

**Festschrift in honor of Cornelis Canenbley's 70th birthday:
The EC-US Cooperation Agreement:
Two Decades of Cooperation, Challenges, and Convergence**

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The 70th anniversary of Cornelis Canenbley's birth coincides approximately with the 20th anniversary of a notable event whose consequences have had a substantial effect on the international evolution of competition law and its enforcement, the field to which Cornelis devoted his career. That event was the signing, on September 23, 1991, of the cooperation agreement between the European Communities (now the European Union, or EU) and the Government of the United States regarding the application of their competition laws.² The agreement ushered an era in which the dominant, though not unbroken, trend has been close cooperation and increasing policy convergence between the competition enforcement policies of the United States and the European Union.

Since signing the Agreement, the European Commission (EC) and the U.S. competition enforcement agencies, the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ):

- implemented the notification, information sharing, and coordination provisions of the Agreement to achieve an effective *modus operandi* in investigating and resolving enforcement matters of mutual competition concern;
- applied the experience gained in their concurrent enforcement to achieve substantive convergence of enforcement policies and practice, especially in merger control and cartel enforcement; and

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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, 23 Sept. 1991, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,504, and OJ L 95/45 (27 Apr. 1995), *corrected at* OJ L 131/38 (15 June 1995) (hereafter "Agreement"), *available at*: http://www.ftc.gov/bc/international/docs/agree_eurocomm.pdf.

- promoted as founding members the development of the International Competition Network, which, in its first decade, has fostered convergence toward sound policy and practice in over 100 competition agencies.

This was accomplished despite differences in their laws and practices, a history of US-EU economic conflicts, and the challenges posed by ‘globalization’ after the fall of communism.

The Agreement was met with some skepticism, and some – including Cornelis Canenbley – have questioned its efficacy. This paper will recall the reasons for that skepticism, describe how the authorities have addressed those concerns, and note the challenges that remain. One point the authors hope to convey is that the Agreement is not a ‘magic box’ that solves all problems, but rather an essential tool to strive for both effective multi-jurisdictional competition policy enforcement and convergence in policy and practice.

The Cold War of Competition Policy and Its Enforcement

At the beginning of the 1980s, one would have been justifiably skeptical that within a few years the Berlin Wall would fall and that, as a consequence, capitalism would largely replace communism. Similar skepticism would have met the notion that over 100 countries would enact competition laws, and then join together in a network devoted to convergence in policy and cooperation in enforcement.

Even among countries west of the Wall, there was more conflict than consensus as to competition policy and its enforcement. The United States was viewed in Europe and elsewhere as an aggressive “extraterritorial” enforcer of its competition policies. Europe appeared to the United States as a “fortress” in which states authorized monopolies and cartels. A British judge, Lord Wilberforce, faced with a demand from a U.S. court for evidence located in the United Kingdom, summarized the situation when he said

"[i]t is axiomatic that in anti-trust matters the policy of one state may be to defend what it is the policy of another state to attack."³

³ *In re Westinghouse Elec. Corp. Uranium Contract Litigation*, [1978] A.C. 547, 617 (H.L.).

In response to U.S. enforcement overseas, the United Kingdom, France, and numerous other countries enacted “blocking statutes” prohibiting their citizens from cooperating with foreign authorities, such as by providing evidence or consenting to judgments.⁴ One notable exception was Germany, which in 1976 signed an antitrust cooperation agreement with the United States.⁵

The European Commission, meanwhile, began to show that it would actively apply its competition laws to foreign firms operating in Europe whose business activities appeared to harm European consumers. In 1984, for example, IBM settled EC charges concerning certain business practices,⁶ prompting DOJ to express concerns to the EC after closing its own investigation of IBM’s practices.⁷

From Conflict to Coexistence and Cooperation

After years of deliberation, the EC Merger Regulation was enacted in 1989, authorizing the European Commission to review proposed large business mergers.⁸ Given the breadth and depth of U.S. direct investment in Europe, substantial mergers and acquisitions by U.S. firms in Europe would fall under the EC’s scrutiny.⁹ Less clear were the precise standards under which

⁴ See Protection of Trading Interests Act, 1980, c. 11 (U.K.); Law No. 80-538 of July 16, 1980, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 17, 1980, p. 1799; see also, SPENCER WEBER WALLER, ANTITRUST AND AMERICAN BUSINESS ABROAD (3d ed. 1997) § 4.16 (describing foreign blocking statutes).

⁵ See Agreement between the Governments of the United States of America and the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,501, available at: http://www.ftc.gov/bc/international/docs/agree_germany.pdf; see also “Deutsch-amerikanisches Regierungsabkommen über die Zusammenarbeit in der Wettbewerbspolitik unterzeichnet,” press release issued by the Federal Economics Ministry, BMWi Tn Nr. 7243 on June 25, 1976 (available in the authors’ files).

⁶ See THE EC LAW OF COMPETITION, 2nd Ed. (2007) §§ 10.225–10.227, at 1295–96 (Jonathan Faull & Ali Nikpay eds.) (discussing the IBM case).

⁷ Baxter urges EC Competition Officials not to force interface disclosures by IBM, 42 ATRR (BNA) 278 (Feb. 4, 1982).

⁸ See Council Regulation 139/2004, EC Merger Regulation, 2004 O.J. (L 24) 1 [hereinafter EC Merger Regulation] (replacing Council Regulation 4064/89, On the Control of Concentrations Between Undertakings, 1989 O.J. (L 395) and Council Regulation 1310/97), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:024:0001:0022:EN:PDF>.

⁹ See Charles S. Stark, Chief, Foreign Commerce Section, Antitrust Div., U.S. Dep’t of Justice, Improving Bilateral Antitrust Cooperation, Remarks at the Conference on Competition Policy in the Global Trading System: Perspectives from Japan, the United States, and the European Union (June 23, 2000), available at: <http://www.justice.gov/atr/public/speeches/5075.pdf>, at 4.

the EC would examine these deals—including whether “industrial policy” would be a factor—and how those standards would compare with those applied by U.S. antitrust authorities.¹⁰

Given the numerous conflicts between the United States and Europe, for example, as to trade in goods and services, government subsidies, and access to government procurement, EC Competition Commissioner, Sir Leon (now Lord) Brittan stated, “With the best will in the world . . . the US and the [European] Community may well one day soon take different views of a competition case.”¹¹ And, he warned, “The problem cases may be rare now, but they will increase in number and complexity.”¹² Consequently, Sir Leon proposed that the United States and the European Community agree to cooperate to avoid conflict in the application of their competition laws.¹³

The U.S. agencies accepted Sir Leon’s invitation and the EC and U.S. authorities agreed to notify each other when enforcement activities might affect their important interests, exchange information to the extent allowed by each party’s laws (i.e., not including confidential information), coordinate their enforcement activities when in their mutual interest, and consider comity in enforcement activities.¹⁴ The purpose of the agreement is to “promote cooperation and coordination and lessen the possibility or impact of differences between the Parties in the application of their competition laws.”¹⁵

¹⁰ See, e.g., Bernd Langeheine, *Substantive Review Under the EEC Merger Regulation*, 1990 FORDHAM CORP. L. INST. 481; James S. Venit, *The Evaluation of Concentrations Under Regulation 4064/89: The Nature of the Beast*, *Ibid.*, 519 (speculating as to the evaluation of concentrations under the EC Merger Control Regulation with regards to industrial and social policy, the meaning of “dominant position,” and when modification of concentrations will be required); Panel Discussion, *Substantive Review Under Merger Regulation*, *Ibid.*, 561.

¹¹ LEON BRITTAN, JURISDICTIONAL ISSUES IN E.E.C. COMPETITION LAW 28 (Univ. of Cambridge Research Centre for Int’l Law, Hersch Lauterpacht Memorial Lectures 1990).

¹² *Ibid.*, 29.

¹³ See Sir Leon Brittan and the US Attorney General, Dick Thornburgh, Discuss EC-US Agreement on Antitrust Issues, EC Press Release IP/91/35 (15 Jan 1991), available at:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/91/35&format=HTML&aged=1&language=EN&guiLanguage=en>.

¹⁴ Agreement, Art. II-VI.

¹⁵ Agreement, Art. I(1).

Cooperation in practice

The Agreement was met with some concerns and some skepticism. On the one hand, counselors were concerned about what information the enforcers would share with one another. On the other hand, some were skeptical that cooperation could be effective in the absence of convergence on substantive enforcement policies.

Cornelis Canenbley was a member of both groups. As to the former, he asserted that a company will be deterred from cooperating with the antitrust authority in one country and from disclosing information to it, if it is aware that there is a fairly extensive exchange of information with other antitrust authorities.¹⁶

As to the latter, he publicly stated his belief that “[a] uniform body of law and a uniform application of the law is . . . a requirement for a closer cooperation.”¹⁷

The EC and the U.S. agencies were well aware of these concerns. Regarding information sharing, they determined what specific kinds of information they could share with each other within the bounds of their respective confidentiality rules. Of course, they could share public information, which can in itself be useful in connection with the analysis of a matter under review. They drew a distinction between confidential *agency* information and confidential *business* information: confidential agency information can be shared with other antitrust authorities in a confidential relationship, while statutes bar the disclosure of confidential business information, absent a waiver from the submitter.¹⁸ The agencies are not prohibited from disclosing confidential agency information, but they normally treat such information as non-public. Confidential agency information includes staff analyses of cases, such as product and geographic market definitions, assessment of competitive effects, and potential remedies. Confidential business information includes premerger filings and responses to agency information requests, and cannot be shared without the submitter’s consent.

¹⁶ Cornelis Canenbley, 1996 FORDHAM CORP. L. INST. 55 (B. Hawk ed. 1997).

¹⁷ *Ibid.*

¹⁸ See European Commission, XXVIIth Report on Competition Policy 1997, at 319; see also John J. Parisi, Enforcement Co-operation Among Antitrust Authorities, [1999] ECLR 133, 137-138.

Likewise, the EC and the U.S. agencies recognized that their respective competition laws contained different legal standards, such as the EC's "dominance" test versus the U.S.'s "substantial lessening of competition" test for mergers, which could lead to different outcomes.¹⁹ To better understand each other's laws and processes, the EC and the U.S. agencies held workshops in which their staffs discussed cases illustrating the scope of their laws, as well as analytical tools, such as market definition and competitive effects analysis. These discussions were particularly timely given the recent issuance of the 1992 U.S. horizontal merger guidelines.²⁰ They also discussed investigative methods such as interview techniques and document gathering and analysis.²¹ Moreover, EC and U.S. agencies' staffs studied each other's pre-merger notification instruments so that each side knew what information the other required.²² Through the course of these meetings and discussions, understanding of each other's system grew as did the development of professional relationships that would prove to be an important intangible factor in the cooperation that would take place in their actual case work.

Convincing the Skeptics

To overcome the concerns and skepticism about information sharing and substantive differences, the authorities would have to demonstrate that they could cooperate effectively in resolving cases subject to scrutiny on both sides of the Atlantic, while preserving confidentiality of nonpublic information.

One notable early case of concurrent enforcement, including coordination of remedies, was *Shell/Montedison*.²³ The dates of the decisions in the footnote reflect a protracted procedure

¹⁹ See *supra*, note 10.

²⁰ See Janet D. Steiger, Perspectives on U.S. International Antitrust Enforcement, 1993 FORDHAM CORP. L. INST. 25-27 (B. Hawk ed. 1994).

²¹ *Id.*

²² *Id.*

²³ *Montedison S.p.A., et al.*, 119 F.T.C. 676 (1995), available at:

[http://www.ftc.gov/os/decisions/docs/vol119/FTC_VOLUME_DECISION_119_\(JANUARY_-_](http://www.ftc.gov/os/decisions/docs/vol119/FTC_VOLUME_DECISION_119_(JANUARY_-_JUNE_1995)PAGES_618-723.pdf#page=59)

[JUNE_1995\)PAGES_618-723.pdf#page=59](http://www.ftc.gov/os/decisions/docs/vol119/FTC_VOLUME_DECISION_119_(JANUARY_-_JUNE_1995)PAGES_618-723.pdf#page=59); *Shell/Montecatini*, Case IV/M.0269, Commission Decision 94/811 of 8 June 1994, 1994 O.J. L 332/48, revised 24 June 1996, 1996 O.J. L294/10, available at:

http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_269. See discussion stemming from this case in 1994 FORDHAM CORP. L. INST. 187-191 (B. Hawk ed. 1995).

in which the parties first obtained a decision from the EC involving commitments, then reached a settlement with the FTC, and finally a revision of the EC commitments. FTC Chairman Robert Pitofsky asked

how much easier it might have been for all concerned if the EC and US investigations could have been coordinated. Given current confidentiality constraints, that would have first required the consent of the parties. As I look at the outcome and the procedural history of this matter, it seems to me that we should be asking what would need to be done to enable "and embolden" all of us, enforcers and parties alike, to enter into such a coordinated effort.²⁴

Several cases over the last half-decade of the 1990s revealed an evolution in the ways that the EC and the U.S. agencies were able to coordinate their enforcement in markets affected by proposed mergers or other business conduct, particularly *Guinness/GrandMetropolitan*,²⁵ *ABB/Elsag Bailey*,²⁶ *Zeneca/Astra*,²⁷ *WorldCom/MCI*,²⁸ and *Exxon/Mobil*.²⁹ Instead of dealing with the authorities one at a time, as in the *Shell/Montedison* case, merging parties recognized the benefits of coordinating their approaches to the authorities from the outset and not just at the remedy phase. The *ABB/Elsag Bailey* and *Zeneca/Astra* cases demonstrated how parties could obtain relatively quick and coordinated enforcement by the EC and U.S. authorities even though both cases presented issues of potential competition that can be very complicated in terms of evidence gathering and evaluation.

²⁴ Robert Pitofsky, *International Antitrust: An FTC Perspective*, 1995 FORDHAM CORP. L. INST. 1, 8 (B. Hawk ed. 1996).

²⁵ *Guinness/GrandMetropolitan*, Case No IV/M.938, Commission Decision of 15 October 1997, 1998 O.J. L 288/24, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998D0602:EN:HTML>; *Guinness PLC, et al.*, FTC Dkt. No. C-3801, available at: <http://www.ftc.gov/os/caselist/c3801.shtm>.

²⁶ *ABB/Elsag-Bailey*, Case No COMP/M.1339, Commission Decision of 16 Dec. 1998, available at: http://ec.europa.eu/competition/mergers/cases/decisions/m1339_en.pdf; *In the Matter of ABB AB and ABB AG*, FTC Dkt. No. C-3867, available at: <http://www.ftc.gov/os/caselist/c3867.shtm>.

²⁷ *Zeneca/Astra*, Case No COMP/M.1403, Commission Decision of 26 Feb. 1999, available at: http://ec.europa.eu/competition/mergers/cases/decisions/m1403_en.pdf; *Zeneca Group plc*, FTC Dkt. No. C-3880, available at: <http://www.ftc.gov/os/caselist/c3880.shtm>.

²⁸ *Worldcom/MCI*, Case No IV/M.1069, Commission Decision of 8 July 1998, 1999 O.J. L 116/1, available at: http://ec.europa.eu/competition/mergers/cases/decisions/m1069_19980708_600_en.pdf; U.S. Department of Justice Press Release, "Justice Department Clears Worldcom/MCI Merger after MCI Agrees to Sell its Internet Business," July 15, 1998, available at http://www.usdoj.gov/atr/public/press_releases/1998/1829.htm.

²⁹ *Exxon/Mobil*, Case No COMP/M.1383, Commission Decision of 29 Sept. 1999, 2004 O.J. L 103/1, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004D0284:EN:HTML>; *Exxon/Mobil*, FTC Dkt. No. C-3907, available at: <http://www.ftc.gov/os/caselist/c3907.shtm>.

Moreover, as companies and their counselors became more familiar with the nature and extent of enforcement cooperation among the agencies, and the agencies earned their confidence, parties recognized the benefits of coordination and became willing to facilitate the cooperative process.³⁰ Parties' willingness to waive their confidentiality rights to facilitate cooperation among enforcement agencies marked the most significant development that emerged from the 1990s merger wave.

Granting waivers is now routine in most mature enforcement relationships, as the relationship between U.S. agencies, the EC, and EU Member States' authorities demonstrates.³¹ Waivers typically cover all materials submitted to the agencies but the waiver is limited to communication between the reviewing agencies.³² The agencies maintain the confidentiality of all materials against third parties and the general public. Waivers enable the reviewing agencies to focus more quickly on the enforcement issues over which they have common concerns, to determine whether enforcement action need be taken by one or both agencies, and to then consider remedies that will avoid subjecting the parties to incompatible obligations.³³

Cooperation and coordination among the agencies and the parties have resulted in a lengthy record of cases in which the U.S. agencies and the EC or EU Member State authorities have arrived at the same results in their parallel review of cross-border mergers. It is beyond the scope of this paper to discuss in detail the many mergers that U.S. and European officials concurrently investigated and in which they cooperated but the following is a representative sample by industry:

³⁰ For a discussion of evolving waiver practice, *see* European Commission, XXVIIIth Report on Competition Policy 1998, § 4.2, at 321.

³¹ *See* INT'L COMPETITION NETWORK, WAIVERS OF CONFIDENTIALITY IN MERGER INVESTIGATIONS, pt. I (June 8, 2005), available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf>.

³² Grants of waivers to the EC in cases coordinated with the U.S. agencies typically contain a specific exclusion for information that is privileged under U.S. law, *e.g.*, in-house counsel communications that are privileged under U.S. law but not under EU law. The May 9, 2003, United States submission to the OECD Competition Committee's Working Party 3 (on international cooperation) concerning Information Sharing in Merger Control Procedures reported that "The U.S. agencies have asked the EC not to send or discuss information that could be considered privileged under U.S. law and the U.S. agencies will refuse to consider and will return such information if it is provided inadvertently." DAFFE/COMP/WP3/WD(2003)25.

³³ *Supra*, note 31.

- The first wave of pharmaceutical industry mergers in the mid-1990s, including Glaxo/Wellcome, Hoechst/Merion Merrill Dow, Upjohn/Pharmacia, and Ciba-Geigy/Sandoz (which created Novartis).
- Auto parts makers consolidated both to meet cost-cutting efforts by the major automakers as well as to take advantage of production opportunities on both sides of the Atlantic. Representative examples are the Bosch/Allied Signal, Lucas/Varity, and Federal-Mogul/T&N mergers.
- Chemical industry mergers, including Shell/Montedison, Rohm & Haas/Morton, Dow/Union Carbide, Solvay/Ausimont, Owens Corning/St. Gobain.
- Agricultural chemical industry mergers such as Novartis/AstraZeneca, Bayer/Aventis CropScience, and DSM/Roche.
- Oil industry mergers, including BP/Amoco, Exxon/Mobil, and BP Amoco/ARCO.
- Mergers in high-technology industries, including ABB/Elsag-Bailey, Hewlett-Packard/Compaq, Lockheed/Loral, Boeing/Hughes, Siemens/Atecs Mannesmann, General Electric/Agfa-Gevaert.
- Mergers in the beverages industries, including Guinness/GrandMetropolitan (creating Diageo) and Diageo-Pernod/Seagram.
- The next wave of pharmaceutical industry mergers, including Glaxo Wellcome/SKB, Hoechst/Rhone-Poulenc (creating Aventis), Pfizer/Pharmacia, and Sanofi/Aventis.

These mergers involved firms with substantial presence and revenues on both sides of the Atlantic, not to mention the rest of the world. Some required substantial divestitures in order to comply with the law, while others raised little competitive concern and, due to the increasing communication among the agencies, were quickly cleared.

Comity³⁴

Although “comity” does not appear in the Agreement, it is the fundamental principle that permeates the Agreement. In furtherance of the purpose of the Agreement, Article VI states:

Within the framework of its own laws and to the extent compatible with its important interests, each Party will seek, at all stages in its enforcement activities, to take into account the important interests of the other Party.

³⁴ ‘Comity’ means ‘rules of convention, usage or international courtesy which most often guide the conduct of States; [but they] are not mandatory rules of law.’ Dominique Carreau, *Droit international*, Pedone, Paris (5th ed, 1997), para. 684. The U.S. Supreme Court over a century ago said it is “neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation . . .” *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

The enforcement issues posed by the doctrine of comity include under what circumstances a sovereign might, as a matter of discretion, refrain from exercising its jurisdiction or alter its exercise in consideration of important interests of another sovereign. Articles V and VI of the Agreement cite factors the parties will take into account in deciding whether to act, or refrain from acting, in view of their respective important interests.³⁵

A noteworthy example of the application of comity under the Agreement is the *Boeing/McDonnell Douglas* case of 1997. Although the EC and the FTC reached different enforcement decisions,³⁶ the EC considered and met concerns the United States Government raised about the impact on U.S. national defense interests of certain potential remedies the EC considered in its examination of the case.

Moreover, as a practical matter in concurrently investigating and resolving cases of mutual interest, the EC and the U.S. agencies consider each other's interests as a practical necessity to ensure that their respective enforcement decisions effectively meet their mutual concerns. For example, when the EC and the reviewing U.S. agency determine in a merger case that a divestiture will be required to alleviate competitive effects in a particular market, they must consider, *inter alia*, whether a proposed divestee is viable and capable of maintaining competition in the affected market on both sides of the Atlantic. When merging parties have proposed divestees that were found to be viable and capable on one side of the Atlantic but not the other, the agencies have informed the parties that transatlantic capability is necessary.

In some instances, it has been possible for either the EC or one of the U.S. agencies to take a decision that fully satisfies the competitive concerns of the other authority and that

³⁵ The Agreement reflects the U.S. agencies' enforcement policy that embodies the doctrine of comity. See Antitrust Enforcement Guidelines for International Operations, issued by the U.S. Department of Justice and the Federal Trade Commission, April 1995, § 3.2, available at: <http://www.justice.gov/atr/public/guidelines/internat.htm>.

³⁶ *The Boeing Co.*, et al., Joint Statement closing investigation of the proposed merger and separate statement of Commissioner Mary L. Azcuenaga, FTC File No. 971-0051, 1 July 1997, available at: <http://www.ftc.gov/opa/1997/07/boeing.shtm>; *Boeing/McDonnell Douglas*, Case No IV/M.877, Commission Decision of 30 July 1997, ¶ 12, OJ L 336/16 (8 Dec. 1997), available at: http://ec.europa.eu/competition/mergers/cases/decisions/m877_19970730_600_en.pdf.

authority takes no further enforcement action. Examples include *Halliburton/Dresser*³⁷ and *Cisco/Tandberg*.³⁸ Some, including Cornelis,³⁹ have urged the authorities to take more actions like those -- that is, to be more deferential to one another and allocate jurisdiction of cases to the “best placed” authority to investigate and resolve competitive concerns. Such actions would relieve burdens on both agencies and parties.⁴⁰

As the *Halliburton* and *Cisco* cases demonstrate, the EC and the U.S. agencies defer in appropriate cases, but experience has shown that such cases are rare. In most instances, especially in merger cases, the authorities are faced with numerous affected product markets, and the affected geographic markets are most often not worldwide. Consumer preferences, transportation costs, government regulations, and the physical nature of a product are just a few of the factors that can limit the relevant geographic markets and possibly to a different magnitude of anticompetitive effects in different jurisdictions. For example, although many pharmaceutical firms sell their products in many countries around the world, government regulation typically limits the scope of the relevant geographic market to national borders. The physical nature of certain products, such as atmospheric gases used in industrial processes, can limit the geographic scope of affected markets. Accordingly, different results—for example, clearance in one jurisdiction and divestiture in another—are due not to a difference between the enforcers’ analyses but rather to different market conditions.

³⁷ *Halliburton/Dresser*, Case No IV/M.1140, Commission Decision of 6 July 1998, ¶¶ 6-7, OJ C 239/16 (30 July 1998), available at: http://ec.europa.eu/competition/mergers/cases/decisions/m1140_en.pdf; U.S. Dept. of Justice press release of Sept. 29, 1998, available at: http://www.justice.gov/atr/public/press_releases/1998/1963.pdf.

³⁸ *Cisco/Tandberg*, Case No COMP/M.5669, Commission Decision of 8 Feb. 2010, available at: http://ec.europa.eu/competition/mergers/cases/decisions/M5669_20100329_20212_253140_EN.pdf; U.S. Dept. of Justice press release of Mar. 29, 2010, available at: http://www.justice.gov/atr/public/press_releases/2010/257173.pdf.

³⁹ Cornelis Canenbley and Michael Rosenthal, Co-operation Between Antitrust Authorities In – and Outside the EU: What Does it Mean for Multinational Corporations?-Part 2, [2005] ECLR 178, 181.

⁴⁰ The Canadian Competition Bureau (CCB) has occasionally decided not to challenge a merger upon determining that remedies contained in another agency’s decision resolved competitive concerns in Canada; see, e.g., Competition Bureau’s Concerns Resolved in Procter & Gamble’s Acquisition of Gillette, CCB Press Release of Sept. 30, 2005, available at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01953.html>.

An example of such a case was *Air Liquide/BOC*.⁴¹ Air Liquide and Air Products jointly bid to take over BOC, dividing BOC's assets between the two acquiring firms. The Air Liquide acquisition fell within the EC's jurisdiction while both acquisitions were reviewed by the FTC. The EC was able to reach an acceptable settlement with Air Liquide; in announcing its decision, the EC referred to its cooperation with the FTC, noting however that

Air Liquide and Air Products as well as the target, BOC, have substantial gas businesses in the United States. The assessment conducted by the Commission relates, however, mainly to the assets and businesses of BOC located in the EEA, which are to be obtained by Air Liquide. The Commission's decision in this case therefore does not prejudice the outcome of the assessment in the United States. The investigation of the case in the United States has not yet been concluded.⁴²

In the United States, the case proved too complex to remedy effectively and the parties decided to abandon the deal.⁴³ The FTC could not simply accept the EC's decision because the EC considered only part of the overall transaction, not including the atmospheric gas markets affected in the United States. This was neither the first, nor has it been the last, such case in which the anticompetitive effects were of different natures and magnitudes on one side of the Atlantic from the other and could not be resolved to the mutual agreement of the parties and the enforcers.

Even when markets are transatlantic or even worldwide, applying comity principles to defer to another reviewing jurisdiction is problematic. In many cases there will not be a clear "center of gravity" such that it would make sense for one or more jurisdictions to withhold investigation and enforcement – for example, although the parties in the *Boeing/McDonnell Douglas* and *Microsoft* matters were based in the U.S. and sales in the U.S. exceeded those in the EU, it would seem odd to assert that the EC should therefore take a pass on applying its competition laws if it believes they would be violated. Even if the effects in one jurisdiction are

⁴¹ *Air Liquide/BOC*, Case COMP/M.1630, Commission Decision of 18 Jan. 2000, OJ L 92/1 (30 Mar. 2004), available at: http://ec.europa.eu/competition/mergers/cases/decisions/m1630_en.pdf.

⁴² EC press release IP/00/46, 18 Jan. 2000, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/00/46>.

⁴³ Failed Bid costs Air Products \$450 Million, New York Times, May 12, 2000 (reporting abandonment of Air Liquide's and Air Products' joint bid for BOC), available at: <http://www.nytimes.com/2000/05/12/business/company-news-failed-bid-costs-air-products-450-million.html?src=pm>

substantially smaller than those in another, expecting the less affected jurisdiction to set aside its concerns about effects in its markets and defer to the enforcement preferences of the more affected jurisdiction seems problematic from legal, policy, and political perspectives.

Convergence

Increasing analytical convergence in all areas of competition policy is a goal of many competition agencies including the U.S. Federal Trade Commission,⁴⁴ and pursuing this goal is nowhere more important than between the U.S. and the EU. While regular cooperation on cases itself tends to further convergence, the U.S. agencies and the EC have also established formal mechanisms to heighten understanding of each other's systems, identify strengths and weaknesses of each other's policies, and minimize differences between them.

In 1999, following the suggestion of EC Competition Commissioner Karel Van Miert,⁴⁵ the U.S. and EC competition agencies formed a Mergers Working Group⁴⁶ to gather the experience gained in the many jointly reviewed mergers and to examine where cooperation could be enhanced, beginning with remedies. In addition to their agencies' case work, the Group drew on the findings of the FTC's 1999 Divestiture Study.⁴⁷ As a consequence of the Group's work, the EC issued a notice on merger remedies that was broadly consistent with U.S. approaches.⁴⁸

Following the conflicting U.S. and EC decisions in the proposed *GE/Honeywell* merger,⁴⁹ the Group examined issues that arise in conglomerate mergers, including leveraging, bundling, and tying, and it also considered analysis of efficiency claims. The effort resulted in a clearer

⁴⁴ R. Tritell and E. Kraus, "The Federal Trade Commission's International Antitrust Program," <http://ftc.gov/bc/international/docs/ftcintantiprogram.pdf> (Oct. 2010).

⁴⁵ Karel Van Miert, Member, Eur. Comm'n, *Mega-Mergers and the Wave of Mergers Across the World – A Challenge for Antitrust Law?*, Remarks before the IX. International Conference on Competition, Berlin, (10 May 1999), in *MEGA-MERGERS – A NEW CHALLENGE FOR ANTITRUST LAWS?* 231, 240–43 (Knud Hansen ed., 2000).

⁴⁶ See European Commission, XXIXth Report on Competition Policy, ¶341, at 115.

⁴⁷ A Study of the Commission's Divestiture Process, Staff of the Bureau of Competition (Fed. Trade Comm'n 1999), available at: <http://www.ftc.gov/os/1999/08/divestiture.pdf>.

⁴⁸ See Mario Monti, *The Commission Notice on Merger Remedies - One Year After*, 2, Remarks Before the Centre d'économie industrielle, Ecole Nationale Supérieure de mines (CERNA) (Jan. 18, 2002), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/02/10&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁴⁹ *GE/Honeywell*, Case No COMP/M.2220, Commission Decision of 3 July 2001, O.J. L 48/1 (18 Feb. 2004), available at: http://ec.europa.eu/competition/mergers/cases/decisions/m2220_20010703_610_en.pdf.

understanding of the issues and the agencies' respective approaches.⁵⁰ It also informed the EC's development of its Non-Horizontal Merger Guidelines,⁵¹ which are broadly consistent with U.S. enforcement practices. Subsequently, the EC and the U.S. agencies have reached consistent outcomes in several cases that raised vertical and conglomerate issues, such as *GE/Amersham*⁵² and *Google/DoubleClick*.⁵³

The Mergers Working Group also focused on procedures and produced a document, adopted in October 2002, that describes best practices for the coordination of merger reviews.⁵⁴ Reflecting the experience gained over the past decade, the document describes how the agencies work together to minimize the potential for inconsistent outcomes and suggests ways that merging parties can facilitate coordination.⁵⁵

In 2004, in part in response to concerns that the EU's legal standard for reviewing mergers left a "gap" compared to the U.S. test, the EU Council of Ministers substantially revised the EC Merger Regulation, supplanting the "dominance" test with a test that asks whether a proposed merger will "significantly impede effective competition."⁵⁶ This formulation is semantically compatible with the Clayton Act's "substantial lessening of competition" test.⁵⁷ The

⁵⁰ See Charles A. James, Assistant Att'y Gen. Antitrust Div., U.S. Dep't of Justice, Recent Developments and Future Challenges at the Antitrust Division, 12-14, Remarks Before the Dallas Bar Association (Sept. 17, 2002), available at <http://www.justice.gov/atr/public/speeches/200239.pdf>.

⁵¹ Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings, O.J. C 265/6 (18 Oct. 2008), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:265:0006:0025:EN:PDF>.

⁵² *GE/Amersham*, Case No. COMP/M.3304, Commission Decision of 21 Jan. 2004, available at: http://ec.europa.eu/competition/mergers/cases/decisions/m3304_en.pdf. The FTC and DOJ granted Early Termination of the Waiting Period on 1 Dec. 2003, available at: <http://www.ftc.gov/bc/earlyterm/2003/12/et031201.PDF>.

⁵³ *Google/DoubleClick*, Case COMP/M.4731, Commission Decision of 11 March 2008, O.J. C 184/10 (22 July 2008), available at: http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf; "Federal Trade Commission closes Google/DoubleClick Investigation," FTC press release of Dec. 20, 2007, available at <http://www.ftc.gov/opa/2007/12/googledc.shtm>; see also William Blumenthal, The Status of Convergence on Transatlantic Merger Policy, remarks before the Amer. Bar Assoc., Brussels, Oct. 27, 2005, available at: <http://www.ftc.gov/speeches/blumenthal/051027transatlantic.pdf>.

⁵⁴ See U.S.-EU Merger Working Group, *Best Practices on Cooperation in Merger Investigations*, ¶¶ 2-3 (2002), available at: http://ec.europa.eu/competition/mergers/legislation/best_practices_2002_en.pdf.

⁵⁵ As this paper was being written, the Group was again conducting a review of its efforts to refine further their coordination of cases needing remedies and issued revised Best Practices on Cooperation in Merger Investigations on Oct. 14, 2011, available at: <http://www.ftc.gov/opa/2011/10/eumerger.shtm>.

⁵⁶ EC Merger Regulation, *supra* note 8, Art. 2.2-3, Recitals ¶¶ 25-26.

⁵⁷ See Mario Monti, European Comm'n responsible for Competition Policy, Convergence in EU-US antitrust policy regarding mergers and acquisitions: an EU Perspective, remarks before the UCLA Law First Annual Institute on US

Council's amendments also clarified the Regulation to allow efficiency claims to be taken into account in merger analysis.⁵⁸ As a result, the EC issued horizontal merger guidelines,⁵⁹ which most knowledgeable observers found functionally equivalent to the U.S. Horizontal Merger Guidelines.⁶⁰ During the drafting of the EC's horizontal merger guidelines, EC and U.S. agency staff and officials engaged in a robust dialogue on all aspects of the guidelines. A similar dialogue took place this past year as the U.S. agencies revised their horizontal merger guidelines.

Continuing and New Challenges

Fulfilling the purpose of the Agreement – to promote cooperation and coordination and lessen the possibility or impact of differences between the Parties in the application of their competition laws—remains a continuing challenge to the enforcers. It recalls an allusion attributed to Jacques Delors about European integration: It is like riding a bicycle – you must keep pedaling.⁶¹

While most aspects of U.S. and EU competition laws and policy are now in harmony, some differences remain, especially regarding unilateral conduct. The substantive differences between Sherman Act, § 2, and EU Article 102 are greater than those in their respective merger control and cartel enforcement laws. Although there is room to interpret different statutory terms in a more or less consistent manner and the EC's Guidance Paper on Article 82 brings EC policy more in line with U.S. policies,⁶² the U.S. and EU courts have construed their respective rules in a manner that indicates different perspectives on the goals and interpretation of the rules in this

and EU Antitrust Aspects of Mergers and Acquisitions, 28 Feb, 2004, at 3, *available at*: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/04/107&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁵⁸ See EC Merger Regulation, *supra* note 8, Art. 2.1(b), Recital ¶ 29.

⁵⁹ Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings, O.J. C 31/5 (5 Feb. 2004), *available at*: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:031:0005:0018:EN:PDF>.

⁶⁰ See Louis Kaplow and Carl Shapiro, Antitrust, Working Paper 12867, Nat'l Bureau of Economic Research, notes 112, 125, and 131, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=961264&download=yes.

⁶¹ See, e.g., Jacques Delors, Where is the European Union heading?, Presentation to a series of conferences in the United States, Mar. 26 – Apr. 4, 2001, *available at*: http://www.notre-europe.eu/uploads/tx_publication/DiscoursIV01-en.pdf.

⁶² Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45/7 (24. Feb. 2009), *available at*: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:045:0007:0020:EN:PDF>

area. As this article is being written, a group of EC, FTC, and DOJ officials and staff are reviewing their respective enforcement cases and policies in the area of unilateral conduct to identify the similarities and differences, with a view to ultimately increasing convergence.⁶³ More cases have arisen that provide opportunities to cooperate in investigations, and FTC staff is cooperating with its EC counterparts in these cases more often than in the past. Firms have also become more willing to facilitate cooperation in conduct cases by waiving their confidentiality rights. While convergence in this area remains more difficult than in merger and cartel cases, the agencies are committed to continuing to increase analytical convergence and avoid inconsistent results.

With over one hundred merger control regimes worldwide, it is important that convergence be pursued beyond the transatlantic realm. The spread of merger review can be viewed as a triumph of competition policy. Many of these laws were adopted as part of broader revisions accompanying the transition to market-based economies. At the same time, however, subjecting global mergers to a gauntlet of regulatory regimes poses problems of its own. Parties that pursue cross-border mergers must often cope with a multiplicity of possible merger reviews, along with different timetables, information requirements, and substantive standards, among other things. It also complicates matters for enforcers.

The International Competition Network (ICN), established in 2001, provides a venue for the world's competition agencies to concretely address such competition policy and enforcement issues.⁶⁴ The ICN now includes almost all of the world's competition agencies.

One of the ICN's first projects was to establish a Merger Working Group.⁶⁵ The group developed, and the ICN adopted, a set of eight guiding principles for merger notification and

⁶³ Jon Leibowitz, remarks in panel discussion, 2010 FORDHAM COMP. L. INST. 67 (B. Hawk ed. 2011).

⁶⁴ ICN, ABOUT THE ICN, <http://www.internationalcompetitionnetwork.org/index.php/en/about-icn>.

⁶⁵ See Elizabeth F. Kraus and Maria B. Coppola, *The International Competition Network: A Virtual Reality*, available at <http://www.ftc.gov/bc/international/docs/krauscoppolaicn04.pdf>; Eleanor M. Fox, *Linked-In: Antitrust and the Virtues of a Virtual Network*, 43 INT'L LAW. 151, 161 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1431560&download=yes.

review, which address topics such as transparency, non-discrimination, and procedural fairness.⁶⁶ In addition, the Working Group developed a set of Recommended Practices for Merger Review Procedures that address issues such as the need for a nexus between the transaction and the reviewing jurisdictions, objective notification thresholds, and conducting merger investigations efficiently.⁶⁷ Following the ICN's adoption of these recommendations, in a very short time, many jurisdictions used them as a benchmark for amending their domestic merger review laws and procedures.⁶⁸ An important feature of the ICN and a major reason for its success is that it draws on the expertise not only of competition agencies but of a network of expert private sector advisers, which included Cornelis Canenbley. The ICN working group also addressed merger investigation techniques and the analytical framework for merger review, including a study of substantive tests applied to mergers and remedies.⁶⁹ In addition to continuing its work on mergers, the ICN is conducting work on unilateral conduct, anti-cartel enforcement, competition advocacy, agency effectiveness, and capacity building.⁷⁰ Important work in furtherance of cooperation, convergence, and capacity building are also conducted by the competition groups of the OECD, UNCTAD, and APEC, as well as several regional organizations. It is noteworthy that work and progress toward convergence in the competition policy area has proceeded through soft law mechanisms.⁷¹

⁶⁶ See ICN, GUIDING PRINCIPLES FOR MERGER NOTIFICATION and REVIEW PROCEDURES (2002), available at:

<http://www.internationalcompetitionnetwork.org/uploads/library/doc591.pdf> .

⁶⁷ See ICN, RECOMMENDED PRACTICES FOR MERGER NOTIFICATION PROCEDURES (2005), available at:

<http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf> .

⁶⁸ See ICN, A STATEMENT OF ACHIEVEMENTS JUNE 2006 – MAY 2007 4 (2007), available at:

<http://www.internationalcompetitionnetwork.org/uploads/library/doc392.pdf>. In 2010, Germany brought its merger regime into conformity with one of the ICN Recommendations by enacting a two-party domestic nexus test (“Zweite Inlandsumsatzschwelle”) into its merger reporting thresholds; see Bericht des Bundeskartellamts über seine Tätigkeit in den Jahren 2007/2008, 22 June 2009, III, 11, available in German only at:

<http://dip21.bundestag.de/dip21/btd/16/135/1613500.pdf>.

⁶⁹ See ICN, ICN INVESTIGATIVE TECHNIQUES HANDBOOK FOR MERGER REVIEW (2005), available at:

<http://www.internationalcompetitionnetwork.org/uploads/library/doc322.pdf>; ICN MERGER WORKING GROUP: ANALYTICAL FRAMEWORK SUB-GROUP, THE ANALYTICAL FRAMEWORK FOR MERGER CONTROL (2002), available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc333.pdf>.

⁷⁰ ICN materials are available on its website at <http://www.internationalcompetitionnetwork.org/>.

⁷¹ In 1997, the World Trade Organization established a Working Group on the Interaction Between Trade and Competition Policy. The group discussed proposals supported by the EU and others to introduce competition disciplines in the Doha Round but the Working Group was disbanded in 2004 following the Cancun Ministerial without

The recent adoption by China and India of competition laws with merger control regimes raises questions similar to those raised twenty years ago upon the advent of the EC Merger Regulation -- for example, will China's or India's competition laws be used to foster industrial policy? During the development of its law, the Chinese and Indian governments actively sought information and guidance from the world's competition authorities and private sector experts.⁷² The United States, the EU, and others continue to communicate and conduct capacity building there and in other emerging markets, and it is hoped that these efforts will bear fruit in the continued spread of good practice in the implementation of competition laws and policies.

Conclusion

The authors submit that the 1991 US-EC Agreement is largely fulfilling its purposes to promote cooperation and coordination and to lessen the possibility or impact of differences in the application of their competition laws. Concerns over information sharing have been met to the point that parties under scrutiny routinely waive their confidentiality rights. Skepticism over the ability to avoid conflict has not been totally negated, as evidenced by the *GE/Honeywell* and *Microsoft* cases, but these cases are but a small and increasingly distant minority amidst a sea of successful collaborations. Although the parties did not commit to change their laws and policies, substantial convergence has nevertheless occurred.

Moreover, the example set by the EC and the U.S. agencies has become a model for others to emulate. Their support for the founding and operation of the ICN and their active participation in the OECD and other multilateral bodies has helped make them influential forces

any formal action regarding competition policy. The United States was skeptical of the value of WTO disciplines in this area; *see, e.g.*, Joel Klein, Remarks before the IX. International Conference on Competition, Berlin, (10 May 1999), in *MEGA-MERGERS – A NEW CHALLENGE FOR ANTITRUST LAWS?* 324 *et seq.* (Knud Hansen ed., 2000). Some bilateral and plurilateral free trade agreements, contain a competition chapter, although those in the agreements to which the United States is a party are not subject to dispute settlement, *e.g.*, NAFTA, Chapter 15, *available at*: <http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta>.

⁷² *See* William Blumenthal, Gen. Counsel, Fed. Trade Comm'n, Looking Towards Implementation of China's Anti-Monopoly Law, remarks before the ABA Section on International Law 2008 Spring Meeting, *available at* <http://www.ftc.gov/speeches/blumenthal/20080404ABAIIntlSecNYreChinaAML.pdf>.

in the development of sound competition policy and practice worldwide. As the Financial Times observed in 2003,

“The growth of US-EU co-operation on antitrust policy shows different methods can coexist, provided objectives are broadly shared – or at least understood – and agencies do not retreat into territorial defensiveness.”⁷³

A prominent competition law professor wanted his students to examine cases in which the U.S. and the EC had differed. The professor asked the FTC for examples other than *Boeing/McDonnell Douglas* and *GE/Honeywell*. FTC staff asked the Professor to consider suggesting to his students that they examine cases in which the agencies came to compatible outcomes and, thereby, learn how agencies enforcing different statutes under different procedures are able to reach compatible, non-conflicting decisions. Whether counselors value conflict resolution as a worthy aspiration or, from a less exalted and more practical perspective, simply want to “get the deal through” for their clients, there is much to be learned from the many, many cases in which the EC and the U.S. agencies reached coordinated, compatible enforcement decisions. This may be the most important lesson learned during the twenty years of the Agreement.

Yet, especially in a rapidly changing environment, healthy skepticism, such as that expressed by Cornelis Canenbley, is valid and remains a spur to both the public and private sectors to fulfill the purposes of the U.S.-EC Agreement as the agencies enter their third decade under it, and to the broader goals of promoting sound competition policies at home and worldwide.

⁷³ *Rules for Regulators: What is Good for the EU is Good for US Trade Relations*, FINANCIAL TIMES, Mar. 4, 2003, at 18.