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Developments in Competition Law in the European Union and the United States: Harmony and Conflict

remarks by
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I. Introduction

I appreciate very much the opportunity to meet with you here in London and to speak to you about relations between the United States and Europe in the field of competition policy. My remarks reflect my own views and not necessarily those of the Federal Trade Commission or any of its other Commissioners.

The subtitle of this program is "Harmony and Conflict." From my perspective as an FTC Commissioner and a former New York State enforcement official, there is far more harmony than conflict among US and EU competition enforcers. Furthermore, while we cannot rule out future conflicts, I believe that the trend is towards more convergence and harmony.

By the way, when I speak of U.S. enforcers, I include not only the FTC and DoJ's Antitrust Division, but also our State Attorneys General who are fully empowered to enforce U.S. Federal antitrust laws.[1] Likewise, when I speak of EU competition enforcers, I include not only the European Commission's Competition Directorate, DG COMP, but also the Member State competition authorities, such as the Office of Fair Trading ("OFT") and the Competition Commission here in London, that are similarly empowered to enforce EU competition policy.[2]

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[1] The statutory bases of state authority to enforce U.S. federal antitrust laws are contained in the section 4C - 4H of the Clayton Act, 15 U.S.C. §§ 15c-15h.

[2] Council Regulation (EC) No 1/2003 of 16 Dec. 2002 on the implementation of rules on competition laid down in Articles 81 and 82 of the Treaty, Art. 5, OJ L 1/1 (4 Jan. 2003); *available at*:

With that point in mind, let me take a moment to salute three enforcement colleagues on this Isle with whom the FTC has worked closely to create and maintain harmonious relations. First, Paul Geroski, whose recent passing is a loss not only to the United Kingdom, but to the whole competition community. I would like to add my condolences to those expressed by my Chairman, Deborah Majoras, when she was here in London last month to participate in the Competition and Consumer Day program. Second, Sir John Vickers, who recently concluded his tenure as Chair of the OFT, during which he contributed in numerous ways to transatlantic convergence in competition policy and enforcement and provided support and leadership to the International Competition Network. We are grateful for his intellectual contributions to the debates over competition policy as well as his support for cooperation among the agencies. And, third, John Fingleton, who has brought his intellect and energy from Ireland to the OFT. Like John Vickers, John Fingleton has also contributed to transatlantic convergence and to the development of the ICN as an effective force for further convergence of competition policy around the world. We in the United States will miss Paul, but look forward to continued contributions from John Vickers and John Fingleton in their new roles.

The communication and cooperation that we in the United States have enjoyed in working with these three gentlemen and with their European competition enforcement colleagues, is in marked contrast to the relations that existed between the United States and Europe - and, in particular, the United Kingdom - just twenty years ago. The uranium cartel and Freddie Laker cases brought the United States and the United Kingdom into conflict over

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http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_001/l_00120030104en00010025.pdf.

sovereignty, national interests, competition policy and its methods of enforcement.[3] These conflicts were of a magnitude and intensity to reach the desks of Margaret Thatcher and Ronald Reagan. The situation was neatly summed up by Lord Wilberforce when, in the uranium cartel litigation, he stated,

> [i]t is axiomatic that in antitrust matters the policy of one state may be to defend what it is the policy of another state to attack.[4]

Even as recently as 1997, Her Majesty's Foreign Office inquired why the FTC would review the Guinness/GrandMetropolitan merger - despite the fact that each company obtained substantial revenues from consumers in the United States.[5]

Fortunately, thanks to communication, cooperation, and convergence among competition policy enforcers, we no longer receive such inquires from the Foreign Office; on the contrary, the U.S. agencies regularly communicate with their foreign counterparts - DG COMP in Brussels, the OFT and the Competition Commission in London, the Bundeskartellamt in Bonn, as well as the other EU Member State competition authorities - not to mention those in our immediate neighborhood, Canada and Mexico, and with the authorities in Australia and Asia, such as the Japanese and Koreans.[6] We are also engaged in dialogue with the Chinese concerning the

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[3] *See* Spencer Weber Waller, ANTITRUST AND AMERICAN BUSINESS ABROAD (3rd ed. 1997) at § 6.14 (providing a synopsis of the uranium cartel litigation).

[4] *In re* Westinghouse Electric Corp. Uranium Contract Litigation, [1978] A.C. 547, 617 (House of Lords).

[5] According to the FTC's complaint in that case (¶¶ 3 and 8, respectively), Guinness's U.S. revenues in 1996 were $645 million, about 8 percent of its worldwide revenues of $8 billion and GrandMetropolitan's U.S. revenues in 1996 were $8 billion, about 57 percent of its worldwide revenues of $14 billion. The FTC's complaint is available at: http://www.ftc.gov/os/1998/04/9710081.cmp.htm.

[6] United States bilateral cooperation agreements with Australia, Brazil, Canada, the European Communities, Germany, Israel, Japan, and Mexico are available at: http://www.ftc.gov/bc/international/coopagree.htm.

development of their competition policies.[7] This communication and cooperation has led to coordination of dozens of multijurisdiction investigations over the past decade, usually with successful results - that is, enforcement decisions that are compatible and do not put parties under conflicting obligations. Therefore, and with all due respect to the late Lord Wilberforce, we strive to cast his axiom to the dustbin of history. Yet, we recognize the possibility of potential conflict.

My remarks today will remind us of those sources of conflict and describe what we in the competition enforcement community have done - and continue to do - to avoid conflict and minimize its effects.

II. Sources of conflict

Competition policy enforcement does not occur in a vacuum. In saying that, I am echoing the words of my Chairman, Deborah Majoras, in her remarks last month before the Fordham Corporate law Institute in New York. Let me quote her in full:

> The job of the antitrust enforcer is, of course, to apply the competition laws fairly and consistently, without regard to "political" interests, meaning partisan interests, as the term is generally used. In this sense, apolitical application is vital to maintaining the effectiveness of our competition laws, and to garnering public support for a culture of competition. This does not mean, however, that competition enforcers operate in a vacuum tube, isolated and immune from the political process. Far from it. The policies of and actions taken by antitrust enforcers can have a significant impact on elected policy-makers; and, similarly, the political actions produced by legislatures and regulatory agencies can have a significant impact on our work.[8]

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[7] *See* The Development of Antitrust in China, Korea and Japan, remarks by Deirdre Shanahan, FTC Bureau of Competition Counsel for Asia-Pacific Affairs, before the Conference on International Competition Law: Real World Issues and Strategies for Success, June 16-17, 2005, in Montreal, Canada; *available at*: http://www.ftc.gov/bc/international/docs/shanahanmontreal.pdf.

[8] Remarks of Chairman Deborah P. Majoras before the 32rd Fordham Corporate Law Institute, New York, Sept. 22, 2005 (forthcoming).

As much as we, who are responsible for enforcement, would like to carry out competition policy on the merits in protection of consumers, we must acknowledge that we are accountable to our governments. And, those governments may pursue other policies that may come into conflict with, and override, competition policy enforcement. Such conflicts can arise in purely domestic matters with no international aspects. The potential for conflict is magnified when business conduct or transactions have effects in more than one jurisdiction. To understand how competition enforcers try to avoid and minimize such conflicts, it is important to recall the sources of such conflict.

A. Sovereignty

The sovereignty of nation states is a fundamental source of potential conflict that necessitates international cooperation for effective competition policy enforcement. Nations adopt competition policies and establish the agencies to enforce them for the benefit of their own consumers. They do not expect other nations to protect their consumers from anticompetitive harm. And, for reasons other than competition policy, they may be suspicious of other nations whose enforcement reaches beyond its borders. These are a couple of reasons why many speakers on this topic routinely say that they do not expect to see the creation of a single world-wide competition enforcement agency in our lifetimes.

Evidence of the importance of sovereignty is all around us. Defense of sovereignty was at the root of the United Kingdom's objections in the uranium cartel and Freddie Laker cases to what it alleged was U.S. extraterritorial enforcement of its competition laws. Other more recent examples include the decisions of the United Kingdom, Denmark and Sweden not to join the European Currency Union and to maintain their domestic currencies rather than replacing them

with the euro. In the field of competition policy, the efforts of Lord Brittan to create a "one-stop shop" for merger reviews in Brussels were constrained by the EU Member States, as the Council of Ministers adopted a merger control regime that requires mergers of a "community dimension" to be notified to DG COMP in Brussels, while leaving all others to the 25 Member State competition authorities.[9] The Merger Regulation also provides that mergers of a community dimension that have an impact on a distinct market of a Member State may be referred to that member state for review. This division of authority reflects a concept based on sovereignty within the European Union: "subsidiarity," a principle by which authority is allocated to the level of government closest and best placed to carry out the authority.[10]

Subsidiarity is an appropriate concept in competition policy enforcement - especially now that most enforcement regimes in the world make consumer welfare the goal of competition policy enforcement. The agencies that are closest to the consumers affected by a business practice or transaction are likely to be best placed to evaluate those effects.

This notion may give heartburn to corporate executives who think globally of the efficiencies that may be realized by a merger of companies with facilities and customers in a number of countries but face review by several competition authorities. During the merger wave of the mid- to late-1990s, Professor Eleanor Fox of New York University Law School said enforcers needed "vision from the top," looking beyond borders to recognize the benefits of

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[9] Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 24, 29 Jan. 2004, [hereafter "EC Merger Regulation"] *available at*: http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_024/l_02420040129en00010022.pdf.

[10] *See* Consolidated Version of the Treaty Establishing the European Community, Article 5, OJ C 325/33 (24 Dec. 2002), *available at*: http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/pdf/12002E_EN.pdf.

globalization of business.[11] Through the communication and cooperation among enforcement agencies that evolved during that time - that I will speak of later in my remarks - the agencies showed that they had a "vision from the top." But, they did not lose sight of the ground, down where the consumers are.

We may not hear complaints as often today as twenty years ago about "extraterritorial" enforcement. But, sovereignty is a fundamental factor in the relations among nations. In fact, the first of the International Competition Network's Guiding Principles for Merger Notification and Review Procedures, adopted at its first annual meeting in 2002, is a recognition of sovereignty.[12]

B. National interests

Sovereignty is often expressed in terms of national interests, such as industries deemed to be strategic and thus to be kept from foreign ownership. France has been in the news lately as some government ministers have claimed that Danone is a "national treasure" that must be protected from rabble such as Pepsico.[13]

While some may shake their heads at the French with some combination of dismay and humor, we all must take seriously national interest claims. France is not alone in providing

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[11] *See, e.g.*, Eleanor M. Fox, Antitrust and Regulatory Federalism: Races Up, Down and Sideways, 75 New York U. Law Review 1781, 1803, *available at:* http://scholar.google.com/scholar?hl=en&lr=&q=cache:WpoOxIhirI4J:www.nyu.edu/pages/lawreview/75/6/fox.pdf+author:%22Fox%22+intitle:%22Antitrust+and+Regulatory+Federalism:+Races+Up,+Down,+and+Sideways%22

[12] ICN Guiding Principles, *available at*: http://www.internationalcompetitionnetwork.org/icnnpguidingprin.htm

[13] For a discussion of such efforts by Member States, *see The Agenda for Europe - Economy and Competitiveness*, remarks by Commissioner Charlie McCreevy, Internal Market Commissioner, Sept. 3, 2005, *available at*: http://www.euractiv.com/29/images/Speech%20McCreevy_tcm29-143848.doc. *See also*, George Parker and John Thornhill, France reminded of takeover laws, Financial Times, Aug. 30, 2005, at 7.

statutory protection from foreign ownership to some industries. The United States maintains several such limitations - specifically, for example, as to airlines - and the Exon-Florio Act of 1988 gives the President the power to block acquisitions by foreign firms that would "threaten to impair the national security."[14] Recently, the bid by Chinese National Offshore Oil Company to acquire Unocal renewed attention to this law. It has prompted an effort by some in the U.S. Congress to provide even more scrutiny of such transactions.[15] And, here in the United Kingdom, the uranium cartel litigation I mentioned earlier was a factor leading to enactment of the Protection of Trading Interests Act of 1980, one of the so-called "blocking statutes."[16]

Such claims of national interest, by the way, are not limited to concerns over foreign ownership; they can include sometimes vague "overriding public interests." For example, merger review in a number of EU member states, including the United Kingdom,[17] is subject to ultimate decision by a Government Minister acting under varying formulations of the public interest. For example, in Germany several years ago, the Bundeskartellamt decided to prohibit the proposed merger of E.on and Ruhrgas.[18] The parties, however, persuaded the Economics

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[14] Section 5021 of the Omnibus Trade and Competitiveness Act of 1988, PL 100-418, 102 Stat. 1107, amending Title VII of the Defense Production Act of 1950, 50 U.S.C. App. § 2158 *et seq.*, adding a new section 721 granting authority to the President to review certain mergers, acquisitions, and takeovers by foreign persons.

[15] *See* H.R. 3057, §6130, as adopted by the U.S. Senate, July 20, 2005; *available at*: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h3057eas.txt.pdf. The measure remains pending further action by the U.S. Congress.

[16] For a description of blocking statutes see SPENCER WEBER WALLER, 1 ANTITRUST AND AMERICAN BUSINESS ABROAD § 4.16 (3d ed. 1997).

[17] *See* Office of Fair Trading, Mergers - Procedural Guidance, chapter 8, concerning "Public Interest Mergers" under the Enterprise Act 2002.

[18] The story of the E.on/Ruhrgas gas is described by Germany's Federal Cartel Office, the Bundeskartellamt, in its annual report on competition policy enforcement for 2001-2002 to the OECD, at ¶¶ 59-68; *available at*: http://www.oecd.org/dataoecd/34/6/2489057.pdf.

Minister to use the authority reserved to him in Germany's competition law to override the Bundeskartellamt's decision and allow the merger to be consummated.[19]

C. Regulatory versus market-based economic policies

The extent to which governments regulate various industries can also override competition policy. This can take a number of forms and serve as an entry barrier. For example, pharmaceutical products and medical devices are typically subject to approval by national regulatory authorities. This is a fundamental reason why pharmaceutical mergers require separate analyses in each nation in which the companies' products are approved for sale. Likewise, national pharmaceutical regulators may impose varying approval requirements meaning that entry may take longer in one country than another. That can affect the competition agencies' entry analysis and lead to different results.

Furthermore, the fact that some nations have been reluctant to liberalize various economic sectors and open them to competition can affect a potential competitor's efforts to enter a new market. The extent to which a nation has, in fact, liberalized a sector, such as telecommunications, may also affect a competition agency's analysis of the extent to which a former monopolist may be abusing a dominant position. Margaret Bloom, former Director of Competition Enforcement at the OFT, suggests in an illuminating article presented to the American Bar Association earlier this year, that European enforcers may be more likely to find abuse of dominance in such liberalizing sectors because currently-dominant firms were

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[19] The story of the German Economics Minister's authorization of the E.on/Ruhrgas merger, overriding the Bundeskartellamt's decision to prohibit it, is contained in the Bundeskartellamt's annual report on competition policy enforcement for 2002-2003 to the OECD, at ¶¶ 55-58; *available at*: http://www.oecd.org/dataoecd/22/21/34831942.pdf.

previously state-controlled monopolies and markets in Europe remain national in scope, leaving less chance for rivalry.[20]

D. Different aims of competition policy and theories of competitive harm

This brings me to a potential source of conflict among competition enforcers and that is differences in competition policy - either as to its aims or its theories of competitive harm, or both. Many jurisdictions, including the United States with its Robinson-Patman Act, enacted anti-price discrimination laws with the aim of protecting small- and medium-sized enterprises against large businesses. Even competition laws that are facially neutral as to such aims may, however, be interpreted to protect "competitors rather than competition."

More specifically, some enforcers may pursue theories of competitive harm that others have found through experience rarely to be supportable with empirical evidence. For example, the EC Merger Regulation requires the EC to consider the "economic and financial power" of the merging parties.[21] The U.S. agencies no longer give this factor, referred to by some as the "deep pockets" theory, much - if any - weight.

III. Evolution from conflict to cooperation to convergence in competition policy

These are the main sources of conflict among nations and their competition enforcers. They have reared their heads in the past and they remain factors with which we may have to contend in the future.

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[20] Margaret Bloom, The U.S. and EU Move Towards Substantial Antitrust Convergence on Consumer Welfare Based Enforcement, ANTITRUST, Vol. 19, No. 3 (Summer 2005) 18, 22.

[21] EC Merger Regulation, *supra*, note 9, Art. 2.1.(b.).

Nevertheless, over the past generation -- Isn't it hard to believe that 1980 was 25 years ago? -- instances of conflict have declined. Instead, cooperation and coordination increasingly typify relations between nations and their competition enforcers. A consequence of that cooperation and coordination has been convergence in competition policy. Keep in mind that this has happened even as the number of competition enforcers has grown substantially.

This evolution from conflict to cooperation to convergence was stimulated within bilateral relationships and has been reinforced and expanded within multilateral relationships. It was also aided by evolving views of economic policy, especially as to the role of competition and open markets as drivers of economic development and growth. And, this evolution has served as a model for newer competition enforcement agencies to emulate, both in the adoption of sound policy and the enforcement of their laws.

A brief review of history is instructive. Conflicts between Canada and the United States over competition policy enforcement in the 1950s resulted in discussions between their respective attorneys general that led to commitments to notify and consult on such matters.

In 1967, the Organization for Cooperation and Development - the OECD - consisting at that time of the major Western industrial countries - agreed to a Recommendation that its members notify one another of competition enforcement matters that would affect another member's important interests and that they would consult with each other and take each other's interests into consideration in making their enforcement decisions.[22]

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[22] OECD, Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade, C(95)130/FINAL (1995), *available at* http://webdomino1.oecd.org/horizontal/oecdacts.nsf/Display/212F3F360F04FE3FC125704900806DC9?OpenDocument.

Beginning in 1976, the United States entered a series of bilateral competition enforcement cooperation agreements aimed at avoiding conflict and fostering cooperation in enforcement. The 1976 Germany-U.S. Agreement stemmed from German-American relations that had developed during the post-World War II de-cartelization of the German economy and the enactment of Germany's competition law in 1957. The 1982 Australia-U.S. Agreement dealt with the problems that arose between them during the uranium cartel litigation I referred to early in my remarks. Two years later, the United States and Canada came to a similar resolution.

Then, in 1991, recognizing that they might come to blows over conflicting merger reviews, given enactment of the EC Merger Regulation, the United States and the European Communities entered into a cooperation agreement.[23] Before the ink was dry on the Agreement, intensive contact began between the U.S. agencies and the EC's Competition Directorate. By the time the mid-90s merger wave began, they understood each other's laws and procedures and were committed to cooperation. Coincidentally, in a development that could only be fully appreciated now, a gentleman named Philip Lowe served as Director of the EC's Merger Task Force from 1993-95. Under his leadership, the MTF and the U.S. agencies began to work together on the ever-growing case load of mergers and built the framework in which day-to-day U.S.-EC cooperation functions.

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[23] European Communities–United States: Agreement on the Application of their Competition Laws, Sept. 23, 1991, 30 INT'L LEGAL MATERIALS 1487, 1492, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,504; *available at*: http://www.usdoj.gov/atr/public/international/docs/ec.htm [hereinafter U.S.-EC Agreement].

By 1997, the agencies had already established a record of numerous successful collaborations. The Boeing/McDonnell Douglas case[24] in that year illustrated how differences between competition laws can lead to different enforcement results. Although the FTC majority and the EC agreed that McDonnell Douglas no longer exerted competitive pressure in the commercial airliner market, their respective laws led them to different conclusions as to the competitive effects of the merger. The FTC found that the merger would not substantially lessen competition while the EC found that the merger would strengthen Boeing's dominant position. The EC agreed to consultations on the case and accepted remedies that would allow the merger to proceed. Some politicians in the United States complained about the result. But, neither the FTC nor the EC let the conflict affect their relations. A month after the Boeing decisions, it was agreed that FTC staff would attend the EC's hearing in the Guinness/GrandMetropolitan case and, shortly after that hearing, agreement was reached with the parties on a settlement that would resolve concerns in the same product market both in Europe and in the United States.[25]

Ironically, a few years later, another case involving Boeing would find the shoe on the other foot, but no one complained of "conflict." Boeing sought to acquire Hughes's satellite business. The FTC accepted a consent agreement, settling charges over the anticompetitive

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[24] *The Boeing Co.*, et al., Joint Statement closing investigation of the proposed merger and separate statement of Commissioner Mary L. Azcuenaga, FTC File No. 971-0051, 1 July 1997, *reported in* 5 Trade Reg. Rpt. (CCH) ¶ 24,295, *available at*: http://www.ftc.gov/opa/1997/07/boeing.htm; *Boeing/McDonnell Douglas*, Case No IV/M.877, European Commission Decision of 30 July 1997, OJ L 336/16 (8 Dec. 1997), *available at*: http://europa.eu.int/comm/competition/mergers/cases/decisions/m877_19970730_600_en.pdf.

[25] *Guinness/GrandMetropolitan*, Case No IV/M.938, Commission Decision of 15 Oct. 1997, *available at*: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=31998D0602; *Guinness PLC, et al.*, FTC Dkt. No. C-3801, Decision and Order, Apr. 17, 1998, *reported in* 5 Trade Reg. Rpt. (CCH) ¶ 24,359, *available at*: http://www.ftc.gov/os/caselist/c3801.htm.

effects resulting from that vertical merger.[26] The EC and FTC fully cooperated with each other in the investigation and settlement of the case, aided by waivers of confidentiality granted by the merging parties. The EC, however, could not find that the merger would create or strengthen a dominant position in any relevant market and therefore it could not condition clearance of the merger on the settlement terms.[27] The recent revision of the EC Merger Regulation's substantive standard, had it been in effect at that time, would have enabled the EC to avoid the dominance analysis of the old standard and to consider adoption of a finding, akin to the FTC's, that the merger would "significantly impede effective competition."

Around this time - actually, in 1999 - the U.S. agencies and the EC decided that the time had come to apply the knowledge they had gained in case cooperation to policy development. The FTC had issued its Divestiture Study[28] and the EC thought it should issue guidance on merger remedies. Therefore, the EC and the U.S. federal agencies agreed to establish a Merger Working Group and merger remedies would be the first issue for its consideration. As a result of its work, the EC issued merger remedies guidelines in 2001[29] that Mario Monti, then EC Competition Commissioner, praised as a product of U.S.-EC collaboration.[30]

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[26] *In the matter of The Boeing Company*, FTC Dkt. no. C-3992, Decision and Order of Sept. 27, 2000, *available at*: http://www.ftc.gov/os/caselist/c3992.htm.

[27] *Boeing/Hughes*, Case No. COMP/M.1879, Commission Decision of 27 Sept. 2000, *available at*: http://europa.eu.int/comm/competition/mergers/cases/decisions/m1879_en.pdf.

[28] Federal Trade Comm., "A Study of the Commission's Divestiture Process" (1999), *available at* http://www.ftc.gov/os/1999/08/divestiture.pdf.

[29] Commission Notice on remedies acceptable under the [EC Merger Regulation], OJ 68/3 (2 Mar. 2001), *available at*: http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/c_068/c_06820010302en00030011.pdf.

[30] Mario Monti, The Commission Notice on Merger Remedies - one year after, 18 Jan. 2002, *available at*: http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/02/10|0|RAPID&lg=EN.

Unfortunately, the GE/Honeywell case of 2001 resulted in an enforcement conflict involving differences in law and enforcement policy, some of which had been observed in the Boeing/McDonnell Douglas case. The EC and U.S. decided to task the Merger Working Group with assessing both substantive and procedural differences in their systems. One result of that effort was the issuance in 2002 of Best Practices on Cooperation in Merger Investigations, a statement that reflects in some detail the ways in which the agencies cooperate with one another and how parties can, if they wish, facilitate that process.[31] Another result of that effort was a more thorough understanding on both sides of the nature and extent of the differences between them in the fields of vertical and conglomerate mergers. I will have a bit more to say about that in a few moments.

In the meantime, cooperation and coordination has continued unabated and has expanded in some cases to tri- and multi-lateral cooperation involving Canadian, Mexican, and other competition authorities. As parties have gained a greater appreciation of the extent to which the agencies actually do communicate and cooperate, they have been more willing to facilitate cooperation, especially through the grant of waivers of confidentiality that principally allow the agencies' staffs to thoroughly discuss the parties documentary submissions.

Let me mention a couple of recent examples of cases whose resolution involved close cooperation between the FTC and the EC:

- ***Sanofi/Aventis***: Sanofi-Synthélabo's 2004 acquisition of Aventis, S.A. raised competitive issues in several pharmaceutical markets. Close consultation and cooperation

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[31] U.S.-EU Merger Working Group, Best Practices on Cooperation in Merger Investigations (2002), *available at*: http://www.ftc.gov/opa/2002/10/euguidelines.htm.

between FTC and EC staff were necessary particularly to achieve non-conflicting remedies in the separate European and U.S. markets for cytotoxic drugs for the treatment of colorectal cancer. Complicating that effort was the existence of third party rights in one of the jurisdictions, a factor that is quite common in the pharmaceutical industry. Because this was a tender offer subject to France's takeover code, the FTC also consulted with France's financial regulator, the AMF.

- ***Sony/BMG***: The FTC and the EC communicated regularly in their respective investigations of this proposed merger of the parties' music businesses. Of particular concern was increasing concentration in the industry and rapidly evolving changes in the distribution of music. Both agencies ultimately closed their investigations without taking enforcement actions, acknowledging publicly their close communication during the investigations.

- ***Proctor & Gamble/Gillette***: Although I was recused from this matter, I can observe that the FTC's press release in this matter noted cooperation among the FTC and not only the EC but other jurisdictions as well.

This experience, including the conflicts, teaches that we cannot underestimate the importance of bilateral relationships in fostering enforcement cooperation in case work as well as in development of convergence in policy.

I mentioned at the outset of my remarks that my references to EU enforcers included the Member State authorities. Although most case coordination is with DG COMP, there are numerous examples of successful collaboration with Member State authorities as well. For example in 2002, the FTC worked closely with the OFT and the Competition Commission on the

cruise lines cases and last year with OFT and the Bundeskartellamt in the GE/InVision case.[32] The U.S. agencies are fully cognizant of the role the Member States play in EU competition enforcement, enjoy positive relations with them, and do whatever we can to further them.

These bilateral relationships have effectively merged and brought aboard many new colleagues in the competition enforcement community to form the International Competition Network. Launched in October 2001, the ICN provides a virtual venue for the world's competition agencies to deal with competition policy and enforcement issues.[33] It facilitates procedural and substantive convergence in antitrust enforcement through a results-oriented agenda and informal, project-driven organization. Its fourth annual conference in Bonn, Germany, in June 2005, was attended by over 400 people, representing more than 80 competition authorities and including non-governmental advisors from the private sector and academia.

In its four years of existence, the ICN has, *inter alia*, developed a comprehensive set of recommended practices for merger notification and review procedures aimed at adoption of best practice notification requirements and review procedures. The ICN has also encouraged and monitored implementation of its recommended practices; in fact, over 50 percent of ICN members with merger review laws have made or planned revisions to their merger regimes that

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[32] *In the matter of General Electric Company*, FTC Dkt. no. C-4119, Decision and related materials *available at*: http://www.ftc.gov/os/caselist/0410106/0410106.htm. *General Electric Company and InVision Technologies*, B7 - 65/04, *Bundeskartellamt* Decision of 17 Aug. 2004, *available (only in German) at*: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion04/B7-65-04.pdf; "Clearance of General Electric / InVision Merger in Close Cooperation with US Competition Authority," *Bundeskartellamt* press release (in English) *at*: http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2004/2004_08_19.shtml.

[33] Visit the ICN's website at: http://www.internationalcompetitionnetwork.org/index.html.

bring them into greater conformity with the recommended practices.[34] Such efforts will lead to convergence, making merger review easier for merger parties and enforcers alike.

IV. US-EU Competition Policy Harmony - close, with some chords yet to be resolved

Let me return to the transatlantic realm now. Despite the numerous cases of successful transatlantic enforcement cooperation, conflicts generate headlines declaring "splits" and "trade wars," as occurred in the wake of the EC's March 2004 decision in its case against Microsoft. Reacting to that decision, Microsoft's general counsel, Bradford L. Smith, said that the EC's decision "shatters any notion that there is harmony in transatlantic competition decisions."[35] Whether one sympathizes or not with Microsoft's position in this case, Mr. Smith's comment is contradicted by dozens of matters successfully resolved by U.S. and European authorities, involving issues of comparable economic weight and importance as those in the Microsoft cases. It is important to study those many cases to understand how cooperation "works" in practice, generally, and as to the resolution of specific issues in actual cases. Having said that, I will speak now to the extent of U.S.-EU convergence in the field of cartels, mergers, and unilateral conduct.

A. Cartels

Cartel enforcement in the United States - particularly that which results in criminal penalties, such as fines and imprisonment of those responsible for the cartel - is handled by the Antitrust Division of the Department of Justice. DoJ has been a consistently tough cartel

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[34] *See* Elizabeth F. Kraus and Maria B. Coppola, International Competition Network - Update, THE THRESHOLD, Vol. V, no. 3 (Summer 2005), 2, 3; *available at*: http://www.ftc.gov/bc/international/docs/krauscoppolaicn05.pdf.

[35] Jonathan Krim, *Regulators, Rival React; EU's Microsoft Decision Shows Split With U.S.*, WASH. POST, Mar. 25, 2004, at E1.

enforcer for decades. It has developed tools, such as leniency, that help to crack, reveal, and unravel cartels. The U.S. Congress has helped these efforts through a recent enactment that allows for higher penalties and other incentives to successfully terminate cartels.[36]

The EC, starting under the leadership a decade ago of Competition Commissioner Karel Van Miert and Director General Alexander Schaub, elevated cartel enforcement to one of its highest priorities.[37] The EC adopted a leniency program in 1996, but with experience, Commissioner Mario Monti modified it in 2002 to converge and cooperate with DoJ's leniency program.[38] The recent establishment of a separate cartel enforcement directorate in DG COMP demonstrates Commissioner Neelie Kroes's commitment to maintaining cartel enforcement as a high priority. The convergence in enforcement policy has been matched by cooperation in investigations. Joint, coordinated dawn raids have taken place and other efforts have been taken to further cooperation in investigations and prosecutions.

B. Mergers

The field of mergers also enjoyed convergence in policy that has made the long-standing cooperation between the EC and U.S. authorities easier to carry out, particularly as to horizontal mergers that account for most merger cases. The reform of the EC Merger Regulation that took

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[36] Antitrust Criminal Penalty Enhancement and Reform Act of 2004; *see* Statement of Assistant Attorney General for Antitrust, R. Hewitt Pate, on its enactment, *available at*: http://www.usdoj.gov/atr/public/press_releases/2004/204319.pdf.

[37] *See* remarks of Alexander Schaub, then-Director General of DG-IV, before the 1999 Fordham Corp. Law Inst., at 68-69.

[38] European Commission Notice on immunity from fines and reduction of fines in cartel cases, OJ C 45 (19 Feb. 2002), *available at*: http://europa.eu.int/comm/competition/antitrust/leniency. *See also*, Mario Monti, EU Competition Policy, 2002 Fordham Corp. L. Inst. 87, 91 (B. Hawk ed. 2003) ("[US and EC] leniency programmes, . . . , are now very similar. In fact, we paid a lot of attention to the success of the U.S. corporate leniency program when we drafted our new guidelines on leniency.")

effect last year included revision of the substantive standard for the review of mergers that effectively harmonized it with the merger review standard contained in the U.S. Clayton Act. The EC's Horizontal Merger Guidelines[39] in most respects include the same elements and track the analytical approach taken under the 1992 DoJ-FTC Horizontal Merger Guidelines.[40] Furthermore, the introduction of the Chief Economist and his team has had a positive impact not only on DG COMP, but also in our cooperation on cases.

Some changes in the procedure under the EC Merger Regulation - particularly the changes in counting the days toward decision deadlines and the possibility to "stop the clock" - benefit not only the merging parties and DG COMP, but also their efforts to coordinate the procedure with other enforcement authorities' investigations.

Another change made as part of the EU merger reform effort deserves more attention than it has received to date: That change is a re-wording of § 5.4 of the EC's premerger notification form, Form CO. It now tracks very closely the language in part 4(c) of the U.S. Hart-Scott-Rodino premerger notification form. It appears that, as Form CO, § 5.4 reads now, merging parties obligated to notify both the EC and U.S. agencies must give the EC at least the same documents they give the U.S. agencies under 4(c) and, perhaps, more. These are the internal company documents that were prepared for officers or directors for the purpose of analyzing the proposed transaction.[41]

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[39] Guidelines on the Assessment of Horizontal Mergers, OJ C 31/5 (5 Feb. 2004), *available at*: http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_031/c_03120040205en00050018.pdf.

[40] U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, issued Apr. 2, 1992, revised Apr. 8, 1997; *available at*: http://www.ftc.gov/bc/docs/horizmer.htm.

[41] The importance of such documents in the initial phase of merger review was described by Marian Bruno, Director of the FTC's Premerger Notification Office, in remarks entitled "Hart-Scott-Rodino at 25," before the

We should also keep in mind other examples of convergence that were already in place and have not changed: specifically, the EC's 1997 market definition guidelines[42] and its 2001 merger remedies guidelines.[43]

But, some substantive differences remain. In that regard, what was not changed in the Merger Regulation is notable, as are European court decisions. For example, the Merger Regulation obliges the EC to consider a number of factors in analyzing the competition effects of a merger, including the "economic and financial power" of the merging parties. As I mentioned earlier, this factor is sometimes dismissively called the "deep pockets" theory, one that American enforcers are unlikely to find persuasive. But, calling it names does not make it go away. Even if the EC were inclined to give it less weight, it cannot ignore this factor, as it learned to its chagrin a few years ago when one of its decisions to clear a merger in the German coal industry was overturned because the Court found that the EC had failed to consider that factor.[44] Furthermore, those same European courts have endorsed "leveraging"[45] and "portfolio power"[46]

American Bar Association conference, "Mergers and Acquisitions: Getting Your Deal Through the New Antitrust Climate," New York City, June 13, 2002, *available at*: http://www.ftc.gov/speeches/other/brunohsr25.htm.

[42] Commission Notice on the definition of the relevant market, OJ C 372 (9 Dec. 1997), *available at*: http://europa.eu.int/comm/competition/antitrust/relevma_en.html.

[43] Commission Notice on remedies acceptable under the [EC Merger Regulation], OJ C 68/3 (2 Mar. 2001); *available at*: http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/c_068/c_06820010302en00030011.pdf.

[44] Case T-156-98, *RJB Mining plc v. Comm.*, 2001 E.C.R. II-337 (Jan. 31, 2001), *available at* http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61998A0156.

[45] Case T-5/02, *Tetra Laval BV v. Commission*, Judgment of the Court of First Instance (First Chamber), 25 Oct. 2002, ¶¶ 151-152 ; *available at*: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62002A0005.

[46] Cases T-114/02 and T-119/02, *BaByliss v. Commission* and *Philips v. Commission*, Judgements of the Court of First Instance, 3 Apr. 2003, *available respectively at*: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62002A0114,

theories that are viewed more skeptically by some enforcers in the United States.[47] "Bundling" may be added to that list, depending on the outcome of the Court of First Instance's pending review of the EC's GE/Honeywell decision.

Having said that, we need to keep it in perspective. Relatively few merger cases raise vertical or conglomerate issues and few of those lead to enforcement actions. But, some of those issues also arise in the context of inquiries over the behavior of dominant firms, and that is an area of remaining divergence between the EC and the United States.

C. Unilateral conduct

The *Microsoft* case is but one recent example that illustrate differences between the U.S. and EC in dealing with unilateral conduct cases. *British Airways*, a case dealing with fidelity rebates is another. Margaret Bloom's article, that I mentioned earlier, neatly describes the differences over this issue that are displayed by the contrasting U.S. and EU judicial decisions in the *British Airways* case.[48] The European court viewed the rebates at issue as suspicious while the American court viewed them as procompetitive.

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http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62002A0119.

[47] *See, e.g.*, Merger Enforcement in a World of Multiple Arbiters, Prepared Remarks of Timothy J. Muris, Chairman, Federal Trade Commission, before the Brookings Institution Roundtable on Trade and Investment Policy, Washington, DC, Dec. 21, 2001, at 7-8; *available at*: http://www.ftc.gov/speeches/muris/brookings.pdf. *See also* GE-Honeywell: The U.S. Decision, remarks of Deborah Platt Majoras, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, before the Antitrust Law Section, State Bar of Georgia, Nov. 29, 2001; *available at*: http://www.usdoj.gov/atr/public/speeches/9893.pdf.

[48] Margaret Bloom, *supra*, note 20, at 22.

She also notes that the law of monopolization in the United States is somewhat unsettled, given the recent Third Circuit Court of Appeals decision in the *Lepage's v. 3M* case.[49] As she put it,

> While U.S. law is clear on the procompetitive benefits for consumers of above cost single product rebates, this is not so for multi-product or bundled rebates. For example, in *LePage's v. 3M*, the Third Circuit ruled that 3M's bundled rebate program violated Section 2 despite the fact that the prices, even after the rebates, do not appear to have been below cost. . . .The opinion reflected a concern over unfairness when a big multi-product firm exploits its advantages to the detriment of a smaller rival - a concern that would be more familiar in Europe.[50]

And, as I mentioned earlier, she observes that while some markets in Europe may have been liberalized, they remain dominated by the former state monopoly. As she noted, "many of the big firms were previously state monopolies. . .[that] have not obtained their powerful positions through superior business performance - in contrast to most large U.S. firms."[51] This, to her, may suggest the need for more interventionist enforcement.

DG COMP is in the midst of a review of its enforcement policy in this area. It has commissioned a study by economists to advise on policy options,[52] and it is currently consulting with the EU Member States on policy options in the area of exclusionary conduct.

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[49] 324 F.3d 141 (3rd Cir. 2003).

[50] Margaret Bloom, *Supra*, note 20, at 22.

[51] *Id*.

[52] Report by the EAGCP, An Economic Approach to Article 82, July 2005, *available at*: http://europa.eu.int/comm/competition/publications/studies/eagcp_july_21_05.pdf.

Commissioner Kroes spoke about the review at the recent Fordham conference in New York, expressing the anticipation of a wide-ranging public discussion of these issues.[53]

V. Enforcement cooperation in practice

So, some differences in competition law and enforcement policy remain in the transatlantic realm. But, differences have not prevented EU and U.S. authorities from effectively cooperating with one another in cases of concurrent jurisdiction. The narrowing of differences in the fields of cartel and horizontal merger enforcement should make cooperation easier in such cases. It should also make us optimistic over the prospect of further convergence.

The EC and the United States recognized when they entered their cooperation agreement in 1991 that the differences in their laws could lead to conflicting results in concurrently reviewed cases. That was the main reason they entered the agreement; its stated purpose is to "lessen the possibility or impact of differences between the Parties in the application of their competition laws."

The agreement contains several mechanisms designed to help the agencies fulfill that purpose; among them are commitments to notify, share information, consult, and to take each other's important interests into account in their decisions. With these elements, the Agreement reflects the concept of comity among sovereigns. Comity is the Golden Rule principle applied to sovereigns - do unto others as you would have them do to you. Given the complexity of the matters the enforcers face, especially in terms of the frequently different effects a transaction or conduct may have in different jurisdictions, comity does not mean that one enforcer simply

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[53] Preliminary Thoughts on Policy Review of Article 82, remarks by Commissioner Neelie Kroes before the Fordham Corporate Law Institute, New York, 23 Sept. 2005.

stands aside; instead it means that they work together, sharing information about the competition effects of the matter under scrutiny in their respective jurisdictions, identifying and clarifying their enforcement interests, and working together to identify an appropriate remedy. Comity is at the heart of the U.S.-EC Agreement and the agencies practice comity as a matter of course.

Cooperation among the enforcement agencies has become routine over the past decade and it increasingly involves mutual cooperation involving the merging and third parties in the investigation and resolution of cases.[54] It was not always so, as a little review of history reveals.

Going into their agreement over a decade ago, U.S. and EC authorities recognized that their respective competition laws contained seemingly different legal standards. Efforts were undertaken to understand each other's laws and processes. Workshops were held in which EC and U.S. staff discussed analytical tools (market definition and competitive effects analysis, particularly under the then-new U.S. horizontal merger guidelines) and investigative methods (interview techniques and document gathering and analysis). A study was made of each other's pre-merger notification instruments to learn precisely what information each side sought and gathered.

With the help of their respective legal services, the agencies also determined what kinds of information they could share with each other within the bounds of their respective confidentiality rules. The agencies distinguish confidential agency information that can be shared with other antitrust authorities from confidential business information, the disclosure of

[54] For a thorough description of the cooperative process *see* John J. Parisi, Enforcement Cooperation among Antitrust Authorities, *available at*: http://www.ftc.gov/speeches/other/ibc99059911update.htm.

which is specifically barred by statute, absent a waiver from the submitter of the information.[55] Confidential agency information is information that the agencies are not prohibited from disclosing, but normally treat as non-public. This includes how the staff analyses the case, including product and geographic market definitions, assessment of competitive effects, and potential remedies.

By the time merger activity started to grow in the mid-1990s, the agencies were ready not only to cooperate with one another, but also to coordinate their respective investigations. But, merging parties and their advisers were not. In some early cases, parties focused their attention on reaching a satisfactory decision in Brussels – within the un-waivable time deadline for a decision – and then turned to Washington, hoping that the U.S. authorities would accept the settlement negotiated in Brussels.[56] But, the agencies were prepared for this, having thoroughly communicated their respective analyses and conclusions with each other and determining what action, if any, should be taken.

As companies and their counselors became more familiar with the nature and extent of enforcement cooperation that took place among the agencies and recognized the benefits of coordination, they became more willing to facilitate the process. One substantial contribution that parties can – and now regularly do – make is to grant the agencies a waiver of their confidentiality rights over the information they submit to the agencies. Such waivers typically

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[55] *See, e.g.*, Commission Report 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, COM(98) 509 final at 5.

[56] *See, e.g., Mergers and Joint Ventures Roundtable*, 1994 FORDHAM CORP. L. INST. 165, 187-195 (B. Hawk ed. 1995); *see also* Robert Pitofsky, *International Antitrust: An FTC Perspective*, 1995 FORDHAM CORP. L. INST. 6-9 (B. Hawk ed. 1996).

cover all materials submitted to the agencies but the waiver is limited to communication between the reviewing agencies. Confidentiality of all materials is maintained against third parties and the general public. Waivers have permitted the reviewing agencies to focus more quickly on those enforcement issues in which they have common concerns, determine whether the concerns are of a magnitude to require enforcement action by one or both agencies, and then consider remedial measures that would satisfy their concerns without subjecting the parties to conflicting obligations.[57]

Cooperation and coordination among the agencies and the parties have resulted in a lengthy record of cases in which the U.S. agencies and the EC or EU Member State authorities have arrived at the same results in their parallel review of cross-border mergers. It is beyond the scope of this paper to go into detail on many of the mergers that U.S. and European officials concurrently investigated and cooperated. I just ask you to think of mergers in the pharmaceutical industry, for example; do you remember when Glaxo and Wellcome were separate companies and they merged? Old names in that industry such as Hoechst, Upjohn, and Rhone-Poulenc were swept away in the merger wave. Or think of the mergers in the auto parts and the oil and chemical industries. BP still exists but Turner & Norall (T&N) does not. This is a small sample, and these companies all have one thing in common - their mergers were reviewed concurrently by the EC and U.S. authorities and settlements of their anticompetitive effects were achieved without conflict, allowing the parties to merge.

In the field of competition policy, U.S. and European authorities have established a cooperative model that has spread to other nations through, among other institutions, the

[57] The ICN issued in June 2005 a comprehensive paper on waivers of confidentiality, including model waiver forms, *available at*: http://www.internationalcompetitionnetwork.org/NPWaiversFinal.pdf.

International Competition Network and, potentially, to other fields of public policy. As the Financial Times opined,

> The growth of US-EU co-operation on antitrust policy shows different methods can co-exist, provided objectives are broadly shared – or at least understood – and agencies do not retreat into territorial defensiveness.[58]

VI. Conclusion

U.S. and EU competition authorities have faced, and continue to face, numerous hurdles to effective cooperation in enforcement and policy convergence. Some of the hurdles stand for efforts to defend sovereign interests. Others reflect different economic or regulatory policies. And, finally, some are differences in competition policies. Each of these hurdles has the potential to trip up the competition enforcers and cause them to crash into conflict.

The competition authorities on both sides of the Atlantic, however, recognize the benefits to their respective consumers of transatlantic investment and trade.[59] Accordingly, while they are watchful for anticompetitive effects of transactions and conduct, they can recognize the procompetitive aspects as well. Ever conscious of their differences, they seek to fulfill the purpose of their cooperation agreement and "lessen the possibility or impact of [those] differences."

There is, indeed, far more harmony than conflict. The relationship is harmonious, but like any musical group, they need to practice and not rest on their laurels.

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[58] *Rules for Regulators: What Is Good for the EU Is Good for US Trade Relations*, FINANCIAL TIMES, Mar. 4, 2003, at 18.

[59] *See generally* Joseph P. Quinlan, DRIFTING APART OR GROWING TOGETHER? THE PRIMACY OF THE TRANSATLANTIC ECONOMY 1-2, 14-15, 22-23, 25-26 (2003), *available at*: http://transatlantic.sais-jhu.edu/PDF/publications/Quinlan%20Text%20FINAL%20March%202003.pdf.