The International Merger Control Regime: Building Cooperation without Harmonization.

by

Lucia Bonova

Institute of Comparative Law
Faculty of Law, McGill University
Montreal, Quebec
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Abstract

Globalization has had two major implications for national merger control regimes: national competition authorities are called more and more to examine transactions with cross-border dimensions and secondly, domestic business practices may be scrutinized by foreign nations. In light of this, divergent substantive standards have become a source of international friction, notably between the two most mature merger control regimes, the European Union and the United States.

Facing this new reality, it has become clear that some sort of international arrangement will be needed in order to reduce the inefficiencies created by multijurisdictional review. Various proposals have been made, ranging from ambitious ones that would include the creation of an international competition code and enforcement agency, to more realistic proposals of achieving international coordination of merger control regimes through bilateral and multilateral cooperation amongst antitrust agencies.

This thesis argues that the path of large-scale cooperation is the most appropriate way to cope with the problems raised by globalization. As such, cooperation does not imply the harmonization of merger control regimes. The future lies in the hands of the International Competition Network which, despite considerable achievements, must evolve in the near future.

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Résumé

La globalisation a eu deux conséquences principales en ce qui concerne les contrôles nationaux des concentrations : d'une part les autorités nationales de concurrence sont invitées à examiner les transactions avec la dimension qui dépasse les frontières nationales et d'autre part les pratiques commerciales domestiques peuvent être examinées par les autorités de concurrence étrangères. Les dispositions substantives différentes sont devenues la source de frictions internationales surtout entre les deux régimes de contrôle de concurrence les plus matures, c'est-à-dire l'Union Européenne et les Etats-Unis.

Face à cette nouvelle réalité, il est devenu apparent qu'afin de remédier aux inefficacités causées par les révisions parallèles dans des juridictions différentes il va falloir adopter un arrangement au niveau international. Des différentes variantes avait été suggérées, commençant par les plus amitieuses comprenant un code international de concurrence et une autorité qui contrôlerait son application, et finissant par les plus réalistes qui proposent d'atteindre la coordination des régimes de contrôle de concurrence par la coopération bilatérale et multilatérale.

Ce mémoire soutient la proposition que la coopération multilatérale est la solution la plus appropriée aux problèmes posés par la globalisation. En tant que telle, l'harmonisation des régimes de contrôle de concurrence n'est pas une condition *sine qua non* de la coopération. Il paraît que le futur se trouve dans les mains du Réseau International de la Concurrence qui malgré ses accomplissements considérables va devoir évoluer dans l'avenir.

To my parents

"While the benefits derived from the use of cooperation in the international competition arena to date have been noticeable, more initiatives need to be pursued to improve such cooperation."

Mr. Bell

Introduction

The phenomenon of globalization characterized by increased interconnectedness and interdependence among world business actors has led to the proliferation of cross-border transactions. The disappearance of economic boundaries between countries has encouraged multinational corporations to expand their businesses beyond national borders.[1] Foreign expansion is driven by mergers and acquisitions, commonly known as M&A's, whereby companies merge or acquire interests in foreign entities and thus expand their businesses into new markets. This phenomenon, however, has not occurred without spillovers. Given that multinational corporations and their management act as rational self-interest maximizers, the increased business activity has been understandably paralleled by a greater occurrence of anti-competitive practices.

Globalization has led to the erosion of national markets and the power balance between states and firms has been overturned.[2] New dynamics between states and firms clearly show that multinationals are the stronger players whose large economic and political influence is so striking that they hold in their hands the power to manipulate both domestic and world markets.[3] The growth rates of merger activity during the past decades are noteworthy.[4] In response to this new climate, escalating notably during the past decade, many states have adopted merger control laws to prevent and regulate the concentration of market power in the hands of large enterprises. The democratization and liberalization of the world economy, represented by the credo "let market forces decide", has led to the situation in which the most competitive firms "kill" smaller

[1] The disappearance of barriers to trade and investment, such as tariffs or foreign ownership and control prohibitions in most industries as well as deregulation and liberalization have reinforced the free trade culture that is the engine of cross-border transactions.
[2] The Group of Lisbon, *Limits to Competition,* (Cambridge, Ma.: The MIT Press, 1995) [Hereinafter "Lisbon Group"], at xviii.
[3] See *ibid.*, at xviii and 69-70.
[4] Looking at the statistics of the European Commission filings of international mergers during the past decades, which are generally representative of world trends, we observe that the number of transactions doubled between 1991 and 1996 and in each of the years from 1997 to 2000 it grew by 20 to 30%. See Jean-Francois Pons, "Is It Time for an International Agreement in Antitrust?" in Josef Drexl, *The Future of Transnational Antitrust – From Comparative to Common Competition Law*, (The Hague-London-New York, Kluwer Law International, 2003), at 350.

businesses. This has led to a high concentration of market power in the hands of large multinationals. At the same time, the effect of the free trade culture on competition, at the national and global levels, has been remarkable. Accordingly, the role of states and international organizations has become crucial in facing this new reality. [5]

The worldwide spread of antitrust enforcement regimes reflects the need to regulate business practices in order to avoid any abuses that would harm competition and ultimately consumers in different world markets. Therefore, today more than 90 countries of the World Trade Organization ('WTO') have effective legislation regulating operations of consolidation referred as to "concentrations" in the European Union ('EU') and "mergers" in the United States ('US').[6]

The debate concerning the implications of globalization for antitrust policy is of great contemporary importance due to the increasing number of international transactions whose effects are felt in a multiplicity of jurisdictions. Because of the generally accepted "effects theory" and the fact that most countries in which multinational firms do business have a competition law and an enforcement agency, large cross-border mergers that meet notification thresholds are reviewed in multiple jurisdictions. The problem arises from the fact that different antitrust regimes are "characterized by a considerable degree of variety in their objectives, organizational forms and enforcement priorities."[7] Not only does the multiple filing and subsequent overlap of merger review by different authorities imply high transaction costs, but more seriously, risks creating divergent outcomes. The fact that one transaction is scrutinized by several different authorities raises serious competition policy issues, notably whether there should be an international competition framework that would minimize the potential for friction among jurisdictions and conflicting results.

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[5] *Supra* note 2, at 92.

[6] Joseph Wilson, *Globalization and the Limits of National Merger Control Laws*, (The Hague: Kluwer Law International, 2003), at 44 [hereinafter Wilson]. See also ICN News Archives, online: ICN <http://internationalcompetitionnetwork.org/news/sept202002.html>.

[7] Jean-Francois Pons, "Is It Time for an International Agreement in Antitrust?" in Josef Drexl, *The Future of Transnational Antitrust – From Comparative to Common Competition Law*, (Kluwer Law International: The Hague-London-New York , 2003), at 350.

From the perspective of international governance, there is an enhanced desire – notably on the part of the United States and the European Union, which are often called to examine the same transactions – to adopt as convergent an approach as possible in order to avoid varying results. Moreover, from the merging parties' perspective, in the name of predictability of possible legal implications of a transaction, an alignment of merger control regimes at the global level seems desirable. Universal rules coupled with a common set of targets and objectives would prevent situations when one transaction is allowed by some jurisdictions and prohibited by others.

Against this background, it appears evident that the ultimate aim is the convergence of outcomes; however the question remains as to whether this should be accomplished through alignment and harmonization of substantive laws or through the cooperation of antitrust agencies or both.

This thesis will examine the impact of economic globalization on merger control regimes in different jurisdictions and the means used in order to achieve global convergence. Since the majority of international business transactions involve the world's two most powerful economic and political entities, the European Union and the United States, this thesis will primarily focus on the harmonization of rules and agency cooperation between these two jurisdictions and eventually on whether present developments should lead to the creation of an international merger review framework.

When discussing the multilateral framework, the question arises as to how developing countries fit into the picture. As result of the globalization of the world economy during the past decades, one could argue developing countries have been delinked from the trade regime and their interests marginalized.[8] Some countries are loosening their connections with the developed world, which might be at the expense of attempts for global cooperative framework.

[8] *Supra* note 2, at 25.

Given the globalization of trade and anti-competitive practices, this thesis argues that the only acceptable scenario is the global cooperative governance of competition issues. Although the harmonization of substantive rules is not a necessary condition for achieving this framework, cognitive convergence should be encouraged. In order to avoid a deeper division of the world, developing countries must be included in any projection or construction of a global competition framework. Therefore, balanced North-South cooperation will be crucial for an efficient multilateral policy-making and enforcement of merger control laws. In other words, the cooperation scenario is the only one offering "humankind opportunities to cope with the forces of fragmentation and delinking".[9]

When examining the possible solutions to the arguably unworkable system of parallel application of national competition laws, including the harmonization of substantive regimes, bilateral and multilateral cooperation among national competition authorities, the creation of a new multilateral framework for competition or the inclusion of competition agenda into an existing international body, two preliminary questions must be posed. Is the merger phenomenon of enough importance to be governed at the international level? And if it is, what is the extent of action that should be taken? As a prerequisite to any debate about the impacts of globalization on national competition laws and any projection of possible solutions, one must ask whether competition law is a suitable candidate for a unifying approach, that is, a "higher-than-national regulation"[10] and potentially a world-wide harmonization of national competition laws. Legal harmonization, although being one of the most obvious solutions to divergent approaches, is not necessarily the appropriate approach to competition law. Another, less obvious choice, would be to stick to the present system of competition of competition laws, which has the potential to achieve optimal results without proceeding through painful international negotiations. In practice, the divergence of regimes is likely to favour blockage of mergers in a sense that the more restrictive regime rules. The more

[9] *Supra* note 2, at 107.
[10] Eleanor M. Fox, "Antitrust and Regulatory Federalism; Races up, down and sideways" 75 N.Y.U.L. Rev. (December, 2000), at 1781.

regimes are in play, the more the possibility of blockage is maximized. Arguably, this system leads to situations in which some "good" business is prevented from happening, but on the other hand, all "bad" mergers would most likely be avoided.

In a similar vein, if we are worried about harmful transactions, maybe we are better off to have a system of so-called "double disapproval", where the most restrictive approach wins. The result of such an approach would amount to a default position of not proceeding with a transaction if one of the reviewing nations is concerned about its harmful effects. In the end, it may be a good thing to have divergent competition laws coexisting in some kind of federal structure and auto-limiting themselves. However, to explore this argument one would need an empirical analysis of the effects of the two options, the harmonized approach and the federalist approach. Notably, it would be interesting to see what would happen if transactions such as the *General Electric/Honeywell* merger went through and compare that with what happened in reality as the merger did not go through.

As can be seen from the previous lines, it is far from certain that competition law is a suitable candidate for a unifying approach. However, in this thesis I intend to explore also the arguments for the internationalization of competition laws, given the global scope of the market where the national competition laws interact. Worldwide harmonization of substantive laws and cooperation at the enforcement levels will be explored as possible solutions, although imperfect, to the excessively overlapping regulatory systems.

In the first chapter, I will highlight the main concepts and underlying principles relative to merger control. The second and third chapters are devoted to the United States and European Community merger enforcement regimes respectively. The fourth chapter will examine the process of international harmonization of national laws in the field of merger control. Finally, the fifth chapter will examine the bilateral and multilateral cooperation in antitrust enforcement as instruments of international convergence.

Chapter 1: Merger Control Regimes

Before delving into the substantive provisions of national merger control laws around the world and projecting how future global merger policy should be shaped, it is important – if not indispensable - to outline some major features, concepts and underlying principles of competition law. The discussion about the objectives of the competition policy seems appropriate in light of the current and past efforts to determine the prospects of a multilateral competition framework. In fact, it would be impossible to advance any argument concerning possible solutions to the cross-border phenomenon and overlapping regulatory frameworks without understanding how merger control regimes were born, why nations consider it necessary to adopt competition and merger control laws and what goals such laws tend to achieve. Therefore, this chapter will examine the general features of merger control regimes from a historical, economic and legal perspective. Given that competition law was born in the US, the discussion of the goals of competition law will be mainly focused on that particular jurisdiction. Nonetheless, European sources will also be examined.

Besides exploring the economic rationale of competition law in general and of merger control in particular, it is important to set out the basic features of this area of law, such as the application of the "effects theory". The explanation of the "effects theory" is necessary in order to shed some light on the challenges that any multilateral merger control regime would face. Different goals, policy objectives, substantive laws, procedures and remedies render any cooperation attempts difficult and substantive harmonization almost impossible.

A. Rationale behind Merger Regulation

While antitrust and competition laws have some solid historical foundations, merger control laws *per se* are a relatively new phenomenon. Given the fact that today's era is clearly marked by the explosion of antitrust regimes around the world,[11] the question arises as to why more and more nations accept the necessity of adopting such laws and what are the objectives pursued by this initiative.

1. General Goals of Competition Law

Simply put, the idea of competition law is to ensure that markets remain competitive by checking abuses of dominant position or market power and other anticompetitive behaviour, such as cartelization or tied-selling, and thus remedying the spillovers of deregulation and making the market work better.[12] Stated differently, the goal is to create an environment of competitive markets ultimately leading to the enhancement of consumer welfare. Another definition usually provided under national laws states that the goal of antitrust law consists in checking and dispersing business power and assuring that the competition process is preserved.[13] Thus, competition law aims to overcome the imperfections of the free market and to provide a climate where producers and consumers may coexist efficiently. To make market actors behave and prevent any kind of abuse, the antitrust policy pursues two kinds of goals: economic and social. Accordingly, when these goals come into conflict, antitrust policy must make a trade-off between the two.

[11] Today around 90 countries have competition laws, approximately 60 of which were enacted in the 1990s. Moreover, some 20 countries are in the process of drafting such laws. *See e.g.* International Competition Policy Advisory Comm., U.S. Dep't of Justice, Final Report 33 (2000), online: ICPAC <http://www.usdoj.gov/atr/icpac/icpac.htm> [hereinafter ICPAC Report]; see also Mark R.A. Palim, "The Worldwide Growth of Competition Law: An Empirical Analysis", 43 Antitrust Bull. 105, 109 (1998) (listing 70 countries with competition laws as of end of 1996). See also Richard Wish, *Competition Law, 5th ed.*, (London: Lexis Nexis Butterworths, 2003), at 1; "there are now at least 100 systems of competition law in the world, in all continents, and in all types of economies; several others are in contemplation." See also ICN News Archives, online: ICN <http://internationalcompetitionnetwork.org/news/sept202002.html>.

[12] ICPAC Report, *ibid.*, at 33, online: ICPAC <http://www.usdoj.gov/atr/icpac/chapter1.pdf>.

[13] *Supra* note 10, at 1783.

i. Economic and Social Goals

Contrary to what one might think, "competition is not the objective of competition policy!"[14] Generally speaking, competition policy follows economic and social goals; competition *per se* "has acquired the status of a universal credo, an ideology."[15]

While economic goals are defined by the narrow economic concept of efficiency, the social goals refer to the vague concept of fairness and they need to be understood in light of a particular national and cultural context.[16] Although some nations tend to rely upon economic goals more heavily while ignoring social goals, as a general rule, most competition policies explicitly or implicitly refer to the concept of fairness.[17]

From an economic standpoint, in order to pursue the efficiency objective, competition policy must be shaped to prevent inefficiencies and minimize waste. The most obvious example of inefficiency would be a monopolist charging prices far above costs. Lacking competitive restraints on a market, a monopolist does not have any incentive to lower prices; conversely, it has a great incentive to maximize its profits by raising prices, which ultimately is welfare reducing. Consequently, resources are inefficiently allocated. In light of these considerations, the general role of competition policy is to prevent such inefficiencies by deterring *ex ante* inefficient behaviour leading to the misallocation of resources.

The bottom line of the efficiency concept and the ultimate goal followed by competition law is consumer welfare. Very narrowly construed, consumer welfare refers to the best quality for the lowest prices possible. Taking into account the contemporary era of globalization, it appears that global consumer welfare rather than national consumer welfare should be promoted. "Global consumer welfare is a global public good, which requires collective action of nation-states or of a supranational authority to ensure its

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[14] Edward M.Graham and J. David Richardson, *Competition Policies for the Global Economy*, (Washington, US: Institute for International Economics, 1997), at 7.
[15] *Supra* note 2, at xii.
[16] *Supra* note 14, at 8.
[17] Contra, Robert Bork considers that modern antitrust law should be conducted solely by the criterion of consumer welfare. See Robert Bork, *The Antitrust Paradox*, (New York, US: Basic Books, Inc., 1978).

optimal production".[18] In other words, in order to avoid the "tragedy of commons in competition law",[19] the satisfaction of consumer welfare at a global scale necessitates a coordinated and concerted action among nation-states and their competition authorities. While the majority of members of the international community believe that "internationalization requires governments not to take nationalistic positions",[20] some authors consider that global consumer welfare should not be taken into account because "no national authority has currently the power to do so".[21]

The conflicting goal pursued by competition law, at least to a certain extent, is the social goal of fairness. The exact meaning of this concept cannot really be narrowed but is generally interpreted as avoiding industrial fragmentation, and promoting labour of "worthy men" or small locally owned businesses.[22] Areeda talks about "populist goals" of dispersal of economic power and prevention of bigness.

> The symbols are those of Jeffersonian democracy in which small, local, responsible, and individually-owned enterprises are contrasted with large, politically irresponsible, absentee-owned and possible corrupt giants capable of crushing smaller businessmen and individuals and of subverting democratic government.[23]

At this stage of discussion it should be noted that while US competition law was born in this particular context having both sets of goals in mind, European competition law evolved in a slightly different context. Competition law in Europe was conceived as a tool to achieve common market and to prevent the distortion of competition within the

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[18] Wilson, *supra* note 6, at 27.
[19] See Wilson *supra* note 6, at 25. "Tragedy of commons" refers to the situation where non-coordinated self-interest pursuing behavior leads to the outcome that is individually efficient but which globally amounts in inefficient waste of resources. If everyone pursued their own self-interest and tried to maximize their profits without taking into account the needs of the community, it would result in a tragedy for the community.
[20] Eleanor M. Fox, "Panel Discussion: Competition Policy in a Multilateral Competition Code" in Claus D. Ehlerman and Laraine L. Laudati, eds., *European Competition Law Annual 1997: The Objectives of Competition Policy*, (Oxford, Hart Publishing: 1998) [Hereinafter "Ehlerman and Laudati"], at 152.
[21] R. Shyam Khemani, "Panel Discussion: Competition Policy in a Multilateral Competition Code" in Ehlerman and Laudati, *ibid.*, at 146.
[22] See Robert Bork, *The Antitrust Paradox*, (New York, US: Basic Books, Inc., 1978), at 17 [hereinafter Bork]. See also Phillip E. Areeda and Herbert Hovenkamp, *Fundamentals of Antitrust Law, Vol.1*, (New York: Aspen Publishers, 2003), at 51[hereinafter Areeda].
[23] Areeda, *ibid.*, at 22.

European Community geographic area. Although not articulated in the Treaty,[24] European competition law has two primary and complementary aims: the promotion of a competitive market economy and integration of the single market.[25] In so doing, it also promotes consumer welfare, which is considered to be a natural outcome of pursuing the other two goals.[26] The bottom line is that while US merger control law has been characterized as purely consumer oriented, EU competition law is concerned not only with consumers, but also with the unfair advantage of dominant firms creating an impediment to market integration.[27] The negative impact of anticompetitive mergers is first examined in Europe in relation to the common market and only consequently in relation to European consumers.

ii. Antitrust Dilemma

Against this background, it is obvious that a problem arises when these two goals conflict. In essence, a conflict occurs when an economically efficient solution turns out to be unfair to other market players. Much controversy surrounds the question as to whether antitrust law should pursue solely the efficiency goal or whether it should take the concept of fairness into account. For instance, a merger between two companies that creates a more efficient firm able to benefit from economies of scale and therefore produce more output for lower cost, might endanger small businesses operating in the same market and having less output. What is the right approach that should be adopted by competition laws? Should antitrust law solely promote efficiency or should it also consider the need to protect locally owned businesses? The ideal approach would be to balance the two goals and find an equilibrium whereby these two seemingly contradictory values would be evenly satisfied. It is clear however, that when balancing these two values, sacrifices must be made on both sides. The question nonetheless is "how much consumer welfare is to be sacrificed for what amount of additional wealth

[24] EC, *Treaty Establishing The European Community*, 25 March 1957, (Consolidated version 1997) [1997] O.J.L *C 340* of 10 November 1997, [hereinafter Treaty or Treaty of Rome].
[25] Christopher Bellamy, Graham Child, eds. *European Community Law of Competition*, (London, UK: Sweet&Maxwell, 2001), at 39.
[26] Benoit Merkt, *Harmonisation internationale et entraide administrative internationale en droit de la concurrence : Droit du GATT/OMC, droit européen, accords bilatéraux et perspectives pour le droit suisse, Studies in Global Economic Law, vol.3,* (Bern : Peter Lang, 2000), at 42.
[27] *Supra* note 10, at 1781.

for small dealers and worthy men".[28] While these two objectives – namely, promoting efficiency and protecting small businesses – may seem complementary and easy to balance against each other, in reality there is no a bright-line test whereby this trade-off would be systematized. The problem is that "there is no common denominator between these values, and there is no economics, no social science, no systematized knowledge of any sort that can provide the criteria for making the trade-off decision".[29]

Some authors, notably Robert Bork, consider that in the area of competition law there is no place for anything other than economic goals. "The only legitimate goal of antitrust is the maximization of consumer welfare."[30] Therefore, "the survival of less efficient but small and locally owned businesses cannot be subsidized through the antitrust laws."[31] On the other hand, this does not mean that such considerations are completely irrelevant, but rather that other means should be used to protect small businesses such as tax benefits, subsidies and the like.[32] However, one cannot overlook the fact that other externalities are to be taken into account. If we solely pursue the efficiency goal we might end up with damaging results for society as a whole.[33]

As outlined above, the question is whether we should promote "populist goals" at the expense of efficiency. While in theory it may seem easy to pursue both goals at the same time, the practical application of such policies by the courts could be problematic. "The court must weigh the interests of the efficient firms, and the consumers they represent, against those of the inefficient or unneeded firms and the populist goals for which they are the alleged proxies."[34]

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[28] Bork, *supra* note 22, at 79.
[29] Bork, *ibid.*
[30] Bork, *ibid.*, at 7.
[31] Bork, *ibid.*, at 69.
[32] Bork, *ibid.*, at 70.
[33] Bork suggests that extreme efficiency and consumer welfare driven markets might lead to the highest level of pollution for instance. Pursuing the consumer welfare to the extreme might have an inefficient global effect. See *ibid.*, at 114.
[34] Areeda, *supra* note 22, at 27.

According to Areeda, such a system would be irrational and virtually impracticable:

> The dilemma is that sporadic protection of small firms would make little contribution to populist goals, while systematic protection would impose unacceptable economic costs, and there is no satisfactory way of resolving that dilemma.... In short, the virtual impossibility of formulating rational criteria for promoting populist goals over efficiency would lead to haphazard ad hocism, wide unpredictability, and multiplied enforcement costs.[35]

Although it is apparent from the Areeda's statement that populist goals are inappropriate for antitrust policy, it is much more difficult, not to say impossible, to argue that competition laws are based exclusively on economics. Fortunately enough, in the United States, the "rule of reason" concept serves to balance goals in circumstances where considerations of efficiency and fairness require a subtle judgment.[36]

In the European context, there is also question of trade-off between the equity and goals of competition law.[37] While some see competition law as a means of enhancing economic efficiency, others tend to see it as a way to promote "fairness". Although the concept of fairness seems rather vague, and various people have a tendency to interpret it differently, generally speaking, it tends to achieve a balance between big and small and ultimately favours smaller firms, sometimes at the expense of larger ones.[38]

Finally, it is important to point out that both goals are not as incompatible as they may seem. The pursuit of social goals by competition laws is indirectly achieved through the scrutiny of monopoly power gained by corporate giants.

> The goals of dispersed power and wider business opportunities are served by antitrust policy which eliminates monopoly not attributable to economies of scale or superior skill, and which prevent those mergers,

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[35] Areeda, *ibid.*, at 28-29.
[36] *Supra* note 14, at 9.
[37] Patrick Massey, "Reform of EC Competition Law; Substance, Procedure and Institutions" in Barry E. Hawk, ed., *EC Competition Law Reform, Selected Chapters of the Annual Proceedings of the Fordham Corporate Institute, International Antitrust Law and Policy*, (Juris Publishing, 2004), at 290.
[38] *Ibid.*

> agreements, or practices which obstruct efficient competition. Populist goals and efficiency goals are consistent over a wide range.[39]

However, it is important to note that although the two sets of goals are not incompatible, the balance between them is very fragile. Different nations will incline to different sets of goals depending on their historical and economic background or depending on their level of development. For instance, competition policy in transitional economy countries should focus primarily on economic goals to counterbalance the social goals that are often used as a part of the agenda of many politicians.[40] On the other hand, it is obvious that developing countries' competition policy will not pursue the same objectives of economic efficiency and consumer welfare. Rather they will try to strengthen their domestic markets, a strategy which is often accompanied by the promotion of emerging "national champions." In developed countries, such an approach is generally perceived as contrary to the very goal of competition policy. Accordingly, each country's competition law and the goals it pursues should be tailored to that country's particular needs.

In addition, the preference for different goals may vary not only from nation to nation but also within one system depending on various economic, social and political circumstances. Thus, "even within a particular national system, the goals of competition law may evolve and transmogrify, often depending on the state of industrialization of the economy, the strength of the political democracy, the power of the judiciary and of bureaucrats, and the exposure of domestic firms to global competition."[41]

2. Objectives of Merger Regulation

Following on the discussion of the goals pursued by competition law in general, we must discuss the objectives of merger control laws in particular. The core purpose of merger regulation is to ensure that the proliferation of mergers and acquisitions and consequent emergence of corporate leviathans does not jeopardize the competitive process which,

[39] Areeda, *supra* note 22, at 23.
[40] Ehlermann & Laudati, *supra* note 20, at 5.
[41] *Supra* note 10, at 1783.

under most modern economic theories, is the only guarantee of consumer welfare. Merger control is deeply concerned with the problem of merged firms possessing power over the market leading to a situation in which these firms are able to restrict output and consequently raise prices above the level that would normally prevail in competitive markets. From the firms' perspective they are making greater profits than they would normally make; from the consumers' perspective, the benefits of competition, materialized in low prices and broad choice, are lost.[42] Therefore, from the beginning of the discussion it is important to note that merger control is not necessarily about preventing a merged firm from abusing its future market power, but rather about maintaining the competitive structure of the market and thus delivering to consumers the benefits that flow from competition.[43]

It goes without saying that most mergers can, and most often do, have generally positive effects represented notably by the creation of considerable economies of scale produced by the synergy of two or more economic entities.[44] Accordingly, the joint forces of two or more companies improve the economic efficiency by reducing the cost of production as a result of which, from the consumer's perspective, the *value for money* ratio is enhanced.[45]

However, on the other hand, mergers can, but rarely do, have negative effects when the merged entity's market power, created by the elimination of competitive restraints between previous competitors, attains the threshold of a monopoly or quasi-monopoly. Although a monopoly *per* se is not a bad thing, it can lead to the possibility of price increases that do not face any market discipline. In effect, monopoly power gives an incentive to the merged firm to maximize its profits by reducing the output and

[42] See Richard Whish, *Competition Law*, 5th ed., (London, UK: Lexis Nexis Butterworths, 2003), at 17 [hereinafter Wish].
[43] Wish, *ibid.*, at 787.
[44] See *supra* note 6, at 291, approximately 95% of mergers pose no anticompetitive effects and are generally beneficial for market. *See also* Andre Fiebig, "A Role for the WTO in International Merger Control" (2000) 20 NW.J.INT'L L. & BUS., at 238-243.
[45] Alistair Lindsay, *The EC Merger Regulation: Substantive Issues*, (London: Sweet & Maxwell, 2003), at 2. "*Value for money*: consumer welfare is enhanced if the price of goods or services is reduced or the quality of those goods is increased whilst the price is not changed."

increasing the prices without any competitive response, which ultimately reduces consumer welfare.

Merger regulation plays a significant role in preventing behaviour that is detrimental to competition and consumers. "The core purpose of merger policy is to prevent prospective anti-competitive effects".[46] In other words, merger control laws aim to find a balance between positive and negative effects of mergers whereby the effective competition on the market would be promoted and anti-competitive effects are prevented.

i. Market Performance: Effective Competition

In light of the abovementioned statement that mergers create considerable efficiencies whilst creating or enhancing market power, the ultimate goal that merger control laws tend to achieve is the maintenance of effective competition in the market.[47] The problem is that although in many cases mergers have positive economic effects, when there is market power[48] created or reinforced, there emerges a substantial likelihood of negative effects such as increased prices, increased barriers to entry or in a worst case scenario the monopolization of the market. The difficult task merger control laws face is allowing mergers having positive effects, such as increasing competitiveness of firms[49] and to deter mergers with negative effects, such as monopolization by dominant firm or other anticompetitive scenarios leading to impediment of effective competition. In other words, since the goal is effective competition and market performance, mergers are assessed through their effect on market performance. Accordingly, the basic objective

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[46] International Competition Network, Analytical Framework Sub-group, "The Analytical Framework for Merger Control" at 2, online: ICN <http://www.internationalcompetitionnetwork.org/afsguk.pdf>.

[47] From an economic standpoint, effective competition should be understood as a situation whereby many actors competing on the same market create a climate where the creation of prices results solely from the competitive process and represents the equilibrium between offer and demand. Effective competition guarantees lower costs and higher effectiveness. Contrary to effective competition is the situation whereby one or more actors dispose of power that create disequilibrium on the market and allow acting independently on competitive forces.

[48] Market power is referring to a sustainable market power conferring a firm a certain degree of independence on the market and not merely a short-term improvement of market share via a combination of market shares of the previously independent entities.

[49] Concentration of power is not necessarily a bad thing in the sense that if smaller firms merge, the overall competitiveness of the new entity will be enhanced and the merged firm will then be able to compete more efficiently. Thus, the competition on the relevant market will be increased and its benefits transferred on the consumer.

that merger regulation follows is to promote mergers having a positive impact on market performance while prohibiting the ones that have a negative impact. Positive impact is manifested, among other ways, by enhanced consumer and total welfare along with the creation of efficiencies.[50]

From the previous discussion it may be concluded that merger control laws are called upon to draw a distinction between "lawful"[51] or "good" mergers having a positive impact on market performance and "unlawful"[52] or "bad" mergers having a negative impact. The question however remains as to what are the criteria and the test to be used to make this subtle distinction. Before going deeper into this discussion, due regard should be had to the fact that there is no a bright-line test that would systematize this division. Therefore, we have to operate using certain assumptions. Since the basic assumption is that mergers create efficiencies[53] because companies act rationally and only merge because of the alleged efficiencies, we can assume that mergers that do not create substantial market power are lawful.[54] On the other hand, the situation is far more complicated when merger create or enhance market power in a way that substantially affects the previous market relationships. Generally speaking, in this situation, the presumption is that mergers are unlawful unless they create particularly strong efficiencies that could not be achieved otherwise.[55] A discussion of how efficiencies are treated in merger analysis will be continued further in the following chapters. At this

[50] *Supra* note 45, at 2. "*Consumer welfare* considers whether the market delivers benefits to consumers, *total welfare* takes account of the interests of producers as well as consumers, and *efficiency* focuses on the way the market operates."

[51] When talking about the "lawfulness" of mergers it should be noted that this language is appropriate only in the US context where under Section 2 of the Sherman Act, the act of monopolization constitutes a felony. However, this wording should be seen from a historical perspective as criminal proceedings in merger context are purely theoretical.

[52] *Ibid.* See text accompanying footnote 51.

[53] Efficiencies however should be understood as a situation where economic state of at least some actors is improved without the other actors being worse off.

[54] *Supra* note 45, at 23.

[55] For a long time, the US and the EU had divergent views as concerns the place that should be allocated to efficiencies in merger analysis. While in the US, efficiencies were considered as an argument justifying an anticompetitive merger (upon condition that they were strong enough, of course), the EU considered efficiencies in the overall assessment of merger but would not use efficiencies to justify a merger found to be anticompetitive. With the adoption of Regulation 139/2004, the situation has changed slightly and efficiencies have started to play a defensive role in the European merger review system.

stage of discussion it should be noted that the idea of competition laws is not to impede transactions unless they demonstrably have negative effects.
Nonetheless the question remains "in what sense is competition "effective" if we are not talking about effectiveness in serving consumers?"[56] In other words, consumers are generally better served by merged firms given the economies of scale created by the synergies. These firms are more efficient in a sense because they are able to produce more output for lower prices which is consumer welfare enhancing. However, this statement is only true insofar as the competition in the market is maintained, at least to the extent that a monopoly situation, leading the monopolist to behave independent of market discipline, is not created. Once a monopoly emerges in a market, consumers generally lose the benefit of efficiencies and their welfare is reduced. Consequently, merger regulation must prevent those mergers that create or enhance market power and impede effective competition.

Depending on the policy choice, merger control laws emphasize either economic benefits potentially brought about by mergers or the danger of the creation of market power impeding effective competition. The role of merger regulation is therefore to strike the right balance between the two often simultaneous effects and determine what is relatively more important.

Having examined the principal objectives and economic bases of merger control laws, we turn to an analysis of the specific case of cross-border issues raised by international transactions and notably their implications for national merger control regimes.

ii. Facing Proliferation of Cross-Border Transactions

Globalization, being far more than a popular slogan, has led, among other things, to a significant increase in the number of international transactions. The dramatic growth in mergers observed during recent years has resulted in more and more nations adopting antitrust legislation, designed in particular to protect national markets from invasion by giant corporations. The territorial configuration of the world economy has been replaced

[56] Bork, *supra* note 22, at 52.

by one global market place in which economic giants fight for their survival while no rest or compassion exists for the fighters.[57] The aggressiveness of the new market environment has had two major consequences. First, the nation-states are called upon to enact legislation in order to regulate the highly competitive climate that has emerged in domestic markets and to prevent the huge concentration of power in the hands of multinational corporations. Secondly, the issue of global governance and a multilateral competition framework has heightened saliency because in order to achieve worldwide efficiency in antitrust enforcement, harmonization of rules and cooperation among nation-states appears to be necessary.

With respect to this new era, it is important to note that competition laws generally and merger control laws specifically are no longer the prerogative of industrialized and developed nations. All countries, including developing countries and countries in legal and economic transition, face the same kinds of challenges posed by the proliferation of cross-border transactions. As discussed earlier, national laws must protect their domestic markets whilst taking into account, at least to a certain extent, the needs of the global market and global consumer welfare.[58] However ambitious this may sound, nations have an interest to adopt a global approach and to take into account other nations' needs when applying competition laws, if they want, in turn, to have their interests taken into consideration. The idea is one of reciprocity among multiple partners leading to a globally beneficial framework in which national merger control laws would be shaped to respond to the international context of cross-border transactions.

As a consequence, nations when applying their competition laws should balance their domestic interests against the interests of foreign nations and their consumers. In other words, the point of reference became the whole relevant market in which the transaction takes place, sometimes global, sometimes regional or national. Although merger analysis *per se* is conducted having in mind the impact of a transaction in the domestic market, merger review cannot ignore the rest of the relevant market.

[57] *Supra* note 2, at xiii.
[58] See Wilson, *supra* note 6, at 27.

In reality, nations cannot avoid considering the interests of other consumers in other parts of the relevant market because national markets are interconnected and ignoring this would have negative repercussions at both, the national and global scales. Therefore, globalization of international trade requires the creation and enforcement of merger control laws to be coordinated among world nations in order to avoid that main goal – global consumer welfare – is compromised. "Disparate national merger control regimes, while taking care of domestic markets and national consumers, promote national champions in the global market and thus exhibit a free-rider problem that undercuts the provision of global consumer welfare."[59] Consequently, domestic laws while facing the new reality of international transactions flooding their territories must take into account the wider repercussions of their national actions.

The basic features of merger control being exposed, an explanation of the "effects theory" seems necessary to shed some light on the challenges that any multilateral merger control regime would face.

B. "Effects Theory": Means of Assertion of Jurisdiction

As stated previously, globalization coupled with the ever growing free trade culture has led to the birth of the multijurisdictional transaction. In other words, most transactions having an international dimension produce effects in a multitude of jurisdictions. As a result, in the area of competition law, the problem has arisen as to what jurisdiction is competent to review a particular transaction. While in theory it might appear obvious to give jurisdiction to the country where the merging parties are incorporated, in practice it leads to problems if the scrutinized transaction has effects outside this jurisdiction.

As will become apparent during the course of this thesis, the issue of extraterritorial application is particularly relevant to competition law. Since the primary aim and underlying philosophy of antitrust regimes is to prevent the lessening of the competition

[59] Wilson, *supra* note 6, at 25.

(as in the US) or the emergence of a dominant player (as was the case in the EU) in national markets,[60] it is only logical for countries to protect their legitimate economic interests in situations where competition within their territory is impeded, regardless of where the primary source of the unlawful behaviour is located.

As was already mentioned, globalization of international trade has regrettably been paralleled by globalization of anticompetitive practices taking place in international markets. In response to this phenomenon, many countries, notably the United States and later the European Union, understood the imperatives to address such economic harm within national boundaries. In order to protect their legitimate economic interests, countries started to apply their national laws to transactions located outside the scope of their natural competence which nonetheless had an effect within their jurisdiction.

1. General Acceptance of "Effects Theory"

The long-established jurisdictional rules appeared not to be well-suited to the new reality of multijurisdictional transactions. The traditional principles of public international law of territoriality and nationality as means of asserting jurisdiction, are inadequate to deal with economic issues, since they were elaborated with a physical rather than economic conduct in mind.[61] Therefore, in order to deal with conducts having adverse effects within a jurisdiction while being subjectively and objectively located outside this jurisdiction, countries started to assert jurisdiction based on effects alone.

i. The "Effects Theory" as Developed in the US

The United States was the first to deal with this situation. Beyond the two traditional bases for asserting jurisdiction, territoriality and nationality, the US Courts expanded the concept of judicial competence on anticompetitive conducts located outside the United States but having effect within the US.[62] Thus, in the name of protecting legitimate economic interests, the Sherman and Clayton Acts, prohibiting operations restraining

[60] Wilson, *supra* note 6, at 44.
[61] Wish, *supra* note 42, at 430.
[62] Robert Lane, *EC Competition Law*, (London: Longman, 2000), at 281.

trade and lessening competition in the US market, became applicable to conducts outside the US jurisdiction which had effects, at least partially, within US national boundaries.

The first manifestation of the "effects doctrine" was in *United States v. Aluminium Company of America*[63] where the US Federal Court of Appeal stated that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders which has consequences within its borders." However, in *United States v. Watchmakers of Switzerland Information Center*[64] the Court dealt with the effects theory exhaustively and made it clear that the US will assume jurisdiction over behaviour having "a substantial and material effect upon US foreign and domestic trade."

The ultimate evolution of the effects doctrine as understood by the US courts came in *Hartford Fire Insurance Co. v. California*[65] where the Supreme Court stated that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some effect in the United States."

In response to the increasing number of conflicting jurisdictions, the US have adopted a "rule of reason" application of the "effects doctrine" under which the US interests must be balanced against the foreign interest before the US courts will assert jurisdiction over foreign conducts.[66] Not only must there be a sufficiently large effect within the United States, but "the interests of United States must [also] be sufficiently strong vis-à-vis those of other nations, to justify an assertion of extraterritorial authority".[67] Although this approach has widely been recognized and used by the US courts, it should be noted

[63] *United States v. Aluminium Company of America*, 148 F 2d 416 (2d Cir 1945), at 443.
[64] *United States v. Watchmakers of Switzerland Information Center, 1965 U.S. Dist. LEXIS 9479,* Trade Case (1965), online: LEXIS <http://www.lexis.com/research/retrieve/frames?_m=1d566f67ecd601b686af5661e63a425b&csvc=bl&cform=bool&_fmtstr=CITE&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAt&_md5=7736343b0993c2c4dbfe02590d6c24f7>.
[65] *Hartford Fire Insurance Co. v. California,* 509 US 782 (1993).
[66] Bruno Zanettin, *Cooperation Between Antitrust Agencies at the International Level,* (Oxford, Oregon: Hart Publishing, 2002), at 12 [hereinafter Zanettin]. See *Timebrlane Lumber Co. v. Bank of America*, 549 F. 2d 597 (9th Cir. 1976).
[67] *Timebrlane Lumber Co. v. Bank of America*, 549 F. 2d 597 (9th Cir. 1976).

that balancing often contradictory interests against each other is a very delicate process for which finding an appropriate forum may be extremely difficult.[68]

ii. Extraterritorial Application of European Competition Law

The European courts were more reluctant in attaching civil and penal consequences to conduct taking place outside the natural scope of European jurisdiction.

Instead of adopting the "effects theory" as already developed in the United States, the European Court of Justice proceeded using more orthodox ways. It applied the "economic entity doctrine" in order to assert jurisdiction over parent companies located outside of the EU for anticompetitive conduct of their subsidiaries located clearly within the EU jurisdiction.[69]

The second step towards the extraterritorial application of European competition law was the *Woodpulp* case wherein the Advocate-General proposed a "qualified effects doctrine".[70] Under this theory, the European Community would be competent to assert jurisdiction over undertakings outside the Community provided that the anticompetitive behaviour has direct, substantial and foreseeable effects within the EC territory.[71] However, the Court did not exactly follow this suggestion and continued requiring some territorial nexus with the EC, the actual operation must have been somehow implemented within the European Community.

Finally in 1997, in the *Gencor/Commission*[72] decision, the European Commission applied the EC Merger Regulation extraterritorially when it opposed the merger of two South African companies on the grounds that the merger would result in duopoly with another South African firm on the global platinum market. This judgment definitely removed any doubts concerning the European Commission's ability to scrutinize foreign

[68] Whish, *supra* note 42, at 432-433.
[69] *Supra* note 62, at 284. See EC, *Dyestuffs*, Cases 48/69 etc *ICI v. Commission* [1972] ECR 619, [1972] CMLR 557.
[70] EC, *Woodpulp*, Case No. 85/202, OJ 1985 L85/1, [1985] 3 CMLR 474 [hereinafter *Woodpulp*].
[71] See *Woodpulp, ibid.*
[72] EC, *Gencor Ltd. V. Commission*, OJ 1997 L11/30, Case T-102/96 [1999], ECR II-753 [1999] 4 CMLR 971.

mergers under the EC Merger Regulation and led to the *de facto* adoption of the "effects doctrine".[73] Since the *Gencor* decision, the European Commission has not hesitated to review and block mergers taking place between non-European companies provided that the size of the transactions satisfies the "community dimension."[74] Accordingly, the "community dimension", objectively defined via combined thresholds, is the sole criterion in the assertion of European jurisdiction, notwithstanding the place of incorporation or the place of conclusion of the merger.

2. The "Effects Theory" as a Source of Conflict between Jurisdictions

Facing multiple effects of cross-border mergers, many countries claim jurisdiction over same transaction.[75] The application of the "effects theory" by a multiplicity of jurisdictions has undeniably been one of the main factors causing frictions between competition authorities and triggered numerous battles notably between the EU and the US. Although the "effects theory" applies in various jurisdictions, in the situation of a *de facto* duopoly[76]of competition regimes between the EU and the US, the majority of "battles" are fought between these two nations.

Not only has the "effects doctrine", in combination with different substantive approaches, led to situations where unlawful behaviour may be scrutinized within a certain jurisdiction while completely located outside this particular jurisdiction but has also led to situations where behaviour considered lawful in one jurisdiction can be prohibited and punished in another. Given that more than 90 countries already have efficient competition laws and more countries are in the progress of drafting such legislation, the extraterritorial application of different laws seems to be an inappropriate model. In practice, it is not difficult to imagine a situation where one country prohibits a

[73] Zanettin, *supra* note 66, at 20.
[74] Article 1(2) and (3) of Council Regulation (EC) No.4064/89 on the Control of Concentrations Between Undertakings, [1989] OJ (L 395) 1.
[75] See e.g. Whish/Wood study which examined 9 cross-border merger cases investigated by more than 2 competition authorities. They found that *Gillette/Wilkinson* merger was reviewed in 14 jurisdictions. Richard Wish and Diane Wood, "OECD Merger Process Convergence Project, DAFFE/CLP/WP 3(93)6 (1993).
[76] Although close to a hundred nations have effective competition laws, the majority of them are inspired by either the US or EU competition laws. Moreover, high-profile cases are played out exclusively in these two jurisdictions.

merger on the grounds that it creates a monopoly which will lead to increase in prices and output restrictions while another country clears the same transaction because it considers that the negative effects will be counteracted by new entries into relevant market or that such effects are unlikely because the remaining competitors will discipline the monopolist.[77] The more jurisdictions review a transaction, the higher the potential for conflicting assessments.

In the area of merger control, extraterritoriality has caused a majority of cross-border mergers to be notified in different jurisdictions, notably in the US and in the EU. During the 80's and 90's, merger filings in the United States involving a foreign entity reached 51 per cent of total notifications and this percentage is further increasing.[78] Approximately the same percentage of mergers including non-EC member entity was notified to the European Commission. In essence, the notification thresholds measuring the effects of a transaction within a particular jurisdiction requiring companies to file the projected transaction in all jurisdictions where this threshold is satisfied, have caused multiple authorities to review a single transaction and often to conclude different outcomes or impose non consistent remedies. This anarchy in the enforcement of different substantive standards, in such a time-sensitive world of corporate transactions, has often led corporations to the abandon their plans to go through with a transaction that would otherwise be beneficial. "While any one remedy could make sense from the point of view of any particular jurisdiction, taken together, remedies from several jurisdictions may lead to what is perceived as overregulation or inefficiency".[79]

Moreover, some nations have raised political objections to the extraterritorial application of antitrust laws and have perceived this trend as an attack on national sovereignty.[80]

[77] This evaluation depends on the degree to which national antitrust policies focus on consumer welfare. Whereas a consumer welfare approach does not allow mergers that restrict output, a total economic welfare approach allows consideration of gains in productive efficiency. See R. Shyam Khemani and Rainer Schone, "Competition Policy Objectives - Working Paper IV" in Ehlerman and Laudati, *supra* note 20, at 225.

[78] Zanettin, *supra* note 66, at 15.

[79] ICPAC Report, supra note 11, at 53.

[80] See Zanettin, *supra* note 66, at 23. In *Re Uranium Antitrust Litigation*, the Canadian Government stated that: "there is no basis in international law for the extraterritorial application of United States antitrust laws to the activities of non-US nationals taken outside the United States in accordance with the laws and

Extraterritoriality has become a source of conflict where some countries have argued that many, mostly larger countries, the United States in particular, are imposing their antitrust laws on the entire world. One author described this phenomenon as: "the resulting situation from extraterritorial application of national antitrust laws would be one of national antitrust imperialism in the world, where strong countries would be able to impose their standards on other countries."[81]

As already mentioned, the overlapping extraterritorial application of merger control laws by various jurisdictions[82] has at certain instances led to divergent outcomes. Two mergers that have resulted in conflicting outcomes and received the most attention were the *Boeing/McDonnell Douglas*[83] and the *General Electric/Honeywell*[84] mergers; both concerning American companies exclusively. The two transactions were notified on both sides of the Atlantic. The US was notified because it was an American merger taking place within US jurisdiction and the EU was notified because the two companies did substantial business in the EU that they met notification thresholds and thus after completion the merger would affect and have "effects" within the EU market. For instance, in the *General Electric/Honeywell* merger, the European Commission took the view that the combination of the two strongest players in the avionics and non-avionics markets would lead to their absolute dominance in the market creating an entity four to five times larger than the second leading competitor. The EU accordingly prohibited the merger. Conversely, the Department of Justice ('DoJ') and the Federal Trade Commission ('FTC'), the two US antitrust enforcement agencies, found no evidence that

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policies of other countries. Such action by the US courts would constitute a direct challenge to Canadian Sovereignty." *In Re Uranium Antitrust Litigation, 1980-1 Trade Cas. (CCH) P63,183 (1980)*, online: LEXIS <http://www.lexis.com/research/retrieve/frames?_m=1d566f67ecd601b686af5661e63a425b&csvc=bl&cform=bool&_fmtstr=CITE&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAt&_md5=7736343b0993c2c4dbfe02590d6c24f7 >.

[81] Maher M.Dabbah, *The Internationalization of Antitrust Policy*, (Cambridge: Cambridge University Press, 2003), at 165.

[82] As was already mentioned, talking about various jurisdictions in practice corresponds to the two main jurisdictions, the EU and the US.

[83] See EC, *Boeing/McDonnell Douglas*, Case No. IV COMP/M.877, 30 July 1997, online: EUROPA-COMPETITION <http://europa.eu.int/comm/competition/mergers/cases/decisions/m877_19970730_600_en.pdf>. See also online: FTC <http://www.ftc.gov/opa/1997/07/boeingsta.htm>.

[84] See EC, *General Electric/Honeywell*, Case No. IV COMP/M.2220, 3 July 2001, online: EUROPA – COMPETITION <http://europa.eu.int/comm/competition/mergers/cases/decisions/m2220_en.pdf>.

following the transaction the competition on the relevant market would be significantly impeded.

At the occasion of these two transactions numerous academics and practitioners started questioning the "effects theory" and the recurring debate of the harmonization of substantive standards became even more intense. Despite the general acceptance of the extraterritorial application of competition laws, it was argued that this practice contradicts with the movement of internationalization and further harmonization of antitrust approaches and policies. If countries can rely on the unilateral application of their domestic laws what would then be the incentive for harmonization or bilateral or multilateral cooperation?

The question however is how alarming are such instances of discord and whether a remedy in form of harmonization or multilateral cooperation is needed. The truth is that although there have been various examples of divergent conclusions by the US and the EU authorities, in more than 20 years of parallel merger enforcement there have been only two high profile-cases that caused trade frictions on both sides of the Atlantic. In this respect, one could think that given the number of cases that are simultaneously reviewed by the two nations, two is not enough to feel concerned about the appropriateness of "effects theory." Moreover, in the majority of instances the two nations cooperated successfully.

Therefore, the question is whether we need any kind of harmonization if only a limited amount of high-profile cases are subject to disagreement. Rather than seeking for a multilateral regime perhaps the focus should be on enhancing international cooperation in an independent forum such as the International Competition Network ("ICN") without necessarily providing for a binding set of uniformized substantive rules. Harmonization and cooperation at a multinational level as remedy to lacunas of the "effects theory" will be treated in following chapters.

Taking account of the above-mentioned shortcomings of extraterritoriality, it has been suggested that some alternative means of asserting antitrust jurisdiction that would objectively allocate jurisdiction between affected nations should be adopted.

3. Towards an Objective Assertion of Jurisdiction: the "Lead Jurisdiction" Approach

The picture that emerges from the previous sections is fairly clear. The extraterritorial application of domestic competition laws seems to be the inappropriate solution in the era of globalization. The question that remains however is one of the alternative solutions. Some authors believe that in order to remedy inefficiencies created by multijurisdictional review, the "lead jurisdiction" approach should be adopted. To this end, each jurisdiction should refrain from imposing an unnecessary burden and decline jurisdiction under the principle of international comity in favour of the jurisdiction having the most relevant interest in a particular transaction. Under this doctrine the reviewing authority would take into account potential spillovers of the review process or remedy imposed in other jurisdictions.

The best placed authority, that is the most affected jurisdiction, would review the transaction and make an overall assessment taking into account the global aspects of the particular transaction. In this model, the other affected jurisdictions would solely express their opinions, no more.[85] This model, however, supposes not only a great degree of international cooperation but also a considerable degree of harmonization of substantive standards.[86]

Logically the question that follows is to what extent the "lead jurisdiction" approach would provide for an internationally workable and enforceable model. Some authors, notably Joseph Wilson, propose to complement this model by the WTO dispute

[85] Wilson, *supra* note 6, at 181.
[86] Wilson, *supra* note 6, at 7.

resolution system that would oversee the determination of the best placed authority and manage tensions that might arise.[87]

Although this option may sound good in theory, in terms of the broader practical implications the question arises as to whether this model would fit the requirement of stringent time frames to be respected in the area of cross-border transactions. If the mere determination of the "best placed" authority would be an issue subject to the dispute resolution system the whole merger analysis could be compromised. Ultimately, this system would slow the whole reviewing process and lead to administrative inefficiencies seriously affecting the success of reviewed transactions.

Another difficulty with the "lead jurisdiction" approach is that this system counts primarily, if not solely on international comity which is not enforceable.[88] It supposes that where a conflict occurs, one jurisdiction takes account of the cost or benefit that accrues to other jurisdiction, which is not always an obvious or easy exercise.[89]

Another issue raised by the current merger control structure, which makes some kind of international coordination necessary, is that more and more nations adopt merger control regimes which involve significant transaction and administrative costs and increases uncertainty and the potential for divergent outcomes.

Overall, although professor Wilson envisages in the "lead jurisdiction" approach, a process that would be expeditious, it must be acknowledged that this would depend on the willingness of the parties to be bound by such a process. However, in all fairness, in

[87] Wilson, *supra* note 6, at 7.
[88] The issue of international comity will be discussed in Chapter 5 of this thesis. See *infra* Chapter 5 A.1.
[89] See *infra* Chapter 5 A.1. for a discussion about positive and negative comity. The kind of comity that would be required in the "lead jurisdiction" model goes considerably beyond what is currently achievable under international comity. It would require that nations take account of other nation's interests in the decision making process.

the current configuration of international affairs, this does not seem to be likely in the near future.[90]

C. Proliferation of Merger Control Legislation across the World

As was already stated, the emergence of antitrust regimes around the world, coupled with the extraterritorial application of domestic laws has inherently resulted in the multijurisdictional review of major cross-border transactions.

The proliferation of merger control laws has raised significant issues with regard to the inefficiencies created by multiple filings of cross-border transactions and the higher potential for conflicts among competition authorities reviewing a transaction. In this respect, the merging parties face significant challenges, particularly as concerns the "uncertainty regarding the ultimate legality of the proposed transaction; the necessity for interacting and negotiating with multiple reviewing authorities, the possibility for inconsistent and perhaps conflicting rulings; and the potential for overly burdensome remedies".[91]

1. Problem of Multiple Filings: Higher Transaction Costs for the Merging Parties

The constant emergence of antitrust laws around the world has caused the merging parties to comply with many different notification requirements. Although filing a form may appear to be a banal formality, filing forms with 90 different competition authorities is not only inefficient and time consuming but also very costly. Stated differently, the possibility of a situation where administrative costs necessary to complete the transaction outweigh the possible benefit is no longer purely hypothetical. Furthermore, since merger notification system works on an *ex ante* basis, the filing procedure is only a formal prerequisite to a transaction but is not a guarantee of successful completion.

[90] This thesis attempts to discuss what is currently achievable with respect to international merger control regime rather than to what is theoretically possible. That is why this thesis will not discuss the "lead jurisdiction" approach as a possible solution to the challenges created by globalization.

[91] ICPAC Report, *supra* note 11, at 41.

In the context of different substantive approaches and various notification thresholds, filing a single transaction with multiple authorities can become very wasteful. The transaction costs may rise to tremendous amounts when transactions are required to be notified in numerous jurisdictions. The parties must provide various documents to all antitrust authorities involved, deal with different notification forms, different procedures and time frames and often even different conditions for approval. The difficulty resides in the fact that the multijurisdictional review is governed *de facto* by the rule of unanimity. In other words, if one authority reviewing the transaction raises serious concerns and prohibits the transaction, the merging parties cannot proceed with their plans even if the transaction was allowed to carry on in other jurisdictions. The present system of multiple reviews lacking any enforceable cooperation network falls short in situations where an important business transaction is blocked by one member of the international community while allowed by the majority. This problem is particularly acute in scenarios where a transaction is cleared by the most "affected" jurisdiction and then blocked by a marginally concerned jurisdiction. Similarly, the current state of affairs is that the lowest threshold and the strictest remedy decide whether the transaction will be successful. As a result, firms spending large amounts of resources to prepare notification in various concerned jurisdictions are usually at the mercy of the most stringent authority. In light of these considerations, if harmonization of the substantive rules is not called for, perhaps harmonization of the procedural rules producing an alignment of notification requirements, the development of a model notification form and the coordination of timetables could reduce the transaction and administrative costs without truly jeopardizing national sovereignty over substantive standards.[92]

As discussed earlier, another practical problem arises with regard to the fact that firms must be competent and familiar with many different merger control regimes, which is very time consuming and expensive. The current system is very arbitrary, complicated

[92] R. Shyam Khemani and Rainer Schone, "Competition Policy Objectives - Working Paper IV" in Ehlerman and Laudati, *supra* note 20, at 230.

and lacks transparency in terms of the authorities to be notified and the rules to be applied to cross-border transactions. Greater transparency in merger review could only be achieved through clear guidelines published by each competition authority that would shed light on the manner in which mergers will be analyzed.[93]

Finally, it should be noted that the complexity and confusion of the current system are at the expense of consumer welfare in a global sense. Ultimately, the consumer is required to support the cost of the administrative inefficiencies and in the worst case scenario the consumer may be prevented from the benefits of a transaction.

2. Inconsistent Substantive Approaches: Risk of Divergent Outcomes

"The substantive standards contained in the competition laws and regulations of nations differ, reflecting divergent policy goals."[94] In other words, the merger control laws adopted by countries around the world use not only different substantive standards but also have different levels of sophistication. As a consequence of the diversity in approaches and philosophy on which merger analysis is based, serious challenges for the merging parties arise, notably as concerns the certainty regarding the ultimate legality of a transaction.

Logically, merger review based on different substantive provisions, using different analytic tools enhances the potential for conflicting outcomes. Accordingly, in order to come to, if not identical at least compatible outcomes, it is necessary to use some common denominators. In the relatively short history of international merger review we have witnessed situations where the differences in substantive approaches have caused, at least partially, a storm over Atlantic.[95]

[93] ICPAC Report, *supra* note 11, at 60.
[94] ICPAC Report, *supra* note 11, at 41.
[95] The divergent views in the *GE/Honeywell* merger which caused frictions between Europe and the United States is a great example of how differences in substantive standrads but also in competition policy goals may result in situations where even bilateral cooperation agreements are helpless. These two cases have had a broad political and economical impact on both sides of the Atlantic and should serve as a memento of the consequences of the extraterritorial application of domestic laws based on different approaches.

In light of the above-mentioned arguments, it seems obvious that continuous endeavours regarding multilateral or bilateral cooperative frameworks and possibly a harmonized set of principles will be crucial. The harmonization of national substantive standards seems rather unrealistic at the present time; therefore the only relief to the problem seems to lead through bilateral and multilateral cooperation. While much controversy surrounds the creation of a multilateral framework for merger control and many states oppose this scenario as a solution to the problem of multijurisdictional mergers, it is unlikely that extraterritorial application of domestic laws will be able to provide for a coherent, efficient and transparent merger review process at a global level in the future.

Chapter 2: US Merger Control Regime

In order to properly cope with the rising internationalization of antitrust and to project how international merger control policy should be shaped, it is absolutely crucial to understand how the two most mature merger control regimes, the US and the EU regimes, operate. Furthermore, in the context of the constant emergence of antitrust laws around the world, it is not surprising that states usually model their competition laws after one of the above-mentioned systems. Therefore, any discourse pertaining to a global merger control regime necessarily requires not only a discussion of the international framework but also of the main features of the US and EU merger control regimes.

The United States plays a significant role in the process of economic and legal globalization and therefore sufficient consideration must be afforded to the US merger control regime. Therefore, this chapter is concerned with the US antitrust laws pertaining to merger control. To this end, it does not attempt to provide a comprehensive account of US antitrust but rather highlights its main features that should be put into global perspective.

Historically, US antitrust and merger policy evolved in parallel with rising concerns about increasing business concentration. Early after the Civil War in the second half of 19th century, the US market went through an industrial revolution that had as a consequence unprecedented economic growth. Companies started using mergers as means of expansion allowing them to compete on the national market.[96] Provincial configuration of the US economy was substituted by a single national market place. As result of merger waves in the United States the phenomenon of groups of corporations, so-called "trusts"[97], acquiring monopoly power and seriously restraining competition in

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[96] Wilson, *supra* note 6, at 62.

[97] Mark R. Joelson, *An International Antitrust Primer : A Guide to the Operations of United States, European Union and Other Key Competition Laws in the Global Economy*, 2nd ed. (The Hague: Kluwer Law International, 2001), at 11. "Trusts" were constituted by agreements among corporations to join and confer control to a "board of trustees." Anybody was welcome to join, however, it was rather difficult, not

almost all strategic industries emerged. As a response to such a highly concentrated market, which furnished an ideal climate for abuses of market power, the Congress adopted statutes containing various substantive and procedural rules designed to govern market conduct and protect the free competition process from restrictive business practices.

From this perspective, US competition law was enacted as an instrument of redistribution of economic power accumulated in the hands of large corporations controlling a majority of the US industry and thereby as an instrument of the promotion of economic equity.[98] When examining US antitrust legislation, it is important to note that the substantive and procedural provisions of the US antitrust regime reflect the historical, economic and political circumstances in which this legislation was born.

A. Substantive Issues

In order to understand the inner working of the US merger control regime, it is important to first, to understand the underlying legislation giving basis to antitrust enforcement, and second, to illustrate the practical application of the substantive test in merger investigations.

1. US Antitrust Legislation

US antitrust legislation pertaining to merger control is built on three pillars: the Sherman Act, the Clayton Act and the Hart-Scott-Rodino Antitrust Improvements Act. Congress' endeavours to enact antitrust rules based on sound economic principles, reflecting the democratic values of US society and capable of adaptation to different social, economic and political climates were successful and there is no doubt that today thanks to this legislation, the US has the most mature and sophisticated antitrust enforcement regime.[99]

to say impossible to survive without entering trust operating in relevant industry. See also Wilson, at 63 and following.

[98] *Supra* note 26, at 31.

[99] See Debra A. Valentine, "US COMPETITION POLICY AND LAW: Learning from a Century of Antitrust Enforcement" in Yang-Ching Chao *et al.*, eds., *International and Comparative Competition Law and Policies*, (The Hague: Kluwer Law International: 2001).

i. Sherman Act : Monopolization and Cartelization[100]

As was already alluded to, the Sherman Act was enacted in 1890 in order to respond to the expansion of damaging business combinations known as "trusts." The wealth accumulated in the hands of a small amount of corporations led to abuses of monopoly power and suppressed competition in various areas of business, particularly on the oil and sugar markets.

Protection provided for in the Sherman Act is two fold. Section 1 is directed to prohibit unlawful behaviour caused by joint conduct.[101] The original wording of the statute, forbidding every agreement "in restraint of trade," was very general and unclear, and therefore the Supreme Court adopted a "rule of reason" interpretation of section 1 and made it clear that only unreasonable restraints of trade, meaning agreements concluded to suppress competition, were outlawed.[102]

Section 2, on the other hand, deals with the prevention of monopoly and abuse of monopoly power.[103] It goes without saying that the monopoly *per se* or the existence of dominance in an industry is not an offence to Sherman Act; what is forbidden is the act of *monopolization,* that is attaining and/or maintaining a monopoly through anticompetitive means, such as buying out direct competitors.[104]

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[100] *Sherman Anti-Trust Act*, ch. 647, 26 Stat. 209, (1980) codified as amended at 15 U.S.C.A. §§ 1-7, (2000).

[101] *Sherman Act 15 U.S.C.A. §1.* "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..."

[102] *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

[103] *Sherman Act 15 U.S.C. §2.* "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 several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished..."

[104] *United States v. United States Steel Corp.*, 251 US 417, 451 (1920). See e.g. Clifford A. Jones & Mitsuo Matsushita, eds., *Competition Policy in the Global Trading System – Perspectives form the EU, Japan and the USA*, (The Hague: Kluwer Law International, 2002); *see also* Joelson, Mark R. *An International Antitrust Primer : A Guide to the Operations of United States, European Union and Other Key Competition Laws in the Global Economy,* 2nd ed. (The Hague: Kluwer Law International, 2001), at 16.

While the Sherman Act protected efficiently against trusts, monopolization and unreasonable agreements in restraint of trade, it didn't manage to cover mergers restraining competition which did not attain "monopoly dimensions."[105]Only mergers attaining large proportions may have been scrutinized under sections 1 and 2 of Sherman Act. Therefore, corporations took advantage of the loophole and circumvented the prohibitions of Sherman Act by avoiding entering into agreements and rather creating holding companies that controlled through member corporations a large market share.[106]

ii. The Clayton Act : Mergers and Acquisitions

Taking into account the abovementioned omissions, Congress took action and in 1914 enacted the first merger control statute, the Clayton Act. The primary goal of this statute was to "reach certain specific practices which have been held by courts to be outside ambit of Sherman Act but which Congress considered dangerous to free competition in trade and commerce."[107]The evolution of US antitrust regime brought about by the Clayton Act was based on years of practice of enforcement of the Sherman Act. In contrast to the Sherman Act, the Clayton Act takes actual as well as potential anticompetitive effects into account and even conduct which will only probably result in the "substantial lessening of competition" may be declared *ex ante* unlawful.[108]

Without doubt the most important provision of Clayton Act is Section 7 - consecrated to corporate mergers and acquisitions. While the Sherman Act requires actual "restraint of trade" for a transaction to be challenged, the Clayton Act imposes a lower threshold under which a transaction that may have as effect the "substantial lessening of competition" is outlawed.[109] In other words, this statute is designed to prohibit *ex ante* acquisitions that may lead to or strengthen monopoly and thus "substantially lessen

[105] Dennis C. Mueller, "Do We Want a New, Tough Antimerger Law" *in* Michael Keenan and Lawrence J. White, eds., *Mergers and Acquisitions: Current Problems in Perspective* (Lexington, Mass., US: Lexington Books, 1982), at169.
[106] *Supra* note 99, 72.
[107] *New Jersey Wood Finishing Co. v Minnesota Mining & Mfg. Co. (1964. CA3 NJ) 332 F2d 346.*
[108] *Supra* note 97, at 22.
[109] *Ibid.*, at 168.

competition" on relevant product and geographical market.[110]The underlying reasoning is to prevent anticompetitive mergers at their inception, taking account of not only the actual effects of the merger but rather the probable effects on future competition. Whatever the present effects and benefits may be, the assessment evolves around the question of how a merger once completed, will affect future competition. If there is a high enough probability that a merger will result in injury attaining degree of "substantial lessening of competition" on the relevant market, the antitrust authorities will take preventive action and either prohibit the transaction or impose remedies on the merger.

Interestingly, at its conception, the Clayton Act dealt exclusively with stock acquisitions leaving gaps as concerns mergers through asset acquisitions. This omission generated numerous debates until 1950, when the Congress passed the Celler-Kefauver amendments to Clayton Act and prohibited anticompetitive acquisitions of assets. This made it clear that the original purpose of Clayton Act was to ban all corporate amalgamations having adverse effects on competition, ranging from stock acquisitions to pure assets acquisitions.[111]

iii. Hart-Scott-Rodino Improvements Act ('HSR Act') : Notification Thresholds

The enforcement of the Clayton Act has generated an intense debate about the timing of merger review. The practice of "midnight mergers"[112] clearly showed that post-merger litigation is not appropriate and may lead to subsequent problems.[113]

[110]See Section 7 *Clayton Act 15 U.S.C.S §18 (2003)* "No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of Federal Trade Commission shall acquire the whole or any part pf assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create monopoly."

[111] *See e.g. United States v. Philadelphia Nat. Bank* 74 US 321, 10 L Ed 2d 915, 83 S Ct 1715 (1963).

[112] The term of "midnight mergers" refers to the phenomenon of transactions quickly consummated without any prior notice or no notice all. This practice made the task of antitrust authorities very difficult and made impossible to review the transaction and assess the possible anticompetitive effects.

[113] In *United States v. El Paso Natural Gas Co.*, 376 US 651 (1964) the Supreme Court after seven years of litigation ordered "divestiture without delay" that happened not earlier than after ten years! This case

In this respect, the adoption of HSR Act, which established pre-merger notification, was crucial for American antitrust law and brought an important innovation to merger review. The moment of review and consequently of remedy was shifted from *ex post* to *ex ante* basis. The underlying philosophy of this improvement was to be able to detect anticompetitive mergers at the very beginning of the process and either prevent them from happening or to impose adequate remedies before the transaction is consumed. The timing of the review is critical in this area of law, because, by definition, the separation of assets following a corporate amalgamation is extremely difficult, not to say impossible.[114]

To this end, the new legislation imposed pre-merger notification of every transaction (acquisition of assets and voting securities) satisfying the thresholds defined through the annual net sales of the merging companies. The HSR Act requires the parties willing to engage in amalgamations above the specified threshold to file their transaction with the antitrust authorities. The filing of a transaction has a suspensive effect, that is, a transaction cannot be completed and implemented unless having obtained the blessing of antitrust authorities.[115] The notification threshold *per se* is two-fold: in order for a transaction to be notifiable it must satisfy the "size-of-person" and the "size-of-transaction" tests. While the "size-of-person test" deals with the volume of annual net sales of parties to the transaction, the "size-of-transaction" test poses a requirement with regard to the value of the transaction.[116] Since only transactions affecting US commerce are notifiable, the size-of-person and size-of-transaction tests are based solely on sales within the US and require that either the acquiring or acquired entities are engaged in US commerce or in any activity affecting the US commerce. This means that even foreign

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law showed the difficulty with "unscrambling the eggs" and highlighted the recurrent issue of post merger litigation leading to a conclusion that the Clayton Act necessitates an amendment.

[114] *Supra* note 6, at 104.

[115] *Hart-Scott-Rodino Antitrust Improvements Act*, becoming Section 7A of the *Clayton Act*, 15 U.S.C §18A (2003) (a) "...no person shall acquire ... unless ... file notification..."

[116] 15 U.S.C §18A (2003) (a) (2), the "Size-of-Person" test requires one of the parties to the transaction to have annual net sales or total assets of at least $10 million while the other at least $100 million. The "Size-of-Transaction" test on the other hand requires the transaction to be valued between $50 million and $200 million. It is important to note that these tests are cumulative except when the size of transaction is over $200 million in which case the transaction has to be filed irrespectively of the "size-of-person" test.

entities may be caught by the notification requirements as long as they affect US commerce in substantial way.

The HSR Act and the pre-merger notification procedure allowed for a more efficient review of mergers and better flexibility in addressing antitrust remedies. While before the enactment of the statute the main remedy available in antitrust cases was an *ex post* divestiture, the agencies now dispose of a wider range of remedies that may be negotiated and are mutually profitable for the merging parties and antitrust authorities.

Given that the primary instrument of the US merger control is still undoubtedly Section 7 of the Clayton Act, it is important to analyze the standards and the elements of merger analysis set forth in this statute.

2. Merger analysis: the "Substantial Lessening of Competition" Test

As was already pointed out, the US merger analysis takes as its central criterion the concept of "substantial lessening of competition" ('SLC'). To this end, the legality of every transaction is assessed individually within a specific context taking account of various factors such as the market structure of a particular industry.[117] As the wording of Section 7 of Clayton Act is rather general, the practice of merger review has led enforcement agencies to issue merger guidelines setting out the analytical framework to be used in conducting merger analysis.[118]The ultimate objective of the enforcement agencies in issuing guidelines is to identify mergers that create or enhance market power and hence jeopardize free competition on a relevant market. In terms of the review practice, the use of guidelines has significantly increased the uniformity of merger analysis criteria applied by the Federal Trade Commission ('FTC') and Department of Justice ('DoJ'). Similarly, from the merging parties' standpoint, the guidelines have

[117] *Supra* note 97, at 173.

[118] The first merger guidelines were issued in 1968. While the merger review practice developed over the years, the merger guidelines were revised. The merger guidelines currently in force are *1992 Horizontal Merger Guidelines*, US Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶13, 104 (1992) (with April 8, 1997 revision to § 4), [hereinafter *1992 Horizontal Merger Guidelines*], online: US DOJ <http://www.usdoj.gov/atr/public/guidelines/horiz_book/toc.html> and FTC <http://www.ftc.gov/bc/docs/horizmer.htm>.

considerably enhanced the predictability and certainty as to whether a transaction will be challenged.[119]

Accordingly, the guidelines provide details on how a relevant market should be identified and thus determine the framework where merger analysis is conducted. They also provide for a number of relevant indicators for assessing the impact of the transaction on competition, such as concentration on the market or probability of new entry.

i. Market definition

First, any decision as to whether a merger is anticompetitive or in any way substantially lessening competition supposes a sound framework in which the analysis will be conducted. The framework used for merger analysis is comprised of two elements: product and geographic market. The ultimate goal is to determine the relevant market; that means a product or a group of products as well as a geographical area that could potentially be subject to the exercise of market power by a monopolist.[120]

The product market encompasses a product or group of products that are included in consumers' response to "small but significant and non-transitory" price increase. In other words, all products that are interchangeable and substitutable because of their qualitative characters constitute the product market. Therefore, if consumers, in response to a price increase of a certain product, shift demand to another product because they consider that these two products are substitutable; this group of products constitutes relevant product market where merger analysis will be conducted.

The geographic market test, on the other hand, analyzes the geographic area in which consumers are mobile and practically able to find their suppliers in response to a "small

[119] *Supra* note 6, at 94.

[120] *1992 Horizontal Merger Guidelines*, *supra* note 118. Section 1.0 states: "A market is defined as a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a "small but significant and non-transitory increase in price", assuming the terms of sale of all other products are held constant. A relevant market is a group of products and a geographic area that is no bigger than necessary to satisfy this test."

but significant and non-transitory" price increase. Thus, if consumers in response to a price increase in a geographic area switch to the same product produced by firms in other locations, this location will be included in the geographic market where the effects of a merger will be assessed.

To sum up, the determination of relevant market analyzes consumers' responses and the reaction of buyers to the firms' behaviour, notably to "small but significant and non-transitory" price increase. Therefore, to analyze the effects a merger would have on a relevant market, antitrust authorities ask what would happen (what would be the consumers' response) if the monopolist controlling the product group produced or sold by the merging firms would impose a "small but significant and non-transitory" price increase. The second question is to determine the geographic markets in which the merging firms produce or sell and all regions within which consumers would move in response to a "small but significant and non-transitory" price increase in the particular product line. The product line and the geographic area constitute the relevant market where merger analysis is conducted.[121] This stage of analysis is of the utmost importance, because the outcome, as to the competitiveness of a merger, may vary depending on the product market and geographical area taken into consideration. If the relevant market is narrowly defined, the danger of concentration increases and the consequent substantial lessening of competition is very high. Conversely, the broader the relevant market is, lesser is the danger and the probability that a merger will cause harm to competition.

Once the relevant market is defined, antitrust agencies have to assess the respective positions of the merging parties on the particular market.

[121] Moreover, the determination of the relevant product and geographical market indicates the type of merger at stake. Horizontal mergers are between companies which are direct competitors operating at the same level of production with the same product and geographic area. Vertical mergers, on the other hand, are mergers between companies engaged in different levels of production having a customer-supplier relationship. Finally, conglomerate mergers are mergers between companies operation at different levels of production and on different product and geographic markets. This thesis uses example and deals principally with horizontal mergers presenting the highest antitrust danger from a consumer standpoint, therefore little importance is attached to vertical and conglomerate mergers.

ii. Concentration of the market

In the early stages of US antitrust enforcement, the antitrust agencies conducting merger analysis relied almost exclusively on market share and the concentration of the market to determine whether a merger will be anticompetitive.[122] However, the application of concentration of the market to the extreme led to situation where the main goal of antitrust enforcement became decentralized markets, rather than free and effective competition.[123] Following the issuance of guidelines, the agencies started to rely more on a whole set of factors and objective criteria, such as ease of entry or efficiencies.

The main and most objective criterion remains still the evaluation of pre and post-merger concentration on the market. The concentration is used to measure the degree of lessening of competition on the relevant market. The basic assumption is that a merger increasing concentration on a relevant market is concomitantly substantially lessening competition and likely to have adverse competition effects on the particular market. Therefore, an increase of post-merger concentration establishes the presumption that the competition on the relevant market will be lessened. [124]

To measure pre and post-merger concentration of markets, antitrust authorities employ a rather precise economic tool, the so-called Herfindahl-Hirschman Index ('HHI').[125] The HHI, giving equal importance to market shares of all firms engaged in the relevant market, measures with impressive exactitude how the concentration of the market increased following the merger. This method is very instructive in showing the actual

[122] *Supra* note 6, at 86.

[123] *Supra* note 6, at 89.

[124]See *United States v. Baker Hughes*, 908 F.2d 981, 982 (D.C. Cir. 1990); showing significant increase in market concentration "establishes presumption that the merger will substantially lessen competition." *See also FTC. V. H.J. Heinz Co.*, 246 F.3d 708 9d.C. Cir. (2001) where the D.C. Circuit stated that "sufficiently large HHI figures establish the FTC's *prima facie* case that a merger is anticompetitive."

[125]HHI measures the increase in market concentration by summing up the squares of individual market shares of each firm participant on the relevant market as after completion of the merger. An HHI below 1000 means that a merger does not raise serious competition concerns and is likely that antitrust authorities will not challenge the merger. HHI between 1000 and 1800 implies that the market is moderately concentrated and the merger is likely to be challenged assuming that the post-merger HHI increased by more than 100 points. Finally, a post-merger HHI above 1800 indicates a highly concentrated market and assuming a 100 point HHI increase establishes presumption of the creation or enhancement of dominant market power. A merger producing an HHI increase of less than 50 points, even in highly concentrated market, is unlikely to affect competition on that market and therefore usually require no further analysis. See *1992 Horizontal Merger Guidelines*, *supra* note 118, section 1.5.

increase of concentration and the change in dynamics governing the market. Since Section 7 of the Clayton Act clearly requires that post-merger competition be substantially lessened; the actual increase of concentration is determinant. Stated differently, a merger in a highly concentrated market that does not lead to a substantial increase of concentration does not raise serious concerns. Conversely, a merger in a moderately concentrated market that substantially increases concentration raises serious competitive concerns even though the post-merger HHI does not indicate a highly concentrated market. Therefore, what is determinant is the increase in concentration that results from the merger as it shows how the structure of the market was altered by the transaction.

As we have seen, concentration of market plays a significant role in the analysis conducted by antitrust authorities. Irrespective of what the reality may be, the starting point of the analysis is the assumption that a substantial increase of post-merger market concentration generates substantial lessening of competition and enhances the likelihood that the merged entity will exercise market power on the relevant market. It is however important to remind, that in order for the agencies to determine potential anticompetitive concerns, they must make an overall assessment of a merger (as described in merger guidelines) instead of solely relying on the static concentration ratio.[126]

iii. Theories of harm

It is generally admitted that mergers have a potential to lessen competition either through coordinated interaction or through unilateral effects.[127]The notion of coordinated interaction comprises tacit or express collusion, this means that firms tacitly or expressly reach terms of coordinated behaviour that are profitable for the firms included in the pact and unprofitable for those firms that do not act in consequence. The key is that it is more profitable for a firm to collude and follow the actions of firms

[126] In 1990, the Court of Appeals for the District of Columbia Circuit in its opinion in *United States v. Baker Hughes Inc.* confirmed that "the Supreme Court has adopted a totality-of-the-circumstances approach to the statute, weighing a variety of factors to determine the effects of particular transactions on competition.... Evidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness." 908 F.2d 981 (D.C. Cir. 1990), at 178-179.

[127] *1992 Horizontal Merger Guidelines*, *supra* note 118, section 2.

engaged in coordinated interaction than to resist which could, in the worst case scenario, force the firm to exit the market. Obviously, this scheme lessens competition on the relevant product and geographic markets by diminishing the competitive restrains and pressures existing between competitors on normally competitive markets. The picture that emerges from this scenario is fairly clear; a price increase introduced by a firm exercising market power is generally followed by other market participants as result whereof consumers are harmed.

In order to conclude to coordinated interaction antitrust agencies use a number of indices, such as past behaviour as to the pricing and marketing practices of market participants, the existence of oligopoly markets, the existence of stable market shares and the extent of product and firm homogeneity.[128] The more these indices are present; the higher is the probability of collusion.

Mergers may lead to the substantial lessening of competition not only through coordinated interaction as we have seen, but also through unilateral effects. The unilateral effects scenario supposes that a firm, following a merger, might find it profitable to unilaterally change its market behaviour by increasing prices and suppressing output.[129] Among different settings in which this kind of anticompetitive behaviour may arise is a merger between firms in differentiated product markets where the products are not perfectly interchangeable. Assuming a merger between firms having offered the next closest substitutes, the merged firm has a great incentive to unilaterally increase the price following the disappearance of competitive restraints exerted by their former competitor. Competitors have only very limited capacity to defeat such a strategy because of the absence of perfect qualitative interchangeability of products and the fact that consumers do not react to increases in price by shifting to other products but instead purchase lower quantities of product. Another scenario of unilateral effects occurs in a case when firms are differentiated not by products but by capacity. This supposes that the merged firm disposes of a larger base of sales and that various competitors are

[128] *Ibid.*, section 2.1.
[129] Sigrid Stroux, *US and EC Oligopoly Control*, (The Hague: Kluwer Law International, 2004), at 185.

unable to respond to price increase and output reduction by increasing their own outputs that would sufficiently to render the unilateral price increase unprofitable to the merged firm.[130]

Even if the market share and the concentration data make one of these anticompetitive scenarios likely, the circumstances of the merger may present some singularities making that the overall impact of the transaction would not be detrimental to competition and consequently not harmful to consumers.

iv. Defensive Arguments: Ease of Entry, Efficiencies and Failure.

The practice of merger review has shown that using market share data as the only reference point in merger analysis may give an inaccurate picture as to the likely effects of a merger on competition.[131] Therefore, the agencies elaborated a set of factors that may be pertinent in the overall assessment of the lawfulness of a merger. The factors include the likelihood of entry, significant efficiencies generated by merger and failing company defence.

The rationale of taking into consideration the likelihood of entry is that if a new entry into a relevant market is "likely, timely and sufficient in its magnitude, character and scope,"[132]the price increase would be most likely unprofitable or impossible to maintain in the long run. Generally, a merger in these market conditions would be considered not to raise antitrust concerns because it is assumed that "such entry likely will deter anticompetitive merger in its incipiency, or deter or counteract the competitive effects of concern."[133]

Efficiencies, being one of the main reasons why companies merge, are naturally considered in merger analysis and may counterbalance possible anticompetitive

[130] *1992 Horizontal Merger Guidelines, supra* note 118, section 2.
[131] *Supra* note 97, at 179.
[132] *1992 Horizontal Merger Guidelines, supra* note 118, section 3.
[133] *Ibid.*, section 3.

concerns.[134] However, in order to be taken into account, efficiencies must be cognizable[135], substantial[136] and merger specific[137] and ultimately must outweigh the potential anticompetitive effects. The higher the likelihood of anticompetitive harm (measured by the post-merger HHI and the increase in HHI as well as by the ease of entry into relevant market) more cognizable the efficiencies must be in order to justify the merger. Although efficiencies may serve as a defence to *prima facie* illegality, it should be noted that efficiencies "almost never justify mergers that would lead to a monopoly or quasi-monopoly."[138] In addition, it goes without saying that efficiencies must benefit consumers, not merely the management of the merged companies.

Lastly, merger guidelines recognize that a merger involving a failing firm is insusceptible to create an anticompetitive harm provided that failure is imminent; the failing firm is unable to reorganize under Chapter 11 of Bankruptcy Act and has made unsuccessful good faith efforts to find an alternative solution, thereby raising fewer anticompetitive concerns.[139] The idea is that in the absence of the proposed merger the assets of the failing firm would exit the market anyways which would lessen competition in the relevant market.

Having presented the main features of the substantive standards, it is now important to expose the procedural framework in which US merger review is conducted.

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[134] The synergy of two companies enhances their ability to produce more output for less money by optimizing the allocation of resources within the new entity. The *1992 Horizontal Mergers Guidelines* as amended in 1997, section 4, provide some examples of what can constitute efficiencies, the most frequent efficiencies being economies of scope and scale, enhanced innovation and lower prices.

[135] *1992 Horizontal Merger Guidelines*, *supra* note 118, section 3 states that "cognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions of output."

[136] *1992 Horizontal Merger Guidelines*, *supra* note 118, section 3 consider substantial efficiencies being of a magnitude "sufficient to reverse the merger's potential harm to competition absent the efficiencies."

[137] Under section 3.0 of *1992 Horizontal Merger Guidelines*, *supra* note 118, merger-specific are those efficiencies "likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable effect."

[138] *1992 Horizontal Merger Guidelines*, *supra* note 118, section 3.

[139] *Ibid.*, section 5.

B. Procedural Issues

1. Competent Authorities

The US antitrust regime presents two procedural and structural singularities; dual federal antitrust enforcement, and the existence of state and federal antitrust structures. While federal antitrust enforcement is split between the Antitrust Division of the Department of Justice ('DoJ') and the Federal Trade Commission Bureau of Competition ('FTC'), state antitrust enforcement is assured by the States' Attorneys General.

i. Department of Justice and Federal Trade Commission

The Antitrust Division of the Department of Justice ('DoJ') is the principal federal antitrust enforcement body headed by the Assistant Attorney General. The DoJ is charged to prosecute violations of federal antitrust laws, notably the Sherman Act and the Clayton Act. Although having concurrent jurisdiction with the FTC, the DoJ is empowered with exclusive jurisdiction over prosecution of criminal antitrust matters and holds sole federal antitrust power in some specific sectors, such as rails, telecommunications, banking and air transportation.[140]

The second antitrust enforcement authority in the US is the Federal Trade Commission Bureau of Competition ('FTC') established in 1914 by the *Federal Trade Commission Act* as an administrative federal expert agency.[141] The FTC is primarily concerned with consumer, shareholder and public protection. The FTC is responsible for gathering information about the business conditions in the US and has authority to take action against violations of the Sherman and Clayton Acts.

The coordination of cases and the interrelation between agencies is resolved through the "clearance procedure" meaning that any agency cannot start an investigation unless the

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[140] *See* Barry E. Hawk & Laraine L. Laudati, "Antitrust Federalism in the United States and Decentralization of Competition Law Enforcement in the European Union : a comparison," 20 Fordham Int'l L.J. 18, November 1996, at 24. See also Wilson, *supra* note 6, at 80.

[141] *Federal Trade Commission Act*, 15 U.S.C. §§ 41-77 (1982), §45(a)(2) states that "The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions, ..., air carriers, ..., form using unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."

other agency was notified and gave its clearance. In case of conflict or when both agencies reveal interest to review a case, the agency having more familiarity and expertise in the relevant field will be called upon to handle the case.[142] This procedure was established to allow an efficient allocation of resources and prevent double efforts.

ii. State and Federal Antitrust Agencies

Dual state and federal antitrust enforcement is a reflection of US constitutional federalism and the separation of powers between state and federal governments. The state attorneys general, representing the state antitrust enforcement authorities are competent with enforcing both state and federal antitrust laws. In addition to being able to challenge mergers under Section 7 of Clayton Act, state attorneys general may sue under state laws which have either comparable provision to Section 7 or may require a higher standard of proof. Most of the states however, do not have specific merger statutes.[143]

The establishment of National Association of Attorneys General ('NAAG') in 1907 has remarkably contributed to the efficient coordination of antitrust enforcement among states themselves but also between state and federal agencies. The main goal of the NAAG is the coordination of efforts, information sharing and joint analysis in multistate antitrust cases. The cooperation among state attorneys general in the NAAG forum has been fructuous over the years and has led to the issuance of joint vertical restraints guidelines, horizontal merger guidelines and several statements of general enforcement policy.[144] Moreover, in order to facilitate multiple merger reviews, minimize the burden of multiple filings and investigations and improve consistency in the application of relevant antitrust laws, the NAAG, DoJ and FTC concluded a "coordination protocol"

[142] Wilson, *supra* note 6, at 80.

[143] Caswell O. Hobbs & Robert S. Schlossberg, *Antitrust Strategies for Mergers, Acquisitions, Joint Ventures, and Strategic Alliances: A Deskbook for Deal Markers*, 2nd ed., (Newark: Lexis Nexis, 2002), at 1-8.

[144] See NAAG, *Guidelines for Vertical Restraints*, 4TRADE REG. REP(CCH) 13,400 (1985); *Horizontal Merger Guidelines*, 4 TRADE REG.REP. (CCH) 13, 405 (10 March 1987); *Horizontal Merger Guidelines*, 4 READE REG. REP. (CCH) 13,406 (30 March 1993); 64 ANTITRUST & TRADE REG. REP. (BNA) Special Supp., at 357 (April 1997). See also Barry E. Hawk & Laraine L. Laudati, at 30 and Wilson at 117.

providing for information sharing and joint investigation among state and federal agencies.[145]

Some authors believe that taking account of the level of coordination and cooperation that has been achieved in the US, the working of the US state/federal antitrust enforcement structure could be instructive for a future international merger control regime model.[146] This model seems to be working on various levels; the harmonization of rules represented by the issuance of joint guidelines and the cooperation of enforcement agencies under the "cooperation protocol".

2. Time Frames

Against the above-mentioned background of substantive rules, it is important to present the merger review process from a procedural standpoint. As we have seen, both parties who are willing to engage in a transaction (except for tender offer when only the acquiring party has the filing obligation), satisfying notification thresholds (and not being exempted from the notification) must file notification to both antitrust authorities, the DoJ and FTC.[147] Taking into account the very nature of corporate amalgamations require a timely review, the review periods are relatively short. The day the transaction is notified the so-called 30 days waiting period (15 days in the case of a cash tender offer) begins during which the competent authorities, that is the DoJ and FTC, initiate "clearance procedure" and decide which agency will review the transaction. Consequently, the reviewing agency may either allow the transaction to proceed or require "second request" information whereby the parties are asked to submit any relevant additional information. In this case the investigation proceeds as per the 1992 Merger Guidelines and the initial waiting period is extended for 30 days (15 days in the case of a cash tender offer).

[145] *Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General*, 1851 ANTITRUST & TRADE REG. REP. (12 March 1998).
[146] Wilson, *supra* note 6, at 127.
[147] 15 U.S.C §18a (2003).

Following the analysis, the reviewing agency concludes that either a transaction does not present a danger to competition or on the other hand, the transaction violates one of the antitrust statutes and its completion would seriously harm competition and consumers on the relevant market. In the latter case, the FTC or DoJ must apply to the District Court in order to obtain a preliminary injunction preventing the completion of the transaction.[148] Moreover, when it seems that the potential harm to competition might be prevented at certain conditions, the reviewing agency will negotiate with the merging parties various measures in order to remedy the anticompetitive concerns. Usually parties are asked to divest certain business, notably the one where competition would be lessened, and give opportunity to competitors to compete on these particular markets. However, it should be noted that the majority of notified transactions are allowed to proceed without any conditions.

[148] 15 U.S.C §18a (f) (2003), *see also* Wilson at 110.

Chapter 3: EC Merger Control Regime

As stated in the previous chapter, the issue of collective articulation of antitrust enforcement at the international level requires a discussion of the US and EU control regimes. Not only may the European merger control regime serve as a model with regard to the structure and institutional design that the international regime should embody, but also provides for an example of system where competition law was developed as a means of integration of separate economies into one "common" market.

Before going any deeper into the discussion on the European merger control regime, it is important to understand that European competition law is a supranational law applicable to concentrations affecting the European market as a single market and thereby does not substitute national laws which remain applicable in cases primarily affecting national markets. In addition, as was already stated, the principal objective of European competition law is the promotion of the integration of national markets into one single common market.

At its very beginnings, the European Union set out the governing principle that the economic activities of Member States and the Community should be done in an open market with free competition. The main objective being to ensure that competition in the internal market is not distorted.[149] To this end, the Community gave itself a set of competition rules to be enforced by the European Commission at the Community level and by the Members States' competition authorities at the national level. This complex system was designed to protect the competitive process within the common market and to enhance competitiveness of European industries at the international level.
With regard to merger control, in contrast to the Treaty of Paris[150] which provided for a rather sophisticated system of control of concentrations, the Treaty of Rome omitted to

[149] EC, *Treaty of Rome*, *supra* note 24. Article 3(1)(g) provides the Community objective of instituting a system ensuring that competition in the internal market is not distorted; article 4(1) sets forth the principle of an open market economy with free competition.
[150] EC, *Treaty of Paris* (1951) instituted the European Coal and Steel Community ('ECSC Treaty') and laid down the basis of the European Union. Article 66 of the ECSC Treaty requiring "prior authorization"

include mergers within its ambit. Interestingly and perhaps ironically, the Treaty of Rome did not specifically provide for merger control rules since the concentration of market power was not considered an issue at the time. On the contrary, increasing market concentration through mergers was respected, if not promoted, as it contributed to the integration of national economies into the common market.[151] That doesn't mean that anticompetitive mergers were allowed without any response. For years, rather than adopting a proper regime, the European Commission extended the application of article 82 and later of article 81 of the Treaty of Rome to prevent concentrations having harmful effects on competition within the common market.[152] Providing for anticompetitive mergers by broadening the interpretation of the above-mentioned articles lasted until 1989 when the European Council adopted its first EC Merger Regulation 4064/89.[153] Stated differently, due to the fact that articles 81 and 82 could not face the ever-growing proliferation of pan-European and international transactions affecting the common market, the first European merger regulation was adopted. Today, after 15 years of existence, it is obvious that European merger control rules have contributed to the restructuring of European industry and have successfully responded to the challenges of a globalizing economy.

Recently, the European merger control regime went through extensive amendments embodying numerous changes.[154] Amongst the procedural and jurisdictional amendments, the new regulation brought about a rewording of the substantive test used to assess the effects of mergers on the common market. The "dominance test", which for

of concentrations having direct or indirect effect on common market imposed *de facto* pre-merger notification.

[151] Wilson, *supra* note 6, at 145.

[152] Article 82 of the *Treaty of Rome* protects against the abuse of dominant position by one or more undertakings within the common market, or in substantial part thereof as long as the abuse may affect trade between Member States. Historically, for lack of an adequate provision, the European Commission broadened the application of article 82 to anticompetitive concentrations (*Europemballage Continental Can v. Commission,* Case 6/72 [1973] ECR 215) and followed in 1987 by applying article 81 to concentrations which pertains to restrictive agreements (*British Am. Tobacco Co., Reynolds Indus v. Commission,* Joint cases 142 & 156/84, [1987], ECR 4487; so-called *Philip Morris* case).

[153] Council Regulation (EEC) No 4064/89 of 21 December 1989, OJ L 395 (30 Dec. 1989); corrected version OJ L 257 (21 Sept. 1990); as last amended by Council Regulation (EC) No 1310/97 of 30 June 1997, OJ L 180 (9 July 1997); corrected version OJ L 40/17 (13 Feb. 1998) [hereinafter *EC Merger Regulation 4064/89*].

[154] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L24/1 of January 29, 2004 [hereinafter *EC Merger Regulation 139/2004*].

years was used as the reference point in assessing the competitiveness of concentrations[155] in the common market, was replaced by the broader concept of "significant impediment of effective competition test ("SIEC test")."[156] The international community perceived this change as a significant improvement because it responds to a larger scale of anticompetitive behaviour, ranging from single dominance to oligopolistic effects. However, being very recent, there is no case law that could witness any significant differences in the practical application of the new test. Arguably, the SIEC test should bring the EU merger analysis closer to the economic principles and more generally closer to the merger analysis as conducted in the US.

This chapter's objective is to highlight the main features of the European merger control regime, both from a substantive and procedural point of view. Moreover, at all stages of this thesis, the European articulation of national and community laws and enforcement procedures should be perceived as a potential model for an international merger control regime.

A. Substantive Issues

1. Notification Thresholds: "Community Dimension"

The proliferation of trans-European and international transactions within European jurisdiction had the immediate impact of creating chaos, due to the multiple enforcement procedures initiated by the competition authorities of the Member States, the European Commission and often foreign antirust agencies. Moreover, various procedures were conducted under differing procedural and substantive standards, which created a system that was inefficient, time-consuming, and a source of uncertainty for merging parties.

[155] Article 2(3) of *EC Merger Regulation 4064/89* stated that "a concentration, which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in substantial part of it shall be declared incompatible with the common market."
[156] Article 2(3) of *EC Merger Regulation 139/2004* states that "a concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market."

The situation highlighted the need for a clear separation of jurisdiction over transactions affecting the common market. The EC Merger Regulation 4064/89 in hopes of rectifying this problem introduced the concept of "community dimension" in order to prevent that parallel investigations were conducted by the Member States and the Community. The "community dimension" became the key notion of European merger control. Its importance stems from the fact that it is used to determine the exclusive jurisdiction of the European Commission for transactions over a certain threshold. The underlying philosophy of this delimitation is the respect of the "one-stop-shop"[157] principle, along with the principle of subsidiarity[158]. Both principles seek to avoid the overlap of competence between the competition authorities of the Member States and the European Commission. This system ensures that a case is handled by the best-placed competition authority and prevents the wasteful use of resources at different levels.

The "community dimension" *per se* is defined via the combined worldwide and Community-wide turnover thresholds.[159] The quantitative delimitation of operations

[157] The "one-stop-shop" principle in merger field is grounded in the articles 21(2) and 21(3) of the *EC Merger Regulation 139/2004* pursuant to which the European Commission has sole jurisdiction to apply the merger regulation and Member States' merger control laws are not applicable to concentrations having a community dimension.

[158] The principle of subsidiarity regulates at which level, European or Member State, the competence should be exercised. The Community exercises competence only in cases where the aim pursued can be best achieved at this level.

[159] Under the article 1(2) of *EC Merger Regulation 139/2004* "a concentration has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and
(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

Moreover, under paragraph 3 of the same article "a concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertaking concerned is more than EUR 2 5000 million;
(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;
(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and
(d) the aggregate Community-wide turnover of each of at least two of the undertakings is more than EUR 100 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

ensures that only those concentrations having a sufficient nexus with the common market falls within the ambit of EC merger regulation. Therefore, the aggregate turnover threshold of the "community dimension" is the sole criterion for the European Commission to assume jurisdiction over a transaction, irrespective of any other criteria, notably the place of incorporation or the place of main business activity of the undertakings concerned.

The system of thresholds has a double role. First, it screens out those mergers that are unlikely to affect the common market. Secondly, regarding mergers that satisfy the "community dimension" it creates an obligation for the merging parties to file a pre-merger notification with the European Commission.[160] In other words, "the EC has sole competence to investigate concentrations of Community dimension, to the exclusion of national merger authorities. In practice, this means that once a transaction is caught by the ECMR, no notifications are required in any of the EU member states."[161] The system of "community dimension" thresholds efficiently provides against multiple notifications and prevents conflicting assessments by the Commission and the Member States.

2. Regulation 4064/89 and the "Dominance Test"

Although the current EU merger regulation in force is Regulation 139/2004, it is important to first present, the historical background of European merger control, and secondly the main features of the previous regulation 4064/89 which applied for the past fifteen years to European merger control enforcement.

[160] Article 4(1) of EC Merger Regulation 139/2004 requires that "concentrations with a community dimension defined in this Regulation shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of public bid, or the acquisition of a controlling interest." In order to make the review process more efficient and timely, the new regulation also provides for the notification of transactions where a binding agreement does not yet exist, provided that "the undertakings concerned demonstrate to the Commission a good faith intention to conclude an agreement or, in case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a Community dimension."

[161] Neil Harvey, *et al.*, *A Practitioner's Guide to Takeovers and Mergers in the European Union*, 3d ed. (Surrey: City & Financial Publishing, 2001), at 3.

Historically, the application of articles 82 and 81 of the Treaty of Rome were found to be inappropriate with regard to effectively controlling mergers, as there were significant gaps in the scope of coverage provided by these articles. Article 82 only covered scenarios where an already dominant firm merged with another firm where its dominant position was increased.[162] Article 81, on the other hand, required that mergers be treated as agreements, which created much controversy and ultimately was found to be inadequate to confront the proliferation of cross-border transactions affecting competition within the common market. Moreover, another important shortcoming of articles 82 and 81 was the fact that their application supposed an *ex post* analysis of already consummated mergers, this fell short of achieving the goal of preventive merger control.

Facing a wide range of issues, the first European merger control regulation 4064/89 was designed to prevent concentrations from impeding competition on the common market by providing an efficient and preventive merger control system. For practical reasons, the existence of a set of case law and the familiarity with the concept of dominance under the article 82, the merger regulation adopted the "dominance test" to apprise mergers having a "community dimension." Thus regulation 4064/89 prohibited concentrations which created or strengthened a dominant position which would result in significantly impeding effective competition.[163]

The rationale for focusing on the dominant position can be explained by the idea that, if, following a merger a dominant player emerges, the remaining competitors will not be able to exert enough competitive pressure to deter the new entity from abusing its position. This approach was originally designed to deal with horizontal mergers where two competitors merge and the remaining competitors are faced with the combined strength of the two previously independent companies. The basic assumption is that a firm having a dominant position has the potential to act independently of its competitors,

[162] Wilson, *supra* note 6, at 148.
[163] Article 2(3) of EC Merger Regulation 4064/89.

customers and ultimately of consumers[164] and thus impose prices that are not the result of the competitive process.

Accordingly, under the dominance test merger analysis was conducted to determine whether a concentration risked the emergence of a dominant player on the market or whether following the operation a dominant position was strengthened to the extent that competition on the market, or a substantial part of it would be impeded. The main analysis was done by looking at the resulting market share. When reviewing a concentration, the European Commission considered whether a concentration was accompanied by an increase of market share and whether a dominant player emerged on the market. For instance, it was assumed that a merger resulting in a firm having a market share of less than 30% was legal due to the lack of dominant position. Similarly, if as a result of a transaction there were three corporations, each with a market share of 30%, the merger would not be dangerous since none of the corporations benefited from a dominant position. In other words, the European Commission examined the increase of market share following concentration and compared it with other competitors' market share in order to determine the likelihood of the creation or the strengthening of a dominant position.

However, critics of dominance test rightly pointed out that in such situation, using another test, notably the "substantial lessening of competition test" as used in the US, the outcome would be diametrically different. As saw previously in chapter 2, pertaining to the US merger control, using the Herfindahl-Hirschman Index method, this merger would result in a highly concentrated market and effective competition would be substantially lessened.[165]

In response to the abovementioned criticisms, the European Union put a new regulation in place which featured a new substantive test.

[164] *Hoffmann La Roche & Co AG v. Commission*, Case 87/76, [1979] E.C.R. 461.
[165] See HHI calculation.

3. New Regulation 139/2004[166] and the "Significant Impediment of Effective Competition Test"[167]

After almost 15 years of application, the debate over whether merger regulation 4064/89 should be amended and whether a new substantive test should be adopted came to a head. European control regime and the dominance test was the centre of widespread criticism for not efficiently dealing with various kinds of anticompetitive scenarios resulting from mergers. Stated differently, the old regulation did not seem to allow the market protection against so-called "unilateral effects."[168] Although the constant broadening of dominance concept by the European courts embraced almost all scenarios of potential anticompetitive effects,[169] doubts at the international level remained as to the real scope of the concept, notably with regard to various oligopolistic structures. The doubt was removed with the coming into force of Regulation 139/2004 expressly providing for the analysis of "unilateral effects" as a potential harm to competition. Consequently, the gap between two tests now appears to have been closed.[170]

The dominance test was reworded into the "significant impediment of effective competition test," which is a *de facto* European homologue of the US "substantial lessening of competition test," combining the best of the two standards and preserving the European courts' jurisprudence relative to the dominance concept. .

Article 2(3) of the new Merger Regulation now reads: "a concentration which would significantly impede effective competition, in the common market or in a substantial part

[166] of *EC Merger Regulation 139/2004* , *supra* note 154.
[167] Article 2(3) of *EC Merger Regulation 139/2004* states that "a concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market."
[168] The notion of "unilateral effects" should be understood as a particular post-merger scenario where the merged entity could profitably raise prices without any tacit or express coordination from its competitors and without the concentration creating or enhancing dominant position.
[169] Using teleological interpretation of the notion of dominance, the European Court of Justice widened the scope of the dominance test to collective dominance albeit not expressly covered in the wording of the Merger Regulation. See EC, *Joined Cases C-68/94* and 30/95 *France and Others v. Commission*, [1998] ECR I-1375.
[170] Caroline Montalcino, "Substantive Tests – Are the Differences between the Dominance and SLC Tests Real or Semantic?" in Gotz Drauz & Michael Reynolds, eds., *EC Merger Control – A Major Reform in Process*, (Richmod, UK: Richmond Law and Tax Ltd., 2002), at 178.

of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market." From the wording of the new test it is apparent that "significant impediment of effective competition" and "creation or strengthening of a dominant position" are no longer two cumulative conditions to be fulfilled in order to declare a transaction incompatible with the common market. On the contrary, "significant impediment of effective competition" goes beyond the dominance scenario and thereby dominance is not a prerequisite of anticompetitivness, but only one example, although the most recurring one, of a situation triggering a significant impediment on effective competition.[171]

With regard to merger analysis, the Commission published guidance in form of guidelines which established a comprehensive road map on how merger analysis ought to be conducted and explained how concentrations will be reviewed under the new substantive test.[172] Henceforth, European merger analysis will rely more on economic analysis[173] and therefore assess horizontal mergers in a more transparent and objective manner. In order to determine post merger concentration, the Commission will use the HHI, as used in the US, a ratio able to objectively determine the post-merger concentration of the market and thus the effect on competition as a result of the transaction. These developments should ensure a sounder and more predictable merger enforcement policy.

To sum up, as a consequence of the new substantive test and new analytical approach, the overall threshold of an anticompetitive transaction under European law has been lowered to the point where the new merger regulation will now be able to detect

[171] Recital 4 of the *Guidelines on the assessment of horizontal mergers under the Council regulation on the control of concentrations between undertakings*, [2004] OJ C31/5, 5 February 2004, online: EUROPA-COMPETITION <http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_031/c_03120040205en00050018.pdf.>..

[172] *Guidelines on the assessment of horizontal mergers under the Council regulation on the control of concentrations between undertakings* [hereinafter "*EC Horizontal Guidelines*"], [2004] OJ C31/5, 5 February 2004.

[173] To this end a new Chief Economist at the DG Competition was appointed with a team of skilled industrial economists that will assist case teams in providing economic expertise in merger analysis. The involvement of the Chief Economist team should guarantee the objectivity of the merger investigations by interpreting the evidence form purely economic perspective.

transactions that previously were not challenged because they did not create or strengthen a dominant position. Moreover, the new merger regulation, in recital 32, establishes a presumption that a concentration resulting in market share of less than 25% is deemed to be compatible with the common market.

Nonetheless, for the sake of consistency and continuity, the previous jurisprudence pertaining to the old merger regulation has remained in force because dominance continues to be the main impediment of effective competition.[174] As concerns the overall analysis, besides efficiencies which will now be considered in merger analysis, the Commission will continue to examine possibilities of new entry and other circumstances that were taken into consideration as countervailing factors in the ECMR 4064/89 such as the relevant market, remaining competition on the market, market share and concentration

i. Relevant Market

Similarly to the US, as a prerequisite to appraise the increase of market share or horizontal effects of an operation, the European Commission must determine the relevant product and geographical market affected by the transaction. The definition of the relevant market is crucial and has a considerable impact on the decision. The narrower the product and geographic market is defined, the higher the likelihood that a concentration will increase market power.

The product market should be understood as all the products which are regarded as interchangeable or substitutable by the customer because of the products' characteristics, prices and intended use.[175] Therefore the crucial question is whether a customer confronted with a "small but significant and non-transitory increase in price" would switch to another product. All products that may be interchanged or substituted for the product in question constitute the relevant product market. For instance, in the

[174] Recital 2 and 6 of the *EC Horizontal Guidelines*, *supra* note 172.
[175] EC, *Commission Notice on the Definition of* the *Relevant Market for the Purposes of Community Competition Law*, [1997] O.J. (C 372), Recital7.

Nestle/Perrier[176] merger, the European Commission held that the relevant product market was the market of mineral waters exclusively; other soft drinks were not included in the analysis insofar as consumers, French consumers in particular, did not consider these two items as substitutable or interchangeable because of the healthy effects of mineral water which are not a common virtue of other soft drinks.

The geographic market, on the other hand, is the area where the relevant product is traded under similar conditions (with respect to the transportation costs, duties or trade flows). Depending on this area the relevant geographic market is either regional, national, European Economic Area ('EEA')-wide or global. The bigger the geographic area, the more difficult it will be to establish the anticompetitivness of a transaction.

From all this, it follows that it is important to determine the relevant market, as a combination of the product and geographical markets, as the determination allows for the identification of the competitors active in the market, the respective merging parties' and the competitors' market shares as well as all other market conditions relevant to the merger analysis.

ii. Market share and Concentration

The European substantive analysis of mergers supposes an analysis of the parties' respective market position and an *ex-ante* prognosis of how their position will be altered post-merger. Market share and especially the increment of market share brought about by a transaction are indications of increase of market power.

Following the new merger regulation, the European Commission has used the HHI to measure the post merger concentration of the market. It should be noted, that the HHI is only an indication of the effect on competition that results from a transaction and to be conclusive, it must be completed by other factors.

176 EC, *Nestle/Perrier*, 22.7.1992, IV/M.190, O.J. [1992] L 356/1.

iii. Probability of New Entry

Under Regulation 4064/89 along with the new regulation a concentration which leads to or strengthens a dominant position may be compatible with the common market, within the meaning of article 2(2) of the Merger Regulation, if strong evidence exists that this position is only temporary and will quickly erode because of the high probability of a strong market entry.[177] Therefore, the Commission must examine the actual market as well as its future evolution. Concentrations concerning markets in expansion will be reviewed less rigorously than those concentrations on markets without the likelihood of new entries. If future market entries are established, the dominant position is not likely to significantly impede effective competition within the meaning of article 2(3) of Merger Regulation.[178] For instance, in the *Aerospatiale-Alenia/de Havilland* case, the Commission evaluated the possibility of new entrants and came to the conclusion that there was no realistic potential competition in the commuter markets in the foreseeable future; hence the transaction was declared incompatible with the common market according to article 8(3) of the Regulation.

In a very recent Commission decision, *Blackstone/Acetex*[179], the Commission argued that the fact that there were committed new capacities coming on stream in the short to medium term had to be taken into account in the overall assessment of the competitiveness of the merger. The Commission's services considered that the new third parties' capacities would countervail any potential price increase and deter any parties' attempt to monopolize.

iv. Remaining Competition on the Market

In order to provide a complete analysis of the effects a concentration will have on the market once completed it is important to evaluate the remaining competition. In order to assess whether the new combined entity will be able to act independently of its competitors in light of its strengthened position, it is necessary to assess the current and

[177] EC, *Aerospatiale-Alenia/de Havilland,* Case No IV/M.53, O.J. [1992] 4 CMLR M2.
[178] *Ibid.*
[179] EC, *Blackstone/Acetex,* Case No COMP/M.3625, See Press Release from July 13, 2005, online: EUROPA – COMPETITION <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/922>.

expected future strength of the remaining competitors.[180] In the *Aerospatiale-Alenia/de Havilland* case for instance, the Commission after evaluating the strength of the other competitors following the transaction decided that it was questionable whether they could provide effective competition in the medium to long term.[181]

More recently, in the *EDP/ENI/GDP*[182] prohibition decision, the Commission considered that given the lack of new capacities from the competitors, the operation would have provided the parties with all the necessary means and incentives to make access to the gas network more difficult for its competitors. Therefore, the merged entity would have had, immediately or in the near future, the ability and the incentive to raise its rivals' costs without sufficient competitive response from its competitors, thereby foreclosing actual and potential competition.

v. *Efficiencies*

The new regime constitutes a turning point with regard to the place allocated to efficiencies in European merger control. In the new regulation as well as in the horizontal guidelines[183], the Commission clearly states that it will take substantiated efficiencies into account in the overall merger analysis, in particular cost savings in the production, distribution or innovation that contribute to bring more competition onto the market by inducing firms to compete harder. However, the claimed efficiency must fulfill certain conditions, notably it must be merger-specific, beneficial to consumer, timely and verifiable.

Using Commissioner's Monti's words, an "efficiency gain' should be understood as:

> [A] long-term and structural reduction in the marginal cost of production and distribution, which comes as a direct and immediate result of the merger, which cannot be achieved by less restrictive

[180] EC, *Aerospatiale-Alenia/de Havilland,* IV/M.53, O.J. [1992] 4 CMLR M2.
[181] See Craig P. & de Burca G., *EU Law: Texts, Cases and Materials*, 2d. ed , (Oxford: Oxford University Press, 1998), at 992.
[182] *EDP/ENI/GDP.* Case No COMP/M.3440, online: EUROPA - COMPETITION <http://europa.eu.int/comm/competition/mergers/cases/decisions/m3440_20041209_610_en.pdf>.
[183] *EC Horizontal Guidelines*, *supra* note 172, at 3.

> means and which reasonably will be passed on to the consumer on a permanent basis, in terms of lower prices or increased quality.[184]

For an efficiency to be taken into account, the parties to the deal must prove that the merger is the only economically viable solution and that there are no other less competitive means to achieve the same result. In other words, they must prove that the particular efficiency they are invoking may be attained solely through the proposed merger and that there is no other non-concentrative alternative to achieve this particular efficiency gain.

One of the recent illustrations of efficiencies being claimed by the parties was *AREVA/URENCO/ETC*[185] joint venture where parties claimed substantial cost savings that one merging firm would achieve by being able to adopt the modern technology of another merging party. The Commission was, however, not sufficiently convinced by the merger specificity of these claims, particularly with regard to the most restrictive aspects of the joint venture.

It goes without saying that the efficiency to be taken into account must directly benefit consumers. The efficiencies should be defined in relation to consumer welfare and not merely shareholders' welfare. The most obvious example of consumer benefiting efficiencies would be lower prices in the relevant product market; however, innovation might also be taken into account. It should be noted that when talking about price reduction following a merger, the reduction must be timely and durable. As Mario Monti has pointed out, the gain in terms of lower prices must occur on a lasting basis and not a temporary play with the goal to drive the competitors out of the market.

The verifiability of efficiencies should be understood as a reasonable certainty that a particular efficiency will be realized in a timely manner. In the same vein, there must be

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[184] Mario Monti, "Antitrust in the US and Europe: a History of convergence," speech given at the General Counsel Roundtable American Bar Association, (Washington DC, 14 November 2001), online: EUROPA COMPETITION<http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/01/540&format=HTML&aged=0&language=EN&guiLanguage=en>.

[185] *AREVA/URENCO/ETC JV*, Case No COMP/M.3099, online: EUROPA – COMPETITION <http://europa.eu.int/comm/competition/mergers/cases/decisions/m3099_20041006_600_en.pdf>.

a high probability that the efficiency is substantial enough to balance potential harm to consumers.[186] Nonetheless in the United States, no efficiency gains are substantial enough to counteract a monopoly or quasi-monopoly.

Taken as a whole, the adoption of "efficiency defence" by the European merger control as a mitigating factor in the event of a dominance finding contributes significantly to the convergence of analytical approaches adopted by the US and EU. It is also a step forward in terms of the enhanced efficiency and transparency of merger review.

vi. Possible Theories of Harm: Coordinated Effects and Non-collusive Oligopolies or "Unilateral Effects"

Insofar as EC merger regulation was based on the concept of dominance, Article 82 provided a road map on how dominance ought to be interpreted. Originally, the concept of dominance in EC competition law was perceived as dominance by a single firm.[187] However, the European courts continuously broadened this notion and brought joint or collective dominance within the ambit of Article 82. The *France v. Commission* case confirmed that dominance as expressed in the Article 82 and in the Merger Regulation are identical concepts and therefore the Regulation could be used to prevent the creation or the strengthening of a collective dominant position.[188]

Coordinated effects or collective dominance are one of the traditional oligopolistic post-merger scenarios. In reality what happens is that a merger taking place in specific market conditions induces structural changes that allow firms to attain a collusive outcome in terms of price and quantities. Among the market conditions making plausible post-merger coordinated effects figure the homogeneity of products in which the merging firms are active, the symmetries of their respective market shares, price transparency and the retaliation mechanism in case of deviation. For instance, it is very difficult to argue the likelihood of coordinated effects in bidding markets that make the competitors'

[186] See *EC Horizontal Guidelines*, *supra* note 172.
[187] See e.g. *Hoffmann-La Roche,* Case c-333/94P (1979) defining concept of dominance as dominance by a single firm.
[188] Kirsty Middleton, Barry J. Rodger & Angus MacCulloch, *Cases and Materials on UK & EC Competition Law,* (London: Oxford University Press, 2003), at 430.

prices non-transparent. The verification of these conditions often requires a sound economic analysis of market conditions and even then it is extremely difficult to build a coordination case.

Nonetheless, the question remained whether the Regulation covers non-collusive oligopolies meaning situations where the effect of merger may still impede competition although the merged entity's market share falls below the traditional dominance threshold. While US Horizontal Mergers Guidelines[189]clearly provide for situations where following the merger, the market equilibrium changes to the extent that prices are increasing even without express or tacit coordination of market participants, the EC merger regulation was criticized for not guarding against such a scenario.

New Merger Regulation 139/2004 together with the newly adopted Horizontal Mergers Guidelines[190] creates a new category of anticompetitive mergers: a non-collusive oligopoly restraining competition without satisfying the single or collective dominance thresholds. Henceforth it is clear that European merger control covers all kinds of anticompetitive situations, *inter alia* non-coordinated effects.

The classic scenario of non-collusive oligopoly would be a situation where two competitors (none having a dominant position) in closely substitutable product markets merge leading to the elimination of competition in this market. Because competition between these two firms is eliminated, consumers' possibilities to switch from one supplier to another become limited, and the merged entity will be able to raise prices, even without having a dominant position *per se*. In other words, even though the after-merger oligopolistic market would exhibit a healthy degree of competition in terms of market shares, it is undeniable that this particular concentration eliminated important competitive constraints and therefore reduced competitive pressure on the remaining competitors. Consequently, even in the absence of the likelihood of a tacit or express coordination between the members of a new oligopoly, the transaction has resulted in a

[189] *1992 Horizontal Mergers Guideline*, *supra* note 118, .
[190] See *EC Horizontal Guidelines*, *supra* note 172.

significant impediment to competition by the sole fact that the competition between merged firms disappeared.

While in theory the new European merger control regime covers all oligopolistic scenarios a test case of unilateral effects is yet to come.
The main features of the substantive rules governing merger analysis as carried on in the European Union being exposed, it is time to present the procedural rules which make the European regime one of the most efficient merger control regimes in the world.

B. Procedural Issues

With respect to procedural issues, the new Regulation adopts new time limits in order to allow parallel investigation procedures with its American counterpart, but also in order to make the merger review more efficient, transparent and adapted to economic reality. Parallel investigations will allow for enhanced discussion and cooperation between both agencies.

However, there remain some considerable differences in terms of procedure between the US and the EU, notably with regard to the nature of merger review itself. While in the US merger review is basically prosecutorial and antitrust agencies challenge the operation before the courts, the Europeans use a completely different approach. European merger review is of an administrative nature and the European Commission itself has decisional power to challenge the transaction or leave it be. "The EU Commission acts both as a prosecutor and judge, and does not need the blessing of a court to enjoin a merger."[191] Nonetheless, the European Commission's decision is subject to judicial review by European courts.

However, despite this significant procedural difference, there is no reason to believe, that further convergence between two sides of the Atlantic might be jeopardized.

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[191] *Supra* note 62, at 185.

1. Competence of the European Commission

While in the US the federal antitrust enforcement power is dispersed among two federal agencies, in the EU the monopoly of enforcement power is held in the hands of the European Commission for transactions satisfying required threshold.[192] On the other hand, as concerns the two-level, state and federal antitrust enforcement, US dual enforcement is directed by federal structure, whereas the EU dual enforcement scheme is governed by the principle of subsidiarity.[193] The dividing line allocating jurisdiction over competition affaires between the community and Member States is represented by the concept of "community dimension." While transactions attaining the size of "community dimension" fall exclusively within the jurisdiction of the European Commission, cases below this threshold are treated by competent member states.

Moreover, while US antitrust authorities must prosecute a merger in courts if they have concluded that the consumption of the transaction would lead to substantial lessening of competition, the European Commission has power to approve or prohibit a merger by an administrative decision. It doesn't however mean that the administrative decisions are not subject to judicial review. On the contrary, 44% of prohibition decisions are scrutinized by the courts.[194]

i. Exclusive Jurisdiction over Transaction with "Community Dimension"

As was already stated, the European Commission has exclusive jurisdiction over transactions having a community dimension, and thereby national authorities are prohibited from applying national laws on transactions satisfying community

[192] Paul B. Stephan, "Against International Cooperation" in Richard A. Epstein & Michael S. Greve, eds. *Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy*, (Washington D.C.: The AEI Press, 2004), at 72.
[193] EC, Article 3b of *Treaty on European Union*, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, *31 I.L.M. 247*, (amending Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179--II), as amended by Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741, in Treaties Establishing The European Communities (EC Off'l Pub. Off. 1987)) stipulates that the Community may take action "only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States."
[194] *Supra* note 184. In 2001, out of 18 prohibition decisions in 10 years practice, 6 were appealed and in two cases parties announced the intention to appeal.

thresholds[195]. Similarly, the Commission has exclusive jurisdiction to apply the Merger Regulation to these transactions[196]. A recent decision of the European Court of Justice confirmed the exclusive competence of the European Commission and the exclusive applicability of the Merger Regulation over transactions with "community dimension" and requested to the Portuguese government to withdraw decisions taken on the basis of national legislation with respect to a concentration having community dimension[197].

As the Court of First Instance ('CFI') exercise the control of legality, it only checks whether there was a manifest error in the Commission's assessment. Although the CFI takes more and more active role in examining circumstances of a transaction when reviewing the Commission's decisions, it should be noted that the CFI, as a body making judicial review of an administrative decision, has authority to check exclusively whether the community law was respected and properly interpreted.

ii. Exceptions to Exclusive Jurisdiction: Referrals

As was stated in the previous section, the basic principle conferring jurisdiction to the Commission over a transaction is based on combined turnover thresholds. In this respect, the referral system constitutes a corrective mechanism to the threshold principle. The underlying idea of referrals resides in the subsidiarity principle, meaning that the best placed authority reviews the transaction while at the same time respecting the one-stop-shop principle. In terms of timing, following the adoption of the new Merger Regulation 139/2004, referrals may be made either prior to notification[198] or after notification has been filed[199]. The new merger regulation brought about an important innovation: the pre-notification referral. This innovation was designed to enhance administrative efficiency in merger review and to allow the parties to take initiative prior to notification of a transaction to request a referral from an antitrust authority when they feel that there is a better placed authority to review the transaction than the one that would be normally competent.

[195] See article 21(3) of the *EC Merger Regulation 139/2004, supra* note 154.
[196] See article 21(2) of the *EC Merger Regulation 139/2004, supra* note 154.
[197] EC, Judgment of 22 June 2004 in case *C-42/01 Portuguese Republic v. Commission.*
[198] Articles 4(4) and 4(5) of the *EC Merger Regulation 139/2004, supra* note 154.
[199] Articles 9 and 22 of the *EC Merger Regulation 139/2004, supra* note 154.

Generally speaking, pursuant to referrals may arise two situations: the Commission either has jurisdiction over a transaction but decides not to exercise it because there is a better placed authority to do so[200], or the Commission does not have jurisdiction over a transaction and accepts to assume it because the concentration affects trade between member states[201]. In both cases, several conditions must be fulfilled. In the first case, a transaction having a community dimension threatens to impede effective competition in distinct markets within a specific Member State; this transaction may be referred to that Member State if the Member State requested it. In the second case, if a concentration not having a community dimension affects trade between Member States while at the same time threatens to significantly affect competition within the territory of one Member State, the latter may request the Commission to take jurisdiction. A certain number of administrative inefficiencies are avoided through referrals to the Commission. In particular, centralized treatment avoids the cost of multiple filings in various Member States as well as the risks of conflicting decisions in parallel national proceedings. Moreover, it secures a coordinated investigation and ensures consistent remedies across the whole territory of the EU.

Finally, it should be remembered that while referrals may contribute to enhance the efficiency of European merger review, this mechanism is only exercised on an exceptional basis in order to avoid uncertainty and unpredictability with respect to the competent jurisdiction.

2. Two-step Investigation Procedure

The efficient scrutiny of large cross-border transaction is one of the main features of the European merger control enforcement. Merger investigations are conducted within tight deadlines to fit the needs of business actors and to ensure the transparency of the review process. Every notified transaction results in the adoption and publication of a reasoned decision.

[200] See articles 4(4) and 9 of the *EC Merger Regulation 139/2004, supra* note 154.
[201] See article 4(5) and 22 of the *EC Merger Regulation 139/2004, supra* note 154.

Prior to the formal notification of a transaction to the European Commission the parties are provided with the possibility of pre-notification contacts with the Commission in order to discuss in an informal way the legal and jurisdictional issues surrounding the proposed transaction.[202] These contacts are particularly important as they help the parties to set up a complete notification which might be crucial for the investigation as the deadlines are very short. Once the parties decide to notify, the deadlines start officially to run. It is important to remember that a transaction cannot be implemented until it has been declared compatible with the common market.

i. First Stage Investigation

The first stage investigation officially starts on the date when complete notification is received by the Commission. In terms of the procedure, new Merger Regulation 139/2004[203] introduces the possibility of notifying a transaction having a "community dimension" to the European Commission prior to the conclusion of a binding agreement provided a good faith intent to conclude such an agreement exists. This innovation is designed to provide a more flexible approach benefiting not only the parties who can best organize their transactions, but also facilitating international cooperation in merger cases.[204]

In contrast with the US where during the initial stages of merger review only general information about the transaction is required, in the EU extensive information is provided by the parties in the notification Form CO.[205]

During the first stage of market investigation, the European Commission makes a detailed appraisal of the market conditions via requests for information in the form of

[202] See EC, Best Practices on the conduct of EC merger control proceedings, 20 January, 2004, Article 3.
[203] *EC Merger Regulation 139/2004, supra* note 154.
[204] See Article 4(1) of EC *Merger Regulation 139/2004*. See also Mario Monti, "A reformed competition policy: achievements and challenges for the future" in *Competition Policy Newsletter*, (Autumn 2004, Number 3), at 5.
[205] Where the simplified procedure is used, the information to be provided is detailed. This is due to the fact that the European Commission reviews approximately 300 transactions having community dimension each year, while the US enforcement agencies deal with thousand of notifications annually, 4700 in 1999 for instance.

questionnaires to the main customers and competitors active in the relevant market. The first phase investigation must be accomplished and an article 6 decision must be taken within 25 working days following the receipt of the notification, which can be extended to 35 days where a Member State requests referral or if the undertakings concerned offer commitments. During the whole procedure the parties and the Commission maintain contacts in order to provide all the necessary information for the proper assessment of the case. At the end of the first phase, once the Commission has evaluated market conditions and conducted an analysis of the possible effects of the transaction on the relevant market, the Commission must take a decision and either approve the transaction and thereby declare it compatible with the common market[206] or initiate an in-depth investigation in cases where the concentration raises serious doubts as to its compatibility with the common market.[207] The Commission may also state that the concentration does not fall within the scope of the Merger Regulation, but this is very rare.[208]

A big asset of the European system, as compared to its US counterpart, is the transparency of the whole review process. Parties are alerted of all concerns and the Commission makes motivated decisions at all stages whereby parties are provided with sufficient insight into the reasons for a particular decision. Moreover, this practice contributes to the elaboration of a body of precedents to guide future parties as well as the agency.[209]

ii. Full Investigation: "Serious Doubts"

With respect to second phase investigations, it is important to note that the new Merger Regulation foresees a systematic appointment of internal peer review panels designed to strengthen the already considerable checks on the soundness of the investigators' preliminary conclusions.[210]

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[206] See Article 6(1)(b) of the *EC Merger Regulation 139/2004*, *supra* note 154.
[207] See Article 6(1)(c) of the *EC Merger Regulation 139/2004*, *supra* note 154.
[208] See Article 6(1)(a) of the *EC Merger Regulation 139/2004*, *supra* note 154.
[209] ICPAC Report, *supra* note 11, at 61.
[210] Mario Monti, "A reformed competition policy: achievements and challenges for the future" in *Competition Policy Newsletter*, (Autumn 2004, Number 3), at 4.

The deadlines for second phase investigations start to run on the date of the first phase decision stating that a concentration raises serious doubts as to its compatibility with the common market. During the second phase, the Commission conducts a more detailed analysis of the market and the parties have right to access the file and request a formal oral hearing. Within 90 days following the initiation of the proceedings or 125 days if the parties have requested an extension, the Commission must take a decision and either prohibit the transaction on the basis of its incompatibility with the common market[211] or declare the concentration compatible and allow the parties to proceed with the transaction.[212] The Commission may also impose remedies on the parties as a condition for the approval.[213]

Prior to the publication of the decision in the second phase, the Commission must obtain the approval of the Advisory Committee, which consists of the representation of Member States' antitrust authorities.

[211] See article 8(3) of the *EC Merger Regulation 139/2004*, *supra* note 154.
[212] See article 8(1) of the *EC Merger Regulation 139/2004*, *supra* note 154.
[213] See article 8(2) of the *EC Merger Regulation 139/2004*, *supra* note 154.

Chapter 4: Harmonization of Merger Control Rules

Legal harmonization was often considered to be a natural complement of the globalization movement and free trade. Many areas of law including environmental rules, labour practices or intellectual property rights were subject to harmonization within various global agreements, the WTO in particular.[214] In this context, competition policy seemed to be another candidate for such an approach as it is deeply concerned with free market access, the main goal of any global trade policy. Various harmonization scenarios have been considered for competition policy, ranging from the establishment of minimum standards to an ambitious international antitrust system, which would include a multilateral codification of antitrust rules, an enforcement agency overseeing its application and a dispute resolution system. However, as was already outlined in the introduction, there is a fundamental debate that must precede any discussion as to the form or the content of any multilateral codification, notably whether harmonization of competition law is necessary or desirable.[215]

The case for harmonization of competition law rests on three previously mentioned arguments. Firstly, given that most economic transactions as well as the markets where these transactions take place are global and the fact that anticompetitive practices are often global as well, the rules governing these transactions should be of a global nature. Secondly, the enforcement of divergent antitrust laws is inefficient as it raises transaction and administrative costs. Third, the parallel enforcement of non-harmonized laws creates a system where the most restrictive laws govern cross-border transactions. In recent years, these three concerns gave rise to an air of inevitability that competition laws would be harmonized. However, while it is clear that national laws cannot successfully cope with these issues, the question remains as to whether the international harmonization of substantive laws will prove more effective.

[214] Harry First, "Theories of Harmonization: A Cautionary Tale" in Hanns Ullrich, ed., *Comparative Competition Law: Approaching an International System of Antitrust Law*, (Baden-Baden, Germany: Nomos Verlagsgesellschaft, 1997), at 31. See also *General Agreement on Trade in Services*, Apr. 15, 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1B, Legal Instruments -- Results of the Uruguay Round 283, 292, *33 I.L.M. 1167,* 1175 (1994).
[215] See Ehlermann & Laudati, *supra* note 20, at xiii.

The debate surrounding the harmonization of competition laws is closely linked to the debate about the goals of the competition law. Recognizing that the goals of competition law vary at least to a certain extent among jurisdictions, depending on the historical and economic background of the countries or their level of development, the question is how the harmonization of competition laws would accommodate this diversity. Either we accept the fact that jurisdictions have different goals and needs and therefore we abandon the idea of harmonization, or we will struggle to attempt to harmonize laws based on different goals, which will necessarily be at the lowest common denominator.

Moreover, the global diversity of competition laws promotes regulatory competition. Different competition laws in different areas of the world allow regulators to observe the impact of the various rules and ultimately compare their efficiency in practice. Having a uniform code would necessarily imply the loss of the benefit of comparison and ultimately of legal innovation.[216] Therefore, unless there is complete certainty about which rules are the most appropriate and which ones prove to be the most efficient in resolving anticompetitive issues, the optimal result would probably come from maintaining the interaction between the different competition laws.[217]

From an economic standpoint, it would be necessary to compare the costs of a non-harmonized approach with the costs of harmonization, including negotiation costs, and to produce a cost-benefit analysis of the harmonization of competition laws. It is important to remember that uncertainty remains as to whether the costs of harmonization are actually lower than the costs of a non-harmonized system and secondly, it is not excluded that the costs of negotiating an international regime will exceed its benefits.[218]

[216] John O. McGinnis, "The Political Economy of International Antitrust Harmonization" in Richard A. Epstein and Michael S. Greve, eds., *Competition Laws in Conflict : Antitrust Jurisdiction in the Global Economy*, (Washington: The AEI Press, 2004), at 131.
[217] Prof. Hovenkamp, "Panel Discussion 3: Competition Policy Objectives in a Multilateral Competition Code" in Ehlermann & Laudati, *supra* note 20, at 145.
[218] Wolfgang Kerber and Oliver Budzinski, "Competition of Competition Laws: Mission Impossible?" in Richard A. Epstein & Michael S. Greve, eds. *Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy*, (Washington D.C.: The AEI Press, 2004), at 53.

A. Is There a Need for Harmonization?

The globalization of trade has led to a substantial increase in cross-border economic activity and cross-border merger activity in particular. While markets have become global in scope, the laws controlling them remain national.[219] A wide consensus has emerged with regard to the inappropriateness of national laws dealing with global transactions, however there has been little consensus as to the solution to this problem.[220] Various proposals have been made, ranging from maintaining the *status quo* to the negotiation of a global competition law code enforced by a supra-national authority.

The problem of jurisdictional overlap is growing. Given that virtually all companies have activities in more than one jurisdiction, they are exposed to numerous laws regulating their behaviour, often containing different provisions. It goes without saying that different provisions almost necessarily lead to disparate treatment in different jurisdictions, which consequently leads to uncertainty. Moreover, complying with different laws imposes a significant burden on the parties and the reviewing agencies in terms of the transaction and administrative costs respectively. In light of these arguments, the case for harmonization seems to be a solid one.

1. The Case for International Harmonization of Competition Standards

As was already mentioned, different legal provisions impose different obligations on the merging parties, which may have onerous consequences on the parties and the agencies involved alike. Accordingly, every merging firm must cope with the disparate requirements of the national laws and must confront various questions prior to completing any transaction, such as in which jurisdiction is the transaction reportable, following which what are the notification delays in each jurisdiction, what information is required in each jurisdictional filing, and finally what are the consequences of

[219] *Supra* note 10, at 1786.

[220] *See* Michael G. Egge, "The Harmonization of Competition Laws Worldwide", Richmond Journal of Global Law & Business, [Vol. 2:1, 2001], at 99. Online: <http://thehookup.richmond.edu/~rjglb/egge.pdf>.

notification for the transaction.[221] Assuming that more than 80 jurisdictions[222] have some form of mandatory pre-merger notification requirement, managing all these issues poses a significant burden on the parties.[223]

On the other hand, from an administrative review standpoint, it seems inefficient that 80 jurisdictions review the same transaction (although this is only purely hypothetical, no transaction has ever been reported in so many jurisdictions). Therefore, it seems obvious that a uniform notification procedure would lead to significant savings for the merging parties and administrators.

Accordingly, if we do not harmonize the substantive rules, at minimum the harmonization of the procedural rules relating to merger control seems desirable. The prospects of harmonization with regard to pre-merger notification rules are good as an agreement should not be difficult to reach. Harmonized notification rules would benefit the cooperation that agencies engage in during their bilateral reviews pursuant to various bilateral agreements.[224] With respect to the harmonization of notification standards, significant work has already been done within the International Competition Network ('ICN'). The ICN's guiding principles and recommended practices for merger notification and review procedures[225] achieved substantial convergence in this respect. Regardless, of the fact that they are not binding on their members.

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[221] *Ibid.*, at 96.

[222] ABA Section of Antitrust Law, *Competition Laws Outside the United States*, ch.1 (2001), at 1-14, at 13. See also William Rowley & Donald Baker, *International Mergers – The Antitrust Process*, 2d ed. (London : Sweet & Maxwell, 2000), at I-1.

[223] Nearly every jurisdiction that requires pre-merger notification as a condition to closing treats different aspects of the notification differently. The triggering event for notification, the extent of information that have to be provided and the time frames vary substantially among jurisdictions. For instance, the European Union requires extensive information in the notification while the United States and Canada leave the extent of information provided to the discretion of the parties but generally speaking they ask only for general information in the original filing. *See* Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004, Annex I: Form CO; Hart-Scott-Rodino Act, 15 .S.C.18a(a) and Canadian Competition Act, R.S.C., ch. C-34, § 123.(1).

[224] Jurgen Basedow and Stefan L. Pankoke, General report in Jurgen Basedow, ed., *Limits and Control of Competition with View to International Harmonization*, (The Hague: Kluwer Law International, 2002), at 55.

[225] See generally, ICN, online: ICN <http://www.internationalcompetitionnetwork.org/notification.html>.

Not only does the compliance of different merger control legislations lead to higher transaction costs regardless of whether the transaction raises competition concerns or not, it also contributes to uncertainty. Under the effects doctrine right up until the final enforcement agency competent to review the transaction gives its approval, the transaction is not sure to be implemented. This uncertainty is particularly uncomfortable in cases where different agencies scrutinize the transaction in different time periods. Moreover, different competition standards lead to uncertainty with respect to the outcome of the national reviews and increase the potential for conflict that only multiplies with the number of agencies reviewing the transaction. In this respect the rationale for harmonization of competition laws resides in the transparency and legal certainty that harmonized rules afford as compared to the uncertainty created by the different approaches of the various enforcement agencies.

Finally, as was already discussed in the introduction, under the system of divergent competition laws it is the most restrictive law that in cases of conflict prevails. In theory, a situation where all but one of the competent jurisdictions approved the transaction, the merger would still not be able to go through. If competition laws were harmonized, this problem would simply disappear. A transaction would either be approved or rejected by all jurisdictions.

In the light of the abovementioned arguments, it appears that the harmonization of competition laws would significantly alleviate some problems related to the parallel application of divergent rules. However, the question remains as to whether these reasons are enough to justify the high costs of harmonization.

2. Is the Need for Harmonization Real?

Two basic questions regarding the harmonization of competition laws must be answered: (1) is the harmonization of merger control laws possible and (2) would harmonization alleviate the problems created by globalization with respect to merger control.

While there is no doubt that the harmonization of competition rules relative to the proscription of anticompetitive practices such as hard core cartels would not only be beneficial but also efficient, the same cannot easily be said about merger control rules. In fact, the discussion of the harmonization of merger control rules should be subdivided into the discussion of harmonization of procedural rules and the harmonization of substantive standards.

Merger procedural rules would be a suitable candidate for harmonization due to the fact that reaching an agreement on procedural rules should not present particular difficulty and harmonized procedure would benefit the merging parties and enforcement agencies equally.[226] On the contrary, with regard to the substantive standards, harmonization would appear to be more difficult as these substantive rules usually reflect the competition culture of each particular country, they have a direct influence on each nation's merger analysis and ultimately on their decisions and are often intermingled with other national policy considerations.[227] Accordingly, the harmonization of substantive standards appears to be an almost impossible exercise.

With regard to the question whether harmonization would resolve the problem of divergent outcomes it should be noted that the harmonization of competition laws would not necessarily lead to uniform outcomes worldwide. Taking for example the EU-US relationship, it is interesting to note that despite many values that the Americans and the Europeans share and despite the high degree of harmonization of rules, it is sometimes impossible to reach a convergent outcome. It would therefore be much more difficult – not to say impossible- to reach convergence at a multilateral level.

[226] *Supra* note 224, at 55.
[227] *Ibid.*, at 56.

> If two enforcement agencies, which follow similar antitrust laws and are influenced by similar cultures, reach conflicting conclusions on fundamental antitrust issues, then it is clear that as firms expand into global market these types of problems will arise more frequently. The need for some type of cooperation between nations is evident.[228]

Another question must be asked as to whether harmonization is really necessary in light of the fact that there exists a *de facto* duopoly between the US and EU antitrust regimes. In reality, there are only two, at most three substantive tests used in merger analysis by different nations worldwide. Virtually all nations having effective merger control laws use either the (1) substantial lessening of competition test, as used in the US or (2) the dominance test, as was formerly used in the EU and few use (3) the public interest test. Emerging regimes have had the tendency to simply follow the lead of the existing antitrust jurisdictions, notably the US and the EU. From this perspective, the disparity of regimes is reduced to two disparate regimes. In addition, there has been a general tendency of convergence between the two countries given their years of interaction and bilateral cooperation, this will be discussed later.[229] Therefore, there are strong indications that over time competition regimes around the world will continue to converge through cognitive convergence and mutual learning even without formal harmonization of substantive rules.

Finally, because there have been relatively few conflicts in the past, the question as to whether it is worth to engage into negotiations of common rules must be raised. In reality, if the number of conflicts in the area of international antirust is rather low, the need for international harmonization is not urgent.[230] Accordingly, we may be better off without harmonization because harmonized rules do not necessarily imply consistent

[228] Kathleen Luz, "The Boeing –McDonnell Douglas Merger: Competition Law, parochialism, and the need for globalized antitrust system" (1999-2000) 32 Geo. Wash. J. Int'l L. & Econ.155, at 171.
[229] The European Union adopting the new "substantial impediment of effective competition test" used in merger analysis got even closer to the US merger control regime. Accordingly, as there is a tendency of convergence between these two regimes, there are strong indications that this tendency will spread on other regimes.
[230] Henning Klodt, "Conflicts and Conflict Resolution in International Anti-trust: Do We Need International Competition Rules", (2001) The World Economy. 24 (7), at 882.

outcomes[231], and the conflicts were rather rare and only a few were due to differences in the substantive laws.[232]

Although the need for harmonization does not seem to be imminent, it is worth noting that convergence attempts, notably between the leading jurisdictions, have proven to be successful in the past.

B. Fruits of Harmonizing Approach: Example of the EC/US Convergence

In the context of the *de facto* duopoly between the US and EU antitrust regimes, it is important to note that a great deal of convergence of the substantive rules between the two jurisdictions has been done. This fact confirms that regulatory competition does in fact lead to innovation and that convergence occurs even without express harmonization.

Examining the convergence of the US and EU regulations we observe that the convergence of rules have the potential to not only to minimize the risk of divergent approaches and ultimately outcomes, but also to make the review process more efficient in situations of approval.

The long-lasting interaction between the US and EU merger control regimes led to the convergence of the substantive test used by the two systems to assess the competitiveness of a transaction and the overall merger analysis..

1. Convergence in Substantive Tests: "SLC" and "SIEC"

In adopting a new substantive test the European Commission clearly showed the willingness to have consistent merger analysis on both sides of the Atlantic. Although the European Union did not adopt *mutatis mutandis* the "substantial lessening of

[231] The inconsistent outcomes may have source in different interpretations rather than in different substantive provisions. Moreover, it is often difficult to achieve meaningful convergence if other considerations, such as industrial policy, come into play. *See* Boeing/McDonnell Douglas.
[232] See *GE/Honeywell* where conflict between the US and EU was caused by different analysis of portfolio effects. For more see Chapter 5.

competition test" the new test clearly converges to this concept in its wording and in its scope.

The European dominance test had long been criticized for not having the flexibility to adapt to the reality and diversity of multinational transactions. It was argued that the dominance test placed too much focus on market share and did not provide against oligopolies that might act independently in fixing prices. "The dominance test is too focused on static structural considerations such as corporate size or industry concentration, and does not allow for a sufficient consideration of dynamic and behavioral factors."[233] Moreover, the dominance test did not analyze the entire impact of a merger on the market; it simply focused on the dominant players. Merger analysis being above all, an economic exercise, requires a sound assessment of the impact of a merger on the effective competition on a relevant market.

It is important to bear in mind the economic assumption that effective competition provides benefits to consumers in the form of lower prices, higher quality products and a wider selection of goods and services. Therefore the basic economic premise is that if post-merger competition is reduced an incentive is provided to new entities to raise prices and reduce output. The role of merger analysis is to forecast a merger's impact on competition on the market and to prevent mergers that are likely to deprive consumers of these benefits.[234] Because the dominance test, focused too much on market share, fell short in this respect, the EU decided to adopt the "SLC test" as known in the United States, UK and Canada.

Accordingly it was argued that the dominance test did not automatically cover all scenarios of anticompetitive behaviour that may occur in a merger. There were potential gaps in the scope of the dominance test approach. In particular, the test was criticized for not encompassing the unilateral effects of non-collusive oligopolistic dominance: for

[233] European Commission, *Green Paper on the Review of Council Regulation (EEC) No 4064/89: Summary of the replies received*, online: EUROPA-COMPETITION <http://www.europa.eu.int/comm/competition>, at 16.
[234] Recital 8 of the *EC Horizontal Merger Guidelines*, *supra* note 172.

example, a merger between the second and third largest firms in a particular market may not have been covered by the dominance test in situations where the market did not exhibit characteristics normally associated with oligopolistic dominance.[235]

However, the SLC test is not without its critics and it can be argued that its adoption in the European Community might jeopardize the whole European merger control regime. Taking into account the European court system it is clear that the word "substantial" leaves room for a broad interpretation and therefore could potentially lead to the arbitrary and discretionary intervention of the European courts.

The new Merger Regulation 139/2004 adopts an original formula which falls somewhere between the dominance and substantial lessening of competition test. It declares concentrations which "significantly impede effective competition, in particular by creating or strengthening of a dominant position" incompatible with the common market. Accordingly, the new test focuses more on the effects that would impede competition of a particular transaction than on the static market share percentage.

Although it would be an oversimplification to argue that no conflict will arise in the future between the EU and the US thanks to the new test, it will definitely decrease the potential for conflicts.

2. <u>Convergence in Overall Merger Analysis</u>

It was also argued that the overall merger analysis in the European Union is not the same as in the Unites States. To this end, besides the new substantive test set out in the new merger regulations, new European Guidelines establishing a comprehensive road map on how merger analysis ought to be conducted following May 1st, 2004 have been put in place. While US/EU convergence proved itself successful notably with regard to the use of economic analysis, the treatment of efficiencies and the unilateral effects of mergers

[235] Timothy J. Muris, "Merger Enforcement in a World of Multiple Arbiters" (Washington DC, 2001), at 17.

and we can now state that the overall merger analysis is very similar and should not be the object of conflicts in the future.

i. Enhanced Use of Economic Analysis

Economic analysis is central in the overall merger analysis. The use of objective economic tools is crucial for the quality and predictability of decisions in competition matters and certainly furthers the transparency of merger decisions.[236] The EU has delayed embracing fully economic analysis into merger review partially due to the historical objective of market integration and the related objective of protecting the freedom of action of market players.[237] Whereas the US has fully committed to the economics from their antitrust beginnings, the EU only recently acknowledged the merits of sound economic analysis.[238]

Henceforth, European merger analysis will rely more on economic analysis and therefore assess horizontal mergers in a more transparent and objective manner. In order to determine the post merger concentration, the Commission, as already discussed, will use the HHI to objectively determine the concentration as results from a transaction.

Today, there is a general agreement within the international antitrust community with regard to the necessity of using economics in the merger analysis. However, it must be noted that although economics may appear to be an exact science, it is not rare to see two completely opposite economic analyses both conducted by recognized scholars. There is a lack of consensus on many economic theories and notably with regard to the effects of some transactions.[239] Economics are vitally dependent on the quality and quantity of the data used and as it often happens in merger cases the merging parties are not able to provide adequate data covering sufficient periods of time and therefore the results of economic analysis are often inconclusive.

[236] C. Ehlerman and Laudati, *supra* note 20, at x.
[237] *Ibid.*, at xi.
[238] EC, Communication from the Commission, A pro-active Competition Policy for a Competitive Europe, Brussels, 20.4.2004, COM(2004) 293 final, at 7.
[239] See e.g. C. Ehlerman and Laudati, *supra* note 20, at 144.

ii. Efficiencies: the "Efficiency Defence " v. the "Efficiency Offence"

Another important modification which has brought European merger control closer to its US counterpart is the European acceptance to use specific efficiencies in the analysis of a transaction's possible effects in a relevant market. While traditionally the view on efficiencies was divergent on the two sides of the Atlantic, contemporary economic reality has shown that efficiencies cannot be overlooked in the overall merger assessment.

Historically, the European Commission has been reluctant to take efficiencies into account to counteract the adverse effects of dominance. Paradoxically, in certain cases the European Commission considered that efficiencies might be a factor enhancing or creating a dominant position. A perfect illustration of an "efficiency offence" can be observed in the *British Telecom/MCI (II)*[240] and *AT&T/NCR*[241] merger cases where the European Commission stated that "it is not excluded that the potential advantages flowing from synergies may create or strengthen a dominant position." In other words, efficiencies (assuming that they lead to reduction of prices through economies of scale and thus have a positive impact on consumer welfare), may work as an incentive for further concentration on the market, which might, in the long run, lead to an increase in prices on the market (assuming the increase in market concentration leads to a substantial lessening of competition on the market and thus to higher prices).[242]

This created a paradoxical situation because the merging companies were required to plead, on one side of the Atlantic that their transaction would create substantial efficiencies while on the other side, those same arguments might potentially have been qualified as contributing to the creation of a dominant position.[243] While the US attaches

[240] EC, *BT/MCI (II)*, Case IV/M.856, Online: EUROPA – COMPETITION <http://europa.eu.int/comm/competition/mergers/cases/decisions/m856_19970514_600_en.pdf>.
[241] EC, *AT&T/NCR*, Case No IV/M.050, Online: EUROPA-COMPETITION <http://europa.eu.int/comm/competition/mergers/cases/decisions/m50_en.pdf>.
[242] Caroline Montalcino, "Substantive Tests – Are the Differences between the Dominance and SLC Tests Real or Semantic?" in Gotz Drauz & Michael Reynolds, Eds., *EC Merger Control – A Major Reform in Process*, (Richmod, UK: Richmond Law and Tax Ltd., 2002), at 178.
[243] Cleary, Gottlieb, Steen and Hamilton, "Comments on the Commission's Green Paper on the Reform of Council Regulation 4064/89" (April 15, 2002).

great weight to the "efficiency defence" to justify a merger that would otherwise be considered as anticompetitive, in the EU the question was that of "efficiency offence". The situation now has been remedied with the changes in the European merger control regulations.

iii. "Unilateral Effects"

While European merger control regulation 4064/89 and the dominance test failed to analyze the "unilateral effects" as a potential danger to competition, the new merger regulation clearly states that "unilateral effects" are part of the possible anticompetitive effects that should be taken into account in merger analysis.

From all this it can be concluded that at the level of substantive laws and policies the gap between the United States and the European Union is considerably diminishing. Nonetheless, the question remains as to what extent the synchronization of rules is a viable solution and whether the convergence of rules will have practical effects on the convergence of outcomes in politically sensitive cases.

C. Limits of Harmonization: Impossible at a Global Level

The harmonization of competition rules as a means to remedy the problems created by globalization has certain practical limits. Given that the harmonization of rules requires extensive international negotiations, it is clear that finding a multilateral consensus on international substantive rules that would be applicable at a multilateral level would be extremely difficult, needless to say impossible. Moreover, the fact that more than 80 countries based on different legal, economic and historical traditions have antitrust regimes and many other regimes are constantly emerging around the world, the negotiation of a common set of rules and their potential modification seems highly unrealistic. Finally, any rules born from negotiations among many participants would necessarily have to be at their lowest common denominator which would be contrary to the objectives of sound antitrust rules.

1. The Constant Emergence of Antitrust Regimes

The actual tendency of the proliferation of antitrust regimes around the world has two major implications for harmonization. First, it makes the negotiations of a common set of rules and their possible modification more and more difficult, and second it raises the problem of new adhesions to a harmonized system.

A harmonized regime has an important shortcoming in that it lacks flexibility. The difficulty resides in the fact that not only would a uniform code have to emerge through burdensome negotiations requiring wide consensus with respect to the substance of the rules, new series of multilateral negotiations would be required to bring about any changes to the existing rules. Accordingly, any modification process would be extremely time-consuming which would serve as a disincentive to any innovation attempts. This represents an insurmountable problem with respect to competition law which is closely linked to the ever-changing market dynamics. As competition law is dependent on constantly evolving market theories and as anticompetitive practices evolve, a harmonized approach would represent too high a degree of rigidity to adapt to new circumstances. Therefore, in the era of globalization where new competition laws are constantly emerging and even the countries having competition law traditions are modifying their laws,[244] a rigid regime would be unworkable. While multiple regimes impose substantive costs, international rules have the disadvantage of lacking flexibility and produce a locked-in effect which could produce even greater costs in a rapidly changing world.[245]

In addition, a uniform regime containing an internationally applicable competition code and an enforcement body to oversee its application could, contrary to its goal, be a disincentive for new nations to adopt competition laws and adhere to the harmonized system. Why would any state adhere to a system, set up by a majority of strong nations

[244] For instance, the European Union adopted in 2004 a new merger control regulation containing a new substantive test.

[245] John O. McGinnis, "The Political Economy of International Antitrust Harmonization" in Richard A. Epstein and Michael S. Greve, eds., *Competition Laws in Conflict : Antitrust Jurisdiction in the Global Economy*, (Washington: The AEI Press, 2004), at 126.

(one can hardly imagine that small nations would have any weight in the negotiation process for these principles), where any deviation would be punished? Accordingly, not only would the harmonization of substantive laws be an extremely difficult negotiation exercise, it could also become counter productive.

2. Different Cultural and Economic Backgrounds

In practical terms, the convergence of competition rules is a very slow process and its success is far from certain.[246] Due to the fact that countries do not share common antitrust traditions, a complete synchronization of rules might be problematic. Moreover, the goals of antitrust laws differ substantially in main jurisdictions. As was already discussed in the first chapter of this thesis, some countries prefer to put economic goals forward while others advocate the promotion of social and political goals.

Given that the legal rules mirror the economic and legal traditions of the countries, negotiating a common set of rules would be extremely difficult. It goes without saying that meaningful common rules require a shared understanding of the purpose of competition law and merger control in particular along with each nation having a similar level of commitment to rigorous market analysis.[247] However, the existing disparities between nations with respect to their legal traditions, the goals of competition law and the state of their development present significant barriers to a common understanding of the rules that should govern cross-border transactions.

Different goals not only make negotiations very difficult, but also suggest that harmonized rules would not be the best for all countries. Different countries have different needs, depending on the state of their development, their cultural background, the degree of openness of their markets, their size and various other factors. Consequently they do not face the same kinds of challenges. It was already mentioned that while "national champions" policies are anticompetitive in industrialized countries;

[246] *Supra* note 81, at 282.
[247] *Supra* note 220, at 102.

they contribute to strengthening of national economies in developing countries. Therefore, a common set of rules applicable worldwide would not be appropriate.

3. Loss of Sovereignty Argument

It was often argued that common antitrust rules would have a negative impact on the sovereignty of nations. In fact, harmonization of competition laws in the form of a uniform code would entail a definition loss of a democratic control over laws having direct impact on the national economy and market conditions. Accordingly, the implementation of international antitrust rules would considerably affect national sovereignty, especially the one of the countries having no competition law at all.[248] Antitrust rules would be imposed on certain countries that did not democratically choose to have competition laws.

Moreover, the pursuit of harmonization may cause substantial problems in terms of neglecting small countries' interests. As harmonized rules are the necessarily fruit of negotiations and constant trade-offs and compromises, it is unlikely that small and mid-size nations would have any major input since their bargaining position is quite weak. In other words, in a harmonization scenario, the bigger nations would impose their rules on small nations and we would enter a new era of legal colonization.[249]

Finally, to be realistic, it is hard to imagine that countries like the US would give up the sovereignty over antitrust rules regulating their markets. Although there are high chances that the US input in harmonized rules would be significant, in the context of multilateral negotiations they would have to necessarily give up something they consider important.[250] In light of this consideration, harmonization is very unlikely to happen anytime soon.

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[248] *Supra* note 230, at 886.
[249] See *Supra* note 81, at 165.
[250] *Supra* note 214, at 39. *See also* Joel I. Klein, "A Note of Caution with Respect to a WTO Agenda on Competition Policy", Address before the Royal Institute of International Affairs, Nov.18, 1996, at 14.

4. Lowest Common Denominator

As the goal of any legal system is to enact the best and the most efficient rules possible, the question is whether harmonization would lead to better rules. Imagining for example, a set of negotiations among 80 countries, it is likely that any agreement on common rules would not go further than the lowest common denominator.[251] There is a substantial chance that these rules would prove ineffective in practice.

Any multilateral approach and harmonization in particular, would involve compromises and the balancing of many different views and interests. Certain jurisdictions, notably the US, oppose themselves to the multilateral negotiation of common rules because they consider that their system is one of the best in the world and therefore harmonization is unlikely to substantially improve their situation.

Accordingly, harmonization would prove ineffective in addressing global anticompetitive practices as it would lower the standards that most of the nations currently use. Therefore it seems that negotiation of common sound antitrust rules at the worldwide level is impossible and that the harmonization of rules at their lowest common denominator is not desirable.

5. Harmonization of Rules is Inadequate to Cope with Globalization

It is also worth noting, that the harmonization approach as such has some practical limits. While it seeks to attain perfect convergence of antitrust laws, it fails to provide a mechanism for resolving disputes when the system breaks down.[252] The synchronization of rules approach has been widely criticized for being proactive while failing to be reactive.[253] Therefore some have suggested that it would be more suitable to provide for a comprehensive mechanism, including a dispute resolution system and a network of enforcement agencies. The main advantage of this alternative is that nations would

[251] *Supra* note 214, at 39.
[252] *Supra* note 228, at 174.
[253] *Ibid.*, at 175.

maintain their national control over antitrust laws while cooperating at the level of substantive goals and administrative practices.[254]

In light of the above-mentioned arguments, it appears that rather than forcing harmonization of competition laws which would not necessarily prove to be better in addressing the issues raised by globalization, it would be better to maintain competition among national systems and promote cooperative scenarios where diversity is not an obstacle. On the other hand, while harmonization neither seems feasible nor desirable, the cognitive convergence of competition laws should be encouraged, notably within the forums such as the ICN.

While pessimism concerning the agreement on common substantive standards seems to be justified,[255] the cooperative scenario appears to be more apt to respond to the challenges of globalization. Accordingly, instead of an international codification, we should perhaps focus more on *ex ante* cooperation, such as within the ICN, that has the virtue of taking everybody's interest into account.

[254] *Ibid.*, at 174.
[255] *Supra* note 218, at 54.

Chapter 5: Cooperation among Merger Control Authorities

From the previous chapter it is clear that harmonization of substantive rules in the form of an international codification is infeasible at the present time and therefore is not an adequate solution to the problems related to the multiple review of cross-border transactions. It appears therefore, that the most efficient and probably the only workable alternative to address these concerns is large-scale cooperation. However the question is which form the cooperation should take – bilateral or multilateral, hard or soft – in order to best remedy the negative consequences of the present a synchronized international antitrust regime.

Another preliminary question to the discussion of cooperative scenarios is whether the harmonization of substantive rules is a prerequisite for efficient and successful cooperation. This question is of particular relevance given the *GE/Honeywell* experience, which demonstrated that even with a great deal of cooperation the EU and the US may analyze the effects of mergers very differently and can reach opposite conclusions.. The divergent outcomes in this case should be attributed to the application of non harmonized rules. However, the reality is that the *de facto* duopoly of the US and the EU regimes results in the majority of nations adopting one of these models anyway. Therefore there is already a certain degree of harmonization in place. Moreover, harmonized laws do not necessarily imply harmonized outcomes; what matters is the way the laws are interpreted and enforced. Therefore what is crucial at the stage of enforcement is the good faith intention to cooperate in order to achieve mutually beneficial and efficient outcome. Accordingly, cooperative efforts, even more than harmonization, have a great potential to minimize the conflicts that could arise between various enforcement agencies. In the light of the above, cooperation does not entail the harmonization of substantive laws; rather, as will be shown below, cooperation may have as consequence a certain convergence in approaches.

While recent attempts to develop harmonized international antitrust rules were unsuccessful, cooperation among antitrust agencies has become part of the every day life

While recent attempts to develop harmonized international antitrust rules were unsuccessful, cooperation among antitrust agencies has become part of the every day life of antitrust officials around the world. Cooperation occurs at different levels, ranging from formal bilateral agreements to informal phone calls, e-mails and multilateral discussion forums. The intensity of cooperation depends solely on the willingness of parties to engage into this kind of relationship, but generally speaking there is an increasing tendency toward cooperative arrangements.

A. Cooperation of Enforcement Agencies in General

The motivation guiding nations to enter into cooperation arrangements resides in their desire to reduce frictions resulting from extraterritorial enforcement of competition laws. From an economic point of view, game theory explains perfectly the need for a cooperative scenario at a global level.[256] Non-coordinated competition policy or enforcement activities lead, under game theory, to an inferior equilibrium at a worldwide level. Accordingly, in order to maximize the efficiency of reviews as well as the coherence of outcomes, antitrust agencies engage in cooperative arrangements.

In addition, cooperation, if exercised over time, produces as a by-product a convergence in substantive analysis and ultimately in legal standards. As will be discussed later, US-EU cooperation has had a perceptible effect on merger analysis as conducted by the agencies on the two sides of the Atlantic. It is no coincidence that the 1992 US merger guidelines are mirrored in the 1997 EC market definition guidelines. Therefore, increasing cooperation and interaction between the countries may lead, as it has led in the past, to greater convergence in substantive standards.

The virtue of the cooperation scenario is that it can take many forms ranging from simple dialogues during multijurisdictional review to the establishment of sound positive

[256] See e.g. Oliver Budzinski, "Toward an International Governance of Transborder Mergers? Competition Networks and Institutions Between Centralism and Decentralism", NYU Journal of International Law and Politics 36, at 7.

comity principles between two jurisdictions.[257] Depending on the degree of cooperation that two agencies are willing to engage in, there is a whole spectrum of possible cooperative scenarios. At either end, the benefits of cooperation outweigh the inefficiencies caused by either unilateral or multilateral extraterritorial enforcement of competition laws.

1. Positive/Negative Comity

Negative comity resides in a doctrine of politeness and good manners between nations and creates a framework for the avoidance of potential conflicts at all stages of antitrust enforcement.[258] Under negative comity an agency when evaluating the effects of a transaction must take into account important interests of other party and notably possible anticompetitive effects in their markets to the extent that it may decide not to pursue investigation (although having the right to apply its law) and leave it to the authorities of that another country. The limit of this approach consists in the fact that the countries take into account the important interests of other countries but only to the extent compatible with their own interests. Many bilateral cooperation agreements include such obligation, among others the US/Germany, Australia/US, US/Canada and EU/US bilateral agreements.

While negative comity consists in refraining from action, positive comity, on the other hand, provides for a more active approach. It consists in positive acts of cooperation and mutual assistance in investigations between antitrust authorities located in different countries. In practice it means that one country may seek antitrust enforcement in a second country when anticompetitive practices by firms in that country adversely affect competition in the first country. In other words, the positive comity principle provides a framework for situations when a national antitrust authority initiates proceeding upon the request of another country. While respecting the sovereignty of participating

[257] See Mr. Bell, "Panel Discussions 1 – Competition Policy Objectives" in Ehlerman and Laudati, *supra* note 20, at 10.

[258] Massimiliano Montini, "Globalization and International Antitrust Cooperation", speech given at the International Conference, Trade and Competition in the WTO and Beyond, (Venice, December 4th-5th 1998), at 6. Online: FEEM <http://www.feem.it/NR/rdonlyres/C88FEC03-642E-41EA-BB3E-6CEFEA827662/304/6999.pdf>.

countries by recognizing that the most affected country bears responsibility for enforcement, it facilitates the gathering of evidence and thus makes the whole enforcement process more efficient. Positive comity is provided for in the US/EU bilateral cooperation agreement[259] as well as in the ANZCERTA agreement.[260]

Positive comity consists in trusting that other nations' competition laws are competent enough to remedy an anticompetitive issue. It is important to note however that it works only when anticompetitive effects are primarily located in one jurisdiction while nonetheless having negative impact in another jurisdiction. In this case the latter may ask the former to apply its competition laws having regard to the impact the anticompetitive conduct is having in its jurisdiction while the requesting party defers or suspends any enforcement activities in this respect. On the contrary, positive comity is helpless in cases when anticompetitive effects are located in both territories justifying the imposition of penalties within both jurisdictions.[261] In this situation, the effects theory takes precedence and both parties will scrutinize the transaction in order to avoid distortions in their national markets.

The critical limitation of both of these mechanisms – negative and positive comity – is that they do not impose any binding obligation on the parties, which do not have therefore any binding obligation to coordinate their enforcement activities. In fact, they only create a voluntary mechanism to foster cooperation between the competition authorities and thus enhance the efficiency of the review.[262]

[259] *Agreement Between the Government of the United States and the Commission of the European Communities Regarding the Application of their Competition Laws*, [1995] OJ L47 (27 April) [hereinafter 1991 *EU/US Bilateral Cooperation Agreement*]. The 1998 addition to the agreement reinforces the use of the principle of positive comity in the US-EU relations in the field of international antitrust.

[260] *Cooperation and Coordination agreement between the Australian Trade Practices Commission and the New Zealand Commerce Commission*, 26 July 1994, [hereinafter Australia/New Zealand Cooperation Agreement].

[261] See Article IV of *the1998 Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of their Competition Laws*, online: FTC <http://www.ftc.gov/bc/us-ec-pc.htm>.

[262] *Supra* note 258, at 8.

2. Soft /Hard Cooperation

Generally speaking, soft cooperation consists of enhanced coordination of antitrust investigations conducted by the countries party to the agreement. Soft cooperation entails application of the general comity principle. Hard cooperation on the other hand is based on positive action and applies positive comity to the fullest extent possible and implies sharing of confidential information.[263] In this sense, hard cooperation can be seen as a way toward "truly cosmopolitan enforcement of competition law."[264]

Soft cooperation in antitrust matters dates to the 1967[265] and 1973[266] OECD Recommendations laying down the basic principles of cooperation in the field of competition. In practice the first document requires Member Countries undertaking investigations under their competition laws effecting interests of other Member Countries to notify the interested countries.[267] Moreover, the recommendation invites countries to cooperate on investigations where two or more Member Countries take action in response to the same violation. The second recommendation goes further and suggests that a Member Country should request another Member Country to take action in cases where anticompetitive behaviour located in the other country has harmful effects in the requesting member country.[268] In addition, the 1973 recommendation suggests the setting up of an arbitration procedure with a view to conciliation in the event that the requested country does not bring a satisfactory remedy to the harmful situation. While these two recommendations laid down basic principles, they lacked precision as to how these principles should be applied. This was remedied by the 1986[269]

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263 Zanettin, *supra* note 66, at 119.

264 Zanettin, *supra* note 66, at 119.

265 OECD, Council Recommendation Concerning Cooperation between Member Countries on Restrictive Business Practices Affecting International Trade, 5 October 1967, reprinted in A.V. Lowe (ed.), *Extraterritorial Jurisdiction* , (Llandylus Grotius 1983), at 243.

266 *Ibid.*, at 244.

267 This recommendation is in line with the traditional principle of comity, that is that states when conducting investigations in antitrust matters take into account other nations interests.

268 This recommendation lays down the principle of positive comity; a harmed country may request another country to remedy under its competition laws an anticompetitive behaviour located in that country but nonetheless having effects in the requesting country.

269 OECD, Recommendation of the Council for Co-operation between Member Countries in Areas of Potential Conflict between Competition and Trade Policies, 23 October 1986 - C(86)65/Final, online: <http://webdomino1.oecd.org/horizontal%5Coecdacts.nsf/Display/68FBA714700074C9C125705000010597?OpenDocument>.

and 1995[270] Recommendations clarifying different conditions and circumstances of the cooperative process. The 1995 Recommendations are particularly interesting as they focus on cooperation in the field of merger control. They reflect the increasing need for cooperation in the context of the multiplication of transborder transactions requiring notifications in a multitude of jurisdictions. The 1995 Recommendations, widely inspired by the success of the 1991 US-EU Bilateral Cooperation Agreement, provide for various cooperative instruments such as information sharing, confidentiality waivers, and procedural coordination of investigative proceedings (time frames for investigations and decisions).[271]

The question however is that to what extent soft cooperation remedies the problems related to the cross-border mergers phenomenon identified in the previous chapters. As concerns the issue of inefficiencies caused by multiple reviews, soft cooperation appears to be, at the present time, the only workable, although limited, solution. As will be shown below, the US-EU cooperation demonstrates that the coordination of investigations and the harmonization of remedies contribute substantially to the reduction of administrative inefficiencies caused by multiple merger reviews. While soft agreements provide for a satisfactory solution as concerns general avoidance of conflicts, they provide only for a limited solution once a serious conflict arises.

Given the well-known shortcomings of soft cooperation agreements,[272] notably the lack of precision and the relatively low degree of enforceability, it is highly desirable that states move forward and begin concluding hard cooperation agreements containing binding rules rather than generic commitments to coordinate action. Soft cooperation agreements and comity principles, while imposing generic obligation of taking into account the other party's important interests fail to define the notion of "important

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[270] OECD, Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade, 27 July 1995 - C(95)130/FINAL, [hereinafter 1995 Recommendations], online: OECD
<http://webdomino1.oecd.org/horizontal%5Coecdacts.nsf/Display/A1EECA344B0470CAC12570500000B164?OpenDocument>.

[271] Article 5 of the 1995 Recommendations, *ibid.*.

[272] The advantages and shortcoming of soft bilateral cooperation agreements will be discussed with greater precision in the section dedicated to the 1992 US-EU cooperation agreement.

interests" and thus provide merely for a non-binding principle to mutual assistance to be applied on a case-by-case basis.[273]

As will be shown below with the example of the US-EU bilateral agreement, soft cooperation agreements are helpless in cases of conflict as they do not provide for any mechanism for conflict resolution. Hard cooperation agreements would, on the other hand, contain binding enforcement provisions, including mechanism for the resolution of conflicts. Moreover, soft cooperation agreements provide only for the exchange of publicly available information, therefore the exchange of confidential information cannot be enforced under these agreements.[274] Hard cooperation agreements would provide for the enforceable exchange of confidential information. In practice, foreign agencies would be bound not only to provide confidential information that it has in file, but also to use its discovery powers at the request of a foreign antitrust authority and this even in cases where it has no interest.[275] This would, however, require changes in national legislations and the conclusion of hard international treaties.

3. Limits of Cooperation

The above-mentioned cooperation schemes reach their limits when "superior", often political objectives come into play. In sensitive economic sectors it would be impossible to suppose that each nation would have identical concerns. Any kind of cooperation, not to mention harmonization, is helpless to overcome such issues.

If the sole goal of competition law were the efficient allocation of resources and the maximization of consumer welfare, then the application of competition laws would be a relatively simple task.[276] However, strategic decisions are made at a political level, and often many other non competition considerations come into play. It is no secret that in the EU the decisions in cases that go through full investigation, meaning the most

[273] *Supra* note 258, at 7.
[274] See e.g. Article VIII of the *1991 US/EU Bilateral Cooperation Agreement.*
[275] Zanettin, *supra* note 66, at 119.
[276] Wish, *supra* note 42, at 17.

controversial and strategic mergers, must be approved by the College of Commissioners, a political body.[277]

The limits of cooperation schemes may be summarized under the headings of strong confidentiality laws and industrial policy considerations.

i. Interference with Confidentiality Laws

It is often difficult for an agency to access information located abroad and as was discussed earlier, soft cooperation agreements do address this shortcoming. To remedy this issue, it will be crucial in the future to conclude hard cooperation agreements providing for an exchange of confidential information.

Another solution to this problem would be to incite and lobby the merging companies to remove these limitations voluntarily by providing confidentiality waivers. This practice would be beneficial for both parties as it would enhance the efficiency of joint investigation and to a certain extent minimize the potential for conflicting outcomes.[278] In practice, the usage of confidentiality waivers is occurring more and more at the present time in order to allow different authorities dealing with the same transaction to cooperate efficiently. Moreover, confidentiality waivers save resources and time to the merging companies as well as to the agencies that often avoid double action.

ii. Interference with Other Policy Objectives: Conflicting Industrial Policy Considerations

Generally speaking, competition laws should be applied in a neutral manner, based on sound economic criteria in the pursuit of consumer welfare. However, it sometimes transpires that other considerations come into play and hinder the objective application of competition laws. Governments may adopt a policy of promoting so-called "national

[277] The decisions of the College must be taken in accordance with the Merger Regulation and are subject to judicial review. However, the decisions are not always predictable and it had happened in practice that a prohibition decision had to be reversed and turned into a conditional clearance. See EC, *Mannesmann/Vallourec/Ilva.* See also C.J. Cook& C.S. Kerse, *E.C. Merger Control*, (London: Sweet&Maxwell, 2000), at 126.
[278] ICPAC Report, *supra* note 11, at 65.

champions" which consists of providing immunity from the application of competition laws in certain domestic markets with a view to enhancing the competitiveness of national champions in international markets. This is often the case in developing countries and is part of the reason why these countries sometimes are reluctant to adopt competition laws and to enter into any kind of enforceable multilateral framework.

Industrial policy considerations play notably in the assessment of mergers. Although the main criteria for the assessment of transactions are competition related this does not exclude other factors from being taken into account; notable concerns include technical and economic progress.[279] For instance, although the Recitals to the European merger control regulation are not legally binding,[280] they outline the rationale of the regulation and recognize that some other objectives, such as developments leading to the increase of the competitiveness of European industry, are welcome considerations.[281]

As will be further analyzed, the divergent outcomes reached by the US and EU antitrust agencies in the *Boeing/McDonnell Douglas* and *General Electric/Honeywell* mergers cannot be attributed to the lack of bilateral cooperation. While divergent outcomes in the *General Electric/Honeywell* merger can be attributed to differences in substantive analysis and the interpretation of evidence, conflicting outcomes in the *Boeing/McDonnell Douglas* merger originate in conflicting trade and industrial policies. The latter merger was particularly intense at the political level as the only competitor to the merging firms was Airbus, the European champion. It raised serious suspicions that the analysis conducted by the Europeans was driven by nationalistic considerations and the willingness to protect European industry. This case only shows that every case of cooperation has its limits, notably in cases when important interests of both parties are at stake. It is hard to imagine that one party would consider the other's interests as more

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[279] C.J. Cook& C.S. Kerse, *E.C. Merger Control*, (London: Sweet&Maxwell, 2000), at 126.
[280] In EC, *France v. Commission,* Joint Cases, C-68/94 & C-30/95, the European Court of Justice stated that little persuasive value could be attached to a recital which is not developed or reflected in the operative part of the Regulation.
[281] *See* Recital 4 and 13 to the EC Merger Regulation. *See* also C.J. Cook& C.S. Kerse, *E.C. Merger Control*, (London: Sweet&Maxwell, 2000), at 127.

important than its own. In the Boeing merger, both parties considered their respective interests in Boeing and Airbus as substantial.

Now that the general features, modalities, strengths and shortcomings of cooperation schemes have been exposed in general, it is time to present features and examples of bilateral cooperation in particular.

B. Bilateral Cooperation

Bilateral cooperation has flourished over past years and soft bilateral cooperation agreements have become common instruments of cooperation among jurisdictions in the antitrust enforcement process. The standard provisions of such agreements include notification arrangements, information sharing and comity, but also coordinated time schedules. Stated differently, bilateral agreements do not contain any substantive competition rules, rather they alert the parties to each other's interests and provide mechanism for taking them into account.[282]

While bilateral agreements were initially signed between various countries and the US as a means of avoiding conflicts with the US, nowadays they are used as means to further an efficient and structured coordination of antitrust investigations in an increasingly globalized economy.[283] The first generation of bilateral agreements did not lay down ambitious cooperative arrangements between the signatories and thus provided for a very soft cooperation.[284] It is only the second generation of bilateral agreements, starting with the 1991 US-EU bilateral agreement that provides for active cooperation among antitrust agencies. This latter group of agreements, that have become a standard

[282] Prof. Mavroidis, "Panel Discussions 5 – Competition Policy Objectives in a Multilateral Competition Code" in Ehlerman and Laudati, at 143.
[283] Zanettin, *supra* note 66, at 53.
[284] The first generation of the bilateral agreements is represented by the 1982 US- Australia agreement relating to cooperation in antitrust matters and the 1984 US-Canada memorandum of understanding. It should be pointed out that the circumstances that led to the signing of these two agreements relate to the conflict with the US that various states experienced at the occasion of the (year?) *Uranium* litigation where an international cartel supported by numerous states was challenged in the US in a private suit and the US government refused to file a supporting *amicus curiae* brief. The preamble of both agreements refers to the conflicts that arose between the US antitrust laws and the policies of the contracting countries.

in the field of bilateral cooperation in antitrust matters, reflect the need for enhanced cooperation and coordination of antitrust policies at the international level in light of the implications of the effects doctrine. To explain this movement under game theory, countries realized that the cooperative scenario maximizes their respective profit in terms of the efficiency of antitrust reviews and thus decided to enter into bilateral arrangements to avoid inefficient jurisdictional conflicts.[285] To this end, the new generation of agreements provides for mutual notification whenever it appears that the enforcement activities of one party may affect other party's important interests.[286] Moreover, they usually lay down the principle of "positive comity" and some of them provide for the exchange of confidential information provided that the parties provide waivers and thus consent to the sharing of sensitive information.[287]

Bilateral cooperation agreements, except for the US-Canada Memorandum of Understanding,[288] are considered to be legally binding international acts as they contain instrumental and procedural obligations imposed on both parties.[289] In addition, they contain provisions for revocation, which clearly indicates the existence of a legally binding act. At this point it should be noted that while formal agreements are important instruments, their existence is not a precondition for cooperation; instead, agreements serve to facilitate and motivate cooperation.[290]

Bilateral cooperation, although not originally designed to achieve convergence of substantive rules, makes participating nations sensitive to the other's interests and often brings about as a by-product the convergence of approaches. As was already mentioned, in the case of US/EC cooperation an example of this phenomenon can be found in the

[285] Oliver Budzinski, "Toward an International Governance of Transborder Mergers? Competition Networks and Institutions Between Centralism and Decentralism", NYU Journal of International Law and Politics 36, at 8.
[286] See e.g. Article II 2 c) of the US-EU and US-Canada agreements. In 2000, the number of notifications under US-EU Agreements amounted to 104 EC notifications and 58 US Notifications. *See* Bruno Zanettin at 79.
[287] *See e.g.* Article VII-3 of the EC-Canada Agreement.
[288] The denomination of agreement as "Memorandum of Understanding" is self-explanatory and shows clearly that parties did not have any intention to bind themselves. Thus this act does not constitute a bonding international agreement.
[289] Zanettin, *supra* note 66, at 77.
[290] *Ibid.*, at 80.

remarkable similarity of the EC market definition guidelines[291] and the US Department of Justice merger guidelines.[292]

1. The 1991 EC/US Agreement

In 1991, having realized the crucial importance of cooperation, the United States and the European Union entered into an antitrust cooperation agreement whose main purpose was "to promote cooperation and coordination and to lessen the possibility or impact of the differences between the parties and their application of competition laws."[293] The underlying objective of the agreement is to mitigate conflicts in areas where the harmonization of rules falls short of achieving convergent outcomes.

As was already mentioned, the 1991 US-EU cooperation agreement marked the new generation of bilateral agreements in the field of cooperation in antitrust matters. The original agreement was deepened in 1998 through the reinforcement of the positive comity principle. However it should be noted that although the 1998 US-EU cooperation agreement includes a far-reaching principle of positive comity, it is principally related to the prosecution of cartels; merger control is expressly excluded from the arrangement.[294]

Under the EU-US agreement, each party, before taking any antitrust enforcement action, should notify and consult other parties whose interests could be potentially affected.[295] At this stage of procedure, parties exchange relevant information, discuss policy considerations and present possible objections and solutions. The goal of such arrangement is to prevent divergent outcomes by cooperation at early stages of merger review when it is still possible to find a compromise. To this end, the agencies share

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[291] See Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372 (9 December, 1997), online: <http://europa.eu.int/comm/competition/antitrust/relevma_en.htm>.
[292] See *1992 Horizontal Merger Guideline*, *supra* note 172.
[293] Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, (September 23, 1991), O.J. (L131) 38 [hereinafter *1991 US/EU Bilateral Cooperation Agreement*].
[294] See Article II (4)(a) of the 1998 Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of their Competition Laws, online: FTC <http://www.ftc.gov/bc/us-ec-pc.htm>.
[295] Article 2(1) of the *1991 US/EU Bilateral Cooperation Agreement*, *supra* note 293..

publicly available information, discuss their respective analyses at various stages of an investigation, including economic theories and empirical evidence needed to test those theories.[296] At the enforcement level, the main goal is to coordinate enforcement activities by making sure that the remedies imposed by reviewing agencies in the United States and in the European Union do not impose inconsistent obligations upon merging parties.[297]

Moreover, the cooperation between enforcement agencies is to the great advantage of merging businesses who can obtain a complete picture and can therefore realistically assess the potential anticompetitive concerns that a particular transaction might raise on both sides of the Atlantic. To this end, it must be noted, however, that the Agreement has one important shortcoming. It clearly belongs to the group of "soft" agreements, and hence is contingent upon the existing laws of each party. As was already mentioned, this is particularly problematic as it concerns the exchange of confidential information in which case parties cannot be forced to coordinate.[298] National laws precluding the disclosure of confidential information are a clear limit to this type of agreements. Moreover, "the lack of enforcement provisions allows the Agreement's mechanism to break down where, for instance, the parties differ in opinion or approach with respect to the anticompetitive consequences of a proposed merger."[299]

2. Fruits of the US/EC Cooperation

Although the US-EU cooperation agreement has some shortcomings and failed to avoid some conflicts, overall the cooperation between the two agencies has been productive. Various exchanges between the US and the EU antitrust authorities have been very frequent in the recent years, notably as concerns information and views on how the merger analysis should be conducted with respect to cross-border transactions. Today nobody is contesting that the 15 years of EU/US cooperation were fruitful and led to a

[296] The 1991 Agreement established the US-EU Merger Working Group mandated to discuss various merger related topics and share views on important issues such as oligopolistic dominance or conglomerate effects. This Group fulfills the function of an independent discussion forum. *See* US-EU Merger Working Group, "Best Practices on Cooperation in Merger Investigations."
[297] US-EU Merger Working Group, "Best Practices on Cooperation in Merger Investigations."
[298] See Article 8 II 2 of the *1991 US/EU Bilateral Cooperation Agreement.*
[299] Wilson, *supra* note 6, at 203.

substantial convergence notably, but not only, as concerns the method of merger enforcement.[300] On a day to day basis, US and EU enforcement agencies coordinate the review process on both sides of Atlantic with respect to particular transactions. More and more we can see parties providing confidentiality waivers to allow for even more efficient cooperation with respect to evidence sharing and the conducting of market investigations.

The first *Microsoft* case is the most prominent and the best example of bilateral cooperation. In this case the European Commission and the US Department of Justice engaged in coordinated action vis-à-vis Microsoft's licensing practices on the market for PC operating systems. Following a confidentiality waiver granted by Microsoft, both authorities investigated in parallel Microsoft's practices and concluded on its anticompetitivness as concerns the discouragement of new entrants and restrictive nondisclosure agreements. In addition, the two agencies negotiated concurrently the remedies in order to allow for consistency given the interdependency of the US and EU markets. This case marked the US' and EU's clear commitment to pool resources in order to respond jointly to anticompetitive practices affecting both jurisdictions. In addition, it showed clearly the possible scope of cooperation ranging from exchanges of views and informal discussions to the exchange of information and the harmonization of the remedies and their timing.[301]

In the past, cooperation between the US and EU antitrust authorities coped successfully with differences in substantive tests. Despite different approaches in merger analysis the agencies almost always reached consistent conclusions. Discrepancies were rather rare. In fact, to date there have been only two cases of real conflict: the *Boeing/McDonnell Douglas* and *General Electric/Honeywell* mergers.

[300] See Robert Pitofsky, "EU and US Approaches to International Mergers – Views form the US Federal Trade Commission", speech given at the EC Merger Control 10th Anniversary Conference, (Brussels, 14-15 September 2000), at 2.
[301] Zanettin, *supra* note 66, at 83.

In the first case, the US and EU authorities came to opposite conclusions with regard to the competitive effects of the merger on the same relevant market. While the FTC considered that this transaction was not a threat to competition, the European Commission concluded that the merger was anticompetitive and imposed substantial remedies. We cannot consider this case as pure failure of cooperation as the charged political atmosphere led to many misunderstandings;[302] however this case showed clearly the limits to the enforcement of the 1991 Agreement. While under the provisions of the Agreement[303] the Commission could have, under the principle of negative comity, declined its jurisdiction, EC merger regulation prohibited it from doing so as the Commission is bound to investigate all transactions fulfilling the threshold criteria. Therefore as was already mentioned, soft cooperation agreements and negative comity in general are effective only within the framework of national legislations and only as long as there is not a clash of "important" interests. In the latter case, each party will logically pursue its own interest. In all fairness however, it must be stated that ultimately the remedies were negotiated quite successfully and the EC's final decision fulfilled the US' demands.[304]

The second case, *General Electric/Honeywell*, brought about even greater conflict between the concerned agencies. Although cooperation between the agencies was intense during the whole investigation, the cause of conflict resided this time in different interpretations of the evidence and of economic theories. While bundling was considered in the US as pro-competitive as it offers lower prices for consumers, the EU concluded that it would lead to the foreclosure of competitors on the relevant market. This only confirms that "procedures of notification and consultation and the principles of traditional and positive comity allow bringing the respective approaches closer in cases

[302] There was a great deal of misunderstanding in the US as concerns the application of the substantive test and decision making process in the EU with regards to a merger. This was a serious obstacle to efficient cooperation.

[303] Article VI of the *1991 US/EU Bilateral Cooperation Agreement,* which deals with the negative comity principle, provides that: «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, to take into account the important interests of the other Party. Each Party shall consider important interest of the other Party in decisions as to whether or not to initiate an investigation or proceeding, the scope of an investigation or proceeding, the nature of the remedies or penalties sought, and in other ways, as appropriate».

[304] Zanettin, *supra* note 66, at 97.

of common interest but there exist no mechanism for resolving conflicts in cases of substantial divergence of the analysis".[305]

While cooperation in the *Boeing/McDonnell Douglas* case was partially hindered by the high level involvement of politicians, the conflict in the *General Electric/Honeywell* case cannot be similarly attributed to a low level of cooperation. In both cases, however, the US-EU cooperation agreement did not produce the expected effects. This failure should be attributed to the lack of enforcement provisions, notably as concerns the resolution of conflicts.

Moreover, it is worth noting however, that the US-EU Cooperation Agreement has functioned as a deterrent by inhibiting the merging parties from providing false, inconsistent or asymmetric information to the EC and US competition authorities.[306]

Finally, it must be noted that except for "some bumps in the road", represented notably by the two high profile cases, *Boeing/McDonnell Douglas* and *GE/Honeywell*, US-EU bilateral cooperation has been productive at all stages of notification, investigation, and decision-making. Although conflicts occurred, number of conflicts avoided was certainly greater.

3. Limits of Bilateralism

Bilateral agreements have shown themselves to be very efficient in bilateral cooperation, notably between the countries that often review the same transactions. However, their importance is clearly limited as they are insufficient to cope with the challenges posed by an increasingly globalized economy.[307]

[305] *See* A. Schaub, *International co-operation in antitrust matters: making the point in the wake of the Boeing-MDD proceedings*, EC Competition Policy Newsletter, vol. 4, no. 1, 1998.
[306] Wilson, *supra* note 6, at 202.
[307] William J. Kolasky, "Global Competition: Prospects for Convergence and Cooperation", American Bar Association Fall Forum, (Washington, D.C., 7 November 2002), online: US DOJ <http://www.usdoj.gov/atr/public/speeches/200446.pdf>.

First, it is obvious that bilateral agreements involve a limited number of players. Therefore it would be difficult, not to say impossible, to manage bilateral agreements at a worldwide level. In fact, if every country possessing effective competition law (not to mention those who are in the process of enacting such legislation) would have to enter into a bilateral agreement with every other country, there would be an unworkable number of bilateral agreements in force.[308] Accordingly, such high number of agreements constitutes a serious practical limitation to such a model and highlights the need for a multilateral agreement. Moreover, it goes without saying that a network of numerous bilateral agreements necessarily implies inconsistent provisions. This would lead to disordered situations and what is more to substantial inefficiencies at the worldwide level.

Bilateral agreements are mostly entered into by those industrialized countries which are often called to scrutinize the same transaction. The conclusion of such agreements presupposes both a certain level of trust in the other's party commitment to antitrust principles as well as a certain level of knowledge of the other's party's antitrust legislation.[309] While players like the US and the EU could probably content themselves with the present system, the problem would certainly arise in a three-or-more country case when an authority would be faced with two or more inconsistent bilateral agreements.[310] In light of the above, "it seems over-optimistic to imagine that a world-wide framework for competition policy could be built up piecemeal from a network of bilateral agreements... it would be virtually impossible to ensure that all the agreements were compatible with each other."[311]

When negotiating bilateral agreements, power asymmetries play an important role and countries with greater bargaining power extract greater concessions from their partners. Accordingly, the final content of the agreement closely depends on relative bargaining

[308] Assuming that there are 100 countries with competition legislation in force and that each of enters into a bilateral agreement witch each other; there would be 4950 bilateral agreements.
[309] Zanettin, *supra* note 66, at 229.
[310] *Supra* note 285, at 9.
[311] Roderick Meikleijohn, "An International Competition Policy: Do We Need It? Is It Feasible?", 22 World Econ. (1999), at 1233, 1247.

power of both countries. It has been suggested that continuing with a bilateral agenda would jeopardize the interests of developing countries.

It is undeniable that bilateralism, while successful at enhancing the efficiency of competition authorities in terms of coordination of the review process, has fallen short of avoiding multiple filings and their associated costs.[312] Although most movement towards consistent outcomes between main jurisdictions has been channelled principally through bilateral cooperation, given the globalization of world economy, the question of multilateral cooperation is becoming increasingly critical.

C. Multilateral Cooperation

In the light of the above-mentioned section it must be in all fairness stated that while bilateral cooperation should be considered as a substantial achievement in the field of international antitrust, this form of cooperation is inadequate and insufficient to cope with the large-scale globalization of the world economy. Therefore, it seems desirable that bilateral cooperation be gradually supplemented and eventually replaced by some form of multilateral framework.

During recent years the world has seen an increase in cross-border merger activity, and a parallel increase in the occurrence of anticompetitive practices having spillover effects in multiple jurisdictions, intensifying the need for a multilateral framework. Various moves towards a multilateral agreement on the treatment of anticompetitive practices crossing national borders have been made, yet, for various reasons, none of them has been a resounding success. A general feature of these arrangements is that they have only recommendation value and therefore are non-binding and non-enforceable. The most important ones are the 1976 OECD Guidelines for Multilateral Enterprises, the 1986 OECD Council Recommendations Concerning Cooperation on Restrictive Business Practices and the 1980 UNCTAD Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Practices. Although these agreements

[312] Wilson, *supra* note 6, at 210.

are not binding and do not involve harmonization of rules, they do represent a step forward in the facilitation of cooperation and information sharing among participants.

While many agree on the necessity to have a multilateral approach to international antitrust issues, the question still remains as to which, if any, international organization should drive the international competition agenda. The WTO was for a long time considered as a clear favourite in this field, but recent years revealed a possibly superior candidate, the ICN which is the only direct network of competition agencies not funnelled through any international organization.[313]

1. Necessity of a Multilateral Framework

As it became clear during the course of this thesis, non-coordinated application of the effects doctrine leads to substantial deficiencies as it lacks coherence and produces cumulative and often inconsistent and contradictory assessments. It is therefore the demand for coherence that drives the need for an appropriate institutional arrangement for the governance of cross-border mergers at a multilateral level.[314]

The question however is one of an appropriate institutional arrangement. Should the governance of cross-border mergers be housed in an international organization? While there is consensus on the fact that anticompetitive practices may compromise the advantages of the liberalization of international trade, notably the benefits of free trade, the need for an international organization for competition is far from being a universally shared goal. Instead, some scholars but also economists and lawyers prefer an informal arrangement in the form of a network of competition agencies.

It is important to mention at this stage that the possible advantages of a multilateral framework in an institutionalized form are not *de minimis*. Ideally, there would be a single reviewing body and a single notification for a global case. Using the European

[313] Donald C Klawiter and Christine A Laciak, "EU-US Cooperation, International competition cooperation: no longer just the formal agreements", at 1. Online : MORGANLEWIS <http://www.morganlewis.com/pubs/A829C92D-22A4-4EAC-B6F185F2EE5F3E2C_Publication.pdf>.
[314] *Supra* note 314, at 74.

model of vertical separation of competences, there would have to be some kind of threshold ensuring that the organization would deal only with global cases. Such an international organization would have to exist in parallel with national enforcement agencies. This design would certainly decrease deficiencies related to multiple review of global transactions. It would ensure a more timely and more efficient review process in terms of administrative costs as it would provide for a one-stop-shop review of multijurisdictional transactions.

In the light of the above, the rationale of a multilateral framework consists in the fact that if the relevant market is global and the merging firms are global it is not appropriate for a national antitrust agency to regulate such transactions as such regulation may have spillover effects in other jurisdictions. The idea is that global transactions taking place in global markets should be dealt with at a global scale pursuant to a uniform set of rules taking into account the of interests of multiple countries and their consumers.

The EU, as first, proposed an international approach to competition policy and suggested that the WTO would be the "natural" forum for such arrangement provided that it is complemented by a world competition code containing preferably minimum standards that would be enforced through the WTO dispute settlement mechanism.

2. The WTO Framework

The WTO framework traditionally treats competition mainly in a large scale as international competition and public restraints to trade such as tariffs, quotas, discriminatory practices or state subsidies. To this end it promotes fair conduct towards domestic and international competitors, through principles of transparency, national treatment and non-discrimination. However, the WTO currently does not deal with competition law *stricto sensu,* that is with the law relative to the prevention of anticompetitive practices engaged into by private businesses. Since the WTO's mandate consists principally of making markets accessible to international trade and dismantling public barriers to entry, it would be logical to extend its mandate to deal with private restrictions to trade that equally offset the benefits of liberalization achieved through WTO.

From the historical standpoint, the relationship between competition and trade is not new. The 1947 Havana Charter[315] constituted the very first attempt to create an International Trade Organization ('ITO'), and it contained a comprehensive competition code which would have been enforced internationally. However, the charter never took effect due to US reluctance and fear of losing sovereignty over competition policy issues.

Later on, during the Uruguay Round, which led to the establishment of the World Trade Organization, a desire to explore competition issues was expressed[316] In par because of its large membership of developed and developing countries, the WTO was originally considered as the most suitable body to house the supranational competition agenda. Several arguments were put forward in favour of an international approach to competition rules within the WTO. First, it was argued that anti-competitive practices reduce and compromise the benefits of trade liberalization and thus they must be dealt with at a global basis. In addition, cases like *Boeing/McDonnell Douglas* showed that arguments over the use of competition laws by various authorities could cause trade wars. Many pointed out that in order to avoid these situations it was absolutely crucial that an international cooperative arrangement be put in place, preferably within the WTO. Moreover, from an institutional point of view it was argued that the WTO had at its disposal a dispute resolution system that was considered to be a major advantage over other organizations.

The EU was one of the biggest proponents of the WTO taking the competition agenda under its umbrella. The EU highlighted the need for an internationally coordinated

[315] Final Act of the United Nations Conference on Trade and Employment (adopted March 24, 1947), Chapter 5.

[316] At the outcome of the Uruguay Round held in 1994 in Marrakesh, some countries expressed the desire to include competition issues into WTO agenda. However, it was only after the Singapore meetings of the WTO in 1996 that a working group exploring the interactions between trade and competition policies was established. See Singapore Ministerial Declaration WT/MIN(96), §20.

framework for competition that would on the one hand develop a common set of international competition rules and on the other hand enforce these rules. However, the US refused to place competition law under the umbrella of the WTO under the pretext that it would be unjust to impose competition law on developing countries (a hidden agenda was apparent, notably that such an arrangement would jeopardize the interests of those US companies which were enjoying often monopoly position in many of developing country markets.) The US also argued that the WTO dispute settlement system would be ineffective in competition matters, as competition law is highly fact intensive and involves a great deal of confidential information.[317] The US also argued that negotiations among such a large membership base would necessarily lead to the adoption of lowest common denominator standards, diluting the effectiveness of such rules. Finally, the US and many other member states considered to be inappropriate that national decisions would be second-guessed by trade dispute panels which were not well placed to consider competition issues involving complex economic evidence.[318] Moreover, due to the *ad hoc* nature of the WTO panels, the consistency of decisions could not be guaranteed.[319] In light of the above arguments, it appears that although the WTO has the advantage of possessing a dispute settlement body, it is far from being clear that giving such authority to the WTO would be beneficial. In fact, the economic and political costs and frictions caused by the utilization of dispute resolution mechanism would be detrimental to future cooperation between the countries.[320]

The truth is that the inclusion of competition in the negotiations for WTO mandate would risk turning competition regime into bargaining chips and objects for trade-offs in other trade negotiations, such as agriculture, services or intellectual property.[321] In addition, one can hardly imagine how the governments and enterprises would turn

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[317] Ehlerman & Laudati, *supra* note 20, at xiv.
[318] Wilson, *supra* note 6, at 237.
[319] Prof. Matshusita. "Panel Discussions 5 – Competition Policy Objectives in a Multilateral Competition Code" in Ehlerman and Laudati, *supra* note 20, at 142.
[320] Ehlerman and Laudati, *supra* note 20, at 11.
[321] Joel I. Klein, Acting Assistant Attorney General U.S. Department of Justice, "A note of Caution with Respect to a WTO Agenda on Competition Policy (London, 18 November, 1996), online: <http://www.apeccp.org.tw/doc/USA/Policy/speech/jikspch.htm>, *see also* Wilson at 237.

highly sensitive and confidential information, which is crucial to conducting any kind of merger analysis, to the WTO.

Certain members of international community dream that a WTO framework for competition could include rules on "general and case-by-case cooperation among governments and national antitrust agencies, positive and negative comity, the exchange of general and case-specific information, and transparency of national antitrust policies."[322] The institutional arrangement within the WTO would have the agency enforcing a common set of rules with regard to multijurisdictional mergers. It goes without saying that the centralization of rule-making and enforcement competences has various advantages, notably as concerns the reduction of transaction costs that would otherwise result from multiple filings, parallel review proceedings and other information and human costs associated with multiple review. However, the WTO framework, like any multilateral institutional framework, would have the disadvantage of being impermeable to innovation and rather rigid as concerns institutional evolution. In other words, competition law, being closely related to market theories that may develop over time, is probably not a suitable candidate for an institutional arrangement. Rather it is a candidate for informal discussions within a forum, such as the International Competition Network.

After the US and a large number of developing countries raised objections to a harmonized approach to competition law within the WTO agenda, the EU and Japan came up with a less ambitious proposal at the Doha Ministerial Conference in 2001, containing a vague commitment to fight cartels in the place of substantive harmonization of competition laws.[323] The Doha declaration limited itself to voluntary cooperation and general principles of fairness, transparency and non-discrimination. As concerns the multilateral framework, the Doha Ministerial Declaration recognized the case for a multilateral arrangement on competition policies but postponed a decision until the next

[322] R. Shyam Khemani and R. Schone, "Working Paper V – Competition Policy Objectives" in Ehlerman and Laudati, *supra* note 20, at 227.
[323] See Ministerial Declaration, WT/MIN(01)DEC/1, ¶25 (Nov. 14, 2001).

Ministerial Conference.[324] However, the Cancun conference did not advance the issue whereby the consensus on the inclusion of competition policy within the WTO became even less realistic.[325]

Altogether, after the Doha round confirmed by the Cancun, it became clear that at the present time national interests do not allow the transfer of merger control competencies to an international body and that there is not enough of political willingness for the WTO to include in its portfolio competition law and in particular the merger control. To refocus the attention of the international community the US came up with the idea of establishing a network of competition agencies that would serve as a forum for informal discussions related to the issues of competition and in particular to the issues arising from proliferating phenomenon of multijurisdictional mergers. To this end was created the International Competition Network which is currently the most promising multilateral approach to competition policy.

3. The ICN Framework

In light of all of the above, it is clear that an "international competition organization" disposing of a binding set of rules and an enforcement body is not an acceptable scenario for the foreseeable future as there is widespread unwillingness to transfer sovereignty over competition policy to any international organization. Rather, there is a demand for diversity.[326] Therefore, the focus should be on enhancing existing cooperation and avoiding overly ambitious goals.

As was already mentioned, the ICN was created in 2001 at the initiative of the US driven ICPAC as a tool to refocus attention away from the inclusion of the competition agenda in the WTO. The EU, although still the main advocate for binding WTO minimum standards, welcomed and supported this initiative and participated actively in its implementation. Today the ICN is a major multilateral forum for national and multinational antitrust enforcement agencies from over 70 jurisdictions and it has been

[324] See Ministerial Declaration, WT/MIN(01)DEC/1, ¶23 (Nov. 14, 2001).
[325] See *supra* note 314, at 70.
[326] *Supra* note 314, at 74.

productive in various areas of competition law, notably in jurisdictional and procedural rules in the merger field.[327] Generally speaking the purpose of the ICN is to "facilitate international cooperation on competition issues, to promote procedural and substantive convergence among competition jurisdictions concerning cross-border cases, and to advance knowledge about best practices on competition matters of common interest."[328]

i. Functioning of the ICN

As concerns the legal nature of the ICN, it is interesting to note that the ICN, unlike other organizations dealing with competition issues, is not based on an international treaty. As such, the ICN has no legal status and is therefore a "virtual organization". This fact has two main consequences: the members maintain their full autonomy, and any of the proposals, recommendations and best practices are non-binding. Accordingly, the principle of voluntariness plays in the ICN at two levels, first as concerns the membership and second, as concerns the observance of its outcomes.[329] This is the strength and the weakness of the ICN at the same time. A weakness on one hand, as none of the acts are formally enforceable; a strength on the other, in the sense that as an un-designed institution the ICN forms a framework for a network of voluntary cooperation while preserving diversity and coherence.

The ICN works via results-oriented working groups ('WG') in charge of different projects.[330] The main aim of ICN, in the field of merger control, is not to achieve substantive convergence *per se*, but rather to promote best practices in various merger review related issues, such as notification thresholds or the timing of a review. As a result of the circulation of best practices, the effectiveness of multi-jurisdictional merger review should be enhanced, jurisdictional conflicts reduced, substantive convergence

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[327] *See* ICN, ICN Membership Contact List, online: ICN <http://www.internationalcompetitionnetwork.org/icn_membership_list.pdf>.
[328] *Supra* note 285, at 20.
[329] See Memorandum on the Establishment and Operation of the International Competition Network, online: ICN <http://www.internationalcompetitionnetwork.org/mou.pdf>.
[330] Presently there are four substantive WGs in force, (i) the merger control process in the multi-jurisdictional context, (ii) the competition advocacy role of antitrust agencies, (iii) capacity building and competition policy implementation, and (iv) the role of competition policy in regulated sectors. See online: ICN <http://www.internationalcompetitionnetwork.org>.

facilitated and transaction costs reduced.[331] As concerns the specifics of merger control, the relevant WG is the WG on the Merger Control Process in the Multi-jurisdictional Context which is further divided into three sub-groups: one for merger notification and review procedures, one for the analytical review framework and one for investigative techniques. The sub-groups use in their works comparative analysis of different merger control regimes. For instance, in order to develop best practices concerning investigative techniques, they compare the current practices as enforced in member countries or, in order to compile the model merger guidelines they review existing merger guidelines in various member countries.

In sum, the ICN's advantage, as compared to any other possible multilateral framework, notably the WTO, is that instead of forcing uniform rules, it highlights the diversity of various regimes and uses it in the process of determining best practices. The fact that the observance of best practices is purely voluntary and that no formal institutional framework is targeted facilitates the adhesion of nations to these practices. Moreover, the effectiveness of the ICN framework will increase with time; members will be keener to participate and adopt best practices as the number of visibly successful arrangements increases.[332] It must be noted that although the adoption of best practices is voluntary, there is an implicit punishment mechanism consisting of the undermined credibility of the authority in default of observance of the best practices, with respect to any future cooperation inside or outside the forum. This implicit mechanism partially compensates for the absence of a formalized dispute resolution system, without creating the ensuing frictions.

The ICN has a virtue of not imposing rules but rather organizing informal sessions where different approaches are reviewed. The guidelines are designed to promote best practices in a particular area rather than create rules that would bring about convergence to the "lowest possible denominator."[333] This is why the activities initiated under the ICN umbrella have been so successful and welcomed thus far. The ICN forum, since its

[331] *Supra* note 314, at 71.
[332] *Supra* note 285, at 50.
[333] ICPAC Report, *supra* note 11, at 62.

conception, has developed through the cooperative interaction of its members a "culture of consensus".[334] Therefore, it is through mutual learning, comparison of existing regimes and the interaction of officials from different antitrust authorities that the ICN framework leads to at least procedural convergence and in the long run possibly even substantive convergence. Harmonization of approaches at the ICN is achieved through the exchange of arguments and a cooperative review process.[335]

The ICN also sensitizes its participants to other nations' competition laws. Diversity of approaches is explicitly accepted and considered to be an important source of inspiration for the ICN's work.[336] Accordingly, there are no pressures to adopt any particular view. It is a forum with international participation where enforcement agencies exchange views on specific enforcement issues of mutual interest in order to identify the most convincing and efficient approach. Experts from all over the world work together on various guidelines and discuss various policy issues. This method has the merit of improving the mutual understanding of respective laws and policies, but it also serves as a forum for sharing information on new anticompetitive practices.

This is a long-term project which without being overambitious has as a virtue the furthering of convergence through amicable discussions. Through the process of mutual learning it is possible to achieve what would otherwise require burdensome negotiations, although the direction is general convergence, not necessarily the harmonization of competition standards. The results achieved in this respect prove that the members are willing to implement the ICN's Recommended Practices[337] and Guiding Principles[338]

[334] *Supra* note 285, at 34.
[335] *Ibid.*, at 25.
[336] ICN, A Statement of Mission and Achievements, up until May-2005, online: ICN <http://www.internationalcompetitionnetwork.org/ICN_Mission_Achievements_Statement.pdf>.
[337] To date there are 13 ICN Recommended Practices: (1) nexus between the transaction's effects and the reviewing jurisdiction; (2) notification thresholds; (3) timing of notification; (4) review periods; (5) requirements fro initial notification; (6) conduct of merger investigations; (7) procedural fairness; (8) transparency; (9) confidentiality; (10) interagency cooperation; (11) review of merger control provisions; (12) remedies; (13) competition agency powers.
[338] There are 8 Guiding Principles around which any merger control regime should be built: (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; (8) protection of confidential information.

into their review practice. To this end several members have made or have proposed to make changes to their national regime in order to bring them into closer conformity with the ICN.[339]

Moreover, from the international negotiation practice point of view, it is obvious that when trying to harmonize substantive standards and adopt a binding uniform code, influential countries will push to have their objectives taken into account while weaker countries would have to be the ones making concessions in order to achieve compromise. As a consequence, the merger standards of powerful countries would dominate the worldwide regulation of mergers. This shows that trying to achieve overambitious goals may lead to big sacrifices to the detriment of members with less bargaining power. In contrast, in a results-oriented forum like the ICN where common binding rules are not an objective, all members regardless of their size or their degree of economic development are on an equal footing and work together towards the soft convergence of competition standards and consequently towards improving the efficiency of competition regimes worldwide.

The ICN, being a fruit of ongoing cooperative interaction between regulatory agencies, promoting informal non-binding "soft law" principles, has been a great success since it was launched in 2001 and has undeniable potential in terms of the governance of enforcement activities related to multijurisdictional mergers. Altogether, through ICN, "a higher degree of interjurisdictional cooperation is striven for without reducing the formal autonomy of the jurisdictional agencies and their rule-making and decision competences."[340] It must be noted that the ICN, as a multilateral discussion forum, does not preclude nations from continuing to improve of bilateral cooperation, notably cooperation in discovery and other comity measures.

[339] ICN, A Statement of Mission and Achievements, up until May-2005, online: ICN <http://www.internationalcompetitionnetwork.org/ICN_Mission_Achievements_Statement.pdf>. For example, the innovation brought about by the new EC Merger Regulation 139/2004 allowing for notification of a transaction on the basis of a good faith intent rather than a binding agreement.
[340] *Supra* note 285, at 32.

The ICN, without forcing substantive convergence, reduces through cognitive convergence the potential for conflicts and generally contributes to an increase of efficiency in the review of multijurisdictional mergers. The ICN plays and will continue to play a crucial role as regard the coherence and effectiveness of international merger control regime. Moreover, the ICN has a substantial advantage over any institutionalized regime based on uniform rules, in that it continues to function even in cases when divergence is due not to the difference of substantive rules, but rather to different interpretations of evidence or other considerations. While uniform rules are powerless in this kind of situation, the ICN through mutual understanding and constant cooperation has developed a diplomatic forum for conflict reduction. However, in all fairness it must be noted, that the ICN has not yet faced a case involving a major conflict. It is likely that cognitive convergence would similarly fail in a case where major national interests are in deep contradiction.

However successful it may be, the ICN framework is not without shortcomings. Although in theory every member has the same weight and exercises the same power in the process of establishing best practices, it cannot be excluded that smaller countries will suffer some discrimination. Moreover, as was already mentioned, it is questionable whether the ICN would be able to resolve cases where strong national interests are at stake.[341] Also a question arises as to whether the respect of diversity within the ICN is a sustainable or short-term solution to the international governance of transnational mergers.

ii. Future Prospects of the ICN

As regard the future prospects of the role of the ICN, already today it may be stated that the coordinated and systematic interaction of competition authorities within the ICN framework offers opportunities for cognitive convergence under which differing views on various merger cases may become convergent and somehow harmonized through the

[341] *Supra* note 285, at 38. *See also* Oliver Budzinski, "The International Competition Network as an International Merger Control Institution" in John-Ren Chen ed., *International Institutions and Multilateral Enterprises : Global Players, Global Markets*, (Cheltenham, UK ; Northhampton, MA, USA : Edward Elgar Pub., 2004), at 74.

repetitive exchange of arguments and the cooperative review process.[342] The development of this approach will lead in the future to the reduction of multijurisdictional conflicts due to increased trust among the agencies.[343] Ultimately, the inefficiencies due to administrative burdens and transaction costs caused by multiple reviews will be minimized, and substantive harmonization in the form of a uniform code will no longer appear needed.

Moreover, the large spectrum of competition related problems, in particular in the field of merger control, that the ICN embraces is impressive and indicates that "this is – or could be – the process of genesis of a fully-fledged international institution and, maybe, even organization."[344] However, to this end, the ICN would have to reinforce its coherency all the while maintaining the diversity. To fulfill both the demand for coherence and the demand for diversity, international merger governance should be shaped into a multilevel system where competencies among the agencies would be allocated horizontally as well as vertically.[345] Although designing such system would be a challenging task given present political conditions, the European system could serve as a model for such arrangement.[346] It would combine a horizontal network of national antitrust agencies with a vertical institution charged with overseeing their activities on the one hand and having separate competences with respect to global cases on the other. Therefore, the ICN, in order to satisfy these requirements, would have to evolve into an institutionalized body adding one level at the top of the current structure. In terms of substantive rules applicable to global cases, ICN best practices would have to evolve towards a binding set of rules whose binding character however would not be the fruit of negotiation but rather the fruit of their repetitive usage and general acceptance. In all

[342] *Supra* note 285, at 25 and 32.
[343] *Ibid.*, at 32.
[344] *Supra* note 314, at 71. The difference between an institution and an organization is discernible. Institutions are generally known systems of interpersonal rules which order repetitive interactions of individual actors and are followed by a majority of them. Organizations, on the other hand, are groups of individuals bound by some common purpose to achieve objectives.
[345] *See* Supra note 314, at 74, 79.
[346] The European merger control system is an example *par excellence* of a multilevel system consisting of two main levels, European, represented by the European Commission, and national, represented by the national competition authorities. The US system, consisting of three levels where the third level is constituted by private litigation, is more complex and hence less appropriate for an international arrangement.

cases in order to maintain diversity, which is the key mechanism used to establish best practices, it will be crucial to continue encouraging cognitive convergence rather than rigid harmonization.

With respect to conflict resolution, first it is assumed that given the process of cognitive convergence, the constant interaction of members and the consensual nature of the ICN, the potential for conflicts is rather low. Although to date the ICN has not faced any serious conflicts, future conflicts may be unavoidable. Future conflict should be resolved through amicable discussion rather than through a formalized dispute resolution process, like the one within the WTO. In the event that a member does not comply, the implicit punishment mechanism is in place whereby the deviant member will be ostracized from any future cooperation.[347]

In order to allow for an efficient multilevel system, it will be absolutely crucial that the ICN find a balance between centralizing and decentralizing forces.[348] While centralization allows for greater consistency, decentralization maintains diversity. However, global governance of cross-border mergers requires equilibrium between the two.

In light of the above, it is clear that this is a long-term project and much work will still have to be done. Whereas the ICN has done a great deal of work with respect to the international cooperation and coordination of various merger related issues, in particular procedural issues. In order to take the international coordination and cooperation to another level, the ICN will, in the near future, have to focus more on overcoming some basic methodology differences and try to achieve some sort of international consensus as to what the objectives are behind the various procedural requirements.

[347] At least in theory as one can hardly imagine the situation where the US would be ostracized in case of non-compliance.
[348] *Supra* note 314, at 79.

Conclusion

During the course of this thesis it has become clear that the cross-border phenomenon presented several challenges to the current framework that must be dealt with at a global scale. While many suggestions have been made as to how to cope with this phenomenon, none seem adequate. The complete centralization of competition rules and enforcement in the form of a uniform world competition code that would be enforced by an international body (the WTO model) seems to be not only unrealistic but also undesirable proposition. Such an arrangement would erode both national and institutional diversity, which as was already shown are necessary elements for institutional learning and innovation. Complete decentralization, meaning parallel unilateral enforcement by national authorities, has created situations of jurisdictional conflicts and has led to the erosion of the coherence of the system at a global level.

Therefore, with regard to the two main options for improving the global governance of cross-border mergers: (1) the convergence or harmonization of national competition laws and (2) the cooperation of enforcement agencies, it has become clear that harmonization of competition laws is not an option due to the fact that this scenario would require an incredible amount of international consensus and centralization efforts (which are unlikely under the present political conditions) and would ultimately lead to rules being created at the lowest common denominator. Contrary to this, the cooperation scenario appears to be a more appropriate route, provided that the existing cooperative initiatives are strengthened and improved.

For a long time it appeared that the WTO could be an appropriate home for an international competition agenda. However, the disadvantage of any international negotiation within the WTO is that the competition debate would not truly take place in a theoretical vacuum. The WTO's size and the number of issues dealt with within the WTO would make any negotiations a balancing of various national interests in different policy fields and would make the negotiations a series of trade-offs between nations in respect to other trade negotiations related to agriculture, services, IP or any other field currently covered in the WTO portfolio and not negotiations towards the best set of competition rules.[349] Any negotiations in such circumstances would certainly lead to a set of lowest common denominator rules, which would prove weak and inefficient and could ultimately jeopardize the WTO's work in other areas. The WTO framework was therefore, at least for the near future, abandoned.

Currently, the international governance of cross-border transactions is somewhere in between a centralized harmonized model and a decentralized cooperative model The ICN somehow offers, although only virtually, a centralized solution, all the while maintaining institutional decentralization and diversity.

For lack of a better alternative, the ICN is assumed to be, at the present time, the most appropriate solution to the cross-border phenomenon. The major issue with regard to the ICN is one of the sustainability of this arrangement over the long run. Generally speaking, there are two different paths through which the ICN may evolve. Either the ICN will evolve towards a more ambitious international merger control institution, which would require adding another level on top of the current ICN structure, with the view of centralizing the activities of its members. The principle of subsidiarity would allocate jurisdictional competence between the various levels as is currently done within the EU. However, such arrangement could ultimately be at the expense of diversity, which is currently one of the main merits of the ICN. On the other hand, the ICN may continue as is, waiting for the first storm all the while risking that the current regime will ultimately become incoherent. Which of the approaches will finally be favoured will depends mainly on the political willingness of ICN member states. But it is clear that in any case the ICN will need more time to mature and grow.

[349] Joel I. Klein, "Working Paper V – Competition Policy Objectives" in Ehlerman and Laudati, at 259.

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