Merger Enforcement in a World of Multiple Arbiters

Prepared Remarks of

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Merger Enforcement in a World of Multiple Arbiters

Some significant differences exist between the approaches of the United States and the European Community in the enforcement of their antitrust laws. We should, however, keep the impact of those differences in perspective. They are too great to ignore, but not so great as to jeopardize either most trans-Atlantic business activity or trans-Atlantic antitrust enforcement cooperation. I hope that further cooperation will lead to a greater understanding of our points of divergence, and that an open discussion of these differences will enable us to continue our decade-long trend of convergence in merger enforcement policy.

I will begin by describing the context – the kinds of differences that exist, the frequency with which they arise, and a qualitative assessment of their importance. I then will discuss the implications of these differences by analogy to the field of advertising regulation. I will conclude by talking about how the U.S. antitrust agencies and the European Commission (EC) are dealing with our differences. I note that the views expressed are my own and do not necessarily reflect the views of the Federal Trade Commission or other Commissioners.

I. CONTEXT

A. Global Perspective

The spread of antitrust enforcement regimes has paralleled the increasing globalization of business activity during the past decade. Most countries in which multinational firms do business have a competition law and an enforcement agency.

Businesses face different competitive conditions in the various countries in which they operate. Some of these differences arise from different legal and regulatory regimes that affect investment, employment, and taxation. Others arise from the market, such as distribution methods and their related costs, language, and customer tastes and preferences. As much as businesses strive for cost savings through, for example, the standardization of products and their distribution, to succeed they must accommodate the differences arising in those markets in which they participate.

Just as competitive conditions vary from country to country, so too do competition regimes. In many cases, the U.S. antitrust agencies work with foreign antitrust agencies whose laws – and, in some countries, enforcement goals – differ from ours. How enforcers manage those differences influences whether they achieve their enforcement goals; it also influences whether companies get caught in a multi-jurisdictional tug-of-war.

B. U.S. and European Community Antitrust Enforcement

Europeans and Americans share many values. There are differences between the European Union and the United States, though, that matter to businesses and antitrust enforcers alike: customer tastes and preferences; technical standards; and regulatory regimes. Trans-

Atlantic business might be simpler if, for example, electrical appliances used the same power and plugs, the U.S. and Europe used the same cellular telephone technology, or there were one standard of measurement, rather than both metric and English.

Similarly, U.S. and European antitrust policies share many fundamental precepts and goals, but also differ in some significant respects. That is why, ten years ago, the European Community and the United States entered into an antitrust cooperation agreement, a major purpose of which is "to lessen the possibility or impact of the differences between [us] in the application of [our] competition laws."[2]

1. Types of Differences

It is important to understand that there are different kinds of differences. One difference is in the scope of business activity covered by U.S. and EU antitrust laws. For example, some exclusive agreements, such as those that grant exclusive territorial rights, may be unlawful in Europe because of the EU's market integration imperative, but would be permissible in the United States. Another difference can be found in varying theories of harm underlying U.S. and EC enforcement decisions. One notable example arises in the area of conglomerate effects, or bundling, or portfolio power, about which I will say more later. In addition, the effects of trans-Atlantic business activity may differ significantly on each side of the ocean. For example, in a merger case, one party may be active on only one side of the Atlantic, or the markets in Europe and the United States may differ for other reasons, such as government regulation (including tariffs), transportation costs, or the nature of the product.

Finally, as I have said elsewhere,[3] antitrust enforcement is highly fact-intensive. Even where there is agreement on theories of harm and the laws of both jurisdictions cover the activity, the enforcers might disagree on the interpretation of the evidence. This kind of difference arises not only in the international context; even after over one hundred years of federal antitrust enforcement, differences arise among United States antitrust enforcers:

- The Federal Trade Commission, for example, has five commissioners who decide collectively whether enforcement action is warranted in any given case. Split decisions at the FTC – like those that occurred most recently in the *PepsiCola*[4]

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[2] *Agreement between the European Communities and the Government of the United States of America Regarding the Application of Their Competition Laws*, Sept. 23, 1991, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,504, and OJ L 95/45 (27 Apr. 1995), *corrected at* OJ L 131/38 (15 June 1995), *available at* <http://www.usDOJ.gov/atr/public/international/docs/ec.htm>.

[3] Timothy J. Muris, *Antitrust Enforcement at the Federal Trade Commission: In a Word – Continuity*, before the Antitrust Section Annual Meeting (Chicago, IL, Aug. 7, 2001), *available at* <http://www.ftc.gov/speeches/muris/murisaba.htm>.

[4] *Pepsi Inc./Quaker Oats Company*, FTC File No. 011-0059, FTC press release dated Aug. 1, 2001, *available at* <http://www.ftc.gov/opa/2001/08/pepsi.htm>.

and *Pillsbury*[5] cases (in neither of which I participated) – show that reasonable minds may reach different conclusions on the application of the same law to the same body of evidence.

- Although the FTC and the DOJ enforce the same merger statute, the Clayton Act, the agencies have sometimes struggled to achieve consistent interpretations.[6] One way we avoid conflict over specific cases is through our market division agreement by which we allocate new cases to one agency or the other.

- The 50 states are empowered to enforce federal antitrust law (as well as their state laws), but do not always agree with the federal agencies' enforcement policies or actions. This difference is exemplified currently in the *Microsoft* case, the outcome of which remains uncertain.[7] The Supreme Court has upheld the authority of the states to obtain divestitures in a merger case beyond those obtained by the federal authorities after reviewing and settling the same case.[8] (Fortunately, this situation has occurred only rarely, and not for many years.)

- Different outcomes can occur when private parties seek to enforce federal antitrust laws. For example, AlliedSignal successfully challenged B.F. Goodrich Company's proposed acquisition of Coltec after the FTC had closed its investigation of the matter.[9]

- During the Clinton Administration, I criticized the antitrust agencies for ***not*** attacking the *Microsoft/WebTV* merger and ***for*** attacking the *Heinz/Beech-Nut* merger.[10] Despite these, and other, differences on individual cases, my points of agreement with my predecessors vastly outnumber my points of difference.

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[5] *General Mills, Inc./Diageo plc/Pillsbury Co.*, FTC File No. 001-0213, FTC press release dated Oct. 23, 2001, *available at* <http://www.ftc.gov/opa/2001/10/pillsbury.htm>.

[6] In fact, the first set of merger guidelines was promulgated by the DOJ in 1968. It was not until 1992 that the FTC and the DOJ promulgated joint merger guidelines.

[7] The DOJ and certain states have entered into a proposed consent agreement with Microsoft that is pending before the United States District Court for the District of Columbia.

[8] *California v. American Stores*, 495 U.S. 271 (1990).

[9] *AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568 (7th Cir. 1999) (plaintiff competitor in the market for wheels and brakes used in aircraft landing gear systems and customer of landing gear obtained preliminary injunction against the proposed merger). After reaching a settlement with AlliedSignal, Goodrich and Coltec proceeded with their merger.

[10] The FTC split 3-2 on whether to challenge, the district court agreed with the dissenters, *FTC v. H.J. Heinz Co.*, 116 F.Supp. 2d 190 (D.D.C. 2000), and a unanimous circuit court of appeals ultimately agreed with the FTC majority, *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001).

2. Statistical Measures of the Effects of the Differences

Given these differences, it is instructive to look at the record of the past decade, in which we witnessed the increasing globalization of business activity and a significant merger wave:

- The EC decided over 1,700 merger cases, of which approximately 400 involved at least one U.S.-based firm.[11]

- The EC required undertakings as a condition of clearing a deal in about 9 percent of those cases (36 of 402).

- In about four percent of those cases (17), the parties withdrew from the proposed transactions in the face of a likely antitrust challenge (e.g., *Time Warner/EMI*).

- The EC prohibited mergers of U.S.- based firms in only two cases – *WorldComMCI/Sprint*[12] and *GE/Honeywell*[13] – the former of which was also challenged by the DOJ. The EC has blocked 16 other mergers, none of which involved a U.S. firm.

- Another case involving U.S. firms, *Boeing/McDonnell Douglas*,[14] generated much controversy despite the EC's ultimate conditioned clearance.

- Finally, in approximately 75 of those cases there was significant trans-Atlantic communication and cooperation.[15]

3. Qualitative Assessment of Differences

Looking at this record, let me suggest what are, in my view, ***not*** sources of difference between the EC and the United States.

[11] Similarly, approximately 25 percent of Hart-Scott-Rodino filings involve at least one foreign firm, a figure that has remained relatively constant through the 1990s.

[12] *WorldCom/Sprint*, Case No COMP/M.1741, European Commission Decision *available at*: <http://europa.eu.int/comm/competition/mergers/cases/decisions/m1741_en.pdf>.

[13] *GE/Honeywell*, Case No COMP/M.2220, European Commission Decision *available at* <http://europa.eu.int/comm/competition/mergers/cases/decisions/m2220_en.pdf>.

[14] *The Boeing Co.*, Joint Statement closing investigation of the proposed merger and separate statement of Commissioner Mary L. Azcuenaga, FTC File No. 971-0051 (July 1, 1997), *reported in* 5 Trade Reg. Rep. (CCH) ¶ 24,295; *Boeing/McDonnell Douglas*, Case No IV/M.877, European Commission Decision (30 July 1997), OJ L 336/16 (8 Dec. 1997); [1998] CEC 2069.

[15] "Significant trans-Atlantic communication and cooperation" means that there was communication between the FTC/DOJ and EC staffs that confirmed decisions to clear, clear with undertakings, or challenge transactions.

First, I do not believe that the EC discriminates against U.S. firms. Statistically, it has cleared the vast majority of mergers involving U.S. firms. At the same time, the EC has blocked, or required substantial undertakings in, a significant number of deals involving only European firms, including, in just the past few years, *Volvo/Scania*,[16] *AirTours/First Choice*,[17] *Vodafone/Mannesmann*,[18] and *Tetra Laval/Sidel*.[19]

Second, I do not believe that the EC distorts its competition enforcement decisions to achieve industrial policy objectives. The EC's 1991 *deHavilland*[20] decision signaled that it would not interpret the Merger Control Regulation to permit the creation of "European champions." The EC's overall enforcement record is consistent with the precedent set in *deHavilland*.[21]

Third, I do not believe that significant differences between the EC and U.S. authorities in enforcement outcomes – as in *Boeing/McDonnell Douglas* and *GE/Honeywell* – are necessarily due to differences in the substantive textual standards of EC and U.S. merger control laws.[22] Rather, it appears that those differences are traceable to the EC's concern with the potential competitive effects of mergers that are variously called range effects, portfolio power, and conglomerate effects.

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[16] *Volvo/Scania*, Case No COMP/M.1672, European Commission Decision, *available at* <http://europa.eu.int/comm/competition/mergers/cases/decisions/m1672_en.pdf>.

[17] *AirTours/First Choice*, Case No IV/M.1524, European Commission Decision, *available at* <http://europa.eu.int/comm/competition/mergers/cases/decisions/m1524_en.pdf>.

[18] *Vodafone Airtouch/Mannesmann*, Case No COMP/M.1795, European Commission Decision, *available at* <http://europa.eu.int/comm/competition/mergers/cases/decisions/m1795_en.pdf>.

[19] *Tetra Laval/Sidel*, Case No COMP/M.2416, European Commission Decision (public version not yet available).

[20] *Aerospatiale-Alenia/deHavilland* (Decision 91/619/EEC), 2 Oct. 1991, OJ 1991 L334/42, *reprinted in* [1992] 1 CEC (CCH) 2,034. In this case, the EC blocked a proposed merger in the world market for 20-70 seat turboprop commuter aircraft that would have given the combined firm 76 percent of the market for 60-70 seat aircraft and 64 percent of the market for 40-59 seat aircraft. In the immediate wake of the decision, the French Transport Minister said, "This [decision] goes against the interests of the European aerospace industry and risks weakening it dangerously against world competition." *See* A. Hill and P. Betts, *Year-Old Watchdog Bares its Fangs*, FINANCIAL TIMES, Oct. 4, 1991, p. 19.

[21] *See* Valentine Korah, AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND POLICY (7th ed. 2000) 310 at n. 22.

[22] In the United States, Section 7 of the Clayton Act prohibits acquisitions the effect of which "may be substantially to lessen competition or to tend to create a monopoly" in any line of commerce or in any section of the country. Clayton Act § 7, 15 U.S.C. § 18 (1998 supp.). In the European Union, the Merger Regulation prohibits concentrations that create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it. Council Regulation (EEC) No 4064/89 of 21 December 1989, OJ L 395 (30 Dec. 1989); corrected version OJ L 257 (21 Sept. 1990); as last amended by Council Regulation (EC) No 1310/97 of 30 June 1997, OJ L 180 (9 July 1997); corrected version OJ L 40/17 (13 Feb. 1998).

For example, in *Boeing/McDonnell Douglas*, the FTC and the EC agreed on the Douglas Aircraft Company's competitive role in the marketplace. The FTC said that Douglas "is no longer in a position to influence significantly the competitive dynamics of the commercial aircraft market."[23] The EC said that Douglas "is today no longer a real force in the market on a stand alone basis."[24] The conclusions sound the same, but those last five words in the EC's decision – "on a stand alone basis" – mark the starting point of divergence in the agencies' outcomes. As then-academic, now FTC General Counsel, Bill Kovacic, describes in his excellent article about this case:[25]

> [T]he FTC did not discuss the entrenchment of dominance issues that animated the EC's May 97 Statement of Objections and later shaped the EC's settlement terms -- namely, that the merger would suppress competition by boosting Boeing's ties to the airlines (by absorbing Douglas Aircraft's supply and maintenance commitments) and enabling Boeing to use MDC's defense R&D funds to enhance its commercial operations. The omission of these considerations reflects a basic difference between EU and U.S. merger policy.

The more recent decisions in the *GE/Honeywell* case evidence a similar source of divergence. Although I am less acquainted than my DOJ and EC enforcement colleagues with the details of the case, as I understand it, there are two issues on which the DOJ and EC analyses appear to have diverged, and on which I will comment here: "mixed bundling" and vertical foreclosure.[26]

The term "mixed bundling" refers to the practice of offering products both on a stand-alone basis and packaged together, with a price discount for purchasing the package. The EC apparently was concerned about the merged firm's ability to bundle complementary products – GE engines and Honeywell avionics – and sell them at prices that would make it difficult for competitors to match, eventually driving them from the market. The EC did not find that the bundled price predatory.

Putting aside the criticisms of the EC's decision based on lack of evidentiary support for the likelihood of this conduct in the aerospace industry,[27] condemning mixed bundling raises important policy issues. First, it can penalize firms for efficient conduct that likely will lower prices. It would be most unfortunate if this decision discouraged firms from mergers that would produce significant economies of scale or scope because they might disadvantage their rivals.

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[23] *The Boeing Co., supra*, n. 13.

[24] *Boeing/McDonnell Douglas*, OJ L 336/16 (8 Dec. 1997), [1998] CEC 2,069.

[25] William E. Kovacic, *Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy*, 68 ANTITRUST L.J. 805, 831 (2001).

[26] There are other important issues, such as how bidding markets are evaluated.

[27] *See, e.g.*, LEXECON, The Economics of GE/Honeywell – Part 1: Mixed Bundling, Aug. 31, 2001.

Second, prohibiting a merger based on a mixed bundling theory assumes the ability to predict with a high degree of confidence that if the conduct were to occur, rivals could not respond effectively and eventually would be driven from the market. Such predictions should be based on a high standard of proof, preferably consisting of empirical evidence. Although merger analysis inherently involves predicting the future, the degree of speculation required to forecast the effectiveness of the predicted conduct, the inability of rivals to respond, and the eventual exit of those rivals in situations such as those presented by *GE/Honeywell* appears to me to entail a significant risk of error, at the expense of the immediate and relatively more certain benefits that mixed bundling likely would produce.

By contrast, U.S. merger policy gives greater weight to likely near-term benefits, the assessment of which involves less speculation than does the assessment of possible long-term harm that might occur after a sequence of events. The U.S. also places greater confidence in the ability of competitors, customers, and suppliers to adapt to and defeat attempted output restrictions or reductions in quality. Thus, the Justice Department has stated that in *GE/Honeywell* it

> found no evidence supporting the notion that competitors would not be able to keep up or would be forced to exit as a result of the merger. GE's and Honeywell's rivals are mostly large, financially healthy companies with large shares in many of the relevant markets and ready access to capital. Since the engines and avionics and non-avionics systems have already been selected for all existing airframe platforms, and since very little or no new platform competition is expected in the near term, these competitors have an assured revenue stream for many years and any exit scenario seemed wholly implausible.[28]

Another basis for the EC's decision to block the transaction was its concern that GE's strength in aircraft leasing, through its GECAS affiliate, and its financial strength would, when combined with Honeywell's avionics business, enable the merged firm to foreclose its rivals from the market. The EC's concern stemmed from GECAS' policy of purchasing only aircraft with GE engines, and its fear that, post-merger, GECAS would implement a similar policy for Honeywell avionics. Although GECAS accounts for, at most, ten percent of commercial aircraft purchases – a share far below what is normally considered, at least in the U.S., to raise risks of vertical foreclosure – the EC believed that GECAS' market share substantially underestimated its importance in the market.[29] Specifically, the EC was concerned that aircraft manufacturers would shift avionics purchases toward Honeywell products, even if they were higher-priced or of lower quality than competing offerings, because the manufacturers likely would gain more from increased aircraft sales to GECAS than they would forego by purchasing Honeywell avionics

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[28] Submission of the United States Department of Justice to the Organization for Economic Cooperation and Development Roundtable on Portfolio Effects in Conglomerate Mergers ¶ 60 (Oct. 15, 2001), *available at* <http://www.usDOJ.gov/atr/public/international/9550.htm>.

[29] This concern is reminiscent of the EC's concern in *Boeing/McDonnell Douglas* that exclusive purchase contracts with certain buyers accounting for eleven percent of the market presented a much greater threat of foreclosure than their market share alone would indicate.

products.

As with mixed bundling, prohibiting a merger based on predictions of vertical foreclosure when the merged firm will have only a small purchasing market share should require a high degree of confidence and hence of proof. It is important to consider the likely adaptive responses of other market participants. The EC's opinion appears skeptical of the adaptive powers of substantial industry players, and leaves observers to question why, if the market worked as the decision posits, engine manufacturers would continue to make substantial expenditures in competing for sole-source engine opportunities.

Finally, the U.S. and EC approaches raise issues of *ex ante* versus *ex post* control of potential anticompetitive practices. Even if the merged firm ultimately were to engage in the practices that the EC fears, it is not clear why these practices could not be challenged under the EC's powers to prohibit anticompetitive agreements and abuse of dominance (recognizing that the EC apparently does not have the statutory powers that exist in the U.S. to undo mergers or to order break-ups of dominant firms). In the U.S., given the likelihood of at least short-term benefits that the merger would have produced, the DOJ concluded that it made more sense to approve it, knowing that it could challenge unlawful conduct later if it were to occur. In short, the DOJ did not want to sacrifice likely and perhaps substantial benefits for longer-term, more speculative harms.

The differences in this case do not appear to be attributable to a failure of cooperation; I understand that the DOJ and the EC worked closely together throughout the investigation. Nor do the differences appear to be traceable primarily to a difference in interpreting the available evidence, which, as I said earlier, is one of the sources of recent split votes at the FTC. Rather, it appears that the EC is more inclined than the U.S. authorities to give credence to concern over potential long-term harm that could arise from range effects of a merger.

Before discussing the implications for business of confronting different antitrust enforcement policies, let me reiterate my belief that, given the breadth of EC and U.S. enforcement responsibility, the scope of our differences is relatively small. We certainly cannot ignore these differences, but, based on our experience, they do not jeopardize the EC-U.S. antitrust enforcement relationship or the ability of business to obtain compatible competition examinations by EC and U.S. authorities in the vast majority of cases.

II. IMPLICATIONS OF OUR DIFFERENCES

What are the implications of differences between enforcers in the interpretation and application of policy? Antitrust is by no means the only field in which businesses can be caught between different enforcers. As you may know, I have spent many years in academia. During that time, I authored a study with Howard Beales (now the FTC's Director of the Bureau of

Consumer Protection) that analyzed the impact of multiple regulators on national advertising.[30] I believe that our findings in that study provide some useful analogies in the multi-jurisdictional merger context.

Both the states and the federal government regulate the content of advertisements. It usually is not economically feasible to adapt national advertising campaigns to the standards of individual jurisdictions. For this reason, every national advertiser that reached a settlement about a particular claim with a state challenger abandoned that claim nationwide. Consequently, enforcement actions brought by individual states created national advertising policy.[31]

One result of this framework is that, when disagreements among regulators arise, the most restrictive jurisdiction will prevail, not the one that most accurately assesses the effects of advertising on consumers. This problem is most obvious when jurisdictions apply different standards to the conduct at issue, but a problem remains even when multiple jurisdictions apply the same standard to the same conduct. In this case, under certain conditions,[32] the most restrictive judgment will govern. As I indicated above, reasonable people can differ in their application of the same law to the same facts. Thus, different judgments will arise even when using the identical legal standard. Without a forum to resolve the inevitable differences of opinion among enforcers, the safest course for a national advertiser may be to restrict its claims to those not likely to be challenged anywhere, thereby reducing the amount of information available to consumers.

This problem can be illustrated by imagining a baseball game with two umpires standing at each base, each of whom unilaterally has the right to call a player "out." Even though the rules of the game are clear, each umpire will call plays as he sees them. For most plays, the existence of additional umpires will not change the outcome. But for close plays, if one of the umpires believes a player is out, scoring will decrease. In such a situation, the most restrictive judgment will prevail, even if other umpires reach the opposite conclusion.

Turning to the merger context, there are apparent similarities. The ruling of the most restrictive jurisdiction with respect to a proposed merger ultimately will prevail. Consequently, disagreements among regulators may lead businesses to restrict their merger activity to transactions that will be acceptable to all jurisdictions. As a result, merger activity may fall to sub-optimal levels, as businesses are dissuaded from negotiating transactions that most

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[30] J. Howard Beales & Timothy J. Muris, STATE AND FEDERAL REGULATION OF NATIONAL ADVERTISING (1993). The states in the last several years have been far less active in regulating national advertising than they were in the period described in our book. Moreover, our analysis reveals that multiple regulators applying different standards on occasion can be preferable to one regulator applying a too-restrictive standard. The results can be quite complex, turning on a variety of factors, as discussed in our book and below.

[31] The point may not hold for relatively small U.S. states.

[32] The conditions include that the decisions are made independently, are based on identical information, and are made without the possibility of a compromise result. As discussed below and in our book, these conditions are more likely to exist with national advertising than with mergers.

jurisdictions would view as competitively benign, out of concern that the most restrictive jurisdiction would block those transactions.[33]

The "most restrictive ruling" phenomenon can be addressed and at least partially vitiated over time through enhanced cooperation and communication among enforcement agencies.[34] At the threshold, the parties and their constituencies will profit from a clearer understanding of the differences in substantive approach employed by the various competition regimes. From this step, greater convergence can evolve. The drawing together of EU-U.S. merger policies concerning product market definition, unilateral effects/dominance and, lately, coordinated effects is illustrative. Thus, enhanced cooperation and renewed efforts at convergence should create greater agreement about the "right" approach to merger review, whatever that may be, thereby reducing disagreement.[35]

Fortunately, the analogy between multiple regulators in the advertising context and multi-jurisdictional merger review is imperfect – there are important differences. One crucial difference is that a merger is seldom an all-or-nothing proposition.[36] A divestiture may be crafted to address the concerns of the most restrictive jurisdiction while permitting the bulk of the transaction to proceed. For example, the ability to divest assets or engage in other undertakings explains why both the U.S. and the EC ultimately approved the merger of Boeing and McDonnell Douglas despite significant analytical differences between them. *GE/Honeywell* is the ***only*** case in which the EC and U.S. disagreed after evaluating the same facts in the same market context and a settlement could not be reached that would permit the transaction to proceed. Of course, remedies based upon disputed theories of harm or aggregated remedies imposed by various jurisdictions may impose costs on the transaction that exceed the benefits of doing the deal, causing the parties to abandon the transaction.

A second important difference between the advertising and multi-jurisdictional merger contexts is that mergers often have different competitive consequences in Europe than in the United States. While consumers in California, Texas, Virginia, and New York are likely to

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[33] As in the advertising context, the costs, including delay, of litigating the lawfulness of a merger in multiple jurisdictions might outweigh the benefits to be obtained by that merger. Thus, if a close-call transaction is pursued, a challenge by the most restrictive jurisdiction might result in the abandonment of a transaction that most jurisdictions concluded did not raise competitive concerns.

[34] The involvement of multiple regulators can also be beneficial, serving as "laboratories" in which different approaches are tried and tested and "compete" with one another for broader acceptance.

[35] In other words, we do not pursue convergence for its own sake, but rather to seek consensus on best practices that each jurisdiction can implement as appropriate.

[36] Advertisements may not be an all-or-nothing proposition, either. Certain disputed claims may be omitted, just like certain divestitures may be made, while still permitting the bulk of the advertisement to be aired. My experience in working with both mergers and advertising campaigns, however, is that mergers are far more likely to be divisible than ad campaigns, with the latter often involving a single theme. Moreover, the most controversial parts of advertising campaigns are frequently elements that also offer significant consumer benefits.

react similarly to most national advertising campaigns, mergers involving worldwide relevant geographic markets are the exceptions. When we oppose a merger based on U.S. market conditions, as we recently did in the *Diageo/Pernod/Seagram* matter,[37] the likelihood of international controversy is greatly reduced.

Moreover, the fact that mergers are pre-notified is another significant difference from advertising.[38] This structure facilitates international cooperation with respect to appropriate merger remedies without the egg unscrambling problem frequently confronted when undoing consummated mergers.

III. DEALING WITH THE DIFFERENCES

As I mentioned earlier, dealing with the differences is a major purpose and goal of the U.S.-EC antitrust enforcement cooperation agreement. In operation, the Agreement enables U.S. and EC antitrust authorities to cooperate with one another in individual cases to reach decisions that do not conflict. To the extent that we succeed in that case-by-case process, we narrow the effect of statutory and policy differences.

A. Case Cooperation and Coordination

Since my return to the FTC, I have heard frequent mention of several cases in which our staff cooperated with foreign authorities and that deserve more attention than they have received. They illustrate that our cooperative efforts in cases are not isolated instances but instead are typical of our approach to handling cases that are undergoing multi-jurisdictional review.

Boeing/Hughes

Everyone remembers *Boeing/McDonnell Douglas,* but few have paid attention to *Boeing/Hughes,* decided last year. In that case, Boeing again confronted a complaining European competitor, but this time, there was also a complaining American competitor. In addition, military considerations were closely integrated with the commercial interests at stake.

One of several issues examined was whether Boeing and Hughes could bundle their satellites and launchers. EC and FTC staff reviewed the evidence and agreed on all of the issues, including their conclusion that Boeing and Hughes did not enjoy the kind of market power that would enable them to bundle their products effectively. Boeing constructively facilitated the agencies' cooperation and offered undertakings to deal with concerns over information sharing. The parties' cooperation facilitated coordination of the process so that the

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[37] *In the Matter of Diageo PLC and Vivendi Universal S.A.*, FTC File No. 011-0057, FTC press releases dated Oct. 23, 2001, and Dec. 19, 2001, *respectively available at* <http://www.ftc.gov/opa/2001/10/diageo.htm> and <http://www.ftc.gov/opa/2001/12/diageo.htm>.

[38] There can be forms of pre-clearance with advertising, as we discuss in our book, *supra*, n. 29.

EC and FTC reached compatible decisions, announced on the same day.[39]

Novartis/AstraZeneca[40]

Another example included the merger of Novartis and AstraZeneca, two leading producers of agricultural chemicals. The EC and the FTC agreed that the proposed transaction would lead to anticompetitive effects both in the United States and Europe. Although the parties agreed to divestitures designed to cure the anticompetitive effects, the challenge was to find a buyer who could effectively manage those assets competitively on both continents. With a lot of good will and hard work on both sides of the Atlantic, our agencies came to agreement on an appropriate divestee.

Air Liquide/Air Products/BOC

The *Air Liquide/Air Products/BOC* case is a good illustration of a case with different effects in different geographic markets. I mention it to emphasize that point because some have cited the case – mistakenly, I believe – as a counterpoint to the EC's *GE/Honeywell* decision. In this case, Air Liquide of France and Air Products of the United States proposed to jointly acquire BOC of the United Kingdom. These companies are three of the world's "Big Four" industrial gas producers. In this unusual joint acquisition, the EC had jurisdiction over Air Liquide's, but not Air Products', portion of the acquisition. The EC cleared the transaction subject to substantial conditions, but noted in its press release that its "decision . . . [did] not prejudice the outcome of the assessment in the United States."[41] Indeed, in the U.S., the FTC signaled that the restructuring that the parties proposed in dozens of affected regional markets was unlikely to restore competition to the *status quo ante.* Facing a likely challenge, the parties abandoned their bid to acquire BOC.

CVC/Lenzing

Just two months ago, the EC blocked CVC's proposed acquisition of Lenzing AG, a transaction that raised competitive concerns in the world market for certain man-made fibers.

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[39] *In the matter of the Boeing Company*, FTC Press Release (Sept. 27, 2000), FTC Complaint, Consent Agreement, Decision and Order, and Analysis to Aid Public Comment, *available at* <http://www.ftc.gov/opa/2000/09/boeing.htm>; *Boeing/Hughes*, Case No IV/M.1879, European Commission Decision, *available at* <http://europa.eu.int/comm/competition/mergers/cases/decisions/m1879_en.pdf>.

[40] *In the Matter of Novartis AG; AstraZeneca, PLC; and Syngenta AG*; *see* FTC Press Release (Nov. 1, 2000), FTC's Complaint, Consent Agreement, Order, and Analysis to Aid Public Comment, *available at* <http://www.ftc.gov/opa/2000/11/astrazeneca.htm>; *AstraZeneca/Novartis*, Case No COMP/M.1806, European Commission Decision, avail*able at* <http://europa.eu.int/comm/competition/mergers/cases/decisions/m1806_en.pdf>.

[41] *See* European Commission Press Release IP/00/46, *Commission approves the acquisition of parts of BOC (UK) by Air Liquide (France) subject to conditions* (18 Jan. 2000); *Air Liquide/BOC*, Case No COMP/M.1630, European Commission Decision, *available at* <http://europa.eu.int/comm/competition/mergers/cases/decisions/m1630_en.pdf>.

The EC's press release announcing the decision states:

> The FTC . . . and the Commission have remained in close and mutually beneficial contact all along the procedure by sharing information, and by discussing and developing consistent analysis of the main substantive issues.[42]

B. Policy Review – The Mergers Working Group

Going beyond cooperation in individual cases, U.S. and EC authorities have committed with renewed vigor to reviewing policies and to seeking convergence of our enforcement approaches. Since our formal consultations in September, EC and U.S. officials have drawn up plans to examine several issues of substance and process with the goal of further narrowing differences. We have established good precedent for this in our recent examination of our respective approaches to remedies in merger cases, after which the EC issued a Notice that reflected experiences and best practices in both jurisdictions.[43]

The substantive areas to be reviewed include the application of the theories of portfolio power and conglomerate effects, which can arise in many contexts. As I mentioned, the EC and FTC faced such an issue in the *Boeing/Hughes* case. These theories have arisen in other cases, such as *Guinness/GrandMetropolitan*[44] and *Tetra Laval/Sidel*,[45] recently decided by the EC. These theories are hardly new.

Over the past few months, I and members of the FTC staff have had several opportunities to talk with our EC counterparts, Commissioner Monti and members of his team. While each side may feel confident that it holds the "correct" view on these issues, all are willing to discuss the issues in detail, which should lead, at a minimum, to a deeper understanding of each side's theoretical foundations and factual predicates. How far we can narrow the differences remains to be seen.

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[42] *See* European Commission Press Release IP/01/1436, *Commission prohibits CVC's acquisition of Austrian fibre company Lenzing* (17 Oct. 2001), *available at* <http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/1436|0|RAPID&lg=EN>; *CVC/Lenzing*, Case No COMP/M.2187, European Commission Decision, *available at* <http://europa.eu.int/comm/competition/mergers/cases/decisions/m2187_en.pdf >.

[43] Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98, *available at* <http://europa.eu.int/comm/competition/oj_extracts/2001_c_068_03_02_0003_0011_en.pdf>.

[44] *Guinness/GrandMetropolitan*, Case No IV/M.938, European Commission Decision 98/602, *reported at* [1998] CEC 2502; *Guinness PLC, et al.*, FTC Dkt. No. C-3801, Decision and Order, Apr. 17, 1998, *reported in* 5 Trade Reg. Rpt. (CCH) ¶ 24,359.

[45] *Tetra Laval/Sidel*, *supra*, n. 18. *See* European Commission Press Release IP/01/1516, *Commission prohibits acquisition of Sidel by Tetra Laval Group* (30 Oct. 2001), *available at* <http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/1516|0|RAPID&lg=EN>.

C. International Competition Network

The problem of multiple decision makers could increase exponentially when global transactions are subject to review in many of the approximately sixty jurisdictions with merger control laws. I am therefore encouraged that the bilateral U.S.-EC policy deliberations will be emulated in a new multilateral network of competition authorities, the International Competition Network (ICN). The ICN was "launched" on October 25 by competition officials from many countries at the Fordham Corporate Law Institute in New York City.[46]

Building on the Global Competition Initiative recommended by the International Competition Policy Advisory Committee[47] (ICPAC), co-chaired by Jim Rill and Paula Stern, the International Competition Network will provide a venue where senior antitrust officials from developed and developing countries will work to reach consensus on concrete proposals for procedural and substantive convergence in antitrust enforcement. We hope to make international antitrust enforcement more efficient and effective, to the benefit of consumers and companies around the world. The ICN also will assist developing countries in building a competition culture based on sound economic principles. One of the ICN's first topics is merger review in a multi-jurisdictional context, and includes projects focusing on merger notification and procedures, the framework for analyzing mergers, and merger investigation techniques.

Input from the private sector, through advisors to the ICN, will be critical to the ICN's success. The advisors can provide insight regarding the selection and analysis of topics as well as practical experience and analytical skills from various disciplines – business, professional, academic, and consumer interest. This input also should promote greater transparency and likely greater acceptance of the ICN's work product.

IV. CONCLUSION

Although the outcome of EC/U.S. policy reviews cannot be predicted at this point, it is clear that both sides remain committed to one of the chief goals of our cooperation agreement – "to lessen the possibility or impact of the differences between us in the application of our competition laws." We and the EC are continuing our close cooperation on cases, we are seeking further convergence through our working group, and we are committed to the success of the International Competition Network. The experience of the last ten years and the analysis I have described shows that *GE/Honeywell*-type outcomes should be the exception, not the norm.

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[46] *See* FTC Press Release, *U.S. and Foreign Antitrust Officials Launch International Competition Network* (Oct. 25, 2001), *available at* <http://www.ftc.gov/opa/2001/10/icn.htm>; International Competition Network, *Antitrust Authorities Launch the "International Competition Network*" (Oct. 25, 2001), *available at* <http://strategis.ic.gc.ca/pics/ct/nr_e.pdf>. The ICN website is found at: <http://www.internationalcompetitionnetwork.org>.

[47] U.S. Dep't of Justice, Antitrust Div., International Competition Policy Advisory Comm. to the Att'y General and Assistant Att'y General for Antitrust, *Final Report* (2000), *available at* <http://www.usDOJ.gov/atr/icpac/finalreport.htm>.