

Winter 2006

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Kathryn Fugina

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### Recommended Citation

Kathryn Fugina, Merger Control Review in the United States and the European Union: Working towards Conflict Resolution, 26 Nw. J. Int'l L. & Bus. 471 (2005-2006)

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# Merger Control Review in the United States and the European Union: Working Towards Conflict Resolution

*Kathryn Fugina\**

## I. INTRODUCTION

While the economy continues to grow on a global scale, large companies seeking to stay competitive must look to international markets as a means of expansion and trade. As international mergers become a more common means of accomplishing these goals, an increasing number of countries are adopting competition laws. Unfortunately, the laws of different countries and regions can, and do, come into conflict.

This paper examines the merger control laws of both the United States and the European Union, why these laws sometimes conflict, and provides suggestions for possible solutions for minimizing future conflicts. Part II reviews the relevant merger laws of the United States and the European Union. Part III looks at the conflicting nature of U.S. and E.U. standards of review, while Part IV analyzes current and proposed solutions to merger control conflicts.

## II. APPLICABLE MERGER AND COMPETITION LAWS WITHIN THE UNITED STATES AND THE EUROPEAN UNION

### A. United States

U.S. laws regarding competition and antitrust embody the substantial lessening of competition standard of review. “The U.S. Department of Justice and the Federal Trade Commission routinely focus on potential harm to consumers in evaluating a prospective merger.”<sup>1</sup> Antitrust and

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\* J.D. Candidate, 2006, Northwestern University School of Law; B.A., 2001, New York University. The author would like to thank her family and friends for all of their love and support, as well as the 2005–2006 JILB Editorial Board for their hard work and dedication this year. The author remains responsible for all errors.

<sup>1</sup> Martha Neil, *Old Continent, New Deal*, 90 A.B.A.J. 50, 54 (Sept. 2004).

competition law in the United States began with the passing of sections 1 and 2 of the Sherman Antitrust Act in 1890.<sup>2</sup> Currently, however, merger review is controlled by section 7 of the Clayton Act, “which directly addresses mergers as a potential threat to competition.”<sup>3</sup>

### *1. Sherman Antitrust Act*

The Sherman Antitrust Act<sup>4</sup> was adopted as a government response to the use of trusts and combinations to control competitive markets.<sup>5</sup> Section 1 of the Sherman Antitrust Act (“Trusts, etc., in restraint of trade illegal; penalty”)<sup>6</sup> focuses on mergers in restraint of trade<sup>7</sup>—it has been said that it “deals with means.”<sup>8</sup> Section 1 forbids using contracts, combinations or conspiracies that might monopolize trade,<sup>9</sup> requiring some type of “collaborative element.”<sup>10</sup> Section 1 creates two main categories of prohibited transactions: those that are *per se* illegal and those that on the surface do not appear to violate the Sherman Act.<sup>11</sup> A transaction is *per se* illegal when it “has no other purpose or effect than that of injuring, suppressing or destroying competitive process.”<sup>12</sup> When all other aspects of a transaction do not appear to create a violation, the transaction must “have the effect of substantially lessening competition or a tendency to create a monopoly in any line of commerce” or be “accompanied with a specific

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<sup>2</sup> Lisa M. Renzi, *The GE/Honeywell Merger: Catalyst in the Transnational Conglomerate Merger Debate*, 37 NEW ENG. L. REV. 109, 118 (2002).

<sup>3</sup> *Id.*

<sup>4</sup> Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2004).

<sup>5</sup> 54 AM. JUR. 2D *Monopolies and Restraints of Trade* § 46 (2004) [hereinafter AMJUR *Monopolies*].

<sup>6</sup> Section 1 states:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1.

<sup>7</sup> CONSTANCE K. ROBINSON & KILPATRICK STOCKTON LLP, PRACTICING LAW INSTITUTE CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES: MERGERS AND ACQUISITIONS 304 (2004) [hereinafter PLI].

<sup>8</sup> AMJUR *Monopolies*, *supra* note 5, § 4.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* § 31.

<sup>11</sup> 1 LOUIS ALTMAN, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS & MONOPOLIES § 4:20 (4th ed. 2004) [hereinafter CALLMANN].

<sup>12</sup> *Id.*

intent to accomplish a forbidden restraint.”<sup>13</sup> *Business Electronics Corp. v. Sharp Electronics Corp.* stated that

[o]rdinarily, whether particular concerted conduct violates § 1 of the Sherman Act is determined through case-by-case application of the so-called rule of reason—that is, ‘the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.’<sup>14</sup>

The focus of section 2 of the Sherman Antitrust Act (“Monopolizing trade a felony; penalty”)<sup>15</sup> is on prohibiting mergers that monopolize a market;<sup>16</sup> therefore, its focus is on the end result of a merger.<sup>17</sup> Rather than analyzing the form of a merger, section 2 looks at the results that could occur if a merger proceeds.<sup>18</sup> Monopolization occurs when there exists both intent to monopolize, as well as the ability to do so.<sup>19</sup> However, if there is an actual monopoly, intent is not required.<sup>20</sup> Since most cases have some aspect of the transaction that falls under section 1, “there have been” few cases “adjudicated on the basis of section 2 alone.”<sup>21</sup> Section 2 prohibits conspiracies to monopolize, which is distinct from the section 1 prohibition of a conspiracy in restraint of trade.<sup>22</sup>

By acting in concert, sections 1 and 2 of the Sherman Act effectively prohibit mergers that might monopolize a market. Even when a merger does not contravene section 1, if monopolization could occur, it would violate section 2.<sup>23</sup> In *Standard Oil Co. of New Jersey v. U.S.*, the Supreme Court stated “having by the first section forbidden all means of

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<sup>13</sup> *Id.* (quoting *United States v. Columbia Steel Co.*, 334 U.S. 495, 522 (1948)).

<sup>14</sup> *Bus. Elecs. Corp. v. Sharp Elecs. Corp.* 485 U.S. 717, 723 (1988) (quoting *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977)).

<sup>15</sup> Section 2 states:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

<sup>15</sup> U.S.C. § 2.

<sup>16</sup> PLI, *supra* note 7.

<sup>17</sup> See AMJUR *Monopolies*, *supra* note 5, § 4.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* § 60.

<sup>20</sup> *Id.*

<sup>21</sup> CALLMANN, *supra* note 11, § 4.21.

<sup>22</sup> *Id.*

<sup>23</sup> AMJUR *Monopolies*, *supra* note 5, § 4.

monopolizing trade . . . the second section seeks, if possible, to make the prohibitions of the Act all the more complete and perfect by embracing all attempts to reach the end."<sup>24</sup>

## 2. Clayton Act

While merger control in the United States began under the Sherman Antitrust Act, since its passage in 1914, merger review has been governed mainly by the Clayton Act.<sup>25</sup> Section 7 of the Clayton Act regulates "[a]cquisition[s] by one corporation of stock of another"<sup>26</sup> and prohibits any merger where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."<sup>27</sup>

Under the Clayton Act, the plaintiff in a merger review case does not have to prove that the proposed merger actually affects competition.<sup>28</sup> Any time a merger is proposed, the Clayton Act

requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended section 7 was intended to arrest anticompetitive tendencies in their 'incipiency.'<sup>29</sup>

The "incipiency standard" that the Act imposes requires only that the merger "may" cause some type of anti-competitive effect.<sup>30</sup> The Clayton Act's concern with potential anti-competitive effects is further highlighted by the fact it goes so far as to allow government challenges to completed mergers.<sup>31</sup>

## 3. Federal Trade Commission Act

The Federal Trade Commission Act<sup>32</sup> ("FTC Act") was originally meant to add support to the Sherman and Clayton acts by "prohibit[ing] only unfair methods of competition in commerce."<sup>33</sup> Attacking anti-competitive practices both before they began and after they came into

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<sup>24</sup> Standard Oil Co. of New Jersey v. U.S., 221 U.S. 1 (1911).

<sup>25</sup> 15 U.S.C. § 18 (1996).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> PLI, *supra* note 7, at 303.

<sup>29</sup> United States v. Penn-Olin Chem. Co. et al., 378 U.S. 158, 171 (1964) (quoting United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362 (1963)).

<sup>30</sup> *Id.* at 304.

<sup>31</sup> PLI, *supra* note 7.

<sup>32</sup> 15 U.S.C. § 45 (1988).

<sup>33</sup> AMJUR *Monopolies*, *supra* note 5, § 1152.

existence, the FTC Act was meant to protect consumers, though in its original inception the Act did this by protecting business competitors.<sup>34</sup>

#### 4. 1992 Horizontal Merger Guidelines

Hoping to “reduce the uncertainty associated with enforcement of the antitrust laws in this area,”<sup>35</sup> on April 2, 1992, the Department of Justice (“DOJ”) issued revisions to its 1982 Merger Guidelines, themselves a revision of the 1968 Guidelines.<sup>36</sup> The DOJ strove to lay out the framework and standards under which mergers were to be analyzed.<sup>37</sup> These guidelines, which are applicable to both DOJ- and FTC-analyzed mergers, marked the first time that the agencies issued joint guidelines<sup>38</sup> for mergers “subject to section 7 of the Clayton Act, to section 1 of the Sherman Act, or to section 5 of the FTC Act.”<sup>39</sup> The guidelines describe a five-step analytical process to determine whether a merger would be anti-competitive and disadvantage consumers.<sup>40</sup> “The elements include: market definition, measurement and concentration; the potential adverse competitive effects of the merger; entry; efficiencies; and failure and existing assets.”<sup>41</sup>

#### 5. The Hart-Scott-Rodino Antitrust Improvements Act

The Hart-Scott-Rodino Antitrust Improvements Act of 1976<sup>42</sup> (“Hart-Scott-Rodino”) was enacted to foreclose numerous loopholes in the U.S. merger policies that incentivized “speedily and surreptitiously consummating suspect mergers and then protracting ensuing litigation.”<sup>43</sup> Actually section 7A of the Clayton Act,<sup>44</sup> Hart-Scott-Rodino provides “a mechanism to provide advance notification to the antitrust authorities of very large mergers prior to their consummation, and to improve procedures to facilitate enjoining illegal mergers before they are consummated.”<sup>45</sup>

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<sup>34</sup> *Id.*

<sup>35</sup> U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines (Apr. 2, 1992), 4 Trade Reg. Rep. (CCH) ¶13, 104, *available at* [http://www.usdoj.gov/atr/public/guidelines/horiz\\_book/0.html](http://www.usdoj.gov/atr/public/guidelines/horiz_book/0.html) [hereinafter Horizontal Merger Guidelines].

<sup>36</sup> CALLMANN, *supra* note 11, § 10.3 (quoting Statement Accompanying Revised Merger Guidelines (April 8, 1997)).

<sup>37</sup> *Id.*

<sup>38</sup> CALLMANN, *supra* note 11, § 10:3.

<sup>39</sup> Horizontal Merger Guidelines, *supra* note 35.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> 15 U.S.C. § 18 (1996).

<sup>43</sup> W.J. Baer, *Reflections on Twenty Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, 65 ANTITRUST L.J. 825, 828 (1997).

<sup>44</sup> 15 U.S.C. § 18(a).

<sup>45</sup> S. Rep. No. 803, at 61 (1976) (discussing the reasons for passing Hart-Scott-

Hart-Scott-Rodino's pre-merger notification requirements ensure that almost all mergers are reported.<sup>46</sup> For certain "very large mergers,"<sup>47</sup> the companies involved must first file notification with the DOJ and the FTC.<sup>48</sup> Notification consists of filing a report form that describes the transaction, indicates whether the companies are competitors (determined by the North American Industrial Classification Code), and provides financial data, planning documents and sales data.<sup>49</sup> The companies must then wait, usually thirty days, while the transaction is reviewed.<sup>50</sup> Either the DOJ or the FTC can issue a Second Request, which would require the companies to provide additional information.<sup>51</sup> The DOJ or FTC can then approve or reject the merger.

## B. European Union

According to the merger controls in place in the European Union, the single most important consideration is the effect a merger will have on competition given the common market of the European Union. "The main test of compatibility with the common market is the effect of the merger on competition on the markets on which the merging businesses operate."<sup>52</sup> When E.U. regulators examine a merger under the European Commission's Merger Regulation, their major area of focus is the effect that the merger might have on competitors in the market.<sup>53</sup> In large part, this may be due to the fact that under E.U. law, once a merger has taken place, there is no legal recourse (unlike in the United States, where the government can require that a merger be reversed).

### 1. Articles 81 and 82 of the European Community Treaty

Despite the fact that both article 81<sup>54</sup> and article 82<sup>55</sup> of the European

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Rodino)[hereinafter *Senate Discussion*].

<sup>46</sup> Renzi, *supra* note 2, at 118.

<sup>47</sup> *Senate Discussion*, *supra* note 45.

<sup>48</sup> PLI, *supra* note 7.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Europa, *Merger Control Between Companies, Summary of Council Regulation* 4064/89, 1989 O.J. (L395) 30 (EC), available at <http://europa.eu.int/scadplus/leg/en/lvb/l26046.htm>.

<sup>53</sup> Neil, *supra* note 1.

<sup>54</sup> Article 81 states:

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and

Community Treaty deal generally with competition law, and neither article even mentions mergers, both have been held to apply to mergers.<sup>56</sup> In *BAT and Reynolds v. Commission*, article 81 was held to limit mergers where a competitor gained a minority share of another company in its market.<sup>57</sup> Article 82 became applicable to mergers after *Continental Can v. Commission*, which held that if a dominant company in a market acquired a

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in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;
  - any decision or category of decisions by associations of undertakings;
  - any concerted practice or category of concerted practices,
- which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Treaty Establishing the European Community, Nov. 10, 1997, art. 81, 1997 O.J. (C 340) 3 [hereinafter EC Treaty].

<sup>55</sup> Article 82 states:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

EC Treaty art. 82.

<sup>56</sup> Renzi, *supra* note 2, at n.29.

<sup>57</sup> Joined Cases 142 & 156/84, *BAT and Reynolds v. Comm'n*, 1987 E.C.R. 4487, PP 37–39 & 64.



competitor and the “degree of dominance reached substantially fetters competition,” the merger can be blocked.<sup>58</sup> Despite the nationalist tendencies of the Member States of the European Union, these articles have become the major enforcement mechanism against cross-border anti-competitive mergers.<sup>59</sup>

## *2. The European Commission's Merger Regulation<sup>60</sup>*

In effect since September 21, 1990, the European Commission's Merger Regulation requires that the Commission review mergers that meet two criteria: “(1) they must contain a ‘concentration,’ and (2) have a ‘Community dimension’ by meeting minimum financial thresholds.”<sup>61</sup> A concentration is “deemed to arise where: (a) two or more previously independent undertakings merge, or (b) one or more persons controlling at least one undertaking, or one or more undertakings acquire . . . direct or indirect control of the whole or parts of one or more undertakings.”<sup>62</sup> The scope of a merger analysis under the Council Regulation goes beyond immediately foreseeable anti-competitive behaviors and into an analysis of what may occur in the future.<sup>63</sup>

Beyond providing for advance notification and giving the Commission the right to review a merger at the request of a member state, the E.U. Merger Regulation applies to mergers that fall beyond the borders of the European Union.<sup>64</sup> Even if the effects of the merger are largely outside of the European Union, the Commission is still granted merger review capabilities under the Regulation.<sup>65</sup>

## *3. Commission Notice on the Appraisal of Horizontal Mergers*

Issued by the Commission in 2004, the Commission Notice on the Appraisal of Horizontal Mergers<sup>66</sup> lays out a framework for analyzing

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<sup>58</sup> Case 6/72, *Con't'l Can. v. Comm'n*, 1973 E.C.R. 215.

<sup>59</sup> *Id.* at 113.

<sup>60</sup> Council Regulation 4064/89, 1989 O.J. (L395/1), corrigendum 1990 O.J. (LL257/14), as amended by Council Regulation 1310/97, 1997 O.J. (L180/1) [hereinafter *Council Regulation*].

<sup>61</sup> Renzi, *supra* note 2, at 114.

<sup>62</sup> Council Regulation, *supra* note 60, at art. 3(1).

<sup>63</sup> CALLMANN, *supra* note 11, § 28.12.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2004 O.J. (C 31) 5 (providing guidelines for the assessment of horizontal mergers pursuant to Council Regulation No. 139/2004), available at [http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c\\_031/c\\_03120040205en00050018.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_031/c_03120040205en00050018.pdf) (last visited Jan. 18, 2006) [hereinafter *E.C. Merger Guidelines*].

mergers. This analysis includes defining the product and geographic markets that the merger would impact, as well as an assessment of the impact on the competitiveness of the merger.<sup>67</sup> The competitiveness assessment follows a series of five steps: (1) whether the merger will likely have any anticompetitive effects in the defined markets;<sup>68</sup> (2) whether the power of the buyer is likely to become a force against increased market power;<sup>69</sup> (3) whether new firms will enter the market to maintain competition;<sup>70</sup> (4) whether any efficiencies will be created;<sup>71</sup> and (5) whether a failing firm defense could exist.<sup>72</sup>

### III. UNITED STATES AND EUROPEAN UNION: DIFFERING APPROACHES TO MERGER REVIEW

#### A. Merger Control Standards of Review

When companies propose a merger, they must submit it for review to the relevant authorities in any country where the criteria for merger review are met. The substantive standards of review for each country are not necessarily the same, which leads to a level of uncertainty as to whether the proposed merger will be approved. These standards fall into three main categories: (1) whether the merger would create or strengthen a dominant position (the market dominance standard of review); (2) whether there is a substantial lessening of competition; and (3) the effects on competition, combined with other policy concerns.<sup>73</sup>

When it comes to competition and antitrust laws in the United States and the European Union, as applied to mergers, these standards of review can conflict. Due to the large number of transnational transactions, these conflicts must be resolved to avoid failures and delays in trade.

#### 1. Market Dominance Standard of Review

Under a market dominance standard of review, the merger is considered in light of whether it would create or strengthen a dominant position in the market. If a firm will attain such a position through the merger, there is a chance that the merger will be prohibited.<sup>74</sup> This is the

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<sup>67</sup> *Id.* ¶ 10.

<sup>68</sup> *Id.* ¶¶ 14–21.

<sup>69</sup> *Id.* ¶¶ 22–63.

<sup>70</sup> *Id.* ¶¶ 64–67.

<sup>71</sup> *Id.* ¶¶ 68–88.

<sup>72</sup> E.C. Merger Guidelines, *supra* note 66, ¶¶ 89–91.

<sup>73</sup> Andre Fiebig, *A Role for the WTO in International Merger Control*, 20 NW. J. INT'L L. & BUS. 233, 252 (2000).

<sup>74</sup> J. William Rowley & A. Neil Campbell, *Multi-Jurisdictional Merger Review – Is it*

standard employed by the European Union Merger Regulation.<sup>75</sup>

## 2. Substantial Lessening of Competition Standard of Review

This standard of review, embodied in the United States' approach to merger control,<sup>76</sup> considers whether a proposed merger will either: (a) narrow the field to a small number of companies, or (b) allow one firm to have complete power over the market.<sup>77</sup> If the proposed merger might possibly lead to either of these results, competition in the field is considered to be substantially lessened and the merger will be prohibited, barring mitigating circumstances.

## 3. Public Interest Standard of Review

While first considering the effects on competition if the proposed merger proceeds, this standard then considers the possible policy concerns of the proposed merger, such as "employment, export promotion and international comparative advantage."<sup>78</sup> This is the approach of the domestic merger policies of countries such as the United Kingdom, France and Spain.<sup>79</sup>

### B. The Standards of Review in the United States and the European Union

In the United States, mergers are evaluated based upon a market dominance standard of review. For at least the last twenty years, "increased economic efficiency leading to an increase in consumer welfare" has been the focus of U.S. antitrust policy.<sup>80</sup> In looking at market power, the United States examines various factors in context, using a microeconomic approach.<sup>81</sup>

The European Union, on the other hand, evaluates mergers under a substantial lessening of competition standard of review. "[M]arket integration, consumer welfare and creating a level-playing field for competition" are important goals of E.U. competition law.<sup>82</sup> Due to the fact

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*Time for a Common Form Filing Treaty?*, POL'Y DIRECTIONS FOR GLOBAL MERGER REV. 9, 12 (1999).

<sup>75</sup> *Id.* at n.9.

<sup>76</sup> *Id.* at n.10.

<sup>77</sup> *Id.* at 12.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at n.11.

<sup>80</sup> Krzysztof Kuik, *Recent Developments in EU/US Trade Relations*, 79 U. DET. MERCY L. REV. 433, 442 (2002).

<sup>81</sup> International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust, Final Report Chapter 2 (2000), available at <http://www.usdoj.gov/atr/icpac/finalreport.htm> [hereinafter Final Report].

<sup>82</sup> Kuik, *supra* note 80.

that there is no recourse after a merger has been completed, the long term effects of allowing a merger are of greater importance.<sup>83</sup> Dominance determinations in the E.U. place a strong presumption on a high market share, with “50 percent and sometimes 40 percent of a market mean[ing] dominance, especially if the next largest company is far behind.”<sup>84</sup>

### C. Cases of Conflict

There have been instances of conflict regarding the approval of proposed mergers. The two famous cases in this area arose from the Boeing/McDonnell Douglas merger and the GE/Honeywell merger. When examining both Boeing/McDonnell Douglas and GE/Honeywell, one theory of the disparity between the U.S. and E.U. outcomes is that “the differences in the respective merger conclusions appear to derive from the relative weight each regulatory body gave to consumers versus competitors.”<sup>85</sup> One reason behind this is the standard of review applied by each body.

#### *1. The Boeing/McDonnell Douglas Merger: A Case of Conflict and Eventual Resolution*

U.S. companies Boeing Company (“Boeing”) and McDonnell Douglas Corporation (“MDC”) pursued merger beginning in 1997. Quickly approved by the FTC, the merger was thought to enhance competition, as well as to strengthen the U.S. defense industry.<sup>86</sup> The FTC approved the merger on the grounds that the merger would not substantially reduce competition due to Boeing’s already existing market domination.

Despite a lack of assets in the European Union or the existence of any European subsidiaries, the European Commission determined that the merger satisfied the financial threshold to establish a Community dimension under the Merger Regulation, thereby granting the Commission jurisdiction to review the merger.<sup>87</sup> Instead of focusing on the defense aspects of the merger, the Commission looked exclusively at the large commercial jet aircraft industry market.<sup>88</sup>

The Commission relied on Boeing’s position within the worldwide commercial jet market when taking the stance that the merger would significantly enhance Boeing’s lead in the worldwide market.<sup>89</sup> At the time

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<sup>83</sup> *Id.*

<sup>84</sup> Final Report, *supra* note 81.

<sup>85</sup> David F. Feeney, *The European Commission’s Extraterritorial Jurisdiction over Corporate Mergers*, 19 GA. ST. U. L. REV. 425, 465 (2002).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> J.D. Banks, *The Development of the Concept of Extraterritoriality Under European Merger Law and its Effectiveness Under the Merger Regulation Following the*

the merger was proposed, Boeing had a 64% market share, Airbus Industrie controlled 30% and MDC had 6%.<sup>90</sup> The proposed combined company would occupy 70% of the worldwide market, and, due to the numerous market-entry barriers including the high amount of initial capital needed, the Commission believed that the combined company would most likely maintain that dominant market position.<sup>91</sup> Given Boeing's exclusive contracts with three of the four largest airlines, the addition of MDC's resources would give the combined company further opportunities to leverage MDC contracts into long term exclusive deals.<sup>92</sup> In light of this market structure and the increased leverage the combined company would have over suppliers,<sup>93</sup> the Commission determined that the merger would harm competition and damage the European Common Market.<sup>94</sup>

The Commission's objections to the merger fell into three main categories: exclusive supply contracts, expansion of market share, and Boeing's access to public funds through defense contracts that might potentially be used in commercial aircraft.<sup>95</sup> Boeing made numerous concessions in an effort to appease the Commission and reduce the possibility that the Commission would block the proposed merger. Due to Boeing's willingness to make changes to its original proposal, the Commission did not block the merger.

## 2. GE/Honeywell: The Merger That Wasn't

In 2000, U.S. company General Electric Company ("GE") proposed the purchase of another U.S. company, Honeywell International, Inc. ("Honeywell"), planning to turn Honeywell into a wholly-owned subsidiary of GE.<sup>96</sup> This merger would have been the largest industrial merger in history.<sup>97</sup> The DOJ approved the merger after requiring few changes.<sup>98</sup> However, the Commission refused to allow the merger, making it the first

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*Boeing/McDonnell Douglas Decision 1997*, 19 EUR. COMPETITION L. REV. 306, 309 (1998).

<sup>90</sup> Commission Decision 97/816, Case IV/M.877 - Boeing/McDonnell Douglas, 1997 O.J. (L 336) 16, 20 ¶ 29 (EC).

<sup>91</sup> *Id.* at 24 ¶ 50.

<sup>92</sup> Banks, *supra* note 89.

<sup>93</sup> Commission Decision 97/816, *supra* note 90, at 20–21 ¶¶ 30–35, 28 ¶ 72, 30–35 ¶¶ 83–103.

<sup>94</sup> *Id.* at 36 ¶ 113.

<sup>95</sup> Feeney, *supra* note 85, at 470.

<sup>96</sup> *Id.* at 474.

<sup>97</sup> Daniel Dombey & Andrew Hill, *Monti Moves to Heal GE Rift: EU Competition Commissioner Calls for More Co-operation With US After Honeywell Deal is Blocked*, FIN. TIMES, July 4, 2001, at 1.

<sup>98</sup> Press Release, Dep't Justice, Antitrust Div., Justice Department Requires Divestitures in Merger between General Electric and Honeywell (May 2, 2001), available at [http://www.usdoj.gov/atr/public/press\\_releases/2001/8140.pdf](http://www.usdoj.gov/atr/public/press_releases/2001/8140.pdf).

time the Commission had ever denied “a merger request of two American corporations that the U.S. antitrust authorities had approved.”<sup>99</sup>

In analyzing the merger, the DOJ “accepted the companies’ argument that the combination would result in a more efficient operation leading to lower prices for consumers.”<sup>100</sup> There were two main issues the DOJ encountered. First, the DOJ was concerned about the possibility of increased costs for the U.S. military due to an anticipated decrease in the development of engine models. To alleviate this risk, the DOJ required that Honeywell’s military helicopter division be sold.<sup>101</sup> Second, the DOJ found that the contracts for Honeywell engine and auxiliary power unit maintenance would decrease, leading to reduced competition. The DOJ solved this problem by mandating the creation of an independent third-party to provide the services required under these contracts.<sup>102</sup>

Despite the requirements imposed by the DOJ, the Commission still believed the merger was potentially unfair to competition. Even though both companies were American, the Commission ruled that it had jurisdiction since the financial requirements were met,<sup>103</sup> and, as defined under the Merger Regulation,<sup>104</sup> a concentration could exist. Despite the numerous industries in which both companies operated, the Commission focused its assessment on the aerospace and industrial systems markets.<sup>105</sup> Specifically, the Commission determined that the aerospace industry was subject to anti-competitive effects due to the merger of GE’s aircraft engine manufacturing unit with Honeywell’s avionic, non-avionic, and engine starter manufacturing unit.<sup>106</sup> This could have led to both horizontal and vertical effects on the industry.<sup>107</sup>

After analyzing the proposed merger and determining that the surviving entity could have dominated several markets, the Commission refused to permit the merger. In order to allow the merger to proceed, the Commission would have required divestitures above and beyond those proposed by the DOJ. As a result, GE chose to forgo the merger.

#### IV. POSSIBLE SOLUTIONS FOR RESOLVING MERGER REVIEW CONFLICTS

There are currently a number of treaties, organizations and ideas

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<sup>99</sup> Feeney, *supra* note 85, at 475.

<sup>100</sup> Neil, *supra* note 1.

<sup>101</sup> Press Release, Dep’t Justice, Antitrust Div., *supra* note 98.

<sup>102</sup> *Id.*

<sup>103</sup> Case COMP/M.2220, General Electric/Honeywell, July 3, 2001, P7.

<sup>104</sup> *Id.* ¶ 6.

<sup>105</sup> *Id.* ¶ 567.

<sup>106</sup> *Id.* ¶¶ 5, 567.

<sup>107</sup> *Id.* ¶ 567.

suggesting ways to bridge the differences between U.S. and E.U. competition and antitrust laws.

#### A. Organisation for Economic Co-operation and Development

The Organisation for Economic Co-operation and Development ("OECD") was established on December 14, 1960 and is now comprised of thirty countries, including the United States and much of Europe.<sup>108</sup> The OECD considers itself "a forum in which governments work together to address the economic, social and environmental challenges of interdependence and globalization."<sup>109</sup> Article 1 of the OECD Convention states that its mission is "[t]o promote policies designed: . . . to contribute to growth in world trade on a multilateral, non-discriminatory basis."<sup>110</sup>

The OECD is divided into the Council, which is comprised of the member nations and the European Commission and is responsible for the running of the OECD; the Secretariat, which analyzes specific issues and creates proposals to address these topics; and the Committees, which work with the Secretariat to discuss and implement proposals on specific issues.<sup>111</sup>

The OECD is considered the most active of all the international organizations that can affect competition policies.<sup>112</sup> In 1995, the OECD issued the Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade.<sup>113</sup> The Recommendation seeks to increase cooperation among member states in the area of antitrust enforcement. This is meant to be accomplished by setting up a means of "notification, exchange of information and co-ordination of action" among member states so that all members are aware when their interests might be affected by the antitrust policies of another member,<sup>114</sup> as well as seeking to provide a

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<sup>108</sup> OECD, Ratification of the Convention on the OECD: OECD Member Countries, [http://www.oecd.org/document/58/0,2340,en\\_2649\\_201185\\_1889402\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/58/0,2340,en_2649_201185_1889402_1_1_1_1,00.html) (last visited Jan. 18, 2006).

<sup>109</sup> OECD, The Organisation For Economic Co-operation and Development PowerPoint Presentation, slide 2, <http://www.oecd.org/dataoecd/29/23/2397890.ppt> (last visited Jan. 18, 2006).

<sup>110</sup> *Id.* at slide 5.

<sup>111</sup> *Id.* at slide 6.

<sup>112</sup> P.J. LLOYD & KERRIN M. VAUTIER, PROMOTING COMPETITION IN GLOBAL MARKETS: A MULTI-NATIONAL APPROACH 131 (1999).

<sup>113</sup> OECD, Revised Recommendation of the Council Concerning Co-operation Between Member Countries On Anticompetitive Practices Affecting International Trade, C(95)130/FINAL, (Sept. 21, 1995), available at <http://www.oecd.org/dataoecd/60/42/21570317.pdf>.

<sup>114</sup> *Id.*

mechanism for “Consultation and Conciliation.”<sup>115</sup> Known both for implementing binding agreements, as well as utilizing non-binding instruments that clarify topics of disagreement,<sup>116</sup> the OECD has two arms that might provide some resolution to the merger control conflicts—the Competition Law and Policy Committee and the Global Forum on Competition.

### 1. The Competition Law and Policy Committee

The Competition Law and Policy Committee (“CLP”) of the OECD has for decades been the leading forum for regular, focused, off-the-record policy dialogue among the world’s leading competition officials.<sup>117</sup> The OECD’s “Competition Committee, made up of the leaders of the world’s major competition authorities, is the premier source of policy analysis and advice to governments on how best to harness market forces in the interests of greater global economic efficiency and prosperity.”<sup>118</sup> This dialogue has built mutual understanding and has had substantial real-world benefits, such as means of conflict avoidance and cooperation that have been used successfully by members and non-members alike. The CLP has also identified voluntary “best practices” and created substantial analytical convergence.<sup>119</sup> Some feel that the Committee can act as a bilateral network to encourage cooperation “in the analysis of particular mergers of common interest.”<sup>120</sup> The CLP has held roundtable discussions, developed framework papers, produced monographs, and sought to develop common competition principles among its members. An example is the Working Party on Cooperation (“WP3”).<sup>121</sup>

The WP3 examines how reporting requirements for mergers can be standardized. When issuing the “Framework for Premerger Notification Forms,” the WP3 determined areas in which countries were collecting essentially similar information. It then suggested how countries could work together to reduce the amount of duplicated effort.<sup>122</sup> Currently, the WP3 is

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<sup>115</sup> *Id.*

<sup>116</sup> OECD, Overview of the OECD, [http://www.oecd.org/document/18/0,2340,en\\_2649\\_201185\\_2068050\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/18/0,2340,en_2649_201185_2068050_1_1_1_1,00.html) (last visited Jan. 18, 2006).

<sup>117</sup> Terry Winslow, *The OECD’s Global Forum On Competition and Other Activities*, 16 ANTITRUST 38 (2001).

<sup>118</sup> OECD, Competition Law and Policy, [http://www.oecd.org/department/0,2688,en\\_2649\\_34685\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/department/0,2688,en_2649_34685_1_1_1_1,00.html) (last visited Jan. 18, 2006).

<sup>119</sup> OECD, Competition: OECD Global Forum on Competition, [http://www.oecd.org/document/60/0,2340,en\\_2649\\_37463\\_2732220\\_1\\_1\\_1\\_37463,00.html](http://www.oecd.org/document/60/0,2340,en_2649_37463_2732220_1_1_1_37463,00.html) (last visited Jan. 18, 2006).

<sup>120</sup> Eleanor M. Fox, *Mergers in Global Markets: GE/Honeywell and The Future Of Merger Control*, 23 U. PA. J. INT’L ECON. L. 457, 466 (2002).

<sup>121</sup> Winslow, *supra* note 117.

<sup>122</sup> *Id.*



looking at multinational merger review and how those processes can be streamlined and reformed.<sup>123</sup>

## 2. *The Global Forum on Competition*

Representatives from more than fifty-five countries met on October 17, 2001 for the first meeting of the Global Forum on Competition.<sup>124</sup> “The OECD Global Forum on Competition is one of eight ‘Global Forums’ created to deepen and extend relations with a larger number of non-OECD economies in fields where the OECD has particular expertise and global dialogue is important.”<sup>125</sup> The Forum was designed to create an open discussion among developed and developing countries regarding issues related to competition and antitrust.<sup>126</sup> At the initial meeting, merger enforcement was on the agenda.<sup>127</sup> In February of 2004, the Forum met for the fourth time to discuss issues such as “Regulatory Reform: Stock-taking of experience with reviews of competition law and policy in OECD countries” and “Challenges/Obstacles faced by competition authorities in achieving greater economic development through the promotion of competition.”<sup>128</sup>

### B. The International Competition Network

The International Competition Network was founded in October 2001, based on recommendations from the 2000 report of the International Competition Policy Advisory Committee (“ICPAC”).<sup>129</sup> Originally entitled the Global Competition Network (“GCN”), the founding principle was that the GCN could be used to foster agreement among nations regarding competition and antitrust law. At the same time, corporations would be better able to predict the success of a proposed merger before starting what can be an expensive process.<sup>130</sup> This proposal was well-received by U.S. authorities.<sup>131</sup> By focusing on narrowly-defined issues, the GCN could

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<sup>123</sup> *Id.* at 39.

<sup>124</sup> Jonathan Lechter et al., *Antitrust Violations*, 39 AM. CRIM. L. REV. 225, 271 (2002).

<sup>125</sup> OECD, Capacity Building: OECD Global Forum on Competition, [http://www.oecd.org/document/60/0,2340,en\\_2649\\_34535\\_2732220\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/60/0,2340,en_2649_34535_2732220_1_1_1_1,00.html) (last visited Jan. 18, 2006).

<sup>126</sup> Lechter, *supra* note 124.

<sup>127</sup> Winslow, *supra* note 117, at 39.

<sup>128</sup> OECD, Fourth Global Forum on Competition, February 12–13, 2004, Paris (France), [http://www.oecd.org/document/56/0,2340,en\\_2649\\_34611\\_17731256\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/56/0,2340,en_2649_34611_17731256_1_1_1_1,00.html).

<sup>129</sup> ICN, History, <http://www.internationalcompetitionnetwork.org/history.html> (ICPAC was formed in 1997 by U.S. Attorney General Janet Reno and Assistant Attorney General for Antitrust Joel Klein) (last visited Jan. 18, 2006).

<sup>130</sup> Renzi, *supra* note 2.

<sup>131</sup> See Charles A. James, Asst. Att’y Gen., Dep’t of J. Antitrust Div., Address Before the OECD Global Forum on Competition: International Antitrust in the 21st Century:

quickly answer needed questions.<sup>132</sup>

Focusing “exclusively on the procedural and substantive issues directly affecting multi-jurisdictional antitrust enforcement,”<sup>133</sup> the GCN would create a dialogue among nations to create standardized practices applicable to adopting countries.<sup>134</sup> Unlike other international organizations, the GCN strove to “be an inclusive, consensus-building effort”<sup>135</sup> that worked towards a “specific convergence agenda” in regards to domestic antitrust and competition laws.<sup>136</sup> Rather than work against the OECD and the Global Forum, the GCN was designed to supplement the work of those organizations.<sup>137</sup>

GCN, now named the International Competition Network (“ICN”), has a mission to create “a project-oriented, consensus-based, informal network of antitrust agencies from developed and developing countries that will address antitrust enforcement and policy issues of common interest and formulate proposals for procedural and substantive convergence through a results-oriented agenda and structure.”<sup>138</sup> The ICN has two main goals: (1) support developing nations in the enforcement of their antitrust laws, including increasing competition; and (2) promote the convergence of antitrust laws among developed and developing nations.<sup>139</sup> This environment was meant to create a more unified approach to antitrust enforcement such that global antitrust policies would be more efficient and effective. It was felt that such a system would eliminate “unnecessary or duplicative procedural burdens” that would otherwise negatively affect consumers and businesses.<sup>140</sup>

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Cooperation and Convergence, 7–11 (Oct. 17, 2001), at <http://www.usdoj.gov/atr/public/speeches/9330.pdf>.

<sup>132</sup> *U.S. and EU Wrangle Over Enforcement at OECD's Global Forum on Competition*, 81 ANTITRUST & TRADE REG. REP. n.2029, 347 (Oct. 19, 2001), available at <http://pubs.bna.com/IP/BNA/ATR.NSF/SearchAllView/F676CFD1DE3FBE5E85256AE9007A7114?Open&highlight=GCN>.

<sup>133</sup> James, *supra* note 131, at 9.

<sup>134</sup> Douglas K. Schnell, *All Bundled Up: Bringing the Failed GE/Honeywell Merger in from the Cold*, 37 CORNELL INT'L L. J. 217, 252 (2003).

<sup>135</sup> Charles A. James, Asst. Att'y Gen., Dep't of J. Antitrust Div., Address Before the Fordham Corporate Law Institute 28th Annual Conference on International Law and Policy: Reconciling Divergent Enforcement Policies: Where Do We Go From Here? (Oct. 25, 2001), available at <http://www.usdoj.gov/atr/public/speeches/9395.pdf>.

<sup>136</sup> *Id.*

<sup>137</sup> James, *supra* note 131.

<sup>138</sup> ICN, Memorandum on the Establishment and Operation of the International Competition Network, available at <http://www.internationalcompetitionnetwork.org/mou.pdf> (last visited Jan. 18, 2006).

<sup>139</sup> SIMON M. LORNE & JOY MARLENE BRYAN, ACQUISITIONS AND MERGERS: NEGOTIATED AND CONTESTED TRANSACTIONS § 8.6 (2003).

<sup>140</sup> ICN, International Competition Network, available at

The First Annual ICN Conference, held in September of 2002, adopted the guiding principles of a merger review scheme. These eight principles were: (1) sovereignty; (2) transparency; (3) non-discrimination on the basis of nationality; (4) procedural fairness; (5) efficient, timely, and effective review; (6) coordination; (7) convergence; and (8) protection of confidential information.<sup>141</sup> The ICN also detailed “Recommended Practices for Merger Notification Procedures,” the categories of which were: (1) establishing a nexus to the reviewing jurisdiction; (2) notification thresholds; and (3) timing of notification.<sup>142</sup>

In June 2003, the Second Annual ICN Conference adopted the “Recommended Practices” proposed at the first ICN Conference.<sup>143</sup> In addition, the Conference adopted other recommended practices that fell under the categories of: (1) review periods; (2) requirements for initial notification; (3) transparency; and (4) review of merger control provisions.<sup>144</sup>

The latest conference, the Third Annual ICN Conference, was held in April of 2004. Additional recommended practices were adopted, including: (1) conduct of merger investigations; (2) procedural fairness; (3) confidentiality; and (4) inter-agency coordination.<sup>145</sup>

### C. Recommendations of the United States International Competition Policy Advisory Committee

In 2000, the International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust (“Advisory Committee”) issued a Final Report regarding the state of international competition law.<sup>146</sup> In its examination of multi-jurisdictional mergers, the Advisory Committee recommended that the “challenges may best be addressed by facilitating, where possible, substantive harmonization and convergence of substantive standards and approaches to merger

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<http://www.internationalcompetitionnetwork.org/> (last visited Jan. 18, 2005).

<sup>141</sup> ICN, Guiding Principles For Merger Notification and Review, *available at* <http://www.internationalcompetitionnetwork.org/icnnpworkinggroupguiding.pdf> (last visited Jan. 18, 2006).

<sup>142</sup> ICN Merger Notification and Procedures Subgroup, Recommended Practices For Merger Notification Procedures, *available at* [http://www.internationalcompetitionnetwork.org/icn\\_npnew.pdf](http://www.internationalcompetitionnetwork.org/icn_npnew.pdf) (last visited Jan. 18, 2006).

<sup>143</sup> Lorne & Bryan, *supra* note 139.

<sup>144</sup> ICN, Recommended Practices For Merger Notification Procedures, *available at* <http://www.internationalcompetitionnetwork.org/mnprecpractices.pdf> (last visited Jan. 18, 2006).

<sup>145</sup> ICN Subgroup on Merger Notification and Procedures, Final Subgroup Draft, *available at* [http://www.internationalcompetitionnetwork.org/seoul/mwg\\_nps\\_seoul.pdf](http://www.internationalcompetitionnetwork.org/seoul/mwg_nps_seoul.pdf) (last visited Jan. 18, 2005).

<sup>146</sup> Final Report, *supra* note 81.

review.”<sup>147</sup> Steps towards achieving this goal were discussed.

Recognizing “that agreement on specific substantive rules is unlikely in the foreseeable future”<sup>148</sup> the Advisory Committee instead outlined areas where nations should begin working to harmonize and converge on issues surrounding merger review. These are: (1) “understanding more clearly the merger review principles currently employed by various jurisdictions”; (2) “developing agreed-upon approaches of what the Advisory Committee is calling ‘disciplines’ that nations would use to guide the review of mergers with significant transnational or spillover effects”; and (3) “encourage continued and deepened cooperation among antitrust authorities in reviewing multijurisdictional mergers.”<sup>149</sup> This last area suggested a framework to “foster this mutually beneficial cooperation between companies and competition authorities.”<sup>150</sup>

#### D. The Framework Directive

The Framework Directive was first proposed in Europe, though it has not been adopted. This model requires that a group of nations agree to a small number of directives that are adopted as a framework for addressing market issues. One example would be a general mandate that there be “no anticompetitive mergers with significant negative external effects, subject to possible transparent and proportional derogation.”<sup>151</sup> The approach is flexible enough that the directives adopted can be general principles that the participating jurisdictions would meet by formulating their own national rules.<sup>152</sup>

#### E. The “Amalgamated” Approach

Rather than expect any of the above forums or ideas to become the primary focus of international merger review and policy, the forums could work in conjunction to develop a viable merger review policy within the framework directive. Charles James, then Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice, made reference to this cooperation between the CLP, ICN, and the OECD Forum on Competition as early as 2001.<sup>153</sup> There has also been mention that the ICN is seeking consensus in the area of a multi-jurisdictional merger control

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Fox, *supra* note 120, at 468.

<sup>152</sup> *Id.*

<sup>153</sup> James, *supra* note 135.

process.<sup>154</sup> Possibilities exist for the sharing of work product, such as in the area of merger reporting requirements, where the CLP has already produced data and the ICN is interested in standardizing these requirements.<sup>155</sup> It is even possible that the ICN's end product could be presented for review to the OECD Global Forum on Competition.<sup>156</sup>

#### F. Principles of Positive Comity

Protection of competition is becoming a major motivating factor in competition policy for both the European Union and the United States,<sup>157</sup> though it must be noted that the phrases "competition, competitive and anticompetitive" might not have the same meaning in both jurisdictions and their governing bodies.<sup>158</sup> As authorities begin to realize that competition must be protected and to do so they must work together, bilateral agreements employing the concept of positive comity have gained support.<sup>159</sup>

Positive comity requires that "when anticompetitive conduct that adversely affects the important interests of one party occurs within the borders of another party, the 'affected party' may request that the 'territorial party' initiate appropriate enforcement actions."<sup>160</sup> This structure attempts to alleviate any conflicts that might arise over jurisdiction.<sup>161</sup> In 1991, the United States and the European Union signed a bilateral agreement encompassing the principles of positive comity.<sup>162</sup>

While the principles of positive comity are not a part of merger control regimes at this time, the lessons learned from their application in other areas informs the discussion. Competition authorities have recognized, through these principles, that it is often important to avoid conflict in sensitive areas such as extraterritorial jurisdiction. By allowing other nations to conduct

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<sup>154</sup> Winslow, *supra* note 117, at 40.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> Kuik, *supra* note 80.

<sup>158</sup> *Id.*

<sup>159</sup> Final Report, *supra* note 81, at ch. 5.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*; Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, U.S.-EC, Sept. 23, 1991, reprinted in 4 TRADE REG. REP. (CCH) ¶ 13,504; 61 ANTITRUST & TRADE REG. REP. (BNA) 382-85 (Sept. 26, 1991); Council Decision 95/145, 1995 O.J. (L 95) 45 (EC), corrected, Corrigenda to Decision 95/145, 1995 O.J. (L 131) 38 (EC). After the European Court of Justice found that the Commission lacked the authority to enact this Agreement, Case C-327/91, France v. Comm'n, (Aug. 9, 1994), 5 C.M.L.R. 517 (1994), the Commission entered into a nearly identical agreement in April 1995. 1995 O.J. (L95) 45, corrected, 1995 O.J. (L131) 38.

reviews regarding anticompetitive behavior that occurred within their borders, these countries recognize that other authorities might be better able to handle the issue. This idea could also be applied to the merger review context. When companies seek to merge, especially in cases where both companies are based in one country, great deference should be given to the merger review authorities in that country.

In the GE/Honeywell and Boeing/McDonnell Douglas cases discussed above, the European Union determined that the economic impact of the proposed mergers was significant enough to affect the E.U. economy. Greater weight should have been given to the findings of the DOJ and FTC to avoid the delays and merger abandonment that eventually occurred. If the principles underlying the idea of positive comity could have been applied in these situations, with deference being given to the findings of the merger's originating country, the issues witnessed might have been avoided.

#### V. CONCLUSION: MULTI-JURISDICTIONAL MERGERS IN THE GLOBAL MARKET

In the end, as the economy grows on a global scale, consensus regarding how to deal with multi-jurisdictional mergers must be reached. Leaving merger review decisions in the hands of domestic organizations and courts could produce a detrimental impact on large international mergers, since "[n]ational authorities and courts consider only the benefits and harms within their own borders; nations act nationalistically."<sup>163</sup> A mutually agreed upon arrangement must be determined and enforced for the benefit of the global economy.

While no country would ever concede all authority over its merger review process to a supra-national organization, it is not inconceivable that countries would consent to a more generalized organization with the power to pass directives for countries to implement. Look only towards the overall success of the European Union in regards to standardizing the laws of its member nations. Within that framework, directives are passed and each nation may implement such directives as they see it fit. For merger review, this might be a promising start towards standardizing the process and allowing more transparency for companies looking towards future mergers.

Concerns could and should arise with regard to developing countries. The membership of the current competition-focused bodies is comprised mainly of developed or nearly-developed governments and economies. What role would less developed countries, where the merger review process might not be of utmost concern, play in the development of merger review

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<sup>163</sup> Fox, *supra* note 120, at 467.

standards? This is not a question that is easily answered. The OECD Forum on Competition did invite non-member countries to participate, though many acknowledged that more non-member countries should have been added. However, there were concerns “that increased numbers would inhibit candid and interactive discussion.”<sup>164</sup>

Additionally, most of the topics covered in the forums and by these groups are part of the agenda set by the member states. Again, the experiences of countries admitted to both the European Union and the World Trade Organization after both had been in existence for a number of years might be probative in this situation. Perhaps, based on the experiences of those countries, a better framework for the inclusion of developing countries in the standardization of a multi-jurisdictional merger review process could be achieved.

In the end, as a global economy becomes the norm, we must look at both national and international law in the context of how it affects the international market. “Global markets demand globally-conceptualized law.”<sup>165</sup> Only as national laws become standardized, especially in relation to the control of markets, can we truly realize the power of a global economy.

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<sup>164</sup> Winslow, *supra* note 117.

<sup>165</sup> *Id.*