

TRANSNATIONAL ACTORS, TRANSNATIONAL
INSTITUTIONS, TRANSNATIONAL SPACES: THE ROLE
OF LAW FIRMS IN THE INTERNATIONALIZATION OF
COMPETITION REGULATION

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Introduction

The emergence of systems of transnational regulation and governance in the last decade has been a considerable challenge to authors studying patterns of business and management from an institutionalist perspective. One view, expounded most clearly in Whitley, is that “as long as the nation state remains the primary unit of political competition, legitimacy and definer and upholder of private property rights, in addition to being the predominant influence on labor market institutions, many characteristics of business systems will continue to vary significantly across national boundaries” (Whitley 2005a: 224). Inevitably such arguments are countered by contrary claims showing how, in specific areas, forms of transnational governance are emerging, what Djelic and Quack refer to as “the progressive transnationalization of a few actors, strategies and logics” (Djelic and Quack 2003: 11).

In this chapter, I examine this issue through distinguishing three elements – transnational social spaces, transnational actors and transnational institutions. As transnational phenomena, each of these elements emerges out of the dynamics of globalization and the weakening of nation-states as frameworks for economic coordination. However, each of them emerges out of different processes and this affects how their interdependence evolves. By distinguishing

these elements, it becomes possible to understand the broader phenomenon of the emergence of a transnational sphere as complex and contingent.

I explore these ideas through examining transnationalization in relation to competition law. As Djelic and Kleiner (this volume) show, the emergence of transnational governance of competition law is very recent. Similarly, until relatively recently, law firms in most countries were local, dealing with home based markets and clients. During the 1990s, however, increasing numbers of large law firms began to internationalize in part to serve multinational clients whose interests, for example, in the field of competition issues and antitrust policies, crossed over national jurisdictions. This phase was characterized by what Evenett et al. describe as the “merits and practicalities of reconciling national antitrust law and enforcement with an increasingly global marketplace” (Evenett et al. 2000: 1).

The chapter proceeds in the following steps. In the first section, I argue that it is necessary to distinguish three interacting aspects of this process – transnational social spaces, transnational actors and transnational institutions. In the second section, I use this framework to understand more clearly the nature of international law firms and how they relate to the emerging transnational sphere of competition law. In the third section, I consider a particular example of transnational competition law in action; the clash between the US and the EU competition authorities over the proposed GE-Honeywell merger and the role of law firms in this process. In the concluding section, I use this example to develop further the basic argument that the way in which transnational spheres of regulation and action are constructed varies according to the different logics and speed in which transnational social spaces, actors and institutions develop across different sectors and countries.

Elements in the Emergence of the Transnational Sphere

There are three elements in my concept of a transnational sphere. These elements are transnational social spaces, transnational actors and transnational institutions. Firstly, it is important to reflect on the terminology of ‘transnationalism’ itself. What does it mean and why use it in comparison to terms such as ‘global’ or ‘international’? Hannerz argues that ‘the term “transnational”... makes the point that many of the linkages in question are not “international” in the strict sense of involving nations – actually, states – as corporate actors. In the transnational arena, the actors may now be individuals, groups, movements, business enterprises, and, in no small part, it is this diversity of organization which we need to consider’ (Hannerz 1996: 6; see also Morgan 2001a). So whilst ‘international’ is usually taken to refer to relations between states and ‘global’ to refer to a distinct level of territorialization (i.e. across the whole world), ‘transnational’ can encompass a variety of different types of actors and different sorts of connections across varying numbers of national boundaries.

In identifying empirically and theoretically a transnational sphere of analysis (Khagram and Levitt 2004), it is necessary to distinguish between transnational social spaces, transnational actors and transnational institutions. From an empirical point of view, an increasing share of our life takes place in transnational social spaces (see Morgan 2001a for the different ways in which this occurs). Large firms, for example, are increasingly transnational social spaces. As such, they facilitate flows of individuals, ideas, capital, technology, products and services, knowledge etc. across national contexts – but within organizational boundaries.

The concept of a transnational actor is more complex. We describe firms as ‘actors’ in the sense that whatever their internal divisions and conflicts, they also display a pattern of coordinated collective action based on internal processes of control, monitoring and discipline. The firm as a transnational social space, therefore, needs to be distinguished from the firm as a transnational actor. Are firms national or transnational actors? One strong argument has been that firms might internationalize their activities but remain predominantly national in their modes of action, control and coordination (Hu 1992; Hirst and Thompson 2000; Doremus et al. 1998).

The clearest argument to the contrary is presented in the path-breaking work of Bartlett and Ghoshal (1989). For Bartlett and Ghoshal, the transnational is a distinctive type of firm. They state that transnationals “decide task by task and even decision by decision where issues should be managed. Some decisions will tend to be made on a global basis, often at the corporate centre...; others will be the appropriate responsibility of local management.” (Bartlett and Ghoshal 1989: 209). For them, the firm is a “differentiated and interdependent network...integrated with a flexible coordinating mechanism” (ibid: 210). Essential to this is the idea of cross-national learning. What emerges as the transnational is a new actor where the dominance of a single national origin and set of practices and processes is no longer the defining feature of the firm. Some authors have been sceptical about Bartlett and Ghoshal’s notion of the “transnational firm”. They have argued that becoming a transnational social space in the way described actually undermines the possibility of becoming a transnational social actor, as the loosening of hierarchical authority and the development of heterarchy and network relationships bring to the surface differences between national institutional settings and create conflicts and games within the firm (see e.g. Kristensen and Zeitlin 2005; Morgan

2005; Whitley 2005b). As a result, the firm finds it difficult to take coherent action or to develop a strong shared identity.

The discourse of “transnational capabilities”, however, suggests that the firm has the power to coordinate effectively its members across different national spaces, to enable them to learn from difference across contexts, to implant this learning within its procedures to produce new improved practices and to reproduce these capabilities over the long term as individuals move in and out of the organization. This is not simply a question of a management commitment to learning across national boundaries expressed in activities such as shared management development, global knowledge management systems and information databases, international project teams etc, though all these may contribute to the development of the firm as a transnational actor. It also implies that the routines, practices and actions of the firm are transnational, not national. Whitley (2005b) argues that the fundamental barrier to this lies in the way in which national institutional contexts remain the dominant career reference point and source of reward and reputation, knowledge and learning for most individuals. Whitley’s expectation is that in most cases, the employees of MNCs will be oriented to “national” labor markets (both internal and external) and this will constrain interest and commitment to the development of transnational capabilities. Of course, firms may well recognize this and try to counteract it through expatriate assignments, appraisal systems designed to reward international cooperation, etc. but the degree to which such mechanisms are successful and create a “transnational” management group or the firm as a transnational actor is difficult to determine.

Finally, we can consider the idea of “transnational” institutions. In the context of the issues explored in this chapter, transnational institutions are constructed as ways to reduce

uncertainties and risk for actors involved in economic transactions across national borders (Morgan 2001b). They are “transnational” in Hannerz’s term because they cannot be reduced to agreements between national states (commonly labeled “international” institutions) but are, on the contrary, distinctive emergent properties from the actions of public and private actors across diverse national contexts and across diverse spatial levels. More problematically, however, transnational institutions may take two forms. On the one hand, they can effectively consist of the imposition of one single national model (e.g. Americanization as discussed in Djelic 1998; Zeitlin and Herrigel 2000) on a number of contexts via the creation of a single transnational rule-making authority. On the other hand, they can emerge from multi-centered and multi-leveled types of process in which “national interests” are one set of constituents but not the only one and not necessarily the most effective one. In the former case, it is clear that the dominant actors are likely to be “national” and the struggle to make the transnational institution a distinctive level of reality is likely to be continually frustrated by actors whose primary interest is in getting the institution to follow their own preferred pattern built out of national institutional contexts. In the latter case, where no one set of national actors is able to exert predominance, the emergent process of compromise and negotiation is likely to interact with and stimulate the development of transnational social actors, i.e. social actors for whom making the transnational institution work in a coherent and effective way becomes the main objective even in the face of resistance by powerful “national” level actors. Neo-institutionalism suggests that as actors and institutions co-evolve, they create path dependency and lock-in and thus a form of stability is developed. As an emergent set of rules of action, cognitive frameworks, and normative commitments become common, then institutions are reinforced and develop their own trajectory and their own significance for actors.

Broadly speaking, firms have been becoming transnational social spaces quite rapidly over the last two decades, though the extent of this varies across sectors and countries. Transnational institutions have been building more slowly and, as one would expect, this process is subject to more complex forms of determination than is the creation of transnational social space inside the firm. In particular, transnational institution building like other forms of institution-building is subject to political and social pressures and reflects the relative strengths of particular nation-states. The overall uncertainties of transnational institution building are high, the time-scale uncertain, the response of key actors and social movements unpredictable. Part of the reason for this is that transnational actors are difficult to create as identities are socially embedded in distinctive national and regional settings. Actors are often better characterized as “national in orientation” but “transnational in effects”. This means that they engage with transnational institutions in a way which undermines the “transnationalism” and instead encourages reversion to patterns of national and international power politics. As a result, the change process is likely to be episodic (rather than incremental), discontinuous (rather than continuous) and reversible (rather than one directional). When there is a lack of powerful actors supportive of institutions, institutions themselves will remain relatively weak, fragile and subject to frequent and rapid change. It is the mutual constitution of actors and institutions that creates stability and certainty. If transnational institutions are to become significant, they need to become arenas which shape and are shaped by transnational actors.

Competition Law as an emergent transnational sphere

The growth of multinationals over the last decade has been characterized primarily by cross-border mergers and acquisitions. As Djelic and Kleiner show, this means that many national

regulators have to consider any mergers and acquisitions proposal for its impact on competition. As national regulators have different procedures and processes, even with similarity of broad principles, this multiplies regulatory costs and leads firms (and regulators) to seek ways to reduce these problems. Developing a common transnational framework for competition regulation is a proposed resolution to this problem. As Djelic and Kleiner argue there are many interested participants in the outcome of competition law. However, few of them are as continuously and closely interested or expert in its development as lawyers. How do they act in relation to the development of this transnational sphere?

Since the early 1990s, there have been an increasing number of law firms with a presence in multiple national jurisdictions. The Global 100 law firms list produced by The American Lawyer on an annual basis and measuring firms in terms of turnover consists entirely of US and UK firms. In the 2003 list, UK law firms occupy 4 of the top 10 places in the Global 100, the rest are from the US.

-Table 11.1 about here-

US firms dominate the list of the Global 100 primarily because of the huge internal market for corporate legal services in the US. However, these US firms are often less international than the UK firms, preferring to focus on high value activities around financial markets in the US. Frequently this means that their offices outside the US are limited to London plus a small number of other cities in Europe and Asia such as Paris, Frankfurt, Tokyo and Brussels. 26 Of the top 10 US law firms (measured by profitability per partner), Skadden Arps is the most

international with offices in 11 countries (see Table 11.2). The top US firm in this list, Wachtell, Lipton, Rosen and Katz only has a New York office. The second in the list, Cravath, Swaine and Moore, only has offices in New York and London.

-Table 11.2 about here-

Overall, the mean is of 5.2 overseas offices and 4.6 countries in which the top 10 US law firms are present. The 10 top UK firms, on the other hand, have an average of 19.7 offices overseas in an average of 14.2 countries.

-Table 11.3 about here-

Compared to, for example, other professional services areas (accountancy, advertising and consultancy), law firms are limited in the extent to which they constitute themselves as transnational social spaces. If we took a simple measure of transnational social space in terms of presence in different countries, the top 100 firms by turnover would vary from one (just in the home base) through to 33 (Baker McKenzie). The Big 4 accountancy practices would generally boast offices in all recognized nation-states in the world, a figure currently hovering around the 150 mark.

The US law firm model is of particularly limited transnationalization with a very small number of overseas offices and limited reliance on overseas earnings or activities. The overwhelming impression of these law firms is that they are national rather than transnational. They act as US firms with international interests, rather than constituting either a transnational social space or a transnational actor. The situation is rather different with regard to the UK firms, as Tables 10.4 and 10.5 show. In two of the firms, overseas business was worth nearly 60% of total turnover and in the others between 40 and 50%. Overseas business is important to the UK firms and does not detract from their overall earnings.

-Table 11.4 about here-

Earnings from German business and the presence of German partners appears particularly crucial for the UK firms as revealed in the following table:

-Table 11.5 here-

These figures reflect the fact that UK law firms have increasingly gone in for mergers with existing law firms, particularly in the European context. Given that mergers amongst partnerships can only occur on the basis of agreement, a significant condition in these deals has been the retention of local partners in positions of dominance. UK international law firms are shifting significantly towards being transnational social spaces, characterized by strong

and diverse national institutional interests encompassed within a fragile and complex international governance structure. They are more transnational social spaces than the US firms but this leads to potentially more conflict between partners than the creation of a common identity (Morgan and Quack 2004).

Transnational Institution building: the case of competition law

The transnational sphere penetrates increasingly deeply into the strategic and operational decisions of firms which increases the requirement for legal advice that can evaluate the consequences of action in multiple national and international jurisdictions. This is particularly clear in the sphere of competition law. In the case of the GE bid for Honeywell, for example, the firm's lawyers had to file notifications of its intent to merge in not just the US and EU but in 25 other jurisdictions as well. Competition regulation reflects the basic concern within capitalist economies of ensuring that firms are not allowed to dominate markets. Different societies have understood these relationships in distinctive ways (see Gerber 1998; Djelic and Quack 2005) but as the issue has become more international, greater complexities emerge over the rules and jurisdictions. Thus a merger between two firms from a single country may have a different impact on market dominance issues in other countries than it does in the home base. Therefore, competition authorities in all the countries affected may have to consider the proposals and can in theory challenge and bring a stop to the whole process. Within the EU, mergers above a certain size are referred not to the national authorities but to the EU Competition commission in an attempt to avoid duplication of effort and increase flexibility and responsiveness to pan-European mergers. Across the US, Europe and Japan, more informal methods of communication have been pursued in order to reduce uncertainties.

These issues are reflected in the emerging literature in this area (Gerber 1998; Braithwaite and Drahos 2000: ch.10; Devuyst 2001; Djelic 2002; From 2002; van Waarden and Drahos 2002; Djelic and Quack 2005; Djelic and Kleiner this volume) that emphasizes the gradual emergence of a set of transnational institutions as ways of avoiding the potential confusion of multiple regulators. The argument can be broadly summarized as follows;

- The European level of competition regulation is emerging as a *sui generis* sphere of transnational governance,
- This is part of a broader convergence of competition regulation standards occurring throughout the world and predominantly influenced by the US antitrust model
- This convergence is characterized less by the imposition of shared legal standards by governments and more by an emerging transnational community of actors who are developing shared practices and understandings around the sphere of competition regulation through continued interaction and dialogue in a range of institutional and network contexts – an example of the emergence of ‘soft law’ (cf. Mörth; Jacobsson and Sahlin-Andersson this volume; see also Djelic and Kleiner; Marcussen this volume).
- This convergence is having consequential effects on national contexts and on firm level strategies and structures. It therefore reflects a gradual but important transfer of both power and influence towards transnational forms of governance and away from the national level. What characterizes competition regulation is the gradual emergence of transnational institutions in terms of “a competition policy and competition institutions that function along quite similar principles” which “owe a lot, indeed, historically to American models” (Djelic 2002: 234).

It is interesting to examine the GE-Honeywell case in the light of these considerations. The GE-Honeywell bid was huge in terms of size. It was between two US companies and approved by the antitrust arm of the US Department of Justice; yet the EU rejected the bid on grounds that it would adversely affect competition in the EU. The result was a bout of recriminations and conflict that revealed underlying issues about the development of the transnational sphere. GE had looked at buying Honeywell in 1999 but had considered its stock price too high. During 2000, however, its price plunged. In October 2000, a merger deal was in the process of being struck with United Technologies when Welch (who was within months of a pre-announced retirement) at the last minute offered a higher price for Honeywell. In strategy terms, the logic of the deal was clear if complex in detail and difficult and uncertain in terms of implementation. Wall Street audiences were initially skeptical. In spite of its record of acquisition and successful integration, GE had never tackled anything as big as Honeywell and achieving the synergies and complementarities would require massive management focus on restructuring and downsizing some areas. Moreover, Honeywell could drag down GE's overall performance because of its relatively slack market positioning. Welch on the other hand described the deal as "a home run", "exciting as hell".

As with most international mergers, lawyers played a significant role at a number of levels. Corporate counsel on the funding of the merger was more or less entirely Wall Street dominated. The main lawyer involved for GE was John Marzulli from the Mergers and Acquisitions group at Shearman & Sterling, one of the top mergers and acquisitions law firms in New York as measured by the value of deals. Representing Honeywell was Peter Atkins from the Mergers and Acquisitions group in Skadden Arps (7th in the league of US M+A advisers in 2003 measured by value). Both Marzulli and Atkins are star lawyers (or "rainmakers" in popular terminology) in their respective firms and practice areas. M+A

lawyers in the top firms are amongst the elite of the elite, moving in the same circles as top bankers. Large law firms like Shearmans are complex places in terms of hierarchies of status and competition between partners. In organizational terms, the firms are divided up into distinct practice areas and the fees paid to the firm reflect both the prestige of the practice group and the lawyers within it. Generally it is the lawyers within the M+A or corporate finance practice group who generate the highest fees and are the most valuable for the company. They stand closest to the centers of capital and the advice which they give is, in theory, highly customized, suited to the specific circumstances of the case. Their advice is partly technical (i.e. what the law allows etc.) but it also has a strong social aspect. It accesses for the client networks of information, reputation and legitimacy. In general, in professional services firms, the more standardized the problem, the lower the fees. Standardization makes competition easier and more transparent. It allows firms to substitute junior employees for partners and thus enables partners to spread their time across more clients (Morgan and Quack 2005).

Whilst corporate finance and M+A activities are at the top in terms of prestige, status and reward, other practice areas have different positions and networks. Antitrust practice groups, for example, are likely to find themselves called on by the M+A lawyers to help on specific areas of a broader deal. In the US, antitrust lawyers are likely to have strong linkages into the government (the Justice Department, in particular), the courts and universities. Their prestige and status is more linked to political and governmental connections. They are less likely than their M+A colleagues to be connected to top business leaders and bankers. These differences are overlaid with issues of geographical location where law firms are spread across a number of offices. The Wall Street connection is strongest for those based in offices in New York. For antitrust lawyers in the US, Washington DC is clearly a central location though it implies

distance from the corporate centre in New York. Members of antitrust practice groups in London, Brussels and Frankfurt, for example, may deal with the local consequences of Wall Street dominated deals, implying a further distance from the centre of corporate power.

Certainly this seems to have been the case with the GE bid. Welch's main concern was how the deal could be financed and how Wall Street would see the merger. Regulatory issues were not at the top of the agenda. Welch's decision to jump in at the eleventh hour meant that any regulator's expectations about pre-notification, private dialogue on potential trouble spots could not be met. Given all their previous experience, Welch and his advisers knew well the way in which the US Department of Justice would deal with the case. They could have expected that the deal would be scrutinized and that they would have to agree to certain divestitures. But it seems that the European dimension was not even raised in the initial stages. The Wall Street Journal wrote in June, 2001 (as the deal was sinking):

GE failed to anticipate the kinds of questions it would be asked in Europe. At his October news conference, Mr. Welch even dismissed specific questions about the 58-year-old Mr. Monti, whom he later conceded he had underestimated...GE conceded yesterday that the Honeywell deal came together too quickly for it to consult its European merger lawyers, Chris Bright of Shearman & Sterling and Simon Baxter of Clifford Chance.¹ But the company's top lawyer says both later signed off on the proposed transaction. Moreover, Honeywell, which had just been through a harrowing negotiation with the same EU lawyers in an earlier merger with AlliedSignal also told GE it anticipated no particular troubles. (WSJ, 15 June, 2001).

¹ In fact, Bright and Baxter were not 'merger' lawyers but members of the antitrust competition practice groups of their respective firms – an important nuance of status difference that the WSJ ignored.

The failure to involve European lawyers reflected the way Shearman & Sterling and most other large US firms work. Wall Street is the primary focus; after that Washington DC and the response of the Department of Justice; only after that might issues of other jurisdictions arise. In other words, they acted like a national firm, pushing their own agenda through their transnational social space in the expectation that this would not be resisted. Shearman and Sterling were not a transnational actor. They failed to coordinate and cooperate across national borders and this contributed to the problems GE got into.

This can be also been seen by turning the perspective round to the institutions themselves. There are two levels to this analysis – the EU level itself as an effort at transnational institution building and the more global level of developing common standards and expectations across the US, Europe and wider. With regard to the EU, procedures and processes for antitrust decisions were emerging slowly. Whilst regulations had been put in place in the 1990s and decisions were coming through the system, this was still an early phase in institutionalization where the influence of certain individuals, most obviously in the late 1990s, the EU Commissioner for Competition, Mario Monti, could be felt. In contrast, of course, the US had a long tradition of antitrust activity and whilst it is obviously true that this was affected by the broader political environment, there was a stability that was lacking in the European context.

In the EU at this time, the official line was that mega-mergers created economies of scale that eventually destroyed smaller competitors. The long-term consequence of this loss of competition would be detrimental. This position was an emergent process coming out of the Commission; not simply the imposition of any EU member. It reflected what Caparoso and

Stone refer to as “the institutional logics of European integration” (2002), an emergent reality for actors that is distinctive and separate from the national sphere.

In comparison, “influenced heavily by conservative economic and legal thinkers mainly at the University of Chicago, the US began to focus on the effect a merger would have on prices, innovation and product development rather than the fate of companies left to compete with the new entity. This has become known as the difference between the SLC (substantial lessening of competition) test² which US competition regulators are now using and the “dominance” test (where it is the fact of dominance per se, i.e. having a high market share) which is the preferred European model (see Venit and Kolasky 2000).

Within a month or so of the merger announcement, a few commentators were beginning to suggest that the EU side of regulatory approval might be more difficult than Welch had expected.³ Forbes magazine predicted on 27 November, 2000 that “there may be antitrust problems and, from a most surprising source, the European community...Monti’s main focus is something called portfolio theory which refers to the range of products created by combining two behemoths. That’s precisely the issue at the heart of GE/Honeywell. GE is buying a high-tech company with 90% overlap with the things we [already] do...’ Welch

² “Today, a “substantial lessening of competition usually is taken to mean a reduction in consumer welfare (or more precisely an increase or facilitation in the exercise of market power to the detriment of consumer welfare)” (Shearman & Sterling’s Comments on the Merger Review Green Paper, March 29, 2002, p. 17).

³ It is worth noting that these events were taking place around the time of US Presidential elections.

Commentators have noted that strong US political pressure seemed to play “a decisive role in garnering European approval of major transactions between American companies” (Defense Daily International, 3 November, 2000). The hiatus created by even normal elections (never mind chad-affected ones such as the Gore-Bush election of 2000) could affect the US government’s ability to press the interests of its companies.

crowded in announcing the pact. Where Welch sees profit, Monti sees 'collective dominance'". (Forbes, 27 November, 2000). Forbes also predicted that competitors in Europe would soon start lobbying the EU to turn the deal down on the grounds of 'dominance'. Meanwhile, GE, postponed formal notification of the deal to the EU until early February "in order to address concerns informally before the antitrust review clock starts ticking" with Jack Welch visiting Mario Monti in January "to discuss moves that could facilitate approval of the acquisition" (WSJ 30 January, 2001).

By this time, the US Justice Department investigation was already well under way. Although, the press referred to the likelihood of a "tough review" (WSJ 14 December 2000), the same article also stated that "an initial evaluation by a Defense Department task force hasn't identified major competitive issues that might derail the huge acquisition". By early May, the Department of Justice had agreed to the merger subject to GE selling Honeywell's helicopter engine unit and allowing new competition in the maintenance and overhaul of Honeywell aircraft engines and auxiliary power units. In this respect, Shearman & Sterling's lawyers had used their skills, qualifications and networks as might have been expected. The Antitrust Practice group leader, operating out of the firm's New York office, was at this time Kenneth Prince who had appeared regularly before the US Dept. of Justice (DOJ) and the Federal Trade Commission since 1975. In Washington, DC, the partner in the Antitrust practice group was Steven Sunshine, a former Deputy Assistant Attorney General in charge of merger enforcement at the US DOJ Antitrust division (1993-95) where he supervised the review of all merger transactions and directed the government's challenges to the transactions where necessary. Another partner in the practice group, based in New York, was Wayne Dale Collins who had also served as a Deputy Assistant Attorney General in US DOJ Antitrust division in the first Reagan administration.

In Europe, on the other hand, the lawyers were facing a more complex environment with less resources. The main Shearman and Sterling partner in Europe, Chris Bright, who ran GE's defense, had only joined the firm in 2001 after the opening shots in the deal had been made. He came from Clifford Chance where he was head of the European Competition practice for two years having moved from Linklaters in 1999. His experience whilst at Linklaters included secondment to the UK Department of Trade and Industry as an advisor in the competition policy division. Bright was being helped by Simon Baxter, a relatively junior partner (since 1998) in the Clifford Chance office in Brussels who specialized in competition law. At this point, Shearman and Sterling did not have a Brussels office and therefore depended on others to act for them on the spot – in this case, Bright's former colleague at Clifford Chance, Simon Baxter.⁴

The opening of the formal antitrust enquiry in the EU revealed that many more issues and objections were being raised than in the US, particularly around the possibility that GE might be able to use its power in so many different areas relevant to aircraft manufacture and financing as to keep out competitors. In late February, in spite of personal representations by Welch to Monti, the European regulators informed GE that the merger would be subject to a detailed Phase II investigation and therefore could not hope to get clearance until July at the earliest. In response, GE offered a number of minor remedies including what were termed 'behavioral commitments' to limit their activities in bundling and dominating the market. GE refused to go any further on the grounds that further divestitures would undermine the logic of the business case for the merger and thus on 3 July, 2001, the EU delivered its verdict that the

⁴ In July 2001, Shearman and Sterling opened a Brussels office.

merger was “incompatible with the common market”. As GE refused to make further concessions, the merger was dropped.

The case demonstrated a fundamental problem for multinational companies in the multiplication of jurisdictional regimes. How were they to know whether a merger proposal would get through in both the US and the EU? The problem was two-fold. Firstly, at least as far as US commentators were concerned, it was unclear what the EU model was (Venit and Kolasky 2000). In terms of EU process, decisions on competition were taken by the Commission on the advice of the Commissioner. In the US, if the Department of Justice could not reach agreement with the parties to a merger, it would take its case to the Courts where it would have to prove its case. US commentators argued that this was much fairer and took decisions out of the political arena in a way which was not the case in the EU. The EU also welcomed opinions of competitors on the deal in a way which was not favored in the US.

The second major aspect of the problem was the contrast between the US and the EU in terms of the underlying principles. The distinction between the SLC model and the market dominance model has already been discussed. What is of more significance, however, is the underlying framework within which this distinction was constructed. In terms of personnel, US commentators were scathing about the limited economic backgrounds of European investigators. Increasingly, US regulators and lawyers have come to share a standard methodology of economic analysis developed through the Chicago School of economics and now comprising an integrated field of knowledge around issues of law and economics (cf. Djelic this volume). The qualifications of the Shearman partner, Collins, a JD and a PhD in Mathematical Economics reflects this integration. Such a combination which would be very difficult to find amongst UK and other European lawyers is not unusual in major US firms.

This integration of law and economics around a liberal, monetarist economic and political agenda became known in the 1980s as the Washington consensus and has since been highly influential as a framework for reshaping societies either through internal reform and more broadly in the world through the influence of the World Bank and the IMF (Dezalay and Garth 2002a, 2002b; cf. also Djelic; Marcussen this volume). As Dezalay and Garth reveal, this is a powerful combination of academic knowledge, expert power and dominant political and economic interests in the US. It brings together different professions, such as lawyers, accountants and management consultancies, into a matrix of power that influences whole societies through US diplomacy and the activities of US dominated world institutions (cf. Botzem and Quack; Djelic; Djelic and Kleiner; Marcussen this volume). The deep institutionalization of the Washington consensus in firms and politics generates deep unease in Europe where it is not clear that there is a distinctive alternative⁵. In this sense, the GE-Honeywell merger brought to the surface the impact of these processes not just on “developing countries” but on the EU where officials were battered by US lawyers and officials with accusations of incompetence for a failure to understand the new economics of law and competition.

In a typical reaction, for example, Shearman & Sterling gave a clear indication that they perceived the European approach as essentially “amateurish” and politicized:

The biggest single issue that remains is a lack of confidence in the Brussels systems and how this may be addressed. There remains wide discomfort (far more than attaches to any other system) with the approach taken by the Commission to merger

⁵ Interestingly one of the most articulate statements of a European alternative comes from an American, Rifkin (2004). See also Garton Ash (2004).

investigations....The Commission has less refined analytical tools and less certain policy goals when compared with the US agencies...The Commission has significantly fewer resources available for each investigation and is less able to resolve issues identified in the allotted time. (Shearman & Sterling Client Publication 'What's new in antitrust' January 2002).

Shearman & Sterling go on to link these inadequacies with firstly the ability of the EU Commissioner to escape the rigorous public exposure of arguments which comes in the US from the necessity for the antitrust section of the Justice Department to go to court and secondly the "political" nature of decision-making on the operation of competition law.

The decision on the GE-Honeywell case therefore raised substantial questions about the EU transnational institution building process in the sphere of competition and antitrust policy. What principles should underlie it and how should it relate to the US model? Two important moves took place in response to these conflicts as political authorities saw the difficulties created by the possibility of further clashes. Firstly, the EU established a review of its merger policy and sought comments from interested parties. 120 bodies responded and 25% of them were law firms or associations of lawyers. 8 UK based and 7 US based law firms responded to the review; the other law respondents were firms from France, Germany, the Netherlands and Scandinavia as well as professional associations from Europe and the US. In late 2002, the EU came back with draft proposals. As well as new suggestions on the process and the criteria for deals to be referred to the EU rather than being dealt with at national level, the Commission agreed to create a post of Chief Competition Economist in the DG for Competition (as a way of partially assuaging US concerns about the lack of technical economic expertise). However, it also appeared to retain the dominance test (rather than

switching to the SLC test) whilst allowing for an efficiency defence to ameliorate over-interventionism on the basis of the dominance test. Secondly, the EU and the US Competition authorities established the International Competition Network as a means of converging standards through negotiation and networking (see Djelic and Kleiner this volume). In this sense, there are ongoing activities aimed at creating a transnational framework for competition law that can provide multinationals with a reasonable level of predictability and certainty. As global merger activity has declined since 2001, the emerging consensus has not yet been severely tested.

Transnational Institution building, actors and social spaces: Conclusions

The events described reinforce the importance of distinguishing between transnational social spaces, transnational actors and transnational institutions. Transnational social spaces are increasing in importance as multinationals grow and develop. This is generating a broad range of problems for national and transnational institutions. The influential participants in the formation of transnational governance are only partially transnational themselves. Many key actors are nationally based and seek to influence the transnational institutions on the basis of their national interest (cf. also Botzem and Quack; Engels; McNichol this volume). This leads to increased conflict around transnational institutions and particularly around the degree to which they become reflective of a particular dominant national context.

From a theoretical point of view, this approach suggests the need to go beyond the simple dichotomy between transnational and national. The national and the transnational clearly co-exist but what is interesting is how they interact and co-evolve. Whilst our social spaces are

becoming more transnational, our capacities to resolve the problems emerging from this do not seem to be keeping pace. Many powerful actors still follow their national patterns and this leads them to interact with emergent transnational institutions in ways that exacerbate difference and conflict.

The example of competition law reveals the significance of US law firms with limited capacities for transnational action. Individual actors within the firms tended to retain strong ties to their local labor market and their local professional knowledge base. These organizations basically work as “national firms with international operations”. They are first and foremost American, with practices, processes and powers rooted in the dominant US conception of how competition law should work. By contrast, the EU is a social space with a variety of different traditions in competition law. Over the last two decades, these traditions have been placed into a setting where the necessity of resolving their differences has become essential. The outcome of these processes is the emergence of a transnational (EU) based view of competition law, distinct from national traditions and embedded in practices, processes and networks spanning different European contexts. At the same time, however, the EU is also faced with strong external pressure to take on a particularly powerful (American-based) model of competition law. The result is a complex process of uncertain institution building in which national actors are highly significant and “transnational actors” limited in their powers and role.

This framework provides the possibility of moving towards an understanding of a diverse range of areas of transnational institution building in the economic sphere. An interesting comparison would certainly be with the dominance of the Big Four accounting firms and the gradual establishment of two dominant standards for financial reporting. It is relatively clear

in this case that the firms themselves were both beneficiaries and proponents of standardization, thus facilitating their presence across the world. What is less clear is how far the model of standardization was based on emergent transnational processes or on the imposed dominance of US practices. It is also not clear how far these firms have developed transnational capabilities and can therefore be considered transnational actors or whether on the other hand they are basically federations of national partnerships (Morgan and Quack 2005).

In conclusion, an empirical and theoretically informed account of the emergence of transnational institutions needs to be sufficiently complex to capture the uncertainties and problems of these developments. By distinguishing between transnational social spaces, transnational social actors and transnational social institutions, it is possible to unpack and understand the various rates of change and conflict around particular transnational institutions. Without considering these various elements, we may over-estimate the extent of change and the degree of emergence of a transnational sphere.

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Centre for the Study of Globalisation and Regionalisation

University of Warwick
Coventry CV4 7AL, UK

Tel: +44 (0)24 7657 2533
Fax: +44 (0)24 7657 2548
Email: csg@warwick.ac.uk
Web address: <http://www.csg.org>