

**Co-operation in Competition Policy Enforcement between the EU and the
US and New Concepts Evolving at the World Trade Organisation and the
International Competition Network**

By Dr. Alexander SCHAUB^{*}

Director-General, DG Competition, European Commission

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OUTLINE

1. Introduction
2. Globalisation
3. Competition policy in the World Trade Organisation
4. International Competition Network (ICN)
5. Bilateral Co-operation with the US
 - a) Merger control
 - b) Cartel Cases
6. Conclusion

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1. Introduction

When I was preparing for this speech, I came across the recent issue of the Mentor Group's "Forum" with my contribution on the consolidating joint EU-US evaluation practices after the 1997 Boeing/McDonnell Douglas merger case.

Browsing through that publication today, I was reminded once again of the rapidly changing environment that is currently making the issue of international cooperation in competition, and in particular the close bilateral cooperation with our American counterparts, an equally fascinating and challenging topic.

Some of the trends that I tried to sketch out in that essay still seemed quite far away on the horizon at the time of writing. However now, less than twelve months on, many of these trends are already in full swing.

In view of these important developments, I would like to use today's opportunity to return to the issue of our bilateral coordination of competition policy enforcement with the Anti-trust Division of the US Department of Justice, and the US Federal Trade Commission in order to take stock of where we are today.

However, before turning more in detail to the state of play of the bilateral cooperation with our US counterparts, I think that it is necessary to firmly place this bilateral cooperation into the broader international context.

2. Globalisation

The successive achievements of trade liberalisation, on a unilateral or multilateral basis, appreciably freed trade in goods and services from artificial obstacles. The broad market opening through the results of the Uruguay Round lent renewed momentum to this development. And barriers to capital movement have generally diminished substantially over the last years.

With regard to international cross-border company mergers, the growth rates are enormous if we look at the transactions notified to the Commission. The number of transactions more than doubled between 1991 and 1996, and in each of the years 1997 to 2000 it grew by 20 to 30 percent. It might be of interest for you that from the beginning of the European merger control policy in 1990 until the end of last month, out of the total of more than 1950 notified cases, 435 transactions involved at least one US company.

Obviously, for competition authorities – which today are essentially national or regional - these global trends pose an unprecedented challenge.

We need to bear in mind that over 90 member countries of the World Trade Organisation have, or are in the process of establishing, antitrust authorities – by the way, most of which are either modelled on the US or the EU anti-trust regime, or a mixture of both. We cannot realistically expect to build the same intensive cooperative relationship with all of our counterparts around the world - the price, in terms of expenditure of scarce administrative resources, would simply be too high, leaving aside quite legitimate doubts about the efficiency and the benefits of such a

”bilateral only” approach. It is therefore time, in my view, to intensify the pursuit of multilateral solutions.

3. Trade and Competition in the World Trade Organisation

In the absence of a specialised world-wide competition organisation and in view of the complementary relationship between trade and competition policy, the World Trade Organisation is the institution best suited to house such an international activity. The WTO possesses the advantages of a very broad membership and a tradition of enforcing binding rules. That is why the Commission has been at the forefront of efforts to persuade member countries of the merits of a WTO multilateral agreement that includes competition.

As you know, the future of this multilateral framework for competition within the World Trade Organisation was discussed during the Doha Ministerial Conference. All parties signing-up to the Doha declaration (including some of the sceptics such as certain developing countries) recognise for the very first time that there is a valid case for the WTO to negotiate and conclude a Multilateral Agreement on Trade and Competition.

A significant development that facilitated our efforts in Geneva was the fundamental shift in the US position in July 2001. The incoming Bush administration clarified with the EU a number of outstanding issues regarding the scope and impact of our proposals for international competition policy. As a result, the US adopted a positive stance on the

envisaged multilateral rules in the WTO and was able to support the text crafted in Doha.

I believe that the inclusion of competition in the Doha Development Agenda is a satisfactory result for a number of reasons.

Up to Doha even the principle of having such an agreement at the WTO was controversial. The negotiation of a multilateral agreement on competition in the WTO will underpin the impressive progress which has been made in trade liberalisation over the past few decades. It will promote the adoption and enforcement of domestic competition regimes, it will spread competition culture, enhance cooperation between antitrust authorities and facilitate the effective combating of anti-competitive behaviour.

We are quite satisfied that the Doha Declaration focuses on the elements that we have proposed as items that need to be taken up first: core principles of competition policy, such as transparency, non-discrimination and procedural fairness, commitment to outlaw hardcore cartels, modalities for voluntary cooperation between antitrust authorities.

From now till the 5th WTO Ministerial in Mexico in 2003 we will continue our efforts within the Working Group in Geneva (and bilaterally with the US and other trading partners) to clarify the issues on the table and make certain that we can soon proceed with the formal negotiation of the envisaged agreement.

4. International Competition Network

In parallel to these developments within the framework of the WTO, another multilateral initiative which remains totally independent of any established structures is currently rapidly growing in importance. I am referring to the International Competition Network, or ICN, as it will undoubtedly soon be generally known.

The ICN is the imaginative response of competition authorities all over the world to the challenges posed in a globalising economy.

When we met last time, I had envisaged that this initiative would be launched some time in 2002. I am pleased to see that this prediction has been overtaken by subsequent events.

The ICN was launched already last October in New York, in its way another response to the September 11th events in the same city. The Anti-trust Division of the DoJ and the FTC as well as the European Commission were among the key driving forces to bring this initiative to life, and all three agencies are Founding Members. It was not least the statement of Joel Klein, made at the conference for the tenth anniversary of EU merger control, that gave one of the crucial starting signals. The movement was strongly supported since the very beginnings by European Competition Commissioner Mario Monti, and it is fair to say that the close cooperation of the competition agencies on both sides of the Atlantic has immensely facilitated the creation of the ICN.

The ICN will not be just another brick and mortar international organisation. It will have a kind of virtual structure without a permanent secretariat, flexibly organised around its projects, guided by a steering

group which is chaired by Konrad von Finckenstein, the Head of the Canadian Competition Authority. This Steering Group will identify projects and devise work plans for approval by the ICN as a whole.

Any national or regional competition agency responsible for the enforcement of antitrust laws may become a member of the ICN. It is remarkable to see that within less than six months after its launch, the ICN has already attracted some 50 anti-trust jurisdictions from five continents. Among the further increasing membership of the ICN we find not only the well-established competition agencies, but also many younger anti-trust authorities, especially from emerging and transition economies.

I would like to stress one point: this is the first time that so many competition authorities take an autonomous initiative designed to come together in order to share and discuss their practical problems in handling international competition issues. The truly global reach of the ICN will put it in a unique position to provide antitrust agencies from developed and developing countries alike a stronger and broader network.

The new network will actively seek advice and contributions from the private sector and consumer organisations, from the legal profession and individual members of the academic community. It will also cooperate closely with other international bodies working in the same field, such as in particular the WTO, UNCTAD, and the OECD.

Apart from the global reach of ICN, another of its salient features is that it is strictly project-oriented, and I am pleased to say that real work on several projects has already got off the ground.

Currently, the main thrust of ICN's work is directed at two topics:

- merger control in a multi-jurisdictional context, and
- competition advocacy.

On the first point, three dedicated working groups look into the following issues: (i) merger notifications and procedures, (ii) the analytical framework of the assessment of merger cases, and (iii) the relevant tools for merger investigations. The ultimate aim of all these activities is to identify best practices and elaborate guidelines on how best to deal with merger cases that are relevant for several jurisdictions.

As you will immediately see, this work programme already encompasses most of the practical issues that are typically raised by multi-jurisdictional mergers. Already now our work is demonstrating that on most issues, there is a fair amount of convergence among most agencies, on procedural as well as substantive aspects. In the end, this enhanced cooperation will provide increased legal security and predictability for international mergers and acquisitions.

Concerning the second topic - competition advocacy - another ICN working group chaired by Fernando Sanchez Ugarte, Chairman of the Mexican Federal Competition Commission, is currently looking at ways of preventing and addressing distortions of competition created by state intervention.

The preliminary results of these working groups will be presented to the first ICN Annual Conference that will be hosted by the Italian Competition authority in Naples in September this year. To encourage the fight against international hard-core cartels, there will also be a special

ICN conference on investigative tools directed at agencies' staff, to be held this fall in the United States.

In view of this broad range of initial activities, I am optimistic about the International Competition Network. I sincerely hope that in the future it will be seen as a milestone in the world-wide convergence of competition enforcement and in the strengthening of cross-boarder co-operation.

5. Bilateral cooperation with the US authorities

Let me now return to the already well-established cooperation on competition matters between the European Commission and the two anti-trust authorities of the United States.

Both sides had realised as early as 1991 that in a globalising world an efficient competition policy is not possible without cooperation between the competent authorities. Therefore, they concluded two far-reaching cooperation agreements during the 1990s. Since then staff-level contacts have become a daily routine in our work.

The main provisions of the agreements deal with information on cases of interest to the other agency, cooperation and coordination of the enforcement actions of both parties' competition agencies and a "positive comity" procedure under which each party undertakes to investigate, upon request, anticompetitive activities in its own territory that adversely affect the interests of the other party. It is appropriate to stress that this agreement does not allow for the exchange of any confidential information, unless the parties involved agree to it.

Today, I would like to give you an update on the latest developments.

a) Merger control

Let me first of all turn to merger control since it is the area where daily US-EU cooperation has reached the most advanced stage, and this despite the well-known fact that both sides are applying rules of substance and of procedure which are drafted quite differently.

But a comprehensive record of close cooperation is no guarantee that different rules might not occasionally result in divergent outcomes. Much has been made in recent months of the seemingly different approaches taken by the Commission and the US antitrust agencies towards conglomerate mergers, in the light of the Commission's decision to block the General Electric/Honeywell deal. I am not convinced that the gap between us is as wide as some would have it - but I can obviously only speak for the Commission, and not for the US agencies, in that regard.

This is not the occasion on which to enter into a detailed discussion of the merits of the approach which we took in the GE case. Suffice it to say that economics is not a pure science, and merger control necessarily involves a prospective analysis of inherently uncertain future effects. In complex cases, this may involve a difficult "judgment call" - as US FTC Chairman Tim Muris recently put it, "reasonable minds may reach different conclusions on the application of the same law to the same body of evidence".

What is indeed remarkable is that divergences are so rare, even when *different* laws are applied to the same body of evidence: the GE/Honeywell is one of the very few cases in which one side has blocked

a deal that was cleared by the other, and the it is only one in which such a divergence is due to a different assessment of the same market. Our many closely coordinated parallel investigations into well-known cases such as *Exxon/Mobil* (Commisison/FTC), *CVC/Lenzing* (Commission/FTC) or *Alcoa/Reynolds* (Commission/DoJ) are impressive examples for a generally convergent approach on both sides of the Atlantic.

During the last months, the Commission and the FTC successfully collaborated on the *Compaq/HP* merger, the largest ever in the information technology sector. This case is a further illustration of the key importance of review procedures being conducted on both sides in parallel, and not successively. Typically, the speedy resolution of this case was once again facilitated by comprehensive waivers of confidentiality limitations by the notifying parties.

And yet, the GE/Honeywell episode has shown that case-by-case cooperation, however frequent and intensive, cannot on its own iron out all differences. In parallel, we need a more broadly-based transatlantic dialogue on competition policy and practice. When divergences do occur, we must learn to manage them and avoid that they escalate into high-profile transatlantic political disputes.

That is why, on 24 September last, Commissioner Monti and his American colleagues Charles James and Tim Murriss agreed in Washington to expand and intensify the activities of an existing bilateral Working Group. Our common purpose is to identify areas where more convergence might be possible, and to see if we can narrow the ground that still divides us.

To this effect several subgroups have in the meantime been set up. They look into various procedural and substantive aspects of merger control. The exchanges of information and views that take place in these groups provide all three agencies involved an even better mutual understanding of our respective working practices and standards. I am eager to see the eventual outcome of these efforts, and at this moment already I am confident that we are moving in the right direction.

Intensive dialogue and cooperation through various channels between the Commission and the US antitrust authorities have already made a substantial contribution to more convergence, and I there is no doubt that - by looking at practical cases where we may have adopted somewhat different approaches - we will reduce the risk of disagreement in the future.

Do we need to go even further and envisage an alignment of the *legal standards* that govern our respective merger control systems?

As is generally known, the substantive legal tests employed by the respective laws in the EU and US are phrased in quite different language. In Europe, where the law governing merger control was drafted only a decade ago, mergers can be declared unlawful where they risk to "create or strengthen a dominant position". In the US, in the words of a statute dating from 1914, mergers can be enjoined if they risk to result in "a substantial lessening of competition" or "tend to create a monopoly".

The more-than-10-year-old body of precedent built up by the European Commission and the European Courts regarding the interpretation of the dominance test has shown a remarkable coincidence of analysis with the -

considerably longer - wealth of interpretative precedent that has been built up in the US with regard to the Clayton Act.

Still, in view of the increasingly international scope of merger activity, it cannot be denied that a possible alignment of the substantive tests used by the main competition authorities might merit discussion. That is one of the reasons why the "Green Paper" on the review of our merger legislation, adopted by the Commission last December, explicitly calls for a public debate on the merits of our dominance test, and in particular on how its effectiveness compares with the "substantial lessening of competition" standard.

b) Cartel Cases

My presentation would not be complete if I did not mention our joint efforts to fight **hard core cartels**, the most harmful anticompetitive practices.

The Commission has substantially increased the resources which it devotes to this task, and the results are starting to become apparent. The number of cartel decisions that we have adopted last year was unprecedented, and we are trying to maintain this high level this year.

However, our cooperation with the US authorities in this area is a little more difficult than in the case of mergers, since there are legal impediments for us to exchange confidential information. This means, for instance, that information submitted to one side by a company under a leniency programme cannot be transmitted to the other side. Yet, within these limitations, we try to coordinate investigative measures against suspected cartels, and in particular, we try to carry out on-the-spot

inspections simultaneously, in order to maintain the “element of surprise”, thus increasing the likelihood of a successful outcome.

An example for the convergence of the *legal rules* for anti-cartel enforcement are our respective leniency programmes. In 1996, the European Commission adopted for the first time such a programme and this has led to a substantial increase in the number of cartels that have been uncovered and sanctioned.

The Commission has now adopted a modified Leniency Notice in February this year, which is modelled in some of its key aspects on the American experience. The EU leniency program now provides for greater transparency and predictability of its application. It also gives a much greater incentive to companies that contemplate to come forward and disclose an existing cartel to which they were members since the first party to provide us with substantial new information can, under certain conditions, obtain full immunity from fines.

The new leniency notice is thus one of several useful illustrations of how the anti-trust agencies on both sides can, and are willing to, listen to and learn from one another.

6. Conclusion

Let me conclude this brief survey of new developments in the area of bilateral and multilateral cooperation focusing on the enforcement of competition rules. I have tried to illustrate the positive impact of the increasing globalisation of business: it encourages the progressive creation of new multilateral structures as the basis of a future system of

international governance. And it favours the further strengthening of bilateral cooperation among the major international players, in the first place between the European Union and the United States.

Despite its relatively short history in the competition area, this relationship has reached a new level of quality and an intensity never seen before. It has turned out to be sufficiently robust to not only survive occasional incidents, but to consider them as strong incentives to deepen and to widen mutual trust and understanding. In view of the multiple pressures exercised today on the competition agencies of both side, this responsible attitude is not self-evident, but an encouraging signal that we can be confident for the future.