

Wilmer Cutler Pickering Hale and Dorr LLP

Wilmer Cutler Pickering Hale and Dorr Antitrust Series

Year 2005

Paper 59

Mario Monti's Legacy: A U.S. Perspective

William Kolasky*

*WilmerHale

This working paper is hosted by The Berkeley Electronic Press (bepress) and may not be commercially reproduced without the permission of the copyright holder.

<http://law.bepress.com/wilmer/art59>

Copyright ©2005 by the author.

Mario Monti's Legacy: A U.S. Perspective

William Kolasky

Abstract

The departure of Commissioner Mario Monti from his post as the EC Commissioner for competition policy provides a good opportunity to reflect upon the achievements and perceived failures of the European Commission in the field of antitrust law over the past five years. This paper attempts to do so on the basis of six core principles of sound competition policy. Under the first principle, it is undisputable that the Commission under Commissioner Monti's leadership has been at the forefront of the international efforts undertaken in the fight against cartels. Second, despite some weaknesses in areas such as conglomerate mergers or in its approach to the Microsoft case, the Commission's focus now appears to be in the protection of competition, not competitors. Third, after a string of annulments of Commission merger decisions by the EC judiciary, the Commission has made substantial progress toward assuring that its decisions are based on sound economics and hard evidence (including consideration of efficiencies). Fourth, recent Commission policy confirms that the Commission is ready to limit intervention to those cases that really cause harm to the competition process. Fifth, despite some concerns arising from the reform of the merger review process, the Commission is working hard to ensure that competition laws do not become bureaucratic roadblocks to efficient transactions. Sixth, Commissioner Monti has been instrumental in promoting international initiatives designed to promote a better understanding of competition policy.



VOLUME 1 | NUMBER 1 | SPRING 2005

Competition Policy International

Mario Monti's Legacy: A U.S. Perspective

William J. Kolasky



bepress Legal Repository

Mario Monti's Legacy: A U.S. Perspective

William J. Kolasky

The departure of Commissioner Mario Monti from his post as the EC Commissioner for competition policy provides a good opportunity to reflect upon the achievements and perceived failures of the European Commission in the field of antitrust law over the past five years. This paper attempts to do so on the basis of six core principles of sound competition policy. Under the first principle, it is undisputable that the Commission under Commissioner Monti's leadership has been at the forefront of the international efforts undertaken in the fight against cartels. Second, despite some weaknesses in areas such as conglomerate mergers or in its approach to the *Microsoft* case, the Commission's focus now appears to be in the protection of competition, not competitors. Third, after a string of annulments of Commission merger decisions by the EC judiciary, the Commission has made substantial progress toward assuring that its decisions are based on sound economics and hard evidence (including consideration of efficiencies). Fourth, recent Commission policy confirms that the Commission is ready to limit intervention to those cases that really cause harm to the competition process. Fifth, despite some concerns arising from the reform of the merger review process, the Commission is working hard to ensure that competition laws do not become bureaucratic roadblocks to efficient transactions. Sixth, Commissioner Monti has been instrumental in promoting international initiatives designed to promote a better understanding of competition policy.



The author is a Partner at Wilmer Cutler Pickering Hale and Dorr LLP. The author thanks Eric Mahr, Pablo Charro, and Cormac O'Daly for their invaluable assistance in the preparation of this article.

I. Introduction

In November 2004, after five years as EC Competition Commissioner, Mario Monti left his post. It is, therefore, a good time to reflect on the achievements of Commissioner Monti and analyze the extent to which he, and by extension, the European Commission, has contributed to the shaping of EC competition law in an increasingly global economy.

This paper argues that, over the past five years, the Commission has come a long way in reforming both its procedures and its substantive standards to bring them more in line with modern economic thinking as to sound competition policy. While Commissioner Monti deserves credit for many of these reforms, some were initiated under his predecessor Karel Van Miert—principally, the reform process that led to the decentralization in the application of Articles 81 and 82 of the EC Treaty (Article 81 and Article 82). In other areas the reforms were, to some extent, forced on the Commission by the European Court of First Instance (CFI) as a result of three decisions reversing merger prohibitions.¹ Whatever the genesis of these ideas, however, Commissioner Monti has been responsible for their implementation, which in most cases has been exemplary. More importantly, Commissioner Monti has overseen the Commission's first efforts at putting the theories and rhetoric of the reforms into practice. While it is too early to make any definitive pronouncements on the Commission's new practices, the approach taken by the Commission in recent merger decisions such as *Sony/BMG*² and *Oracle/PeopleSoft*³ provides reason for the competition community to be optimistic. Commissioner Monti also deserves enormous credit for guiding his Directorate-General (DG COMP) through a difficult period and engineering a positive response to the Commission's losses at the CFI. The string of reversals and annulments could have thrown his institution into crisis but for his strong leadership. Commissioner Monti was, on the contrary, able to use the ongoing reform process to reflect on the perceived failures of DG COMP and propose measures to tackle such weaknesses.

Central to Commissioner Monti's success in the implementation of the reforms—from the U.S. perspective at least—has been that he has fully embraced a consumer welfare standard for competition enforcement. In an October 2002 speech in the Netherlands, I defined competition as “the process by which market forces operate freely to assure that society's scarce resources are employed as

1 See Case T-342/99, *Airtours v. Commission*, 2002 E.C.R. II-2585 [hereinafter *Airtours*]; Case T-310/01, *Schneider Electric v. Commission*, 2002 E.C.R. II-4071 [hereinafter *Schneider*]; and Case T-5/02, *Tetra Laval v. Commission*, 2002 E.C.R. II-4382 [hereinafter *Tetra Laval*], appeal to the ECJ is pending.

2 Commission Decision COMP/M.3333, *Sony/BMG* (Jul. 19, 2004, not yet reported) [hereinafter *Sony/BMG*].

3 Commission Decision COMP/M.3216, *Oracle/PeopleSoft* (Oct. 26, 2004, not yet reported) [hereinafter *Oracle/Peoplesoft*].

efficiently as possible to maximize total economic welfare.”⁴ The fact that Commissioner Monti's reforms were based on this key objective has provided a fundamental vision for EC competition law that is not far from U.S. views on the aims of antitrust policy, and this, hopefully, will guide the Commission's future decision-making at both the macro-policy level and the micro-case level.

In earlier papers and speeches, I have also articulated a number of core principles of sound competition policy that should assist antitrust authorities in getting their priorities right. At the time of Commissioner Monti's departure, it may be useful to analyze EC competition policy over the last five years in light of these principles. I have proposed the following core principles:

- (i) Impose strong deterrent measures against hard-core cartels;
- (ii) Protect competition, not competitors;
- (iii) Base decisions on sound economics and hard evidence—this should, among other things, lead to recognizing the central role of efficiencies in antitrust analysis;
- (iv) Realize that our predictive capabilities are limited—this requires antitrust authorities to be as flexible and dynamic as the industries with which they deal; and
- (v) Impose no unnecessary bureaucratic roadblocks.

Finally, as an additional guiding principle, I believe it is the role of every experienced antitrust enforcer to

- (vi) Promote a better understanding of sound competition policy, principally by means of an active involvement in international initiatives.

II. First, Impose Strong Deterrent Measures Against Hard-Core Cartels

Detection and prosecution of hard-core cartels (those involving price-fixing, output limitation, bid rigging, or market sharing) should be every competition authority's top enforcement priority. As recently pointed out by the U.S. Supreme Court, collusion is “the supreme evil of antitrust.”⁵ Cartels raise prices and restrict supply, enriching producers at the expense of consumers and affecting the welfare of the entire economy.

4 William J. Kolasky, *What is Competition?*, Seminar on Convergence sponsored by the Netherlands Ministry of Economic Affairs, The Hague (Oct. 28, 2002), available at <http://www.usdoj.gov/atr/public/speeches/200440.htm>, reprinted as Kolasky, *What is Competition? A Comparison of U.S. and European Perspectives*, THE ANTITRUST BULLETIN 29 (Spring-Summer 2004).

5 *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

From this perspective, Commissioner Monti's contribution to the effective enforcement of a sound competition policy can only be praised. Early during his five-year tenure, Commissioner Monti made it clear that action against cartels would be one of his top priorities.⁶ In fact, he has described cartels as "cancers on the open market economy, which forms the very basis of our Community."⁷ During his mandate, Commissioner Monti has successfully ensured effective enforcement against hard-core cartels, substantially increasing the resources allocated within the Commission to cartel detection and prosecution. Moreover, Commissioner Monti has recognized that—as we know well in the United States—public enforcement would benefit from complementary action brought by private parties that have suffered the consequences of cartel behavior; he has, therefore, been a strong advocate for increased private action within EU Member States.⁸ There is little doubt that over the past five years, the United States has found in the European Community a strong ally in a fight that has become increasingly global as barriers to trade continue to be dismantled.

A. UNPRECEDENTED NUMBER OF CASES PROSECUTED

The most straightforward tool for measuring the success (or failure) of a competition authority in prosecuting cartels is an assessment of the number of cases successfully prosecuted. During the five years of Commissioner Monti's tenure, we have witnessed an unprecedented number of hard-core cartel cases being successfully brought to an end in Europe. During the 2001-2003 period, the Commission issued on average eight cartel decisions per year (with ten negative decisions affecting more than 65 companies in 2001 alone). This is an enormous increase in cartel enforcement by the Commission when compared to the average for the previous 30 years of EC cartel practice: 1.5 decisions per year.⁹

Conscious of the increased globalization of cartels, Commissioner Monti also set as one of his top priorities the development of cooperation mechanisms to ensure successful prosecution of cartels on a worldwide scale. Cooperation between antitrust agencies in the European Community and the United States

6 "Fighting cartels is one of the most important areas of activity of any competition authority and a clear priority of the Commission..." (Mario Monti, *Fighting Cartels—Why and How? Why Should We Be Concerned with Cartels and Collusive Behaviour*, 3rd Nordic Competition Policy Conference, Stockholm (Sep. 11-12, 2000), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/00/295&format=HTML>)

7 *Id.*

8 Mario Monti, *Private Litigation as a Key Complement to Public Enforcement of Competition Rules and the First Conclusions on the Implementation of the Merger Regulation*, IBA 8th Annual Competition Conference, Fiesole (Sep. 17, 2004), available at <http://www.europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/04/403&format=HTML>.

9 European Commission, *XXXIIIth Report on Competition Policy (2003)*, available at http://www.europa.eu.int/comm/competition/annual_reports/2003/final_en.pdf.

has now become regular practice. The very prominent *Vitamins* case is a good example of the extensive cooperation between both antitrust authorities, such cooperation leading to the successful prosecution of one of the most damaging cartels ever uncovered.

B. UNPRECEDENTED HIGH LEVEL OF FINES

The increased number of cartels that have been successfully investigated and brought to an end has been coupled with an unprecedented level in the amount of fines imposed on the infringers. Under Commissioner Monti's tenure, the Commission has made wide use of the broad discretion that the EC legislation affords to it when determining the level of fines to be imposed on cartel perpetrators. In particular, and in what may be seen as a compensation for the lack of criminal sanctions at EC level, the Commission is not bound by a strict set of requirements such as those imposed by the U.S. Sentencing Guidelines when determining the amount of fines in cartel cases.¹⁰ Such unprecedented high fines fulfill the objective of continued deterrence by increasing the level of fines that companies may face for infringement of the competition rules.

Since Commissioner Monti took office in October 1999, the total amount of fines imposed by the Competition Directorate in cartel cases is above EUR 4.5 billion (an unprecedented amount compared to earlier EC standards; in fact, as U.S. Assistant Attorney General for Antitrust R. Hewitt Pate recently pointed out, EC fines exceeded those levied against cartelists in the United States during the same period¹¹).

As the clearest example of this increased emphasis on deterrence, the *Vitamins* cartel led in 2001 to overall fines exceeding EUR 850 million. In the *Vitamins* case, Hoffmann-la-Roche, the world's largest maker of vitamins, was fined EUR 462 million—until the recent *Microsoft* Article 82 decision,¹² the highest fine ever imposed by the Commission on an individual company—and BASF, the world's second-largest maker of vitamins, almost EUR 300 million. Other cases prosecuted during Commissioner Monti's mandate have led to overall fines of

10 Note that the Commission has issued Guidelines on the Method of Setting Fines Imposed Pursuant to Article 15(2) of Regulation No. 17 and Article 65(5) of the ECSC Treaty, 1998 O.J. (C 9) 3. However, the Guidelines expressly indicate, as part of their policy statement, that they do not detract from the discretion that the Commission is granted when setting fines, within the overall limit of 10 percent of overall turnover. For an overview of the Commission's application of its Guidelines, see François Arbault, *La politique de la Commission en matière d'amendes antitrust: récents développements, perspectives d'avenir*, COMPETITION POLICY NEWSLETTER No. 2 (2003).

11 R. Hewitt Pate, *Antitrust in a Transatlantic Context—from the Cicada's Perspective*, Antitrust in a Transatlantic Context Conference, Brussels (Jun. 7, 2004), available at <http://www.usdoj.gov/atr/public/speeches/203973.htm>.

12 Commission Decision COMP/C-3/37.792, *Microsoft* (Mar. 24, 2004, not yet reported) [hereinafter *Microsoft*].

EUR 478 million (Plasterboard cartel, 2002), EUR 313 million (Carbonless Paper cartel, 2001), EUR 222 million (Copper Plumbing Tubes cartel, 2004), and EUR 218 million (Graphite Electrodes cartel, 2001).¹³

C. LEGISLATIVE REFORMS FACILITATING THE PROSECUTION OF CARTELS

During his tenure, Commissioner Monti has brought to successful completion the far-reaching reform of the rules implementing Articles 81 and 82 that was launched by his predecessor Karel Van Miert. One of the key objectives of the Modernization Regulation¹⁴ has been “to allow the Commission to become more active in the pursuit of serious competition infringements” and to “strengthen competition policy with regard to cartels.”¹⁵ To that effect, the Commission has been granted new inspection powers, such as (i) the power to seal any business premises and books or records for the period of and to the extent necessary for the inspection; (ii) the power to ask for oral explanations of facts or documents pertaining to the subject matter and purpose of the inspection; and (iii) (more contentiously) the power to enter non-business premises when a reasonable suspicion exists that books or other records relevant to the inspection are being kept in those non-business premises.¹⁶ These new powers of investigation are coupled with increased fines for breach of the obligation to cooperate during the Commission’s inspections.

In addition, and most importantly, the Modernization Regulation is premised upon the creation of a network of competition authorities, called the European Competition Network (ECN), which should provide a basis for increased horizontal cooperation by the Commission and national competition authorities in cartel prosecution—namely, by an increased flow of information between the agencies.

Last, it is worth noting that, throughout the consultation process that led to the Commission’s reform of its enforcement powers, the European Commission did not shy away from a discussion as to whether cartels should be criminalized in the European Community. In the United States, we have long considered hard-core cartels to be crimes, and have prosecuted the perpetrators as crimi-

13 Note that in a recent judgment, the CFI reduced the total amount of the fines imposed on seven of the eight cartel participants, from approximately EUR 207 million to approximately EUR 153 million. See, e.g., Case T-236/01, Tokai Carbon v. Commission (Apr. 29, 2004, not yet reported).

14 Council Regulation 1/2003/EC on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1 [hereinafter *Modernization Regulation*].

15 Commission White Paper on Modernization of the Rules Implementing Articles [85] and [86] of the EC Treaty, 1999 O.J. (C 132) 1.

16 See *Modernization Regulation*, *supra* note 14, at art. 20.

nals. In the end, the Commission decided not to follow the approach of other national competition law authorities (e.g. the United Kingdom and Ireland) that have recently opted for the criminalization of hard-core cartels.¹⁷ Notwithstanding, it is safe to say that the new investigative powers granted to the Commission, coupled with the strong commitment by the European Community to promote cartel detection and prosecution, will ensure that cartel perpetrators continue to have a tough time if engaging in illegal activity in the European Community.

D. REVISION OF THE COMMISSION'S LENIENCY PROGRAM

The revision of the Commission's Leniency Notice¹⁸ has been another of the major drivers in the Commission's unprecedented effort against cartels. The new Leniency Notice also provides a good example of the synergies brought about by the cooperation and mutual understanding between authorities in the United States and the European Community; the experience gathered by the United States through its own amnesty program positively influenced the EC revision. In addition, the Commission has taken into account the challenges an EC amnesty applicant will face in parallel U.S. civil litigation in devising creative alternatives to written corporate statements, in particular, the acceptance of oral amnesty applications.

Among the revised features of the new program, the Leniency Notice softens the conditions that must be met by an applicant seeking to qualify for amnesty as it removes the requirement that the applicant provide "decisive" evidence and extends amnesty to applicants that acted as "instigators"—provided that the company did not take steps to coerce other entities into participating in the infringement—or played a determining role in a cartel.¹⁹

The Leniency Notice also provides increased certainty that amnesty will be afforded to the first firm that, by providing important insider information to the Commission at the critical stages of a cartel investigation, allows the Commission to either: (i) launch an inspection at the premises of the suspected companies; or (ii) establish an infringement, when the Commission is already in possession of sufficient information to launch an inspection, but not to establish such infringement. In order to increase legal certainty, the

17 Article 23(5) of the Modernization Regulation stresses that the fines imposed thereunder "shall not be of a criminal law nature." (*Modernization Regulation, supra* note 14, at art. 23(5).)

18 Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, 2002 O.J. (C 45) 3.

19 During the six years of operation of the 1996 Leniency Notice, the difficulty—and legal uncertainty—regarding the applicability of the criteria for immunity led to only three companies being granted full immunity from prosecution: Rhône-Poulenc (Aventis) with regard to two of the three infringements in which it was involved in the *Vitamins* investigation; Brasserie de Luxembourg in the *Luxembourg Breweries* case; and Sappi in the *Carbonless Paper* case.

Commission will now provide an amnesty applicant a letter confirming its position, provided that the applicant complies with the obligations of cooperation set out in the Leniency Notice. The Commission is also prepared to inform leniency applicants at an early stage of the procedure about the expected level of reduction which they can expect in their fine.

The revamped Leniency Notice has already contributed—and, undoubtedly, will continue to contribute—to the increased detection of hard-core cartels by the Commission. Already in the first year of operation of the new Leniency Notice, more than 20 applications for immunity were received by the Commission—a stark contrast to the total of 16 applications for immunity that were received during the six years of operation of the 1996 Leniency Notice.²⁰

III. Second, Protect Competition, Not Competitors

The guiding principle of antitrust law should be the protection of competition and not the protection of competitors. The competitive process works in part because it rewards successful firms and eliminates inefficient rivals. Therefore, an antitrust authority should never seek to protect competitors from stronger rivals. It should encourage vigorous competition, even by dominant firms and even at the risk of driving weaker competitors from the market. In general, a firm's conduct should only be challenged as exclusionary where it is likely to exclude rivals from the market, serves no legitimate business purpose, and tends to destroy competition itself.

A. POSITIVE STATEMENTS AND THEORIES

Commissioner Monti, in one of the last speeches of his mandate, stated that the main goal of EC competition policy is consumer welfare and that “only a very poorly informed observer can still resort to the catchphrase that the main goal of competition policy in Europe is a different one, such as protecting competitors.”²¹ Such statements show an undoubted desire to move EC competition policy further away from the protection of competitors and are to be welcomed. There has also been salutary recognition by senior Commission officials of the need to clarify the Commission's policy on the application of Article 82, and of the importance of stimulating a debate within the antitrust community about this area of

20 Bertus Van Barlingen, *The European Commission's 2002 Leniency Notice after one year of operation*, COMPETITION POLICY NEWSLETTER 2 (2003).

21 Mario Monti, *A Reformed Competition Policy: Achievements and Challenges for the Future*, Center for European Reform, Brussels (Oct. 28, 2004), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/04/477&format=HTML>.

law.²² An internal review is underway in the Commission, and draft guidelines may be forthcoming in 2005-2006.

B. INCONSISTENT APPLICATION

It is, however, difficult to ignore some of the more problematic cases and theories of the last five years. The following are prominent examples of where the Commission still seems to have some progress to make, but it must be emphasized that the overall signs confirm that the Commission is making significant strides in this regard.

1. Conglomerate Mergers

First, the Commission's approach to conglomerate mergers remains of concern. *General Electric/Honeywell* would have been the largest industrial merger in the world.²³ After a careful five-month investigation, the U.S. Department of Justice (DOJ) decided not to challenge the merger, save where it led to horizontal overlaps.²⁴ In contrast, in a well-publicized, and sometimes criticized,²⁵ decision, the Commission decided that the merger would strengthen GE's already dominant position in the market for large jet engines and would enable the merged entity to acquire dominance in the small engines, avionics, and non-avionics markets.

In coming to this decision, the Commission chose to forego immediate price reductions to consumers in the fear that the merged entity would ultimately be able to drive out competitors. It based its reasoning on a theory of portfolio effects, fearing the "opportunities and incentives [for bundling], given the unprecedented range of products and services that will be put at the disposal of the merged entity,"²⁶ and it appeared to be concerned that the merged entity would be able to enjoy economies of scale and scope which would foreclose competitors.

22 Philip Lowe, Speech delivered at the Fordham Antitrust Conference, Fordham Annual Conference on International Antitrust & Policy, New York (Oct. 23, 2003), available at http://www.europa.eu.int/comm/competition/speeches/text/sp2003_040_en.pdf.

23 Commission Decision 2004/134/EC, *General Electric/Honeywell*, 2004 O.J. (L 48) 1 [hereinafter *GE/Honeywell*]. For a more detailed critique of the Commission's decision, see William J. Kolasky, *Conglomerate Mergers and Range Effects: It's a Long Way from Chicago to Brussels*, George Mason University Symposium Washington D.C. (Nov. 9, 2001).

24 See U.S. DEP'T OF JUSTICE, NOTE FOR DISCUSSION AT OECD ROUNDTABLE ON PORTFOLIO EFFECTS IN CONGLOMERATE MERGERS (Oct. 15, 2001), at paras. 53 to 60.

25 For criticism from the business community and leading economists, see Hal R. Varian, *Economic Scene: In Europe, GE and Honeywell ran afoul of 19th century thinking*, N.Y. TIMES, Jun. 28, 2001; from legal scholars, see George L. Priest, *The GE/Honeywell Precedent and Franco Romani*, WALL ST. J., Jun. 20, 2001, at A1; and for more colorful criticism from editorial writers, see Editorial, *Europe to GE: Go Home*, WALL ST. J., Jun. 15, 2001, at A14 and Editorial, *Obstructionist Europe*, WASH. POST, Jun. 22, 2001, at A24.

26 *GE/Honeywell*, *supra* note 23, at para. 361.

In another example of its theory on conglomerate mergers, the Commission prohibited the proposed merger between Tetra Laval and Sidel on the ground that Tetra Laval would leverage its market power in the carton packaging market into the market for polyethylene terephthalate (PET) packaging in which Sidel was active.²⁷ This decision was annulled by the CFI. The CFI did confirm that the Commission could, in the presence of “convincing evidence,” prohibit a merger because of its conglomerate effects; however, such convincing evidence had not been adduced in the case under consideration.²⁸ The Commission has appealed this judgment to the European Court of Justice (ECJ), and the *GE/Honeywell* decision has been appealed to the CFI, so the EC courts will have further opportunities to rule on conglomerate mergers.

U.S. law has long considered that antitrust agencies should very rarely interfere with conglomerate mergers. On the contrary, it is recognized that such mergers have the potential to generate significant efficiencies: the injection of capital; the improvement of management efficiency; the transfer of know-how and best practices across traditional industry boundaries; and the increased ability to get by during economic downturns through diversification. In addition, conglomerate mergers provide a market for owner-managers to sell the businesses that they create, thereby encouraging enterprise and risk-taking. The European Community’s concern with theories that have been long abandoned in the United States is probably misplaced. Greater faith should be placed in the competitive process rather than worrying about competitors who may be less efficient than the merged entity.

THE EUROPEAN COMMUNITY’S CONCERN WITH THEORIES THAT HAVE BEEN LONG ABANDONED IN THE UNITED STATES IS PROBABLY MISPLACED. GREATER FAITH SHOULD BE PLACED IN THE COMPETITIVE PROCESS RATHER THAN WORRYING ABOUT COMPETITORS WHO MAY BE LESS EFFICIENT THAN THE MERGED ENTITY.

2. Microsoft

In 2004, the Commission fined Microsoft EUR 497.2 million for refusing to make interoperability information for work group servers available on a non-discriminatory basis and for bundling its media player with Windows.²⁹ The behavioral remedies imposed on Microsoft have been defined by some as “interventionist” and as “chilling competition and innovation.”³⁰ In relation to the requirement to make available an unbundled version of Media Player, it is worth

27 Commission Decision 2004/124/EC, *Tetra Laval/Sidel*, 2004 O.J. (L 43) 13 [hereinafter *Tetra Laval/Sidel*].

28 *Tetra Laval*, *supra* note 1.

29 *Microsoft*, *supra* note 12.

30 See Assistant Attorney General for Antitrust R. Hewitt Pate’s Statement on the EC’s Microsoft Decision (Mar. 24, 2004), available at http://www.usdoj.gov/atr/public/press_releases/2004/202976.htm.

noting that the U.S. courts rejected a similar remedy. Similarly, when considering the refusal to supply full interoperability information, the Commission may have been too influenced by competitors, who were already competing effectively on the server market. The remedy of obligatory licensing, while not unknown to U.S. law, is one that must be treated carefully, as a dominant company must be encouraged to invest in research and create intellectual property. Allowing competitors to access valuable intellectual property rights may not, in the long term, be protective of dynamic competition.

3. Rebates Offered by Dominant Firms

Finally, the Commission and the EC courts have long regarded rebates offered by a dominant firm with some skepticism.³¹ Just prior to the beginning of Commissioner Monti's term of office, the Commission condemned a ticketing scheme offered by British Airways (BA) to travel agents.³² Then in a case decided during Commissioner Monti's mandate, *Michelin II*, the Commission found that the tire manufacturer's rebate scheme violated Article 82 as it was loyalty inducing.³³ Both these decisions were upheld by the CFI on the ground, amongst others, that the schemes led to foreclosure.³⁴ In *British Airways/Virgin* (*BA/Virgin*), the CFI drew attention to the inability of BA's competitors to match the level of discounts being offered by BA.³⁵ It also dismissed BA's argument based on the rebate's lack of effect on the market (see below) and the fact that its competitors' market shares were increasing.³⁶

This concern with foreclosure of competitors is alien to U.S. law, which considers that single-product price-cutting is lawful provided price remains above the firm's avoidable costs. EC law on rebates, as we discuss in greater detail below, has long been criticized, and it will undoubtedly attract a lot of interest when the Commission publishes guidelines on the application of Article 82.

The future guidelines and positive statements about EC competition policy not seeking to protect competitors cannot obscure that real reform is, in the end, dependent on the way in which antitrust cases are investigated and decided. Over-reliance on the statements of competitors in the course of an investigation

31 See Case 85/76, *Hoffmann La Roche v. Commission*, 1979 E.C.R. 461.

32 Commission Decision 2000/74/EC, *Virgin/British Airways*, 2000 O.J. (L 30) 1.

33 Commission Decision 2002/405/EC, *Michelin*, 2002 O.J. (L 143) 1.

34 Case T-219/99, *British Airways plc v. Commission* (Dec. 17, 2003, not yet reported) [hereinafter *BA/Virgin*]; Case T-203/01, *Manufacture française des pneumatiques Michelin v. Commission* (Sep. 30, 2003, not yet reported) [hereinafter *Michelin II*].

35 *BA/Virgin*, *supra* note 34, at paras. 276-278.

36 *Id.* at para. 298.

will naturally result in greater emphasis being placed on these competitors' concerns. This must be avoided and, as we will move on to discuss, there is no substitute for a detailed examination of facts and sound economic theory in an antitrust case.

IV. Third, Base Decisions on Sound Economics and Hard Evidence

Competition agencies have long been confronted by companies, aided by lobbyists and public relations companies, seeking help in using antitrust as a weapon against their competitors. When faced with such competitor complaints, the best way to avoid the agency's decisions becoming politicized is, in Joseph Schumpeter's words, to test the complaint against "the cold metal of economic theory."³⁷ Commissioner Monti has recently stated that he had devoted his efforts to making "independent and neutral assessments" and that EC competition policy has become "clearly grounded in sound micro-economics."³⁸ I have no doubt that EC policy is moving in the correct direction of requiring sound economic theory and cogent evidence to be adduced before intervention.

A. NEED TO DISCHARGE GREATER BURDEN OF PROOF

In *Airtours*,³⁹ *Tetra Laval*,⁴⁰ and *Schneider*,⁴¹ the CFI overturned Commission decisions prohibiting those three mergers.⁴² In the three instances, the Commission was found not to have discharged its burden of proof for reaching a prohibition decision. For example, in *Airtours*, the CFI condemned the Commission's decision in the following terms:

“[T]he Court concludes that the Decision, far from basing its prospective analysis on cogent evidence, is vitiated by a series of errors of assessment as to factors fundamental to any assessment of whether a collective dominant position might be created. It follows that the Commission prohibited the transaction without having proved to the requisite legal standard that the

37 JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY (1942).

38 Monti, A Reformed Competition Policy, *supra* note 21.

39 *Airtours*, *supra* note 1.

40 *Tetra Laval*, *supra* note 1.

41 *Schneider*, *supra* note 1.

42 In an interesting postscript to these cases, both *Airtours* and *Schneider* have filed actions for damages against the Commission.

concentration would give rise to a collective dominant position of the three major tour operators, of such a kind as significantly to impede effective competition in the relevant market.”⁴³

B. RESPONSES TO THIS CRITICISM

As acknowledged by Commissioner Monti in a recent speech, this “rigorous scrutiny” is “a welcome development, but also a challenging one.”⁴⁴ Commissioner Monti has acted quite positively to this high profile criticism. The Commission has appointed a Chief Economist, Lars-Hendrik Röller, and has hired a team of industrial economists with the task of providing an independent and objective opinion on a case’s economic merits. This appointment should lead to greater economic analysis when deciding which cases to bring and which mergers to prohibit; the Commission should not be concerned about bringing winnable cases under current law but should seek only to bring cases that have a sound economic basis.⁴⁵

In addition, at an organizational level, Commissioner Monti has disbanded the Merger Task Force, which used to have exclusive competence in the review of mergers, and has replaced it with teams aligned according to different industry sectors. The Commission has also initiated a devil’s advocate/peer review system under which cases which are examined under phase II of the Merger Regulation⁴⁶ are subjected to scrutiny by an independent team of Commission officials. These reforms should further help strengthen the Commission’s decision-making process.

It is often noted that in merger cases the Commission acts as investigator, judge, and prosecutor. Unlike in the United States where the DOJ must obtain an injunction to prevent a merger, Commission decisions are not, in the normal course of events, subject to judicial review. The knowledge that facts will have to stand up to judicial scrutiny and that witnesses will have to survive the cauldron of cross-examination acts as a disciplining tool on DOJ officials. The Commission’s decision-making, on the other hand, requires essentially only self-discipline. Given the length of proceedings—even in *Tetra Laval* where a new expedited procedure was used, the CFI’s judgment was handed down a year after the Commission’s prohibi-

43 *Airtours*, *supra* note 1, at para. 294.

44 Monti, A Reformed Competition Policy, *supra* note 21.

45 For an interesting reflection on the role and impact of a U.S. Special Economic Assistant, see Oliver E. Williamson, *From Theory to Practice: Working with Economic Experts*, 17-SPG Antitrust 61.

46 Council Regulation 139/2004/EC on the Control of Concentrations between Undertakings, 2004 O.J. (L 24) 1, replacing Council Regulation 4064/89/EEC.

tion decision—and that subsequent actions for damages are no real compensation for a wronged company, this lack of an independent check on the Commission is a major difficulty. The internal nature of the peer review system may well not prove adequate in this respect. It certainly does not, for example, go as far as the United Kingdom’s House of Lords Select Committee would have wished when it suggested having a new case team for phase II of all mergers.⁴⁷

There have, however, been signs that these reforms may be producing positive results. In 2004, the Commission cleared the creation of the joint venture merging the recorded music businesses of Sony and Bertelsmann after consideration of detailed pricing evidence.⁴⁸ After in depth analysis of bidding data during its phase II investigation, the Commission has very recently also cleared the way for Oracle to acquire Peoplesoft.⁴⁹ Both cases are good examples of the Commission’s renewed commitment to base its merger decisions on solid economic thinking, and it is hoped that this trend will be continued in the future.

C. NEED FOR MORE EFFECTS-BASED DOCTRINES

Fact-intensive investigation is the key to good antitrust enforcement. Economic theory cannot be used if it is unburdened by careful factual analysis. For example, product bundling is usually pro-consumer but can under certain circumstances be anticompetitive, and, without due attention to the facts, it is often impossible to tell which is the case.

In some instances, the EC authorities have not had to carry out this detailed factual analysis. For example, in both *BA/Virgin* and *Michelin II*, the CFI stated that there was no need to show that the rebate schemes under consideration had anticompetitive effects on the market. It was sufficient to prove that they “tended to have” or “were capable of having” this effect.⁵⁰ This failure of the CFI to demand proof of anticompetitive effects, or at the very least, require that the conduct be likely to have such effects is disappointing from a court that in the area of mergers has been so willing to grapple with economics and complex facts.⁵¹ In contrast, the *Microsoft* decision is more satisfactory, as the Commission

47 The Review of the EC Merger Regulation, 32nd Report of the House of Lords Select Committee on the European Union, HL Paper 165, Session 2001-02, at para. 255, available at <http://www.publications.parliament.uk/pa/ld200102/ldselect/lddecom/165/16501.htm>.

48 *Sony/BMG*, *supra* note 2.

49 *Oracle/PeopleSoft*, *supra* note 3.

50 *BA/Virgin*, *supra* note 34, at para. 293.

51 As noted by a Senior Commission official, “We [...] were slightly surprised at the Court of First Instance’s analysis in *Michelin II*, that it placed so great an emphasis on per se rules and on certain types of conduct and did not go into any further economic analysis of the case.” (Lowe, *supra* note 22.)

took due account of possible efficiencies and of the concrete effects of certain practices on the market.

Allegedly exclusionary conduct is a subject of complexity and controversy and the CFI, in the rebates cases, appears to have simply set the Commission's bar too low by not requiring more than a demonstration that conduct tends to have a certain effect. It can only be hoped that the Commission itself addresses this point in its forthcoming guidelines on the application of Article 82.

D. RECOGNITION OF THE ROLE OF EFFICIENCIES

On a more positive note, the Commission's recent guidelines on horizontal mergers at last give due recognition to the role of efficiencies in antitrust analysis.⁵² The guidelines state that efficiencies may counteract potential harm to customers brought about by a merger, and that the Commission will make an "overall competitive appraisal of the merger."⁵³ It will take "any substantiated efficiency claim" into consideration, provided that it is of benefit to consumers, merger-specific, and verifiable.⁵⁴

This is a very promising development and contrasts vividly with the inadequate treatment of efficiencies in *GE/Honeywell*. There, the Commission objected to the increased access to capital that Honeywell would enjoy due for instance to GE's AAA bond rating. Cheaper access to capital is a source of efficiency like all other efficiencies so it should, like any other efficiency, be a reason to approve a merger, not prohibit it. Further, the Commission's conclusion was reached despite the fact that Honeywell's main competitors (United Technologies, BF Goodrich, and Thales) were large financially healthy companies and that GE's competitors (Rolls Royce and Pratt & Whitney) were both investing heavily in the development of their next generation engines.

The United States has long regarded analysis of efficiencies as integral to antitrust enforcement. The rule of reason requires a balancing of the pro- and anticompetitive effects of conduct. In addition, in the United States, account is taken of both allocative efficiencies (i.e. those realized through cutting price, increasing output, and moving towards a more competitive outcome) and productive efficiencies (i.e. actual reductions in unit costs due to cost savings/economies of scale). It is not clear that the Commission takes allocative efficiencies into account in the same manner. In *GE/Honeywell* the Commission maintained that the parties had not claimed any merger-specific cost savings; rather the price cuts that would have flowed from mixed bundling were not true

52 Commission Notice on Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations between Undertakings, 2004 O.J. (C 31) 5.

53 *Id.* at para. 76.

54 *Id.* at paras. 77-78.

efficiencies but strategic pricing that would not result in sustainable price reductions.⁵⁵ There is no sound economic basis for this differing treatment of allocative and productive efficiencies, but it is hoped that the Commission will now truly take account of “any substantiated efficiency claim” (emphasis added).

E. OTHER REFORMS

Outside the area of mergers, the Commission has inspired legislation and guidance that is infused with greater economic thinking: its block exemption for vertical restraints;⁵⁶ its guidelines on vertical⁵⁷ and horizontal⁵⁸ agreements; its revised block exemption⁵⁹ and accompanying guidelines⁶⁰ on the transfer of technology; and the notices prepared for the coming into force of decentralized application of Article 81.

Article 82, recently described as the “last of the steam powered trains,”⁶¹ has however, been slightly neglected to date, as it alone has not been reformed during Commissioner Monti’s tenure. Some of the Commission’s practices, for example on rebates, are not always inspired by modern economic thinking but rather by notions of protecting the process of competition. As stated, it is expected that the Commission will produce guidelines in this area in the near future, and it is hoped that these will usher in much-needed, more economically-inspired, reform.

SOME OF THE COMMISSION’S PRACTICES ARE NOT ALWAYS INSPIRED BY MODERN ECONOMIC THINKING BUT RATHER BY NOTIONS OF PROTECTING THE PROCESS OF COMPETITION. IT IS EXPECTED THAT THE COMMISSION WILL PRODUCE GUIDELINES IN THIS AREA IN THE NEAR FUTURE, AND IT IS HOPED THAT THESE WILL USHER IN MUCH-NEEDED, MORE ECONOMICALLY-INSPIRED, REFORM.

55 Götz Drauz, *Unbundling GE/Honeywell: the Assessment of Conglomerate Mergers Under EC Competition Law*, Fordham Corporate Law Institute, New York (Oct. 2001), at 25-28.

56 Commission Regulation 2790/99/EC on the Application of Article 81(3) of the Treaty to Categories of Vertical Agreements and Concerted Practices, 1999 O.J. (L 336) 21.

57 Commission Notice on Guidelines on Vertical Restraints, 2000 O.J. (C 291) 1.

58 Commission Notice on Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements, 2001 O.J. (C 3) 2.

59 Commission Regulation 772/2004/EC on the Application of Article 81(3) to Categories of Technology Transfer Agreements, 2004 O.J. (L 123) 11.

60 Commission Notice on Guidelines on the Application of Article 81 of the EC Treaty to Technology Transfer Agreements, 2004 O.J. (C 101) 2.

61 Brian Sher, *The Last of the Steam-Powered Trains: Modernising Article 82*, E.C.L.R. 2004, 25(5), 244.

V. Fourth, Realize That Our Predictive Capabilities Are Limited

A. THE HIPPOCRATIC OATH

Antitrust officials should, like doctors, take a sort of Hippocratic oath: before intervening, they should be confident that their actions will not cause harm. Antitrust authorities should not seek to be industrial policymakers, but they should limit themselves to being diligent law enforcers. This is because the predictive powers of antitrust lawyers are limited. Markets evolve in ways that even sophisticated industry participants could not have anticipated.

Sadly, although practice is improving, not all examples of enforcement under Commissioner Monti have shown such restraint. First, *Tetra Laval*⁶² is a disappointment, both in the overly speculative approach taken by the Commission in its administrative ruling and, as demonstrated by the appeal to the ECJ, the degree to which the Commission has resisted the CFI's efforts to hold it to a reasonable standard of proof. Government should embrace such judicially imposed burdens and not seek to exercise its enormous powers without first demonstrating some degree of likelihood that those powers are required to address specific anticompetitive effects. Second, in *GE/Honeywell* the Commission reached conclusions on the forced exit of competitors without adequate account being taken of the possible counterstrategies available to these competitors (teaming arrangements and mergers amongst themselves). It thus failed to give due regard to Nash's test of equilibrium which assumes that every other market player will play his best strategy. Further, any determination, based on a possible ultimate outcome, should be reached only where the authority is very confident that rivals will be forced from the market. Mere reliance on their word is not sufficient.

B. NEED FOR FLEXIBILITY AND FORWARD THINKING

Linked to this recognition of limited ability to predict, antitrust authorities should be flexible and forward-looking. Often antitrust authorities are called upon to intervene in new economy industries and it must be ensured that they adapt to changes in these industries. In this context, it is important to recognize the role of non-price competition in dynamic industries. For example, new-economy industries frequently require risky upfront investments that will not be made without the promise of substantial return. The costs of regulatory mistakes are therefore very high as government interference may frustrate innovation and discourage efficient practices, and this to the detriment of the competition touchstone itself, consumer welfare. In new-economy industries, it may thus be better to err on the side of reducing Type I (falsely finding abuse) errors over reducing

62 *Tetra Laval/Sidel*, *supra* note 27.

Type II errors (falsely not finding abuse). Yet, of course, a balance must be struck; some regulation is necessary—and prices cannot be allowed to rise to unacceptably high levels. Additionally, the emergence of potentially superior new entrants should be encouraged.

The Commission has been somewhat responsive to the need for competition policy to be cognizant of effects on ex ante incentives for investment and innovation. For example, the recently adopted guidelines on technology transfer agreements contain several statements about competition being dynamic and the importance of incentives for innovation.⁶³ The new block exemption contains fewer per se prohibitions on certain types of clauses and gives parties greater flexibility in drafting agreements. Also, the guidelines confirm that above the block exemption's safe harbor market share thresholds, there is no presumption that intellectual property and license agreements, as such, give rise to antitrust concerns. Finally, the Commission states at the outset of the guidelines that it will be reasonable and flexible in applying the block exemption and it rules out a mechanical application thereof.⁶⁴

VI. Fifth, Impose No Unnecessary Bureaucratic Roadblocks

Regulatory authorities must work hard to ensure that antitrust laws do not themselves become bureaucratic roadblocks to efficient transactions. The vast majority of agreements and transactions that are entered into on a daily basis are pro-competitive or, at worst, competitively neutral. This is equally true in relation to mergers. The views of ECJ Advocate General Antonio Tizzano in his recent *Tetra Laval* opinion are particularly illustrative of this; he notes that “[in cases of uncertainty] it has been thought preferable to run the risk of authorizing a transaction incompatible with the common market, rather than the risk of prohibiting one that is compatible, so unjustifiably restraining the parties’ freedom of economic activity.”⁶⁵

The need for efficient review applies not only to administrative authorities, but also to the judiciary. Unfortunately, as discussed above, the EC regime—at least in relation to merger review—is still far away from the U.S. prosecutorial-style model, where it is up to the judge and not the enforcer to decide whether a merger should be prohibited or not. I strongly believe that a clear separation of the functions of prosecutor and jury is critical for efficient antitrust enforcement,

63 See, e.g., Guidelines on the Application of Article 81 of the EC Treaty to Technology Transfer Agreements, *supra* note 60, at para. 70.

64 *Id.* at para. 3.

65 Case C-12/03, *Commission v. Tetra Laval*, ECJ judgment pending, at para. 79.

and that in the long-term such separation of powers can only bring benefits to the enforcer who must convincingly argue the merits of its case in front of an independent third party. While it is now clear that there will be no changes in the short term to the way mergers are reviewed in Europe, it is fair to note that Commissioner Monti was open to discuss the issue throughout the merger reform process.⁶⁶ Throughout his tenure, Commissioner Monti has also provided unconditional support for the work of the judiciary, even if the Commission's challenge to the standard of review set by the CFI in *Tetra Laval* poses some doubt as to how the Commission sees its role in the merger review process.

On the plus side, the successful implementation of the administrative reforms undertaken in the antitrust field is one of Commissioner Monti's key successes. As I noted in one of my speeches while I was at the DOJ,⁶⁷ a regulatory authority should strive to further four main goals: (i) to eliminate unnecessary and costly existing regulation; (ii) to inhibit the growth of unnecessary new regulation; (iii) to minimize the competitive distortions caused where regulation is necessary by advocating the least anticompetitive form of regulation consistent with the valid regulatory objectives; and (iv) to ensure that regulation is properly designed to accomplish legitimate regulatory objectives. There is no doubt that the Modernization Regulation is driven by such objectives. The Modernization Regulation is based on the principles of efficient supervision—with the allocation of resources to those areas of antitrust law where intervention is most important—and simplified administration. It is a radical shift from earlier EC decision-making, and introduces a principle of self-assessment where it will be up to the companies—and their legal and economic advisers—to undertake an overall assessment of the potential pro- and anticompetitive effects of their agreements. The Modernization Regulation thus puts an end to the 40-year-old system of notification to the Commission of agreements that may prima facie be restrictive of competition but may also qualify for exemption. While the notification system provided for some degree of legal certainty (that said, the comfort letters which the Commission used in the majority of cases, were not binding in national proceedings), it placed severe burdens on the Commission's enforcement activities and only very rarely led to prohibition decisions by the Commission.⁶⁸

66 See, e.g., Mario Monti, Review of the EC Merger Regulation—Roadmap for the Reform Project, British Chamber of Commerce Conference on Reform of European Merger Control, Brussels (Jun. 4, 2002), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/02/252&format=HTML>.

67 William J. Kolasky, A Culture of Competition for North America, Economic Competition Day: Shared Experiences at the Federal Competition Commission of Mexico, Mexico City (Jun. 24, 2002), available at <http://www.usdoj.gov/atr/public/speeches/11351.htm>.

68 According to the Commission's White Paper on Modernization of the Rules Implementing Articles [85] and [86] of the EC Treaty, *supra* note 15, at 29, under the earlier regime there were only nine decisions in which a notified agreement was prohibited without a complaint having been lodged against it.

The Commission's efforts in clarifying its understanding of Articles 81 and 82 by means of notices should hopefully bring further reassurance to the business community about the type of conduct which is likely to be tolerated by the Commission and the Member States' antitrust authorities.

However, it is possible that the principles inspiring the review of the antitrust procedural rules have not been extended to the merger field. The EC merger review process has been described as "front-loaded," because the parties' initial Form CO notification must set forth in great detail the transaction, the conditions in the affected markets, and the impact the transaction has on those markets. In exchange for this intensive provision of data, the merging parties are afforded the (relatively) short deadlines for clearance by the Commission in cases that raise few anticompetitive concerns. Past Commission practice shows that, during the period 1990-2004, more than 90 percent of the merger cases notified to the Commission have been cleared during a phase I (non-extended) procedure. Against this background, which confirms that the vast majority of mergers are either pro-competitive or competitively neutral, the new Form CO requires provision of even more extensive data, in particular by introducing additional disclosure requirements for closely related neighboring markets to those in which the parties to the concentration are active.⁶⁹ The same requirements apply in relation to the referral possibilities that the new EC merger legislation affords to merging parties, by means of a "reasoned submission," as provided for in Form RS.⁷⁰ However, Form RS requires, among other items, detailed explanations on market definition; specific information on the parties' and their competitors' market shares; in addition to detailed customer and supplier data in all potentially affected Member States. The amount of information required by Form RS may act as a barrier for making extended use of the opportunities that the referral system affords to merging parties.

THE COMMISSION'S EFFORTS IN CLARIFYING ITS UNDERSTANDING OF ARTICLES 81 AND 82 BY MEANS OF NOTICES SHOULD HOPEFULLY BRING FURTHER REASSURANCE TO THE BUSINESS COMMUNITY ABOUT THE TYPE OF CONDUCT WHICH IS LIKELY TO BE TOLERATED.

69 Product markets are closely related neighboring markets when the products are complementary to each other or when they belong to a range of products that is generally purchased by the same set of customers for the same end use, see Form CO relating to the Notification of a Concentration Pursuant to Regulation 139/2004/EC, *supra* note 46.

70 Form RS relating to Reasoned Submissions Pursuant to Articles 4(4) and 4(5) of Regulation 139/2004/EC, 2004 O.J. (L 133) 31.

VII. Sixth, Promote a Better Understanding of Sound Competition Policy, Including International Initiatives

The principles set out above provide strong examples of the impact that antitrust enforcers may have in advancing consumer welfare through engaging in forceful competition advocacy. The influence of a competition authority can also be measured by the extent to which the agency has made a real contribution to furthering antitrust policies in the international context, be it through bilateral exchanges or by building strong partnerships in the international fora.

A. BILATERAL COOPERATION

Despite the diverging positions of the EC and U.S. authorities in such prominent cases as *GE/Honeywell* and *Microsoft*, there is no doubt that Commissioner Monti has made a very substantial contribution to a better understanding of EC antitrust policy in the international arena. In fact, in the wake of the Commission's prohibition of the *GE/Honeywell* merger, Commissioner Monti embarked on a personal crusade—with the full support of antitrust officials on the other side of the Atlantic—to bridge any gaps that the *GE/Honeywell* decision may have brought to light. The decision is a good reminder that without extensive bilateral cooperation, the sharing of fundamentally similar goals may still prove insufficient to bring about convergent results. The openness of the Commission to discuss its decision should be praised, as it triggered an important debate on the economic issues surrounding the topic of portfolio effects and related theories of harm.⁷¹ It also led to encouraging statements from Commissioner Monti about the positive approach of the Commission to efficiency-enhancing mergers and to later recognition of the importance of efficiencies in the new horizontal merger guidelines.

As noted earlier, EC-U.S. cooperation has not been restricted to the merger field, and during Commissioner Monti's tenure both antitrust authorities have regularly exchanged views and have successfully assisted each other in the prosecution of some of the most prominent international cartels (e.g. *Vitamins* and *Fine Arts Auction* cartels). The Commission has also concluded bilateral agreements with other key antitrust authorities, such as those in Canada and in particular Japan, with whom the European Communities successfully entered a cooperation agreement during Commissioner Monti's tenure (July 2003).⁷²

71 See, e.g., OECD Roundtable on Portfolio Effects in Conglomerate Mergers, *supra* note 24.

72 See European Commission, Agreement Concerning Cooperation on Anticompetitive Activities (Jul. 10, 2003). Note that the EC also entered a Memorandum of Understanding with the Republic of Korea on the terms for a bilateral competition dialogue on Oct. 28, 2004.

B. REGIONAL (EU) COOPERATION

The Commission's increased efforts towards multilateral cooperation find their strongest expression at regional (EU) level. The Modernization Regulation relies on a network of competition authorities, the ECN, which should provide a basis for increased cooperation by the Commission and national competition authorities in the application of Articles 81 and 82. In the context of the reform process that led to the Modernization Regulation, the Commission surrendered its monopoly on the application of the Article 81(3) exception to the prohibition of agreements, which *prima facie* restrict competition for the benefit of Member State competition authorities and courts. The ECN largely mirrors the cooperation that the new EC Merger Regulation envisages for the Commission and national competition authorities, most notably through an increased use of the referral mechanisms provided for under EC law, which ensure that merger cases are allocated to the authorities that are best placed to deal with them.⁷³

C. MULTILATERAL COOPERATION

At multilateral level, Commissioner Monti has been one of the strongest proponents of the work undertaken by the International Competition Network (ICN). The ICN is a network of national competition authorities that now comprises more than 80 members and has been instrumental in facilitating a better understanding of competition law enforcement. It has recently extended its work from the areas of competition advocacy and merger activity (where the ICN has had a very visible role) to examination of the fundamental issues surrounding anti-cartel enforcement. As an example of the positive cross-contamination effects that multilateral fora like the ICN may have on national authorities, the Commission played close attention to the set of (non-binding) Guiding Principles and Recommended Practices that the ICN adopted for the control of multi-jurisdictional mergers. In the context of the review of the EC Merger Regulation, some of ICN's recommendations, in particular those pertaining to a more flexible approach to the triggering factors and the timing for notifying a concentration, were incorporated—as advocated by the Commission—into the new rules.⁷⁴

In addition to the role played within the ICN and in other multinational agencies such as the Organization for Economic Cooperation and Development or the UN Conference on Trade and Development, few will question Commissioner Monti's efforts to develop a better understanding of the competition rules through capacity building programs, which are indispensable to further the independence and credibility of the younger competition authorities. In this

⁷³ See, e.g., Council Regulation 139/2004/EC, *supra* note 46, at art. 9, 22.

⁷⁴ See *id.* at art. 4(1).

international context, it is also worth recalling that Commissioner Monti was one of the strongest proponents of incorporating a set of multilateral rules on competition within the framework of the World Trade Organization trade agreements.⁷⁵ Even if it is now clear that—at least for the time being—the ongoing trade round will not deal with this issue,⁷⁶ the debate initiated by the Commission is yet another example of the importance that Commissioner Monti has afforded to international initiatives throughout his tenure. ▼

75 “In the absence of a specialized world-wide competition organization and in view of the complementary relationship between trade and competition policy, the World Trade Organization is the institution best suited to house an International Competition Agreement. The WTO possesses the advantages of a very broad membership and a tradition of enforcing binding rules. That is why the Commission has been at the forefront of efforts to persuade member countries on the merits of a WTO multilateral agreement in the area of competition.” (Mario Monti, A Global Competition Policy, European Competition Day, Copenhagen (Sep. 17, 2002), *available at* <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/02/399&format=HTML>.)

76 See WTO General Council Decision adopted on Aug. 1, 2004, WT/L/579 (Aug. 2, 2004).