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Regulators, Firms and Information:

The Domestic Sources of Convergence in Transatlantic Merger Review

ABSTRACT

Despite high-profile divergences, competition officials in the European Union and United States frequently state a desire to reach convergent substantive decisions when regulating individual transatlantic merger cases. The extent of transatlantic convergence depends largely on the role of two domestic actors involved in the merger review process: regulators and firms. This article employs two competing approaches (principal-agent and regulatory capture) to assess the ways in which these actors and domestic institutions shape convergence in transatlantic merger review. Empirically, the article investigates the work of the EU-US Mergers Working Group and explores the extent to which it conforms more closely to the preferences of regulators or merging firms. By increasing procedural convergence over information exchanges, the competition regulators increase the likelihood of convergence in substantive decisions, which reduces the likelihood of intervention by political principals. The findings suggest that regulators have used their discretionary authority to overcome domestic political and legal institutions that obstruct information sharing and have reduced the information asymmetry traditionally enjoyed by merging firms. As a result, it is the regulatory agents who have shaped the convergent process via their discretionary authority and captured the merging firms to serve their regulatory interests.

KEYWORDS

Competition policy; convergence; information; merger review; principal-agent; regulatory capture

I. Introduction

Since the late 19th century, the gradual proliferation of national competition policies reflects the emergence of free market economies throughout the world. These competition policies — broadly including merger review, cartel and monopoly policies and state aids — operate as regulatory tools to prevent anticompetitive business activity from undermining the benefits of competition in a domestic free market economy. As markets internationalize, however, the implementation of competition policy is no longer simply a behind-the-border matter of regulating domestic business activity. Rather, it becomes the subject of important bilateral and multilateral efforts to prevent political disputes and anticompetitive business activities from destabilizing the international political economy.

Nowhere are the new pressures on domestic competition policies more evident than in the transatlantic marketplace, where officials in Brussels and Washington frequently regulate business activity that concurrently affects the domestic markets of the European Union (EU) and the United States of America (US). News media portrayals and academic work on transatlantic competition relations often focus on infrequent disagreements between EU and US regulatory authorities. For example, the Boeing/McDonnell Douglas and GE/Honeywell mergers and Microsoft antitrust cases have received considerable attention and contributed to speculation that insurmountable divergences exist in the substance and procedures of EU and US competition policies.[1] This article sets out to investigate in greater detail the accuracy of such common perceptions.

Transatlantic competition relations tend to follow largely from a bilateral framework designed to increase information exchanges. Within this bilateral framework, the EU and US have begun to pursue the convergence of regulatory procedures and substantive decisions in individual competition cases. A useful way to begin analyzing this transatlantic convergence is to explore the domestic politics that drive the process and determine outcomes in an important subsection of competition policy: merger review. Such an exploration intentionally moves beyond the current pre-occupation with single case studies of divergence to provide a more complete understanding of the state of EU-US competition relations.

The central goal of the study is to evaluate the relative influence of domestic sources of convergence in EU and US merger review. Two sources, regulators and merging firms, are central to the analysis as the domestic actors most directly involved and responsible for the implementation of transatlantic merger review. From a theoretical perspective, the article concentrates on the explanatory power of two competing approaches, namely principal-agent and regulatory capture, that emphasize different actors as the potential drivers of convergence. In empirical terms, the article investigates the work of the EU-US Mergers Working Group (MWG), in particular its pursuit of convergence via the 2002 Best Practices Guidelines. The analysis evaluates the extent to which this convergence in transatlantic merger review conforms more closely to the preferences of regulators or merging firms.

Domestic political oversight and legal obstacles in the EU and US act as barriers to convergence and prohibit the free exchange of confidential business information that regulators need for merger review. The MWG's Best Practice Guidelines show that regulators have overcome these institutional obstacles by using their considerable discretionary authority to pursue transatlantic information

exchanges. In this context, the relationship between procedural and substantive convergence and information sharing is crucial to the understanding of transatlantic competition relations. By increasing procedural convergence over information exchanges, the regulators increase the likelihood of convergence in substantive decisions (i.e., to approve or prohibit a given merger), which reduces the likelihood of intervention by political principals. While acting under their discretionary authority, the competition regulators strive for substantive and procedural convergence within the legal institutional limits decided by their respective political principals.

The regulators' high level of discretionary authority also raises the prospect of capture by merging firms. As the providers of crucial business information, merging firms maintain a strong position to obstruct transatlantic convergence that is not in their interests. While merging firms prefer substantive convergence of regulatory approval in individual reviews, they are likely to support procedural convergence only when it speeds up the approval process and ensures the protection of confidential business information. Despite the strong position of firms, the analysis suggests that regulators have used their discretionary authority to pursue substantive and procedural convergence in a manner that avoids capture by merging firms. While procedural convergence speeds up the approval process and respects the protection of confidential information, it also reduces the information asymmetry that benefits the merging firms by incorporating third parties into the review process. In addition, as merging firms increasingly waive their rights to confidentiality, they increasingly serve the interests of the regulators who prefer avoiding the divergent substantive decisions that could prompt political intervention.

In short, it is the EU and US competition regulators who have used their discretionary authority to overcome domestic institutional obstacles and to shape

convergence in a way that captures the firms that they regulate. Building on a formal framework for information exchanges, convergence is now an important trend in this policy area because it suits the interests of regulators and largely addresses the needs of firms without challenging the domestic statutory limits of EU and US competition law.

The paper proceeds in the following manner. The next section introduces two competing explanations of convergence that emphasize the role of regulators (principal-agent) and firms (regulatory capture). The section also identifies the reasons why convergence would be expected to be in the interests of these two actors. The third section discusses the transatlantic framework for cooperation in merger review and the emergence of the EU-US Mergers Working Group. The section evaluates the extent to which the working group's Best Practice Guidelines conform more closely to the interests of the regulators or merging firms. The final section summarizes the findings and suggests areas for future research.

II. The Domestic Sources of Convergence

As noted in the introduction, the internationalization of competition issues has led to important bilateral and multilateral efforts to prevent associated political disputes and anticompetitive business activities from destabilizing the international political economy. The creation of the International Competition Network is the latest, but not the only, multilateral effort to address these problems and to encourage convergence among national competition policies.[2] Given their large market sizes and high economic diversity (Drezner 2007: 35-36), the EU and US are two of the most important players in these efforts. As such, their domestic experiences with bilateral

convergence should provide important insights that will help to inform and shape further multilateral convergence in competition policy.

Despite the existence of transatlantic divergences in some individual merger cases, this study focuses on the convergence of EU and US competition policies. To be clear, this study does not assume that EU and US competition policies are completely convergent. Indeed, important differences do exist. The head of the EU's Competition Directorate, Philip Lowe, notes a number of areas in which transatlantic differences and difficulties remain: coordination of investigations, different legal systems, different enforcement cultures, different priorities, language problems, shortcomings in the internal organization of competition authorities, and lack of transparency (2006: 4). That being said, this article adopts the view that highly publicized disagreements are 'the exception rather than the rule' (Evenett et al. 2000: 19) and that the dominant <u>trend</u> in this policy since the 1990s has been one of convergence rather than divergence.[3] By looking beyond the pre-occupation with rare divergent cases, the study is able to identify and assess more accurately the domestic and bilateral politics over time that lead to substantive and procedural convergence in transatlantic merger review. Such a broader investigation is more useful for evaluating the role of regulators and firms and for determining future EU-US and multilateral competition relations.

How then can the causes and processes of that convergence be conceptualized and analyzed? Scholarly investigations of convergence often define the phenomenon as a 'tendency of societies to grow more alike, to develop similarities in structures, processes, and performances' (Kerr 1983: 3).[4] Researchers in international political economy and other areas have employed a variety of theoretical approaches and methods to test for the causes and effects of convergence.[5] Many studies test for the

existence of convergence, which requires an analytical sensitivity to 'distinctions between goals, content, instruments, outcome and style' (Bennett 1991: 230). Instead of testing for the existence of convergence, this study investigates the actors and institutions that drive the process of convergence in transatlantic competition relations.[6]

Broadly speaking, three domestic actors play prominent roles in the process of transatlantic convergence in this policy area: politicians, regulators and firms. From a theoretical perspective, two competing explanations — principal-agent and regulatory capture — provide insights into the roles played by these actors and the ways in which they may act as sources of convergence. These two approaches also differ in the extent to which they see certain actors as the most important drivers of convergence.

The principal-agent approach illuminates the relationship between politicians and regulators. The approach is particularly suitable for testing herein due to the domestic institutional constraints that exist in competition policy and the high level of discretionary authority delegated to EU and US competition regulators. The discretionary authority allows considerable latitude for the regulators to pursue their interests, share information and pursue convergence between their respective competition policies. Alternatively, regulatory capture illuminates the relationship between regulators and firms. This approach is worth testing in the current context because the regulators must rely on firms as crucial sources of information during transatlantic merger reviews. Such an information asymmetry can create opportunities for firms to capture regulators in ways that drive convergence to satisfy business interests.

A. Principal-Agent Explanation

According to the principal-agent approach, political principals rationally delegate regulatory authority on a contractual basis to non-elected agents. After delegating this authority, the ability of principals to control their agents is challenged by inherent information asymmetries that favor the agents. In merger reviews, principals cannot legislate and observe every case that comes before the competition agents. Rather, principals grant regulatory agents a degree of authority to undertake merger reviews at their own discretion, which reduces the principals' costs of implementing competition policy. While maintaining their independence from political principals, regulators use their discretionary authority to decide on matters not specifically codified in statute. However, when discretionary authority is broad, agents can use their technical and institutional expertise to pursue regulatory policy that conforms to their own preferences (Moe 1984).

But agent discretion is not completely unchecked by principals. Principals develop control mechanisms to overcome the inherent problems that arise from information asymmetries and agent discretion. These control instruments are embedded in domestic legal arrangements that are frequently categorized as administrative and oversight procedures. Administrative procedures are typically established during the initial delegation of regulatory authority to the agents. These administrative procedures 'define ex ante the scope of agency activity, the legal instruments available to the agent, and the procedures to be followed by it' (Pollack 1998: 220). After the initial delegation, principals have recourse to two types of oversight procedures: monitoring and sanctioning. Monitoring can take many forms, including public hearings, standing oversight committees, third-party constituent complaints and judicial review (McCubbins and Schwartz 1984). Sanctioning

provides a broader array of control instruments, including ‘control over budgets, control over appointments, overriding of agency behavior through new legislation, and revision of the agency’s mandate’ (Pollack 1998: 220-21). The current study is interested in the extent to which the existence of these various control instruments influence agent behavior.

In competition policy, EU and US political principals established over time the administrative and oversight control instruments generally identified in the literature. In the EU, domestic control instruments were developed in Regulation 17 (1962) and the Merger Control Regulation (1990, 1997, 2004). In the US, domestic control instruments were developed in the Sherman Act (1890), Clayton Act (1914), Federal Trade Commission Act (1914) and Hart-Scott-Rodino Act (1976). In addition, the EU and US principals maintain the ultimate authority to sanction their regulators by changing respective domestic competition laws.[7]

This study simplifies the EU’s political principals as its Member States acting individually or collectively through the Council of Ministers or the European Council, while the US political principals are Congress and the White House. In the EU, the regulatory agent is the European Commission, or more precisely, the Competition Directorate. Two actors function as the primary agents in US competition policy: the US Department of Justice’s Antitrust Division and the Federal Trade Commission.

Differences between EU and US competition laws can lead to substantive divergences in the definition of relevant product and/or geographic markets, which can result in dramatically divergent market analysis calculations. Similarly, procedural differences are embedded in domestic competition policies, such as different timetables for competition investigations, different evidence-gathering tools and different roles for the judiciary. Procedural obstacles also exist that prohibit the

free exchange of important information between the regulatory authorities. As Gerber argues, cooperation in competition policy 'is essentially about transferring information, and the transfer of many of the most important forms of information require authorization by the political authorities of the revealing state' (1999: 135). Legal procedural obstacles thus reflect the concern of political principals that the 'receiving state might use information to the advantage of its own firms and to the disadvantage of the transferring states' firms' (Gerber 1999: 135).

In accordance with EU procedures, competition authorities are prohibited from sharing confidential information obtained from merging firms without the express approval of those firms.[8] The legal situation differs in the US where competition authorities may exchange confidential information with overseas regulators without the consent of the firms. However, according to the 1994 US International Antitrust Enforcement Assistance Act, such exchanges of confidential information should be based on reciprocity. Because the EU's competition authorities are legally prohibited from communicating confidential information (without express consent), US competition authorities are unable to exchange freely such information obtained during competition investigations (Svetlicinii 2006: 5).

So, given the presence of political principals and different institutional constraints, how and why would EU and US competition regulators pursue convergence of their respective merger reviews? The application of domestic competition policies to increasingly international business activity has raised the prospect that different domestic competition policies will overlap and come into conflict. For example, competition regulators in different jurisdictions may reach divergent substantive decisions on how to treat a given multijurisdictional merger. These divergent substantive decisions may directly conflict when one regulator

approves a merger and the other prohibits the transaction, as occurred in the Boeing/McDonnell Douglas case. Divergent substantive decisions may also include disagreements over the precise remedies (e.g., divestment of assets, implementation of licensing agreements) that firms must offer in order to gain regulatory approval of a merger, as occurred in the GE/Honeywell case.

In any merger review, competition regulators prefer avoiding outcomes that are not favorable for overall competition within their respective markets.[9] When a merger is multijurisdictional, regulators also prefer avoiding divergent substantive decisions because they can prompt politicians intent on resolving the dispute to intervene with various control instruments. Regulators are interested in limiting this political intervention because, in the words of former EU Competition Commissioner Mario Monti, competition decisions are 'a matter of law and economics, not politics' (European Commission 2001).[10] Such politicization increases the pressure on competition officials to conduct their analyses for reasons other than their legal and economic regulatory objectives.

Dispute resolution via political intervention — including threats and the actual imposition on foreign firms of various punitive measures based in domestic law — also raises the prospect that competition decisions may be linked to trade disputes and other non-competition issues (Fox 1995). As a result, the final outcome of the investigation is uncertain and may not reflect the initial analysis and decision of the competition regulators. Divergent decisions can also trigger wider political conflicts that the competition agents prefer avoiding. The International Competition Policy Advisory Committee argues that, in such an environment, convergence should be pursued because 'When divergence occurs, it is the agencies that must often explain and at times attempt to reconcile their differences. Clashes also may lead to trade

wars' (ICPAC 2000: 41). The OECD adds that 'Encouraging convergence in national competition policies towards best practice standards should lessen trade frictions. Convergence serves as a conflict avoidance tool' (2000: 3).

In order to avoid undesirable political intervention in individual merger cases and to reduce the likelihood that disagreements will lead to wider political disputes, regulatory agents prefer convergence of procedures for exchanging information, which increases the likelihood of convergent substantive decisions. In accordance with the PA approach, regulatory agents should be expected to seek this convergence in areas under their discretionary authority. Procedural convergence via non-discretionary changes to domestic competition law protecting confidential information would prompt direct legislative intervention by the same political principals whose intervention the competition agents generally prefer avoiding.

B. Regulatory Capture Explanation

In addition to the regulatory agents, another potential driver of convergence arises from the theory of regulatory capture. According to Stigler, regulatory capture occurs when public regulation is 'acquired by the industry and is designed and operated primarily for its benefit' (1971: 3). By carefully allocating their financial and organizational resources, business interests can 'capture' and exert pressure over regulatory agents in order to achieve a favorable outcome for themselves. Such outcomes increase the ability of individual firms to maximize profits and/or markets but may not be favorable for overall competition within those markets.[11]

While firms maintain a financial and organizational resource advantage, their influence over regulatory agents can be further enhanced by information asymmetries that benefit the firms. According to Gatsios and Seabright, regulatory capture occurs

'usually because asymmetries of information between government and firms require the regulatory agency to be closely involved with firms on a day-to-day basis, with a resulting tendency to identify with the aims of the firms themselves' (1989: 46). These information asymmetries are inherent in merger review because 'firms are also the main source for specialist information, a fact which also gives considerable scope to bias or changes the character of official governmental consideration' (Doern 1995: 204). Such information asymmetries become readily apparent in the institutional structure of the merger review process where the regulators rely on merging firms to provide sensitive and confidential business information about their market activities.

As the regulatory agents' discretionary authority increases, the opportunity also increases for the targets of regulation (merging firms) to influence its shape (Doern 1995). Gatsios and Seabright agree, arguing that because merger policy is an exemplary case of discretionary regulatory authority, it is more susceptible to regulatory capture. They argue that competition regulators are vulnerable to capture by merging firms because under discretionary regulation 'there is uncertainty not only about the facts relating to particular firms but also about the precise aims that the regulatory agency is pursuing' (1989: 46).

If merging firms are able to capture competition regulators, would they push for increases in transatlantic convergence? Merging firms are fundamentally interested in gaining regulatory approval of their proposed merger. When their merger is reviewed in both EU and US jurisdictions, the firms seek a convergent substantive regulatory decision that approves the transaction. They prefer the regulators reach this convergent substantive decision as quickly as possible while protecting confidential business information. The behaviour of merging firms, therefore, revolves around three interrelated issues: approval, speed and confidentiality.

First, merging firms require convergent regulatory approval of their transaction. Without convergent regulatory approval, a merger would be prohibited and the firms subjected to punitive measures in either one or both of the jurisdictions. In cases where the regulators have concerns over the domestic anticompetitive effects of the merger, approval requires some type of negotiated deal on possible remedies, such as the divestment of certain assets. Second, regarding the need for speed, mergers are sensitive to the passage of time because of possible changes to the economic and industrial structure factors that initially led to the proposal (Gilchrist 2000/2001: 2).[12] Speed is also important because, until the transaction is approved, a competitor that has recently become aware of a pending merger deal may submit a rival or hostile take-over bid for one of the merging parties (Cini and McGowan 2009: 145). Third, merging firms are interested in protecting confidential information during the merger review process. Such confidential information may include a firm's trade secrets, proprietary information, and information relating to business strategies, investment plans and marketing goals and methods (ICPAC 2000: 65). The leaking of this information may have negative consequences on share prices and be used to the benefit of competitors.

Merging firms are, therefore, interested in substantive convergence of transatlantic regulatory approval and procedural convergence to the extent that it speeds up the review process and protects confidential information. The convergence of procedures and sharing of information is generally argued by scholars and regulators to increase the speed of transatlantic investigations and increase the likelihood of regulators reaching similar substantive decisions and consistent remedies.[13] Despite these incentives, merging firms may have reason to resist procedural convergence, particularly as it pertains to sharing confidential information

and the coordination of timing for investigations (ICC 1999; Parisi 1999). First, the firms may be suspicious of the extent to which confidential business information is fully protected from competitors when it is shared between EU and US competition authorities reviewing their merger. Second, if a firm is engaging in anticompetitive behavior that adversely affects one of the jurisdictions, by restricting certain information exchanges between the respective regulators, it may be able to hide incriminating evidence. Third, firms may want to undertake strategic disclosures of information to the different competition regulators. By providing different amounts and types of information, they may try to play the competition authorities against each other and attempt to influence the regulatory decisions in their favor. Likewise, firms may wish to avoid procedural convergence in timing of investigations conducted by the EU and US competition regulators. According to Svetlicinii, 'merging parties could first notify the authority which is more likely to approve the proposed concentration with the aim to use it as a tool for advocating the arguments for the approval to the other side' (Svetlicinii 2006: 10).[14]

The nature of merger review requires close, regular contacts between regulators and merging firms due to the information asymmetries that benefit the firms. Because competition regulators are required to collect large amounts of information under tight regulatory deadlines, they must depend heavily on merging firms for sensitive business information about current and prospective market shares and market activity. This information asymmetry and the resulting dependency may increase the possibility that competition regulators are captured by firms and pursue convergence in ways that satisfy the interests of those same firms that are being regulated.

In sum, while regulators and merging firms prefer substantive convergence of decisions in individual cases, their positions differ over procedural convergence. In accordance with the principal-agent approach, competition regulators prefer substantive and procedural convergence, and they prefer this convergence to occur under their discretionary authority. Such discretionary convergence reduces the likelihood of divergent decisions, which reduces the likelihood of political intervention in individual cases and reduces the need for non-discretionary legislative changes. In accordance with the regulatory capture approach, merging firms are also interested in increasing the likelihood of regulatory approval via the substantive convergence of EU and US decisions. Their support for procedural convergence, however, is conditioned by the demand that it speed up regulatory approval and protect confidential information. In any given case, merging firms may also see it in their interest to oppose the sharing of information and coordination of timings, which makes them generally more wary of procedural convergence than the regulators.

As both the regulators and firms prefer convergence of substantive decisions, the real test of their relative influence as drivers of transatlantic convergence in merger review is over procedural convergence and the extent to which they support and operate within their domestic institutional settings. An empirical investigation of the EU-US Mergers Working Group and its Best Practice Guidelines should reveal whether procedural convergence in transatlantic merger review conforms more closely to the interests of regulators or firms.

The following analysis relies on a variety of primary sources — including bilateral agreements, official speeches, public documents, official reports, expert interviews — and secondary sources. Among the primary sources used, it should be noted that the International Competition Policy Advisory Committee (ICPAC) was

established in November 1997 by the US Attorney General and Assistant Attorney General for Antitrust. Its final report reflects two year's worth of hearings and contributions from the business, academic, economic and legal communities in the US and other jurisdictions, including the EU. The positions of individual interviewees are described in general to protect their anonymity, as agreed by the author. In an effort to place the empirical test in the correct context, many of the primary sources are drawn from the period during which the events in question occurred.

III. The MWG — A Discretionary Effort at Convergence

Before analyzing the origins and work of the EU-US Mergers Working Group, it is useful to concentrate on two formal competition agreements that set the stage for convergence in transatlantic merger review.[15] First, the EU and US competition authorities signed a Bilateral Competition Agreement in 1991.[16] The agreement's central components include: 1) notification when competition enforcement activities may affect the 'important interests' of the other agency; 2) exchange of non-confidential information; 3) coordination of investigations; 4) conduct of enforcement activities, 'insofar as possible', that are consistent with objectives of the other agency; and 5) consultation. Careful to stay within the discretionary authority of the competition regulators, the agreement is voluntary and does not override existing national competition laws. The bilateral agreement reduces the potential for divergent EU-US decisions by formalizing the exchange of non-confidential information at multiple stages of competition investigations. Case handlers for individual merger reviews 'try to synchronize their fact-finding actions and coordinate their respective approaches on the definition of relevant markets, on points of foreign law relevant to the interpretation of the case, and on possible remedies to ensure they do not conflict'

(Devuyst 2001: 324).[17] Their discussions help to identify applicable legal principles and precedents as well as issues relevant to analyzing the competitive effects of proposed mergers. According to ICPAC, these cooperative measures have been instrumental in encouraging convergence in transatlantic competition relations: 'Perhaps the most notable steps toward convergence have occurred between the United States and the EU, presumably because of the high level of interaction and cooperation between the two jurisdictions following the implementation of [the Bilateral Agreement]' (2000: 51). While the agreement itself does not explicitly mention substantive or procedural convergence, key negotiators hoped that the increased contacts among competition regulators would eventually lead to such an outcome.[18]

Second, the EU and US competition authorities agreed the Administrative Arrangements on Attendance in 1999. Again, this agreement is not binding and does not override existing national competition laws.[19] Rather, it clarifies a discretionary and reciprocal procedure for allowing representatives of foreign competition authorities to attend internal hearings and meetings in cases of mutual interest. In accordance with domestic law, attendance by foreign competition officials must be approved by the merging firms in cases where confidential information may be discussed.[20] When conducting their respective competition investigations, EU and US regulators frequently meet with the targeted firms as a way to increase their information on the market impact of the activity in question. Before this agreement, requests for attendance were handled on a case-by-case basis.[21] By simplifying the procedure for attendance into a standard discretionary practice, the agreement is intended to reduce information asymmetries and reduce the likelihood that competition regulators will reach divergent substantive decisions on the same merger

case. While limited to merger review, Monti identifies such exchanges of representatives as ‘a virtually unprecedented step forward in EU-US regulatory cooperation’ (2001b).

Reflecting the concerns of the regulators, both of the formal EU-US agreements were negotiated under their discretionary authority as a way to avoid the legal requirement of political intervention/approval. Reflecting the concerns of firms regarding the treatment of sensitive business information, both agreements explicitly respect domestic laws that protect the confidentiality of such information (Damro 2006b).

Following these agreements, high-level EU and US competition authorities decided to explore further, under their discretionary authority, areas of merger review ripe for transatlantic convergence (James 2002; Kolasky 2002a; Pitofsky 2000). In October 1999, the EU and US competition agents established the transatlantic Mergers Working Group (MWG) as an ad hoc forum to address common problems in merger review. Reflecting its discretionary nature, the MWG was not established by a legally binding agreement, but rather two provisions of the 1991 Bilateral Agreement: the general provisions in Article III for increasing information exchanges and Article VII on consultations. The competition agents decided early that they wanted the group to be informal, with an agenda reflecting their regulatory needs at any given time. The MWG’s membership and meeting schedule is flexible and, while it generates working papers and shared notes, all are considered internal documents.[22] The group’s flexible nature is important because its members ‘are very busy people working daily on cases with limited time resources’.[23]

While the MWG is informal and non-binding, it serves as a forum for developing ways to limit political intervention, at least indirectly, by exploring the

potential for convergence in discretionary areas of EU and US merger review (Damro 2006b). By exploring areas ripe for convergence, the MWG seeks to reduce the likelihood of divergent substantive decisions, which, in turn, will reduce the likelihood of political intervention in individual merger cases. By remaining informal and under the discretionary authority of the competition agents, the MWG also avoids the intervention of political principals in its general activities. In short, as the EU's former Director-General for Competition Alexander Schaub argued, the MWG facilitates the prevention of 'high-profile transatlantic political disputes' (2001: 11).

Following numerous meetings and tele/video conferences, the EU's Competition Directorate and the US Department of Justice and Federal Trade Commission endorsed the MWG's efforts toward convergence (Monti 2002; Melamed 2000; Kolasky 2002a). Indeed, the MWG has been credited with concrete successes leading to convergence in the EU's Notice on Remedies (European Commission 2002; Monti 2002) and the US decision to publish the motivation of their decisions not to challenge certain relevant actions (Monti 2004; USDoJ 2002). This evidence of convergence is notable in that it is not coercive or unidirectional, rather it follows from 'a mutual learning process based on mutual experience'.[24] In addition, both of these instances of convergence occurred in areas under the discretionary authority of the competition regulators, not a change to the non-discretionary statutes governing competition policy.

In 2002, the MWG established three sub-groups, one to deal with procedural issues and two others to deal with substantive issues on the conglomerate aspects of mergers and the role of efficiencies in merger analysis. The work of these sub-groups included a series of video conferences 'involving presentations and discussions of each other's policy approach and of the lessons learned from the review of mergers.

The officials involved also made a visit to each other's agencies' (European Commission 2003: 4).[25]

As the MWG's agenda expanded, the sub-group on procedural issues worked to clarify a set of best practices in transatlantic merger review.[26] Although the MWG was not explicitly designed to generate public documents, these discussions resulted in the guidelines on Best Practices on Cooperation in Merger Investigations.[27] The set of best practices was publicly issued in October 2002 by EU Competition Commissioner Mario Monti, Chairman of the US Federal Trade Commission Timothy Muris and US Assistant Attorney-General for Antitrust Charles James 'with a view to minimising the risk of divergent outcomes, and to enhancing the good relationship developed over the last decade' (European Commission 2003: 5). According to Holger Dieckmann, an official in the EU's Competition Directorate, the guidelines provide a good example of how 'a policy dialogue on procedures' can improve cooperation in individual merger cases: 'In particular, they should ensure that both sides are always aware of the stage their respective investigations have reached, and how they are both thinking in terms of substantive competition analysis at any given point. This should serve to avoid misunderstandings or surprises' (2003: 8-9).

The guidelines identify central objectives and four specific areas (coordination on timing, collection and evaluation of evidence, communication between the reviewing agencies and remedies/settlements) in which procedural cooperation and convergence will reduce the likelihood of divergent decisions in individual merger cases. The remainder of this section assesses the Best Practice Guidelines (BPG) with the intent of identifying the ways in which practices conform to or conflict with the interests of regulators and firms.

Among its objectives, the BPG mentions that nothing in the document will override respective domestic laws and enforcement responsibilities of the competition agents. The BPG provides an advisory framework, identifies a number of best practices that are routinely employed informally and makes clear that the regulatory agents 'reserve their full discretion in the implementation of these best practices and nothing in this document is intended to create any enforceable rights' (p. 1). Regarding the motivation of the EU and US competition authorities, the BPG notes that the regulators 'have an interest in reaching, insofar as possible, consistent, or at least non-conflicting, outcomes [because] Divergent approaches… undermine public confidence in the merger review process, risk imposing inconsistent requirements on the firms involved, and may frustrate the agencies' respective remedial objectives' (p. 1). This claim speaks directly to the regulators' desire for convergence in substantive merger decisions while highlighting the need to maintain public, and therefore political, confidence.

Also among its objectives, the BPG argues for the active involvement of merging firms and third parties in the review process: 'Given legal constraints existing in both jurisdictions, effective inter-agency coordination between the US and the EU depends to a considerable extent on the cooperation and good will of the merging parties, and to a lesser extent on third parties' (p. 2). This cooperation and good will is encouraged particularly in the disclosure of sensitive business information, which is 'subject to confidentiality restrictions', and the timing of investigations (p. 2). By highlighting the confidentiality restrictions, the competition regulators reassure the firms (and political principals) that sensitive business information will not be used inappropriately or leaked to competitors. The role for third parties mentioned in the objectives is considered in more detail below.

Regarding the coordination of timing, the BPG urges merging parties to notify early their decision to merge and to discuss timing before filing in either jurisdiction. In transatlantic merger cases, firms must officially notify EU and US competition authorities of their intent to merge by submitting a Form CO and Hart-Scott-Rodino filing, respectively.[28] The discussions of timings 'will be most beneficial if held as soon as feasible after the transaction has been announced' with the intent to 'synchronize' the investigations to the extent possible under EU and US law (p. 3). The topics to be addressed in these discussions may include timeframes for filing and submitting information and the prospect of reaching a timing agreement (in the US) and/or a waiver from the obligation to notify within seven days of the conclusion of a binding agreement to merge (in the EU). According to the BPG, 'The success of this effort depends on the active participation and cooperation of the parties, and would, in most cases, require the parties to discuss timing with the agencies before filing in either jurisdiction' (p. 3). The guidelines, therefore, discourage merging firms from obstructing the timing of investigations for the purpose of playing one competition agency off the other.

Regarding the collection and evaluation of evidence, the BPG notes that regulators may benefit from sharing publicly available information to assist with their respective investigations. This publicly available information allows regulators to cross-check the confidential information provided by firms. Specific to the actions of the merging firms, the BPG encourages the exchange of draft informational questionnaires, requests waivers of confidentiality, and encourages the firms to allow joint EU-US conferences and joint interviews with executives. In order to encourage merging firms to waive their legally-protected rights to confidentiality, the BPG notes the willingness of the regulators to provide sample waiver letters. The guidelines also

encourage waivers of confidentiality and joint interviews and conferences with third parties where appropriate (p. 3-4). If third parties are present during these meetings, the merging firms will typically request that they leave when confidential information is discussed.[29]

Requests for waivers of confidentiality in merger cases were not always common practice in transatlantic competition policy. Throughout the 1990s, firms had to learn the modalities of this procedure and become confident that the competition regulators would not leak, whether intentionally or unintentionally, the sensitive information to their competitors (Janow 2000).[30] Anecdotal evidence also suggests that competition authorities encourage merging firms to waive rights to confidentiality by arguing that such an action will increase the likelihood that foreign regulators will reach the same decision in a particular merger case.[31] As a result of these incentives, waivers are increasingly granted nowadays, with merging parties usually agreeing blanket non-disclosure waivers (Svetlicinii 2006: 5). Because waivers of confidentiality are now common practice in merger cases, when merging firms decide not to waive their rights, competition regulators may actually perceive this behavior as evidence that the firms have something to hide (ICPAC 2000: 71).[32] Such a situation can slow the merger review process as the regulators scrutinize the transaction through their own resources and without the benefit of input from regulators in the collaborating jurisdiction.

The BPG also outlines the best practices for undertaking communication between the reviewing agencies. Each agency will typically designate a contact person who will be responsible for 'setting up a schedule for conferences between the relevant investigative staffs of each agency; discussing with the merging parties the possibility of coordinating investigation timetables; and coordinating information

gathering or discovery efforts, including seeking waivers from the merging parties and from third-parties' (p. 4). The BPG also sets out considerations for a typical timetable for consultations between the regulatory authorities, notes the possible need for involvement of high-level competition officials in the consultations, and highlights the ability of regulators to attend 'certain key events in the other's investigative process' (p. 5), pursuant to the 1999 Administrative Arrangements on Attendance. All of these efforts at communication are undertaken under the discretionary authority of the regulators and are designed to increase their ability to exchange information.

Finally, regarding remedies/settlements, the BPG recognizes that 'the remedies offered by the merging parties may not always be identical, in particular because the effects of a transaction may be different in the US than in the EU' (p. 5). Due to this possibility, the agencies 'strive to ensure that the remedies they accept do not impose inconsistent obligations upon the merging parties', to the extent consistent with their respective law enforcement responsibilities (p. 5). The BPG also advises merging firms to 'consider coordinating the timing and substance of their remedy proposals' (p. 5). The BPG concludes by noting that 'Where appropriate, and consistent with confidentiality and/or non-disclosure obligations, the agencies should share draft remedy proposals or settlement papers, on which they may provide comments to one another, and participate in joint conferences with the parties, buyers, and trustees' (p. 6). Again, mindful of their domestic institutional constraints, the regulators pursue discretionary ways to increase the likelihood of convergent remedies while respecting the firms' rights to confidentiality.

While the BPG focuses primarily on the roles of regulators and merging firms, the objectives and four sections are also noteworthy for specifically identifying a role for third parties in the merger review process. Such third parties may include

competitors, customers, suppliers, and members of the merging firms' administration or management organs or recognized workers' representatives.[33] While outside the explanatory frameworks of principal-agent and regulatory capture, the role of third parties provides unexpected insights into the information asymmetry that is typically seen to favour the merging firms in the review process. In particular, the competitors of merging firms play an important role when participating in the market-testing of remedies proposed by the merging firms.

During a merger review, third parties can submit their views in writing, or, if appropriate, participate in hearings and conferences with the competition authorities.[34] In oral hearings, third parties may be allowed to make formal presentations and ask questions of the merging firms. This access 'provides an opportunity for competitors to encourage a single jurisdiction to hold a transaction hostage and thus use (or abuse) the process to delay and sometimes to disrupt mergers' (ICPAC 2000: 63). In particular, the market-testing system offers considerable opportunity for third party influence over possible remedies. For competitive reasons, third parties are likely 'to express dissatisfaction with whatever concessions are offered by the [merging] parties. The [merging] parties therefore are placed under great pressure to make that extra concession which it is hoped will lead to an acceptable compromise' (Gilchrist 2000/2001: 3). Gilchrist continues, 'It would be illogical to expect competitors to say that concessions offered by parties to a merger are sufficient or perhaps even too much' (2000/2001: 7).[35] The input of these third parties may be amplified in cases where reliable, publicly available information is lacking and/or where complex new markets are being analyzed (Nourry 2000: 189).[36] While this market-testing system may potentially disadvantage merging firms, it should be noted that competitors have strong disincentives from providing false information: they may be subjected to fines,

their submissions are cross-checked with other sources of information, and they prefer maintaining a positive reputation because a merger of their own may come up for review in the future.[37] Likewise, this system is preferred over one that enlists independent consultants to undertake market-testing. Such an alternative system would increase the duration of the process, which would violate the merging firms' preference for a speedy review and decision.[38]

Without satisfying the concerns of third parties, the merging firms may reduce the likelihood of achieving their fundamental interest, obtaining regulatory approval of their proposed transaction. This influential role of third parties is the direct result of the competition regulators' discretionary use of them to acquire information crucial to the convergent process of transatlantic merger review. Their contributions to the merger review process change the dynamic between regulators and merging firms. Thanks to third parties, the regulators do not have to depend as heavily as might be expected on the merging firms for sensitive business information about current and prospective market shares and market activity. Coupled with the increasing use of waivers of confidentiality, this reduction of the information asymmetry decreases the likelihood that competition regulators are captured by the interests of the merging firms.

IV. Conclusions

Despite the common tendency to focus on EU-US disagreements over high-profile mergers, the preceding analysis suggests an increasing likelihood for the substantive convergence of transatlantic merger decisions. The findings also reveal a potential for procedural convergence under the discretionary authority of like-minded competition regulators. Convergence in this policy area builds on a formal framework

for information exchanges and has become a dominant trend because it suits the interests of regulators and largely addresses the needs of merging firms without challenging the domestic institutional constraints of EU and US competition law.

The principal-agent and regulatory capture approaches offer useful analytical tools for highlighting the role of domestic institutions, deducing the interests of regulators and firms and assessing their relative influence in transatlantic merger review. An analysis of the Best Practice Guidelines of the EU-US Mergers Working Group reveals an important role for both regulators and firms as domestic sources of convergence in transatlantic competition policy. While political principals are not typically active in the daily implementation of transatlantic merger review, they are capable of intervening in cases of substantive divergence and their control instruments provide an ever-present reminder of their presence to the regulatory agents.

The empirical analysis helps to assess the comparative explanatory power of principal-agent and regulatory capture approaches in this case. EU and US competition officials share a common interest in avoiding the political intervention and pressure that is provoked by divergent substantive merger decisions. In accordance with the principal-agent approach, this study finds that the regulatory agents pursue substantive and procedural convergence via their discretionary authority. Unique domestic institutions of EU and US competition law prohibit the free exchange of confidential information that is needed for fully-informed decision-making in the merger review process. This obstacle has driven the competition regulators together to pursue convergence in merger review in a number of discretionary ways, as outlined in their Best Practice Guidelines: coordination of timing, collection and evaluation of evidence, communication between reviewing agencies, and remedies/settlements. By increasing procedural convergence, the

regulatory agents reduce the likelihood of reaching divergent substantive merger decisions that would prompt intervention by political principals.

On the other hand, merging firms are also important sources of domestic convergence as they seek to capture regulators in ways that increase the likelihood of regulatory approval via substantive convergence of merger decisions. Their support, however, for procedural convergence depends largely on the extent to which it speeds up the approval process and protects confidential information. Regulators have overcome the legally-embedded information asymmetry that traditionally favored merging firms by encouraging them to waive rights of confidentiality and assuring that confidential information will be protected during synchronized investigations. The regulators have also reduced the information asymmetry that could contribute to regulatory capture by incorporating third parties into their coordinated merger reviews. As a result, it is the EU and US regulatory agents who have shaped the convergent process via their discretionary authority and captured the merging firms to serve their regulatory interests.

The findings of this study suggest potentially fruitful avenues for further research on transatlantic and multilateral competition policy. While this article has focused on convergence in merger review, further research is necessary to determine the extent to which the findings are replicated in other areas of transatlantic competition policy. As domestic interests and institutions vary across other areas of competition policy, such as cartels, investigations of the conditions under which regulators exercise their discretionary authority and firms act as facilitators or obstructionists may provide a broader understanding of the process of convergence. Likewise, as the work of the EU-US Mergers Working Group has now been subsumed in the International Competition Network, further research is warranted on

the extent to which regulators are able to avoid political intervention and capture firms in similar multilateral processes of convergence in competition policy. As two of the most significant actors in the international political economy, the bilateral experiences of the EU and US should go a long way toward informing and shaping further multilateral convergence in this increasingly important policy area.

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NOTES

[1] For varying perspectives on these cases, see Fox (2007); Anwar (2005); Morgan and McGuire (2004); Evans (2002); Damro (2001); James (2001); Kovacic (2001); Boeder (2000); McGowan and Cini (1999).

[2] Multilateral efforts have also been undertaken — with varying degrees of success — in the Organisation for Economic Co-operation and Development, United Nations Conference on Trade and Development and World Trade Organization. For work on these efforts and the International Competition Network, see Damro (2007, 2006a); Djelic and Kleiner (2006); Roebling et al. (2003).

[3] For similar arguments from academics and competition officials, see Fox (2007); Barnett (2006); Monti (2004, 2001a); Pate (2004); James (2002, 2001); Schaub (2002); ICPAC (2000: 51, 56); Melamed (2000); Pitofsky (2000); Venit and Kolasky (2000); Gerber (1999); Parisi (1999). For examples of convergent decisions, see the following mergers: Halliburton/Dresser, Reuters/Telerate, Johnson & Johnson/Guidant, Exxon/Mobil, GE/Instrumentarium, Bayer/Aventis, GE/Agfa NDT, and MCI WorldCom/Sprint (Svetlicinii 2006).

[4] In the context of merger review, the International Competition Policy Advisory Committee equates 'convergence' with 'harmonization' as 'a process that relieves tensions between and among the laws and policies of different nations by bringing the laws and policies into a state of greater compatibility' (ICPAC 2000: 42).

[5] For examples of different approaches, see Holzinger, Knill and Sommerer (2008); Ekins, Guzman and Simmons (2006); Swank (2006); Knill (2005); Holzinger and Knill (2005); Doremus et al. (1999); Berger and Dore (1996).

[6] For a study that includes investigations of transatlantic convergence in competition relations, see Evenett et al. (2000).

[7] For more extensive treatment of these control instruments, see Cini and McGowan (2009); Damro (2006b: 23-39); Gerber (1998); Sullivan (1991); Shughart (1990).

[8] Svetlicinii cites the relevant legal provisions as article 20 of Council Regulation 17/62 or equivalent provisions in other regulations in the field of competition as well as Regulation 1/2003 and the 2004 EC Merger Regulation. Ham (1993: 588) provides a useful list of the domestic legal constraints in both

the EU and US that protect confidential information, including the EU's Regulation 17, parts of the US Code and the Federal Trade Commission Act. See also Parisi (1999).

[9] Because the respective markets may differ significantly, competition officials looking at the same merger can (and sometimes should) come to divergent decisions simply because the transaction will have differing impacts on different markets (ICPAC 2000: 52). This reality is an important reason why full and consistent convergence of substantive decisions is unlikely ever to happen. However, ICPAC notes that 'Government officials have observed that "even if the transaction needs to be addressed somewhat differently on both sides of the Atlantic because of differing market conditions and competitive realities, we reach solutions involving divestitures and licensing that neither conflict nor force firms to choose between complying with U.S. or EC law"' (2000: 53).

[10] ICPAC agrees, arguing that competition 'agencies must establish their independence and "parochial" political concerns should not play a role in the merger review process' (2000: 63). This preference for remaining independent and avoiding political intervention is also supported by interviews with an EU Merger Task Force official (February 2001, Brussels, Belgium) and an EU External Relations Directorate official (May 2001, Brussels, Belgium).

[11] See Mattli and Woods (2009) for work on regulatory capture in the international context.

[12] ICPAC agrees, arguing that 'Mergers are almost always time sensitive; delays may prove fatal to a transaction, particularly if it relates to a high technology industry, such as electronics, computers, or software, with a very short life cycle. In addition, delay breeds uncertainty in product, labor, and capital markets, enabling competitors to raid customers and staff' (2000: 93).

[13] See Devuyst (2001); Monti (2001a); ICPAC (2000); Janow (2000); Pitofsky (2000); Parisi (1999); Van Miert (1998).

[14] This claim is supported by author's interview with a US Department of Justice official, December 1999, Washington, DC. See also ICPAC (2000: 72).

[15] For more on these two agreements, see Damro (2006b). While the 1998 Positive Comity Agreement also forms part of the transatlantic competition framework, it remains outside this study because it does not apply to merger review (Janow 2000: 33).

[16] Following a challenge before the European Court of Justice in 1994, the agreement was reconfirmed by a joint decision between the Council of Ministers and European Commission in 1995.

[17] According to ICPAC, conflicting remedies are particularly problematic because they represent a situation in which a merging firm 'is unable to comply with the remedies imposed by two different jurisdictions' (2000: 52). This significant concern over conflicting remedies is also supported by an interview with the legal counsel for a major multinational corporation and member of the Competition Policy Subcommittee of the EU Committee of the American Chamber of Commerce, February 2001, Brussels, Belgium.

[18] Interview with former EU Competition Commissioner, April 2001, London, United Kingdom.

[19] The European Commission goes to great lengths to make clear that this accord is an 'understanding', not an official 'agreement' of legal equivalence to the 1991 Bilateral Agreement (http://ec.europa.eu/competition/international/bilateral/usa.html, last accessed 21 August 2009).

[20] Interview with US State Department official in US Mission to EU, May 2001, Brussels, Belgium.

[21] Interview with US State Department official in US Mission to EU, May 2001, Brussels, Belgium.

[22] Interview with EU Merger Task Force official, September 2001, Brussels, Belgium.

[23] Interview with US State Department official in US Mission to EU, May 2001, Brussels, Belgium.

[24] Interview with EU Competition Directorate official, May 2001, Brussels, Belgium.

[25] For more on the interactions of these sub-groups, see Kolasky (2002b: 6-7).

[26] The desire to clarify best practices was also heightened by the experience of the 2001 GE-Honeywell merger case (Kolasky 2002b).

[27] http://ec.europa.eu/competition/mergers/legislation/eu_us.pdf, last accessed 21 August 2009.

[28] These notification requirements, which also apply to mergers that are exclusively domestic in their effect, are based in the EU's Merger Control Regulation (MCR) and the US's Hart-Scott-Rodino Act (HSR). The MCR and HSR contain specific thresholds at which firms must officially notify competition authorities of their intent to merge.

[29] Interview with private practice competition lawyer, February 2001, Brussels, Belgium.

[30] This increase in firms' confidence during the 1990s is supported by an interview with the legal counsel for a major multinational corporation and member of the Competition Policy Subcommittee of the EU Committee of the American Chamber of Commerce (February 2001, Brussels, Belgium), a private practice competition lawyer (February 2001, Brussels, Belgium), a member of the EU's External Relations Directorate (January 2001, Brussels, Belgium), a Vice President of Public Affairs

for a major multinational corporation (July 1999, Brussels, Belgium), and a member of the EU's Competition Directorate (July 1999, Brussels, Belgium).

[31] Interview with private practice lawyer and former member of European Commission's Legal Service, February 2001, Brussels, Belgium.

[32] Interview with private practice competition lawyer, February 2001, Brussels, Belgium.

[33] The BPG did not create an entirely new role for third parties because such a change would have required political principals to amend non-discretionary legislation. Rather, the involvement of third parties is based on existing domestic statutes. For example, see EU Commission Regulation (EC) No 447/98, 1 March 1998, on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings.

[34] Such interactions are typically referred to as 'oral hearings' in the EU and 'pitch meetings' in the US DoJ. For more on oral hearings, see Durande and Williams (2005).

[35] For an assessment of the differing roles of competitors in EU and US merger review processes, see Venit and Kolasky (2000).

[36] Interview with two merger case handlers in EU's Competition Directorate, January 2001, Brussels, Belgium.

[37] Interview with two merger case handlers in EU's Competition Directorate (January 2001, Brussels, Belgium) and the legal counsel for a major multinational corporation and member of the Competition Policy Subcommittee of the EU Committee of the American Chamber of Commerce (February 2001, Brussels, Belgium).

[38] Interview with private practice lawyer and former member of European Commission's Legal Service, February 2001, Brussels, Belgium.

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