M&A transactions, parties contemplating transactions desperately need a system that is both transparent and predictable.

In this regard, the European system has been singled out for criticism. That criticism takes the form of claims that the system is "opaque," that it lacks adequate checks and balances, and that it is all-too-often animated by "competitor-rather than competition-led investigation."[29/]

[29/] *See, e.g., Competition Policy Should Be Focused on Consumers,* INDEP. (London), July 5, 2001, at 3 ("[W]here US law is based on protecting consumers, EU competition policy focuses primarily on protecting competitor companies."); *No Time for Protectionism*, BUS. WK., July 23, 2001, at 98 ("The EU's focus on competitors rather than consumers makes the Bush Administration suspicious."); Robert Pitofsky, *Antitrust At the Turn of the Twenty-First Century: A View from the Middle*, 76 ST. JOHN'S L. REV. 583, 586 n.15 (2002) (asserting that "[t]he principal area of divergence between European and American antitrust law is the EU's apparent willingness to protect competitors rather than the competitive process"); Sarah Stevens, *The Increased Aggression of the EC Commission in Extraterritorial Enforcement of the Merger Regulation and Its Impact on Transatlantic Cooperation in Antitrust*, 29 SYRACUSE J. INT'L L. & COM. 263, 275 (2002) (noting "suspicions that EC opposition to the AOL/Time Warner merger stemmed from concerns about the impact upon the large telephone companies of Europe that remain fragmented and dominated by originally state-owned utility companies"). *Cf.* David S. Evans & Michael Salinger, *Competition Thinking at the European Commission: Lessons from the Aborted GE/Honeywell Merger*, 10 GEO. MASON. L. REV. 489, 507-518 (2004) (discussing Chicago school and post-Chicago critiques of the risks in protecting competitors in the name of protecting competition).

When one speaks of transparency in competition law, one generally refers to public availability of standards, policies, guidelines, reports of decisions, and, most importantly, bases for decisions. Many jurisdictions with competition laws feature transparency at the general policy level, but fewer do at the level of decisions on specific transactions. The latter can be effected not only by publication of decisions but also dissemination of information in many other ways: through periodic (preferably at least annual) reports, articles, speeches, a broad variety of press releases, as well as a well-maintained web site for the competition authority.[30]

Transparency in the EU has, in fairness, been quite good in most of these respects. Not only are all decisions reported, but, in order for a Commission investigation to move to a more rigorous level (so-called Phase II, reserved for transactions about which the Commission has serious competitive concerns), it must provide the parties, and make publicly available, a

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[30] A number of websites provide useful links. *See, e.g.,* American Bar Association, Section of Antitrust Law, *available at* http://www.abanet.org/antitrust/sites/.html (last visited October 30, 2004) (providing links to the EU's Competition Directorate as well as 37 national competition authorities, including Argentina, Australia, Austria, Belgium, Brazil (but only for one agency, the Conselho Administrativo de Defesa Ecónómica (CADE)), Bulgaria, Canada, Chile, Costa Rica, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Mexico, the Netherlands, New Zealand, Norway, Peru, Portugal, Slovakia, South Africa, Spain, Sweden, Switzerland, Taiwan, Turkey, the U.K., and Venezuela. The OECD's Competition webpage, *available at* www.oecd.org/countrylist/0,2758,en_2649_37463_2919959_1_1_1_37463,00.html (last visited October 30, 2004), contains links to all of those (except Peru) plus several others: Albania, Brazil (both the CADE and the Secretariat for Economic Monitoring (SEAE)), Croatia, Greece, Iceland, India, Indonesia, Jamaica, Kyrgyzstan, Macedonia, Poland, Romania, Russia, Slovenia, Thailand, Ukraine, the U.S. (both the FTC and the Antitrust Division of the Department of Justice), Uzbekistan, and Zambia (a total of 55). Links to additional western hemisphere sites may be found at the OAS webpage, including links to actual competition legislation only, *available at* http://www.sice.oas.org/compol/natleg.asp#natleg (last visited October 30, 2004) (including laws of Argentina, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, the Dominican Republic, Guatemala, Jamaica, Mexico, Nicaragua, Panama, Peru, the U.S., Uruguay, and Venezuela), and to competition authorities, *available at* http://www.sice.oas.org/compol/natcomp.asp#natcompagwh (last visited October 30, 2004) (adding to OECD's list only Colombia, Panama and Peru).

detailed, written statement of objections, setting forth the reasons for the investigation and identifying specific areas of competitive concern.[31/] In addition, former Commissioners of the Competition Directorate, such as Karel von Miert and Mario Monti,[32/] have regularly discussed competition policy in articles, speeches, to say nothing of official Commission papers and studies, all of which are publicly available.[33/] What is missing, then, in the EU's case, seems to

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[31/] *See* ECMR, *supra* note 26, art. 6(1)(c); Press Release, European Commission, Commission Opens Full Investigation into General Electric/Honeywell Merger (Mar. 2, 2001), *available at* http://europa.eu.int/rapid/start/cgi/guesten.ksh?reslist (last visited Feb. 12, 2004).

[32/] A new Competition Commissioner, Neelie Kroes of the Netherlands, was appointed on August 12, 2004 to succeed Mario Monti effective November 1, 2004. *See Dutch EU Commissioner Takes Charge of Competition*, AGENCE FRANCE PRESSE, Aug. 12, 2004, 2004 WL 90096940. However, her appointment, and certain others, were for a time withdrawn by EU President-Designate José Manuel Barroso in the wake of controversy partially over her appointment but principally over the appointment as Justice Commissioner of Italy's Rocco Buttiglione. *See* Dan Bilefsky, *Barroso Withdraws EU Slate of Commissioners*, WALL ST. J., Oct. 28, 2004, at A12. Mr. Buttiglione had been put on the slate as Italy's representative for the Commission by Italian Prime Minister Silvio Berlusconi but lost his support after outrage erupted in the Italian Parliament and the European Parliament following certain intemperate remarks by Buttiglione about gays and women. *See, e.g.,* Dan Bilefsky, *EU Faces Political Crossroads: It Is Commission vs. Parliament in Pivotal Vote for Power,* WALL ST. J., Oct. 27, 2004, at A15. Despite speculation – understandable under the circumstances – that Mario Monti might remain in office for some time, *see* Dan Bilefksy & Gabriel Kahn, *Italian Nominee's Withdrawal Doesn't End Barroso's Woes,* WALL ST. J., Nov. 1, 2004, at A2, Ms. Kroes was finally installed in November 2004 as the new Competition Commissioner, though at the cost of selling off her shareholdings and pledging not to sit on any cases involving companies (of which there are many) with which she was previously associated. *See, e.g.,* Rory Watson, *Barroso's New Team Gets to Work*, THE TIMES (London), Nov. 22, 2004, at 32.

[33/] *E.g.,* Commission of the European Communities, Green Paper on the Review of Council Regulation (EEC) No 4064/89 (Dec. 11, 2001), *available at* http://www.europa.eu.int/comm/competition/mergers/review/green_paper/en.pdf (last visited February 12, 2004); *Merger Control in the European Union: A Radical Reform*, Speech 02/545 by Prof. Mario Monti, Commissioner for Competition Policy, Before the IBA Conference on EU Merger Control, Brussels, Belgium (Nov. 7. 2002), *available at* http://europa.eu.int/comm/competition/speeches/index_2002.html (last visited Oct. 30, 2004).

be only complete transparency with respect to submissions by the merging parties' competitors[34] and the extent to which they will be permitted to participate in the process.[35] This is significant because the contemporary phenomenon of multijurisdictional merger review furnishes competitors an unparalleled opportunity to abuse the process by delaying the transaction through protests or other submissions in one jurisdiction or another -- in effect, holding the transaction hostage. Sometimes the delay itself will kill that merger hostage, which might well have provided welfare benefits and been procompetitive.

There is, however, a more fundamental problem, one that is by no means limited to the EU and one that is, by its nature, incapable of being "fixed" by a supranational body like the WTO. That problem is simply that one cannot have *complete* transparency and predictability in global M&A transactions if market definition from one regulatory system to another is radically different. This is a problem that G.E. and Honeywell encountered, to their chagrin though not necessarily to their surprise, albeit -- evidently, judging by their public reaction -- to the surprise of U.S. antitrust authorities.

That reaction in itself is also surprising. Such differences in approach from one regulatory body to another are not new; U.S. antitrust regulators, staffed by excellent lawyers and economists, surely should have realized that the markets of concern to another jurisdiction would not simply parrot those defined in the United States. Moreover, it is difficult to imagine

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[34] Here various competing concerns relating to the confidentiality of proprietary information offered by competitors may weigh against full and complete disclosure.

[35] Apparently, during the Commission's consideration of the Boeing/McDonnell Douglas merger, representatives of Airbus were permitted to participate in Commission hearings, question Boeing witnesses, and review proposed remedial obligations. ICPAC Report, *supra* note 1, at 56.

that these potential differences simply didn't occur at all to a company as large, sophisticated, and experienced (when it comes to M&A transactions) as G.E., particularly given the worldly and knowledgeable legal and investment banking advice it must have received, not to mention its own, in-house strategic planning.

In fact, it is at the strategic planning stage that this issue should be identified and worked out. There is frequently uncertainty about how a particular relevant market will be defined, and that is just as true for the domestic merger as it is for the global. Exacerbating the uncertainty in the global transaction, however, is that many countries that could exercise jurisdiction for merger review may not have many precedents or even a well-developed approach to market definition, and lawyers practicing in such jurisdictions may not have had much experience with these matters, particularly at an early stage in that jurisdiction's development of competition law. What is needed, then, is an opportunity for pre-clearance with respect to the parties' proposed market definition and any party-offered remedies predicated on that definition.

II A BRIEF PRIMER ON U.S. AND EU MERGER ENFORCEMENT

The United States employs a multiplicity of merger enforcement mechanisms. When one considers remedies available to the Federal government in Section 7 of the Clayton Act[36/] and -- in situations where it matters -- Section 1 of the Sherman Act,[37/] and then adds to the mix Section

[36/] 15 U.S.C. § 18.

[37/] 15 U.S.C. § 1.

5 of the Federal Trade Commission Act[38/] and the antitrust laws of the various U.S. states,[39/] one finds potentially 52 authorized *governmental* enforcers,[40/] not counting an additional layer of specialized sector regulators.[41/] Layered on top of this is *private* antitrust enforcement, at least

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[38/] 15 U.S.C. § 45(a) (proscribing, *inter alia*, unfair methods of competition, unfair or deceptive trade practices, and anticompetitive practices that substantially injure competitors or are inherently unfair).

[39/] Most states of the United States have their own, state-level antitrust laws. In addition, state attorneys general have always had, at least to some degree, power to enforce the federal antitrust laws. Prior to the 1980's, states could sue for recovery of damages to the state itself, or on behalf of political subdivisions, but Supreme Court case law made recovery of damages on a *parens patriae* theory problematic, in contrast to injunctive relief, as to which the Court was more receptive. *Compare* Hawaii v. Standard Oil Co., 405 U.S. 251 (1972) *with* California v. American Stores Co., 492 U.S. 1301 (1989). With the enactment of the H-S-R Act, however, a state attorney general was permitted to bring *parens patriae* actions for injuries to the property of natural persons who were state residents. *See* 15 U.S.C. §§ 15c-15h. Under the aegis of the National Association of Attorneys General (NAAG), state-initiated enforcement activity has increased dramatically, *see* Robert H. Lande, *When Should States Challenge Mergers: A Proposed Federal/State Balance*, 35 N.Y.L. SCH. L. REV. 1047 (1990), though this has met with criticism from commentators. *See, e.g.,* Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 940-41 (2001). Specifically with regard to mergers, a separate set of state-level merger guidelines has also been developed. *See generally* Horizontal Merger Guidelines of the National Association of Attorneys General, 52 ANTITRUST & TRADE REG. REP. (BNA) No. 1306, at S-3 (Mar. 12, 1987).

Note that the FTC and the Department of Justice have executed protocols with the state attorneys general to facilitate coordination of merger investigations. *See* Protocol for Coordination in Merger Investigations between the Antitrust Division and State Attorneys General, 62 ANTITRUST & TRADE REG. REP. (BNA) 338 (Mar. 12, 1992); FTC Program to Assist State Law Enforcement Agencies with Merger Investigations, 57 Fed. Reg. 21,795 (1992).

[40/] These include the Antitrust Division of the U.S. Department of Justice, the Federal Trade Commission, and the Attorneys General of the 50 states.

[41/] *E.g.,* the Federal Communications Commission, with jurisdiction over telecommunications and broadcast industry mergers, and the various federal bank regulatory agencies (to wit: the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision), with jurisdiction over financial institution mergers and acquisitions by depository institution holding companies.

by those plaintiffs in civil actions who can satisfy the prudential standing and antitrust injury qualifications imposed by the U.S. Supreme Court.[42/]

Notwithstanding the multiplicity of potential enforcers, they all share one common feature of the U.S. system. In order to enjoin a proposed merger. recourse to the judiciary is necessary.[43/] Other national jurisdictions are more likely to have far fewer potential enforcers. In many nations, such as Germany, there will be only one;[44/] Brazil has three.[45/] The European Union, due to its Communitarian roots, presents a hybrid profile.

In general, the preference of the EU Merger Regulation[46/] is the "one-stop-shop" approach,[47/] whereby the Commission enjoys exclusive jurisdiction over "concentrations"[48/]

[42/] *See, e.g.,* Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334 (1990); Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

[43/] Of course, if the FTC, even if unsuccessful in a request for preliminary injunctive relief, were to wish to go forward on the merits, then it *could* proceed administratively, but even then the final administrative decision of the FTC would be subject to judicial review in a U.S. court of appeals.

[44/] To wit: the Bundeskartellamt. *See generally* Bundeskartellamt, Competition Policy Division, Information Leaflet Relating to the German Control of Concentrations (November 2000), *available at* http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_englisch/00MerkblattFuKoD_e.pdf (last visited Nov. 3, 2004).

[45/] *See* Michael G. Cowie & Cesar Costa Alves de Mattos, *Antitrust Review of Mergers, Acquisitions, and Joint Ventures in Brazil,* 67 ANTITRUST L.J. 113 (1999) (describing the allocation of merger control authority among three government institutions in Brazil and explaining some of the attendant problems).

[46/] *See* note 26, *supra*. Unless otherwise specified, all ECMR citations herein are to the January 2004 version.

[47/] Member States may not apply their national competition laws to concentrations with a Community dimension, except in certain limited circumstances, such as where a concentration threatens to impede competition in a "distinct market" in a Member State (*but cf.* Art. 9(1)-(2), under which a Member State may ask the Commission to grant jurisdiction to
(continued...)

having a "Community dimension."[49/] Community dimension is, at least in part, a quantitative concept, measured by the "turnover"[50/] within the Community of the undertakings involved. M&A transactions involving undertakings based outside the EC are nonetheless covered if they have sufficient turnover within more than one Member State. Thus, under Art. 1(2) of the original ECMR, a concentration would have a Community dimension if --

(A) the aggregate worldwide turnover of all undertakings concerned is more than 5 billion; ***and***

(B) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than 250 million; ***unless***

(...continued)
apply the national competition law, *see infra* note 54), or where Member States' legitimate interests other than competition (*e.g.*, national security) are implicated (*see infra* notes 60-61 and accompanying text).

[48/] A "concentration" is defined as either a *merger* of two or more previously unaffiliated undertakings or the *acquisition* by one or more undertakings or by persons controlling them, whether by stock purchase or asset purchase, of direct or indirect control of all or part of one or more other undertakings. ECMR, *supra* note 26, art. 3(1). "Control," in turn, includes "rights, contracts, or any other means which separately or jointly . . . confer the possibility of exercising decisive influence on an undertaking." *Id*. art. 3(2) Acquisition of a minority interest may or may not constitute control, depending upon factors such as how widely dispersed the other shareholdings are and who has the power to oversee or manage day-to-day business. *Cf. id*. art. 5(4)(b).

[49/] The ECMR was intended to apply to "significant structural changes the impact of which on the market goes beyond national borders of any one Member State." *Id*. pmbl ¶ 8.

[50/] "Turnover," in this context, refers not to a fruit-filled pastry but to sales of goods and provision of services in the preceding financial year, exclusive of VAT or sales tax. *Id*. art. 5(1). It is thus somewhat similar in concept to "gross revenues." The term does not, however, apply in the case of insurance companies and banks, for which alternative measures are employed. *Id*. art. 5(3).

(C) each of the undertakings concerned achieves more than 2/3 of its aggregate Community-wide turnover within one and the same Member State.[51]

A 1998 amendment to the ECMR has added to the "Community dimension" definition a territorial concept, encompassing certain concentrations involving companies with turnover in at least three Member States, even if the turnover does not rise to the preceding levels. Thus, in addition to the aforementioned thresholds, Community dimension is also established where:

- the combined aggregate worldwide turnover of all the undertakings concerned is more than 2.5 billion; ***and***
- the combined aggregate turnover of all the undertakings concerned is more than 100 million in each of at least three Member States; ***and***
- in each of those three countries, the turnover of at least two of the undertakings concerned exceeds 25 million each; ***and***
- the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than 100 million; ***unless***
- each of the undertakings concerned achieves more than 2/3 of its aggregate Community-wide turnover within one and the same Member State.[52]

Nevertheless, there are several exceptions to the "Community dimension" paradigm:

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[51] *Id*. art. 5 (2). Note that the turnover figures in question relate to the entire corporate complex. The degree of affiliation necessary for aggregation of turnover is governed by Article 5(4) of the Merger Regulation and uses the usual measurements: power to exercise voting rights, control over management and policies, etc. However, where only part of one or more undertakings is being acquired, only the turnover relating to the acquired part(s) is taken into account. *Id*. Note further that, with respect to joint ventures, the relevant turnover is that of the parent investors, *id*. art. 5(4)(3), thereby eliminating the possibility that parties could use joint ventures to evade the EC Merger Controls.

[52] ECMR, *supra* note 26, art. 1(3).

(1) Referral to National Competition Authority[53/] -- Under Article 9 of the Merger Regulation, any Member State may -- *sua sponte* or at the invitation of the Commission -- endeavor to assert jurisdiction over a merger with a Community dimension if it will affect[54/] competition in a "distinct market" within that Member State's territory.[55/]

(2) Jurisdiction over Mergers Without a Community Dimension[56/] -- A Member State may request the exercise of jurisdiction by the Commission even in the absence of a Community dimension, in order that smaller states that do not have a national

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53/ *Id*. art. 9(2). This clause arose from an amendment proposed by Germany.

54/ There is a dichotomy between a concentration that (a) "threatens to affect *significantly* competition in a market within that Member State, which presents all the characteristics of a distinct market, or (b) "affects [but not necessarily significantly!] competition in a market within that Member State, which presents all the characteristics of a distinct market *and which does not constitute a substantial part of the common market*." ECMR, *supra* note 26, art. 9(2)(a)-(b) (emphasis added). As to subparagraph (a), the Commission will determine whether such a "distinct market" exists and, if so, whether the merger would create or strengthen a dominant position within that market. If the answer to either is negative, the Commission will adopt a decision to that effect addressed to the Member State concerned and assume exclusive jurisdiction; if positive on both, the Commission might still deal with the case itself, or decide to refer all or part of the case to the competent authorities of the Member State. *Id.* art. 9(3). As to subparagraph (b), where the distinct market does not form a substantial part of the common market, and the Commission concurs, it "*shall* refer the whole or part of the case relating to the distinct market concerned."

55/ Time limits apply here to the Commission's action. If it has not initiated proceedings because it has determined, pursuant to ECMR, *supra* note 26, art. 6(1)(b), that the concentration, though cognizable, does not raise serious doubts as to its compatibility with the common market, then it must act within 35 working days. *Id*. arts. 9(4)(a), 10(1). If the Commission *has* initiated proceedings pursuant to Article 6(1)(c) but has not taken any preparatory steps under Article 8(2), (3), or (4) to maintain or restore effective competition in the market concerned, the Commission must act within 65 working days, *id.* art. 9(4)(b); if it does not, it shall be deemed to have decided to refer the case to the competent authority of the Member State claiming jurisdiction.

56/ *Id*. art. 22. This clause arose from an amendment proposed by the Netherlands.

competition authority or, alternatively, have one with resources that are not at the time adequate to process the case, are not unduly burdened.[57] The Commission shall without delay notify the undertakings and the competent authorities of affected Member States, which have 15 working days to join the initial request.[58] Thereafter, the Commission may take action under the Merger Regulation if it finds that the concentration "affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request."[59]

(3) Legitimate National Interest[60]-- Member States are empowered under Article 21(3) to "take appropriate measures to protect legitimate interests other than those taken into consideration by [the Merger Regulation]." Examples listed in the Regulation include "public security, plurality of the media and prudential rules" (*e.g.,* with respect to financial institutions). Any other ground for invocation of

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[57] *Id*. art. 22(1). Such a request must be made within 15 working days of the date on which the concentration was notified, or, if no notification was required, was otherwise made known to the Member State concerned. *Id.*

[58] *Id.* art. 22(2).

[59] *Id.* art. 22(3). The Commission has 10 working days to make a decision on such a request. If it fails to act within that period, it "shall be deemed to have adopted a decision to examine the concentration in accordance with the request." *Id.* Somewhat relatedly, if a concentration without a Community dimension is capable of being reviewed under the national competition laws of at least three Member States, the Commission, upon receipt of a "reasoned submission" from the undertakings concerned that the concentration should nonetheless be examined by the Commission, shall transmit the submission to the affected Member States, which have 15 working days to express disagreement. If any one does, the case will not be referred to the Commission; if none does, the concentration will be deemed to have a Community dimension. *Id.* art. 4(5).

[60] *Id.* art. 21(4). This clause arose from an amendment proposed by the U.K.

> the "legitimate national interest" exception must be communicated, together with reasons therefor, by the Member State to the Commission, which will assess that interest's compatibility with the provisions of Community law and inform the Member State of its determination within 25 working days.[61]

The policy objectives of the U.S. and EC schemes are also somewhat different. The U.S. antitrust laws were enacted to preserve and maintain competition within a late 19th century concept of a free market, during a period when the breadth of congressional power under the Commerce Clause of the U.S. Constitution[62] -- one of the chief goals of which was to create a kind of "common market" among the states of the United States -- was thought to be far less extensive than it is today.[63] With respect specifically to merger regulation, the principal goal of Section 7 of the Clayton Act (as amended by the Cellar-Kefauver Antimerger Act of 1950) was to halt the "rising tide" of concentration in the American economy.[64]

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[61] *Id.*

[62] U.S. CONST. art. I, § 8, cl. 3.

[63] *See, e.g.,* United States v. E.C. Knight Co., 156 U.S. 1 (1895) (holding that manufacturing was not "commerce" and that, consequently, the Sherman Act could not be used to stop a monopoly by blocking a sugar refining company from acquiring four competing refineries). After the Commerce Clause revolution effected by cases such as NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), United States v. Darby, 312 U.S. 100 (1941), and Wickard v. Filburn, 317 U.S. 111 (1942), the analysis in *E.C. Knight* seems quaint and anachronistic.

While more recent cases have demonstrated a willingness by the U.S. Supreme Court to rein in some of the more aggressive assertions of the commerce power vis-à-vis the states -- *see, e.g.,* United States v. Lopez, 514 U.S. 549 (1995) (invalidating Gun-Free School Zones Act); United States v. Morrison, 529 U.S. 598 (2000) (invalidating portions of the Violence Against Women Act) -- congressional power under the Commerce Clause remains plenary.

[64] Cellar-Kefauver Antimerger Act, ch. 1184, 64 Stat. 1110 (1950) (current version
(continued...)

The EU competition laws, in contrast, were intended to promote the integration of the separate economies of the member states into a unified "Common Market" and only secondarily to promote effective competition within the Community. Thus the EU authorities are responsible not merely for maintaining but also for *creating* such a competitive common market. In passing its Merger Control Resolution, the European Council sought to facilitate intra-Community mergers (thereby helping to integrate the economy into a single market) by replacing multiple and potentially conflicting competition regimes in the member states with a single and coherent regime[65/] for reviewing M&A transactions with a Community dimension and preventing non-EU firms from gaining a dominant position within the Community.[66/]

These somewhat different policy objectives may explain, at least in part, the distinct and somewhat divergent roles played by the authorities under their respective enforcement schemes.

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at 15 U.S.C. § 18). *See* Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics,* 74 HARV. L. REV. 226, 234-38 (1969).

65/ Hence, the "one-stop-shop" approach. This notion is advantageous to M&A transactions between undertakings from different EU member states, inasmuch as the transactions are subject to review only in Brussels and are not, in general, required to be reported to individual national authorities. *See* Stefan Schmitz, *How Dare They? European Merger Control and the European Commission's Blocking of the General Electric/Honeywell Merger*, 23 U. PA. J. INT'L ECON. L . 325, 332-33 (2002) (observing that the one-stop-shop principle "ensures that any other national jurisdiction with the European Community need not be notified of the mergers, no matter how much effect they may have in these jurisdictions"); Diane P. Wood, *United States Antitrust Law in the Global Market: Implications for Domestic Law Reform,* 1 IND. J. GLOBAL LEGAL STUD. 409, 420 (arguing that the drafters of the European Commission's merger regulation produced a "one-stop shopping" system so the parties would know the competency of the Commission).

66/ *See generally* C.J. COOK & C.S. KERSE, E.C. MERGER CONTROL 61 (2d ed. 1996); Derek Ridyard, *An Economic Respective on the EC Merger Regulation,* 11 EUR. COMPETITION L. REV. 247, 248 (1990); Margarida Alfonso, *A Catalogue of Merger Defenses Under European and United States Antitrust Law,* 33 HARV. INT'L L.J. 1, 65 (1992).

The EU Commission acts as both prosecutor and judge and does not require the blessing of a court to enjoin a merger.[67/] While the Commission's decisions can be challenged in the Court of First Instance[68/] and appealed to the European Court of Justice[69/] pursuant to Article 225(3) of the EC Treaty,[70/] the European system places responsibility for seeking judicial review on the petitioning parties, who must decide whether challenging the decision is worthwhile, given the

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67/ *See* ECMR, *supra* note 26, art. 7 (concentration with a Community dimension may not be implemented until declared compatible with the Common Market pursuant to arts. 6(1)(b), 8(1), 8(2), or 10(6)).

68/ The EC Court of First Instance ("CFI") was created in 1988 to hear actions brought against Community institutions by EC staff or by private parties in certain technical areas; the European Court of Justice ("ECJ") has appellate jurisdiction in such cases. The CFI was established because of the heavy caseload burdening the ECJ. The latter was expending lots of time and resources on factfinding, but now the CFI performs this function in cases falling within the scope of its jurisdiction, which includes review of Commission decisions on competition law matters. Note that appeal to the ECJ is permitted on points of law *only*.

69/ Located in Luxembourg, the ECJ consists of judges appointed by agreement among the governments of the of the member states for six-year terms. In general, the ECJ has original jurisdiction in cases in which the Commission or another Community institution is a party. Other actions are brought in national courts but are referred to the ECJ for preliminary rulings on matters of EU law; such rulings are binding on the national courts.

The ECJ's jurisdiction is quite broad. While national courts are bound to enforce European law, the ECJ has the final say in interpreting treaties. Treaty Establishing the European Community, art. 234, *available at* http://europa.eu.int/eur-lex/en/treaties/dat/EC_consol.pdf (last visited October 16, 2004) [hereinafter "EC Treaty"]. Article 234 of the Treaty (formerly Art. 177) requires the courts of last resort in member states to refer questions of European law to the ECJ by asking for "preliminary rulings" on such issues. The ECJ also exercises judicial review of acts or omissions of EC institutions. Thus, for example, one against whom enforcement action has been taken has a right of appeal to the ECJ after the case has been heard by the CFI (assuming the latter has jurisdiction). The various forms of EU legislation -- directives, regulations -- as well as failures to act by EU institutions can be challenged.

70/ *Id.* art. 225(3).

time and cost involved and the minimal likelihood of success.[71] That likelihood is minimal both because review is not a full appeal but is predicated on rather limited grounds of annulment[72] and because the courts can be expected to show substantial deference to the Commission's economic analysis of facts and circumstances surrounding a proposed M&A transaction.[73]

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[71] The degree to which the availability of judicial review acts as an effective check on the Commission or is a valuable procedure for petitioning parties is a matter of current controversy. Traditionally, the appeal process was seen as too time consuming to be of practical value for firms seeking to rescue a proposed merger. *See* Nicholas Levy, *The Control of Concentrations Between Undertakings*, in 2 COMPETITION LAW OF THE EUROPEAN COMMUNITY § 8.01 (Valentine Korah ed., rev. ed. 2000) ("The backlog of cases ... [makes] recipients of prohibition decisions skeptical as to the practical benefits of appealing such decisions ... insulating the Commission from effective judicial review"); Donna E. Patterson & Carl Shapiro, *Trans-Atlantic Divergence in GE/Honeywell: Causes and Lessons,* ANTITRUST, Fall 2001, at 18, 22 ("The right to spend ... two years or more appealing a Commission decision to prohibit a merger is not an adequate substitute [for *ex ante* judicial review]"). However, though the Court of First Instance had never previously annulled a Commission decision on the legality of a merger, the last three challenges (Tetra Laval, Schneider Electric, and Airtours) before the Court have been successful. *See* Case T-342/99, Airtours v. Commission, [2002] ECR II-2585; Case T-5/02, Tetra Laval v. Commission, [2002] ECR II-438; Case T-77/02, Schneider Electric v. Commission, [2002] ECR II-4201. Furthermore, both *Tetra Laval* and *Schneider* were heard by the court pursuant to a new "fast-track" procedure, introduced in 2001 to deal with urgent cases. Arguably, then, judicial oversight of the Commission is developing into a more substantial and practical check than observers had suggested previously.

[72] EC Treaty, *supra* note 69, art. 230(4).

[73] The latter point is not, in concept, radically different from the degree of deference accorded to similar determinations by U.S. government agencies under U.S. administrative law and the *Chevron* doctrine. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). However, at least with respect to preliminary injunction requests by the DOJ or the FTC, the courts lack an administrative record to defer to and thus will review the Government's allegations *de novo*. In contrast, *Chevron* deference would potentially be available to a subsequent administrative proceeding on the merits that the FTC might conduct. *Cf.* Prometheus Radio Project v. FCC, 373 F.3d 372, 440 (3d Cir. 2004) (invoking highly deferential *Chevron* standard of review); Sinclair Broadcast Group, Inc. v. FCC, 284 F.3d 148, 165 (D.C. Cir. 2002) (holding, on petition for review of FCC order limiting common ownership of television stations in local markets, that statutory silence on grandfathering issue requires, under *Chevron*, only an inquiry into whether FCC's interpretation was reasonable). *But cf.* N.Y.S. Bar Ass'n v. FTC, 276 F. Supp. 110 (D.D.C. 2003) (denying *Chevron* deference to FTC
(continued...)

By contrast, as noted above, neither the DOJ nor the FTC has the power, acting administratively, to impose preliminary relief; to do so, they must persuade a U.S. district court of the propriety of such relief. If the DOJ wishes to pursue the matter after being unsuccessful on a request for preliminary injunctive relief, it may do so, but it lacks the power administratively to determine the propriety of the proposed transaction and must continue to litigate in the federal district court. When the FTC decides to pursue the merits administratively, it *does* have both prosecutorial and decision-making powers, but must go through a potentially very lengthy administrative litigation process and therefore lacks the streamlined enforcement power available to the European Commission.

Another difference in enforcement powers is that the European Commission's authority extends only to transactions subject to the notification requirements of the ECMR, while both the DOJ and the FTC can challenge transactions that are exempt from the pre-merger notification requirements of the Hart-Scott-Rodino Act.[74/] Furthermore, whereas U.S. antitrust authorities can sue the merged entity after consummation of the transaction if it engages in abuse of market power, the European Commission has ceded comparable authority.[75/]

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interpretation under privacy provisions of Title V of Gramm-Leach-Bliley Act).

[74/] *See, e.g.,* 15 U.S.C. § 18a(i)(1). The exemptions are designed to eliminate the need for pre-merger notification for classes of transactions deemed *unlikely* (*i.e.,* by no means impossible, but of low probability) to violate the antitrust laws, as well as for those subject to substantive antitrust review by sectoral regulators. For example, while bank mergers subject to the Bank Merger Act, 12 U.S.C. § 1828(c), are transactions that are exempt from the H-S-R Act, 15 U.S.C. § 18a(c)(7), they are clearly subject to challenge by the DOJ. *See* 12 U.S.C. § 1828(c)(6)-(7).

[75/] Notwithstanding apparent authority under Arts. 81 and 82 of the EC Treaty, Sir Leon Brittan, acting for the Commission at the time the European Council approved the ECMR,
(continued...)

Apart from differences in enforcement authority, divergent substantive standards for merger review should, and do, give rise to different conclusions, if for no other reason than that two antitrust authorities reviewing the same proposed transaction will often, of necessity, perceive different impacts on different markets.[76] Complaints about the EU's order in GE/Honeywell,[77] or the remedy on which it insisted in order to clear Boeing/McDonnell Douglas, can appear hasty and ill-informed when one looks at a number of other transactions cleared by the EU but subjected to remedies by U.S. authorities.[78] Remedial undertakings have been seen in both systems even where neither of the merging parties has productive assets in the relevant market within the country of the competition authority.[79]

(...continued)
pledged that the Commission would not invoke Arts. 81 and 82 after a merger had been consummated with respect to alleged abuse of market power attributable to the merger.

[76] *See* Debra A. Valentine, *Building A Cooperative Framework for Oversight in Mergers -- The Answer to Extraterritorial Issues in Merger Review,* 6 GEO. MASON L. REV. 525, 527-28 (1998).

[77] Case COMP/M.2220, General Electric/Honeywell, 2001 O.J. (C74) 6 (July 3, 2001), *available at*http://www. europa.eu.int/comm/competition/mergers/cases/decisions/m2220_en.pdf.(last visited April 15, 2005), *appeal filed*,Case T209/01, Honeywell Int'l Inc. v. Commission, 2001 O.J. (C331) 23 and Case T210/01, General Electric Co. v. Commission, 2001 O.J. (C331) 24.

[78] *See, e.g.,* Baxter Int'l Inc./Immuno, 5 TRADE REG. REP. (CCH) ¶ 24,184 (Mar. 24, 1997), EC Case No. IV/M. 821 (Oct. 9, 1996); Upjohn/Pharmacia, 61 Fed. Reg. 31,120 (1996), EC Case No. IV/M. 631 (Sept. 28, 1995). *See also* Thomas B. Leary, *A Comment on Merger Enforcement in the United States and the European Union*, Prepared Remarks Before the Transatlantic Business Dialogue Principals Meeting (Oct. 11, 2001), *available at* http://www.ftc.gov/speeches/leary/tabd010111.htm (last visited Nov. 8, 2004) (opining that the EC was well within its rights to review, and ultimately block, a merger involving two U.S.-based companies, especially as the United States has not hesitated to review mergers involving non-U.S.-based companies but which affect its economy).

[79] *See, e.g.,* Boeing/McDonnell Douglas, EC Case No. IV/M.877, 1997 O.J. (L336)
(continued...)

Developments with regard to Structural Remedies

The most obvious, and to-date most often successful, structural remedy has been *divestiture*. During the 1980's and 1990's, both the DOJ and the FTC targeted their enforcement efforts on requiring divestitures in geographic markets where competition might be at risk from the proposed transaction. The emphases were on the amount of divestiture, the timing of divestiture, and the selection of one or more competitively suitable purchasers for divested assets.[80/] Normally, this was a process of negotiation with the parties to the transaction that culminated ultimately in the execution of a consent agreement.

Until relatively recently, little attention was paid to whether the divestiture remedy turned out to be successful in practice. Starting in the mid-1990's, however, the FTC began to have misgivings. Notwithstanding the best intentions of all parties, competition might nonetheless be lost if divestiture buyers were not adequately replicating the level of pre-merger competition. One concern was the timing of divestiture, with an average period of 15 months from execution of the consent agreement until final divestment, often leaving assets or entities slated for divestiture in limbo during the intervening period and thereby potentially diluting the competitive impact of their acquisition by the ultimate purchaser(s). A second concern was the

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16 (July 30, 1997); Gencor/Lonrho, EC Case No. IV/M.619, 1996 O.J. (C247) 19 (Apr. 24, 1996), *aff'd,* Case T-102/96, Gencor Ltd. v. Commission, 1999 E.C.R. II-753, [1999] 4 CMLR 971 (holding, in case concerning merger of mining operations in South Africa, that EU jurisdiction is appropriate when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community); In re Oerlikon-Bührle Holding, AG, 5 TRADE REG. REP. (CCH) ¶ 23, 697 (Feb. 1, 1995); In re Institute Merieux, 113 F.T.C. 742 (1990).

80/ For a discussion of divestitures in the context of financial institution mergers, *see generally* FISHER, *supra* note 4, §§ 3.12.5, 4.1 - 4.4.

possibility of strategic behavior on the part of the seller that could undercut, if not eliminate, the remedial purpose of the divestiture. A third, and related, concern was the possibility of collusive, oligopolistic behavior between the merged entity and the purchaser of the divested assets. Also present were concerns with less sinister overtones. For example, would-be purchasers often lacked information they needed in order to operate a divested business successfully. They saw themselves as lacking adequate bargaining power to negotiate acceptable terms but were reluctant to ask the FTC for assistance. Moreover, a buyer's self-interest might often be inconsistent with the FTC's objectives; for example, a buyer might wish to purchase assets in order to compete in a market other than the one of concern to the agency.

Many of these concerns were instantiated in the findings and conclusions of a Divestiture Study undertaken by the FTC's Bureau of Competition in 1995 and released in 1999:

- The majority (75%) of divestitures appeared to have created viable competitors in the markets of concern to the Commission.
- Merging parties tended to look for marginally acceptable buyers and engage in strategic conduct intended to impede the success of the buyer.
- Most buyers of divested assets did not have access to sufficient information to prevent making errors in making their purchases or in subsequent business operations.[81]

Traditionally, in both the U.S. and the EU, divestiture had been the merger remedy of choice. Now, however, there were doubts about its efficacy, and these doubts resonated with EU Commissioner Mario Monti, who noted in a 2000 statement:

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[81] Federal Trade Comm'n, Bureau of Competition, *A Study of the Commission's Divestiture Process* (Aug. 6, 1999), *available at* http://www.ftc.gov/os/1999/9908/divestiture.pdf (last visited October 16, 2004).

> The recent study by the US Federal Trade Commission, which has reviewed their experience with divestitures in the past decade, cautions us to be careful in choosing a purchaser who just has the pocketbook to pay for the divested assets. The study identifies the very great importance of choosing a purchaser who demonstrates the necessary incentives and interests to compete in the relevant markets where the competition concerns arise.[82/]

In fact, the Commission had already acted upon that insight in rejecting a divestiture package that had been proposed in the *Total Fina/Elf Acquitaine* transaction.[83/]

[82/] Mario Monti, *The Main Challenges for a new decade of EC Merger Control,* Prepared Statement before the EC Merger Control 10th Anniversary Conference, *available at* http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/00/311|0|RAPID&lg=EN (last visited February 12, 2004) [hereinafter Monti, *Challenges*].

[83/] *See, e.g.,* Press Release, *Commission authorises TotalFina to take control of Elf Acquitaine subject to substantial changes to the plan originally notified* (Feb. 9, 2000), *available at* http://www.europa.eu.int/comm/competition/mergers/cases/index/by_nr_m_32.html#m_1642 (last visited April 15, 2005); Total Fina/Elf Acquitaine, Affaire No. Comp./M.1628, ¶ 319 *et seq.* (Feb. 9, 2000)., *available at* http://www.europa.eu.int/comm/competition/mergers/cases/decisions/m1628_fr.pdf (last visited April 15, 2005).

In the wake of these developments, there has arisen, both for the FTC and the EU,[84] a marked preference for divestitures involving "up-front buyers" -- *i.e.*, buyers who receive pre-approval from the regulator before the transaction may close. By 1999, though phrased as a "preference," the FTC was insisting upon up-front buyers in about 60% of divestitures.[85] The message for those involved in strategic M&A planning is clear: one must do one's homework and be prepared to identify an up-front buyer *ab initio*.[86] Undertaking this analysis as part of preliminary merger planning may pay dividends later on, when time pressure to close the deal may result in panic selling of assets or standalone businesses at firesale prices. The corollary is likewise clear: If the parties fail to come up with a buyer acceptable to the FTC, the agency will

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[84] DOJ consent decrees make far less use of up-front buyers. Indeed, even the use of consent decrees has been much rarer for the DOJ than for the FTC when it comes to voluntary divestitures, as DOJ has, at least in the past, taken the view that there is no antitrust violation, and therefore no need for a consent decree, where parties to the merger sell off overlapping businesses prior to closing, so long as the voluntary divestiture actually solves the competitive problem.

Note, however, that this view is not necessarily reflected in the more recent policy statement on merger remedies. There, DOJ explicitly identifies only "fix-it-first" remedies (which are structural remedies that the parties implement, and DOJ accepts, before consummation of the merger), which are said to obviate the need for DOJ to file a case. U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES § IV.A. (October 2004), *available at*http://www.usdoj.gov/atr/public/guidelines/205108.htm#N36 (last visited April 15, 2005) [hereinafter "DOJ POLICY GUIDE"]. At the same time, however, this Policy Guide recognizes that parties "may always *unilaterally* decide to restructure their transaction to eliminate any potential competitive harm. While this may obviate the need for the Department to further investigate the transaction, it is not considered a fix-it-first remedy for the purposes of this Guide since the Division did not 'accept' the fix." *Id.* n. 36 (emphasis in original). Presumably, such unilateral restructuring could include voluntary divestiture.

[85] Richard G. Parker, *Global Merger Enforcement*, Remarks before the Int'l Bar Ass'n, Barcelona, Spain, at 8 (Sept. 28, 1999), *available at* http://www.ftc.gov/speeches/other/barcelona.htm (last visited October 16, 2004).

[86] Parker & Balto, *supra* note 28, at 11.

stop the merger.[87] The same emphasis on up-front buyers can be seen now in the EU as well,[88] as evidenced by several recent decisions.[89]

However, the infatuation with up-front buyers may be exaggerated and potentially unnecessary where there are a number of highly qualified potential purchasers, particularly where the divestiture is of an ongoing business, and will certainly impose significant additional costs on the parties, including (i) delay in closing and deferral of merger-related economies of scale, (ii) uncertainty for the to-be-acquired business and its existing employees during the interregnum, leading to a reduction in its value to buyers, and (iii) lower than fair-market value sales prices because of the buyers' leverage.

A second trend has been the use of "as is" divestitures of an ongoing business, as opposed to divestitures limited to the specific line of commerce giving rise to competitive concerns. The rationale is to ensure that the buyer can restore the scale and scope economies of the acquired company. This approach has been seen in two FTC cases involving oil companies, one where clearance was predicated upon divesting non-overlapping service stations deemed important to improve the competitive posture of divested refining and marketing assets,[90] the

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[87] *Id*. at 6-7 (citing examples of Ahold-Pathmark and Abbot Laboratories-ALZA Corp.). *See also* U.S. DEPT. OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES (October 2004), *available at* http://www.usdoj.gov/atr/public/guidelines/205108.htm (last visited October 30, 2004).

[88] Remedies Notice, *supra* note 26, § 20.

[89] *E.g.*, Case No. COMP/M 2060 -- *Bosch/Rexroth* (Dec. 4, 2000); Case COMP/M 1915 -- *The Post Office/TPG/SSPL* (Mar. 13, 2001); Case COMP/M 2337 -- *Nestlé/Ralston Purina* (July 27, 2001).

[90] In re Exxon Corp. & Mobil Corp., Docket No. C-3907, 2001 WL 147170 (Jan. 26, 2001).

other where divestiture of pipeline and shipping assets was deemed necessary in order to bring Alaska North Slope crude oil to refinery markets.[91]

The same rationale was echoed by EU Commissioner Monti:

> The buyer is not the only relevant element to look at. The package of assets to be divested is also critical. If there is any doubt that the business offered for divestiture does not include all the assets that would be needed to compete in the markets concerned, then the parties may have to provide a broader package of assets, or risk having their proposed remedy rejected by the Commission.[92]

This approach was seen in *Unilever/Bestfoods*, where, in order to ensure the viability of divested businesses, the package had to include appropriate supply arrangements, manufacturing facilities, sales forces, and intellectual property rights associated with those businesses, along with the full range of products -- including products for which the Commission had not raised competitive concerns -- in order to assure the buyer's ability to compete fully.[93]

A potential problem with the "as is" approach is the subjectivity of the regulator's identification of which assets are "necessary" in order to constitute an organic business. Moreover, this approach will increase the total purchase price for potential buyers, thereby eliminating some who don't want the entire package, will lead once again to enormous leverage on the part of the remaining buyers and consequent sales at distressed prices. In some circumstances, a comprehensive strategic planning process may circumvent these concerns by

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[91] In re BP Amoco, P.L.C. & Atlantic Richfield Co., Docket No. C-3938, 2000 WL 422209 (April 13, 2000).

[92] Monti, *Challenges*, *supra* note 82, at 4.

[93] Case No. COMP/M 1990, *Unilever/Bestfoods*, Art. 6(2) (Sept. 28, 2000).

identifying in advance those assets potentially of greatest competitive concern and then spinning them off prior to making a merger filing -- perhaps even to a less than effective competitor![94]

A third divestiture variant involves "crown jewels" provisions.[95] This is generally a fall-back position in the event the parties are unable to sell a smaller (though satisfactory to the regulators) divestiture package. The threat that a trustee will take over and sell off more assets than absolutely necessary is thought to provide the parties to the transaction with genuine incentives to find an acceptable buyer promptly and close the deal.[96]

The danger of this approach[97] is that it might end up with the forced divestiture of assets the existence of which in the combined company was a material, if not indispensable, basis for doing the deal in the first place. Even in a less draconian divestiture, this sword of Damocles hanging over the combined entity might well delay the integration of assets and the realization of efficiencies that were a fundamental premise of the transaction.[98] By the same token, it is

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[94] The former FTC Chairman has foreseen this solution, *see* Robert Pitofsky, *The Nature and Limits of Restructuring in Merger Review,* Prepared Statement before Cutting Edge Antitrust Conference (Feb. 17, 2000), *available at* http://www.ftc.gov/speeches/pitofsky/restruct.htm (last visited October 16, 2004), but there doesn't seem to be much the regulators can do about it.

[95] Crown jewels provisions typically involve the addition of specified, and usually very valuable, assets to a previously proposed but inadequate divestiture package.

[96] *See, e.g.,* William J. Baer, *Report from the Bureau of Competition,* Prepared Remarks Before the American Bar Ass'n Antitrust Section Spring Meeting 1997, *available at* http://www.ftc.gov/speeches/other/abaspg97.htm (last visited Feb. 12, 2004).

[97] DOJ does not favor "crown jewels" provisions, because "generally they represent acceptance of either less than effective relief at the outset or more than is necessary to remedy the competitive problem." DOJ POLICY GUIDE, *supra* note 84, § IV.H.

[98] The author is not aware of any instance either in the U.S. or the EU in which this latent threat has materialized.

unlikely to be something that can be adequately defended against by pre-merger planning, short of suggesting to a client what would essentially be a sham pre-filing sale of crown jewel assets subject to a right of repurchase after closing; quite obviously, counseling such a scheme would exceed the boundaries of ethical law practice.[99]

Developments with regard to Behavioral Remedies

In some cases, the structural remedy of divestiture is off the table either because of, *e.g.*, lack of buyers,[100] inability to solve the competitive problems,[101] negative repercussions upon merging parties (as discussed above), or because of other negative externalities, such as in high-tech markets in which divestitures might disrupt ongoing R&D.[102] The alternative is a

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[99] Nonetheless, far more egregious ethical lapses have occurred in recent history, due to the indeterminacy of the rules of professional conduct outside the litigation context. For discussion of these issues in the wake of Enron and other business scandals, *see, e.g.,* Keith R. Fisher, *The Higher Calling: Regulation of Lawyers Post-Enron,* 37 U. MICH. J. LAW REFORM 1017 (2004); Roger C. Cramton, George M. Cohen, & Susan P. Koniak, *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley,* 49 VILLA. L. REV. 725 (2004); Mark A. Sargent, *Lawyers in the Moral Maze*, 49 VILLA. L. REV. 867 (2004); John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293 (2003); Susan P. Koniak, *Corporate Fraud: See Lawyers*, 26 HARV. J. L. & PUB. POL'Y 195 (2003).

[100] This was the problem in the *Boeing/McDonnell Douglas* merger. *See* Boeing/McDonnell Douglas, EC Case No. IV/M. 877 (July 30, 1997).

[101] The Remedies Notice contemplates this problem where there are exclusive agreements, network effects, key patents, etc. *See The Commission Notice on Merger Remedies – One Year After,* Remarks of Mario Monti, European Commissioner for Competition Policy at 5 (Jan. 18, 2002), *available at* http://www.europa.eu.int/comm/competition/speeches/index_2002.html (last visited April 15, 2005).

[102] In such a case, licensing might be preferable to divestiture. *See, e.g.,* William J. Baer & David A. Balto, *New Myths and Old Realities: Recent Developments in Antitrust Enforcement,* 1999 COLUM. BUS. L. REV. 207, 222-23 (1999) (discussing example of Ciba Geigy/ Sandoz merger); Atif I. Azher, Comment, *Antitrust Regulators and the Biopharmaceutical Industry: Compulsory Licensing Schemes Ignoring Gene Therapy Patients'*
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behavioral remedy. While behavioral remedies are somewhat disfavored by regulators because of the perceived need for ongoing monitoring, they present a strategic planning opportunity in cases where structural remedies are either unavailing or unpalatable.

Generally speaking, the purpose of a behavioral remedy is to provide assurances that competitors will not be unfairly excluded from access to critical technologies or assets that will be controlled by the merged entity. Such assurances are typically in the form of commitments offered by the parties to the transaction, and these have often been acceptable to both U.S. and EU authorities. They can be unusually effective in transactions in which access to limited resources are implicated.[103/] Some less than obvious real-world examples have included transactions creating the first pan-market horizontal market power, such as the merger creating the first pan-European mobile phone network,[104/] or transactions featuring vertical concerns, such

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Needs, 25 U. PA. J. INT'L ECON. L. 383, 410-413 (2004) (discussing example of Ciba Geigy/ Sandoz merger); In re Ciba-Geigy Ltd., No. 961-0055, 1996 F.T.C. LEXIS 701 (Dec. 15, 1996) (imposing requirement of licensing package of gene therapy technology).

[103/] *See, e.g.,* Case No. COMP/M 1403, *Astra/Zeneca*, Art. 6(1)(b) (Feb. 26, 1999) (commitment to grant competitively suitable licensee exclusive distribution rights to one of two betablockers). *Cf.* Lufthansa-SAS Order, IV/35.545 LH/SAS (Jan. 16, 1996) (not a merger clearance but an Art. 81 proceeding, involving a joint venture (a transaction that would now be cognizable under the ECMR) where the scant resources were slots at saturated airports and access to frequent flyer program incentives, effectively "locking" passengers on particular routes into specific carriers).

[104/] Case No. COMP/M 1795, *Vodafone Airtouch/Mannesmann*, Art. 6(1)(b) (April 12, 2000). The nondiscrimination commitments in the case, which guaranteed access to the parties' integrated network for a period of three years, were designed to enable other mobile companies the ability to provide pan-European seamless telephone service that they would otherwise be unable, contractually or otherwise, to replicate on their own in any reasonable time frame.

as the possibility of upstreaming or downstreaming competitively sensitive information[105] or a media company merger that would, as a result of existing licenses, give rise to control over access to premium cable television content.[106]

Creativity in crafting an appropriate remedy can go a long way. Consider, for example, the pharmaceutical merger of Astra and Zeneca. Astra had a long-standing dominant position with its local anesthetic, Bupivacaine, notwithstanding expiry of its patent. Zeneca was not competing in that product market until 1998, when it entered into an extensive licensing agreement for a slightly longer-acting local anesthetic called Chirocaine, perhaps the only product with the potential to compete with Astra's. To address the potential competitive concern in this product market, the parties committed not only to reverse all the Chirocaine licensing agreements but also to contribute their expertise during a transition period to support a rival company in launching Chirocaine.[107]

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[105] The Remedies Notice does not identify this problem, but non-disclosure and non-discrimination commitments by the vertically integrated entity have been featured in U.S. merger approvals. *See generally* Thomas C. Wilcox, *Behavioral Remedies in a Post-Chicago World: It's Time to Revise the Vertical Merger Guidelines,* 40 ANTITRUST BULL. 227 (1995); Michael W. Klass & Michael A. Salinger, *Do New Theories of Vertical Foreclosure Provide Sound Guidance for Consent Agreements in Vertical Merger Cases?,* 40 ANTITRUST BULL. 667 (1995).

[106] Case No. COMP/M 2050, *Vivendi/Canal+/Seagram*, Art. 6(2) (Oct. 13, 2000). Here, the Commission's concern was the potential for denying competitors access to premium films for pay-TV that had been acquired by the parties by virtue of Seagram's share control of Universal studios. The solution was a commitment not to grant Canal+ "first-window" rights covering more than 50% of Universal productions and co-productions.

[107] Case No. COMP/M 1403, *Astra/Zeneca*, Art. 6(1)(b) (Feb. 26, 1999).

Note that the FTC refused similar commitments (leading ultimately to the withdrawal of the proposed transaction) in another pharmaceutical merger involving Abbot Laboratories and ALZA. The FTC had monitoring concerns about potential problems between (continued...)

Decisionmaking Criteria

Article 2(1) of the ECMR requires the Commission to take into account a broad array of issues:

> (a) the need to preserve and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or without the Community;
>
> (b) the market position of the undertakings concerned and their economic and financial power, the opportunities available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

Although there is no explicit cross-reference linking the meaning of "dominance" when referred to, albeit obliquely, in the ECMR to the same term as used in Art. 82 of the EC Treaty, the presumption is that they are roughly congruent.[108/] There is, however, a difference in analytical method. Whereas, under Article 82, the issue is whether an undertaking possesses sufficient market power to enable it to behave in its markets independently of pressures from

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the merged entity and the rival during the transition period, given that the former had little incentive to make the acquiror of the potentially competing product successful. *See* Parker & Balto, *supra* note 28.

[108/] The concept of dominance is mentioned expressly in ¶ 25 of the preamble to the Merger Regulation, and is encompassed as well within the cross-reference to Arts. 81 and 82 of the EC Treaty in pmbl. ¶ 7 (noting that Arts. 81 and 82 are not, in and of themselves, "sufficient to control all operations which may prove to be incompatible with the system of undistorted competition envisaged in the [EC] Treaty") and ¶ 32 (calling for a safe harbor for concentrations where the market share of the undertakings involved is less than or equal to 25% of the common market or a substantial part thereof).

competitors, customers, and consumers, the issue under the ECMR is whether a position of dominance will be created or strengthened by the concentration.[109]

Recently, the Commission seems to have made a significant move towards bridging the gap between the "dominance" approach and the U.S. Clayton Act's "substantially to lessen competition"[110] approach by moving to a new substantive test prohibiting mergers that would "significantly impede effective competition" (the "SIEC test").[111] Nevertheless, the SIEC test seems, at least in part, to be a face-saving device, allowing the Commission continued reliance on case law based on the traditional "dominance" test while simultaneously demonstrating convergence towards an "SLC" approach that presages increased reliance on economic analysis.[112]

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[109] Under the revised ECMR, the approach extends beyond dominance to the "significantly impede effective competition" standard, discussed *infra* notes 111-112 and accompanying text.

[110] 15 U.S.C. § 18. This "substantial lessening of competition" standard that characterizes the traditional U.S. approach is often referred to in a shorthand manner (*e.g.,* by the International Competition Network) as the "SLC" test. *See* International Competition Network Mergers Working Group Analytical Framework Subgroup, Annex for Issue Paper for 2002 Naples Conference Description of Analytical Framework under United States Merger Law (2002), *available at*http:// www.internationalcompetitionnetwork.org/afsgusa.pdf (last visited October 16, 2004).

[111] *See* ECMR, *supra* note 26, art. 2(2)-(3); Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings 2004 O.J. C 31/5 [hereinafter "2004 E.C. Merger Guidelines"] (providing guidelines for the assessment of horizontal mergers pursuant to Council Regulation No. 139/2004), *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_031/c_03120040205en00050018.pdf (last visited October 16, 2004). This is a major step toward convergence with the Clayton Act's "SLC" test.

[112] See ECMR, *supra* note 26, pmbl. ¶ 25: "The notion of 'significant impediment to effective competition' . . . should be interpreted as extending, *beyond the concept of dominance*, only to the anti-competitive effects of a concentration resulting from the non-coordinated

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As with U.S. market concentration methodology, the size of the post-merger market share is critical. The ECMR has the safe harbor of a presumption of compatibility with the common market for undertakings with a market share of 25% or less,[113/] though there is nothing comparable under U.S. antitrust standards.[114/] In general under the ECMR, 40% or more virtually guarantees a second-stage inquiry,[115/] while at 50% the burden shifts to the parties to prove that the concentration is not anticompetitive.[116/] In the U.S., by comparison, virtually anything over 35% is likely to be deemed to have, well nigh irrebuttably, a significantly adverse effect on competition.

Again, similar to the procedure in the U.S., market definition is key to the competitive analysis. In their pre-merger notification, the parties will have designated the relevant markets, though, as is common with such an advocacy piece, the market definition proposed may well be

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behaviour of undertakings which would not have a dominant position on the market concerned." (Emphasis added).

[113/] *Id.* pmbl ¶ 32.

[114/] For example, posit a hypothetical 5-firm market where, in measuring market share, firms A & B have 12% each, firm C has 26%, and firms D, and E have 25% each. Under the HHI methodology, described *infra* at notes 119-125 and accompanying text, the pre-merger market is already highly concentrated, and the merger of even the two smallest firms, A & B, though yielding a combined market share of less than 25%, will result in a ΔH of 288, well above the safe harbor of the Horizontal Merger Guidelines.

[115/] In connection with the pre-notification procedure, a "first-stage decision" must be made by the Commission within one month after the requisite notification, subject to extensions where the parties have submitted "commitments" to obtain first-stage clearance for the transaction. If the concentration is determined to be such that it raises serious questions about the impact on competition, then the Commission will move to a second-stage investigation.

[116/] On the other hand, the Commission has granted clearance to a company that had a market share of more than 80%. *See* Case IV/M.042, Alcatel/Telettra, 1991 O.J. (L. 122) 48.

broader than the Commission is prepared to delineate. Geographic market definition in the EU is much like it is in the United States, and the Commission may define the geographic market as comprised of one or more Member States, the entire Community, or an even larger area (even worldwide, as in the Boeing/McDonnell Douglas merger).[117/] With respect to product market definition, again like DOJ and the FTC, the Merger Task Force uses a "SSNPI"[118/]-type test whereby two products are presumed to be in the same relevant market if the purchasers of one would shift a sufficient part of their purchases to the other in the event of a "small but significant and nontransitory price increase."

As part of the structural methodology, both systems make use of the Hirschman-Herfindahl Index ("HHI") for taking a snapshot of the competitive posture of each relevant market both before and after the proposed transaction.[119/] Also, both systems take the view that

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[117/] Boeing/McDonnell Douglas, *supra* note 100, at 19, ¶ 20. *See also*, Pinar Karacan, *Differences in Merger Analysis Between the United States and the European Union, Highlighted in the Context of the Boeing/McDonnell Douglas and GE/Honeywell Mergers,* 17 TRANSNAT'L L. 209, 212 (2004) ("[B]oth the EU and the United States considered the world market to be the [geographic] market for large commercial aircraft.").

[118/] The acronym signifies the standard known as the "small but significant and nontransitory price increase." Under the approach first introduced in the Justice Department's 1982 Merger Guidelines, firms that sell competing products or substitutes to which consumers would switch in response to the hypothetical firm's attempt to impose a SSNPI would make that price increase unprofitable, would prevent the exercise of market power, and ought therefore to be included in the defined market. Department of Justice, Merger Guidelines – 1982, § 11.B.1, *reprinted in* 4 TRADE REG. REP. (CCH) ¶ 13,102. *See generally* FISHER, *supra* note 4, § 3.8.1.

[119/] The Hirschman-Herfindahl Index ("HHI") is a numerical method for estimating market concentration in terms of the sum of the squares of each competitor's market share. The index approaches zero (theoretically, at least) when a market is unconcentrated and is supplied by a large number of firms of relatively equal size, increases both as the number of firms serving the market decreases and as the disparities in size among market participants increase, and reaches a theoretical maximum of 10,000 at a 100% concentration level (*i.e.,* the market is supplied by only a single firm). The HHI is an integral part of merger review under the

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in unconcentrated markets, defined as those with a post-merger HHI of less than 1,000, competitive concerns are not significant and mergers will not be challenged. There are theoretical divergences at the other end of the spectrum, highly concentrated markets, which the U.S. continues -- officially, at least -- to define as markets with an HHI over 1,800, while the EU uses a post-merger HHI of greater than 2,000. Given that the HHI is arrived at by squaring the market shares of all firms competing in the relevant market, that 200 point discrepancy is not all that significant. What ***is*** significant, however, is the permissible level of ΔH -- the change in HHI attributable to the merger.

Although the Horizontal Merger Guidelines issued jointly (for the first time) by the DOJ and the FTC in 1992[120/] specify that a merger in a concentrated market is subject to challenge where the ΔH exceeds 50, the practice is considerably different. For one thing, even the theoretically acceptable ΔH may, by official pronouncement, be different in certain sectors of the economy; in banking, for example, the DOJ[121/] has indicated that it will not challenge a bank

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horizontal merger guidelines issued by U.S. antitrust regulators. *See* FISHER, *supra* note 4, at § 3.7. It is also central to the analysis performed by the Competition Directorate of the EU. *See, e.g.,* European Commission, Directorate-General for Competition, Glossary "H" (defining HHI as a "[s]pecific measurement of market concentration, that is, of the extent to which a small number of firms account for a large proportion of output"), *available at* http://www.europa.eu.int/comm/competition/general_info/h_en.html (last visited October 16, 2004).

[120/] *See* Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines (April 2, 1992), *reprinted in* 4 TRADE REG. REP. (CCH) ¶ 13,104 (as amended, April 8, 1997, with respect to efficiencies), *available at* http://www.ftc.gov/bc/docs/horizmer.htm (last visited Feb. 12, 2004).

[121/] The FTC lacks jurisdiction over *pure* bank mergers or bank holding company acquisitions of banks. Prior to the Gramm-Leach-Bliley Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338 (1999) ("GLEBA"), transactions subject to the Bank Holding Company Act of 1956,
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merger or bank holding company's acquisition of a bank in a concentrated market where the ΔH is 200 or less.[122] Apart from such theoretical sectoral distinctions, in practice the level of concentration at which mergers are being challenged by U.S. authorities in recent years has been averaging a ΔH in the range of 1729 to 1798.[123] The EU appears to endorse, as a matter of policy, a transaction evoking competitive concern only for a highly concentrated market (calculated at a minimum HHI of 2000) with a ΔH of 150.[124]

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12 U.S.C. § 1841 *et seq*. ("BHCA"), were considered completely exempt from FTC jurisdiction and the Hart-Scott-Rodino Act (though the FTC did not completely acquiesce to this). After GLEBA, however, to the extent that a financial holding company makes an acquisition of nonbank interests pursuant to Section 4(k) of the BHCA, these are no longer exempt from H-S-R premerger notification requirements. *See* 15 U.S.C. § 18a(c)(7)-(8); Federal Trade Commission, Premerger Notification Office, Formal Interpretation 17, *available at* http://www.ftc.gov/os/2000/04/hsrformalinterp17_.htm (last visited October 16, 2004).

[122] *See* Letter from Charles F. Rule, Acting Assistant Attorney General, Antitrust Division, to C. Todd Conover, Comptroller of the Currency, re: Acquisition of Brookhaven Bank and Trust by First National Bank of Jackson at 5, n.10 (Feb. 8, 1985). The notion is that this special rule, a departure from the normal tolerance of a ΔH of 50, implicitly recognizes the competitive effect of limited-purpose lenders and nondepository financial entities that might not otherwise be included in the product market definition. *See, e.g.,* Banc One Corp., 77 FED. RES. BULL. 742, 743 n.5 (1991).

[123] *See* KY P. EWING, COMPETITION RULES FOR THE 21ST CENTURY: PRINCIPLES FROM AMERICA'S EXPERIENCE 39 (2003), citing William J. Kolaski, *Coordinated Effects in Merger Review: From Dead Frenchmen to Beautiful Minds and Mavericks,* Prepared Remarks Before the American Bar Ass'n Antitrust Section Spring Meeting 2002, *available at* http://www.usdoj.gov/atr/public/speeches/11050.htm (last visited October 30, 2004).

[124] Commission of the European Communities, Notice on the appraisal of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (Dec. 11, 2002), *available at* http://www.europa.eu.int/comm/competition/mergers/review/final_draft_en.pdf (last visited Oct. 16, 2004).

Use of a numerical approach like the HHI creates merely an illusion of transparency. In practice, HHI standards are applied inconsistently. Moreover, those standards differ for different industries, such as the safe harbor noted above for a ΔH of 200 or less in U.S. bank mergers.

Indeed, bank mergers provide a good illustration of the doctrinal shortcomings of the HHI analysis. Market share for bank transactions is measured by deposit data. The notion of using deposits as a proxy for market power is, at best, counterintuitive. Banks' "product" is, after all, credit, not deposits. When one recalls that the HHI was originally developed to measure market share for industrial companies, the problem of using deposit data as a proxy for market power of banking organizations becomes apparent: It is tantamount to using the amount of iron ore bought by a steel company, rather than the steel produced by the company, as a measure of its market share. In short, as applied to banks, the HHI measures market share by *inventory* rather than *product*.[125/]

In short, HHI methodology does not by itself confer transparency and is, in fact, meaningless without insights into the regulator's methodology of market definition. That is the area of least convergence between the U.S. and the EU. That the U.S. and the EU in fact take radically different approaches is nowhere better illustrated than the *GE/Honeywell* case.

[125/] The only explanation ever offered is that accurate loan data are proprietary and therefore hard to come by, whereas deposit data are regularly kept by depository institutions (for purposes of reserve requirements, deposit insurance, etc.) and their regulators.

III A CASE STUDY IN DIVERGENT ANTITRUST ANALYSIS: MARKET DEFINITION, DOMINANCE, AND THE GE/HONEYWELL TRANSACTION

General Electric announced its proposed acquisition of Honeywell on October 22, 2000 at an acquisition price of $42 billion, in the process breaking up a pending merger between Honeywell and United Technologies Corporation (UTC).[126/] In its investigation, DOJ identified two key product markets that were affected by the merger: (1) the market for military helicopter engines, and (2) the market for providing heavy maintenance, repair, and overhaul ("MRO") services for aircraft engines and auxiliary power units ("APU").

As to the first market, DOJ found that the merger would have substantially lessened competition in the production of U.S. helicopter engines[127/] which, consequently, could expose the U.S. military to higher prices, lower quality, and reduced innovation in the design, development, and production of the next generation of advanced military helicopter engines. To remedy this concern, the DOJ required the parties to divest Honeywell's helicopter engine business, which generated revenues of $200 million in 2000.[128/]

As to the second market, DOJ was apprehensive about the likelihood of increased prices and reduced quality in the repair and overhaul of Honeywell aircraft engines and APUs as a

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126/ *See* Andrew Ross Sorkin & Claudia H. Deutsch, *General Electric Buying Honeywell in $45 Billion Deal,* N.Y. TIMES, Oct. 23, 2000, at A1.

127/ GE and Honeywell are the two premier manufacturers of U.S. military helicopter engines, collectively accounting for a substantial majority of all engines running military helicopters. They also received virtually all of the applicable research and development funding provided by the U.S. Department of Defense through its Joint Turbine Advanced Gas Generator. *See* Press Release, *Justice Department Requires Divestitures in Merger Between General Electric and Honeywell* (May 2, 2001), *available at* http://www.usdoj.gov/atr/public/press_releases/2001/8140.htm.

128/ *Id.*

result of the strong and combined position of the merged enterprises. DOJ therefore required the parties to authorize a new, third-party MRO service provider for certain models of Honeywell's aircraft engines and APUs in order to introduce a new player in this market and thus promote more competition.[129]

There is some indication that the Commission had knowledge of the proposed merger at the time notice was given to U.S. authorities in October 2000, though there is a dispute about whether any meaningful communication between the Commission and DOJ took place during that period.[130] Clearly, however, the Commission did not receive its own *formal* notification until four months later, in February 2001,[131] probably after DOJ had indicated to the parties (even if informally) that it would allow the merger to proceed.[132] Despite not having been privy

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[129] *Id.*

[130] According to former Assistant Attorney General Charles James, the Commission had been informed, given access to information, and involved in the discussions "at the very highest policy levels about the evidence and the theories the two agencies were pursuing." Charles A. James, Assistant Attorney General, Antitrust Division, Dep't of Justice, Address Before the OECD Global Forum on Competition, Paris, France, at 5-6 (Oct. 17, 2001), *available at* http:// www.usdoj.gov/atr/public/speeches/9330.pdf. (last visited April 15, 2005). In contrast, former EU Competition Commissioner Mario Monti's position was that "he had 'some useful telephone conversations' with Mr. James in the days beforehand, but that it was 'unfortunately impossible to have any discussions at all at the very highest policy level.'" John Deq. Briggs & Howard Rosenblatt, *A Bundle of Trouble: The Aftermath of GE/Honeywell,* 16 ANTITRUST 26, 28 (2001).

[131] *See In Wake of GE/Honeywell Case, Monti Answers Critic*, EURECOM, July/Aug. 2001, *available at* http://www.eurunion.org/news/eurecom/2001/eurecom070801.htm (last visited April 15, 2005).

[132] See Stefan Schmitz, *The European Commission's Decision in GE/Honeywell and the Question of the Goals of Antitrust Law,* 23 U. PA. J. INT'L ECON. L. 539, 567 (2002) (observing that notification was "probably also after the DOJ had indicated that it would allow the deal to go through."), citing Donna E. Patterson & Carl Shapiro, *Transatlantic Divergence in GE/Honeywell: Causes and Lessons*, 16 ANTITRUST 18, 22 (2001) (asserting that GE

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to the strategic councils of the parties, one might nonetheless speculate about a number of things here: the degree to which the Commission was involved in talks with the parties from the outset, and the degree to which GE hoped that a favorable DOJ decision would put moral and political pressure on the Commission to approve the deal as well.[133/] Whichever – if any – of these speculations may have obtained here, what is known for certain is that the Commission moved to a second-stage inquiry -- itself an ominous portent, inasmuch as the vast majority (roughly 95%) of cases do not reach this stage.[134/]

One factor that has subjected the Commission's decisions (not only in GE/Honeywell but in other cases as well, such as Boeing/McDonnell Douglas) to criticism is that body's penchant for giving plenary consideration to the views of those in direct competition with the parties to the transaction. In the United States, antitrust regulators are skeptical of the value of submissions by

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experienced difficulty in filling out the Commission's Form CO to the satisfaction of the Merger Task Force). The Antitrust Division did not formally announce its agreement on divestitures with the parties until May 2, 2001. *See GE-Honeywell: The U.S. Decision*, Remarks by Deborah Platt Majoras, Deputy Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, Before the Antitrust Law Section, State Bar of Georgia (Nov. 29, 2001), *available at* http://www.usdoj.gov/atr/public/speeches/9893.htm (last visited April 15, 2001). *Cf.* Barbara Crutchfield George, Lynn Vivian Dymally & Kathleen A. Lacey, *Increasing Extraterritorial Intrusion of European Union Authority Into U.S. Business Mergers and Competition Practices: U.S. Multinational Businesses Underestimate the Strength of the European Commission from G.E.-Honeywell to Microsoft,* 19 CONN. J. INT'L L. 571, 591 (2004) (citing JACK WELCH & JOHN A. BYRNE, JACK: STRAIGHT FROM THE GUT (2001), to the effect that GE's then-CEO, Jack Welch, "was optimistic about obtaining merger approval because his confidence was bolstered by his knowledge that the year before the Allied Signal-Honeywell merger had been approved with only a few behavioral remedies and a roughly $40 million concession to a competitor.")

133/ *See* Schmitz, *supra* note 132, at 567 ("GE could have hoped that the U.S. decision would put pressure on the European authorities to approve the deal as well.")

134/ *Id*. at 567-68.

such competitors because of their obviously skewed incentives.[135] The ECMR, however, permits a variety of third parties, provided they can show "sufficient interest" in the outcome of the proposed transaction, to be heard.[136] Among those deemed to have "sufficient interest" are not only customers and suppliers but also competitors, and the latter have not been shy about mounting attacks on proposed mergers.[137]

Emphasis on the impact of the transaction on European competitors pervades the Commission's decision. In support of its position on the GE/Honeywell transaction, the Commission noted that the first phase of the investigation had indicated that the merger might bring about horizontal overlaps in the market for large regional jet engines, overlaps that would significantly reduce the existing degree of competition in this market. In the Commission's view there were also vertical effects "to the extent that Honeywell is a supplier of components to competing engine manufacturers." Furthermore, there were conglomerate effects "stemming

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[135] As a matter of U.S. antitrust policy, the focus, of course, is on consumer welfare instead.

[136] ECMR, *supra* note 26, art. 18(4). *See also* Commission Regulation (EC) No. 802/2004 of 7 April 2004, implementing Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, 2004 O.J. (L133) 1, arts. 11(c)(providing advance recognition of "sufficient interest" for (i) "members of the administrative or management bodies of the undertakings concerned or the recognized representatives of their employees" and (ii) "consumer associations, where the proposed concentration concerns products or services used by final consumers"), 16(1)-(2) (requiring third parties wishing to be heard to so request in writing), *available at* http://www.europa.eu.int/comm/competition/mergers/legislation/regulation/#implementing (last visited April 15, 2005).

[137] *See, e.g.,* BARRY E. HAWK & HENRY L. HUSER, EUROPEAN COMMUNITY MERGER CONTROL: A PRACTITIONER'S GUIDE 309-310 (1996).

from the possible bundling of jet engines, avionics and non-avionics [that are] likely to foreclose competition in these markets."[138]

On May 8, 2001, GE received from the Commission a 155-page statement of objections reflecting continuing competitive concerns about the likely affected markets.[139] Clearly this was a harbinger of difficulties to come. The statement "invited the parties to intensify their efforts to reach an agreement with the Commission and confirmed that the merger would not be allowed in its current form."[140] On June 14, 2001, the parties to the proposed merger reacted with a series of commitments proffered to address the Commission's concerns. The Commission did not, however, deem these commitments adequate, so the parties proffered a second, amplified set of commitments on June 28, 2001. These again proved inadequate from the Commission's perspective.[141] Additional last-minute negotiations ultimately proved fruitless, and on July 3 the Commission issued a decision blocking the merger.[142]

In terms of product market definition, the contrast to DOJ's approach could not be more stark. The Commission could not have cared less about markets for helicopters and MRO

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[138] All of this is detailed in Press Release IP/01/298, Commission Opens Full Investigation into the General Electric/Honeywell Merger (Feb. 3, 2001) [hereinafter "Phase II Press Release"], *available at* http://europa.eu.int/rapid/start/cgi/guesten.ksh?reslist (last visited February 12, 2004).

[139] Schmitz, *supra* note 132, at 568.

[140] *Id.*

[141] According to the Commission's procedures, they were also untimely. *See id.* n.135, citing Commission Regulation 447/98 of March 1, 1998 on Notifications, Time Limits and Hearings, 1998 O.J. (L 61) 1, art. 18.

[142] Case COMP/M.2220, General Electric/Honeywell, 2001 O.J. (C 46) 3, *available at* http://www.europa.eu.int/comm/competition/mergers/cases/decisions/m2220_en.pdf (last visited October 30, 2004) [hereinafter "GE/Honeywell"].

services, not only because these markets had very little effect on the Common Market but also because they had already been addressed and remedied by the DOJ investigation. Rather, the Commission identified the markets for aerospace and power systems as posing competitive concern. These product markets consisted principally of submarkets for aircraft engines and related products (itself divided into three submarkets: large commercial jet aircraft, regional commercial jet aircraft, and corporate jet aircraft engines), avionics systems,[143] non-avionics systems,[144] and engine controls.

Both GE and Honeywell manufacture aircraft engines, and the submarkets of concern to the Commission featured significant premerger horizontal overlaps with respect to regional and corporate jet aircraft engines, in which both GE and Honeywell were major players.[145] The Commission assessed the extent of the parties' market penetration, the viability of existing competitors and their ability to check the market power of the merged entity, and the possibility of countervailing buyer power. Based on that assessment, the Commission concluded that the transaction would strengthen GE's existing position of dominance in the markets for engines for large commercial and large regional jet aircraft,[146] create a dominant position in the market for

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[143] *I.e.,* systems used to control an aircraft, including navigation and communication systems and systems for assessing flying conditions.

[144] *E.g.,* APU, environmental control systems, electric power, wheels and brakes, landing gear, and aircraft lighting.

[145] For example, following the merger, the parties would enjoy a complete (*i.e.*, 100%) monopoly in the market for large regional jet aircraft engines. GE/Honeywell, *supra* note 142, ¶ 84.

[146] *Id.* ¶ 341. The Commission's finding that GE holds a dominant position in several of the submarkets for jet engines has been criticized by U.S. antitrust regulators. *See, e.g.,* U.S. Dep't. of Justice, Antitrust Submission for OECD Roundtable on Portfolio Effects in (continued...)

corporate jet engines, and lead to the eventual creation of a dominant position in the avionics and non-avionics markets, as well as the market for engine starters.

Ultimately, the Commission concluded that no other competitors in the jet engine sector could realistically challenge the merged entity in the long term, and that it would soon realize a position of dominance across the entire jet aircraft engine market.[147]

The proposed transaction also involved some significant vertical elements (emerging from Honeywell's role as a provider of components to competing jet engine producers) and "conglomerate effects" (resulting from the possible bundling of jet engines with avionics and other airplane parts).[148] Honeywell had been a leading supplier of engine controls that are incorporated into jet engines; it was particularly strong in the market for engine starters, where it enjoyed a fifty to sixty percent market share.[149] The Commission feared that, following the merger, GE/Honeywell could disrupt the supply of engine starters to other manufacturers either by raising prices to increase its rivals' costs or by limiting supply.[150]

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Conglomerate Mergers, *Range Effects: The United States Perspective* (Oct. 12, 2001) [hereinafter "OECD Roundtable Submission"], *available at*http:// www.usdoj.gov/atr/public/international/9550.pdf. (last visited Oct. 30, 2004).

[147] The Commission concluded that Pratt & Whitney (P&W) was gradually exiting the market for commercial jet aircraft engines, GE/Honeywell, *supra* note 142, ¶ 184, and that, Rolls Royce (RR), while possessing the technical capability to compete against GE, would be severely disadvantaged by its inability to match the kinds of financial incentives GE could provide manufacturers and airline customers, *id.* ¶ 204.

[148] *See* Phase II Press Release, *supra* note 138.

[149] GE/Honeywell, *supra* note 142, ¶¶ 335-337 & Table 23.

[150] *Id.* ¶ 420.

Conceptually speaking, the most significant parting of the ways between EU and US views of the GE/Honeywell merger involves the Commission's views on the conglomerate effects of combining GE's position in the engine market with Honeywell's leading position in many of its product markets. While U.S. antitrust authorities typically have shown relatively little concern over conglomerate mergers,[151] the Commission believes the ***"portfolio power"*** of large conglomerates producing related products may harm competition. Underlying this theory is the belief that producing a range of complementary products confers advantages beyond what might be indicated by the market shares of the individual products.

The Commission maintains that conglomerates are better positioned than their smaller competitors to employ predatory strategies (and to disguise such strategies), and that even if they refrain from doing so, the threat of such action can be used to discipline their rivals.[152] Furthermore, the Commission believes conglomerate structures tend to entrench existing positions of dominance because of the greater financial resources available in such structures.[153]

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[151] *See, e.g.,* OECD Roundtable Submission, *supra* note 146, at 6-11.

[152] *See* Levy, *supra* note 71, § 8.07[4](b) (citing European Commission, XIXth Report on Competition Policy 228 (1989)). This seems to be an inversion on the once trendy but now moribund "waiting in the wings"-cum-restraining influence theory of potential competition – not a perfect inversion, to be sure, as potential competition posited the absence of a market overlap. For now dated, but never overruled, examples of U.S. Supreme Court jurisprudence treating potential competition, *see, e.g.,* United States v. Marine Bancorporation, 418 U.S. 602 (1974); United States v. Falstaff Brewing Co., 410 U.S. 526 (1973).

[153] *Id.* (citing European Commission, XXIst Report on Competition Policy 369 (1991)); see also Commission Decision of 15 October 1997 Declaring a Concentration to be Compatible with the Common Market and the Functioning of the EEA Agreement (Case No. IV/M.938 - Guinness/Grand Metropolitan), 1998 O.J. (L 288) 24, 29 (finding the holder of a portfolio of products has "greater flexibility to structure his prices, promotions and discounts, ... will have greater potential for tying, and ... will be able to realise economies of scale and scope in his sales and marketing activities").

Generally speaking, U.S. regulators seem to have rejected this theory, although the Supreme Court has had occasion to espouse it.[154]

According to the Commission's findings, Honeywell, already the only competitor offering a full range of avionics and non-avionics products,[155] was able to offer one-stop shopping.[156] The Commission opined that the merged entity's breadth of products would position it to offer specially priced packages (or "bundles") of its products, and to develop technically integrated systems.[157] Although the parties insisted that this kind of package pricing was uncommon in the sector, the Commission found evidence that bundling occurred regularly. Indeed, the Commission found that Honeywell had engaged in an increased level of bundling of avionics and non-avionics products since merging with Allied Signal in 1998.[158] Furthermore, the Commission believed that the merged entity's ability to offer attractively priced bundles of products and services would be greatly enhanced by the combination of Honeywell's broad product range with GE's engines, MRO (maintenance, repair and overhaul) aftermarket capabilities, and financial services.[159] Simply put, the Commission apprehended that Honeywell's existing competitors would be unprepared to challenge a bid for dominance by the

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[154] *See* FTC v. Procter & Gamble, 386 U.S. 568, 578-79 (1967) (finding P&G's acquisition of Clorox would be detrimental to competition, even absent horizontal overlap, because P&G's size would intimidate competitors and deter new entrants).

[155] GE/Honeywell, *supra* note 142, ¶¶ 241-275.

[156] *Id.* ¶¶ 276-282. While the Commission considers one-stop-shopping advantageous for merger review, it takes a far less favorable view of one-stop-shopping in connection with concentrations.

[157] *Id.* ¶¶ 289-296.

[158] *Id.* ¶¶ 296-297.

[159] *E.g., id.* ¶¶ 342-349.

merged entity, based on both their inability to offer a comparable range of products and their lesser financial resources.[160/]

Indeed, financial resources and the focus thereon constitutes the most striking aspect of the Commission's analysis. GE's market capitalization, the largest in the world, was approximately $480 billion (as of June 1, 2001), a figure the Commission compared to that of Boeing ($56 billion), UTC ($39 billion),[161/] and RR ($5 billion).[162/] GE's financial muscle would, in the Commission's view, enable the merged entity to leverage that financial power to gain significant competitive advantages over smaller competitors.

In the first place, GE enjoyed the advantage of its financial arm, GE Capital, which at the time of the decision managed about $370 billion, equivalent to more than 80% of GE's consolidated assets. GE Capital would be a virtual sinkhole, capable of absorbing potential product failures and strategic mistakes.[163/] GE had been able to invest heavily in ambitious research and development (R&D) projects, and to absorb project failures that would devastate its smaller competitors, including RR and P&W.[164/]

[160/] Antecedents for the Commission's application of its portfolio effects approach to the GE/Honeywell transaction were its decisions in two aircraft industry mergers, Aerospatiale/DeHavilland, E.C. Case No. IV/M.053 (Oct. 2, 1991) and Boeing/McDonnell Douglas, *supra* note 100.

[161/] Note that P&W is a division of UTC. GE/Honeywell, *supra* note 142, ¶ 174.

[162/] *Id.* ¶ 107 & n.28.

[163/] Id. ¶ 108. In support of this point, the Commission cited the example of RR, which, after the failure of one of its R&D projects in the 1970's, had to exit from the relevant market. *Id.* ¶ 110.

[164/] *Id*. & n.29.

GE could also use -- and had, in fact, already used in the past -- GE Capital's financial strength to discount heavily prices for jet engines[165] and could then recoup its profits by raising the price of MRO aftermarket services and replacement parts.[166] Moreover, the Commission asserted that the financial strength of GE Capital could be used, and had been used, to afford significant financial support to airframe manufacturers in platform program development assistance, and thus obtain a monopoly for engines for those airframes.[167] The Commission concluded that these exclusive agreements would significantly affect the engine market, since they guaranteed significant penetration of an airline's fleet and subsequent incumbency benefits.[168]

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[165] *Id.* ¶ 111 & n.32.

[166] *See id.* ¶¶ 139, 149-162, 227.

[167] In return for putting in a $2 billion advance order for the long-range version of Boeing's 777, GE was designated the exclusive engine supplier for the plane. GE had secured a total of 10 out of the last 12 exclusive positions granted by airframe manufacturers. *Id.* ¶ 114.

[168] Exclusive dealings had been the *bête noire* of an earlier Commission merger decision involving Boeing and McDonnell Douglas. Boeing had a number of exclusive arrangements with U.S. airlines and, with the acquisition of McDonnell Douglas, would, the Commission declared, be in a position to offer McDonnell Douglas aircraft as well as spare parts and support service for older aircraft. The Commission observed that the combination of a broader product range, financial resources, and higher capacity -- and thus the ability to respond to airlines' needs for deliveries on a short lead-time -- would significantly increase Boeing's ability to induce airlines to enter into exclusive deals. Airbus, the only remaining competitor, would not be able to offer such exclusive deals because Airbus was unable to offer a full "family" of aircraft. (At the time of the merger, Boeing accounted for over sixty percent of world sales of commercial jets; Airbus, a European consortium that has received subsidies from three European governments, accounted for around thirty percent; McDonnell Douglas accounted for around five percent. *See* Eleanor M. Fox, *Lessons from Boeing: A Modest Proposal to Keep Politics Out of Antitrust*, ANTITRUST REP., Nov. - Dec. 1997, at 19-24).

The merger only received clearance from the Commission after Boeing agreed to a number of significant commitments, including (A) to maintain McDonnell Douglas as an (continued...)

Apart from influencing the manufacturers of airframes, the strength of GE Capital could also be used to influence airlines in their buying decisions. Hoisting GE on its own petard, the Commission quoted from a book written by GE's former CEO, Jack Welch,[169] recounting a loan which GE Capital arranged for Continental Airlines when the airline was in financial difficulty in 1993.[170] A few months later, Continental ordered GE engines for its aircraft.[171]

Next, the Commission addressed the position and powers of GE Capital Aviation Services ("GECAS"), a division of GE that purchased new airplanes and leased them to customers (including commercial airlines). With a share of 10% of purchases of all new aircraft, GECAS was, in fact, the single largest airplane buyer in the world.[172] The Commission maintained that GECAS could enhance GE's position in the market through attractive financing

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independent company for a period of ten years; (B) to provide customer support for McDonnell Douglas aircraft at the same level provided for Boeing aircraft; and, most importantly, (C) not to enter into additional exclusive agreements until 2007 and not to exercise its exclusive rights under existing agreements with U.S. carriers.

169/ To wit: WELCH & BYRNE, *supra* note 132.

170/ GE/Honeywell, *supra* note 142, ¶ 117, citing John Curran, *GE Capital: Jack Welch's Secret Weapon,* FORTUNE, (Nov. 10, 1997), *available at* http://www.ge.com/news/welch /articles/f1197.htm). After the deal, a consultant was quoted as having said cryptically: "Capital is part of the arsenal for GE's industrial side to *beat the competition*." *Id*. (emphasis added).

171/ GE/Honeywell, *supra* note 142, ¶ 118. In fact, the Commission found, Continental Airlines aircraft use predominantly GE engines. The Commission's data showed that the airline chose GE engines over those of its competitors every time it had a choice. *Id.* ¶ 119. GE Capital Aviation Services also had the largest single fleet of aircraft, twice as big as its nearest competitor, International Lease Finance Corporation. *Id.* ¶ 122.

172/ *Id*.

packages for purchasing deals of large aircraft. Indeed, 99% of planes purchased by GECAS had GE engines.[173]

While GECAS' innovative financing techniques could result in attractive packages for customers, the Commission apprehended the creation of an unfair advantage over competitors like RR and P&W because GECAS could demand the use of GE engines on all plane purchases.[174] Neither RR nor P&W had the financial capacity to replicate this strategy by establishing similar leasing and purchasing arms,[175] and the Commission was concerned that Honeywell's product mix would be similarly promoted, building market share in avionics and non-avionics product markets without the need for substantive improvements in price or quality.[176]

The combination of the advantages conferred by GE Capital and GECAS made GE's high market shares a "proxy for dominance"[177] in the Commission's view. Such dominance would only be exacerbated by the fact that GE's competitors were not in a position to offer anything remotely comparable to GE's financial services. The Commission concluded that given the nature of the jet engines market, GE's already strong market position with many airlines, its incentive to use GE Capital's powers with customers, and its ability to leverage its vertical integration through GECAS, GE appeared to be in a position to behave independently of

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[173] *Id.* ¶ 132.

[174] *Id.* ¶¶ 133-136.

[175] *Id.* ¶ 142-144, 160.

[176] *Id.* ¶¶ 344-349.

[177] *Id.* ¶ 163.

its competitors, customers, and, ultimately, consumers.[178] The Commission therefore concluded that GE could be characterized as a dominant undertaking in the markets for large commercial jet aircraft engines and for large regional jet aircraft engines.[179]

In order to allay the Commission's concerns, GE offered, *inter alia*, to maintain GECAS as a separate legal entity and to conduct its dealings with Honeywell on an arm's-length basis.[180] Not surprisingly, the Commission was not satisfied with this offer. It argued that mere legal separation of the entity would not affect its management, and thus control would remain in the hands of GE. Most importantly, the separation would not prevent GECAS from exercising and continuing the commercial strategy of GE.[181]

A second offer involved a divestiture of 19.9% of GE's shares in GECAS.[182] This, too, the Commission felt was insufficient because it would have left GE with a substantial and decisive equity position in GECAS and would not have changed the influence of GE over GECAS's management and policies.[183] Even a total divestiture of GECAS would only have eliminated its financial power related to *pre-existing* dominance of GE in the large jet aircraft engine market. Thus, even if GE had been willing to sell GECAS completely and had thus convinced the Commission that there was no *pre-existing* dominance by GE in this market, it is

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178/ *Id.* ¶¶ 225, 229.

179/ *Id.* ¶¶ 163-172.

180/ *Id.* ¶ 498. An independent expert would monitor compliance. *Id.*

181/ *Id.* ¶¶ 530-532. Moreover, as with any behavioral remedy, significant monitoring on the part of the Commission would be necessary.

182/ *Id.* ¶¶ 535-536.

183/ *Id.* ¶¶ 551-555.

very unlikely that the merger would have received clearance because of lingering problems with post-merger dominance. The latter would be caused, in no small part, by the combined entity's ability to *bundle* its products.

This "bundling" analysis took GE and Honeywell by surprise, as it had not been a feature of EC merger decisions before. The Commission described "bundling" as a simple business arrangement whereby a number of products are combined in a package and sold at a single price.[184/]

Here is where the Commission's legal approach enters into questionable territory. In the market for large commercial aircraft engines, the Commission needed to show a strengthening of a dominant position. Nowhere in its decision did the Commission state that the newly merged entity would use bundling to improve its market position. Rather, the Commission relied on its "portfolio effects" approach and deemed it sufficient that the merged entity "[would] have the ability to engage in packaged offers of engines, avionics and other services." Since none of the competitors of a merged GE/Honeywell could match this ability, or could do so only at substantially higher costs, GE could therefore be expected to attract new clients at the expense of such competitors while simultaneously retaining existing ones. Ultimately, this could only lead, in the Commission's judgment, to the strengthening of GE's existing dominance.

[184/] The Commission viewed bundling as potentially a very successful exclusionary strategy, and therefore of enormous competitive concern. Analytically, the Commission approached the bundling phenomenon by subdividing it into three categories: (1) "mixed bundling" -- the sale of interrelated products together at a price lower than the prices obtaining where each product would be sold separately; (2) "pure bundling" -- offering products for sale only as a package but not offering them individually; and (3) "technical bundling" -- selling individual high-tech components that will not perform efficiently without their bundled affiliated components.

A similar approach was taken by the Commission with regard to the strengthening of GE's already dominant position in the market for engines for large regional aircraft. In the market for engines for corporate jets, the Commission used the concept of potential bundling to determine the creation of a dominant position for the merged entity.

Bundling, as conceived by the Commission, is a behavioral problem, in that it contemplates the manner in which a market player will use its powers. Merger control as it had previously been conceived in the EU, on the other hand, is concerned with the situation of the parties and the markets *at the time of the merger*, and not with possible future behavior. Although it is probably true that the combined entity would indeed have the potential to bundle, and while it cannot be ruled out that at some future time it might engage in this behavior, using this potential to conclude that the merger would, under the Commission's pre-existing analytical approach, *strengthen a pre-existing dominant position* is questionable.

The legal question -- which will no doubt be addressed on judicial review -- is whether it is permissible to block a merger because of possible future bundling or other potential conduct – indeed, whether bundling all by itself constitutes an abuse of a dominant position within the meaning of Article 82 of the EC Treaty. This question strikes at the heart of EU merger control and may well have serious repercussions on the conception and future application of the ECMR. There is no question but that bundling services and goods is, and should be, subject to rigorous scrutiny by the Commission. Arguably, however, the tool for that scrutiny should be Article 82 of the EC Treaty, not the ECMR.

The Commission can advance two contrary arguments, however. First, if the conduct is anticompetitive, considerations of efficiency would suggest that it be addressed while the Commission already has the parties before it and while they are already under an obligation to furnish detailed information about their finances and the structure and competitive conditions of affected markets. If the Commission can negotiate *ex ante* a remedy that resolves these concerns (involving, as they did here, prior practices) at the same time that it addresses concerns raised by a proposed M&A transaction, that is arguably all to the good, particularly as the Commission's resources for action *ex post* are quite small compared to those of its U.S. counterparts.[185] That disparity in resources takes on added significance when one realizes that it is often more difficult for the Commission to bring an *ex post* action to curb an abuse of a dominant position than it is for U.S. authorities to bring an action under the Sherman Act.[186]

Second, and perhaps even more persuasive, is that the Commission's use of the merger review process ought to apply different (and arguably more stringent) standards to firms with market power -- including conglomerates -- than to their smaller competitors. Obviously, a firm without market power cannot work any serious injury to competition through "exclusionary" practices like vertical restraints, refusals to deal with a smaller rival, etc. If one accepts the proposition that particular conduct may be unlawful when practiced by a monopolist but not by a

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[185] *See* Levy, *supra* note 71, §8.02[6](d) (explaining that the Merger Task Force responsible for reviewing transactions has only about fifty specialized officials in total). In contrast, the FTC has more than fifty economists with doctoral degrees alone in addition to its staff of legal and other experts. Critics of the Commission's Merger Task Force have suggested that this limitation has also forced it to rely too heavily on the clearly interested economic analyses provided by the parties and their competitors in assessing the competitive impact of proposed mergers. This problem has worsened with the increased number of cases the Commission is responsible for reviewing and with enhanced expectations of the scope and detail of Commission investigations. In 1991, the Commission reviewed only 63 transactions; in 1999, it considered 292. *Id.* § 8.02[6](c).

[186] The Commission can act only on a complaint or through a request for information based on Art. 11 of Council Regulation 17. Moreover, the remedy of divestiture is much more difficult to implement in an Art. 82 context than it is during the give and take of negotiations over a merger clearance.

competitor without market power, it follows that the greater a monopolist's market power, the more potentially objectionable -- and therefore deserving of scrutiny -- the conduct in question becomes.

In the merger context, it is axiomatic that acquisition is a less competitive means of building market share than is *de novo* entry and/or "natural" growth as a result of building a better mousetrap. Thus if a dominant firm seeks to enhance or entrench its market power by merger, prior conduct that was questionable but on the acceptable side of the anticompetitive line might become intolerable post-merger. Under this analytical template, GE's merger with Honeywell would have enhanced GE's already dominant position (based on the horizontal, vertical, and conglomerate effects found by the Commission), and the potential impact of the financial power represented by GE Capital and GECAS would have threatened the competitiveness of additional markets.

However one comes out on the validity of the Commission's approach, what emerges beyond peradventure is the potential, even between two arguably "converging" competition regimes such as those of the U.S. and the EU, for radically disparate interpretation of common legal standards and decidedly different application of product and geographic market definition, with all its consequences for an M&A transaction of worldwide scope, to a given set of facts.

IV PROPOSALS FOR WORLD TRADE ORGANIZATION INVOLVEMENT

Divergences in antitrust analysis between the different legal systems, exemplified as between the U.S. and the EU by the GE/Honeywell and Boeing/McDonnell Douglas imbroglios, are by no means a newly discovered problem. Since the days of the Havana Charter in the late

1940's,[187] there have been sporadic efforts to achieve some form of multinational competition law framework. Examples of such efforts include the draft restrictive business practices codes of

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[187] In 1948, the UN Conference on Trade and Employment resulted in what became known as the Havana Charter or the International Trade Organization (ITO). Some 53 nations signed the Havana Charter and pledged therein to promote both domestic and international actions for the purpose, *inter alia*, of eliminating restrictive business practices on the part of public or private commercial enterprises, including business practices that might limit access to markets or foster monopolization. *See* Havana Charter for an International Trade Organization, United States Conference on Trade and Employment, held at Havana, Cuba, 21 November 1947 to 24 March 1948, Final Act and Related Documents, U.N. Doc. ICITO/1/4 (March 1948), at Chapter V, Restrictive Business Practices, Art. 46, *available at* www.worldtradelaw.net/misc/havana.pdf (last visited Dec. 1, 2004). *See generally* CLAIR WILCOX, A CHARTER FOR WORLD TRADE 153-60, 227 (1949); Frederick M. Abbott, *Public Policy and Global Technological Integration: An Introduction*, in FREDERICK M. ABBOTT AND DAVID J. GERBER (EDS), PUBLIC POLICY AND GLOBAL TECHNOLOGICAL INTEGRATION 3 (1997). Congress, however, objected to the Havana Charter, and the creation of the ITO was aborted, although the trading system was preserved under the General Agreement on Tariffs and Trade. For more background information, *see* Robert R. Wilson, *Proposed ITO Charter*, 41 AM. J. INT'L L. 879 (1947); George Bronz, *The International Trade Organisation Charter*, 62 HARV. L. REV. 1089 (1949).

the United Nations Conference on Trade and Development (UNCTAD)[188] and the OECD[189] and the Munich Draft International Antitrust Code.[190]

At the urging of the European Union, among others, a decision was made to put the propriety of negotiation of a multilateral competition policy under the auspices of the WTO on the agenda for the next trade negotiations "round."[191] The likelihood of any consensus on the issue emerging is remote, however, because of significant differences between developed

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[188] *See* UNCTAD, The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, U.N. Doc. TD/RBP/CONF/10, *reprinted in* 19 I.L.M. 813 (1980). For the more recently revised version, see U.N. Doc. TD/RBP/CONF/10/Rev.2 (2000), *available at* http://www.unctad.org/en/docs/tdrbpconf10r2en.pdf (last visited Dec. 1, 2004).

[189] *See, e.g.,* OECD, Council Recommendation Concerning Cooperation between Member Countries on Restrictive Business Practices Affecting International Trade (Oct. 5, 1967), *reprinted in* 8 I.L.M. 1309 (1969); OECD, Council Recommendation Concerning a Consultation and Conciliation Procedure on Restrictive Business Practices Affecting International Trade C (73) 99 (Final) (July 3, 1973), *reprinted in* 19 ANTITRUST BULL. 283 (1974); Revised Recommendation of the OECD Council Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting Trade, OECD Doc. No. C (86) 44 (Final) (May 21, 1986), revised by OECD Doc. C(95)130/final (July 27-28, 1995), *reprinted in* 35 I.L.M. 1314 (1996).

[190] *See* International Antitrust Code Working Group, Draft International Antitrust Code as a GATT-MTO-Plurilateral Trade Agreement (July 10, 1993), *reprinted in* 65 ANTITRUST & TRADE REG. REP. (BNA) S-1, Issue No. 1628 (Aug. 19, 1993) (Special Supp.). This proposal went nowhere fast – even faster, indeed, than its predecessors. For discussion, *see generally* Daniel J. Gifford, *The Draft International Antitrust Code Proposed At Munich: Good Intentions Gone Awry*, 6 MINN. J. GLOBAL TRADE 1 (1997).

[191] Doha Ministerial Declaration, *supra* note 19, ¶ 23 (declaring agreement that "negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations").

economies, most of which now have their own competition laws, and developing economies, most of which do not.[192/]

Indeed, such a lack of consensus is all too familiar in – indeed, almost emblematic of -- international law and internationalist tendencies generally. Even if internationalization of a particular matter is a desideratum, it is far from an inevitability. One need think only of the movement for world governance after World War I that gave rise to the pitifully inadequate League of Nations, or the push for a kind of world federalism after World War II; these movements were fated to be dashed against the rocks of long-standing -- and possibly innate -- sociological, political, historical, and cultural differences among nations and peoples. The same sorts of socio-political and historico-cultural differences doomed an attempt at an international language, as witnessed by the singular lack of success of Esperanto,[193/] and have even scotched the effort to ratify a Constitution for the European Union.[194/]

[192/] Among those that do not there is also apparently a widespread mistrust about the value of such regimes to the developing world. *See, e.g.,* Working Group on the Interaction Between Trade and Competition Policy, Report on the Meeting of 26- 27 September 2002, WT/WGTCP/M/19, P 17 (Nov. 15, 2002), *available at*http:// www.wto.org (last visited October 30, 2004) (reporting submissions by India on the non-discrimination principles). *Cf.* Michal S. Gall, *Size Does Matter: The Effects of Market Size on Optimal Competition Policy*, 74 S. CAL. L. REV. 1437, 1439 (2001) ("the size of a jurisdiction's market significantly affects the competition policy that it should adopt"); A.E. Rodriguez & Malcolm B. Coate, *Limits to Antitrust for Reforming Economies*, 18 HOUS. J. INT'L L. 311, 312 (1996) (suggesting that "antitrust policies adopted in reforming economies should be strictly limited in scope").

[193/] Esperanto, an invented language not springing from any particular people or geographic region, was developed in the late 19th century in the belief that a common language, allowing people with different native tongues to communicate more effectively, would be useful in resolving human problems that historically had led to strife. Esperanto is not officially supported by any sovereign government. *See generally* Esperanto – An Overview, *available at* http://www.webcom.com/~donh/efaq.html (last visited April 15, 2005).

[194/] *See, e.g.,* World Briefing Europe: *European Union Chief Gives Up on*

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Even among developed economies with established competition law regimes, a variety of countervailing policy interests can often dilute a given state's commitment to competition law. Examples of these sorts of interests are plentiful and well known: granting of monopoly power associated with certain rights in intellectual property; government subsidies for, or regulatory policies applicable to, certain sectors; protectionist trade policies aimed at limiting competition from foreign imports or investment by foreign multinational corporations; trade initiatives creating preferences for export cartels.[195/] Indeed, the Commission's approaches in the Boeing/McDonnell-Douglas and GE/Honeywell merger applications demonstrate beyond cavil that parochial national (or, in this instance, regional, as a proxy for national) interests can often diverge and that significant disparities in merger policies can serve – and, in fact, are normally intended to serve – those interests.

Several commentators have advocated, to a greater or lesser degree, reasonably comprehensive roles for the WTO in harmonization of competition law, potentially a uniform international antitrust code for premerger review with the WTO as either a supranational

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Constitution, N.Y. TIMES, Sept. 22, 2005, at A10; Elaine Sciolino, *European Charter Architect Faults Chirac for Its Rejection*, N.Y. TIMES, June 15, 2005, at A3; Alan Cowell, *Britain Suspends Referendum on European Constitution*, N.Y. TIMES, June 7, 2005, at A10; Marlise Simons, *Dutch Voters Solidly Reject New European Constitution*, N.Y. TIMES, June 2, 2005, at A10; Elaine Sciolino, *French Voters Soundly Reject European Pact*, N.Y. TIMES, May 30, 2005, at A1.

195/ *See, e.g.,* Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 374 (1997) (noting that such countervailing interests will determine the rate and nature of future progress and giving as examples governmental and subgovernmental pressures, business pressures, institutional pressures, private interest groups, transnational coalitions, and international organizations).

enforcement agency[196] or a super-clearinghouse with authority to dictate which national competition regimes have sufficient nexus to a particular transaction so as to justify premerger notification filings.[197] Neither suggestion appears workable, however, both for institutional WTO reasons and for pragmatic reasons relating to sovereignty and national competition regimes.

Axiomatic to the trade law orientation of the WTO are principles of non-discrimination, typically formulated as "most favored nation" treatment ("MFN")[198] or national treatment[199] or some combination thereof.[200] It is therefore to be expected that extending those principles to competition law would be advocated (along with the principle of transparency) by some antitrust scholars[201] and by some WTO members for consideration by that organization.[202]

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[196] *See* Eleanor M. Fox, *Toward World Antitrust and Market Access,* 91 AM. J. INT'L L. 1, 13 (1997).

[197] *See* Fiebig, *supra* note 22, at 247-251.

[198] MFN status typically arises from clauses in international trade arrangements pursuant to which parties to a treaty are bound to extend trading benefits equal to those extended to any third party state.

[199] National treatment is the commitment of a country to accord to foreign investors and to foreign-controlled enterprises in its territory treatment no less favorable than that accorded in like situations to domestic investors and enterprises.

[200] *See, e.g.,* John H. Jackson, *The WTO "Constitution" and Proposed Reforms: Seven "Mantras" Revisited,* 4 J. INT'L ECON. L. 67, 72-73 (2001) (listing MFN as one of seven "mantras" central to the WTO); Debra P. Steger, *Afterword: The "Trade and..." Conundrum - A Commentary,* 96 AM. J. INT' L. 135, 137, 139 (2002) (suggesting that non-discrimination and affiliated legal principles now predominate over market access and reciprocity norms).

[201] *See, e.g.,* Eleanor M. Fox, *Global Markets, National Law, and the Regulation of Business: A View From the Top,* 75 ST. JOHN'S L. REV. 383, 396 (2001) (advocating transparency and non-discrimination based on nationality); Donald I. Baker et al., *The Harmonization of International Competition Law Enforcement*, in COMPETITION POLICY IN THE GLOBAL ECONOMY 439, 441-47 (Leonard Waverman et al. eds., 1997) (including national treatment and

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Uncritical transference of these international trade principles of non-discrimination, forged as a result of multilateral negotiations intended to affect the *sovereign* behavior of nation states, to competition law, which is targeted at *private* (*i.e.,* non-sovereign) conduct and is, moreover, very much a *sui generis* concept as one moves from one nation's competition law to another's, raises a host of difficulties.[203/] Among these are problems of asymmetry.

MFN obligations, for example, are well-known in the international trade literature as being susceptible to the free-rider syndrome. When a nation state with MFN status knows that it can secure for itself any benefit extended to another nation state, the incentive to bargain is considerably reduced, if not entirely eliminated. At the same time, one country may be discouraged from offering a concession to another if that same concession must be extended equally to all states partaking of MFN status.[204/]

Similar problems may attend according national treatment. Suppose that it would be beneficial, as a matter of competition policy, for a particular nation to lower the threshold for

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transparency as fundamental principles for harmonized international antitrust).

[202/] *See, e.g.,* Communication from the EC Communication from the European Community and its Member States, WT/WGTCP/W/222, ¶ 11 (Nov. 19, 2002), *available at* http://www.wto.org (last visited October 16, 2004) (stressing prevalence of non-discrimination principles in trade law and national antitrust laws as argument for incorporating them as part of WTO antitrust regime).

[203/] Commentators have differentiated international trade law from international competition law on this sovereign-private distinction. *See, e.g.,* P.J. Lloyd, *The Architecture of the WTO*, 17 EUR. J. POL. ECON. 327, 348 (2001); Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy,* 94 AM. J. INT'L L. 478, 489 (2000).

[204/] *See, e.g.,* Henrik Horn & Petro C. Mavroidis, *Economic and Legal Aspects of the Most-Favored Nation Clause,* 17 EUR. J. POL. ECON. 233, 253 (2001) (discussing the free-rider phenomenon and concessions).

pre-merger notification. A national treatment regime could dissuade the government from taking that action where the administrative onus of doing so -- having to review a burdensome number of pre-merger filings from foreign enterprises -- would threaten to overwhelm the resources at the competition authority's disposal. Similarly, local industry might be deterred from seeking legal reforms the benefits of which would also have to be extended – again, often asymmetrically -- to foreign enterprises.

Other asymmetries arise out of the disparate levels of regulatory strength, and the accompanying disparities in regulatory incentives, that are characteristic of different types of national economies. Encouragement of exports, protectionism for indigenous industries, and promotion of local employment are all typical, if parochial, nonantitrust goals that can cause governments to skew the results of competition-based assessments of transnational transactions.[205/] Although this danger lurks behind any nation's competition policy, it is particularly acute for larger, more developed economies (*e.g.,* the U.S. and the EU), which have sufficient market "clout" to be able unilaterally to assert extraterritorial jurisdiction in a meaningful way. At the same time, while smaller economies can rarely expect to make a plausible threat to prohibit *altogether* conduct by a large MNE that might have negative welfare effects within their borders,[206/] they can band together and create a regional competition authority

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[205/] ICPAC Report, *supra* note 1, at 50 & n. 30, citing James B. Kobak, Jr. & Anthony M. D'Iorio, *The High Costs of Cross-Border Merger Reviews*, in THE GLOBAL ECONOMY AT THE TURN OF THE CENTURY, VOL. III: INTERNATIONAL TRADE, at 717, 721 (Gulser Meric & Susan E. W. Nicholds eds., 1998).

[206/] The MNE will simply "vote with its feet" and abandon doing business in such a country, at least where the loss of revenues from such an exit (or the increase in costs from remaining) would be smaller than the anticipated increase in revenues from the merger or other transaction.

– a mini-EU, in effect – that will enjoy enough resources from member countries to portend a credible, joint prohibition or other regulatory response.[207/]

Another problem with a WTO-based attempt at harmonization of competition law is that, in stark contrast to the bulk of the trade regime with which the WTO has experience, competition law predominantly[208/] addresses private, as opposed to sovereign, conduct. Principles on which universal agreement can be anticipated are few and at a level of generality that does not further the analysis, such as the notion that anticompetitive mergers and acquisitions should be prohibited and that enforcement action against cartels should be vigorous. Even these principles, however, are subject to exceptions, such as for anticompetitive transactions that promote certain noncompetition-related interests that are deemed to outweigh their anticompetitive effects, and for the frequently tolerated export cartels.

Furthermore, applying "core" non-discrimination principles to competition law is rather like attempting to force a square peg into a round hole. While national antitrust laws are, on occasion, relatively indifferent to anticompetitive effects that are *wholly* external,[209/]

[207/] *E.g.,* the Caribbean Community (CARICOM) Single Market and Economy (CSME), Protocol VIII on Competition Policy, Consumer Protection, Dumping and Subsidies (Protocol Amending the Treaty Establishing the Caribbean Community) art. 30, *available at* http://www.caricom.org (last visited October 30, 2004).

[208/] For simplicity, this discussion will ignore the analytical complications engendered by the odd state-conferred monopoly, by state-owned enterprises, and by barriers to entry effected as a matter of extrinsic regulatory policy.

[209/] In the United States, for example, the Sherman Act, as amended by the Foreign Trade Antitrust Improvements Act (FTAIA), is simply inapplicable to trade or commerce with foreign nations except where "such conduct has a direct, substantial, and reasonably foreseeable effect" on domestic trade or commerce. 15 U.S.C. § 6a. *See, e.g.,* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796-97 n.23 (1993) (FTAIA "was intended to exempt from the Sherman Act export transactions that did not injure the United States economy"). Indeed, export
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fundamentally they make no distinctions based on the nationality of the actor.[210] Unlike tariffs, subsidies, and the like, there is little basis in competition law for the application of concepts such as MFN or national treatment.

The trade law principles animating the WTO approach raise yet another problem. Whatever consensus on competition principles has emerged internationally has largely been the result of *bilateral* agreements on antitrust matters.[211] For example, the United States has entered

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cartels are a well-known exception to the ukase against cartels. *See* Waller, *supra* note 194, at 397 (noting the disparity of treatment). Another example is the Webb-Pomerene Act, 15 U.S.C. § 61 *et seq.* (exempting from the Sherman Act associations engaged exclusively in export trade). *See also* Diane P. Wood, *The U.S. Antitrust Laws in a Global Context,* 2004 COLUM. BUS. L. REV. 265, 267-68 ("Another persistent sore spot in the cartel area is the existence of legally tolerated export cartels. Some (though not necessarily all) Webb-Pomerene associations and export trading companies might fit that description. To the extent that an export arrangement among competitors is legitimately described as a cartel rather than a joint venture--that is, it exists solely because it will be more profitable to reduce output and increase prices and no efficiencies from joint operations are likely--it is a raw way of harming foreign consumers, whose injuries are not likely to bother a domestic political constituency."); Mitsuo Matsushita, *International Cooperation in the Enforcement of Competition Policy,* 1 WASH. U. GLOBAL STUD. L. REV. 462, 471 & n.16 (2002) (citing Japanese export cartel law, *Yushutsunyu torihiki ho* [Export and Import Transactions Law], Law No. 299 of 1952, as amended). *Cf.* U.S. DEPARTMENT OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS § 3.122 (1995) (authorizing invocation of the Sherman Act to open foreign markets closed by anticompetitive restraints such as an import cartel or monopolistic exclusive dealing), *available at*http://www.usdoj.gov/atr/public/guidelines/internat.htm (last visited October 30, 2004).

[210] Assuming, that is, in the case of a MNE, that corporate domicile – "nationality" -- continues to have any significance at all. *See, e.g.,* PETER T. MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW (1995); *The Discreet Charm of the Multicultural Multinational*, ECONOMIST, July 30, 1994, at 58; U.S. INTERNATIONAL TRADE COMMISSION, THE EFFECT OF GREATER ECONOMIC INTEGRATION WITHIN THE EUROPEAN COMMUNITY IN THE UNITED STATES (USITC Pub. No. 2204) (July 1989).

[211] *See, e.g.,* Antitrust Cooperation Agreements, *available at*http:// www.usdoj.gov/atr/public/international/int_arrangements.htm (last visited October 30, 2004).

into several of these bilateral cooperative antitrust agreements,[212] which may be regarded as a supplemental to, or perhaps a subset of, the network of bilateral treaties, known as Mutual Legal Assistance Treaties (MLATs),[213] that have proliferated in recent years in an effort to promote effective transnational law enforcement.[214] Likewise, the European Union has entered into several such bilateral antitrust agreements.[215] In theory, such agreements endeavor to effect a mutual allocation of prosecutorial resources in order to maximize enforcement and minimize duplication. In practice, however, this is not always possible, particularly in cases affecting significant national (or Communitarian, as the case may be) interests, be they competitive or extra-competitive.[216]

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[212] These bilateral antitrust agreements have been entered into pursuant to express authority granted by Congress under the International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. § 6201 *et seq.* The Act requires that the treaty partner have comparable ability to that of the United States enforcement apparatus to provide assistance and that it maintain the confidentiality of information disclosed.

[213] MLATs create frameworks for mutual (usually bilateral) cooperation in the investigation and prosecution of transnational crime. *See* Keith R. Fisher, *In Rem Alternatives to Extradition for Money Laundering,* 25 LOYOLA OF L.A. INT'L & COMP. L. REV. 409, 436 (2003). As antitrust violations are criminal offenses under the laws of many jurisdictions, bilateral competition agreements are conceptually similar.

[214] Typically MLATs deal with obtaining and preserving evidence and providing assistance to facilitate confiscation of criminal proceeds and instrumentalities. *Id.*, citing Jimmy Gurulé, *The 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances – A Ten Year Perspective: Is International Cooperation Merely Illusory?*, 22 FORDHAM INT'L L.J. 74, 90-91 & n.55 (1998) (listing MLATs entered into by the United States with Colombia, Mexico, the Cayman Islands, Thailand, Panama, Switzerland, and other nations).

[215] Indeed, one of the key agreements is the Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of their Competition Laws, *available at*http://www.usdoj.gov/atr/public/international/docs/1781.htm (last visited February 12, 2004).

[216] The contretemps over Boeing/McDonnell Douglas and GE/Honeywell are cases
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The characteristic WTO non-discrimination principles are fundamentally incompatible with the effectiveness of these sorts of bilateral antitrust agreements. If the parties to such a bilateral regime were simultaneously subject to such WTO obligations, they would find themselves in the awkward position of being compelled to accord the positive comity[217/] benefits of their bilateral cooperative arrangement to *all* WTO members, *e.g.,* providing them notification of competition enforcement actions that might affect their interests (assuming those could be known in each case), expending resources to provide them with antitrust assistance with no reciprocal obligation having been entered into by the majority of the recipients, and, worst of all, being forced to take into account, as a matter of traditional (or "negative") comity, the interests of these multifarious third-party nations in assessing whether to take enforcement action that might affect nationals of such nations (and, if so, the extent to which such enforcement would be compatible with those third-party interests).

(...continued)
in point.

[217/] The notion of comity in international law refers traditionally to respect for the interests of another nation state. This is sometimes referred to as "negative comity." "Positive comity" is the obverse: a request by Country A that Country B initiate (completely voluntarily, and in whatever form it deems appropriate) some form of enforcement proceeding to remedy anticompetitive conduct taking place within Country B's borders that is substantially and adversely affecting the interests of Country A. "[I]f a signatory [*e.g.*, to a bilateral antitrust agreement] believes that anticompetitive practices carried out in the territory of another signatory are adversely affecting its own important interests, it may notify the other signatory and request its competition authorities to initiate appropriate enforcement procedures. However, in order to preserve control over limited enforcement resources, the requested signatory would retain the right not to act on the request." Joanna R. Shelton, Deputy Secretary-General, OECD, Competition Policy: What Chance for International Rules?, at 5, *available at* http://www.oecd.org/dataoecd/34/39/1919969.pdf (last visited November 1, 2004). *See also* OECD Committee on Competition Law and Policy, CLP Report on Positive Comity, OECD Doc. DAFFE/CLP(99)19, at 46-49 (June 14, 1999); Seung Wha Chang, *Interaction Between Trade and Competition: Why a Multilateral Approach for the United States?,* 14 DUKE J. COMP. & INT'L. L. 1, 11 & n.42 (2004).

The glib solution likely to be offered by the WTO's Working Group on the Interaction of Trade and Competition[218/] (the "WTO Working Group") would be to exempt such bilateral agreements from non-discrimination principles. That, indeed, is the position advocated by the European Union[219/] and is likewise the *preliminary* conclusion drawn by the WTO Working Group.[220/] Such an exemption would seems to vitiate the efficacy of any WTO centralization effort on global competition norms[221/] and would call into question the wisdom of considering that particular international forum in the first place.

Finally, there is the potentially messy and uncertain area of sectoral exceptions. Many countries, including the United States, commit to the discretion of authorities other than competition authorities the power to approve or deny mergers in certain regulated industries (*e.g.,* telecommunications, energy, banking). One is hard pressed to imagine how an organization like the WTO could obtain sufficient consensus to approve the infringement on sovereignty necessary to eliminate what will, of necessity, be a patchwork quilt of national laws

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218/ This working group was established in 1996 after the Singapore Ministerial Conference.

219/ *See* Communication from the European Community and its Member States, WT/WGTCP/W/222, at 8 (Nov. 19, 2002), *available at*http://www.wto.org (last visited October 30, 2004).

220/ Working Group on the Interaction Between Trade and Competition Policy, Report (2001) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, WT/WGTCP/5, at 28 (Oct. 8, 2001), *available at*http://www.wto.org (last visited October 30, 2004).

221/ Granting regulatory forbearance or providing assistance to some WTO members but not to others would appear antithetical to the core principles of non-discrimination and transparency invoked by the Doha Ministerial Declaration. Analogous exemptions for customs unions and free trade areas under the GATT and other agreements have been quite controversial. *See, e.g.,* JOHN H. JACKSON, THE WORLD TRADING SYSTEM 165-73 (2d ed. 1997).

containing myriad sectoral exceptions, exemptions, and special rules. Governmental motivations underlying these exemptions are, of course, varied; most are likely non-discriminatory, but perhaps not all. The WTO Working Group has acknowledged this problem but, in order to avoid dealing with it, has blithely asserted that non-discrimination in antitrust "would not preclude the enactment of sectoral exceptions, exemptions and exclusions from national competition regimes."[222/] That evident reluctance to come to grips with so fundamental an issue to competition policy, particularly where the potential detriment to maintaining these special regimes includes not only the inefficiency that lack of competition in such sectors brings but also the rather obvious risk of kindling protectionist international trade responses in some cases, confirms the inadequacy of the WTO forum.

The proposal to use the WTO as a clearinghouse is also flawed. Undoubtedly it would be more convenient for an MNE to be able to make one preliminary filing with a supranational competition regulator, which would then make a binding determination as to which member countries would, and would not, be entitled to premerger notification and to exercise jurisdiction over the proposed transaction.[223/] Apart from the fact that the WTO lacks both the particular institutional expertise and the resources to staff such an operation, there is no principled basis on which such determinations could be made. To do so, the WTO would, in effect, be substituting its judgment for someone else's – either (1) the considered judgment of individual sovereign

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222/ WORKING GROUP ON THE INTERACTION BETWEEN TRADE AND COMPETITION POLICY, CORE PRINCIPLES, INCLUDING TRANSPARENCY, NON-DISCRIMINATION AND PROCEDURAL FAIRNESS: BACKGROUND NOTE BY THE SECRETARIAT, WT/WGTCP/W/209, ¶ 36 (Sept. 19, 2002), *available at* http://www.wto.org (last visited October 16, 2004).

223/ The downside is that for transactions that present anticompetitive profiles in particular jurisdictions, one is merely adding an additional layer of regulatory scrutiny.

nations about their own competition policy and about what sorts of transactions raise competitive (or even extra-competitive) concerns sufficient to trigger a reporting requirement, or (2) the judgment of competition authorities, charged with interpreting (and with expertise in interpreting) their own country's antitrust laws, that a particular transaction should be notified because it raises the sorts of policy concerns at which those laws were directed. The entire notion, while perhaps superficially attractive, is too rife with practical difficulties to be workable, even if nation states were willing to cede so much of their sovereignty to an international organization – a dubious proposition at best.

André Fiebig's proposal, while offering some palliatives, suffers from these same infirmities. He suggests that exemptive rulings[224/] by the WTO[225/] would be binding on member nations, which would have to amend their national competition laws accordingly, subject to the right of a member nation to overrule the WTO upon a showing of compelling reasons.[226/] That any nation would cede authority to determine whether its own competition experts could even review the transaction is patently politically unrealistic, even if there were (i) a meaningful

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[224/] These would be rulings by Fiebig's suggested WTO Premerger Office that particular transactions pose no threat to competition within particular countries. Fiebig, *supra* note 22, at 249.

[225/] To his credit, Fiebig acknowledges that one has difficulty offering a cogent standard for identifying transactions that are competitively innocuous. *Id.* at 252.

[226/] He posits, however, that this possibility of overruling the WTO would be available only where the country could establish that within its borders the parties to the transaction would have more than 10% of the market share. *Id.* at 251. One wonders at the arbitrariness of this or any other percentage that might be selected, short of one that was truly and irrefutably *de minimis* (*e.g.,* less than 5%). That any sovereign nation would accede to such a suggestion seems implausible.

quantitative standard that could be applied to reach such a conclusion and (ii) a qualitative set of criteria for ascertaining market share upon which all countries either would or should agree.

Last but not least, even some proponents of a broad role, in principle, for the WTO in competition law and policy concede that, notwithstanding the proliferation of merger control regimes, recourse to a regime such as the WTO is in part premature and in part uncalled for. As Professor Mitsuo Matsushita has observed:

> Mergers and acquisitions in the scope of the WTO should be put off for future consideration until such time comes when national markets will have been so globalised that they are integrated into one world market and the distinction between domestic policy and international trade policy will have been blurred so much that convergence of merger policy is essential to maintain the integrated world market . . . . [I]tems such as the convergence of filing requirement in mergers and acquisitions is a very important issue. This should be dealt with in the appropriate forum. However, taking into account the objective of the WTO, one may say that this is outside its scope.[227/]

V. A MORE CIRCUMSCRIBED ROLE FOR THE WTO?

The preceding discussion has identified certain immanent flaws that render the WTO unsuitable for the supranational competition authority role advocated by several scholars and commentators. Nevertheless, there do seem to be a number of more modest functions that organization could usefully perform.

At the outset, however, it should be acknowledged that concerns about proliferation of merger control regimes have a tendency to be overblown. To listen to complaints from multinational corporate behemoths or their sophisticated M&A counsel about the number of filings they have to make is likely to evoke about as much sympathy as an obese child whining

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227/ Mitsuo Matsushita, *Reflections on Competition Policy/Law in the Framework of the WTO*, in FORDHAM CORP. L. INST. 31, 34-38 (Barry E. Hawk ed., 1998).

for a candy bar. If one is large enough to be conducting business on a manifold multinational basis, surely it should come as no surprise, either *a priori* or *a posteriori*, that compliance with the laws of each jurisdiction in which one does business will be required. These include not just competition laws but tax laws, corporate laws, securities laws, licensing laws, and potentially a host of others.[228/] Such compliance is merely a recognized cost of doing business for all enterprises, large and small, domestic or multinational.

Nor is there any question about the legitimacy, at least in principle, of substantive competition concerns even among nation states that are remote from a transaction's so-called "center of gravity." The transaction's effect on local economies may well justify not only review but a remedy, though clearly, under the well-established territoriality principle of public international law,[229/] that remedy should be tailored to address anticompetitive effects within the local economy only and, mindful of those bounds, should not unduly trammel extraterritorially the parties' ability to effect the transaction.

Acknowledging that potential for exaggeration and the legitimacy of substantive competition concerns does not, however, eliminate the possibility that there are useful, efficiency-enhancing, and harmonizing functions of a *procedural* nature that could be performed for international M&A transactions on a centralized basis. Foremost among such procedural approaches would be the implementation of an internationally enforceable requirement of transparency in merger review. Under such a regime, each country would be required, before

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[228/] It is especially incongruous, even embarrassing, to hear such complaints about foreign competition laws from large, U.S. corporations, which, because of their long experience in doing business on a multi-state basis domestically, have every reason to expect compliance costs arising from a multiplicity of legal regimes and requirements.

[229/] *See* note 15, *supra*, and accompanying text.

applying its competition law to any M&A transaction involving a foreign party, to have published reasonably detailed merger guidelines. To be satisfactory, these guidelines would identify the national agency or agencies with jurisdiction over the transaction, articulate the basis on which such jurisdiction will be exercised,[230] elucidate each such agency's enforcement policies in a manner adequate to facilitate strategic planning, provide guidance on each such agency's approach to market definition, detail which defenses or mitigating factors (if any) will be taken into account by each such agency when reviewing a reportable transaction,[231] and delineate any non-competition factors that will be taken into account in the merger review process.[232]

Apart from considerations of transparency, there are other harmonizing procedural suggestions that might tentatively be offered. The goals animating these suggestions are, wherever possible, to streamline transaction costs, expedite procompetitive or competitively neutral international M&A transactions, and dilute the potential (which, admittedly, can never entirely be erased) for conflict between and among merger review jurisdictions.

To be sure, there neither is, nor can there be, any requirement that WTO members enact their own competition laws. For those that do, however, and specifically for that further subset that include merger control and premerger notification within their competition law regimes,

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230/ This would entail, at a minimum, defining with some precision the types of transactions subsumed within the regulatory scheme, the threshold below which such transactions need not be reported or will have no competitive concern, and the manner in which such threshold is calculated.

231/ *E.g.,* failing firm defenses, efficiencies, etc.

232/ For example, those countries that require, or permit, policies designed to promote "national champions" should not endeavor to conceal such policies but should put other countries and foreign businesses on notice.

certain modest but meaningful reforms could be practicably implemented and enforced under the aegis of the WTO.

First, requiring filings on transactions unlikely to cause any appreciable detrimental effect on competition within the member's territory should be prohibited and sanctionable as violative of customary principles of international law.[233/]

Second, procedures should be implemented by each member nation for advance advisory opinions (a kind of *pre*-premerger notification) on whether a filing will be required. Such advisory opinions would perforce be based on and subject to accurate submissions by the parties, including information about (A) their businesses, (B) business conducted within the member nation's territory, (C) revenues from the member's territory, and (D) the extent (if any) to which the parties actually compete within the member's territory (and, if so, whether their combined market share is too low to occasion competitive concern).[234/]

Third, filings should not be required unless one of the parties to the transaction either carries on significant operating business in the jurisdiction or has more than *de minimis* sales revenues there. Mere ownership of assets in a country, without any indicia of impact on consumers or the economy, should not be a sufficient nexus. Nor should either reliance on worldwide sales figures (*i.e.,* those outside the jurisdiction) or vaguely articulated *potential* effects on the local economy be sufficient bases for the exercise of jurisdiction.

[233/] *See supra* note 15 and accompanying text.

[234/] Canada, for example, has a procedure under which the parties may apply for an Advance Ruling Certificate, the granting of which is discretionary with the Bureau of Competition Policy but which, if granted, absolves the parties from premerger notification.

Fourth, notification thresholds should be specified with precision. In particular, the imprecision and subjectivity inherent in market share tests[235] should, if at all possible, be avoided.

Fifth, guidance should be provided (*i.e.,* transparency) on the timing for providing notifications. That will avoid uncertainty and the potential levying of substantial fines.[236]

Finally, there should be additional guidance in the form of regulations or published policy statements and interpretations (transparency again!). This guidance will enable counsel, including especially local counsel, intelligently to advise their clients about a variety of matters, including, in particular, whether premerger notification will, in fact, be required for a particular transaction.

CONCLUSION

With the proliferation of national competition laws, a number of proposals have been put forward for a supranational competition authority to be housed within the World Trade Organization. To be sure, even within well-developed competition law regimes, such as those of the United States and the European Union, substantial disparities in market definition and in the methodology of assessing market power can and do arise, notwithstanding convergence and nominal use by both systems of the same or similar yardsticks and principles. The GE/Honeywell fracas established that beyond cavil.

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[235] According to the ABA Antitrust Section, a significant number of jurisdictions use this approach for ascertaining whether a proposed transaction is reportable, including Brazil, Bulgaria, the Czech Republic, Estonia, Greece, Israel, Portugal, Slovenia, Slovakia, Spain, Taiwan, Tunisia, and Turkey.

[236] *See, e.g.,* ICPAC Report, *supra* note 1, at 111, n.49 (noting reports of "recent problems that parties meet under the Brazilian system, including threats to retroactively apply changes in the law so as to impose fines on parties for 'late' notification.").

To the extent that the aforementioned supranational competition authority proposals envisage a substantive role for the WTO, they fail to take adequately into consideration not merely the political unpalatability of such an arrangement but, more significantly, the institutional unsuitability of the WTO for the task. This article suggests an alternative, and considerably more modest, role as an enforcer of purely procedural reforms designed to abate the potential for interjurisdictional conflicts, diminish transaction costs, expedite procompetitive or competitively neutral M&A transactions, and, most important of all, promote transparency in transnational merger review.