Mergers and Acquisitions in the European Community and the United States: A Movement toward a Uniform Enforcement Body

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MERGERS AND ACQUISITIONS
IN THE EUROPEAN COMMUNITY
AND THE UNITED STATES: A MOVEMENT
TOWARD A UNIFORM ENFORCEMENT BODY?

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I. INTRODUCTION

The extraterritorial application of competition laws is common in the world market. The European Community (EC) and the United States, which have the two largest international economies in the world,\(^1\) often find themselves regulating the same mergers and other financial transactions. This creates a potential for conflict, and the resulting tension leads to efforts to harmonize EC and U.S. competition laws. While harmonization is itself important, it may not be enough to ensure efficient regulation of the market. In addition to considering the substance of the laws being applied to mergers, we must also account for factors other than competition policy that influence the decisions of regulatory bodies.

This Note will argue that the current system of extraterritorial application of competition laws, while beneficial from a purely competitive standpoint, is not optimally efficient for the world market. Because nations consider industrial policy\(^2\) when investigating mergers, efficiency losses can result. The recent merger between Boeing and McDonnell Douglas\(^3\) reveals the tensions placed on enforcement bodies in considering both industrial and competition policy. The Boeing merger highlights the possible efficiency losses caused by the current EC and U.S. systems of extraterritorial regulation of mergers. This Note suggests a new system that will avoid these efficiency losses.

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2. Industrial policy is shorthand for any economic or social concern, other than competition policy and efficiency, that influences antitrust law enforcement.

3. Boeing and McDonnell Douglas are the two major U.S. manufacturers of commercial airplanes. In 1996, Boeing accounted for 64% of the production of aircraft world wide, while McDonnell Douglas accounted for 3.3%. Their only major competitor was Airbus, which gained 32.3% of the world market. See Polly Lane, Boeing—Fired Up for '97—Company's First Priority Is to Clear Antitrust Hurdle, SEATTLE TIMES, Jan. 12, 1997, at F1.
Under the current system, national merger and acquisition authorities have an incentive to advance industrial policy in an attempt to increase national welfare relative to other countries. With the Clinton administration's stance on government intervention, there are indications that industrial policy is a major consideration for the Department of Justice (DOJ) and Federal Trade Commission (FTC). The European Community similarly has an incentive to advance regional industrial policy because of the political sensitivity of the EC Commission. These incentives could lead both U.S. and EC enforcement authorities to use merger control to protect and promote domestic industry. Changing competition policy into a type of industrial policy, the merger enforcement authorities no longer solely consider benefits to the market; instead they concentrate also on benefiting their relative economies.

This kind of misuse of national competition law has led to attempts to create a worldwide antitrust code. While an international code is a worthy goal, it is less important than creating uniform enforcement. As the then-head of the Directorate IV for Competition Policy stated in 1993, "[w]hen we talk about convergence, it's probably more important to talk about procedures [than substantive law] to make sure the policies are the same . . . ."

Some commentators believe the most effective way to ensure uniform policy is to create an international agency to handle antitrust enforcement, perhaps through the World Trade Organization (WTO). However, as was recognized by Ambassador to the EC Commission

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5. See id. at 257.

6. See Peter Curwen, Merger Control in the European Community: An Analysis of Scope, Subsidiarity and Duopoly, 5 EUR. BUS. J. *17 (1993), available in LEXIS, 4th News and Analysis. Curwen discusses the approval of a merger between Aerospatiale's helicopter business and Merrerschmitt-B6 Bolkow-Blohm, which created a 50% market share in the EC for civilian helicopters. Approval of this merger led the author to conclude that the "Commission's decisions in such cases are heavily influenced by political considerations." Id.


Greenwald, the creation of a world-wide antitrust body may be premature. Foremost among the problems with such a WTO body is that substantial differences remain among the antitrust laws of WTO members. In addition, there is significant disagreement and misunderstanding about the goals of antitrust laws on a global scale. A global enforcement body at this time seems unlikely; however, that should not preclude smaller steps toward better international enforcement of antitrust laws. One such step could be an EC/U.S. merger board to regulate mergers that affect the interests of both jurisdictions.

This Note begins in Part II by comparing the standards under which the United States and European Community apply their competition laws extraterritorially to mergers and acquisitions. It will then briefly compare the substance of those laws, noting ultimately that they are very similar in their approach and could easily be applied by a joint enforcement board. A consideration of the effects on the market of industrial policy's influence on merger control is presented in Part III, with the conclusion that the current system generally results in over-regulation of mergers and acquisitions. As a result, the market is less efficient, but retains higher levels of competition. Part V concludes by proposing that a joint enforcement board for the European Community and United States be implemented to alleviate these efficiency losses.

II. EXTRATERRITORIALITY

A. U.S. Extraterritorial Application of Competition Laws

1. Extraterritorial Application by U.S. Courts

The United States applies competition laws to foreign undertakings based on an "effects test." This standard was established by Judge Learned Hand in United States v. Aluminum Co. of America. The test allows antitrust laws to be applied extraterritorially if the acts in question were (1) intended to have an effect on the United States and (2) did have such an effect. This very broad standard allows U.S. regulation of many foreign activities, a reason for which the effects test has drawn criticism.

10. See id.
11. 148 F.2d 416 (2d Cir. 1945).
12. See id. at 443-44.
Perhaps in response to this criticism, the Ninth Circuit has tried to limit the effects test. In *Timberlane Lumber Co. v. Bank of America*, the Ninth Circuit set out the appropriate standard as a “Jurisdictional Rule of Reason,” which requires a three part analysis: (1) does the activity have or intend to have a substantial effect on U.S. commerce; (2) is the activity of the magnitude to be covered by U.S. law; and (3) as a matter of international comity, should the extraterritorial jurisdiction of the court extend to cover the activity? The court must determine, under the guise of comity, whether another jurisdiction’s interest is so great that as a matter of deference the court should refuse to apply jurisdiction. This test has met with mixed reaction. The Restatement of Foreign Relations Law has adopted this standard, but circuit and district courts are divided over whether to consider issues of comity. To date, the Supreme Court has not decisively ruled on the issue.

While the Supreme Court has not determined whether extraterritorial application should be tempered with a standard of reasonableness, it has considered the issue of extraterritorial application in *Hartford Fire Ins. Co. v. California*. In *Hartford*, British insurance companies conspired with one another to obtain favorable terms on premiums. Such collusion violates U.S. antitrust laws. Because these companies operated in the United States, nineteen different states joined to bring an antitrust action against the British companies under both the Sherman and Clayton Acts. The insurance companies responded by arguing that British law should control based on ideas of comity, claiming extraterritorial application of U.S. law would create a conflict between the two countries’ laws.

The Supreme Court considered the issue and had the opportunity to determine the limits of extraterritorial jurisdiction. However, instead of determining whether to apply a reasonableness standard, the Court focused solely on the conflict of laws issue, holding that comity is only required when there is a true conflict between foreign and domestic laws. Because the British law in this case made the activities legal, but

14. 549 F.2d 597 (9th Cir. 1976).
15. Id. at 613–14.
16. See id. at 615.
17. See id. at 614–15.
19. Compare e.g., *In re Uranium Antitrust Litig.*, 617 F.2d 1248 (7th Cir. 1980) (favoring the ALCOA test over the *Timberlane* test); with *Rivendell Forest Prods., Ltd. v. Canadian Forest Prods.*, 810 F. Supp. 1116 (D. Colo. 1993) (applying comity to refuse jurisdiction over Canadian company).
20. 113 S. Ct. 2891 (1993) (refusing jurisdiction over Canadian lumber price fixing, despite substantial effects).
21. See id. at 2910.
did not require them, the Court reasoned that there was not a true conflict. It concluded:

Since the London reinsurers do not argue that British law requires them to act in some fashion prohibited by the law of the United States . . . or claim that their compliance with the laws of both countries is otherwise impossible, we see no conflict with British law . . . . We have no need in this case to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on the grounds of international comity.22

As the Supreme Court defines it, a conflict will only exist when two nations place conflicting obligations on a party and that party cannot comply with both obligations.23 This kind of conflict will never arise in the area of mergers and acquisitions. When a merger is investigated, the government either approves or challenges it. Because a merger is never required by law, a firm can always comply with the obligations of both nations. Therefore, the holding of Hartford dictates that comity will not play a role in the judicial analysis of mergers.

2. Extraterritorial Application of U.S. Law by the DOJ and the FTC

Although the courts may not require comity considerations when evaluating proposed mergers and acquisitions, the agencies responsible for enforcement do have some leeway in evaluating these factors. Since the FTC and DOJ are primarily responsible for the enforcement of U.S. antitrust laws, it is important to understand how they approach the issue of comity.24 Using their broad prosecutorial discretion, the agencies consider the important interests of foreign governments in making decisions to oppose or approve international mergers.25

The DOJ issued guidelines for the enforcement of competition laws

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22. Id. at 2910–11.
23. See id.
24. While private citizens do have the ability to bring a cause of action under the Clayton Act, the vast majority of mergers and acquisitions are dealt with by the FTC or the DOJ. In addition, once a merger is approved by those agencies, it is likely that a court will defer to their judgment. It is only in the rare case of a merger not considered by the DOJ or the FTC that a private litigant has a realistic chance of success. Otherwise any anticompetitive merger would have already been opposed by one of the agencies, making an action by the private litigant unnecessary.
These guidelines adopt the approach taken by the Timberlane court. The DOJ applies U.S. law, based on the effects doctrine, but tempers its enforcement by employing a reasonableness, or comity, test. The DOJ has set out the relevant factors that should be considered before applying the antitrust laws of the United States extraterritorially. These factors are as follows:

1. The relative significance, to the violation alleged, of conduct within the United States as compared to conduct abroad;
2. The nationality of the persons involved or affected by the conduct;
3. The presence or absence of a purpose to affect U.S. consumers or competitors;
4. The relative significance and foreseeability of the effects of the conduct on the U.S. as compared to the effects abroad;
5. The existence of reasonable expectations that would be furthered or defeated by the action; and
6. The degree of conflict with foreign law or articulated foreign economic policies.

This list reveals that the agencies are willing to consider important issues of comity. Because there is no "conflict of laws" issue requiring court considerations in the area of mergers and acquisitions, the only analysis of foreign comity interests will be done at the agency level.

B. EC’s Extraterritorial Application of Competition Laws

1. Application by the European Court of Justice

The European Court of Justice (ECJ) has adopted a very similar, if not identical, approach to extraterritorial application of EC laws. It applies a "modified effects test" as established in the Wood Pulp case. In Wood Pulp, a number of foreign firms, including eleven U.S. companies, colluded to establish higher prices on wood pulp. The
price fixing had a substantial effect on the EC, because nearly sixty percent of all EC consumption of wood pulp was imported from the firms.\textsuperscript{34} In its initial investigation, the Commission determined that EC law should apply to these foreign firms. The Commission believed it was appropriate to apply EC law based on the effects test, concluding that “[i]n so far as the restrictive practices of the undertakings to which this decision is addressed perceptibly affected competition within the community and trade between the member states, Article (85)(1) applies to them.”\textsuperscript{35}

The parties in \textit{Wood Pulp} challenged the decision of the Commission to the European Court of Justice.\textsuperscript{36} The parties contended that under international and EC law, only territorial jurisdiction was permissible and that this extraterritorial application was therefore improper. The court dismissed the objection, ruling that the case did not require extraterritorial jurisdiction and that territorial jurisdiction was being applied.\textsuperscript{37} The court declared that the controlling factor was not where the companies were located, but where they “implemented” their illegal practices. “The decisive factor is therefore the place where [the price fixing] is implemented.”\textsuperscript{38}

While the court claimed to use territorial application, the “place of implementation” test seems much like the effects test. The companies in \textit{Wood Pulp} were located outside of the European Community and their illegal behavior (i.e., the act of collusion) did not occur within its borders. The only implementation in the European Community by the firms was to sell goods in the EC at artificially inflated prices. Whether one deems this “implementation in” the European Community or “effects on” the European Community is simply a matter of semantics. If a company does not implement a practice in the European Community, it is difficult to foresee it having any substantial effect. Similarly, if an activity has a substantial effect in the European Community, some illegal practice must necessarily be “implemented” there.

The U.S. firms also urged the ECJ to refuse jurisdiction on grounds of comity, arguing that the United States had a more important interest in this case and that its law should apply.\textsuperscript{39} The firms contended that they were merely following the requirements of the Webb-Pomerene

\begin{itemize}
\item \textsuperscript{34} See Åhlström, 1988 E.C.R. at 5240.
\item \textsuperscript{35} Re Wood Pulp, 3 C.M.L.R. at 474.
\item \textsuperscript{36} See Åhlström, 1988 E.C.R. at 5194.
\item \textsuperscript{37} See id. at 5243.
\item \textsuperscript{38} Id.
\item \textsuperscript{39} See id. at 5244.
\end{itemize}
Act, \(^{40}\) which made such price-fixing activities legal in the United States. The firms also claimed that EC law should not apply to them, as they were merely conforming to U.S. law.\(^{41}\) The European Court of Justice employed reasoning on this claim similar to that of the Supreme Court in the *Hartford*\(^{42}\) decision, holding that it need not consider issues of comity in the case because there was no conflict between the laws of the two jurisdictions.\(^{43}\) For comity to apply, there must be a "contradiction between the conduct required by the United States and that required by the Community."\(^{44}\) If one can comply with both EC and U.S. law there is no conflict, and thus no need to look at issues of comity. As in the United States, the ECJ holding effectively eliminates comity in the area of mergers and acquisitions, because a true conflict of laws will never be present.\(^{45}\)

2. Extraterritorial Application by the Council and the Commission

Through the Merger Regulation\(^{46}\) in 1989, the Council of the European Union\(^{47}\) codified the effects test for mergers. Application of EC law to a merger requires only that a firm earn 250 million ECU in the European Union and have 5 billion ECU turnover worldwide.\(^{48}\) If, in fact, the *Wood Pulp* implementation test was different from the effects test, the Merger Regulation completely nullifies the prior standard. There are no territorial requirements for jurisdiction. The Merger Regulation bases its jurisdiction solely on the fact that very large mergers will affect the EC market, which in turn will have a substantial effect on the European Community. In this way, the Merger Regulation buttresses the effects doctrine as the standard for extraterritorial jurisdiction in the European Community.

The Merger Regulation is not only consistent with the effects test, but also implicitly reaffirms that there is no requirement that a court consider issues of comity. Nonetheless, there are indications that the

\(^{41}\) See Åhlströhm, 1988 E.C.R. at 5244.
\(^{42}\) *Hartford*, 113 S. Ct. 2891.
\(^{43}\) See Åhlströhm, 1988 E.C.R. at 5244.
\(^{44}\) *Id.*
\(^{45}\) See text accompanying notes 21–24.
\(^{46}\) Council Regulation 4064/89 on the Control of Concentration Between Undertakings, 1989 O.J. (L 395) 1 [hereinafter Merger Regulation].
\(^{47}\) The Council is essentially the legislative branch of the European Union. It is composed of the EU Ministers of every member state.
\(^{48}\) See Merger Regulation, supra note 46, art. 1.
Commission will consider comity factors. The most obvious indication given by the Commission is the Treaty on Competition made with the United States. This treaty sets out that the European Community will consider the important interests of the United States in enforcing its own competition laws. While the treaty does not create any court-enforceable comity requirement, it does reveal the Commission's willingness to consider issues of comity in appropriate circumstances.

Having seen that the European Commission and United States apply the same extraterritorial jurisdictional standard reveals the ease with which a joint EC/U.S. merger board could determine its jurisdiction. Other nations do not agree on the effects test, presenting a major hurdle to global antitrust enforcement. Given that the United States and European Community both apply an effects test, a joint board could easily determine its jurisdiction based on such a uniform standard. All mergers with substantial effects in both the European Community and United States would be reviewed by the joint board, while all other mergers would be left to the individual enforcement bodies. Because both the United States and the European Community recognize the validity of the effects test, determining the board's jurisdiction should not be a stumbling block. Such ease in determining jurisdiction would not be present with a global enforcement body.

III. U.S. AND EC SUBSTANTIVE MERGER LAWS

Section 7 of the Clayton Act is the primary U.S. legislation dealing with mergers and acquisitions. This statute extends to partnerships, sole proprietorships, and corporations. Not only does the Clayton Act

49. See Agreement between the Government of the United States of America and the Commission of the European Communities Regarding the Application of their Competition Laws, 1995 O.J. (L 95) 1.

50. The Clayton Act sets out in relevant part,

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.


52. See id. at 462.
apply to mergers that would immediately have anticompetitive effects, but it can also be applied to mergers that have a future probability of substantially reducing competition.\(^5\)

Once a merger is before either agency, that agency must make a number of determinations. The agency begins by considering the relevant product and geographical markets.\(^{54}\) Then, it evaluates whether the merger would significantly increase market concentration, resulting in potentially adverse competitive effects.\(^{55}\) Next, the agency assesses whether entry into the market would be timely in order to counteract any anticompetitive effects.\(^{56}\) Finally, the agency determines any possible efficiency gains that could not reasonably be achieved in a more competitive way.\(^{57}\) If, after considering these aspects, the agency determines the merger is anticompetitive, the agency will either block the merger or require that the parties take measures to solve the problem. Most of the enforcement occurs through the use of a consent decree requiring some kind of divestiture or competitive covenant before the consolidation may take place.

The laws of the European Community are somewhat less clear than the time-tested Clayton Act. When the EC was conceived, no law dealt explicitly with mergers and acquisitions.\(^{58}\) Instead, the Court was forced to expand the language of article 86,\(^{59}\) and occasionally article 85,\(^{60}\) to cover mergers. As a response to this inadequate coverage of mergers, the Council adopted the Merger Regulation.\(^{61}\) The Merger Regulation espouses a very similar approach to that taken in the United States.

The Merger Regulation begins by requiring that notice be given to the Commission of any merger falling within the scope of the regulation. The Commission must define the relevant product and geo-

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55. See id. at *11.
56. See id.
57. See id. at *64.
58. See Treaty Establishing the European Community, Feb. 7, 1992, O.J. (C 224) (1) (1992), [1992] (articles 85 and 86 deal most closely with mergers, but they do not give complete coverage); see also Merger Regulation, supra note 46, Preamble ("Whereas Articles 85 and 86, while applicable ... are not, however, sufficient to cover all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty...").
61. See Merger Regulation, supra note 46, Preamble.
graphic markets. After making those determinations, it turns to the market structure and the impact the merger will have on competition. This generally takes the form of consideration of market shares and market concentration. Then, the Commission considers a number of other factors, including both barriers to entry and efficiencies gained or lost from the merger. If the Commission rules that the merger is anticompetitive, it most often enforces this decision through some kind of settlement with the parties. The settlement usually requires a divestiture or other competitive covenant.

A. Pre-Merger Notification Requirement

The first requirement placed on merging firms in the United States is the notification requirement. This requirement was added to the original antitrust laws by the Hart-Scott-Rodino Antitrust Improvements Act of 1976. The filing requirement prevents firms from having to “un-merge,” by allowing either the FTC or DOJ to consider the substance of the merger beforehand. Once the agencies have received formal notice of the proposed merger, the parties must wait thirty days


63. See id. at 32.

64. The filing requirements do not apply to all mergers. However, if a merger is large enough to invoke the jurisdictions of multiple nations, filing will most likely be necessary. Generally, a filing is required if:

(1) The acquisition is of voting securities or assets, whether done directly or indirectly through an entity such as a controlled partnership;
(2) The buyer or seller is engaged in interstate commerce or in an activity affecting interstate commerce;
(3) The following “size of parties” test is met:

   (a) One party has annual net sales or total assets of at least $100 million;
   (b) The other party has annual net sales or total assets of at least $10 million;

and

(4) As a result of the acquisition, the buyer will hold assets and/or voting securities in the seller satisfying either of the following “size of transaction” tests:

   (a) At least 15 percent of either the seller’s assets or its voting securities; or
   (b) More than $15 million worth of the seller’s assets and voting securities.

Holmes, supra note 51, at 465–66.

before completing the merger.\textsuperscript{66} This waiting period can be extended for twenty additional days, plus any time needed to file supplemental information.\textsuperscript{67} These time frames can be extended, but the intent is to eliminate unnecessary delays.\textsuperscript{68}

Like the Hart-Scott-Rodino Antitrust Improvements Act of 1976,\textsuperscript{69} the Merger Regulation requires notification of any merger as long as it has a Community dimension.\textsuperscript{70} This requirement is crucial to EC enforcement, because most enforcement occurs before the merger takes place. While the notice provision eliminates the costs of “undoing” a major merger, it also imposes delays on undertakings awaiting approval. Like the United States, the European Community attempts to alleviate this delay. Article 10 of the Merger Regulation places time limits on the Commission, giving it one month after notification to decide if it wishes to open proceedings against the firms.\textsuperscript{71} If it decides to open formal proceedings, the Commission has four additional months to conduct the investigation and to decide whether to block, alter, or approve the merger.\textsuperscript{72} The whole system of advanced notification is very similar to the U.S. system and sets the stage for preventive enforcement of the Merger Regulation.

B. Definition of Relevant Product Market

In the United States, the DOJ defines the relevant product market by concentrating primarily on demand-side substitution.\textsuperscript{73} The agency considers the characteristics of the product to determine whether any substitute goods are available to relevant consumers. Common goods that are not unique will generally have a larger product market than goods that are more unusual. If a market is defined broadly because of readily available substitutes, a merger is more likely to be approved.\textsuperscript{74} This is because the substitution effect ensures that there will be competitive pricing even after the merger.

\begin{itemize}
\item \textsuperscript{66} See HOLMES, supra note 51, at 465.
\item \textsuperscript{67} See id.
\item \textsuperscript{68} See id.
\item \textsuperscript{69} 15 U.S.C. § 18a (1994).
\item \textsuperscript{70} See Merger Regulation, supra note 46, art. 4. A merger is deemed to have a Community dimension as long as one firm earns at least 250 million in the ECU and has five billion ECU worldwide.
\item \textsuperscript{71} See id. art. 10.
\item \textsuperscript{72} See id.
\item \textsuperscript{73} See Merger Guidelines, supra note 54, at *12. This approach has also been accepted by the Supreme Court. See Eastman Kodak Co. v. Image Tech. Serv., Inc., 504 U.S. 451, 481–82 (1992).
\item \textsuperscript{74} See Merger Guidelines, supra note 54, at *12.
\end{itemize}
Similarly, in the European Community the Commission first defines the relevant product market. The Commission defines the relevant product market as comprised of, "in particular[,] all those products which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and intended use." This approach is identical to the approach taken by U.S. authorities. The determination hinges on demand-side substitutability. If consumers can simply purchase a different product in response to a price change, the product market will be defined broadly. The broader the product market, the more likely it is that there will be effective competition; therefore, the merger will more likely be approved.

C. Relevant Geographic Market

The geographic market of the product must also be determined. The U.S. Supreme Court has set out the relevant factors that an agency should use in defining the geographic market. The geographic market is the "area in which the seller operates and to which buyers can practicably turn for supplies." Courts and agencies will consider practical considerations, such as the area in which the defendant markets its product, the transportation costs of the product, and the perishability of the product. If transportation costs are low and the product is not perishable, the geographic market will often be large, simply because firms from farther away are able to compete in the region.

In the European Community, many people believed that the Commission would adopt a presumption of a Community-wide geographic market. Instead, the Commission considers many issues in defining the geographic market. As in the United States, the major consider-

75. See Andersen, supra note 62, at 30.
76. See Commission Decision of 2 October 1991 Declaring the Incompatibility with the Common Market of a Concentration Case IV/M.053, Aerospatiale-Alenia/de Havilland, 1991 O.J. (L 334) 1, ¶ 10 [hereinafter de Havilland Decision]. Looking at the issue of substitutability, the Commission determined that larger jet aircraft were not substitutable for commuter aircraft and therefore defined the relevant product market as regional (commuter) aircraft. See id. ¶ 8.
77. See Merger Regulation, supra note 46, at *12.
79. See Holmes, supra note 51, at 315.
80. See Andersen, supra note 62, at 32.
ations are the costs of transportation and barriers to the importation of substitute items. If transportation costs are relatively low and barriers minimal, the geographic area of competition becomes larger. This is because, with low transportation costs, a firm in the United States or elsewhere may be able to compete in the European Community against native firms. On the other hand, if a product is relatively expensive to transport, then it is unlikely that a firm outside of the Community will be able to compete with domestic companies, dictating a smaller geographic market.

D. Market Share and Market Concentration

Considerations of market share and the importance of market concentration are the areas in which the EC and U.S. approaches differ most. U.S. agencies consider both market share and concentration. If market share and market concentration are high, the merger is presumed to be invalid. The Supreme Court has held that a merger by a firm that acquired only one percent more market share, but already had twenty-eight percent of the market in a very concentrated industry, was invalid. The Court explained that "even a slight increase in concentration" will make the merger illegal when concentration is already great in the industry.

The FTC and DOJ both use these basic tests in their merger guidelines. They focus on the market share and concentration, indicating that high concentration will generally create a presumption of invalidity. Agencies calculate market concentration by using the Herfindahl-Hirschman Index (HHI), which is a measure of market competition. The HHI is defined as the sum of the squares of the post-merger market share percentage of all competitors in a given market.

82. Compare de Havilland Decision, 1991 O.J. (L 334) ¶20 (finding a world market where "there are not tangible barriers to the importation of these aircraft into the Community and there are negligible costs of transportation"); with Case IV/M.190, Nestlé/Perrier v. Commission, 1992 O.J. (L 356) ¶1 21,25, [1993] 4 C.M.L.R. 17 (price of water is low, but transportation costs are high, so the relevant geographic market is only France) [hereinafter Nestlé/Perrier].
85. Id. at 279.
86. See Merger Guidelines, supra note 54, at *40 ("Other things being equal, market concentration affects the likelihood that one firm, or a small group of firms, could successfully exercise market power.").
87. For example, if a market has one firm with a 30% market share, one with 25%, one with
HHI is below 1000, the merger will most likely not have anticompetitive effects. If it is between 1000 and 1800, the merger will probably not be challenged, as long as the change in concentration is less than 100 points, meaning that the firm did not increase its market share enough to make the merger anticompetitive. If the HHI is above 1800 and the change in market concentration is more than 50, it is likely that the merger will be challenged.

The European Community takes a slightly different approach. Article 2 of the Merger Regulation provides the framework under which the effects of a merger are to be considered. The regulation provides that when a concentration creates or strengthens a dominant position that further hampers effective competition, the merger is not to be approved. In making this decision the Commission must take into account:

the need to preserve and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings whether located within or without the Community.

Under this provision, the Commission will look to the change in market share and market structure. The higher the market share, the less likely the Commission is to approve the merger because of the danger of a dominant position. While this is similar to the U.S. approach, there is one major difference. The European Community does not consider high market concentration as a major factor against allowing a merger. Rather, the Commission focuses on the formation of a dominant position and considers whether the remaining competitors are strong enough to compete with the new entity. Under this approach, the Commission is likely to allow a merger that leaves only three firms in the industry, as long as their market shares are fairly equal. The same highly concen-

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20%, one with 15% and one with 10%, the $HHI = 2250 \left(30^2 + 25^2 + 20^2 + 15^2 + 10^2\right)$. This would be considered a concentrated industry.

88. See Holmes, supra note 51, at 485.
89. See id.
90. See id.
91. See Merger Regulation, supra note 46, art. 2.
92. Id.
93. See de Havilland Decision, 1991 O.J. (L 334) ¶ 28 (opposing the merger when market share grew from 46% to 63%, because this strengthened a dominant position).
trated industry is presumed to be an anticompetitive oligopoly in the United States. However, under the language of the Merger Regulation, this does not create an anticompetitive "dominant position" in the European Community.

Despite the fact that the language of the Merger Regulation largely ignores oligopolies, the Commission has applied the Merger Regulation to those arrangements. In the Nestlé/Perrier merger, and again in the Mannesmann/Vallourec/Ilva merger, the Commission applied the regulation to oligopolies and substantially altered those consolidations. The Commission applied the regulation to those cases despite the fact that the merger created a duopoly or oligopoly instead of one dominant firm. This result shows that the practical approaches of the United States and European Community are not so different, despite the contrast in technical language. Both the United States and the European Community will consider market shares and market concentration, even though concentration ratio is not firmly imbedded in the analysis of the Merger Regulation.

E. Entry Analysis

Notwithstanding the fact that a high market concentration indicates that a merger is anticompetitive under U.S. law, a party can rebut this presumption by a showing of other factors. One of the most important factors that the FTC and DOJ will consider is the entry of potential competitors into the market. If significant entry into the industry is possible, then this may temper the anticompetitive effects of the merger. The agency will not challenge a merger if entry into the market is so easy that market participants, either collectively or unilaterally, could not profitably maintain, an artificial price increase above pre-merger levels.

The European Community takes a similar approach to barriers to

94. See generally Eleanor J. Morgan, The Treatment of Oligopoly Under the European Merger Control Regulation, 41 ANTITRUST BULL. (Mar. 22, 1996) (dealing with the Commission's handling of oligopolies, but concluding that the Commission is moving toward looking at concentration data to determine competition).
97. See WEATHERIL & BEAUMONT, supra note 81, at 825.
98. See FTC v. University Health, Inc., 938 F.2d 1206, 1218 (11th Cir. 1991) (findings of high market share and high concentration create a presumption of illegality).
99. See Merger Guidelines, supra note 54, at *56.
100. See id.
101. See id.
entry. Upon a finding that a merger would create a dominant market position, the Commission must still consider the possibility that other firms will enter the market and create additional competitive pressure.\textsuperscript{102} If market entry is not burdensome, then “the dominant position is not likely to significantly impede effective competition” within the meaning of the Merger Regulation.\textsuperscript{103} The reasoning, similar to that advanced in the United States, is that if a dominant firm tries to manipulate prices and create monopoly profits, other firms will enter the market and reduce prices to competitive levels. Applying this reasoning, both the United States and European Community will approve mergers that create dominant firms, so long as the possibility for competition will keep them from exerting pressure on prices and gaining monopolistic profits.

F. Efficiency Analysis

The DOJ and FTC will both consider efficiency gains in determining whether a proposed merger will be beneficial to consumers. As the agencies point out, “[t]he primary benefit of mergers to the economy is their efficiency-enhancing potential, which can increase the competitiveness of firms and result in lower prices to consumers.”\textsuperscript{104} The agencies have determined that a merger may be approved, despite having the potential for anticompetitive effects, if the expected net efficiencies are significantly greater than the competitive risks.\textsuperscript{105} While the Supreme Court has never forwarded efficiency gains as a reason to approve a merger, recent circuit court cases have considered the efficiency-enhancing potential. For example, the Eleventh Circuit has recognized that efficiency gains should be analyzed in considering a merger, so long as the benefits flow to the consumer.\textsuperscript{106} Thus, although efficiency analysis has not been specifically adopted by the Supreme Court, it is applied in the lower courts and through the prosecutorial discretion of the agencies.\textsuperscript{107}

\textsuperscript{102} See Merger Regulation, supra note 46, art. 2.
\textsuperscript{103} See de Havilland Decision, 1991 O.J. (L 334) at ¶ 53.
\textsuperscript{104} Merger Guidelines, supra note 54, at *64.
\textsuperscript{105} See id. at *65.
\textsuperscript{106} See FTC v. University Health, Inc., 938 F.2d 1206, 1222 (11th Cir. 1991).
\textsuperscript{107} See Mark A. Warner, Efficiencies and Merger Review in Canada, the European Community, and the United States: Implications for Convergence and Harmonization, 26 VAND. J. TRANSNAT’L L. 1059, 1106 (1994). In addition to arguing that the United States should do more to consider efficiency gains and losses from mergers, the author also does an excellent job of explaining the economic significance of productive and allocative efficiencies. See id. at 1061–68.
The Commission also will consider the issue of efficiency gains in contemplating a proposed merger. Even though it has never used efficiency gains to uphold a merger, the issue of efficiencies has been raised in cases before the Commission. In the recent merger of Accor and Wagons-Lits, the Commission considered that the merger, while creating a dominant position, could nonetheless be beneficial to consumers if net efficiency gains were created. The firms had argued that the merger would result in productive efficiencies from economies of scale and that these benefits outweighed the losses in allocative efficiencies to the consumers. The Commission ultimately rejected this argument, claiming that even if it were true, those same efficiencies could be accomplished by other means that were less detrimental to competition. The Commission stated that the benefits in this case were speculative and would not pass down to the consumer. Even though the Commission ruled against the efficiency argument in this case, the ruling is strong evidence that the Commission might uphold a merger that resulted in net efficiency gains, so long as the benefits accrued to consumers.

G. Enforcement Activities

In order to enforce their decisions, the FTC and DOJ require the assistance of the courts. Once an agency has concluded that a merger is anticompetitive, it may seek court remedies, including forced divestiture of stock or assets, corporate spin-offs, or various restrictions on the companies' production or competition. While this kind of retroactive relief from the courts is available, the most common form of enforcement is through a consent decree. A consent decree places conditions on a merger in exchange for the agency's approval. Most consent decrees require divestiture of some of the merging company's assets. An example of such a decree occurred recently in the merger of Kimberly-Clark Corporation and Scott Paper Company. Because of high concentration and market share, the DOJ required the two companies to divest production facilities for baby
wipes and facial tissue products. Not only did these assets have to be divested, but they also had to be preserved in production form, so that a prospective purchaser could immediately compete in the industry. This kind of divestiture is the most common requirement used by the DOJ and FTC in consent decrees to retain competition allowing for approval of the merger.

There are other restrictions that the agencies may place on a merger. Often, the DOJ or FTC will require leasing or licensing of key assets, important patents or technology and the conclusion of supply agreements for the newly acquiring company of the divested assets. These types of competitive covenants are quite common, alone or in conjunction with a divestiture. While these requirements are admittedly not enforceable without court approval, most settlements are approved with little complication, leaving primary enforcement authority of such antitrust laws to the DOJ and FTC.

In the European Community, the Commission has the power to call a concentration incompatible with the common market. After deeming a concentration incompatible, the Commission has a number of remedies available. If the merger has already taken place, the Commission may require the “undertakings or assets... to be separated or the cessation of joint control or any other action that may be appropriate to restore conditions of effective competition.” This is a very broad range of retroactive powers. However, the Commission’s most important power is the ability to alter proposed mergers through consent decrees, just as in the United States.

Article 8(2) gives the Commission the power to “attach to its decision conditions and obligations ... with a view to modifying the original concentration plan.” This is the most widely used method of enforcement and results in settlement negotiations that begin almost as soon as a firm proposes its merger to the Commission. Most often, the European Commission requires partial divestiture of assets, but it

116. See id. at 66,561.
118. See Bergmann, supra note 113, at 67.
119. See id.
120. See Merger Regulation, supra note 46, art. 8(3).
121. Id. art. 8(4).
122. Id. art. 8(2).
123. See Bergmann, supra note 113, at 51 (noting that some cases are settled even before the second phase of investigation is opened).
may also use less restrictive approaches.124 Such solutions may include ensuring the independence of competitors, granting leases or licensing of intellectual property to competitors, and restricting future behavior, such as through covenants not to compete or not to acquire certain assets.125

The Kimberly-Clark/Scott Paper126 merger also reveals how the European Community has used consent decrees to modify mergers. In that case, the Commission approved the merger subject to compliance with a number of obligations.127 The Commission required that Kimberly-Clark divest its kitchen towel business in the United Kingdom and in the Republic of Ireland. This included granting the purchaser a three-year, royalty-free use of the trademark name "Kleenex," with seven years of optional renewals of the license with royalty payments.128 In addition, Kimberly-Clark was required to divest production facilities in the United Kingdom,129 accounting for 12.3% of production in the U.K. and Irish markets.130 That divestiture included the transfer of sales, production, and administrative staff, and the assignment of existing contracts for inputs.131 By requiring these changes, the Commission preserved the competitive atmosphere of all sectors of the paper products market.

Unlike the DOJ and the FTC, the EC Commission has the power to enforce its own decisions.132 This power is subject to unlimited review by the ECJ.133 While it seems the Commission has greater enforcement power, in practice both the U.S. and EC authorities have similar degrees of power. Both rely on negotiated consent decrees and both can turn to a court to validate their decisions if a party objects.

H. Comparative Summary of EC and U.S. Substantive Competition Law

The substance of both U.S. and EC merger laws is very similar. The
process begins with notification followed by a determination of the relevant product and geographic markets, concentrating mostly on the idea of substitutability. Then both jurisdictions consider market share. The only major difference in enforcement is that a high market concentration in the industry does not traditionally create a presumption of illegality in the European Community. However, the Commission has now indicated its willingness to implicitly consider market concentration by applying the Merger Regulation to oligopolies. Both jurisdictions conclude their analysis by considering whether barriers to entry or efficiency gains can save an otherwise anticompetitive merger.

Not only is the substance of the laws very similar, but also the manner of enforcement in both jurisdictions is analogous. Both enforcement authorities have the power to attack a merger that has already taken place, and, more importantly, they can block or alter proposed mergers. In both jurisdictions, consent decrees are most often used to alter the merger, generally through divestiture orders. While the Commission may enforce its own decisions, in practice such authority does not represent a large deviation from U.S. enforcement. Because most cases are handled through consent decrees, U.S. courts are usually only consulted to approve predetermined settlements. This leaves most practical enforcement authority with the agencies, just as the Commission has primary authority in the European Community.

As was the case with extraterritorial jurisdiction, the substantive standards for merger regulation in the European Community and United States are very similar. Although global antitrust substantive standards may be a bar to the creation of a global enforcement body, EC and U.S. substantive standards do not impede the creation of a joint enforcement board. Such a board could simply apply the current laws as applied in both the European Community and United States to all appropriate mergers.

IV. INDUSTRIAL POLICY AND INCONSISTENT APPLICATION OF COMPETITION LAWS

Both the European Community and the United States would benefit from a joint enforcement board. It is necessary for the United States and the European Community to create a merger board because current enforcement authorities take improper considerations into account when applying the law. Foremost among these considerations is industrial policy. By considering industrial policy when investigating mergers and acquisitions, national authorities grant domestic companies competitive advantages. If a merger will help a domestic industry,
even if it is not competitively sound, an enforcement body might approve it. The enforcement authority would do so because even though overall market welfare will decrease, domestic welfare may improve relative to the rest of the world. Both EC and U.S. authorities have an incentive to advance these industrial policy concerns. The Commission is subject to considerable political pressures from member states in making its decisions. Even though industrial policy and other social factors are not to be considered under the Merger Regulation, it is impossible for the Commission to remain completely isolated from all political pressure. In a similar way, the FTC and the DOJ are both politically influenced and thus use national industrial policy as a factor in their decisions. The Attorney General and the FTC Commissioners are appointed officials. Thus, the authorities applying the law may be influenced by issues of national policy. If, in fact, these considerations are included, regulation of mergers and acquisitions is not as efficient as it should be.

In many cases, where the relevant product and geographical markets are small, political influences may not have a great effect on merger policy. In those cases, one party can regulate the effects that a merger will have on its own markets without affecting the other party. With no overlap in jurisdiction, there will be little or no conflict in application of the laws. This situation was present in the Kimberly-Clark/Scott Paper merger. In that case, the merger as proposed created a number of anticompetitive effects in both the European Community and the United States. The United States dealt with the relevant U.S. effects and required divestiture of some U.S. assets. However, it did not examine any of the effects that would take place in Europe. Instead, the European Community opened its own investigation and required divestiture of European assets. Although this was technically extraterritorial application, it had little impact on the United States.

134. See Curwen, supra note 6, at 17–23 (when considering major mergers “the obvious lesson to be learned from this apparent inconsistency is that the Commission’s decisions in such cases are heavily influenced by political considerations”).

135. See Weatherill & Beaumont, supra note 81, at 827.

136. Many people called for more industrial policy considerations and sought to promote the industrial interest of the EC after the decision in the de Havilland Decision. Whether or not the Commission will completely defer to industrial policy is yet to be determined. See id.

137. See Lane, supra note 3, at Fl.


MERGERS AND ACQUISITIONS

However, there are a large number of cases in which the relevant market is global. In those cases, any decision by one party to block or alter a merger will have a direct effect on the policies of the other party. This kind of situation was found in the Boeing/McDonnell Douglas merger. Because the Boeing merger implicated a completely integrated world market for aircraft, decisions by either party greatly affect the other. Ideally, the basis of these decisions should be competition policy alone, but considerations of industrial policy are likely to be contemplated in an effort to improve national welfare.

A. U.S. Incentives to Allow the Boeing Merger

There is an incentive for the United States to approve the Boeing merger, even if it has substantial anticompetitive effects. The incentive stems from the ability to externalize the costs of the anticompetitive merger onto other nations, while internalizing many of the benefits. Normally, if all costs and benefits are considered, the DOJ or FTC would reject an anticompetitive merger if the merger would result in allocative inefficiencies that create losses for consumers. However, if most of the losses can be externalized onto consumers in other countries, while most of the gains can be internalized in the United States, then the merger might be approved in order to accomplish national welfare gains.

The Boeing/McDonnell Douglas merger presents such an opportunity to externalize costs. The merger creates a massive company with market shares of more than sixty percent. If the United States approves the merger despite its anticompetitive effects, a dominant domestic company would be created. This could result in allocative inefficiencies worldwide and some productive efficiencies. Assuming that the productive efficiency gains do not outweigh the allocative efficiency losses, the merger is not good for the world market.

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market and the functioning of the EEA Agreement Case IV/M.623, Kimberly-Clark/Scott, 1996 O.J. (L 183) 1).

140. Boeing and McDonnell Douglas are two of the largest aircraft manufacturers in the world. They both have notified the EC and the U.S. of their plans to merge and both sides were investigating the competitive effects this merger might have. See Shailagh Murray, Boeing Deal Faces Headwind from EU as Commercial Airline Sales Stir Worry, WALL ST. J., Dec. 19, 1996, at A10.


142. See Hewitt, supra note 4, at 258–62.

However, some of the benefits from the merger will fall only within the United States. These benefits include increased tax revenues generated as Boeing earns increased profits from its dominant worldwide position. There will also be increased employment in the United States as Boeing hires more workers to meet the increased demand for its planes. While such factors are not meant to be considered under competition policy, it is likely, and often urged, that they be considered. This changes the balance that the United States uses in applying its antitrust laws. The agencies will now pass the merger so long as its allocative inefficiencies to U.S. consumers are outweighed by the productive efficiencies and the national welfare gains from having a dominant industry. The effect of this is under-enforcement of U.S. competition laws, because the government is approving an anticompetitive merger that provides gains for the United States relative to the rest of the world.

To demonstrate, one can attribute utility values to the Boeing merger. Suppose considerations of industrial policy from the merger would create 100 units of gain to the United States through such benefits as increased employment and tax revenues. Next, suppose that worldwide there would be a loss of 150 units due to anticompetitive effects, but that only 75 of these units would burden U.S. consumers. Further assume that there are significant worldwide production efficiency gains of 75 units, 40 units of which benefit the U.S. economy. Applying normal competition policy, the United States should block this merger, because the allocative efficiency losses outweigh the productive efficiency gains. However, if the United States examined this from an industrial policy standpoint, there is only a 75-unit allocative loss to U.S. consumers, while there is 40-unit gain from productive efficiencies and a 100-unit gain from industrial policy considerations.

144. See Hewitt, supra note 4, at 302 (arguing that the United States should loosen antitrust laws in order to remain competitive globally).
145. This would presumably be employment that is gained from competitors like Airbus; therefore, employment in the industry worldwide is not increasing, but in the United States it is.
146. Half of the costs would fall on the United States if U.S. consumers were responsible for the purchase of one half of the world’s airplanes. In reality, the percentage of costs falling on the United States would be smaller, because all of the other nations of the world probably buy more than 50% of Boeing’s planes.
147. Productive efficiency gains would be distributed based roughly on sales of planes, because most of the benefit of a merger is from economies of scale. The economies of scale allow per unit prices for airplane production to be reduced. It is assumed, then, that the lower prices for planes would pass on to the consumers.
148. 75 gain - 150 allocative loss = -50 net loss from merger.
In this case there is a net 65-unit gain\textsuperscript{149} to the United States. Under this balance, U.S. regulators will approve the merger in order to improve the national welfare.

This approach creates a situation in which the United States approves a merger that is not beneficial to the world market. Because the consumers of products such as airplanes are worldwide consumers and the benefits from the merger mostly extend to the producing nation, the United States would benefit by approving the merger. Of course, if jet aircraft were purely domestic products, this approach would not work, because all costs and benefits would be incurred in the United States and the costs could not be externalized. Industrial policy can only be advanced when the relevant market is international. Nevertheless, with the increasing globalization of the economy, the ability to externalize costs will increase.

B. European Community Incentives to Apply Their Competition Law

The merger of U.S.-based firms like Boeing and McDonnell Douglas will also create incentives for EC opposition. As we have seen, the Commission is justified in investigating this merger under the effects test because it falls within the turnover requirements of the Merger Regulation.\textsuperscript{150} The only limiting consideration may be the idea of comity. Considerations of comity, however, did not stop the European Community from scrutinizing the Boeing merger. When applying its own law there is great incentive for the European Community to block the merger, even if it is good for the global economy. The Commission has the incentive to promote the aerospace industry in the European Community by protecting Airbus, a European competitor.\textsuperscript{151} Through blocking the merger, the Commission could protect Airbus' competitive position. The European Community would keep the jobs that the United States would have gained through the merger and EC member states would retain the tax revenue from Airbus' operations.

Again, by assigning values to the utility of this merger, the incentive for the European Community to advance its welfare through competition policy is revealed. Suppose the Boeing merger has little or no

\textsuperscript{149} -.75 U.S. allocative efficiencies + 100 national welfare gains + 40 national productive gains = +65 net gain to United States from merger.

\textsuperscript{150} EU 'more than likely' to Probe Boeing/McDonnell Douglas Merger, 180 AEROSPACE DAILY 420, Dec. 19, 1996.

\textsuperscript{151} Airbus is a four member consortium that is the second leading producer of airplanes. See Charles Goldsmith, Airbus Prepares for Unique Restructuring: Four Members Need to Mesh Assets and Cultures, WALL ST. J., Aug. 30, 1996, at A6.
allocative efficiency losses, meaning that the merger is competitively sound. At the same time the merger results in twenty-five units of productive efficiency gains for the world market, ten units of which benefit EC consumers. However, the merger hurts the competitive stance of Airbus, so costs to the European Community in employment and other losses from Airbus’ deteriorated position are equal to fifty units. Looking at this merger from a purely competitive standpoint, EC authorities should approve the merger because it results in twenty-five units of benefit to the world market. However, if the Commission considers EC welfare, as many parties advocated after the de Havilland decision,\textsuperscript{152} it would block the merger. The merger results in losses to the European Community of fifty units and gains of only ten. From a purely EC industrial welfare perspective, this merger should not be approved.

Although the Commission and the FTC both claim not to consider industrial policy in applying antitrust laws, one need only look to the actual outcome of the Boeing merger to realize national considerations do play a role. While we have already seen that the United States and European Community apply very similar substantive laws to mergers, the two enforcement authorities treated the merger very differently. The FTC found no violation of the antitrust laws caused by the merger and did not challenge it.\textsuperscript{153} The FTC based its decision on the fact that McDonnell Douglas “no longer constitutes a meaningful competitive force.”\textsuperscript{154}

The European Community scrutinized the merger more closely and threatened to block it until the Commission completed last-minute negotiations with Boeing.\textsuperscript{155} After Boeing’s concessions, the Commission approved the merger subject to conditions.\textsuperscript{156} Boeing’s concessions consisted of:

the cessation of existing and future supply deals, the “ring-fencing” of McDonnell Douglas’s commercial aircraft activities,

\textsuperscript{152} See Andersen, \textit{supra} note 62, at 40–41; see also Weatherill & Beaumont, \textit{supra} note 81, at 827 (“the Commission was also criticized for failure to take account of the industrial and regional implications of the [de Havilland merger].”).


\textsuperscript{154} Id.


the licensing of patents to other jet aircraft manufacturers, and commitments not to abuse relationships with customers and suppliers and a commitment to report annually to the Commission on military and civil aeronautics R&D projects benefiting from public funding.\textsuperscript{157}

The Commission had considered requiring Boeing to divest McDonnell Douglas's Civil Aircraft sector, but abandoned the idea when it was determined that there was no legitimate buyer.\textsuperscript{158} Instead, Boeing was required to maintain the Civil Aircraft section as a separate legal entity for a period of ten years.\textsuperscript{159}

If, in fact, the two sides did not consider industrial policy in applying the same substantive standards to this merger, how could such different results have been reached? Even though both parties claim they did not consider industrial policy,\textsuperscript{160} this Note would argue that both jurisdictions considered such policy concerns and thus arrived at such different conclusions.

1. Agreement Between the U.S. and the EC on Application of Their Competition Laws as an Answer to the Inconsistency

In order to alleviate these kinds of conflicts, the United States and the European Community have entered into an agreement on the application of their competition laws.\textsuperscript{161} The treaty recognizes in its preamble that "sound and effective enforcement of the Parties' competition laws would be enhanced by cooperation."\textsuperscript{162} To implement this goal of effective enforcement, the treaty creates a number of notification and information-sharing requirements.\textsuperscript{163} While these requirements make both parties aware of the other's interest and makes information gathering easier, they do little to assure that the laws are applied in a consistent fashion.

\textsuperscript{157} Id.

\textsuperscript{158} See id.

\textsuperscript{159} See id.

\textsuperscript{160} For example, the four commissioners' statement for the FTC emphasized that the agency did not clear the transaction to create a "national champion" in the commercial aircraft industry. See WEATHERILL & BEAUMONT, supra note 81, at 827.

\textsuperscript{161} See Agreement between the Government of the United States of America and the Commission of the European Communities Regarding the Application of their Competition Laws, supra note 49.

\textsuperscript{162} Id. at Preamble.

\textsuperscript{163} See id. arts. 2,3.
Article V sets out provisions that are designed to avoid conflicts in the application of competition laws. It allows one party to request that enforcement activities be carried out in the other party's territory. However, actual enforcement is discretionary and does not preclude enforcement by both parties against a single undertaking. The treaty explicitly states that nothing in the article "precludes the notifying party from undertaking enforcement activities with respect to such anticompetitive activities." The treaty attempts to temper any possible conflicts in application by requiring that "each party will seek at all stages in its enforcement activities, to take into account the important interests of the other party." This essentially creates a commitment to comity. Each party should consider the other's interests and not apply its own competition laws when they are inconsistent with the superior interests of the other party.

Despite its intentions, this requirement of comity is not effective at eliminating conflicts in the area of mergers for two reasons. The most obvious reason is that comity creates no legal obligation. As the Supreme Court has noted, comity is "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." The parties need only consider the other's interest, but there is no concrete requirement for conduct. Second, even if the interests of the other party were truly taken into account, it would be a rare case when either the European Community or the United States considered the other's interest more important than its own. In the Boeing example, it is fair to say that both parties would consider their respective interests in Boeing and Airbus to be very substantial. Any deferral to the other party is unlikely.

Even assuming that this treaty was effective and that the parties regularly deferred to the other party's interests, this deferral may not be good for the market in the case of mergers. If, for example, the European Community deferred to the United States in the Boeing case because Boeing and McDonnell Douglas are U.S. companies, this could have drastic effects on competition. The United States will have an incentive to pass the merger even if it is anticompetitive. Without the European Community to balance those interests, the aerospace industry could become a monopoly. By deferring to a "superior" U.S. interest, the default position would change from one of over-

\[164. \text{See id. art. 5.}\]
\[165. \text{See id. art. 4.}\]
\[166. \text{Id. art. 6.}\]
\[167. \text{Hilton v. Guyot, 159 U.S. 113, 163–64 (1895).}\]
competition to one of possible monopoly power abuses. Most economists would agree that if enforcement must break down, it is better to have too much competition than not enough. Thus, the treaty is, at best, ineffective, and, at worst, anticompetitive in the area of mergers and acquisitions.

V. CONCLUSION

Because of the danger of anticompetitive mergers, extraterritorial application of competition laws is necessary under the current system. Extraterritorial application of EC and U.S. laws prevents anticompetitive mergers from occurring, thereby protecting competition. Unfortunately, industrial interests dictate that some mergers, which are not inconsistent with the market, are blocked. While this default position of competition is generally better than no extraterritorial application at all, the European Community and United States could do better.

Although eliminating national welfare incentives from the Commission, FTC, and DOJ would be nearly impossible, there could be a way to limit industrial welfare concerns from the area of merger regulation. One solution would be to create a joint enforcement body. An independent board comprised of representatives of both jurisdictions would be able to eliminate national policy considerations and replace them with true competition policy. By eliminating these incentives, each merger could be judged on its efficiency gains and losses on a global scale. This would ensure that efficiency gains are not lost and anticompetitive mergers are not approved because of industrial policy.

An effective enforcement board could be modeled after the current Competition Commission in the European Community. Directorate IV has managed to apply competition policy consistently to the fifteen member states, without one state's interests being disproportionately taken into account. The same thing could be done by creating a board with equal numbers of members from the United States and the European Community. Of course, the board should be as politically independent as possible; any inadvertent political considerations would be balanced by membership on both sides.

This board could then determine which mergers to consider by employing the effects test, which is accepted by both the European Community and the United States. The board would exercise jurisdiction over any merger that had substantial effects in the European Community and the United States. Once the board took jurisdiction no other authority could consider the merger. The board would apply the same substantive approach that is now taken by EC and U.S. enforce-
ment authorities, considering market share, demand side substitution, and barriers to entry. It could then balance efficiency gains and losses to determine whether an otherwise anticompetitive merger is nevertheless desirable.

Regulation by the board would be essentially the same as that currently applied by the United States and the European Community, with one important exception. The enforcement board would apply competition policy alone, without any influence from national industrial policy and welfare concerns. Examining the merger from a purely competitive standpoint, the board would neither advance an anticompetitive merger to promote a domestic industry, nor oppose an efficiency enhancing merger to protect the industry. The novel approach would always measure the merger against its effects on the market. Efficiency-producing mergers would be advanced, while anticompetitive and allocatively inefficient mergers would be opposed. Eventually, this model could be expanded to structure a global board on mergers and acquisitions. Until that time, joint enforcement by the two most powerful economies in the world would be a good start toward total global harmonization of competition laws.