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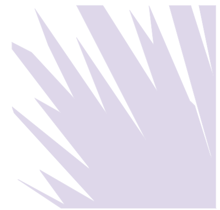

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# COORDINATION AMONG NATIONAL ANTITRUST AGENCIES

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This paper examines the manner in which national antitrust agencies within the European Union ("EU") and within the United States ("US") coordinate antitrust enforcement in their respective territories, and also how they interact with other antitrust organizations around the world. In looking at these issues, the hope is to add a new perspective to the ever important question of convergence of substantive antitrust laws in a global economy. An examination of how national antitrust agencies coordinate among themselves provides some insight into whether convergence should always be the goal, and whether it can realistically be achieved.

Part I focuses on coordination among national antitrust agencies within the EU. Part II focuses on coordination among the US enforcement agencies. Part III focuses on cooperation among the EU, the US and other non-EU countries and organizations. The paper concludes with some policy considerations for purposes of examining these issues.

## PART I: COORDINATION AMONG NATIONAL ANTITRUST AGENCIES IN THE EU

### A. Introduction - Antitrust Enforcement in the Pre-Modernization Era

Council Regulation (EC) No. 1/2003[5] ("Regulation 1/2003") entered into force on May 1, 2004. The main objective was to strengthen the enforcement of European Commission ("EC") competition rules at a national level through increased involvement of national competition authorities ("NCAs") and national judges.. Until that date, the enforcement of competition rules in the EU lacked coordination, was not based on the same set of rules and principles, and had limited application by NCAs and national judges. While it is possible for the early decades of the development of EC competition policy to attribute such an effect to a divergence of opinion for a clear antitrust policy, consensus began to develop in the 1980s, with member states gradually setting

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5 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. OJ L 1 of 4 January 2003, p. 1.

up national competition authorities and introducing national competition laws that were often largely modeled on EC law. Nonetheless, at that time the EU did not have normative instruments suitable to ensuring coordination of antitrust policy and enforcement at the national level.[6]

In the pre-modernization era, the EC was to a large extent alone in applying Articles 81 and 82 of the EC Treaty for prosecuting antitrust infringements capable of affecting trade between member states. NCAs retained competence to apply national antitrust provisions to infringements in their national territory, including infringements capable of affecting trade between member states, and thus fell within the scope of application of Articles 81 and 82 EC. However, the "monopoly" in the application of Articles 81 and 82, together with the fact that agreements affecting trade could be notified and approved in Brussels, led to a sub-optimal enforcement situation. This sub-optimal situation was further compounded by the EC's limited enforcement resources, the under-development of the NCAs' involvement in the application of EC competition law, and redundancies leading to inefficiencies because of different sets of rules.[7]

Regulation 1/2003 impacted the EC's enforcement prerogatives and investigative powers. It determined, on the one hand, the appropriate use of the available resources and on the other hand, a mechanism whereby the coherent application of antitrust principles was actively pursued.

For the first time, the national competition authorities of the member states and the national courts obtained the power to apply the competition provisions in the Treaty in full within their respective jurisdiction/sphere of competence.[8] In addition, when applying national competition law to agreements or conduct in breach of those rules, NCAs and national courts were obliged to apply Articles 81 and 82 of the EC Treaty (provided that the conduct was capable of affecting trade between member states).[9]

**B. The European Competition Network and Its Functioning**

The fact that Regulation 1/2003 empowered NCAs and national courts to apply Articles 81 and 82 triggered the concern that Community competition law might be applied in vastly diverging ways by different authorities and/or courts. In this respect, the establishment of the European Competition Network ("ECN") was the most appropriate solution to ensure cross-border cooperation between antitrust authorities, capillary enforcement, and coherent application of EU competition rules.

The ECN is not an autonomous body or organization in the EU institutional landscape. It is, rather, a forum for cooperation between the EC and the NCAs. The role of the ECN is to facilitate the exchange of information between competition authorities and the mutual assistance in antitrust investigations, with a view to shaping a common competition culture and enhancing the efficiency of the antitrust enforcement action across Europe.[10] The function of the ECN is not limited to the "institutional" activities provided for in Regulation 1/2003. Outside of the scope of such provisions, cooperation has grown and developed. Within the ECN, informal exchanges as well as periodic meetings in a range of different fora have their place. While the *plenary meetings* and *working groups* address issues concerning horizontal cooperation between the Authorities, ECN *subgroups* bring together experts for specific sectors. Moreover, any topic of sufficient weight and mutual interest can be taken up at the periodic Meetings of Directors General.

6 It must be observed, as an example, that Regulation 17/62 contained little provision for exchange of information between the Commission and the NCAs and none at all for exchange of information between the NCAs.
7 *See* Recital 3 of Regulation 1/2003: "*The centralised scheme set up by Regulation No 17 […] hampers application of the Community competition rules by the courts and competition authorities of the Member States, and the system of notification it involves prevents the Commission from concentrating its resources on curbing the most serious infringements. It also imposes considerable costs on undertakings.*"
8 *See* Articles 5 and 6 of Regulation 1/2003.
9 *See* Art. 3 of Regulation 1/2003.
10 *See* K. Dekeyser and M. Jaspers, *A New Era of ECN Cooperation*, World Competition, 2007, pp. 3-24.

### 1. An Integrated and Flexible Enforcement System

Regulation 1/2003 sets forth the provisions regulating the cooperation within the ECN. The resulting system is based on parallel competencies of the Commission and the NCAs in the application of EU competition rules and on flexible case allocation. Additional orientations on the functioning of the ECN are included in the Commission Notice on cooperation within the Network of Competition Authorities (the "Network Notice").[11]

As a consequence of the establishment of the ECN, additional resources (in terms of investigative tools and case-specific information) became available to European competition authorities, enhancing their ability to be effective enforcers including in cases that have certain cross-border implications. NCAs are able to draw on information exchanges and assistance from other authorities in the network under the mechanisms foreseen in the Regulation.

Moreover, work sharing in the network contributes to making effective and efficient use of the limited resources available for antitrust enforcement.

The parallel competence and the flexible case allocation principles, included in the Network Notice, allow any well-placed competition authority to take action on a case.[12] Cases can be handled by authorities that are well placed in terms of being close to (and consequently possess enhanced knowledge of) the markets affected. In addition, work sharing in the network can contribute to alleviating the persisting resource constraints for antitrust enforcement. At the same time, the Commission is enabled to play a leading role in the enforcement and is not prevented from handling cases raising important policy issues independent of their geographical scope.[13]

### 2. Exchange of Information

A key, value-adding element of the ECN is the possibility to exchange case-specific information. Such information can be relevant for case allocation purposes and/or for investigating and/or proving a case. Exchanged information can be used in evidence, if the conditions in the Regulation are fulfilled. There are specific safeguards for leniency-related information.

Article 12 of Regulation 1/2003 regulates the exchange of information within the ECN. It provides that, for the purpose of applying Articles 81 and 82 of the Treaty, the Commission and the competition authorities of the member states shall have the power to (i) provide one another with and (ii) use in evidence any matter of fact or of law, including confidential information.

With respect to the use in evidence of exchanged information, Art. 12(2) of Regulation 1/2003 clarifies that

> Information exchanged shall only be used in evidence for the purpose of applying Article 81 or Article 82 of the Treaty and in respect of the subject-matter for which it was collected by the transmitting authority. However, where national competition law is applied in the same case and in parallel to Community competition law and does not lead to a different outcome, information exchanged under this Article may also be used for the application of national competition law.

Only in two specific cases the information exchanged can be used in evidence to impose sanctions on natural persons namely when (i) the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 81 or Article 82 of the Treaty or (ii) the information has been collected in a way which respects the same level of protection of the rights of

11 OJ C 101 of 27 April 2004, p. 43.
12 On work sharing in the network and the concept of *well-placed* authority, see the Network Notice, paras 5ss.
13 *See* ECJ judgment in case C-344/98, *Masterfoods*, [2000] ECR I-11369.

defense of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.

In this respect, it is worth adding that, although Art. 12 empowers NCAs to exchange information, it does not compel them to do so when requested by another NCA.[14] The exchange of information is discretionary. Whether such discretion is outweighed by a general duty to cooperate imposed on the NCAs by Art. 10 of the EC Treaty has been the subject of debate.[15] Some argue that the rationale of Art. 10, i.e., the need that the Community institutions and the national authorities assist each other in the implementation of the Treaty, suggests that a duty to provide information does exist. However, there are opinions to the contrary.[16] What can be emphasized at this point is that, even if the *option* set forth by Article 12 is indeed construed as an *obligation*, such an obligation should not be considered unlimited. Leniency information, for instance, is of pre-eminent importance for antitrust enforcement and, as such, must be handled with caution.

The reflections above lead to the conclusion that the principles regulating the exchange and use in evidence of information gathered within the network are a cornerstone of the functioning of the ECN system. Access to information obtained anywhere in the network countries allows to build more solid cases at a faster pace while avoiding any duplication of investigative efforts. However, one caveat exists: the leniency information is an invaluable enforcement resource for the authority that gathers it and accordingly will subject to a special regime.

### 3. Cooperation in the EU and Leniency: The ECN Model Leniency Program

In order to provide a greater degree of predictability for potential applicants and prevent them from being faced with contradictory demands when more than one ECN leniency program is applicable, ECN members launched the ECN Model Leniency Program. It is an important tool for the harmonization of all European leniency programs.

The principal aim of this program is to provide details on how the one-stop-shop options for the handling of leniency within the ECN should work, thus setting out the principal substantive rules that ECN members believe should be common to all the programs they operate.

### 4. Work Sharing

With the sole exception of Article 11(6), the system of Regulation 1/2003 is a system of parallel competences. The Network Notice envisages that work sharing should be flexible and a matter of dialogue between the enforcers in the ECN. This approach initially raised concerns and was also contested in court.

In legal terms, it is noteworthy that the Court of First Instance ("CFI") has for the first time taken position on questions of work sharing between the Commission and national competition authorities in the ECN in its judgments of March 8, 2007[17] in the France Télécom cases. In a nutshell, the applicants in the case had argued that – by carrying out an inspection in a case that had previously been dealt with by the French NCA and consensually been pursued further by the Commission – the Commission had violated an alleged 'division of competences' that, according to the applicant, could be derived from Regulation 1/2003, the Network Notice and/or general principles.

In its judgment in Case T-339/04, the CFI rejected the arguments of the applicant(s) in respect of work sharing in the ECN in their entirety. It held in particular that Regulation 1/2003 has, in conformity with the principle of subsidiarity, provided for a wider association of the national

14 It must be considered that NCAs are already subject to an obligation to comply with the Commission's request for information pursuant to Art. 18(6) of Regulation 1/2003.
15 *See* J. Faull & A. Nikpay, *The EC Law of Competition*, 2nd ed., 2007, pp. 141-142.
16 It is argued, in particular that the provision of Art. 12 of Reg. 1/2003 is a specific provision and, as such, it would prevail over Art. 10 EC Treaty. The latter is a rule of general character, which is only applicable to the extent that Community legislation does not specifically provide on the matter. *See* J. Faull & A. Nikpay, *cit.*, pp. 141-142.
17 Judgements of the CFI of 8 March 2007 in Cases T-339/04 and 340/04, France Telecom v. Commission.

competition authorities with the application of the EC competition rules. However, the Regulation has not changed the general competence of the Commission recognized by the case law of the European Court of Justice ("ECJ") (*Masterfoods*). Moreover, the Regulation has not established a division of competences that could preclude the Commission from carrying out an inspection where a national competition authority is already dealing with the same case. Neither the Network Notice – as evidenced by its contents and wording – nor the Joint Statement establish binding criteria that could lead to the conclusion that – in the case at hand – solely the French competition authority could deal with the case and that the Commission was prevented from doing so. Furthermore, the principle of subsidiarity does not put into question the competences conferred on the Commission by the EC Treaty, which include the enforcement of the EC competition rules.

From a practical perspective, work sharing is not a major issue of concern and discussion within the network. Based on the Network Notice, cases are in the vast majority of instances followed up and concluded by the authority that started them.[18] When initiating an investigation, authorities naturally take into account that they have a close relationship with the market in which the infringement takes effect, access to the evidence (if necessary with assistance by one or more other authorities) and enforcement powers to address the case. At present, there is no indication that any cases at all have been initiated by an authority that could not be considered well placed within the meaning of the Network Notice. In addition, any issues arising in connection with a possible re-allocation have been addressed and solved through bilateral discussions taking place within the network and at the earliest possible stage. In sum, the practice of the ECN shows that very few cases have been transferred from one competition authority to another or have given rise to work sharing discussions between authorities in the network.

### 5. Coherent Application of Antitrust Rules

Regulation 1/2003 pursues as one major objective: the coherent application of the EC competition rules by all enforcers. It recognizes the fact that inconsistencies in the application of Articles 81/82 EC can be detrimental to companies doing business in the internal market. Against this background, it calls for a high level of coherence which in turn, entails a degree of coordination in the ECN.

In the above respect, Regulation 1/2003 sets forth three main mechanisms in order to ensure the coherent application of the antitrust rules: (i) obligation on NCAs to apply community law whenever there is an effect on trade between member states, in a manner that ensures convergence between national and community law (Art. 3); (ii) obligation on the NCAs to inform the Commission at the latest 30 calendar days before the adoption of an envisaged decision (Art. 11(4)); and (iii) possibility for the Commission to intervene if there is a serious risk of incoherence by relieving the NCA of its competence to act (Art. 11(6)).

Art. 3 of Regulation 1/2003 has so far ensured the desired convergence in the application of antitrust rules, with the result that, from this perspective, there is now a level playing field for undertakings doing business in the European Union.[19]

In addition, the information mechanism foreseen in Art. 11(4) of Regulation 1/2003 allows the Commission to review all the envisaged decisions from NCAs so as to exercise its task and particular responsibility towards ensuring a coherent application of the antitrust provisions. The possibility to submit observations on a case[20] has proven, in this respect, to be a pragmatic and balanced tool to foster the required convergence. The aim of such observations is to draw the national authority's attention to certain issues or to raise certain points which might merit further reflection. They are usually undertaken in a very informal manner in phone contacts between the national case-team and the responsible unit within DG Competition. In certain cases, the oral

18 *See* K. Dekeyser and D. Dalheimer, *Cooperation within the European Competition Network – Taking Stock After 10 Months of Case Practice*, in P. Lowe & M. Reynolds (eds), *Antitrust Reform in Europe: a Year in Practice*, London, International Bar Association, 2005, pp. 105-123.
19 *See* K. Dekeyser and M. Jaspers, *cit.*
20 *See* Network Notice, para. 46.

dialogues are followed by a letter, but the fact that the views are expressed in writing does not change the informal nature of the exercise.

It is useful to underline that coherent application should not be confounded with absolute uniformity in outcome. Ensuring an overall level playing field for European business is achieved when the same type of legal and economic considerations govern enforcement action by ECN members. Market or case-specific elements may result in a different outcome for cases that would initially appear to be the same. Different ECN members may also opt for different instruments – such as prohibition or commitment decisions – to address the identified concern.

At this stage of the ECN activities, the Commission has never used the possibility granted by Art. 11(6) to take action on a case and relieve an NCA of its competence to act to ensure coherent application of EC rules. Informal contacts and comments have proven to be very effective in drawing the national authority's attention on the most relevant aspects of a case and the willingness of the national authorities to engage in these dialogues and to take due account of the suggestions made has turned this more voluntarily cooperation instrument into a useful complementary tool to the formal powers given to the Commission. In this respect, the powers granted by Art. 11(6) remain as an *extrema ratio* in the array of Commission's enforcement tools.

### 6. Achievements of The ECN Network

At present, the allocation of cases, work sharing, and exchange of information in the ECN have resulted in an enhanced and coherent application of EC competition rules. The ECN has had policy effects beyond what is expressly required by the Modernization Package, such as the growing convergence of national procedural rules and the work in the leniency field being good examples.[21] However, not all discrepancies in the centralized and decentralized application of the competition rules have been removed, as the different policies for fines of each NCAs demonstrate.

The ECN network has brought about substantial improvements in antitrust enforcement in the EU. While the Commission maintains a leading and propulsive role within the network, it must be noted that, since the adoption of Regulation 1/2003, the NCAs have also been very active in prosecuting cartels as well as in pursuing other antitrust infringements of all types. Between May 2004 and mid-November 2007, the ECN members have adopted some fifty decisions applying Art. 81 to cartels. Three out of five of these decisions were adopted by the NCAs.[22]

Numerous NCAs are pro-active enforcers in the liberalizing markets and have in recent years exercised a strict control vis-à-vis foreclosing strategies by – still dominant – incumbent operators. NCAs are active in sectors that involve highly complex economic questions, e.g., financial services, and address areas that had for a long time not been the object of competition law scrutiny, e.g., liberal professions. Also, the role of the sectoral ECN subgroups has to be highlighted in this regard. These groups bring together experts from the authorities in a given area and serve as a forum for mutual information and joint learning. They also provide opportunities for coordination of enforcement action that is reflected in clusters of cases being moved forward by various enforcers.

Thus, the improvements to be credited to the ECN go far beyond dry numbers and remarkably consist of continuous efforts in exchanging intelligence information and actively cooperating in case work.

## C. Conclusion

Before the ECN, the EC held a monopoly in the application of Art. 81 and 82 of the EC Treaty. The ECN has significantly improved the situation by decentralizing enforcement powers and responsibilities.

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21 *See* K. Dekeyser and M. Jaspers, "A New Era of ECN Cooperation," in *World Competition*, 30(1), 2007, p. 22.
22 *See* presentation by W. Wils at the conference "Fifty Years of the Treaty: Assessment and Perspectives of Competition Policy in Europe," IESE, Barcelona, November 19-20, 2007.

The ECN is not a decision-making body, but rather a forum for discussion, cooperation, and information exchange. Far from invading and eroding the competences and the prerogatives of single NCAs, the ECN is an efficiency-enhancing structure (in terms of both resources and information available) facilitating an incisive antitrust enforcement. In this scenario, the EC maintains a crucial and leading role, in particular by ensuring a coherent application of antitrust principles and policy in all member states. The EC may also, thanks to the ECN, focus its attention on the most urgent priorities, such as pan-European infringements.

The positive effects of the ECN are further enhanced by the sharing, within the network, of a common leniency policy and culture. In this respect, it is a great achievement that NCAs throughout Europe have within a remarkably short time frame decided to endorse the Model Leniency Program and align their leniency policies (already existing or forthcoming) to it. The result is a consolidation of a system characterized by greater efficiency and legal certainty, where it is easier, on the one hand, to unveil cartels and, on the other hand, to prosecute them at a faster pace and with greater effectiveness.

## PART II: ANTITRUST COOPERATION AMONG US ANTITRUST AUTHORITIES

### A. Introduction

Antitrust enforcement in the United States can best be described as a patchwork of concurrent, and to some extent overlapping, authorities at both the federal and state levels. Foremost at the federal level, the Antitrust Division at the US Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") oversee investigation, litigation, and transactional review of a broad range of antitrust-related matters. At the state level, attorneys general may bring suit on behalf of the state and in their *parens patriae* role under both state and federal law, and state and territorial antitrust agencies also engage in transactional reviews. Moreover, private plaintiffs may sue on behalf of individuals, groups, or a large class of millions of "clients" under both federal and state law. The role of private plaintiffs and their interaction with US antitrust authorities is important but outside the scope of this paper.

Cooperation between the federal agencies and between federal and state governments occurs frequently on both formal and informal bases. The two prominent federal agencies, DOJ and FTC, share enforcement authority under the Clayton Act and accordingly coordinate with each other, at times in a dysfunctional fashion, to allocate investigative resources. Also, with the adoption of the Protocol for Coordination of Merger Investigations and the Protocol for Increased State Prosecution of Criminal Antitrust Offenses, federal and state antitrust authorities have increased their formal coordination in the investigation and prosecution of anticompetitive conduct. Moreover, federal caselaw heavily influences state court litigation and decision-making, thereby creating one body of law shared by both.

The United States and other countries cooperate through formal mechanisms, including bilateral agreements, mutual legal assistance treaties, and other diplomatic instruments, and informal mechanisms, and informal relationships. In addition, consultation occurs through various multinational organizations.

Congress enacted the Sherman Act into law in 1890 and passed the Clayton Act in 1914.[23] While the DOJ had already been prosecuting anticompetitive conduct for more than 30 years, President Franklin D. Roosevelt formally created the Antitrust Division of the DOJ in 1933 with the appointment and confirmation of Harold M. Stevens, the first Assistant Attorney General for Antitrust.[24] Congress's passage of the Federal Trade Commission Act – in the same year as the Clayton Act – established the FTC, in part to supplement the DOJ's enforcement of the antitrust

23 *See* Department of Justice, Timeline of Antitrust Enforcement Highlights at the Department of Justice, *available at* http://www.usdoj.gov/atr/timeline.pdf (last visited June 17, 2008).
24 *See* Lauren Kearney Peay, Note, *The Cautionary Tale of the Failed 2002 FTC/DOJ Merger Clearance Accord*, 60 Vand. L. Rev. 1307, 1311-12 n.15 (2007).

laws[25] and to create an administrative agency for the administrative rulemaking and adjudication of antitrust matters.[26]

## B. Cooperation Between Federal Antitrust Authorities

### 1. Background

The DOJ and the FTC share government enforcement of the federal antitrust laws. While the DOJ holds exclusive federal power to prosecute criminal and civil claims under the Sherman Act[27] and the FTC routinely investigates violations of the Robinson-Patman Act, both agencies can bring civil enforcement actions under the Clayton Act.[28] In its Antitrust Division Manual, the DOJ describes the enforcement relationship with the FTC:

> The Antitrust Division and the FTC have concurrent statutory authority to enforce Sections 2, 3, 7, and 8 of the Clayton Act. Judicial interpretation of Section 5 of the FTC Act permits the FTC to challenge conduct that also may constitute a Sherman Act violation, and thus, there is an overlap with the Division in this area as well. This overlapping antitrust enforcement authority necessitates coordination between the two agencies to ensure both efficient use of limited resources and fairness to subjects of antitrust investigations.[29]

When both agencies hold concurrent jurisdiction and to ensure efficient use of resources, the "clearance procedure" is used to designate one agency to proceed with the investigation.[30] Usually, one agency will grant the other agency clearance quickly.[31] Adopted in 1995 by the two agencies, the Hart-Scott-Rodino Premerger Program Improvements agreement provides internal procedures to decide which agency will investigate a specific merger.[32] Not withstanding these procedures, conflicts do arise between the DOJ and FTC, especially in merger review under Section 7 of the Clayton Act.[33]

In addition to consultation and referral for both merger and non-merger matters, the DOJ and FTC regularly share information and evidence with one another to the extent permitted by law.[34] The two agencies also cooperate in studying and designing antitrust policy, such as their participation in joint hearings and joint drafting of reports on a variety of topics,[35] issuance of various guidelines,[36] and joint filing of amicus briefs.[37] Further, the DOJ and FTC create task forces to study particular areas of the law and present reports, including the State Action Task Force and the Noerr-Pennington Task Force.[38]

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25 *See* D. Bruce Hoffman & M. Sean Royall, *Administrative Litigation at the FTC: Past, Present, and Future*, 71 Antitrust L.J. 319, 319–20 (2003).
26 *See* David Balto, *Returning to the Elman Vision of the Federal Trade Commission: Reassessing the Approach to FTC Remedies*, 72 ANTITRUST L.J. 1113, 1113–14, 1117-18 (2005).
27 While it holds no power pursuant to the Sherman Act, the FTC can bring suit under 15 U.S.C. Section 45, i.e., FTC Act Section 5, for conduct that might violate the Sherman Act. *See* ABA Section of Antitrust Law, *Antitrust Law Developments* 691 n.454 (6th ed. 2007) (hereinafter "Antitrust Law Developments") (citing *FTC v. Cement Inst.*, 333 U.S. 683, 690 (1948)).
28 Antitrust Law Developments at 691. Other federal agencies possess limited jurisdiction under the Clayton Act, including the Surface Transportation Board, Federal Communications Commission, Department of Transportation, and the Federal Reserve Board. *Id.* at n. 455.
29 Antitrust Div., U.S. Dep't of Justice, Antitrust Division Manual ch. VII (3d ed. 1998), *available at* http://www.usdoj.gov/atr/foia/divisionmanual/ch7.htm (hereinafter "Antitrust Division Manual").
30 Antitrust Law Developments at 693. The latest revision of the Clearance Procedures of Investigations was adopted in 1993. *Id.* at n.462.
31 *Id.* at 694.
32 *Id.*
33 *Id.* at 693-94.
34 Antitrust Division Manual, Chapter VII.
35 Antitrust Law Developments at 694. Those topics include intellectual property, health-care, and single-firm conduct. *See, e.g.*, Federal Trade Comm'n & U.S. Dep't of Justice, Hearings on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy (Feb. 6–Nov. 6, 2002), *available at* http://www.ftc.gov/opp/intellect/index.htm; News Release, FTC, FTC Issues Report on How to Promote Innovation Through Balancing Competition with Patent Law and Policy (Oct. 28, 2003), *available at* http://www.ftc.gov/opa/2003/10/cpreport.htm; FTC/DOJ Report and Hearings on Health Care and Competition Law and Policy (Feb. 2003–Sept. 2003), *available at* http://www.ftc.gov/ogc/healthcarehearings/index.htm; Department of Justice and FTC Issue Merger Challenges Data, Announce Upcoming Merger Enforcement Workshop (Dec. 18, 2003), *available at* http://www.usdoj.gov/atr/public/pressreleases/2003/201899.htm.
36 *See, e.g.,* U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines (1992, revised 1997), *available at* http://www.ftc.gov/bc/docs/horizmer.htm; U.S. Dep't of Justice & Federal Trade Comm'n, Antitrust Guidelines for Collaborations Among Competitors (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf; U.S. Dep't of Justice & Federal Trade Comm'n, Antitrust Guidelines for Licensing of Intellectual Property (1995), *available at* http://www.usdoj.gov/atr/public/guidelines/0558.htm; U.S. Dep't of Justice & Federal Trade Comm'n, Antitrust Enforcement Guidelines for International Operations (1995), *available at* http://www.usdoj.gov/atr/public/guidelines/internat.htm; U.S. Dep't of Justice & Federal Trade Comm'n, Commentary on the Horizontal Merger Guidelines (2006), *available at* http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf.
37 Andrew Gavil, *Antitrust Bookends: The 2006 Supreme Court Term in Historical Context*, 22 Antitrust 21, 22-23 nn.48, 49 (Fall 2007) (citing numerous joint briefs for the United States as amicus).
38 Report of the State Action Task Force: Recommendations to Clarify and Reaffirm the Original Purposes of the State Action Doctrine to Help Ensure Robust Competition Continues to Protect Consumers (Sept. 2003), *available at* http://www.ftc.gov/os/2003/09/stateactionreport.pdf; Noerr-Pennington Task Force, *described at* http://www.ftc.gov/os/2003/07/antitrustoversighttest.htm.

### 2. Jurisdictional Conflicts Between the DOJ and the FTC

Section 7 of the Clayton Act tasks both the DOJ and FTC to prevent the formation of monopolies.[39] In 1976, Congress's passage of the Hart-Scott-Rodino Antitrust Improvements Act ("H-S-R Act") established a premerger notification process and a statutorily-defined waiting period.[40] However, the H-S-R Act did not provide any procedures for the DOJ and the FTC to define which agency would investigate a merger.[41,42] At the same time, because it required the review of all mergers of a specific size and set a time limit for review, the H-S-R Act, in effect, demanded that the DOJ and FTC work efficiently to decide which agency would review each merger.[43]

To alleviate the rising tide of clearance disputes, the DOJ and FTC entered into two agreements, one in 1993 and the second in 1995, under which the agency with the most expertise in the industrial sector of the proposed merger would investigate.[44] Nevertheless, clearance disputes between the DOJ and FTC consumed much of the 30-day waiting period, leaving the "cleared" agency with little time to review the merger.[45]

In 2002, the DOJ and FTC announced the creation of a Memorandum of Agreement ("Clearance Agreement") that delineated the industry sectors that were to fall under each agency's purview, and the divisions would be permanent.[46] Approximately two months before the announcement, Senator Ernest Hollings, Ranking Member of the Commerce, Justice and State Appropriations Subcommittee of the US Senate that has the power to approve or disapprove the DOJ's budget, vociferously objected to the Clearance Agreement on the grounds that it would shift antitrust oversight from the FTC, which does not sit directly in the Executive Branch, to political appointees in the DOJ.[47] Political support for the Clearance Agreement never recovered, and despite the March 2002 joint announcement, the DOJ and FTC abandoned the effort in May 2002.[48]

### 3. Findings in the Antitrust Modernization Commission Report

The same year that the Memorandum of Agreement was nullified, the Congress enacted the Antitrust Modernization Commission Act, which created a committee to study the current state of all antitrust laws and enforcement and make recommendations for improvement.[49] In 2007, the Commission delivered its final report within which it recommended

> The Federal Trade Commission and the Antitrust Division of the Department of Justice should develop and implement a new merger clearance agreement based on the principles in the 2002 Clearance Agreement between the agencies, with the goal of clearing all proposed transactions to one agency or the other within a short period of time. To this end, the appropriate congressional committees should encourage both antitrust agencies to reach a new agreement, and the agencies should consult with these committees in developing a new agreement.[50]

39 Antitrust Law Developments at 333.
40 *Id.* at 334.
41 *See The Cautionary Tale of the Failed 2002 FTC/DOJ Merger Clearance Accord*, 60 Vand. L. Rev. at 1314-15.
42 Even though notification must be made to both the DOJ and FTC at the beginning, parties would pick which agency they preferred to deal with by contacting the one or the other immediately after filing. The agencies now discourage this practice.
43 *See id.*
44 *See id.* at 1315-16; *see also supra* n.12.
45 *Id.* at 1316 (citing Federal Trade Commission, Clearance Delays, http://www.ftc.gov/opa/2002/02/clearance/cleardailystats.htm). The DOJ and FTC commissioned a study to evaluate the problem and found that 24 percent of all matters for which clearance was requested delayed the review process, on average, by three weeks each. *Id.* at 1317-18; News Release, FTC, FTC and DOJ Announce New Clearance Procedures for Antitrust Matters (Mar. 5, 2002), *available at* http://www.ftc.gov/opa/2002/03/clearance.shtm.
46 *Id.* at 1318. (citing Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations (Mar. 5, 2002), available at http://www.ftc.gov/opa/2002/02/clearance/ftcdojagree.pdf). The DOJ was to have jurisdiction over agricultural and associated biotechnology; avionics, aeronautics, and defense electronics; beer; computer software; cosmetic and hair care; financial services/insurance/stock and option, bond, and commodity markets; flat glass; health insurance and healthcare products and services; industrial equipment; media and entertainment; metals; mining and minerals; missiles, tanks, and armored vehicles; naval defense products; photography and film; pulp, paper, lumber, and timber; telecommunications services and equipment; travel and transportation; and waste. The FTC was to have jurisdiction over airframes; autos and trucks; building materials; chemicals; computer hardware; energy; healthcare; industrial gases; munitions; operation of grocery stores and grocery manufacturing; operation of retail stores; pharmaceuticals and biotechnology; professional services; satellite manufacturing and launch and launch vehicles; and textiles.
47 *Id.* at 1334 (citing Philip Shenon, *Plan to Split Up Antitrust Oversight Stalls*, N.Y. Times, Jan. 18, 2002, at C2.
48 *Id.* at 1335 (citing Charles A. James, Statement Regarding DOJ/FTC Clearance Agreement (May 20, 2002), *available at* http://www.usdoj.gov/opa/pr/2002/May/02_ag_302.htm).
49 Antitrust Modernization Commission Act of 2002. The Commission was composed of twelve commissions with four each appointed by the President, Senate, and House of Representatives. Pursuant to its enabling statute, the Commission terminated 30 days after issuing its report.
50 Antitrust Modernization Commission, Report and Recommendations at 134 (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm (hereinafter "Antitrust Modernization Commission Report").

The Commission found that the clearance disputes occurred infrequently,[51] but when they do, the conflicts, among other things, "create tension in the normally cooperative relationship between the two agencies and undermine public confidence in the US antitrust enforcement regime."[52] The Commission highlighted two components of the 2002 Clearance Agreement that it found especially important. First, the allocation of areas of primary responsibility should be retained in whatever new agreement might be created.[53] Second, any new agreement should include the 2002 Clearance Agreement's "tie-breaker" process where an independent arbitrator would assign a merger to one agency within 10 days of the initial clearance request.[54]

### C. Cooperation Between Federal And State Antitrust Authorities

All 50 states, plus the District of Columbia, Puerto Rico, and the Virgin Islands, have passed antitrust laws that largely track the Sherman Act and the Clayton Act.[55] In fact, the 1890 enactment of the Sherman Act occurred after 26 states had already put in place some form of antitrust prohibition, and the principal author of the Sherman Act himself stated that the federal statute was to "supplement the enforcement" of state law.[56] During the Reagan administration, many states perceived federal antitrust efforts as lacking and accordingly became more active in enforcing both federal and state law.[57] Today, state antitrust authorities coordinate more closely with federal authorities in the investigation and prosecution of anticompetitive conduct.

#### 1. Background

A majority of states have laws similar, many almost identical, to Sections 1 and 2 of the Sherman Act, and less frequently, laws similar to Sections 3 and 7 of the Clayton Act and the Robinson-Patman Act.[58] Many states' competition laws specifically require deference of varying degree to federal precedent, *i.e.*, "harmonization statutes."[59] In states where no harmonization statute exists, state courts generally follow federal caselaw.[60] While some state courts have extended their jurisdiction's competition laws to interstate commerce,[61] some states have used comity to curtail the extraterritorial reach of state law.[62] The United States Supreme Court has held that state antitrust laws are not preempted by either the Commerce Clause or the Supremacy Clause of the US Constitution.[63]

In addition to state laws, states can bring suit under federal antitrust statutes. The H-S-R Act included provisions that ordered the DOJ to provide investigative information to state attorneys general and allowed state attorneys general to sue under the Sherman Act with *parens patria* actions in the name of state residents for treble damages.[64] In addition, a state may bring suit as an injured purchaser on its own behalf under Section 4 of the Clayton Act,[65] and a state can seek injunctive relief under Section 16 of the Clayton Act for harms to the state's economy.[66]

In 1983, the National Association of Attorneys General ("NAAG") created the Multistate Antitrust Task Force.[67] In 1989, NAAG formed the Executive Working Group on Antitrust to coordinate federal and state enforcement efforts.[68] A majority of states have joined the

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51 *Id.*
52 *Id.*
53 *Id.* at 136.
54 *Id.*
55 Antitrust Law Developments at 623 (citing ABA Section of Antitrust Law, *State Antitrust Practice and Statutes* (3d ed. 2004)). To read a comprehensive list of state antitrust laws, see *State Laws*, 6 Trade. Reg. Rep. (CCH) Paragraph 30,000. *Id.*
56 Antitrust Law Developments at 623 (citing 21 Cong. Rec. 2457 (1890).
57 *See* Kevin J. O'Connor, *Federalist Lessons for International Antitrust Convergence*, 70 Antitrust L.J. 413, 421 (2002).
58 Antitrust Law Developments at 623-24.
59 *Id.* (collecting statutes).
60 *Id.* (collecting cases).
61 *Id.* at 625 (citing *Coca-Cola, Co. v. Harmar Bottling Co.*, 2006-2 Trade Cas. (CCH) Paragraph 75,464, at 106,234 (Tex. 2006) ("mere involvement of interstate commerce does not permit a defendant to escape suit")).
62 *Id.*
63 Antitrust Modernization Report at 185 (citing *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 130 (1978); *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) (holding state antitrust laws to be within "an area traditionally regulated by the States" for which there is a "presumption against finding pre-emption")).
64 15 U.S.C. Sections 15c, 15f (2000); *see* Susan Beth Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General*, 68 Fordham L. Rev. 361, 376-91 (1999).
65 Antitrust Law Developments at 725 (stating that "the states allege pricing fixing and seek overcharged amounts as their damages").
66 *Id.* at 726 (citing *In re K-Dur Antitrust Litig.*, 338 F.Supp.2d 517, 550 (D.N.J. 2004) (denying defendants' motion to dismiss states' claims for alleged conspiracy to delay entry of generic drugs)).
67 Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 Duke L.J. 673, 679 (2003).
68 Antitrust Modernization Report at 188 (citing Michael DeBow, *State Antitrust Enforcement: Empirical Evidence and a Modest Reform Proposal*, *in* Competition Laws In Conflict 269 (Richard A. Epstein & Michael S. Greve eds., 2004)).

Voluntary Pre-Merger Disclosure Compact, which "encourages merging firms to submit pre-merger filings to the member states in return for an agreement by the states to forgo the issuance of individual state subpoenas and to obtain documents through the same process used by the relevant federal antitrust agency."[69]

Consultation, coordination, and cooperation between federal and state antitrust authorities can take on a variety of forms. For example, in criminal investigations, the DOJ and state antitrust authorities agreed to a cross-deputization program in which state attorneys generals could be appointed to assist in the prosecution of federal criminal antitrust cases.[70] As another example, the NAAG Executive Working Group holds monthly teleconferences with federal authorities.[71] In the past, the DOJ held Common Ground Conferences with state attorneys general to discuss coordination of state and federal antitrust enforcement.[72]

### 2. Coordination Protocols

In 1998, the DOJ, FTC, and NAAG adopted the Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General ("Merger Protocol").[73] In 1996, the DOJ and NAAG adopted the Protocol for Increased State Prosecution of Criminal Antitrust Offenses ("State Prosecution Protocol").[74] Together, the Merger Protocol and the State Prosecution Protocol represent the two most important examples of the formal coordination between federal and state antitrust enforcement authorities.

The Merger Protocol helps define the areas ripe for coordination in the merger review process. For example, to avoid subpoenas from multiple state enforcement agencies, the Merger Protocol specifies that the federal agency investigating the proposed merger will share H-S-R filing documents with the state authorities with the consent of the merging parties.[75] Further, the Merger Protocol encourages the reviewing authorities to hold a teleconference early in the process to coordinate the collection of evidence and the hiring of experts.[76] The Merger Protocol also urges federal and state authorities to work closely with each other during settlement negotiations, and if possible, hold joint settlement talks.[77]

The State Prosecution Protocol provides a mechanism for the DOJ to hand off criminal investigations to a state attorney general when the alleged anticompetitive conduct, usually bid-rigging or price fixing, only affects local concerns.[78] The State Prosecution Protocol imposes two criteria: first, the state attorney general must have the legal and personnel resources to undertake the criminal prosecution, and second, the state attorney general is willing to undertake the criminal prosecution.[79] If the attorney general satisfies those requirements, the DOJ will transfer all evidence related to the investigation.[80]

### 3. Conflicts Between Federal and State Laws and Jurisprudence

In *Illinois Brick Co. v. Illinois*, the Supreme Court closed the door on the recovery of damages for indirect purchasers harmed by Section 1 of the Sherman Act.[81] Before and after the Court's 1977 decision in *Illinois Brick*, more than 25 states enacted laws, sometimes called "*Illinois*

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69 Antitrust Modernization Report at 188-89 (citing National Association of Attorneys General, Voluntary Pre-Merger Disclosure Compact (1987, revised 1994), *available at* http://www.naag.org/assets/files/pdf/200612-antitrust-voluntary-premergerdisclosure-compact.pdf).

70 Antitrust Law Developments at 798-99 (citing Antitrust Division Manual, ch. VII). The California Attorney General's Office participated in a grand jury investigation of alleged anticompetitive conduct involving electrical signals with the Antitrust Division. *See, e.g., United States v. Rosendin Elec.*, 1989-2 Trade Cas. (CCH) paragraph 68,809, at 62,242-45 (N.D.Cal. 1987); FTC, News Release, State, Federal Law Enforcers Launch Sting on Business Opportunity, Work-at-Home Scams (June 20, 2002), *available at* http://www.ftc.gov/opa/2002/06/bizopswe.shtm.

71 American Bar Ass'n, Section on Antitrust Law, The State of Federal Antitrust Enforcement at 48 (2004), *available at* http://www.abanet.org/antitrust/at-comments/2005/02-05/federal_at_enforcement.html.

72 U.S. Dep't of Justice, Cooperative Antitrust Enforcement (1995), *available at* http://www.usdoj.gov/atr/public/speeches/0142.htm.

73 U.S. Dep't of Justice, Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General (1998), *available at* http://www.usdoj.gov/atr/public/guidelines/1773.htm (hereinafter "Merger Protocol").

74 U.S. Dep't of Justice, Protocol for Increased State Prosecution of Criminal Antitrust Offenses (1996), *available at* http://www.usdoj.gov/atr/public/guidelines/0618.htm (hereinafter "State Prosecution Protocol").

75 Robert L. Hubbard & Sondra Roberto, *State Merger Enforcement*, 6 Sedona Conf. J. at 3 (2005).

76 *Id.*

77 *Id.* at 4.

78 *See* Protocol for Increased State Prosecution of Criminal Antitrust Offenses.

79 *Id.*

80 *Id.*

81 431 U.S. 720 (1977).

*Brick* repealers," that specifically permit recovery for indirect purchasers for violations of state antitrust laws.[82] The Supreme Court ruled that these laws were not preempted by federal law in its seminal decision in *California v. ARC America Corp.*[83] In that case, the state attorneys general of Alabama, Arizona, California, and Minnesota brought suit against ARC America under Section 4 of the Clayton Act as indirect purchasers who fell victim to a price fixing conspiracy in violation of Section 1 of the Sherman Act.[84] The states also alleged violations of their state antitrust laws.[85] In approving a settlement agreement, the District Court denied relief of the states' indirect purchaser statutes because it found that those laws were preempted by federal law, and the Ninth Circuit affirmed.[86] The Supreme Court, however, found that the state indirect purchaser statutes are not preempted:

> [T]he Court of Appeals erred in holding that the state indirect purchaser statutes are pre-empted. There is no claim that the federal antitrust laws expressly pre-empt state laws permitting indirect purchaser recovery. [. . .] Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies.[87]

Moreover, the Court found that state indirect purchaser laws do not obstruct the "purposes and objectives of Congress," stating that "[s]tate laws to this effect are consistent with the broad purposes of the federal antitrust laws: deterring anticompetitive conduct and ensuring the compensation of victims of that conduct."[88]

Ninety-seven years ago, in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, the Supreme Court held that minimum vertical price fixing, also referred to as minimum resale price maintenance, was *per se* illegal.[88] In 2007, the Supreme Court, in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, overruled the *per se* rule of *Dr. Miles* and replaced it with a rule of reason analysis.[90] Currently, 13 states forbid resale price maintenance,[91] and the adherence of another eight states to federal precedent remains an open question.[92] Moreover, 37 states filed an amicus curiae brief with the Supreme Court to implore the court not to overturn the *per se* rule of *Dr. Miles*.[93] The Vertical Restraints Guidelines issued by NAAG, last revised in 1995, currently describe resale price maintenance as *per se* illegal.[94]

Two years prior to the Supreme Court's decision, NAAG adopted a resolution that included numerous principles of state enforcement that takes a somewhat strident position of the states' independence from federal antitrust enforcement.[95] The principles proclaim that "the federal antitrust laws were enacted by Congress with the intent that those laws complement rather than supplant state antitrust laws."[96] Also, the principles state that NAAG "[o]pposes federal preemption of any state antitrust statutes, including indirect purchaser statutes, or other limitation of state antitrust authority, as such preemption or limitation would impair enforcement of the antitrust laws, harm consumers, and harm free competition."[97]

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82 Antitrust Law Developments at 639 n. 118 (collecting statutes). Those states (and District) include Alabama, Arkansas, California, Colorado, the District of Columbia, Hawaii, Idaho, Illinois, Kansas, Maine, Maryland, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, New York, North Dakota, Oregon, Rhode Island, South Dakota, Utah, Vermont, West Virginia, and Wisconsin.
83 490 U.S. 93 (1989).
84 *Id.* at 97-98.
85 *Id.*
86 *Id.* at 99.
87 *Id.* at 101-02 (citing 21 Cong.Rec. 2457 (1890) (remarks of Sen. Sherman)) (footnote and other citations omitted).
88 *Id.* at 102 (citing *Illinois Brick*, 431 U.S. at 746; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-486 (1977)).
89 220 U.S. 373 (1911).
90 127 S.Ct. 2705 (2007).
91 Richard A. Duncan and Alison K. Guernsey, *Waiting for the Other Shoe to Drop: Will State Courts Follow Leegin?*, 27 Franchise L.J. 173, 174 (Winter 2008). Those states include California, Connecticut, Kansas, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New York, Ohio, South Carolina, Tennessee, and West Virginia. Note that New York and New Jersey hold contractual provisions that implement resale price maintenance unenforceable.
92 *Id.* at 177. Those states include Arkansas, Georgia, Maine, North Dakota, Vermont, and Wyoming.
93 *See* Briefs for the States of New York, Alaska, Arkansas, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, and Wyoming as Amici Curiae Supporting Respondents, *Leegin Creative Leather Prods. Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) (No. 06-480), *available at* http://www.antitrustreview.com/files/2007/02/leegin.pdf.
94 *Id.* (citing Nat'l Ass'n of Attorneys General, Vertical Restraints Guidelines (2d ed. 1995)).
95 Nat'l Ass'n of Attorneys General, Resolution, Principles of State Antitrust Enforcement (2005), *available at* http://www.abanet.org/antitrust/at-committees/at-state/pdf/modernization/naag-sp2005-res.pdf.
96 *Id.* at 1.
97 *Id.* at 2-3.

### 4. Findings in the US Antitrust Modernization Commission Report

In its evaluation of state enforcement of antitrust laws, the US Antitrust Modernization Commission analyzed state enforcement using the NAAG State Antitrust Litigation Database.[98] The Commission found that of the 343 antitrust actions recorded during 1990 to 2006, 59 percent of the actions were undertaken with federal antitrust authorities.[99] The Commission also found that 80 percent of the enforcement actions dealt with "local or regional conduct."[100] Forty-seven percent of the cases recorded involved price fixing, bid rigging, or market allocation, and 34 percent involved merger review.[101] The remaining 19 percent consist of various forms of anticompetitive conduct, such as boycotts, tying, and resale price maintenance.[102]

The Commission concluded that, overall, "[t]he available evidence suggests that . . . state and federal non-merger antitrust enforcement over the past seventeen years has been broadly consistent and not in conflict."[103] The Commission recommended that no statutory change was necessary for state non-merger enforcement.[104] In addition, the Commission recommended no statutory change to the states' role in reviewing mergers.[105] Additional recommendations for merger review included the encouragement of federal and state authorities to coordinate their merger review activities, to harmonize the application of substantive antitrust law, and to make investigative information requests consistent across federal and state authorities.[106]

## PART III: COOPERATION AMONG THE EU, THE US AND OTHER NON-EU COUNTRIES

Given the globalization of the economy and the cross-border nature of infringements, international cooperation – both at the bilateral and multilateral level – has become essential for the effective enforcement of competition rules. For example, in 2003, the DOJ, the European Commission ("EC") Directorate-General for Competition, the Canadian Competition Bureau, and the Japanese Fair Trade Commission conducted simultaneous searches and interviews regarding suspected interrelated global cartel activity.[107] With the rise of multinational corporations and the global scope of commerce, multinational antitrust investigations and prosecutions are increasingly becoming the norm.[108]

On the one hand, this cooperation can take place informally at a bilateral or multilateral level, for example through the implementation of the 1995 OECD Recommendation on international cooperation that provides a legal basis for the cooperation between the European Commission and the competition authorities of other OECD member countries. Activities carried out under the framework of the WTO, the OECD, and the International Competition Network ("ICN") brought about substantial progress in the development of common standards to address specific issues.

On the other hand, the expansion of international economic relations increasingly requires that the EU and other countries conclude international agreements with other states and regions.

In 1967 the OECD recommended that the issues regarding the international enforcement of national competition laws be addressed during the negotiation of bilateral agreements. At the time, discussions amongst OECD member states resulted in a body of recommendations which would later

98 Antitrust Modernization Report at 190.
99 *Id.* at 191. The Commission noted that the NAAG State Antitrust Litigation Database defines "federal participation" as "there was a federal case related to the state case." *Id.* Further, the Commission stated that the "database does not explain whether federal participation was 'joint, parallel, or independent.'" *Id.*
100 *Id.*
101 *Id.* Figure 1 indicates that 29% of the merger review cases recorded involved federal participation and five percent without federal participation.
102 *Id.* at 195. Table A shows that six cases involving resale price maintenance occurred from 1999 to 2006.
103 *Id.* at 194.
104 *Id.* at 192-98. The Commission also recommended that state "non-merger enforcement should focus primarily on matters involving localized conduct and competitive effects." *Id.* at 196-97.
105 *Id.* at 198-200.
106 *Id.* at 200-03.
107 Scott D. Hammond, U.S. Dep't of Justice, Antitrust Div., An Update of the Antitrust Division's Criminal Enforcement Program, Address Before the A.B.A. Section of Antitrust Law Cartel Enforcement Roundtable 1 (Nov. 16, 2005), *available at* http://www.usdoj.gov/atr/public/speeches/213247.htm (last visited July 18, 2008).
108 *Id.* (stating 90 percent of nearly $3 billion in criminal fines collected from FY1997 to FY2005 came from international cartel activity and approximately 50 percent of corporate defendants were foreign based).

form the basis for many bilateral agreements, including the timely notifications of cases of interest to the other country, the sharing of information, the coordination of parallel investigations and mutual assistance in collecting evidence, as well as positive comity principles.

## A. Cooperation Among the EU And Non-EU Countries

Today the EU engages in bilateral relations with a large number of countries and particular importance is placed on the bilateral cooperation agreements between the EU and USA, Canada and Japan, which – particularly the US agreement – have been developing satisfactorily. Under these agreements, competition authorities on both sides exchange information and coordinate their enforcement activities. Each side may ask the other to take on enforcement actions (positive comity), and each side must take account of the other's interests when enforcing competition rules (traditional or negative comity).

### 1. Administrative Agreements on Cooperation in Competition Law Matters: The Bilateral Agreements

#### a. United States of America

On September 1991, the Commission entered into the first independent agreement with the US on the issue of cooperation between competition authorities in the application of their competition laws ("EC/US Agreement"). The 1991 agreement was the first bilateral agreement to include the concept of positive comity. Furthermore, in 1998 the parties supplemented the agreement with another agreement regarding the application of "positive comity principles" in order to enhance the enforcement of their competition laws. The EC/US Agreement was intended to avoid or settle possible conflicts and has developed into an intensive cooperation between the European Commission and the two American competition authorities.

The EC/US Agreement covers the Commission's proceedings regarding competition law arising under Articles 81, 82, 85 and 86 EC as well as under ECMR and, within the US, competition proceedings carried out by the Antitrust Division of the Department of Justice and the Federal Trade Commission under the Sherman Act, the Clayton Act, the Wilson Tariff Act and the FTC Act.

The scope of the EC/US Agreement is limited to cooperation between the competition authorities at a federal level in the US and at the EC level in the EU. It excludes certain regulated sectors within the US, and does not establish a right for private parties. Moreover, this agreement must be interpreted in a manner consistent with the parties' existing domestic regulation. The main obligations of the EC/US Agreement are: (i) the obligation to notify the other party whenever the competition authorities become aware that their enforcement activities may affect the other party's important interests; (ii) a general obligation to provide the other party with the requested information unless the information falls under one of the exceptions and (iii) an obligation to assist to the other party's competition authorities in their enforcement activities and coordinate enforcement activities.

Thanks to efforts made on both sides to find a convergent policy, both EC and US authorities have reached compatible results, in particular due to the so-called negative and positive comity rules.

The negative comity principles require that an authority restrain itself in the application of its laws and regulations where the advantage gained from their application would be smaller than the negative effect they would have on the interests of another country's authorities.

In practice, the American authorities seem to have only once formally called upon the Commission, in *Boeing/McDonnell Douglas,*[109] to consider the interests of the American defense

109 OJ L 336/16, 1997.

industry in the investigation of the aforementioned concentration. Ultimately, the Commission was able to respect that request in its final Decision, authorizing the concentration.[110]

The positive comity principles, on the other hand, provide the parties with a framework for the common prosecution of certain practices, when anti-competitive practices in the territory of one party are also capable of affecting another party's significant interests. Thus, if one party believes that antitrust infringements taking place on the other party's territory are adversely affecting its important interests, it can inform the other party and request that appropriate enforcement activities be carried out by the competent authorities. The notified party has the discretion to decide whether or not to undertake enforcement activities and the notifying party is not prevented from undertaking its own enforcement actions.

In particular, the purpose of the 1998 Positive Comity Agreement has been to improve the rules governing the division of cases between parties in the investigation of anticompetitive activities which adversely affect the interests of another party and which are impermissible under the domestic competition laws of the State in which they are taking place (Article I(1) of the Positive Comity Agreement). In this respect, the Court of First Instance has assumed that the main purpose of the agreement was to give one party the opportunity to benefit from the effects of a procedure initiated by the other party.[111]

In any case, in addition to these measures used to enhance efficiency, the desire to avoid jurisdictional conflicts must also be emphasized.

The application of the 1998 Comity Agreement is subject to two important limitations: (i) the information provided by one party to the competition authorities of the other party to implement the agreement shall be used exclusively for that purpose unless the authority providing the information, as well as its source, consent to another use; and (ii) the applicable rule takes precedence over the Comity Agreement.

To date the positive comity mechanism has only been formally used in *Sabre/Amadeus*[112] where US agencies asked the Commission to investigate anti-competitive conduct by several European airlines for their failure to provide Sabre, a US-based computer reservation system, with the same comprehensive and timely flight information they provided the European based Amadeus system. The Commission initiated proceedings against one airline following a request by the Department of Justice.

However other cases have been dealt with the positive comity principle on an informal basis: in *Nielsen* a competitor complained in both Europe and the US about an alleged abuse of dominant position by a research company. Since the complaint concerned practices employed mostly in Europe, the US authorities entrusted the Commission to carry out the proceedings as soon as they were ensured that the Commission would take action. Nevertheless, the Commission got the US authorities involved in the investigation, and they were able to close their proceedings shortly after the Commission did.[113]

Similarly, the Commission was able to better assess the proposed *Halliburton/Dressler* merger because it had already been the subject of negotiations between the parties and the US competition authorities.[114]

Moreover, in March 1999 the EC and the US agreed upon allowing reciprocal attendance at determined procedural stages in individual cases. Even if attendances had informal precedents, since US officials were informally present at the Commission hearings in the *Boeing/MDD* merger

110 Conversely, the Commission was recommended to exercise restraint in applying the ECMR after the *Oracle/Peoplesoft* merger was authorised in the U.S.
111 CFI Judgement of June 15, 2005, *Speciality graphites*, Case T-71/03, Section 116.
112 IP/00/835.
113 EC Com. Report on Competition Policy 26, 1996, 347.
114 EC Com. Report on Competition Policy 28, 1998, 351.

investigation, the chance provided for in the administrative arrangements was first used in December 1999, when officials of the Federal Trade Commission attended the Commission's oral hearing in the *BOC/Air Liquide* merger case.

While EC and US competition authorities have learned to cooperate closely to their mutual advantage, there are still concerns that US rules on discovery may undermine EU procedures, especially in the context of leniency applications.

This issue arose in the *Vitamins* cartel case when US plaintiffs sought to obtain full copies of leniency applications that were filed with the Commission to be used as evidence in their action for damages.

The Commission filed an *amicus curiae* brief in the matter of *In Re Vitamin Antitrust Litigation* where it did not dispute the possibility of suing leniency applicants for damages, but argued that the EC leniency program "*should not be available as a shortcut for plaintiffs*" because the application of discovery rules to EU leniency applications might "*undermine the effectiveness of the EC leniency program at a very critical stage of investigation.*"[115] However, according to the plaintiffs, the defendants should take into account the fact that providing written statements to any governmental body "*waives any privilege or protection that otherwise may have shielded those materials from discovery.*"

The issue is not settled and shows the difficult balance of interests between protecting leniency applicants, whom authorities depend on to disclose the existence of cartels, and the plaintiffs' right to access information in order to bring an action, especially since private actions are now strongly encouraged by the Commission. The Commission has since than decided to follow the practice of US competition authorities and allow companies to apply for leniency orally.[116]

Notwithstanding this intensive cooperation, the Commission and the US antitrust authorities have reached different conclusions in several important cases.

With respect to mergers, the *GE/Honeywell* proposed merger, among others, was treated differently by the US Department for Justice, which cleared the merger and the Commission, which blocked it, showing that besides the challenge to aligning their procedures, the substantive tests carried out by the antitrust authorities do not converge entirely.[117]

The divergence in the approach to antitrust enforcement taken by the EC and US antitrust authorities was reinforced by the *Microsoft* case, which highlighted that unilateral behaviour is one of the most controversial issues in this area.

In this regard, it has to be recalled that some months after the EC decision on Microsoft, Mr. R. Hewitt Pate, then assistant Attorney-General for the Antitrust Division of the US Department of Justice stated: "*…Unilateral conduct remains the area of greatest separation between the general approaches of the US and the EU. At the broadest level, we in the United States might be said-in words suggested by Judge Posner at a recent Antitrust Division event to have a more Darwinian view of the competitive process. Over here, as a DG Comp economist has put it during the same program, there is a great emphasis on requiring that dominant firms limit themselves to 'gentlemanly' competition.*"

And EC Commissioner Mario Monti replied: "*…I think we are aiming at safeguarding conditions of Darwinian competition just as our American friends, provided it is Darwinian competition on the merit. If competition is Darwinian but through means other than the merit, then I believe that the competition authorities should be draconian.*"

115 *See* A. Burnside, H. Crossley: "Co-operation in competition: a new era?", in *E.L.Rev*, Sweet and Maxwell, April 2005, p. 252.
116 *Ibid.*
117 In speeches on this case, Charles James, who at the time was Assistant Attorney General for Antitrust at U.S. Department for Justice, pointed out that "*the DoJ had considered the merger to be procompetitive and beneficial to consumers*" that U.S. laws "*protect competition, not competitors" and that the European approach "reflects a significant point of divergence.*" The EU's reply was that it is mostly concerned with consumer welfare and that, in the long term, consumer welfare relies on effective competition, consequently the long-term risk of seeing competitors exit from the market is seen as more harmful than any advantage gained from the short-term improvements to competition. *See* A. Burnside: "GE, Honey; I sunk the Merger," in *ECLR* , 2002, p.109.

In *Microsoft*, although both the Commission and the US Department of Justice kept each other informed throughout the duration of their respective proceedings against the corporation, in the US the case was resolved via a settlement, reached in 2002, which imposed largely behavioural remedies on Microsoft, while the Commission's proceeding in 2004 concluded by requiring Microsoft to disclose certain source code information, supply a version of Windows which does not include the Media Player, as well as the levy of a massive fine.

**b. Competition Law Agreement EC/Canada**

In 1999 the EC concluded a cooperation agreement with Canada that, for the most part, follows the agreements between EC and US.

The most relevant difference between the two agreements is the scope, given that the EC/Canada Agreement does not cover Article 86 EC proceedings. Another difference is that the catalogue of situations requiring a notification contains an additional circumstance requiring notification, *i.e.,* "enforcement activities that involve one of the parties seeking information located in the territory of the other party."

Under this agreement, each party's competition authority must, when carrying out coordinated enforcement activity, try to ensure that the other party's enforcement objective is also reached. Mechanisms of negative and positive comity are provided.

**c. EC/Japan Competition Law Agreement**

In 2003 the EC entered into an agreement with Japan on cooperation on competition law activities. The agreement was entered into exclusively by the EU Council. All relevant sections of the agreement follow the parallel agreements with the United States and Canada. It should be noted that the purpose of the EC/Japan Competition Law Agreement is not only to facilitate the cooperation and coordination between competition authorities but that such cooperation should contribute to the effective enforcement of each party's domestic competition laws. The first occasion was the *Heat Stabilisers and Impact Modifiers* case.[118]

**d. Bilateral Relations with Korea and China**

The Commission signed a Memorandum of Understanding with the Korea Fair Trade Commission in October 2004. It establishes a bilateral competition "dialogue," through which these authorities may exchange opinions on issues of competition policy and work together in case-related applications of their competition laws when it is admissible under their existing domestic laws.

Furthermore, the Chinese Department of Commerce and the Commission agreed in May 2004 to establish a "structured dialogue." This provides a forum for consultations on issues of competition policy and for assistance in the introduction of a competition regime.

**2. Multilateral Cooperation**

Since the end of World War II, attempts have been made to solve the legal and practical concerns raised by the parallel application of national competition laws, subject to the principle of territoriality, in the framework of a globalizing economy.

The draft of the *Havana Charter* (1948), the *UNCTAD Model Law* (1980) and the *Draft International Antitrust Code* (1993) were different attempts to find effective structures for governance at a multilateral level and thus respond to globalization.

In this respect, it has been affirmed that any form of "global solution" raises serious concerns about the economic and institutional differences between States. Moreover, according to this

118 EC Commission Report on Competition Policy 33, 2003, Section 697.

point of view, there is a serious objection that harmonization of the principles of competition law at a global level, would not be flexible enough to adapt quickly to new problems: "top down" solutions would even lead to insufficient enforcement.[119]

Therefore, as harmonization of competition law at the international level seems neither realistic nor desirable, international organizations seek to reach a consensus on a minimum set of standards at the international level.

While the draft of the *Havana Charter* contained a chapter on competition policy, this chapter was cast aside after the rejection of the Charter by the American Congress and forgotten during the *Uruguay Round,* which led to the creation of the WTO (1994), demonstrating the minor importance of competition law.

However, many provisions of WTO law refer to competition law concepts. The precise content of those general indications has yet to be developed because the WTO system is generally directed at States and thus does not have direct effects on business practices.

For example in *Kodak/Fuji* the US tried to argue that an exclusive agreement between Japanese wholesale distributors and a national manufacturer was an infringement of WTO law because it restricted trade. The dispute settlement panel of the WTO concluded that the toleration of anti-competitive practice of private persons does not constitute a *state* restriction of trade.[120]

The WTO members made an attempt to include issues of competition law in the WTO system during the Ministerial Conference of Singapore in 1996, and the so-called "Singapore Issues" were put on the agenda of the Ministerial Conference of Doha of 2001 where a working group was appointed to concentrate on the principles of transparency, non-discrimination and the protection of procedural fairness.

However, during the Ministerial Conference of Cancun in 2003, the majority of the WTO members opposed the initiation of formal deliberation on a possible WTO competition agreement that was strongly supported by the EU.

Thus the EU, in order to improve multilateral coordination efforts which have yet to become a common competition framework, participates in informal international bodies. This fosters dialogue between authorities and experts, creating movement towards a convergence in competition laws and procedures, and towards the development of a new competition regime.

The idea is to achieve a convergence of national cartel law through voluntary adoption and gradual evolution. The biggest advantage of this "bottom-up" approach is that it respects the principle of subsidiarity and takes account of the States' sovereignty over antitrust enforcement.

On the other hand, this approach causes delays and imbalances in the implementation of the proposed recommendations. In conclusion, convergence is less harsh, but much slower to achieve.

#### a. The OECD

One of the more important bodies for multilateral cooperation is the OECD. It was established in 1961 and brings together 35 countries to provide statistics on economic and social data so it can analyze and forecast economic developments and social changes and thus help countries find solutions to common problems related to market economy.

In particular the OECD's Competition Committee is a source of policy analysis and provides governments with advice on important competition policy issues and market-oriented reform

119 *See* G. Roebling in G. Hirsch, F. Montag, F. Jurgen Sacker, "Competition Law: European Community Practice and Procedures," Thomson Sweet & Maxwell, 2008, p 121 and 127.
120 WTO, WT/DS44/R-"Kodak/Fuji."

by actively encouraging and assisting government decision-makers in tackling anti-competitive practices and regulations. Members of the Committee include senior representatives from the competition authorities in OECD countries, plus observers from a number of non-OECD countries. A larger number of countries participate through the Global Forum on Competition. Business and consumer representatives also participate in some Committee and Global Forum activities.

The OECD Committee works out *Best Practice Roundtables* and *Studies*, which provide statements on fundamental and sector specific topics of competition policy. Moreover, the Competition Committee proposes recommendations to the OECD Council of Ministers. They do not create binding law, but they often influence the development of the law in the OECD member states. Among these recommendations, there are the OECD Recommendation 1995 on International Cooperation; the OECD Recommendation 1998 on Effective action against hard core cartels; the OECD Recommendation 2001 on Structural separation in regulated industries; the OECD Recommendation 2005 on the merger review, whose content is similar to the ICN recommendation on the same topic.

**b. The International Competition Network**

The ICN was created in 2001, as a global antitrust network that was launched to "*provide competition authorities with a specialised yet informal venue for maintaining regular contacts and addressing practical competition concerns*." It should be noted that the ICN does not have any binding power, but seeks to propose and adopt recommendations and guidelines to address relevant issues in the area of antitrust enforcement: it is an informal network of competition authorities which discusses topics of competition law and policy with the aim of providing recommendations for a convergence of procedural and substantial law.

Nowadays a large majority of the existing competition authorities joined the ICN (89, coming from 79 jurisdictions), including competition authorities from developing countries, as well as non-governmental bodies such as international organizations (*e.g.*, OECD and WTO), industry and consumer associations, associations and practitioners of antitrust law and economics and members of academia. ICN appoints project-related working groups that compare the individual jurisdiction's different approaches in reports and conferences. When there are sufficient common features, at the annual conferences ICN presents Guiding Principles or Recommended Practices that have been endorsed by all competition authorities.

At present, ICN practice is mainly focused on a multi-jurisdictional merger review as the number of multiple notifications of large proposed concentrations has strongly increased. The ICN recommendations seek to reconcile the tension between the national control over mergers on one hand, and the desired coherent and efficient global regulatory framework on the other hand. If the recommendations are implemented they foster the convergence and a greater compatibility of the different proceedings thus making cross-border cooperation between the authorities of the ICN more effective. Furthermore, the increased predictability of parallel proceedings reduces the regulatory barriers for the merging undertakings.

This is an example on how the "bottom-up" approach can, in the long term, bring to a gradual convergence of national antitrust rules and a development of a global competition culture, possibly leading to the codification at international level.

**c. Legal Relationships with Candidate Countries**

Nowadays, the European Union has accession relationships with Croatia, Turkey Macedonia and Albania. The agreements contain several provisions on the development of competition policy and state aid rules in those countries. Moreover, the Association Agreement between the EC and Turkey differs from the competition rules of other agreements of the EC, by allowing for the possibility of sanctions for private persons (Articles 32-33 Decision of the Association Council No. 1/95).

#### d. Regional Association Processes

The European Union has association agreements with the Southern Mediterranean Region ("EuroMed") and with the neighboring CIS States. These agreements contain an obligation of the partner countries to introduce competition and state aid discipline.

Moreover, the European Union has intensified its political and economic dialogue with the African, Caribbean and Pacific countries ("ACP countries") with the Cotonou Agreement, entered into force on April 1, 2003 and replacing the so-called Lomé Agreements. It provides for the implementation of rules and policies on restrictive agreements or practices as well as assistance and co-operation in drafting an appropriate legal framework.

#### e. Free Trade Agreements

Legal relations between the EC and Switzerland are based on the bilateral Free Trade Agreement of 1972 and seven other bilateral agreements, which entered into force on June 1, 2002. The substantive rules on competition declare that restrictive agreements, abuses of a dominant position and any state aid are incompatible with the proper functioning of the agreements in so far as they may affect trade between the EC and Switzerland.

The EC and its member states entered into other free trade agreements, containing competition rules, with Mexico (entered into force on October 1, 2000), Chile (signed in 2002) and South Africa (entered into force on May 1, 2004).

## B. Cooperation Among the US And Other Countries' Antitrust Authorities

### 1. US Diplomatic Instruments Enabling Cooperation Between Nations

The United States and eight nations have put in place executive, bilateral agreements through which they coordinate antitrust enforcement and investigations.[121] In general, these agreements provide notification of investigations, sharing of non-confidential information, coordination of investigations, and consultation to resolve problems and disputes.[122] The International Competition Policy Advisory Committee, as appointed by former President Bill Clinton and former Attorney General Janet Reno, described the bilateral agreements as:

> Each of these agreements reflects two themes: enforcement cooperation, on the one hand, and the avoidance or management of disputes, on the other. According to the US Department of Justice, the extent to which one or the other of these themes has predominated in a particular agreement has depended on the specific bilateral concerns and history from which the agreement emerged. In addition, the most recent bilateral agreement includes a third theme, that of technical cooperation.[123]

Enacted in 1994, the International Antitrust Enforcement Assistance Act enables executive agreements, if negotiated with certain conditions, to include provisions for the exchange of confidential information between antitrust authorities but does not allow the disclosure of confidential information for multinational merger review.[124] However, so far, the United States has entered into only one such agreement.[125] Nonetheless, the degree of cooperation is still quite considerable.

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121 Antitrust Law Developments at 1261. Those countries include Germany, Australia, the European Communities, Canada, Israel, Japan, Brazil, and Mexico. Because these instruments are executive agreements, they do not affect existing law, such as prohibitions on the disclosure of confidential information without consent.

122 *Id.* at 1262.

123 *See* International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust, U.S. Dep't of Justice, Final Report, Annex C-1, v (Feb. 28 2000), *available at* http:// www.usdoj.gov/atr/icpac/finalreport.htm (last visited July 18, 2008) (hereinafter "ICPAC Report").

124 *Id.*, Annex C-1, at vii.

125 Agreement Between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance (1999), *available at* http://www.usdoj.gov/atr/public/international/docs/usaus7.htm (last visited July 18, 2008).

The United States Executive Branch has also negotiated and the United States Senate has approved Mutual Legal Assistance Treaties ("MLATs") with more than 30 countries.[126] These treaties facilitate cooperation between nations in criminal antitrust matters, including the compulsion of evidence and the obtainment of confidential investigation information.[127] The DOJ's Office of International Affairs serves as a point of contact for MLAT-related matters.[128]

**2. Findings in the United States' Antitrust Modernization Commission Report**

The United States' Antitrust Modernization Commission analyzed cooperation between the US antitrust authorities and the rest of the world and decided that, for the most part, the DOJ and FTC worked closely and efficiently with other nations on antitrust-related issues.[128] At the same time, the Commission made a number of recommendations and findings. First, the Commission notes that 70 jurisdictions require notification of a proposed merger, and the filing requirements for each nation remain heterogeneous, and in aggregate, quite expensive.[130] The Commission recommended that the DOJ and FTC conduct a feasibility study, in coordination with other nations, of "some kind of common premerger notification system across countries that would reduce the burden associated with multiple filings."[131]

Second, the Commission recommended that principles of both negative and positive comity be inserted into most bilateral and multilateral agreements because it provides "a useful mechanism to avoid duplicative enforcement and to reduce instances of potentially conflicting decisions."[132] The Commission recommended that comity should promote the goals of deferral, harmonization, coordination mechanisms, and benchmarking reviews.[133] Regarding deferral, a country, if the transaction or conduct does not impact its jurisdiction to as great of an extent as another country, would not seek an enforcement action or to impose remedies and defer to the other jurisdiction.[134] The harmonization of remedies principle simply means that, rather than limiting other nations from imposing different remedies, nations would have confidence that the first country to act would be "competent and free from political influence."[135] The coordination mechanism and benchmarking review principles allow for entities subject to conflicting remedies will have an avenue to request the nations to consult with one another, and the benchmarking review principle would encourage nations that impose disparate remedies to conduct a "retrospective evaluation as to why the usual cooperation mechanisms failed."[136]

**Conclusion**

There has been a lot of effort to improve coordination and cooperation among national antitrust enforcement agencies in the EU and the US. Is the level of coordination and cooperation sufficient? The answer to that question is debatable. There are still differences in approach and there is still lack of coordination in certain areas. For example, in certain circumstances, confidentiality requirements limit cooperation on parallel case development in different jurisdictions. There are also substantive law differences among different national competition authorities, especially in the US. For example, in the US, there are differences in the law enforcement approach at the DOJ and at the FTC in monopolization cases, especially as those matters relate to intellectual property and competition law interfaces.[137] Some also argue that there are differences in merger enforcement views

126 *Id.* at 181 n.7.
127 Antitrust Law Developments at 1262; U.S. Dept. of State, Mutual Legal Assistance (MLAT) and Other Agreements, http://travel.state.gov/law/info/judicial/judicial_690.html (last visited July 18, 2008) (showing MLATs currently in force or pending Senate approval).
128 U.S. Dept. of State, Mutual Legal Assistance (MLAT) and Other Agreements (directing prosecutors to contact Office of International Affairs).
129 Antitrust Modernization Report at 213-14, 216.
130 *Id.* at 217 (citing PricewaterhouseCoopers survey that found mergers typically required eight complete filings and cost $3.8 million to $11.5 million). It remains doubtful that there more than a handful of mergers which have been reported to much more than a dozen jurisdictions that require notification. This is based on an informal survey of several experienced practitioners.
131 *Id.* (noting that Germany, France, and Britain attempted a joint filing system but its use was infrequent).
132 *Id.* at 221.
133 *Id.* at 223.
134 *Id.* at 223-24. The Commission divided deferral between complete deferral, where a "direct, substantial, and reasonably foreseeable" standard would apply, and presumptive deferral in which choice-of-law principles would determine the nation to which deference would paid.
135 *Id.* at 224.
136 *Id.* at 224-25.
137 *See* Willard K. Tom, "The DOJ/FTC Report on Antitrust Enforcement and Intellectual Property Rights," Antitrust, Summer 2007, Vol. 21, number 3, at 36-37.

and aggressiveness between the DOJ and the FTC.[138] Finally, there are arguably ambiguities surrounding several recent US Supreme Court antitrust opinions, as to which some controversy has been generated.[139]

What insight, if any, does this provide to the inevitable questions surrounding "convergence" of the substantive antitrust laws in a global economy? The authors do not express any opinion, but rather offer two different viewpoints for consideration. One view is that to the extent there are differences in substantive antitrust enforcement among the authorities within the US, over time competition between the authorities will result in a superior substantive approach, and the same should apply for competition among substantive antitrust laws around the globe.[140] Furthermore, convergence of antitrust laws on a global basis may be too difficult and an unrealistic goal due to the unique political, social, legal and economic background of every country.[141] While comity and cooperation are a good thing, acceptance of some difference in substantive law may be necessary when cooperation inevitably breaks down. This is especially the case given the uncertainty of the state of economics and its important role in antitrust law. Arguably further efforts to achieve better coordination and cooperation, both within the US and the EU and among each other, are of greater importance then achievement of complete convergence.

On the other hand, in an integrated global economy a single set of rules would certainly be more predictable, efficient and result in decreased legal fees, which in turn can spur economic growth and create efficiencies (factors of tremendous importance). Although there may be some benefits to competition among antitrust agencies, it could be argued that the inconveniences and inefficiencies the competitive process imposes on businesses make the result in the end not worth it. Moreover, some could question whether superior substantive approaches result from the competitive process.

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138 *See, e.g.,* Jonathan B. Baker and Carl Shapiro, "Reinvigorating Horizontal Merger Enforcement," October, 2007, Prepared for the Kirkpatrick Conference on Conservative Economic Influence on U.S. Antitrust Policy, Georgetown University Law School, April 2007, organized by Robert Pitofsky, *available at* http://faculty.haas.berkeley.edu/shapiro/mergerpolicy.pdf.

139 *See* Commissioner J. Thomas Rosch, "A Modest Proposal For Modest Antitrust Decisions at the Supreme Court," presented at the Antitrust Section Spring Meeting of the American Bar Association, March 27, 2008, *available at* http://www.ftc.gov/speeches/rosch/080327modest.pdf.

140 *See* William E. Kovacic, Chairman, U.S. Federal Trade Commission, "Competition Policy in the European Union and the United States: Convergence or Divergence?," Bates White Fifth Annual Antitrust Conference, Washington, D.C., June 2, 2008, *available at* http://www.ftc.gov/speeches/kovacic/080602bateswhite.pdf.

141 J. Thomas Rosch, Commissioner, U.S. Federal Trade Commission, "Has The Pendulum Swung Too Far? Some Reflections on U.S. and EC Jurisprudence," Bates White Fourth Annual Antitrust Conference, June 25, 2007, *available at* http://www.ftc.gov/speeches/rosch/070625pendulum.pdf.