Florida Journal of International Law

Volume 14 | Issue 3 Article 2

March 2002

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GLOBALIZATION OF MERGER CONTROL: A LOOK AT BILATERAL COOPERATION THROUGH *THE GE/HONEYWELL CASE*

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I. INTRODUCTION

On July 3, 2001, the European Commission (Commission) prohibited the General Electric Co.'s (GE) proposed forty-two billion dollar acquisition of Honeywell Inc.[1] The Commission asserted that the merger would have severely reduced competition in the aerospace industry by combining the strong position of GE in aircraft engine markets with the similarly strong position of Honeywell in avionics and non-avionics systems.[2] This was the fifteenth time the Commission had blocked a

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1. Commission Decision of July 3, 2001, Declaring Concentration to be Incompatible with the Common Market and the EEA Agreement, Case No. COMP/M.2220 — General Electric/Honeywell, 2001 O.J. (C 1746) [hereinafter *GE/Honeywell Decision*]. Following the blocking of the transaction, both undertakings launched actions against the Commission before the European Court of First Instance requesting the annulment of the decision of the Commission. At the date of this writing both actions are still pending. *See* Case T-209/01, 2001 O.J. (C 331) 39 (Honeywell); Case T-210/01, 2001 O.J. (C 331) 40 (GE).

2. *See GE/Honeywell Decision*, *supra* note 1, ¶ 567. The Commission concluded that the remedies proposed by GE were insufficient to resolve the competition concerns resulting from the proposed acquisition of Honeywell. *Id.* ¶ 566; *see also* E.U. Institutions Press Releases, The

merger since September 1990, when the European Merger Regulation took effect.[3] The *GE/Honeywell* decision adds to a string of high profile decisions taken by the Commission concerning multinational mergers. Decisions such as *Boeing/McDonnell Douglas*,[4] together with the blocking of the *MCI WorldCom/Sprint* merger,[5] the conditional approval of the *AOL/Time Warner* merger,[6] and the abandoned *EMI/Time Warner*

Commission Prohibits GE's Acquisition of Honeywell, DN: IP/01/939, July 3, 2001 [hereinafter Commission Prohibits GE's Acquisition of Honeywell]; E.U. Institutions Press Releases, Statement on General Electric/Honeywell Merger, DN: IP/01/842, June 14, 2001.

3. Council Regulation 4064/89 on the Control of Concentrations between Undertakings, art. 25(1) 1990 O.J. (L 257) 13 (EEC) [hereinafter European Merger Regulation].

4. Commission Decision 97/816 of July 30, 1997, Declaring a Concentration Compatible with the Common Market and the Functioning of the EEA Agreement, Case No. IV/M.877 — Boeing/McDonnell Douglas, 1997 O.J. (L 336) 16.

5. On February 21, 2000, the Commission announced an investigation into a proposed merger between the merged entity MCI WorldCom and Sprint, two American telecommunications firms, which if completed would have created a firm worth $180 billion. *See* E.U. Institutions Press Releases, Commission Opens Full Investigation into the MCI WorldCom/Sprint Merger, DN: IP/00/174, Feb. 21, 2000 [hereinafter Commission Opens Full Investigation]. On June 28, 2000, the Commission decided to prohibit the merger between the firms, as it would have resulted in the creation of a dominant position in the market for top-level, universal internet connectivity. Commission Decision of June 28, 2000, Declaring a Concentration Incompatible with the Common Market, Case No. COMP/M.1741 — MCI WorldCom/Sprint, *available at* http://europa.eu.int/comm/competition/mergers/cases/decisions/m1741_en.pdf (last visited Apr. 15, 2002). This was the thirteenth time the Commission had blocked a merger since 1990. E.U. Institutions Press Releases, Commission Prohibits Merger Between MCI WorldCom and Sprint, DN: IP/00/668, June 28, 2000. At the same time, the U.S. Justice Department also blocked the deal due to its potential effect on competition. *See also Super Mario*, ECONOMIST, Feb. 26, 2000.

6. Commission Decision of Oct. 11, 2000, Declaring a Concentration to be Compatible with the Common Market and the EEA Agreement, Case No. COMP/M.1845 — AOL/Time Warner, *available at* http://europa.eu.int/comm/competition/mergers/cases/decisions/m1845_en.pdf (last visited Apr. 15, 2002); *see also* E.U. Institutions Press Releases, Commission Opens Full Investigation into AOL/Time Warner Merger, DN: IP/00/634, June 19, 2000 (containing an account of the Commission's investigation of the merger); E.U. Institutions Press Releases, Commission Gives Conditional Approval to AOL/Time Warner Merger, DN: IP/00/1145, Oct. 11, 2000. One of the Commission's primary concerns was AOL's position in the emerging market of on-line, internet music delivery. Mario Monti, European Competition Policy for the 21st Century, Speech at the Fordham Corporate Law Institute's Twenty-Eighth Annual Conference on International Antitrust Law and Policy (Oct. 20, 2000), *in* E.U. Institutions Press Releases, DN: SPEECH/00/389, Oct. 20, 2000. For the U.S. perspective, *see generally* Press Release, Federal Trade Commission, Commission Statement on Time Warner/AOL Merger (Nov. 9, 2000), *available at* http://www.ftc.gov/opa/2000/11/timewarneraol.htm (last visited Apr. 15, 2002); Press Release, Federal Trade Commission, FTC Approves AOL/Time Warner Merger with Conditions (Dec. 14, 2000), *available at* http://www.ftc.gov/opa/2000/12/aol.htm (last visited Apr. 15, 2002); Alec Klein, *U.S. Agency Chief Plays Key Role in AOL Deal*, INT'L HERALD TRIB., Nov. 30, 2000,

merger,[7] had already focused attention on and occasionally sparked criticism of the Commission's evaluations of cross-border mergers.[8]

Well aware of possibly building tension between U.S. and E.U. authorities due to the Commission's blockage of the *GE/Honeywell* merger, Commissioner Mario Monti was quick to point out that:

> The European Commission and the U.S. Department of Justice have worked in close co-operation during this investigation. It is unfortunate that, in the end, we reached different conclusions, but each authority has to perform its own assessment. . . . This does not mean that one authority is doing a technical analysis and the other pursuing a political goal, as some might pretend, but simply that we might interpret facts differently and forecast the effects of an operation in different ways.[9]

Commissioner Monti made a major effort to conciliate the undertakings and officials in the United States by describing the transaction as a rare case of well-meaning competition authorities coming to different opinions about the impact of a deal on the global market.[10]

The importance of the *GE/Honeywell* decision lies in the fact that the Commission's decision contrasted the U.S. Department of Justice's (DOJ) conclusion, which had cleared the merger earlier that year, requiring only minimal disposals. The DOJ's Antitrust Division determined that the merger, as modified by the remedies insisted upon, would have been pro-competitive and beneficial to consumers.[11] The Commission decision

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at 1; Stephen Labaton, *AOL Deal Clears its Major U.S. Obstacle*, INT'L HERALD TRIB., Dec. 15, 2000, at 1.

7. *See generally* E.U. Institutions Press Releases, Commission Opens Full Investigation into Time Warner/EMI Merger, DN: IP/00/617, June 14, 2000; *Europe's Merger Morass*, ECONOMIST, Sept. 23, 2000; *Time Warner Drops EMI Takeover*, INT'L HERALD TRIB., Oct. 6, 2000, at 13.

8. For the U.S. media's reaction to the block of the GE/Honeywell transaction, see Steven Pearlstein, *E.U. Rejection Shows Divergence of the World's Rules*, WASH. POST, July 4, 2001, at E1; Peter Pae, *E.U. Rejects GE Acquisition of Honeywell*, L.A. TIMES, July 4, 2001, at pt. 3, p. 1; Lester C. Thurow, *Irreconcilable Differences*, BOSTON GLOBE, July 10, 2001, at D4; R.C. Longworth, *GE-Honeywell's Roadblocks Rare: An Exception Amid a Flood of Global Mergers*, CHI. TRIB., July 5, 2001, at 1, Zone N; *U.S. Chorus Gets Louder Over Failed GE Deal: Top Politician Slams E.U. for Blocking Honeywell Sale*, NAT'L POST, July 12, 2001, at C10.

9. Commission Prohibits GE's Acquisition of Honeywell, *supra* note 2.

10. Daniel Dombey & Andrew Hill, *Monti Moves to Heal GE Rift*, FIN. TIMES (London), July 4, 2001, at 27; *Engine Failure*, ECONOMIST, July 7, 2001.

11. *See* Press Release, Department of Justice, Justice Department Requires Divestitures in Merger Between General Electric and Honeywell (May 2, 2000), *available at* http://www.usdoj.gov/atr/public/press_releases/2001/8140.htm (last visited Apr. 15, 2002). The DOJ's agreement

which followed was the first case of the European Union blocking a merger already approved by U.S. authorities.

The conflicting decisions rendered by two closely co-operating partners in the *GE/Honeywell* case highlight the risk and uncertainty undertakings and regulating authorities must face when operating in the global market. Specifically, the rulings question whether the current procedures and cooperative frameworks effectively provide foreseeable outcomes for undertakings operating in the United States and the European Union to meet the necessities of the global market.

This Article addresses several of the sounding parameters of multinational merger control. Initially, it reviews the global progression of merger control regimes and highlights the way in which the multitude of jurisdictions affect undertakings. Afterwards, the Article describes the domestic jurisdiction's perspective in facing the global market and examines the different incentives that may lead it to cooperate with other competition jurisdictions. Finally, the Article evaluates the U.S. and E.U. approaches towards co-operation, while analyzing their ability to address global happenings.

II. Globalization of Merger Control

The effects of globalization have made it clear that economic and competition policy problems can transcend national boundaries. For the past forty years, globalization has represented "the economic integration achieved by the activities of multinational enterprises."[12] These enterprises are no longer strictly limited by geographical and physical boundaries. Today, their economic decisions reflect a global perception.

Although globalization processes have strongly influenced national economies and brought them closer to interdependence, the impact of globalization has not caused centralization or homogenization in all areas. In contrast to the alleged increase of homogeneity in trade-related aspects, other fields of national consideration, such as domestic politics, industrial policy, and legal frameworks vary in their characteristics, culture, and

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with GE and Honeywell resolved its concerns about the merger, as the parties were required to divest the helicopter engine business and authorize new service providers for engine and auxiliary power units. *See id.*

12. Alan Rugman, *The Illusion of the Global Company*, FIN. TIMES (London), Jan. 8, 2001, at 2.

scopes. Thus, the deepening structural interdependence of the world economy did not necessarily lead to a fall in sovereignty.[13]

In areas dominated by domestic considerations, states may implement policies that are liable to contradict global aims. This misfit between domestic interests and the global perspective may often generate economic inefficiencies. In particular, this is the case in the highly sensitive area of international merger control, where domestic interests may be hidden within the appraisal process, thereby creating a duality capable of hindering optimal international antitrust regulation.

Today, more than eighty jurisdictions apply a range of antitrust legislation to various transactions. Legislation in forty of these jurisdictions was created within the last decade. Approximately sixty jurisdictions possess specific rules for the control of mergers and acquisitions, and almost fifty have ex-ante notification mechanisms requiring undertakings to notify the proper authorities about their merger transactions in advance.[14] These jurisdictions increased the enforcement of competition laws throughout the world and contributed to the maintenance of competitive markets and the protection of consumer interests. On the other hand, as the number of jurisdictions holding antitrust regimes has dramatically increased in the last decade, so too has the intricacy of evaluating mergers. The number of existing antitrust jurisdictions demonstrates the complexity of approving cross-border transactions and the possibility of jurisdictional overlap in concentration assessments. Potentially, this could lead to conflicting decisions, increases in legal confusion, enlarged costs for undertakings, and reductions in legal and economic certainty.

III. EFFECTS ON UNDERTAKINGS

On the whole, the multitude of antitrust jurisdictions presently active in the global arena has enhanced competition and economic growth, and ensured a wide choice of goods and services to consumers. Nevertheless, as a byproduct of the numerous sources of national legal regimes, internationally active entities are now exposed to the effects of overlapping jurisdictions.

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13. The increase in trade homogeneity does not clearly illustrate a true globalized process. *See* ALAN RUGMAN, THE END OF GLOBALIZATION 2-4 (2000), for a discussion on the myth of globalization and the existence of regional trade blocks.

14. 2000 INT'L COMPETITION POL'Y ADVISORY COMM. TO THE ATT'Y GEN. & ASSIST. ATT'Y GEN. FOR ANTITRUST, FINAL REPORT, annex 2-C, *available at* http://www.usdoj.gov/atr/icpac/2c.pdf (last visited Apr. 9, 2002) [hereinafter ICPAC].

As the number of jurisdictions reviewing single transactions increases, so does the complexity of those processes. This reduces legal and economic certainty, as more than one approval becomes necessary to properly clear a deal. The existence of different approaches to the same transaction also heightens the risks of imposing inconsistent limitations on the undertakings seeking approval and may undermine their confidence in the process. In the case of *GE/Honeywell,* the assessment of one transaction by two jurisdictions generated uncertainty and lead to conflicting decisions. However, this was not the first time merging parties faced contrasting rulings and remedies from different jurisdictions. Examples may be found in several cases. In the *Gencor/Lonrho* decision,[15] the Commission asserted its jurisdiction to block a proposed merger between the South African platinum interests of Lonrho, a British firm, and South Africa's Gencor because it would have created a duopoly in the platinum and rhodium markets.[16] The South African Competition Board had no objections to the transaction, favoring the consolidation on the grounds that two equally matched competitors were preferable to a single dominant firm, a situation that already existed in the South African market.[17] After first relying upon the South African determination, the undertakings were then forced by the European Union to cancel the transaction.[18]

In a different case in 1997, the U.S. Federal Trade Commission (FTC) authorized the *Boeing/McDonnell Douglas*[19] merger without any conditions, concluding that Boeing's acquisition would not "substantially lessen competition." Appraising the same transaction, the Commission voiced "serious doubts" about the proposed merger's compatibility with

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15. Commission Decision of Apr. 24, 1996, Declaring a Concentration to be Incompatible with the Common Market and Functioning of the EEA Agreement, Case No. IV/M.619 — Gencor/ Lonrho, 1997 O.J. (L 011) 30; *see also* Case T-102/96, Gencor Ltd. v. Comm'n, 1999 E.C.R. II-753.

16. Commission Decision of Apr. 24, 1996 — Gencor/Lonrho, 1997 O.J. (L 011) 30, ¶¶ 206, 210. The market in question was primarily that of platinum mined in South Africa, although the geographic market for platinum sales was global. *Id.* ¶ 16.

17. Case T-102/96, Gencor Ltd. v. Comm'n, 1999 E.C.R. II-753, ¶¶ 8, 19. The two merging companies still had to compete with a third South African mining company that was active in the platinum market. Commission Decision of Apr. 24, 1996 — Gencor/Lonhro, 1997 O.J. (L 011) 30, ¶ 74.

18. Case T-102/96, Gencor Ltd. v. Comm'n, 1999 E.C.R. II-753, ¶¶ 328-29.

19. Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger, Roscoe B. Starek III, and Christine A. Varney, in the Matter of Boeing Co./McDonnell Douglas Corp., July 1, 1997, 1997 WL 359761 (F.T.C.) (File No. 971-0051), *available at* http://www.fas.org/MHonArc/MSWG_archive/msg00097.html (last visited Apr. 11, 2002).

the common market.[20] Following a high-profile investigation that attracted U.S. criticism, the Commission ultimately required the undertakings to modify their agreement in order to eliminate possible harm to competition.[21] However, the intricacy of operating in the global market may best be depicted by the *Exxon/Mobil* decision. Although the two giant petroleum firms were ultimately allowed to merge, they were forced to accept the potential that they would have to notify approximately forty jurisdictions and be subject to their own merger review requirements.[22]

Evidently, the global arena presents an unpredictable and complex environment for merging entities, demanding that they be subject to the laws of multiple jurisdictions. It is not uncommon for a single transaction to trigger notification processes in several jurisdictions. This external application of separate domestic competition rules to one transaction may

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20. Commission Decision 97/816 of July 30, 1997, Declaring a Concentration Compatible with the Common Market and the Functioning of the EEA Agreement, Case No. IV/M.877 — Boeing/McDonnell Douglas, 1997 O.J. (L 336) 16, ¶ 2. The European Commission's concern was that the merger would drastically reduce competition in the global civil aviation market, as the merger would reduce the number of large commercial aircraft manufacturers from three to two. *See id.* ¶ 9. As a result, Airbus, the remaining commercial aircraft manufacturer based in Europe and jointly owned by governmental and private firms, would be left facing a single dominant competitor. *See id.* ¶¶ 106-08.

21. *See id.* ¶¶ 113-24. Before the Commission withdrew its objections, the *Boeing/McDonnell Douglas* decision raised a debate regarding the Commission's authority to assess and prevent the merger. Amy Ann Karpel, Comment, *The European Commission's Decision on the Boeing-McDonnell Douglas Merger and the Need for Greater U.S.-E.U. Cooperation in the Merger Field,* 47 AM. U. INT'L L. REV. 1029, 1031-32, 1031 n.12 & 1032 n.13 (1998). Some critics suggested that the concerns of the Commission were based purely on its desire to protect Airbus, rejecting the Commission's claim that its investigation was conducted strictly on the principles of E.U. law. *Id.* at 1031-32. The tension between the U.S. and the E.U. authorities increased, leading to the Clinton administration's announcement that the United States might take the matter to the World Trade Organization (WTO) if the European Union carried out its threat to declare the merger illegal. Brian Coleman, *Clinton Hints U.S. May Retaliate if E.U. Tries to Block Boeing-McDonnell Deal,* WALL ST. J., July 18, 1997, at A2. *See generally* Andre Fiebig, *The Extraterritorial Application of the European Merger Control Regulation,* 5 COLUM. J. EUR. L. 79 (1998/99); Crystal Jones-Starr, Comment, *Community-Wide v. Worldwide Competition: Why European Enforcement Agencies are Able to Force American Companies to Modify Their Merger Proposals and Limit Their Innovations,* 17 WIS. INT'L L.J. 145 (1999); *Brussels v. Boeing,* ECONOMIST, July 19, 1997, at 53; *Distrustful,* ECONOMIST, July 26, 1997, at 60; MARK FURSE, COMPETITION LAW OF THE UK & EC 306 (2d ed. 2000).

22. *See generally* Press Release, Federal Trade Commission, Exxon/Mobil Agree to Largest FTC Divestiture Ever in Order to Settle FTC Antitrust Charges: Settlement Requires Extensive Restructuring and Prevents Merger of Significant Competing U.S. Assets (Nov. 30, 1999), *available at* http://www.ftc.gov/opa/1999/9911/exxonmobil.htm (last visited Apr. 15, 2002) (describing conditions placed on the approval of the merger between the two firms in the United States).

give rise to legal conflicts, incoherence between rulings of foreign agencies or courts, as well as political contradictions and enforcement difficulties.[23] Undertakings might be required to invest great lengths of time and resources in the notification process and in the identification of the jurisdictions they are subject to. Moreover, suspensions of concentrations, forced by the need to comply with rules in many jurisdictions, also carry various collateral costs.[24] Undertakings are often fined by certain jurisdictions when they fail to notify those jurisdictions' authorities about the transaction prior to its conclusion. Finally, the existence of distinct, domestic, economic and political considerations and different geographical markets make it harder for undertakings to anticipate each appraisal procedure's results. Failure to predict the outcomes of these procedures may result in financial loss for the undertakings and a weakening of their competitive ability.[25]

IV. THE DOMESTIC JURISDICTION'S PERSPECTIVE

As competition becomes increasingly transnational, so may the restraints on it. Anticompetitive conduct occurring in a given territory could produce legal consequences not only within that territory, but also in other jurisdictions. State's attempts to regulate conduct, which they consider to be a direct concern, have led to the extension of the territorial

23. Mario Monti, Cooperation Between Competition Authorities — A Vision for the Future, Speech at the Japan Foundation Conference (June 23, 2000), *in* E.U. Institutions Press Releases, DN: SPEECH/00/234, June 23, 2000.

24. In the 2001 mid-year report of the Transatlantic Business Dialogue (TABD), a regular gathering of corporate leaders from both the United States and the European Union, Michael Treschow, Chief Executive Officer of Electrolux, Sweden, referred to the merger investigation procedures as "horrendous," saying that in many cases businesses are essentially frozen for a year or more awaiting antitrust decisions. Edward Alden, *Corporate Chiefs Call for Cheaper Antitrust Process*, FIN. TIMES (London), May 17, 2001, at 10. Other voices from the TABD asserted that delays and uncertainty resulting from antitrust investigations in the United States and the European Union have been "detrimental to value creation." *Id. See generally* TRANSATLANTIC BUS. DIALOGUE, 2001 MID YEAR REP. (May 15, 2001), *available at* http://www.tabd.com/recommendations/MYM01.pdf (last visited Apr. 15, 2002) (discussing cooperation between U.S. and E.U. firms).

25. *See Engine Failure*, *supra* note 10 (describing the error in judgment made by Jack Welch, GE's Chairman, who underestimated the risk that regulators might derail the transaction and the effect regulation would have on both undertakings); Kenneth N. Gilpin, *Honeywell Chief Quits After GE Failure*, INT'L HERALD TRIB., July 5, 2001, at 10 (describing the effect of such a blockage on Honeywell and its chairman and chief executive Michael Bonsignore).

principle of jurisdiction in some instances, so as to cover conduct abroad.[26] Given the nature of business activities in the last decade, states could not rely upon purely territorial jurisdiction when aiming to protect local consumers. In the field of competition law, the assertion of such long-arm jurisdiction allows states to control anticompetitive activities which may have been approved in the state where they occurred, but nevertheless affect competition abroad.

The United States was the first country to fully adopt an extraterritorial regime of antitrust policies. Cases such as the controversial *Aluminum Company of America*,[27] and the later *Hartford Fire*,[28] shaped the effects doctrine and paved the way for the principle of extraterritoriality.[29] Subsequently, the United States has occasionally reviewed and taken enforcement actions against foreign firm mergers, even when neither of the firms had production assets within the United States.[30]

Other states have also developed antitrust regimes granting them better control of commercial activities affecting their territory. Included in these regimes were similar principles of extraterritoriality.[31] Representing the European Union, the European Court of Justice refrained from directly adopting the effects doctrine into competition law. In the *Wood Pulp Cartel* decision[32] the Court defined the implementation of an agreement in the European Union as the leading criterion for establishing the extraterritorial jurisdiction of the Commission.[33] The execution of an agreement in the European Union would thus trigger the extraterritorial

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26. OPPENHEIM'S INTERNATIONAL LAW 459-60, 468-69 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

27. United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).

28. Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

29. *See also* Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 615 (9th Cir. 1976) (listing such relevant considerations, as: effect on foreign commerce of the United States; type and magnitude of violation; and international comity and fairness); Laker Airways Ltd. v. Sabena, 731 F.2d 909, 959 (D.C. Cir. 1984) (finding U.S. antitrust law applicable where it would further interests protected under domestic law).

30. ICPAC, *supra* note 14, ch. 2.

31. States which were able to successfully enforce their extraterritorial jurisdiction have gradually expanded their jurisdictional borders. Examples of extraterritoriality may be found in the obligation of pre-closing notification of mergers. In many jurisdictions, such a requirement is triggered by the mere existence of worldwide sales or assets, regardless of where the parties are located or carry out their business activities. *See id.* annex 2-A; *see also id.* annex 2-C, for statistical information on merger challenge rates and notification obligations in worldwide jurisdictions.

32. Joined Cases 89/85, 104/85, 114/85, 116-117/85, 125-129/85, Re Wood Pulp Cartel: A Ahlstrom Oy v. Comm'n, 1988 E.C.R. 5193.

33. *Id.* ¶¶ 16-17.

application of European competition laws.[34] The implementation requirements, coupled with the criteria delineated in the European Merger Regulation, also allowed the Commission to assert jurisdiction over the *GE/Honeywell* transaction.[35]

States tend to shape their domestic merger enforcement mechanisms to concentrate on protecting their local markets. Such mechanisms rarely consider their impact on foreign undertakings and global efficiency. This is possibly caused by distinct parameters for notifications, timetables, criteria for asserting jurisdiction over mergers, or different evaluation procedures. Furthermore, the assessment standards and the goals of competition policies may differ between individual authorities.[36] These differences exist at the expense of the foreign undertakings, which face uncertainty and confusion in the approval procedure.

In addition to all of these legitimate divergences, it is possible to identify aptitudes towards advancing non-competitive goals in the guise of cross-border merger evaluations. The possible use of antitrust policy as a governmental tool to achieve goals beyond maintaining competition may lead to a lack of clarity or consistency. The different interests promoted by separate national enforcement bodies vary. These interests might include several goals, such as creating a "national champion," protecting domestic industry, promoting the development of new local employment opportunities, or increasing domestic welfare.

When a merger crosses jurisdictions it permits each of the concerned authorities to advance local considerations and internalize many of the merger's benefits while ignoring the external costs laid on undertakings and consumers outside their jurisdictions.[37] Competition restraints often

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34. *Id.* In the case of *Gencor Ltd. v. Commission*, the European Court of First Instance applied the implementation criterion to the merger, ruling that "the criterion as to the implementation of an agreement is satisfied by mere sale within the Community." Case T-102/96, Gencor Ltd. v. Comm'n, 1999 E.C.R. II-753, ¶ 87.

35. European Merger Regulation, *supra* note 3, art. 1 (setting forth the requirements, under which the regulation applies to concentrations). The regulation-set thresholds rely on the "combined aggregate worldwide turnover of all undertakings concerned" and the "aggregate Community-wide turnover of each of at least two of the undertakings concerned." *Id.* art. 1(2). Based on these criteria, the European Merger Regulation applies to undertakings irrespective of their place of business or registration. This seems to suggest that the Commission has jurisdiction to examine a concentration even when the merging parties have no actual presence in the European Union.

36. For example, in the *GE/Honeywell* case, the conflicting decisions can be attributed to the difference between the European Union's goal of maintaining competition within the industry, and the U.S. antitrust legislation's focus on how the transaction affects consumers.

37. *See* David Synder, Note, *Mergers and Acquisitions in the European Community and the United States: A Movement Toward a Uniform Enforcement Body*, 29 LAW & POL'Y INT'L BUS. 115, 135-36 (1997).

transfer wealth from the consumers to the undertakings, despite reducing economic efficiency. When embedded in the international scene, such limitations frequently shift wealth from consumers in one country to corporations in another.[38] A given jurisdiction will strive to shield its local markets from a negative transfer of wealth, while the jurisdiction that receives the positive transfer of wealth caused by the anticompetitive behavior its local corporations will be reluctant to act against such behavior. Each of them, concentrating on their own economic realities, will justify their differences in their decisions.[39]

Returning to the *GE/Honeywell* case, it is clear that the distribution of anticompetitive effects may differ in the various countries involved. Additionally, as a consequence of their domestic, non-competition considerations, national antitrust authorities may conflict in their assessments of the proposed merger.

During the Commission's investigation of the *GE/Honeywell* case, Commissioner Monti rejected allegations that the Commission politicized the case, stating that "[t]his is a matter of law and economics, not politics."[40] The Commissioner also stated that "[t]he nationality of the companies and political considerations have played and will play no role in the examination of mergers, in this case as in all others."[41] Commissioner Monti's statement came as a reply to political pressure from the United States aimed at persuading the Commission to approve the

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38. David J. Gerber, *The U.S.–European Conflict Over the Globalization of Antitrust Law: A Legal Experience Perspective*, 34 NEW ENG. L. REV. 123, 125 (1999).

39. For instance, the more a country's economy is based on export, the more it may be able to ignore undesirable effects on competition by absorbing them elsewhere. Net exporters are more likely to consider the interests of their producers. This is clearly evident in countries which produce but do not consume. They will tend to favor the interests of their corporations and may under regulate, from a global perspective, commercial activities. Net importers, who are able to apply their laws to actions abroad, will tend to over regulate anticompetitive activity in comparison to the efficient global regulatory level. *See* Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501, 1504 (1998).

40. E.U. Institutions Press Releases, Commissioner Monti Dismisses Criticism of GE/Honeywell Merger Review and Rejects Politicization of the Case, DN: IP/01/855, June 18, 2001 [hereinafter Commissioner Monti Dismisses Criticism]. Earlier, Commissioner Monti dismissed accusations that political considerations were entwined in the European Merger Regulation, emphasizing that "[w]ithin the E.U.'s merger framework there is no scope for the European Commission to protect European companies from being acquired by U.S. companies or to promote the commercial aspirations of European companies." Deborah Hargreaves & Peter Spiegel, *Monti Rebuffs U.S. Attack on Merger Policy*, FIN. TIMES (London), Oct. 19, 2000, at 14.

41. Commissioner Monti Dismisses Criticism, *supra* note 40.

transaction.[42] Because the global arena lacks a supreme authority governing merger assessments and is immune from domestic concerns, it is difficult to determine if the conflicting decisions were actually results of differing legal analysis and contrasting economic realities, or whether the agencies' evaluations were influenced by non-competition factors entwined with domestic concerns.

Generally, one can expect two opposing possibilities when examining the international effect of the application of extraterritorial jurisdiction over mergers. First, domestic jurisdictions may use their extraterritorial powers to block a merger if they believe it will decrease their domestic welfare, even though the merger's enhancing effect would increase global welfare. Similarly, a domestic jurisdiction may also be motivated to promote local industrial policies in an attempt to boost its welfare relative to other countries. In this situation, the extraterritoriality of competition rules serves as the perfect non-diplomatic, undetected platform from which to advance local economic and industrial considerations under the mask of legal arguments.

In contrast, the second possibility suggests that the extraterritorial application of competition law may have balancing merits. This will be the case when a domestic jurisdiction approves a merger it has deemed beneficial for its domestic market, but which will severely effect competition beyond that jurisdiction's borders. In these circumstances, consumers located outside the domestic jurisdiction would be absorbing the harmful results. Here, the merger may increase local benefits, but it simultaneously decreases competition in other markets. Although the merger should have been forbidden from a global perspective, the domestic jurisdiction may tend to approve such a transaction. In situations such as this, extraterritorial applications of competition laws by other jurisdictions may block the merger, thus advancing global efficiency.[43]

V. INCENTIVES FOR COOPERATION

The international arena creates new challenges for antitrust authorities. As more competition problems transcend national boundaries, competition authorities are driven towards wider cooperation and more effective

42. Populist claims that the Commission was unjustly reaching into other countries' affairs and asserting authority over foreign transactions which took place under other jurisdictions were not new. In the *Boeing/McDonnell Douglas* case, the Commission was subject to criticism regarding its assessment of the merger. *See supra* text accompanying note 21.

43. Thus, claims that merger reviews are politically influenced may work in both ways, explaining the approval of the transaction by one authority, as well as its blockage by another.

enforcement of competition law. Yet, cross-border transactions involving international entities increase the complexity of concentrations' assessments and challenge the maintenance of competitive markets. Therefore, an alliance between the different competition authorities would facilitate enhanced enforcement of competition law and prevent influential multinational corporations from distorting trade and harming consumer welfare.

Overall, the diminishing efficiency of undertakings and domestic jurisdictions calls for nations to establish a cooperative mechanism. This is an interaction born not of a shared ideology, but of necessity.[44] Cooperation allows nations to reduce burdens on their local undertakings, and ensure the protection of their consumers. Furthermore, such a joint effort may prevent the overlap of jurisdictions, the possibility of contrasting decisions, and the potential deterioration of international economic relations, which can ultimately lead to trade wars.

The fact that separate, unilateral antitrust regimes advocate different policies influences the motivation of individual jurisdictions to negotiate a cooperative framework. The ability to further domestic considerations at the expense of global efficiency questions whether influential jurisdictions, when implementing extraterritoriality, will be keen to cooperating with weaker jurisdictions. One factor affecting the willingness of states to collaborate with each other is their import to export ratio. Other issues include nations' abilities to externalize their antitrust rules, and the existence of dissimilar restraints and costs placed on foreign undertakings.[45] The different value each jurisdiction attributes to free trade and competition concerns may also sway their eagerness to unite forces. Furthermore, the similarities and interactions between their legal systems influence the feasibility of concurrence amongst them as well. Finally, the needs for efficient enforcement policies and information accessibility also play a key role in persuading nations to work together.

The following model demonstrates incentives for nations to shift from unilateral extraterritoriality to global cooperation and the creation of an international, cooperative antitrust agreement. The model assumes that extraterritorial jurisdiction over corporate activities which take place fully or partially outside the assessing jurisdiction creates two distinct

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44. Robert Pitofsky, Competition Policy in a Global Economy — Today and Tomorrow, Remarks at the European Institute's Eighth Annual Transatlantic Seminar on Trade and Investment (Nov. 4, 1998), *available at* http://www.ftc.gov/speeches/pitofsky/global.htm (last visited Apr. 15, 2002).

45. This refers to the possibility of ignoring costs placed on external undertakings and the existence of negative, slip-over influences on the incentive to cooperate.

outcomes. The first is the domestic market's gain generated from the maintenance of competition. This value gain is symbolized by the letter [G]. The second outcome stems from the extraterritorial application of antitrust law governing undertakings located outside the assessing jurisdiction and their effects on local markets and general economic efficiency. These undertakings are subject to the additional costs of notifying several jurisdictions, the possibility of conflicting decisions, the harm of legal uncertainty, and the confusion of the multijurisdictional appraisal process. Where they are not generating greater competitiveness, these burdens reduce general economic efficiency. Such costs, which are fully or partially externalized beyond the domestic border, are symbolized by the letter [C].[46] An additional expense from the extraterritorial application of competition law is absorbed by the appraising jurisdiction itself and is attributed to the encumbrance of cross-border enforcement, the mounting tension between the different jurisdictions involved, and the possibility of retaliation or foreign jurisdictions blocking domestic transactions. This domestic cost caused by extraterritoriality is symbolized by the letter [D].

Unilateral extraterritorial applications of antitrust policy typically result in local gain [G], domestic cost [D], and externalized cost [C]. From a global perspective, the benefits of extraterritorial application should outweigh its inefficiencies in order for such assertions of jurisdiction to be warrantable. This is most evident in a case where the value of [G] = 0, as the merger was approved without concessions, even though the merging parties were required to notify several authorities, most of which were unaffected by the merger, creating a high value of [C]. Thus a jurisdiction's unlimited extraterritorial application may result in increases of [C] and [D], without necessarily adding value at the other end of the equation, [G].[47] Globally, an increase in extraterritorial application can be justified when [delta] [G] is higher than [delta] [C] + [D].

However, as mentioned above, in the extraterritorial application of antitrust law, the possibility of ignoring external costs and advancing domestic considerations may alter the balance from the optimum point and

46. The value is only partially externalized when the undertakings are not located completely outside the jurisdiction's borders. For example, when country A assesses a transaction between two corporations located in country B, the value is fully externalized. On the other hand, when country A assesses a transaction between two corporations, one located in country A and one in country B, the value is only partly externalized.

47. Note that the externalized cost [C] tends to be greater than the local cost [D], thus allowing for deeper extraterritoriality as long as [G] + [D] > [C]. However, the increase in the domestic cost [D] will eventually prevent unlimited extraterritoriality.

allow extraterritorial evaluations of transactions even when the cost for the involved undertakings exceeds the domestic market's possible benefits. The domestic jurisdiction, which concentrates on the local market, might disregard the externalized cost [C] and focus on the maintenance of local competition. Thus, the domestic jurisdiction may solely consider its internal costs and adopt an alternative equation in which as long as [delta] [G] is higher than the local cost [delta] [D], it will apply its extraterritorial jurisdiction. Consequently, as long as the local gain from extraterritoriality exceeds the local costs, including domestic inefficiencies from extraterritoriality, the domestic jurisdiction will pursue this policy, ignoring the externalized cost.

Another factor which may affect this equation is the significant expense of notification fees that several jurisdictions impose on undertakings planning to merge in what may be considered their jurisdictions. This could create an incentive for some competition authorities to extend their jurisdictions in order to catch more transactions under their jurisdictional umbrella. Although these remote mergers may not have any influence on domestic competition, domestic jurisdictions may assert their extraterritorial jurisdiction over them, benefitting from notification fees while disproportionately burdening undertakings, causing economic inefficiency, and thus increasing the cost [C]. In this case, the cost [C] would rise, even though there would be no [G] benefit to legitimize it from the global perspective.

One may question why a jurisdiction able to pass costs onto other nations' undertakings and shift general reductions in economic efficiency elsewhere would be motivated to participate in an international cooperation agreement to control concentrations. Some of the incentives to cooperate are mentioned above. These include, inter alia, the more effective enforcement of competition laws as well as the prevention of contrasting decisions and the overlapping of jurisdictions. A cooperation agreement would also aid countries aiming to eliminate or reduce burdens on their local undertakings due to foreign competition authorities' assertions of jurisdiction. Moreover, cooperation would allow states to shift from a unilateral level of extraterritoriality, to a dual level consisting of two or more jurisdictions. By interacting with other nations, a country could limit its extraterritorial application of competition law and remain relatively assured that neither its domestic interests, nor its expectation of additional gains from cooperation would be harmed.

As mentioned above, applying unilateral extraterritorial jurisdiction may urge a country to adopt a balance point of [delta] [G] > [delta] [D], thus ignoring the value [C], which is absorbed by other nations' undertakings, and adopting a sub-optimal standpoint.[48] Assuming that two countries have comparable import and export activities, as well as similar merger control regulations and fairly equal costs and gains from their unilateral extraterritoriality, both can be described by the same basic equation: [delta] [G] > [delta] [D].

Formerly [delta] [C] was disregarded by both jurisdictions due to their abilities to externalize its costs. Nevertheless, in a two state dimension, although both states are able to externalize the value [delta] [C], each state would absorb the other's externalized value [delta] $[C]^{\text{State II}}$. As a result, neither country would be able to fully benefit from the externalization of the cost [C], as it would be absorbed parallel to the other state's externalized costs. Thus, in a bilateral arena, both jurisdictions are exposed to additional costs:

State I: [delta] $[D]^{\text{State I}}$ + [delta] [C] $\underline{\text{Externalized by State II}}$

State II: [delta] $[D]^{\text{State II}}$ + [delta] [C] $\underline{\text{Externalized by State I}}$

In this situation, when the externalized value $[C]^{\text{State I}} = [C]^{\text{State II}}$, neither jurisdiction will benefit from their theoretical ability to ignore the externalized costs because each one would absorb the externalized costs of the other. As a result, both countries would be motivated to lower the value [C], and may consequently consider cooperation in order to eliminate as many added costs as possible. Interaction would also permit each jurisdiction to reduce its domestic cost [D]. In such a cooperative framework, added expenses from excessive scrutiny, unnecessary notifications, and the loss of legal certainty can be lessened to a minimum. Increased collaboration would provide easier enforcement, better access to information, and improved coordination between authorities. Furthermore, cooperation would also cut the risk of tension between authorities created by lack of communication and conflicting decisions. Both states would therefore agree to reciprocally eliminate as many of the costs laid on the other as possible.

The economic power of a country, its import/export ratio, and its legal system — including extraterritorial jurisdiction, prior notification, suspension, and fines — determine the volume of its externalized value [C]. Thus, countries with similar legal systems and volumes of trade may

48. From a global perspective, [delta] [G] should be higher than [delta] [C] + [D] to justify extraterritoriality.

share similar values. In turn, nations which absorb and externalize virtually equal [C] values may be potential candidates for cooperation agreements. At the same time, their potential domestic costs [D] would tend to be comparable. In this respect, relations between the United States and the European Union present a good example, as both maintain substantial import and export volumes, have similar legal principles, and theoretically, share similar values.[49] In contrast, a country with the ability to externalize the value [C] to another country's undertakings may have few incentives to cooperate with the latter country if the latter country lacks the ability to externalize equal values. In this situation, the strong externalizing country has little to gain from a cooperation agreement and may drift towards a unilateral model. Therefore, it can be generally assumed that when $[C]^{\text{Externalized by State I}} > [C]^{\text{Externalized by State II}}$, State (I) would lack a motive to cooperate, while State (II) would favor such interaction. State (II) will seek collaboration because that would allow the state to decrease the negative effects that were being externalized onto it. It should be emphasized that this example assumes the existence of a closed cooperation agreement not addressing additional, related topics. In a wider multi-topic agreement, the ability to allow transfers of value between the cooperating parties would exist. Thus, although one jurisdiction might not find it beneficial to cooperate on antitrust issues, the other may favor a wider cooperation framework including additional matters to increase its gains from the interaction.

Diversity in trade volumes, import/export ratios, and abilities to externalize jurisdictions may explain differences in the willingness to negotiate cooperation. Other factors, which affect the feasibility of agreement, tend to be highly unpredictable. These include political and

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49. The two jurisdictions share comparable legal systems, extraterritorial applications of their antitrust laws, high volumes of trade, similarities in their export/import ratios, and extensive economic links. These factors make cooperation a mutual goal, beneficial for both jurisdictions. For instance, in 1999, the European Union was the world's leading exporter of merchandise with a world-share of 18.8%, while the United States was second, holding a world-share of 16.4%; the United States was the world's largest importer of merchandise with a world-share of 23.6%, followed by the European Union with a world-share of 18.8%. *See* World Trade Organization, *World Trade in 1999 — Overview*, Tbl. 1.6, *available at* http://www.wto.org. (last visited July 24, 2002). In 1999, the United States exported $152 billion of merchandise to the European Union (21.9% of all U.S. exports for that year) and imported $201.1 billion of merchandise from the European Union (19% of all the U.S. imports for that year). *See id.* Tbl. III.15. Other major trading partners with the United States in 1999 were Canada (23.7% of all U.S. exports and 19% of its imports), Mexico (12.6% and 12.7%, respectively), Japan (8.3% and 10.5%, respectively), Korea, and China (with smaller percentages). *See id.* The European Union's major trading partners in 1999 were the United States, Japan, China, Switzerland, and Norway (excluding E.U. member states). *See id.*

industrial parameters, as well as interest groups' and bureaucrats' individual aims and fears. Domestic politics, economic considerations, employment opportunities, political strength, and stability are only several of the additional issues that influence the incentives for cooperation and may sometimes taint states' willingness to negotiate. In addition, unless regularly affected by the extraterritoriality of other nations, some nations may be suspicious of the true benefits obtained from cooperation.

From a different perspective, the benefits of cooperation may also bring nations with strong extraterritoriality to negotiate with weaker partners, if the stronger nations require such interaction because of technical constraints, potential political gains, or the desire for control. The fact that extraterritoriality cannot efficiently control remote activities on a daily basis may weaken these powerful nations' position in comparison to the model, consequently moving them towards cooperation. Specifically, this may be the case when powerful nations use negotiations to influence weaker nations' markets and increase their dependence, or when stronger nations are forced to rely on other nations' cooperation in order to effectively enforce their competition laws.

The theoretical model, and its fluctuation due to the different legal systems and trade patterns described above, permits key observations of the approaches that nations take towards interaction and the feasibility of cooperation or harmonization between those different jurisdictions. First, the existence of extraterritorial jurisdiction plays a significant role in the ability and willingness of a state to cooperate with other nations and protect its local market.

Second, countries with similar economic strengths, equal trade volumes, comparable legal systems, and reciprocal trading, will share incentives for cooperation. A powerful jurisdiction will theoretically refrain from interacting with weaker jurisdictions, as such collaboration would revoke the benefits otherwise obtained from unilateral extraterritoriality and require the investment of resources in a seldom-used mechanism. These powerful jurisdictions may view such cooperation as a waste of resources, particularly when competition related agreements would only necessitate cooperation in one or two cases a year. However, if such an alliance were to allow the stronger nation to pursue other objectives, such as political gain, that nation might cooperate nevertheless.

Third, a weaker jurisdiction unable to apply its laws extraterritorially would theoretically have several incentives to cooperation with its strong trading partners. One primary motive for a weaker jurisdiction to enter a cooperation agreement would be the ability to reduce the burden of inefficiency caused by other nations' excessive extraterritorialities.

Finally, the model may explain the difficulty in creating a multinational forum for merger control. Such a forum would not allow jurisdictions to retain benefits otherwise achieved through carefully constructed bilateral relations. This may increase costs for stronger jurisdictions, as they would be required to invest resources into cooperative efforts with nations that they would not normally interact with. Furthermore, the stronger jurisdictions would not be able to continue unilaterally applying their competition laws upon other jurisdictions.

VI. THE U.S. AND E.U. APPROACHES TOWARDS CROSS-BORDER COOPERATION

A brief review of U.S. and E.U. approaches towards cooperation and harmonization may be useful before examining the cooperation agreements between them.

The European Union has traditionally taken a harmonization-oriented approach towards cross-border competition. This played an important role in establishing the European Common Market and was used to prevent the creation of private economic barriers. Historically, the European Union has pushed for the harmonization of competition law beyond its Member States. The roots of its current approach towards global cooperation in the field of competition law may be traced back to the "wise man" group.[50] Nominated by Commissioner Karel Van Miert, the group was given a mandate to suggest possible means for strengthening international rules and cooperation.[51] Based on the "wise man" group's report, the European Union adopted its current "twin-pack approach."[52] On one hand, the

50. *See generally* Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules: Report of the Group of Experts, COM(95)0359 — C4-0352/95, July 3, 1995.

51. According to the E.U. perspective, international competition rules should be based on principles of non-discrimination and transparency and should relate to the areas of merger control, cartels, and abuses of dominant positions. Due to the complementary relationship between trade and competition policy, the WTO has been identified as the most appropriate forum to host these efforts. The advantages of the WTO include its broad membership and its ability to enforce binding rules upon its member states. *See generally* European Commission Press Release, Commission Proposes Building World Competition Instrument, DN: IP(96)523 (June 18, 1996); Communication Submitted by Sir Leon Brittan & Karel Van Miert: Towards an International Framework of Competition Rules, COM(96)284 final; European Parliament, Resolution on the XXVth Report by the Commission on Competition Policy - 1995 (COM(96)0126 — C4-0240/96), 1996 O.J. (C 362) 0135.

52. Monti, *supra* note 23.

European Union leans towards intensifying bilateral cooperation between competition agencies. The European Union has therefore engaged in both cooperation agreements, and when those were found insufficient, limited extraterritorial enforcement of its competition laws. On the other hand, realizing that bilateral agreements are not vehicles for conflict resolution, the Commission advocated the creation of a multinational cooperation framework to ensure convergence and coordination between the vast number of competition enforcement systems around the world.[53]

The U.S. approach differs from the E.U. perspective, viewing attempts to establish a multinational forum for competition matters with skepticism.[54] The United States regards the current bilateral framework as extremely important and considers the extensive harmonization of competition laws and the implementation of an international antitrust code premature, unnecessary, and unrealistic in the short term.[55] The current U.S. tendency towards bilateral cooperation replaces its former approach, which pursued a unilateral competition regime. Initially, the United States embarked on a fifty-year strategy premised mainly on the extraterritorial application of its antitrust laws.[56] Following this, and due to the limits of aggressive unilateral enforcement, the United States advocated a complementary system of international interaction in the enforcement of national antitrust laws.[57] Today, the U.S. approach includes the encouragement of vigorous antitrust law enforcement on domestic unilateral bases, the deepening of bilateral agreements, and the creation of next generation agreements which would allow greater information exchange between competition agencies.[58] There are also indications that the United States is willing to take a more positive and active stance towards multinational cooperation. In a 2000 report, the International Competition Policy Advisory Committee (ICPAC) highlighted the significance of establishing greater cooperation in competition policy and

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53. Monti, *supra* note 6.

54. *See, e.g.*, Pitofsky, *supra* note 44.

55. *See generally* Diane P. Wood, *Is Cooperation Possible?*, 34 NEW ENG. L. REV. 104 (1999); Diane P. Wood, *The Internalization of Antitrust Law: Options for the Future*, 44 DEPAUL L. REV. 1289 (1995); Diane P. Wood, *A Cooperative Framework for National Regulators*, 72 CHI.-KENT L. REV. 521 (1996).

56. *See generally* William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101 (1998).

57. *See* Spencer W. Waller, *National Laws and International Markets: Strategies of Cooperation and Harmonization in the Enforcement of Competition Law*, 18 CARDOZO L. REV. 1111, 1111 (1996).

58. *See* Spencer W. Waller, *The Internalization of Antitrust Enforcement*, B.U. L. REV., 343, 344 (1997).

merger control.[59] The ICPAC report called for the production of an independent, global competition initiative to foster dialogue directed towards a greater convergence of competition law and analysis.[60]

Between themselves, the United States and the European Union have engaged in two bilateral cooperative agreements: first, the 1991 Competition Agreement,[61] and second, the 1998 Positive Comity Agreement.[62] The 1991 U.S.-E.U. Competition Agreement has been one of the most frequently enforced treaties. This is due mainly to the level of commercial activity crossing the Atlantic Ocean. Based on the recognition that the economies of the world, particularly those of the United States and the European Union, were becoming increasingly interrelated, the United States and the European Union signed the 1991 Competition Agreement as a means to promote cooperation and coordination, and lessen the possibility of negative impacts from differences in their applications of their competition laws. At the time of signing, the parties were facing a growth in transatlantic transactions and wished to ensure a more effective and efficient application of their competition rules.[63] The signing of the Agreement also symbolized both parties' understanding of the interdependence of global economics and the need for mutual respect for each other's significant interests. The 1991 Competition Agreement thus set as its objective the promotion of a better coordination of competition policy and actions.[64] The 1998 Positive Comity Agreement reinforced the 1991 Competition Agreement. However, mergers were not within the scope of the 1998 Agreement, since U.S. and E.U. merger legislation,

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59. ICPAC, *supra* note 14, ch. 1.

60. This initiative at the multinational level reflects a U.S. shift from focusing solely on bilateral relations to a wider perspective. Such a move is aimed to increase convergence, but it is not a U.S. push for a global harmonized framework.

61. Agreement Between the United States and the European Communities on the Application of Their Competitive Laws, Sept. 23, 1991, U.S.-E.C., 30 I.L.M. 1487 (1991).

62. Agreement Between the United States and the European Communities on the Application of Positive Comity Principles in the Enforcement of their Competition Laws, June 4, 1998, U.S.-E.C., 1998 U.S.T. LEXIS 72, 1998 O.J. (L 173) 28.

63. France questioned the validity of the 1991 Competition Agreement in the European Court of Justice (ECJ) on the basis of Article 228 of the E.C. Treaty. The ECJ voided the Agreement while taking the opinion that the Commission had exceeded its powers and that the European Council should have been the body to conclude the Agreement. Case 327/91, French Republic v. Comm'n, 1994 E.C.R. 3641. The Agreement was finally approved on behalf of the European Community on April 10, 1995 and was to apply with effect from September 23, 1991.

64. *See* Karel Van Miert, *Globalization of Competition: The Need for Global Governance*, *available at* http://europa.eu.int/comm/competition/speeches/text/sp1998_052_en.html (last visited Aug. 12, 2002).

including their strict timetables for merger review, did not permit deferrals or suspensions of action as envisaged by the Agreement.

Although the cooperation between the United States and the European Union does not avoid the possibility of conflicting views, as the parties retain independent analysis and decision making rights, both parties consider it positive. The Agreements have undoubtedly proven their worth as vehicles for sharing views on policy development and interaction on individual cases, and "contribute[d] to improving the effectiveness and efficiency of the parties' competition laws and reducing the risk of divergent decisions."[65] Both Agreements have also led to a much closer relationship between the U.S. and E.U. authorities and to a greater understanding of each other's competition policy.[66] Commissioner Monti referred to them as "notable success[es]," in his description of the daily contact between the competition agencies.[67] Moreover, he emphasized their contribution to lowering the risk of conflicting or inconsistent rulings by the agencies.[68]

U.S.-E.U. cooperation is relevant in the field of merger control as well. Today, virtually any sizeable transaction involving international businesses is likely to be subject to review in the United States and by the European Merger Regulation.[69] The 1991 Competition Agreement allows a close relationship between the Commission, the FTC, and the DOJ.[70] This communication between the jurisdictions substantially decreases the possibility of conflicting merger decisions and facilitates more efficient

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65. *Id.*

66. *See* Jean-Francois Pons, International Co-operation in Competition Matters — Where Are We Four Years After the Van Miert Report?, Speech before the European Commission (July 9, 1999), *available at* http://europa.eu.int/comm/competition/speeches/text/sp1999_015_en.html (last visited Aug. 12, 2002).

67. Monti, *supra* note 6.

68. *Id.*

69. *See* Charles S. Stark, Chief of Foreign Commerce Section, Antitrust Division of U.S. Department of Justice, *Improving Bilateral Antitrust Cooperation*, Speech at the Conference on Competition Policy in the Global Trading System: Perspectives from Japan, the United States and the European Union (June 23, 2000), *available at* http://www.usdoj.gov/atr/public/speeches/5075.pdf (last visited July 25, 2002).

70. This includes a close daily contact between case teams in the Commission, the FTC, and the DOJ, which is conducted to acquire knowledge of the substantive and procedural rules in each other's jurisdiction, substantial convergence in competition analysis, and joint movements towards best practices in both substantive and procedural matters. *See* Report from the Commission to the Council and the European Parliament on the Application of the Agreement Between the European Communities and the Government of the United States of America Regarding the Application of their Competition Laws, Jan. 1, 1999 — Dec. 31, 1999, COM (2000) 618 final [hereinafter E.C. Report of 1999].

concentration appraisals in most cases.[71] U.S.-E.U. merger cooperation has been characterized by a marked, progressive convergence in the agencies' thinking with regards to the definition of markets, the assessments of proposed operations' likely competitive effects on the relevant markets, and the appropriateness of remedies proposed by the parties to relieve the competition concerns identified by the authorities.[72]

The Commission has recently published the *Green Paper*, suggesting amendments to the European Merger Regulation.[73] The *Green Paper* further supports the process of convergence between the United States and European Union and may help intensify it. Among other issues, the *Green Paper* also evaluates the possibility of introducing greater flexibility to the definition of the triggering event which would require notification.[74] Furthermore, an amendment to the timetable for the settlement process and the stop-the-clock provisions is analyzed. As proposed, that amendment would allow undertakings to request additional time to negotiate commitments and modifications to the transaction.[75] Moreover, the *Green Paper* engages in a discussion on substantive tests for merger appraisals,

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71. Today, the depth of cooperation between the United States and European Union depends primarily on the merging parties' consent to waive confidentiality and permit the agencies to share information.

72. *See* E.C. Report of 1999, *supra* note 70.

73. *Green Paper* on the Review of Council Regulation (EEC) No. 4064/89, COM (2001) 745 final.

74. Such modification would allow undertakings to notify the Commission and the U.S. agencies of a transaction simultaneously. In order to achieve a similar flexibility, parties may presently submit an informal notification to the Commission parallel to a formal notification to the U.S. agencies. *Cf. id.* ¶ 184.

75. Currently, the Commission operates under a strict timetable to conclude its merger investigations. European Merger Regulation, *supra* note 3, art. 10; *see also supra* text accompanying note 3. Concerning the GE/Honeywell merger, the proposed modifications would have allowed GE more time to discuss modified commitments to solve the concerns raised by the Commission. During the case, GE proposed a number of commitments on June 14, 2001, which was the legal deadline for submission of remedies. The Commission considered these remedies insufficient to resolve the competition concerns it had identified. On June 28, 2001, beyond the deadline for submission of remedies, GE proposed a new set of remedies. This offer did not meet conditions set by the Commission's Notice on Remedies Acceptable under Council Regulation (EEC) No. 4064/89 and under Commission Regulation (Z-C) No. 447/98, 2001 O.J. (C 680) 3, 3-11. According to this Notice, the Commission could only accept modified commitments when they solved the competition concerns in a clear and straightforward manner without the need for a further market test. However, had more time been available to GE for submitting its commitments as proposed under the *Green Paper*, it may have been able to initially suggest modifications that would have been considered sufficient to resolve the competition concerns the Commission identified. *See generally* Dimitri Giotakos et al., *General Electric/Honeywell — An Insight Into the Commission's Investigation and Decision*, 3 COMPETITION POL'Y NEWSL. 5 (2001).

considering the merits of the "dominance test" as laid down in the European Merger Regulation and of the "significant lessening of competition test," used in other jurisdictions and the United States. These proposals and recommendations on both technical and substantive levels are likely to bring closer the merger procedures undertaken in the United States and the European Union.

Practical cooperation between the United States and the European Union is evident on a case-by-case basis, as the sharp increase in communications between the United States and the European Union during the last merger wave demonstrates.[76] In the Exxon/Mobile merger, informal contacts between the FTC and the Commission started soon after the announcement of the transaction, a few months before the formal notification occurred in May 1999. Following the notification and after obtaining waivers from the merging parties which allowed the exchange of confidential information between the authorities, the agencies closely cooperated in assessing much of the case's substance.[77] The MCI WorldCom/Sprint merger also serves as a good example because it created an unprecedented level of cooperation between Washington and Brussels.[78] And the AOL/Time Warner merger is another very recent illustration of effective cooperation between the U.S. and E.U. enforcement agencies.[79]

In light of the increase in large scale cross-border transactions, the United States and the European Union took steps to improve their cooperation. In October 1999, at the annual bilateral meeting between the Commission, the FTC, and the DOJ; a joint U.S.-E.U. Merger Working Group was established. The group's aim was to enhance transatlantic cooperation in the control of global mergers. The group was mandated to study the respective U.S. and E.U. approaches to identification and implementation of remedies and to post-merger remedy compliance monitoring. The group was also chartered to focus on the scope of further convergence of U.S. and E.U. analysis and methodology in merger cases, specifically concentrating on their treatment of oligopolies and collective dominance/coordination interactions.

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76. Report from the Commission to the Council and the European Parliament on the Application of the Agreements Between the European Communities and the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition Laws, Jan. 1, 2000 — Dec. 31, 2000, COM (2002) 45 final, §§ 1.2, 1.4.

77. E.C. Report of 1999, *supra* note 70.

78. *See* Commission Opens Full Investigation, *supra* note 5.

79. *See supra* note 6.

Addressing cooperation between the United States and the European Union in the field of merger control, then FTC Chairman Robert Pitofsky observed:

> It is hard to imagine how day-to-day cooperation and coordination between enforcement officials in Europe and the United States could be much improved. Within the bounds of confidentiality rules, we share, on a regular and continuing basis, views and information about particular transactions, coordinate the timing of our review process to the extent feasible, and almost always achieve consistent remedies.[80]

Referring to the *Boeing/McDonnell Douglas* case, which sparked much attention and criticism from both sides of the Atlantic, Chairman Pitofsky viewed it as "a little blip in a constant stream of cases."[81]

Should the conflicting *GE/Honeywell* decisions be viewed similarly? Commenting on the Commission's *GE/Honeywell* decision, Charles A. James, Assistant Attorney General for the U.S. DOJ Antitrust Division, issued a statement backing the DOJ decision, stating that clear and longstanding U.S. antitrust policy holds that antitrust laws protect competition, not competitors,[82] thus implying that the E.U. decision reflected a significant point of divergence. However, he concluded by emphasizing the close cooperative relations between the United States and the European Union. "In fact, there were extensive consultations in this matter throughout the entire process. This matter points to the continuing need for consultation to move toward greater policy convergence."[83]

When focusing on the similarities between the United States and the European Union, and their past record of cooperation and coordination, the *GE/Honeywell* decision may be viewed as a unique transaction which triggered a rare difference in competition analyses. The United States

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80. Robert Pitofsky, E.U. and U.S. Approaches to International Mergers — View from the U.S. Federal Trade Commission, Speech before the European Commission Merger Control Tenth Anniversary Conference, (2000), *available at* http://www.ftc.gov/speeches/pitofsky/pitintermergers.htm (last visited July 23, 2002).

81. *An Interview with Bob Pitofsky*, GLOBAL COMPETITION REV., Dec. 1997/Jan. 1998, at 26, 27.

82. Press Release, Department of Justice, Statement by Charles A. James, Assistant Attorney General on the E.U.'s Decision Regarding the GE/Honeywell Acquisition (July 3, 2001) [hereinafter Statement by Charles A. James], *available at* www.usdoj.gov/atrpublic/press_releases/2001/8510.htm (last visited July 23, 2002).

83. *Id.*; *see also* Peter Spiegel, *U.S. Calls for More Antitrust Agreement with Europe*, FIN. TIMES (London), Oct. 26, 2001, at 11.

considered short-term efficiencies and the expected positive effects on consumers.[84] In contrast, the Commission relied on the portfolio vertical foreclosure theory, and raised doubts about the transaction's positive effects. The Commission's main concern was that in the long-term, the post-merger price reductions would force competitors to exit the industry, eventually leading prices to rise above pre-merger levels.[85] Adding to the analytical difference may have been the fact that when the Commission reviewed the transaction, it took into consideration GE/Honeywell's U.S. competitors' arguments, which had not been heard in the same magnitude when the DOJ reviewed and approved the transaction earlier. Conflicts may have also stemmed from customers' oppositions to the merger, which could be aired in privacy and anonymity under E.U. regulations — in contrast to the United States' public proceedings, which may have deterred customers from openly opposing the transaction.[86] As each authority preformed its own assessment, the risk of dissenting views, although regrettable, could never be totally excluded.

As stated by Commissioner Monti, the existence of conflicting results when assessing the same transaction "does not mean that one authority is doing a technical analysis and the other pursuing a political goal, as some might pretend, but simply that we might interpret facts differently and forecast the effects of an operation in different ways."[87] Such different opinions have been very rare, but when they do occur, the two jurisdictions "must learn to manage at the technical level and avoid such decisions becoming a political dispute."[88]

Overall, bilateral cooperation cannot eliminate differences, nor can it dispel the possibility of conflicting decisions, as parties retaining their

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84. The United States based its decision on findings "confirmed by customers worldwide, that the combined firm could offer better products and services at more attractive prices than either firm could offer individually." Statement by Charles A. James, *supra* note 82. *See also* Press Release, Federal Trade Commission, FTC Chairman Muris Stresses Commitments to Cooperation with European Commission (Nov. 14, 2001), *available at* http://www.ftc.gov/opa/2001/11/euus.htm (last visited July 23, 2002); John R. Wilke, *U.S. Antitrust Chief Criticizes E.U. Decision to Reject Merger of GE and Honeywell*, WALL ST. J., July 5, 2001, at A3; *see generally* Helen Power, *Euro Sceptics*, LAW., July 23, 2001, at 23.

85. It is especially interesting to examine the Commission's decision while referring to the Organisation for Economic Co-Operation and Development's report on the portfolio effect, which stated the conditions under which the negative effects of a conglomerate merger would materialize. COMPETITION COMMITTEE REP., ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, DAFFE/COMP PORTFOLIO EFFECT IN CONGLOMERATE MERGERS 5 (2002).

86. Power, *supra* note 84, at 26.

87. Commission Prohibits GE's Acquisition of Honeywell, *supra* note 2.

88. *Avionics: E.U. Committee Backs Commission Over GE-Honeywell Decision*, Eur. Rep. (Eur. Info. Service) § 2604 (June 27, 2001).

independent appraisals are subject to different legal systems. Thus, the *GE/Honeywell* decision should be viewed, like the *Boeing/McDonnell Douglas* decision, as a split from an otherwise healthy cooperation. But, such diversions will become less common, as convergence in competition law and practice between the United States and the European Union continues to intensify.[89]

VII. CONCLUSION

The United States and the European Union have managed to develop a cooperative framework which decreases the possibility for divergences, as in the *GE/Honeywell* decision. Although there are jurisprudential differences between the U.S. and E.U. merger legislations, their close engagement in assessment and analysis of the same transactions and their impact on competition has led to similar conclusions in the majority of cases.[90] Thus, the reality of U.S.-E.U. merger cooperation provides relatively high certainty for undertakings and close interaction for authorities. However, it cannot eliminate the possibility of future conflicting decisions.

As seen in the model above, cooperation between different jurisdictions is not easily achieved. The U.S.-E.U. relations are some of the most successfully implemented interactions in the area of antitrust law. The importance of U.S.-E.U. collaboration increases in proportion to the amount of trade between the two countries. But as highlighted in the model, the incentives motivating the United States and the European Union are not always so attractive to other jurisdictions. Different trade patterns and legal systems may diminish the incentives to cooperate. Moreover, low levels of trade between two jurisdictions decrease the benefits of cooperation for both the countries and the undertakings. Cooperative efforts should therefore concentrate not on the creation of endless bilateral connections, but on strengthening valuable links between close trading partners. As to this issue and the E.U. approach towards bilateral agreements, Jean–Francois Pons, Deputy Director-General of the European Commission said:

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89. *See generally* Mario Monti, Antitrust in the U.S. and Europe: A History of Convergence, Conclusion, Speech before the General Council Roundtable of the American Bar Association (Nov. 14, 2001), *available at* http://www.eurunion.org/news/speeches/2001/011114mm.htm (last visited July 23, 2002).

90. *See* Stark, *supra* note 69.

> While we have considered going further and concluding further bilateral agreements, we are not inclined to do so where it would be a waste of scarce resources, particularly for countries with whom we would only co-operate concerning one or two cases a year. A priority in this regard is certainly Japan.[91]

Regarding the creation of bilateral agreements, it seems that more importance should be attributed to the quality of bilateral relations. Any agreement achieved between two close trading parties will do little to assist if it does not establish greater transparency and de-facto convergence. In this respect, the U.S.-E.U. cooperation has undoubtedly reached a relatively high level of concurrence, which manages, to a certain degree, to bridge their existing legal differences. When studying the global arena, it is evident that more should be done to increase unity in merger control. The existing bilateral agreements only partially reduce the inefficiencies stemming from the overlapping of jurisdictions.

Therefore, a multinational effort should supplement current merger control. However, as the model illustrates, a multi-participant agreement is not easily obtained because a multitude of participants would reduce each individual participant's ability to retain benefits from its select bilateral agreements. In addition, when a multinational framework includes a harmonization process, it limits domestic sovereignty, further decreasing its appeal to certain jurisdictions. Nevertheless, the benefits of such an agreement would justify the efforts. Multinational harmonization, even at a partial and technical level, would assist in eliminating inefficient outcomes such as multiple notifications, lengthy suspensions, overlapping of jurisdictions, and the possibility of conflicting decisions. Harmonization would also increase similarities between competition goals and evaluation methods. Furthermore, such a framework could eliminate the potential of industrial, political, or other domestic considerations interfering with the appraisal process. These efficiencies are still likely to be generated even if only a small circle of economically strong jurisdictions were to participate in the harmonization efforts. The creation of such an initially limited forum might reduce the stronger jurisdictions' reluctance to include weaker jurisdictions in the framework.[92] Although the creation of a global or regional, harmonized or partially harmonized system to control

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91. Pons, *supra* note 66.

92. For an explanation of the reasoning behind this reluctance, see conclusions of the model in Part V of this Article.

multinational mergers and acquisitions is difficult to achieve, it is a worthy goal, necessitated by the growth of international trade.[93]

93. This Article does not directly address the current frameworks for multinational cooperation and harmonization. For reading regarding such efforts, see Waller, *supra* note 58, at 1111; Friedl Weiss, *From World Trade Law to World Competition Law*, 23 FORDHAM INT'L L.J. 250 (2000); articles cited *supra* note 55; ICPAC, *supra* note 14; TRANSATLANTIC BUS. DIALOGUE, *supra* note 24.