

THE EUROPEAN COMMISSION'S DECISION ON THE BOEING-MCDONNELL DOUGLAS MERGER AND THE NEED FOR GREATER U.S.-EU COOPERATION IN THE MERGER FIELD

AMY ANN KARPEL *

TABLE OF CONTENTS

Introduction	1030
I. Background.....	1035
A. The Merger Regulation.....	1035
B. FTC Approval of the Boeing-McDonnell Douglas Merger.....	1039
II. European Commission's Decision on the Boeing- McDonnell Douglas Merger.....	1040
III. EU Power to Oppose the Merger	1046
IV. Consistency of the Commission's Decision.....	1047
A. Exclusive Supply Arrangements.....	1048
B. Spillover Effects of McDonnell Douglas' Defense Division.....	1050
C. Expansion of Boeing's Market Share and Other Factors Strengthening Dominance.....	1052
D. Remedies.....	1058
V. Implications of the Commission's Decision.....	1059
VI. Recommendations.....	1061

* Senior Articles Editor, *The American University Law Review*, Volume 48; J.D. Candidate, May 1999, *American University, Washington College of Law*; B.A., with honors, June 1996, *University of Washington*. I would like to thank Todd Miller for his comments and advice on an earlier draft of this Comment, as well as Professor Perry Wallace for his enthusiasm and encouragement in the selection of this topic. In addition, I thank my parents, sister and friends for their support and understanding throughout the production of this Comment.

A. The Failure of the Present System to Address Conflicts between EU and U.S. Competition Policy	1061
B. Toward a Solution	1064
Conclusion	1069

INTRODUCTION

On August 8, 1997, the first and third largest producers of civilian jets, The Boeing Company ("Boeing") and McDonnell Douglas Corporation ("McDonnell Douglas") merged to form a single company with combined annual sales of approximately \$48 billion.¹ With the loss of McDonnell Douglas as an independent corporation, only Boeing and Airbus Industries ("Airbus")² remained to compete in the global market for large commercial aircraft, estimated to be worth \$1.1 trillion over the next twenty years.³ Boeing's acquisition of McDonnell Douglas pushed its nearly two-thirds share of the market to seventy percent.⁴ The capture of such a significant share of the market prompted the Federal Trade Commission to investigate the merger, yet after review, the FTC concluded that Boeing's acquisition would not "substantially lessen competition"⁵ and it approved the merger.⁶

The FTC's approval, however, was not the end of the debate over the competitive effects of the Boeing-McDonnell Douglas merger. Directorate General IV of the European Commission ("Commission"), the European Union's ("EU") antitrust authority,⁷ did not

1. See Jeff Cole & Thomas E. Ricks, *Boeing's Military-Aircraft Operations to Be in St. Louis Under Merger Deal*, WALL ST. J., Aug. 4, 1997, at A5 (reporting merger of Boeing and McDonnell Douglas).

2. See Commission Decision of 97/816, 1997 O.J. (L 336) 16, 19-20 [hereinafter Boeing-McDonnell Douglas Decision] (describing Airbus); Charles Goldsmith, *Re-Engineering After Trailing Boeing for Years, Airbus Aims for 50% of the Market*, WALL ST. J., Mar. 16, 1998, at A1 (discussing the history of Airbus and its current goals). Airbus was established in December 1971 as a consortium of economic interests. Airbus is collectively owned by privately-owned Daimler-Benz Aerospace Airbus of Germany and British Aerospace, and government-owned Aerospatiale of France and CASA of Spain. See Boeing-McDonnell Douglas Decision, *supra*, at 19-20.

3. See Jeff Cole et al., *Boeing-McDonnell Merger Clears Hurdle*, WALL ST. J., July 24, 1997, at A2 (reporting that Boeing-McDonnell Douglas merger will leave only "two players"—Boeing and Airbus—to compete in the global market for large civilian jets, estimated to be worth \$1.1 trillion over the next 20 years).

4. See Boeing-McDonnell Douglas Decision, *supra* note 2, at 24 (indicating Boeing's increase in market share from 64% to 70%).

5. See 15 U.S.C. § 18 (1994) (prohibiting mergers which "may be substantially to lessen competition, or to tend to create a monopoly").

6. See *In re Boeing Company/McDonnell Douglas Corp.*, FTC, file no. 971-0051 (July 1, 1997) (statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger, Roscoe B. Starek III & Christine A. Varney) (approving the Boeing-McDonnell Douglas merger).

7. See generally RALPH H. FOLSOM, EUROPEAN UNION LAW 66-68 (2d ed. 1995) (giving general explanation of Commission's organization). The Commission is organized by Directorate

share the FTC's confidence that the merger would not substantially lessen competition.⁸ The EU⁹ feared a strengthening of Boeing's dominant position in the global market for large civilian jets, which post-merger would be served by only two competitors.¹⁰

As the deadline for the Commission's official statement on the merger approached, the prospects that the EU would approve the \$14 billion deal dimmed.¹¹ Concerned U.S. lawmakers rejected the EU's authority to prevent the merger,¹² suggesting that EU concerns

Generals, essentially departments, numbering I through XXII. Each Directorate General ("DG") is allocated particular administrative, legislative, drafting, and enforcement duties. DG IV is in charge of competition. *See id.*

8. *See Commission Begins Investigation of the Boeing/McDonnell Douglas Merger*, OFFICIAL PRESS RELEASE OF THE EUR. UNION IP/97/236 (Eur. Comm'n, Brussels, Belg.), Mar. 19, 1997, at 1 [hereinafter *Commission Begins Investigation*] (stating the Commission's concern that merger in its initial form posed significant impediments to competition).

9. *See EUROPEAN COMM'N, SERVING THE EUROPEAN UNION* (1996) (explaining roles of the various bodies within the EU). "EU" is used in this Comment to refer to the European Union as a whole. Although the Commission investigated and ultimately decided the compatibility of the merger with EC Law, much like the FTC would in the United States, for the purposes of this Comment it is assumed that the Commission is a representative of the EU. Thus, concerns expressed and decisions made by the Commission are considered to have been made by the whole of the EU.

10. *See Commission Begins Investigation*, *supra* note 8 (announcing Commission's decision to proceed with a phase two investigation of Boeing-McDonnell Douglas merger).

11. *See Alex Fryer & James V. Grimaldi, Rebuff Sends Boeing Packing*, SEATTLE TIMES, July 16, 1997, at C1 (noting that an EU advisory panel voted a second time to deny merger approval absent concessions from Boeing, and that negotiations between Boeing and the Commission had reached a standstill). Disapproval of the Boeing-McDonnell Douglas merger would essentially mean that the Commission concluded the merger would lead to a strengthening of Boeing's already dominant position in the commercial aircraft industry and, as a consequence, be incompatible with EC Law. *See infra* Part I.A (discussing the Merger Regulation). Talks between Boeing and the EU continued, but just days before the date of the EU's official decision, it appeared only a "miracle" would bring the parties to a compromise. *See Brian Coleman, U.S. May Retaliate If EU Rejects Boeing Merger*, WALL ST. J., July 18, 1997, at A2. Senior European aviation officials reportedly referred to the crisis (i.e., the possibility that the EU would disapprove the merger) as "a nightmare they'd rather not think about." Charles Goldsmith, *Forces Opposing Merger Are Gaining Strength in the EU*, WALL ST. J. EUR., July 17, 1997, at A2 (reporting the pessimistic view held by U.S. authorities about the prospects of EU approval). The estimated cost of acquiring McDonnell Douglas was between \$14 billion to \$16 billion. The actual cost fluctuated depending on the market. For example, when Boeing and McDonnell Douglas first announced the merger, McDonnell Douglas was estimated to be worth \$14 billion; seven months later, McDonnell Douglas was estimated at a value of \$16.3 billion. *See Cole & Ricks, supra* note 1, at A5 (reporting value of Boeing-McDonnell Douglas merger).

12. *See Alex Fryer, Europeans, Boeing May Have a Deal*, SEATTLE TIMES, July 22, 1997, at A1 (reporting that U.S. Representative Jack Metcalf (R-Wash.) planned to introduce a resolution in the U.S. House of Representatives condemning the EU investigation as an "unwarranted and unprecedented interference in a United States business transaction"); Stephen H. Dunphy & James V. Grimaldi, *A Superpower in Aviation, and Now in Foreign Policy*, SEATTLE TIMES, July 20, 1997, at F1 [hereinafter Dunphy & Grimaldi, *A Superpower in Aviation*] (reporting that U.S. Senator Slade Gorton (R-Wash.) was "outraged" that the EU was asserting its antitrust authority extraterritorially); James V. Grimaldi, *EC Boeing Stand Worries Clinton*, SEATTLE TIMES, July 17, 1997, at D1 [hereinafter Grimaldi, *EC Boeing Stand*] (reporting on measure passed by U.S. Senate condemning the "imminent disapproval" of the merger). The contempt of U.S. lawmakers toward the EU's scrutiny of the Boeing-McDonnell Douglas merger is curious considering that the Commission's investigation of the Boeing-McDonnell Douglas merger is not the first time it

were based purely on its protectionist interest in promoting Airbus,¹³ and warning EU authorities not to stand in the way of the merger.¹⁴ The EU countered,¹⁵ stating that its investigation was conducted strictly on the basis of European Community ("EC") law,¹⁶ and added

has used the Merger Regulation to examine a merger between two U.S. corporations. See, e.g., Commission Notification 33/05, 1996 O.J. (C 33) 7 (Chase Manhattan/Chemical Banking) (investigating competitive effects of a merger between American banks Chase Manhattan and Chemical Banking and concluding that the merger did not pose significant impediments to competition); Commission Notification 95/03, 1995 O.J. (C 334) 3 (Seagate/Conner) (investigating competitive effects of a merger between Seagate and Conner, both U.S. companies, and concluding the merger did not pose a significant impediment to competition). Furthermore, U.S. antitrust authorities routinely examine anticompetitive behavior of non-U.S. corporations. See, e.g., *In re* Mahle GmbH, Mahle, Inc., Metal Leve, S.A. and Metal Leve, Inc., FTC Docket No. C-3746 (June 4, 1997) (alleging that the acquisition of Metal Leve, Inc. by Mahle, GmbH—a corporation organized, existing, and doing business under German law with its principle place of business in Stuttgart, Germany—was in violation of U.S. antitrust laws, and ordering Mahle, GmbH to divest Metal Leve, Inc.); *In re* Shell, Montedison, FTC Docket No. C-3580 (May 25, 1995) (finding that merger between two leading polypropylene-making technologies, Montedison, S.P.A., and Royal Dutch Shell Group, both Dutch corporations, was in violation of U.S. antitrust laws, and ordering divestiture of Shell's polypropylene assets located in the United States); see also FTC Comm'r Christine A. Varney, *The Federal Trade Commission and International Antitrust*, Remarks Before the Fordham Corporate Law Institute 23rd Annual Conference on International Antitrust Law and Policy 12 (Oct. 17, 1996), available at <http://www.ftc.gov/speeches/varney/fcli_96.htm> (discussing FTC's imposition of fines on Mahle, GmbH for failing to notify the FTC, as mandated by the Hart-Scott-Rodino Act, prior to its acquisition of Metal Leve, Inc.); FTC, THE FEDERAL TRADE COMMISSION: ANTICIPATING THE 21ST CENTURY 7 (Spring 1997), available at <<http://www.ftc.gov/reports/21cent/antic21.htm>> (noting that Mahle, GmbH and Metal Leve, S.A. agreed to pay the highest civil penalty ever for a Hart-Scott-Rodino Act violation—more than \$5 million). These cases are not isolated examples of U.S./EU involvement in foreign mergers. The FTC noted that 25% of pre-merger notifications under the Hart-Scott-Rodino Act are from foreign firms. See *The Federal Trade Commission and International Antitrust*, *supra*, at 14. Furthermore, at least 24 mergers reviewed by the EC between 1990 and 1995 involved situations in which both parties' headquarters were outside the EU. See EUROPEAN UNION LAW AFTER MAASTRICHT 449 (Ralph H. Folsom et al. eds., 1996).

13. See Grimaldi, *EC Boeing Stand*, *supra* note 12, at D1 (expressing U.S. lawmakers belief that EU concerns regarding Boeing-McDonnell Douglas merger stemmed from its intentions to protect Airbus).

14. See *id.* (reporting President Clinton's statement that it would be unfortunate if a trade war resulted, but that the United States had "some options" should the EU attempt to block the merger); Steven Pearlstein, *Boeing Yields to Key EU Demand to Win Approval of McDonnell Deal*, WASH. POST, July 23, 1997, at D10 (reporting that President Clinton and U.S. officials threatened retaliatory measures should the EU fail to approve the merger).

15. The EU responded to allegations that protectionism formed the basis for its objections in *Our Analysis of the Boeing-McDonnell Douglas File is Conducted Strictly on the Basis of the European Merger Regulation, and Nothing Else*, OFFICIAL PRESS RELEASE OF EUR. UNION IP/97/400 (Eur. Comm'n, Brussels, Belg.), May 13, 1997, at 1 [hereinafter *Analysis of Boeing-McDonnell Douglas File*].

16. See generally EUROPEAN COMM'N DELEGATION TO THE U.S., THE EUROPEAN UNION: A GUIDE 6-11 (1994) (explaining the structure of EU and role of EC law within EU). "EC law" refers to the law governing the European Community (EC). The EC is a subpart of the EU. The EU is comprised of three "pillars." The first pillar consists of the European Coal and Steel Community ("ECSC") and the European Atomic Energy Community ("Euratom"). See TREATY ON THE EUROPEAN UNION TOGETHER WITH THE COMPLETED TEXT OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 2, 1992, O.J. (C 224) [hereinafter EC TREATY]; TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY, Apr. 18, 1951, 261 U.N.T.S. 167 [hereinafter ECSC TREATY]; TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY,

that mergers in violation of EC law were subject to penalty.¹⁷ United States' criticism of the EU's stance escalated,¹⁸ and the specter of a

Mar. 25, 1957, 298 U.N.T.S. 167 [hereinafter Euratom Treaty]. See generally EUROPEAN COMM'N DELEGATION TO THE U.S., THE EUROPEAN UNION AND THE U.S. IN THE 1990'S at 8 (1996) (describing the three "pillars" that constitute the EU). The second and third pillar consist of the Common Foreign and Security (CFSP) and Justice and Home Affairs, respectively. See EC Treaty arts. J-K. Prior to 1993, the EC was called the European Economic Community (EEC) and the EEC, ECSC and Euratom were collectively called the EC. See FOLSOM, *supra* note 7, at 8. In 1993, with the signing of the Maastricht Treaty, the EC was joined by the second and third pillars to form the EU. See FOLSOM, *supra*. The first pillar is the only one which imposes a body of law binding on member states. This body of law is enforceable by the EU's judicial bodies, the Court of First Instance (CFI) and the European Court of Justice (ECJ). See FOLSOM, *supra* at 29, 34 (explaining that the CFSP and Justice and Home Affairs are not enforceable by the ECJ and that the EC, ECSC, and Euratom Treaties form the primary source of law in the EU); see JOHN PINDER, EUROPEAN COMMUNITY: THE BUILDING OF A UNION 40 (2d ed. 1995) (explaining EC law is binding on member states and enforceable by the CFI and ECJ). Because only the rules governing the EC are legally binding, the only law within the EU is EC law. See PINDER, *supra*, at 19 (stating that although it is becoming more common for all elements of the EU to be referred to as the EU, it is inappropriate to use the term EU in relation to the EU's legal system, which only applies to the European Communities). Thus, although the EU, specifically the European Commission, objected to the merger, it is EC law which governs the merger.

17. See Fryer, *supra* note 12, at A1 (reporting that the Commission could fine Boeing up to 10% of its combined sales—as much as \$3.5 billion to \$4 billion—should Boeing proceed with the merger absent EU approval, and that the Commission could also fine companies that continued to do business with Boeing); see also *infra* note 107 (discussing Commission's ability to impose fines). The EU's power to penalize the merger compelled Boeing to enter talks with the EU and prompted both President Clinton and Congress to enter the discussion, urging both sides to reach a compromise. See Cole et al., *supra* note 3, at A2 (reporting U.S. government's "furious" lobbying of EU in regards to the Boeing-McDonnell Douglas merger); Dunphy & Grimaldi, *A Superpower in Aviation*, *supra* note 12, at F1 (analyzing Clinton Administration's involvement in the Boeing crisis); James V. Grimaldi, *Europe Gives Boeing Deal Tentative OK*, SEATTLE TIMES, July 23, 1997, at A1 (reporting that Boeing had little choice but to negotiate with the EU given the EU's power to impose fines); Pearlstein, *supra* note 11, at D10 (recounting Clinton administration's involvement in resolving Boeing crisis).

18. See *A 'Dangerous' Merger?*, WALL ST. J., July 21, 1997, at A22 (noting the shock of U.S. lawmakers and businesses at the "audaciousness" of the EU's attempt to block the merger between two American companies). United States lawmakers rejected the EU's authority and jurisdiction to block the merger, maintaining that the EU had no right to "tell American companies how to do business," and questioned its motive, believing the EU's protests were merely a means to protect and advance Airbus. See Christopher Carey, *Europeans Ask Bloc for Boeing Rejection; Resistance Could Delay Deal by Several Months*, ST. LOUIS POST DISPATCH, July 17, 1997, at C1 (quoting U.S. Representative Jim Talent (D-Ohio), calling Commission's dismissal of FTC findings "ludicrous"); *A 'Dangerous' Merger?*, *supra*, at A22 (arguing that the EU should not interfere with "capitalist choices of consenting adults" and questioning whether the EU's reaction resulted from its desire to protect its own aircraft manufacturing industry). The strong reaction of U.S. lawmakers to EU "interference" with the Boeing-McDonnell Douglas merger is reminiscent of the EU's outrage at the extraterritorial application of the Helms-Burton Act. See *Helms-Burton and U.S. National Security*, OFFICIAL PRESS RELEASE EUR. UNION IP/97/120 (Eur. Comm'n, Brussels, Belg.), Feb. 12, 1997 (statement of Sir Leon Brittan) (criticizing the unacceptable extraterritorial effects of the Helms-Burton Act). The issues surrounding the Helms-Burton controversy and the Boeing-McDonnell Douglas merger, however, differ. The Helms-Burton controversy was over the best means to achieve the mutual goal of fostering political reform in Cuba. See *id.* (finding the Helms-Burton approach to promoting reform in Cuba unacceptable); *Commission Reacts to U.S. on Cuba*, OFFICIAL PRESS RELEASE EUR. UNION IP/96/650 (Eur. Comm'n, Brussels, Belg.) July 16, 1996 (stating that although the EU shared the United States' desire to reform Cuba, it rejected the U.S. approach). This controversy is in contrast to the Boeing case, in which the EU and the United States not only shared the same overall goal

trade war seemed inevitable.¹⁹ In the end, however, crisis was averted: Boeing agreed to several key concessions and the EU approved the merger.²⁰

In the aftermath of the conflict, several questions remain. This Comment focuses on the Commission's decision on the Boeing-McDonnell Douglas merger and its consistency with past Commission decisions and EC law. This Comment also considers the apparent futility of an agreement between the United States and EU, designed to prevent antitrust conflicts, in reconciling the dispute over the Boeing-McDonnell Douglas merger and suggests how antitrust authorities on both sides of the Atlantic could work together to avoid a repeat of the Boeing case. Part I begins with an outline of the basic premise and tenets of EC Competition Policy, specifically the EC Merger Regulation. Part I also looks briefly at the FTC's approval of the merger, as a source of comparison between the different approaches taken by the two antitrust authorities. Part II considers the Commission's decision on the merger, detailing the reasons for its decision. The EU's power to enforce its decision is discussed in Part III. Part IV examines the consistency of the Commission's decision on the Boeing-McDonnell Douglas merger with EC law and past Commission decisions. Part V determines that the Commission's decision was largely consistent with past decisions and EC law and suggests that the Boeing-McDonnell Douglas controversy was a result of divergent antitrust laws, rather than misapplication or political manipulation of those laws. Finally, Part VI concludes that current

of promoting competition, but followed the same means as well, investigation and application of relevant antitrust laws, to achieve that goal. The controversy in the Boeing-McDonnell Douglas merger stemmed from a difference of interpretation, namely what constituted a significant impediment to competition. See *supra* Part I.B (discussing the FTC's view on the competitive effects of the Boeing-McDonnell Douglas Merger) and Part II (discussing the Commission's view on the competitive effects of the Boeing-McDonnell Douglas merger).

19. See Steven Pearlstein & Anne Swardson, *U.S., Europe Clash Over Airline Deal*, BOSTON GLOBE, July 17, 1997, at C2 (quoting U.S. Representative Norm Dicks (D-Wash.), who suggested the United States and EU could be "heading for a major trade war" over Commission's opposition to the merger); Grimaldi, *EC Boeing Stand*, *supra* note 12, at D1 (reporting concerns of a looming trade war). Support of the EU's tough stance on the merger by its most powerful member countries, suggest that had a "trade war" resulted, the political will to fight it would have existed. French President Jacques Chirac, for instance, voiced his support for the Commission's position and urged it to "stand firm" against the Boeing-McDonnell Douglas deal. See *id.* German Economic Minister Gunter Rexrodt, as well as Belgian Prime Minister Jean-Luc Dehaene, also publicly offered the Commission their support. See *EU Commission Meets Again on Boeing/McDonnell-Douglas Merger*, AGENCE FRANCE-PRESSE, July 17, 1997, available in Westlaw, 1997 WL 2154492.

20. See Boeing-McDonnell Douglas Decision, *supra* note 2, at 34-37 (detailing Boeing's concessions); Steven Pearlstein, *Europeans Relent, Back Boeing Merger*, WASH. POST, July 24, 1997, at E1 (reporting that Boeing Chairman Philip Condit conceded to concessions to secure EU approval of the merger).

mechanisms designed to avoid conflicts, specifically a U.S./EU agreement on competition policy, are inadequate. This Comment advocates that to prevent future Boeing-type crises, the United States and the EU should forge more effective means of cooperating on mergers affecting both jurisdictions. Such means would require the two antitrust authorities not only to consult with each other, but to coordinate and work together in both the investigative and decisionmaking processes.

I. BACKGROUND

A. *The Merger Regulation*

Like U.S. antitrust law, EC Competition Policy is a collection of different provisions, amended over time.²¹ The main tenets of EC Competition Policy are contained in the founding treaties of the European Community.²² Excluding cases of state aid and dumping

21. The list of regulations governing competition law is extensive, but for the essential laws, see EC TREATY arts. 85-94 (prohibiting anticompetitive behavior, including dumping, abuse of a dominant position, restriction of trade, and distortion of the market through state aid); Council Regulation 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings, 1990 O.J. (L 257) 14 [hereinafter Regulation 4064/89] (prohibiting mergers and certain types of joint ventures that create or strengthen a dominant position). Article 85(1), prohibiting activities which may restrain trade between member states, and article 86 prohibiting abuse of a dominant position, along with the Merger Regulation, form the heart of EC antitrust law. See EC Treaty arts. 85(1), 86; Regulation 4064/89, *supra*. The regulations detailing the block exemptions to Article 85 also are important. The regulations granting block exemptions stem from Article 85(3), which permits activities in violation of 85(1) if the activities are necessary to promote greater efficiencies or economic or technical progress, and are beneficial to consumers. See Commission Regulation 556/89, 1989 O.J. (L 61) 1 (exempting certain categories of know-how licensing agreements); Commission Regulation 4087/88, 1988 O.J. (L 359) 46 (exempting certain types of franchising agreements); Commission Regulation 417/85, 1985 O.J. (L 53) 1 (exempting certain types of specialization agreements); Commission Regulation 418/85, 1985 O.J. (L 53) 15 (permitting exemption to categories of research and development agreements); Commission Regulation 123/85, 1985 (L 15) 16 (permitting exemption to categories of motor vehicle and servicing agreements); Commission Regulation 2349/84, 1984 O.J. (L 219) 15 (permitting certain categories of patent licensing agreements); Commission Regulation 1984/83, 1983 O.J. (L 173) 5; Commission Regulation 1983/83, 1983 O.J. (L 173) 1 (allowing limited types of exclusive distribution agreements). See also the regulations amending the Merger Regulation: Council Regulation 1310/97, 1997 O.J. (L 180) 1 (amending various provisions of the merger regulation, in particular lowering thresholds triggering application of the Merger Regulation) and Commission Regulation 2367/90, 1990 O.J. (L 219) 5 (making technical changes to the Merger Regulation). Regulation 1310/97 took effect March 1, 1998 and therefore was not in effect at the time the Boeing decision was rendered. See Regulation 1310/97, *supra*, at 6.

22. See EC TREATY arts. 85-94; ECSC TREATY arts. 65, 66(7). Euratom, the third founding component of the European Community, contains no provisions on competition. See EURATOM TREATY. Although the ECSC and Euratom Treaties were intended to cover the coal and steel and atomic energy sectors, respectively, the EC Treaty provisions governing competition apply to both the atomic energy sector and to those parts of the coal and steel sector falling outside the scope of the ECSC Treaty. See ROGER KOCH, SPICERS EUROPEAN UNION POLICY BRIEFINGS: COMPETITION POLICY AND LAW 23-24 (1994) [hereinafter KOCH, EU POLICY

covered by separate articles,²³ Articles 85 and 86 of the EC treaty form the backbone of EC Competition Law.²⁴ Article 85 prohibits practices that "have as their object or effect the prevention, restriction or distortion of competition within the common market."²⁵ Article 86 prohibits the abuse of a dominant market position.²⁶ Council Regulation 17 provides the mechanisms for enforcing Articles 85 and 86.²⁷ Various interpretation problems and clashes with the European Court of Justice ("ECJ") revealed the inadequacy of the EC Treaty when applied to mergers²⁸ and compelled the European Commission to design rules specially aimed at preserving competition when two or more companies merged.²⁹ The result was Council Regulation 4064/89 (the "Merger Regulation" or "Regulation"), which the Council adopted in 1989.³⁰

The Merger Regulation applies to all companies (called undertakings in the EU) involved in a concentration³¹ that have a Community dimension.³² The Regulation, however, does not limit its reach to EU

BRIEFINGS]. The reach of the EC Treaty is the largest, handling matters not already covered by the jurisdiction of the ECSC or the Euratom. *See id.* at 18 (noting that EC Competition Law consists of a hierarchy of various provisions). *See generally supra* note 16.

23. *See* EC TREATY arts. 91-94.

24. *See id.* arts. 85-86.

25. *Id.* art. 85.

26. *See id.* art. 86.

27. *See* Council Regulation 17/62, art. 15, 1962 O.J. (L 13) 87 (providing rules needed to "secure uniform application of Articles 85 and 86 in the common market").

28. For an explanation of the role of the ECJ, *see* EUR. COMM'N, *supra* note 9, at 17-18.

29. *See* Regulation 4064/89, recital 6, *supra* note 21, at 14 (noting the difficulties in applying Articles 85 and 86 to concentrations); *see also* Timothy Dorsey, *The European Community Merger Regulation: Questions Answered Uncertainties Remain*, 8 TUL. EUR. & CIV. L.F. 95, 97-100 (1993) (discussing the difficulties in applying Articles 85 and 86 to mergers).

30. *See* Regulation 4064/89, *supra* note 21, at 14.

31. *See* Regulation 4064/89, *supra* note 21, art. 3.1-3.2, at 17 (defining "concentration" to include mergers as well as acquisitions and certain types of joint ventures); *see also* KOCH, EU POLICY BRIEFINGS, *supra* note 22, at 186 (discussing definition of a concentration). Concentrations of the joint venture variety are sometimes covered by Article 85 of the EC Treaty, depending on whether the joint venture is categorized as a cooperative or restrictive. *See id.* at 186-87 (discussing Commission's use of Article 85 and the Merger Regulation as they apply to joint ventures).

32. *See* Regulation 1310/97, *supra* note 21 (detailing threshold criteria). Regulation 1310/97 provides that a concentration (i.e., merger) has a community dimension if it meets four threshold criteria: (1) ECU 2.5 billion world-wide turnover; (2) ECU 100 million combined aggregate turnover in at least three EU countries; (3) ECU 25 million turnover in each of at least two of the companies in each of at least three countries included for the purpose of (2); and (4) ECU 100 million aggregate EU-wide turnover of each of at least two of the companies. *See id.* at 2-3. Regulation 1310/97 amended Article 1 of Regulation 4064/89. The amendment implemented by 1310/97 became effective March 1, 1998. *See id.* at 6. Prior to March 1, 1998, Regulation 4064/89 outlined the threshold criteria providing that a concentration had a community dimension if it met two threshold criteria: (1) the aggregate worldwide turnover of all the undertakings concerned totaled ECU 5 billion or greater; and (2) the aggregate EU-wide turnover of each of at least two of the undertakings concerned totaled ECU 250 million. *See* Regulation 4064/89, *supra* note 21, art. 1, at 16. One ECU is equivalent to approximately \$1.1. *See* Currency Exchange, WALL ST. J., Apr. 20, 1998, at C15. The threshold crite-

companies.³³ The Commission bases its assessment of whether a concentration has a community dimension on the activities and turnover³⁴ of the companies involved, regardless of whether the company is incorporated, or even located within the EU.³⁵ If the companies involved in a concentration meet the threshold criteria for turnover, both overall and in the EU specifically, the Regulation authorizes the Commission to act.³⁶

If the Commission finds that the concentration has a Community dimension, then the proposed merger is analyzed according to a three-step process that: (1) defines the relevant product and geographic markets; (2) determines whether the company has a dominant position,³⁷ and; (3) considers whether the dominant position stands as a significant impediment to competition.³⁸ Under the second and third steps, the Commission considers numerous factors, including market share, correlation between market share and economic power, barriers to entry, access to supply, the market position of competitors, the need to preserve and develop competition, supply and demand trends, and the interests of the intermediate and ultimate consumers.³⁹

ria leave ample room for companies, having their principle fields of activities outside of the EU, to nonetheless qualify as having a community dimension. In fact, the recital to the Merger Regulation makes specific reference to this possibility. See Regulation 4064/89, recital 11, *supra* note 21, at 14 (stating that the Regulation can apply in cases where the companies involved "do not have their principal fields of activities in the Community but which have substantial operations there").

33. See, e.g., Chase Manhattan/Chemical Banking, *supra* note 12 (illustrating Commission's willingness to investigate non-EU corporations).

34. Turnover is roughly equivalent to the proceeds derived from sales less taxes. The Merger Regulation contains a lengthy definition of turnover and how to calculate it in Article 5. See Regulation 4064/89, *supra* note 21, at 18; see also Regulation 1310/97, *supra* note 21, at 3 (amending Regulation 4064/89's turnover calculation methods).

35. See Towards an International Framework of Competition Rules: Communication from the Commission to the Council, COM (96)284 final, *reprinted in* EUROPEAN COMM'N, IIIA COMPETITION LAW IN THE EUROPEAN UNION: RULES IN THE INTERNATIONAL FIELD 433 n.1 (1997) [hereinafter International Framework] (noting that the Merger Regulation authorizes the Commission to examine mergers of firms with headquarters outside the EU if threshold requirements are met).

36. See Regulation 1310/97, *supra* note 21, at 2-3 (establishing criteria required to trigger Merger Regulation).

37. See Commission Decision 91/299, 1991 O.J. (L 52) 21.40 (Soda-ash Decision) (defining dominance as the "power to hinder effective competition," and accompanying ability to exclude competitors from the market).

38. See Regulation 4064/89, art. 2.1, *supra* note 21, at 16 (stipulating the areas that the Commission "shall" take into account when appraising a merger). See generally EUROPEAN COMM'N, XXIIIRD REPORT ON COMPETITION POLICY 1993, at 173-85 (1994) [hereinafter REPORT ON COMPETITION 1993] (discussing the appraisal of merger pursuant to the Merger Regulation); Dorsey, *supra* note 29, at 95 (examining the rationale and substantive review criteria and procedure used by the Commission in analyzing a merger); Ethan Schwartz, *Politics as Usual: The History of European Community Merger Control*, 18 YALE J. INT'L L. 607, 654-55 (1993) (describing substantive evaluations of mergers under the Merger Regulation).

39. See Regulation 4064/89, art. 2.1(a)-(b), *supra* note 21, at 16 (stating that the Commis-

The areas of examination under the Merger Regulation, however, are not fixed. In the past, the Commission has emphasized some criteria over others and even added or deleted criteria when appropriate in a particular case.⁴⁰ If the proposed merger either strengthens or creates a dominant position deemed either to impede competition or create the possibility that the dominant company will abuse its position, the Commission has two options: (1) declare the merger incompatible with the EC law;⁴¹ or (2) negotiate modifications to the proposed mergers so as to make it compatible with EC law.⁴² Should the Commission choose the former, it has the authority to impose substantial fines on companies who go through with the merger ab-

sion's assessment must consider "the need to maintain and develop effective competition" in view of several factors, but providing no strict list of acceptable and unacceptable behavior); *see also* Dorsey, *supra* note 29, at 107 (listing factors considered in Commission merger assessments).

40. Regulation 4064/89 states that the Commission shall assess:

(a) the need to maintain 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 located either within or outwith the Community;

(b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

Regulation 4064/89, art. 2.1 (a)-(b), *supra* note 21, at 16.

The Commission has used the parameters set forth in the above article to develop concepts such as collective dominance, which occurs when a small number of firms rather than a single undertaking collectively controls a dominant part of the market. *See* EUROPEAN COMM'N, XXII REPORT ON COMPETITION POLICY 1992, at 23 (1993) (discussing Commission interpretation of the Merger Regulation to "prevent the creation or strengthening not just of a dominant position held by a single firm but also of a dominant position held jointly by a number of firms"); *Recent Events in EU Merger Control*, 9 FIN. TIMES BUS. L. EUR. 3 (May 29, 1997) (reporting that Commission will declare a merger incompatible with EC law when it finds an oligopoly of firms occupying a dominant position—i.e., collective dominance); *see also* Commission Decision 97/26, 1997 O.J. (L 11) 30, 58-62 (Gencor/Lonrho) (finding the proposed merger incompatible with EC law because the merger would lead to the creation of a duopoly—two companies each controlling 35% of the market—dominating the world platinum market).

41. *See* Regulation 4064/89, art. 2.3, *supra* note 21, at 17 (stating that Commission shall declare a concentration incompatible with the common market if it leads to the creation or strengthening of a dominant position that significantly impedes competition). The term "incompatible with the common market" simply means in violation of EC law. The EU's fundamental premise is to facilitate the common market (i.e., European integration). Therefore, anything deemed to be incompatible with that goal is prohibited by law. *See generally* EC TREATY art. 2 (stipulating that the Community's "task" is "to promote throughout the Community a harmonious and balanced development of economic activities" through establishment of the common market).

42. *See* Regulation 4064/89, art. 8.2, *supra* note 21, at 19 (providing the Commission may declare a merger compatible with the common market or accept modification, eliminating antitrust concerns, and declare the merger compatible with EC law); Dorsey, *supra* note 29, at 106 (explaining options available to Commission upon finding that a concentration created or strengthened a dominant position).

sent EU approval.⁴³ These fines can total 10% of the company's annual revenue, which for a large company could run in the millions or even billions.⁴⁴

Given the flexibility in the application of the Merger Regulation, it is important to understand the premise on which the Regulation operates.⁴⁵ Like U.S. antitrust law, EU antitrust law operates on a policy of promoting competition, which protects consumers from monopolistic abuse and fosters innovation and efficiency among competitors.⁴⁶ This, however, is not the only goal of EC Competition Policy.⁴⁷ Both the Treaty of Rome and the Merger Regulation contain provisions emphasizing two other essential EU objectives: fostering European industry and propelling further integration of the European market.⁴⁸ Although the Commission has the legal authority to consider these social and political objectives in its merger decisions, it has not openly done so. Instead, the Commission's past decisions adhere to the mostly objective criteria set forth in Part I.A.⁴⁹

B. *FTC Approval of the Boeing-McDonnell Douglas Merger*

In accordance with U.S. antitrust law, Boeing reported its merger plans with McDonnell Douglas to the FTC.⁵⁰ After what it called an "intensive and exhaustive investigation," the FTC concluded that the

43. See Regulation 4064/89, art. 14.2, *supra* note 21, at 22 (giving Commission authority to collect fines from undertakings proceeding in the face of Commission disapproval); Regulation 17/62, art. 15(2), *supra* note 27, at 87 (authorizing Commission to collect fines from businesses in violation of EC Competition law).

44. See Regulation 4064/89, art. 14.2, *supra* note 21, at 21 (stating that Commission may impose fines not exceeding 10% of the aggregate turnover of the companies for violations of Merger Regulation); see also Commission Decision 89/22, 1989 O.J. (L 10) 50, 72 (BPB Industries) (imposing fines totaling nearly ECU 3.2 million for violation of EC Law). One ECU is equivalent to approximately \$1.1. See *Currency Exchange*, *supra* note 32, at C15.

45. See KOCH, EU POLICY BRIEFINGS, *supra* note 22, at 18 (articulating importance of understanding EC Competition Law).

46. See Regulation 4064/89, art. 2.1(a)-(b), *supra* note 21, at 16 (stating that effective competition and the interest of the consumer must be taken into account in merger appraisals); ANTICIPATING THE 21ST CENTURY, *supra* note 12 (noting that one of the FTC's basic missions is preventing anticompetitive practices with the goal of spurring efficiency and innovation, and protecting the consumer).

47. See KOCH, EU POLICY BRIEFINGS, *supra* note 22, at 18-19 (stating that promoting competition is not the only goal of EC Competition Law).

48. See EC TREATY art. 3(c), (k) (stating that EU activities shall include building an internal market and strengthening competitiveness of European industry); Regulation 4064/89, recitals 2-4, 13, *supra* note 21, at 14-15 (stating that adopting Merger Regulation was consistent with goal of increasing competitiveness of European industry, improving the conditions of growth, raising the standard of living within the EU and furthering European integration).

49. This may be explained by a combination of the Commission's desire to avoid interpreting the vague language of the Merger Regulation's recital, and its belief that adherence to more objective criteria enhances the legitimacy of EU authority.

50. See Hart-Scott-Rodino Antitrust Improvements Act of 1976, tit. II, 15 U.S.C. §§ 18a(a), (d) (1994) (requiring notification of mergers to the FTC and Department of Justice).

merger "would not substantially lessen competition or tend to create a monopoly in either the defense or commercial aircraft markets."⁵¹ The FTC rejected speculation that approval of the merger was based on a desire to create a "national champion" in the world aircraft market,⁵² stating that the FTC lacked the "discretion to authorize anticompetitive but 'good' mergers because they may be thought to advance the United States' trade interests."⁵³ Although the FTC recognized Boeing's increased share of the large commercial aircraft market from 60% to nearly 70%, as well as the substantial barriers preventing potential competitors from entering the market, the FTC concluded that the merger was not a violation of antitrust law.⁵⁴

The essential reasons for the FTC's decision were that McDonnell Douglas no longer constituted a "meaningful competitive force in the commercial aircraft market," and that nothing McDonnell Douglas could do, either alone or in concert with others, could alter its position.⁵⁵ Consequently, a merger between Boeing and McDonnell Douglas could not be deemed anticompetitive, because McDonnell Douglas, with its lack of competitive potential, offered Boeing little or no competitive advantage in the civil aircraft market.⁵⁶ The FTC did express concern, however, about the twenty-year exclusive supply contracts Boeing had concluded with three major airlines, stating that it intended to monitor their "potential anticompetitive effects."⁵⁷

II. EUROPEAN COMMISSION'S DECISION ON THE BOEING-MCDONNELL DOUGLAS MERGER

The Commission began its investigation into the Boeing-McDonnell Douglas merger after Boeing notified the Commission on

51. *In re Boeing Company/McDonnell Douglas Corp.*, *supra* note 6. *But see In re Boeing Company/McDonnell Douglas Corporation*, FTC, file no. 971-0051 (July 1, 1997) (statement of Commissioner Mary L. Azcuenaga) (arguing in dissent that the merger "created a classic case for challenge" under U.S. merger guidelines, and finding reason to believe the merger in violation of Section 7 of the Clayton Act).

52. *See Carey*, *supra* note 18, at C1 (reporting accusations by Airbus that U.S. antitrust authorities collaborated in a deliberate strategy to eliminate Airbus from the commercial aircraft market).

53. *In re Boeing Company/McDonnell Douglas Corp.*, *supra* note 6, at 1-2.

54. *See id.* (basing decision on McDonnell Douglas' lack of commercial viability and unlikelihood that merger would influence market for military aircraft).

55. *See id.* at 3 (detailing reason for McDonnell Douglas' poor commercial position).

56. *See id.* at 3-5. Given this assessment, Boeing's only reason for investing \$14 billion dollars to acquire McDonnell Douglas would be for the advantages offered by McDonnell Douglas' defense division. The EU's assessment of McDonnell Douglas' commercial position, however, was significantly different. *See Boeing-McDonnell Douglas Decision*, *supra* note 2, at 24-28. The EU argued that McDonnell Douglas' commercial aircraft production capacity would bolster Boeing's commercial aircraft business by boosting capacity, improving technology, and adding skilled workers to its manufacturing assets. *See id.*

57. *See In re Boeing Company/McDonnell Douglas Corp.*, *supra* note 6, at 5.

February 18, 1997.⁵⁸ On March 19th, the Commission announced it had decided to proceed with an in-depth investigation of the merger and would reach a final decision within four months.⁵⁹ Two months later the Commission notified Boeing of its objection to the merger, and negotiations between Boeing and the Commission commenced.⁶⁰ The Commission announced its final decision on July 30, 1997.⁶¹

When the Commission announced its decision on the Boeing-McDonnell Douglas merger, it stated that it based its decision on the Merger Regulation and "in accordance with its own past practice and the jurisprudence of the European Court [of Justice]."⁶² Although Commission officials may have considered political or social concerns while investigating the merger, these concerns did not find official expression in the Commission's decision.⁶³ Like the FTC, the EU stated that it molded its decision around the objective criteria of its own antitrust laws.⁶⁴

The Commission centered its analysis on the Merger Regulation.⁶⁵ Defining the product and geographic market of the merging compa-

58. See Boeing-McDonnell Douglas Decision, *supra* note 2, at 16-17.

59. See *Commission Begins Investigation*, *supra* note 8, at 1 (announcing Commission's concern about potential anticompetitive effects of Boeing-McDonnell Douglas merger and its intention to investigate the merger). A Commission inquiry into a proposed merger proceeds in two phases. See Regulation 4069/89, *supra* note 21, arts. 6, 8, at 19. Each merger meeting the threshold criteria must pass a phase one, or Article 6, inquiry. If, after this inquiry, the Commission finds that merger raises serious doubts as to its compatibility with competition law, the Commission will instigate a phase two, or in-depth, investigation of the merger pursuant to Article 8 of the Merger Regulation. See *id.* (stipulating necessary assessments to be made when investigating mergers). The Commission is obligated to complete a phase one inquiry within one month and a phase two inquiry within four months. See *id.* at 20-21.

60. See *Cool Heads Needed in Brussels and Washington*, 9 FIN. TIMES BUS. L. EUR. 16, May 29, 1997 (stating that Commission notified Boeing and McDonnell Douglas of its antitrust concerns and that two months remained to reach a solution).

61. See *The Commission Clears the Merger Between Boeing and McDonnell Douglas Under Conditions and Obligation*, OFFICIAL PRESS RELEASE OF THE EUR. UNION IP/7/729 (EUR. COMM'N, Brussels, Belg.), July 30, 1997 [hereinafter *Commission Clears Merger*].

62. *Id.* (stating that its "rigorous analysis" of the merger was "in accordance with its own practice and the jurisprudence of the European Court"); see also *Analysis of Boeing-McDonnell Douglas File*, *supra* note 15 (quoting Karel Van Miert, European Commissioner in charge of Competition Policy, who stated, "[O]ur analysis of this case is strictly conducted along the lines and criteria which have been spelled out in the legal framework of the merger Regulation [sic], and nothing else").

63. See Boeing-McDonnell Douglas Decision, *supra* note 2 (containing no explicit references to social or political concerns as factors in Commission's decision on the merger).

64. See *id.* at 16 (detailing regulations and laws applicable to its decision); *Commission Clears Merger*, *supra* note 61, at 1 (stating that Commission reached its conclusion on the basis of European Merger Regulations and past decisions). But see *A Dangerous Merger?*, *supra* note 18, at A22 (arguing that EU's method of gaining concessions from Boeing resembled bullying and showed little regard for the rule of law).

65. See Boeing-McDonnell Douglas Decision, *supra* note 2, at 16 (using Merger Regulation to assess compatibility of proposed merger with EC law); *Commission Clears Merger*, *supra* note 61, at 1 (stating that Commission's analysis was based on Merger Regulation and EU precedent).

nies, unlike many merger regulation cases, appeared to provide the Commission with little trouble.⁶⁶ The Commission defined the product market as that for "large commercial jet aircraft."⁶⁷ The Commission, acknowledging U.S. trade officials' concern about EU interference with the U.S. defense industry, refrained from analyzing the merger as it affected the market for defense.⁶⁸ The definition of the relevant geographic market proved even less difficult. Given the global need for commercial planes, the Commission concluded that the relevant geographic market was clearly the world.⁶⁹

The Commission next considered whether Boeing occupied a dominant position in the commercial aircraft market.⁷⁰ Boeing, the number one producer among only three manufacturers of civilian commercial jets, already occupied a dominant position.⁷¹ The Commission cited the fact that Boeing's pre-merger market share for large commercial jets totaled 64% worldwide and that Boeing planes accounted for 60% of the planes in service.⁷² In addition, the Commission pointed out that Boeing was the only manufacturer who offered a 400-plus seat aircraft, as well as a "complete family of aircraft."⁷³

Further, the Commission ruled out the possibility that another competitor would enter the market and pose a viable source of competition.⁷⁴ Like the FTC,⁷⁵ the Commission concluded that the enormous capital costs involved in commercial jet manufacturing erected barriers too high for any possible new entrant to surmount.⁷⁶

66. See Boeing-McDonnell Douglas Decision, *supra* note 2, at 18-19 (discussing relevant product and geographic markets).

67. See *id.* at 17-18. The Commission found two separate relevant product markets, the market for wide-body jets and the market for narrow-body jets, within the overall market for large commercial jets. See *id.*

68. See *id.* at 17-18.

69. See *id.* at 19 ("[T]he Commission considers that the geographic market for large commercial jet aircraft to be taken into account is a world market.").

70. See *id.* at 19-21 (assessing Boeing's dominant position in the commercial aircraft market).

71. See *id.* at 14 (identifying Boeing as the leading manufacturer of large commercial aircraft).

72. See *id.* at 22 (providing worldwide in-service fleet percentages for Boeing, McDonnell Douglas and Airbus); see also Case C-62/86, *Akzo Chemie B.V. v. Commission*, [1991] 1/7 E.C.R. 3359, [1993] 3 C.M.L.R. 215 (holding that when a firm controls more than 50% of the market share, it is presumed, absent "exceptional circumstances," that it occupies a position of dominance).

73. See Boeing-McDonnell Douglas Decision, *supra* note 2, at 21-22 (describing purchasers' desire to select a single supplier offering several aircraft models).

74. See *id.* at 24 (basing unlikelihood of new competitors on onerous entry costs and technical production methods).

75. See *In re Boeing Company/McDonnell Douglas Corp.*, *supra* note 6, at 2 (characterizing barriers to entry in commercial large jet market as "extremely high").

76. See Boeing-McDonnell Douglas Decision, *supra* note 2, at 24 (discussing improbability

Boeing would remain secure in its position of dominance, with or without the merger.⁷⁷

The most difficult question for the Commission contemplating the Boeing-McDonnell Douglas merger, however, rested in the third step of the Merger Regulation's analysis: whether the acquisition of McDonnell Douglas would significantly strengthen Boeing's dominant position.⁷⁸ Boeing's acquisition of McDonnell Douglas would increase its worldwide market share to 70% and give Boeing a monopoly on the smallest narrow-body passenger jets (the 737 and MD-95). This would be in addition to its already existing monopoly on the largest wide-body passenger jet (the 747).⁷⁹ Unlike the FTC,⁸⁰ however, the Commission did not dismiss the competitive potential of McDonnell Douglas.⁸¹ Although the Commission recognized the deterioration of McDonnell Douglas' sales in recent years, the decline in customer confidence, and the company's shrinking investment in research and development, the Commission maintained that Boeing would benefit from the remaining competitive potential of McDonnell Douglas in the commercial aircraft industry.⁸²

The Commission further explored the increase in customer base that Boeing would reap as a result of the merger.⁸³ The acquisition of McDonnell Douglas would increase Boeing's customer base from 60% to 84% of the current worldwide fleet in service.⁸⁴ The Commission viewed such a large customer base as a competitive advantage in Boeing's favor.⁸⁵ Not only would Boeing be in a superior position to

of new market entrants).

77. See *id.* at 24, 36 (concluding that merger reinforced Boeing's dominant position and that no new entrants to the aircraft market were likely to enter and challenge that position).

78. See *id.* at 24-36 (exploring nature and reasons for Boeing's dominance and the reinforcement of that dominance through its acquisition of McDonnell Douglas).

79. See *id.* at 24-25.

80. See *In re The Boeing Company/McDonnell Douglas Corp.*, *supra* note 6, at 2 (holding that the merger did not present an antitrust violation because McDonnell Douglas no longer constituted a competitive force in civil aircraft market).

81. See Boeing-McDonnell Douglas Decision, *supra* note 2, at 25-26 (finding that although McDonnell Douglas ceased to be a real force in the market on a "stand-alone basis," its competitive potential could be a significant factor in the market when merged with Boeing).

82. See *id.* at 24 (positing that remaining competitive potential of McDonnell Douglas would improve Boeing's position in civil aircraft market). The Commission emphasized that alone McDonnell Douglas did not represent a competitive force, but that in concert with Boeing the competitive potential of McDonnell Douglas' commercial division would improve significantly. See *id.* at 26. The commercial division of McDonnell Douglas is called Douglas Aircraft Company, but for the purposes of this Comment, McDonnell Douglas Corporation is referred to as a whole, recognizing that consideration of the defense division of McDonnell Douglas was not touched by the Commission.

83. See *id.* at 26-27.

84. See *id.*

85. See *id.* (stating that a vital element in strengthening Boeing's dominance would be its post-merger increase in customer base).

induce current purchasers of McDonnell Douglas planes to buy Boeing planes in the future,⁸⁶ but, given the range and size of its fleet, Boeing would be better equipped to offer loyal customers preferential access to its planes and services.⁸⁷ Further, the exclusive supply arrangements Boeing had already crafted with American, Delta and Continental, the first, third and fourth largest operators of McDonnell Douglas aircraft respectively, stood as testimony to this type of marketing advantage.⁸⁸ The Commission predicted that use of these exclusive supply arrangements would rise, which would increasingly prevent other manufacturers from competing for a large number of commercial aircraft contracts.⁸⁹

Of final concern to the Commission was the link between McDonnell Douglas' civil and defense divisions. The Commission, pursuant to the request of the U.S. government, declined to investigate the potentially anticompetitive consequences involved in Boeing's acquisition of McDonnell Douglas' defense division. It did, however, look at the effect that McDonnell Douglas' military capacity would have on Boeing's civil aircraft division.⁹⁰ The Commission's primary concern was that Boeing's acquisition of McDonnell Douglas' defense division would enhance its access to publicly funded research and development.⁹¹ Essentially, the Commission feared that government aid intended for defense purposes would create a spillover effect, whereby knowledge and expertise intended for military purposes and supported by publicly funded defense grants would penetrate Boeing's civil division.⁹² The spillover would indirectly give Boeing a competitive advantage in research and development for its commercial jets.⁹³ The Commission also voiced reservation about the acquisition of McDonnell Douglas' defense division in regard to third party suppli-

86. *See id.* (concluding that the close ties McDonnell Douglas has with its customers would be transferred to Boeing upon its acquisition).

87. *See id.* at 22-23, 26 (stating that Boeing's close ties with McDonnell Douglas' commercial customers would give Boeing the opportunity to better influence and identify customer needs).

88. *See id.* at 27-28 (maintaining that Boeing has used its leverage with customers to acquire exclusive supply deals).

89. *See id.* at 23, 27-28 (concluding that Boeing could use influence acquired from its increased customer base to induce future exclusive supply arrangements and further exclude potential competitors). The Commission believed Boeing's exclusive supply arrangements with American, Delta, and Continental could foreclose competitors from 40% of the worldwide market for large commercial jets. *See id.* at 28.

90. *See id.* at 28 (concluding that Boeing's acquisition of McDonnell Douglas' defense division would significantly strengthen its dominant position in civil aircraft market).

91. *See id.* at 30-35.

92. *See id.* at 32-36.

93. *See id.* at 35 (finding that Boeing's access to technology of McDonnell Douglas' defense division would further strengthen Boeing's commercial market dominance).

ers.⁹⁴ Given that McDonnell Douglas was the leading manufacturer of military aircraft, the Commission feared that Boeing's acquisition of McDonnell Douglas would give Boeing greater bargaining power with suppliers who may have contributed parts to both McDonnell Douglas' civil and defense aircraft.⁹⁵

The Commission, examining these above concerns, concluded that the acquisition of McDonnell Douglas would indeed strengthen Boeing's existing dominant position.⁹⁶ Unchanged, the Commission contended, the merger would violate the Merger Regulation and EC Competition Law.⁹⁷

In an effort to change the Commission's position, Boeing accepted three key concessions: (1) cessation of existing and future supply deals; (2) "ring-fencing" of McDonnell Douglas' commercial division for a period of ten years;⁹⁸ and (3) licensing of nonexclusive patents and "underlying know-how" generated through publicly funded research and development to other jet aircraft manufacturers.⁹⁹ In addition, Boeing agreed not to abuse its relationship with customers and suppliers to gain an unfair competitive advantage, and to report to the Commission annually regarding any military and civil research and development projects benefiting from public funding.¹⁰⁰

Cessation of the exclusive supply arrangements, the ring-fencing of McDonnell Douglas' commercial division, and the commitment not to abuse its relationship with customers was intended to remedy the "anticompetitive" advantage Boeing stood to gain by the enlargement of its market share and customer base.¹⁰¹ Boeing sought to remedy the spillover effect from McDonnell Douglas' defense division through licensing of nonexclusive patents and know-how. Boeing's commitment to supply the Commission with annual reports on projects benefiting from public funding and to refrain from linking de-

94. See *id.* at 35-36.

95. See *id.* at 35.

96. See *id.* at 36.

97. See *id.* (finding that proposed merger incompatible with the common market absent changes).

98. See *id.* (detailing Boeing's commitment to maintain commercial division of McDonnell Douglas as separate legal entity for ten years); see also *Commission Clears Merger*, *supra* note 61 (using "ring fencing" to describe Boeing's commitment to maintain McDonnell Douglas' commercial division as separate legal entity).

99. See *id.* at 36-38.

100. See *id.* at 37-38.

101. See *id.* at 38-39 (discussing Boeing remedies). The Commission noted that the traditional option of divestment was an impossibility with McDonnell Douglas. See *id.* at 38. No other existing aircraft manufacturer expressed interest in acquiring McDonnell Douglas, nor would it be possible (given the capital-intensive nature of jet aircraft manufacturing) to find a potential new entrant to the commercial jet market who might be interested in purchasing McDonnell Douglas. See *id.*

fense aircraft and commercial aircraft supply contracts was also designed to remedy the spillover effect.¹⁰² The Commission considered such measures adequate to remedy the major anticompetitive problems stemming from the merger, and declared the merger compatible with EC law.¹⁰³

III. EU POWER TO OPPOSE THE MERGER

Had the Commission and Boeing been unable to reconcile their differences, the Boeing-McDonnell Douglas merger would have been declared incompatible with EC Competition Law.¹⁰⁴ If Boeing had proceeded with the merger absent EU approval, the Merger Regulation would have empowered the Commission to fine the merged Boeing-McDonnell Douglas ten percent of its annual revenue.¹⁰⁵ For a company the size of Boeing-McDonnell Douglas, that fine would have amounted to nearly five billion dollars.¹⁰⁶

In addition, the possibility existed for the Commission to levy a fine equaling ten percent of annual revenue against any EU company that continued to do business with Boeing.¹⁰⁷ This latter fine would

102. See *id.* at 38-39.

103. See *id.* at 39 (finding that Boeing's concessions addressed the competition problems the Commission identified).

104. See *id.* (stating that the Commission's approval was contingent on Boeing complying with its concessions).

105. See Regulation 4064/89, art. 14, *supra* note 21, at 22 (authorizing the Commission to "impose fines not exceeding 10% of the aggregate turnover" of the companies involved in concentrations proceeding despite a Commission finding of incompatibility with the common market); *Commission Clears Merger*, *supra* note 61 (stating that Merger Regulation allows for "appropriate measures to be taken by the Commission in the event of non-compliance").

106. Compare *Cole & Ricks*, *supra* note 1, at A5 (reporting that Boeing's estimated annual turnover is approximately \$48 billion), with *Fryer*, *supra* note 12 (reporting that the EU could levy fines amounting to 10% of a company's annual turnover). Thus, Boeing's fine would amount to 10% of \$48 billion, or \$4.8 billion. But see CHRISTOPHER HARDING, EUROPEAN COMMUNITY INVESTIGATIONS AND SANCTIONS 88-90 (1993) (explaining that percent of turnover calculations for fines may not be as simple as taking 10% of world-wide turnover).

107. See *Fryer*, *supra* note 12, at A1 (reporting that the Commission could fine Boeing as well as corporations doing business with Boeing, if Boeing proceeded with a merger deemed incompatible with EC law). Regulation 17/62 is the general sanctions provision for breaches of EC Competition Policy. See Regulation 17/62, *supra* note 27; EUROPEAN UNION LAW AFTER MAASTRICHT, *supra* note 12, at 348. Regulation 17/62, Article 15(2) allows the Commission to levy fines, according to the gravity and duration of the offense, on companies who deliberately and knowingly violate EC Competition Law. See HARDING, *supra* note 106, at 81-82. Although not explicitly stated in Regulation 17/62, conducting business with a company deemed to be operating in violation of EC Competition Law would appear to violate the general principle of Article 85. Article 85 prohibits all "agreements between undertakings which have as their object or effect the prevention, restriction, or distortion of competition within the [EU]." See EC TREATY art. 85. If the Commission has deemed the concentration to significantly impede competition, it is not a stretch to assume that any deliberate third party action in support of that concentration, would also be deemed to impede competition and hence, constitute an Article 85 violation subject to the fines set forth in Regulation 17/62. See Regulation 17/62, *supra* note 27.

have eliminated Boeing's competitive advantage in the European market and precluded Boeing from effectively rivaling Airbus within the jurisdiction of the EU.¹⁰⁸

Although the Boeing-McDonnell Douglas merger avoided such sanctions, it is important to recognize that the EU significantly altered the shape of the Boeing-McDonnell Douglas merger. In making several concessions, Boeing directly submitted itself to the EU's regulatory authority, and will continue to remain subject to that authority as the EU monitors Boeing for compliance with the conditions of the merger.¹⁰⁹ Nearly \$5 billion in fines and the possible foreclosure of the European market await Boeing should it fail to do so.¹¹⁰

IV. CONSISTENCY OF THE COMMISSION'S DECISION

Consistency of the Commission's Boeing-McDonnell Douglas decision with past Commission decisions is not a requirement of the Commission's adjudicative process. The Commission is merely bound to judge a given merger in accordance with the Merger Regulation. Consistency of decisions, however, is crucial to both the legitimacy of Commission decisions, particularly in the eyes of a skeptical American public, and the ability of businesses and their attorneys to structure mergers in compliance with EC law. The following analysis examines the three central concerns of the EU regarding the Boeing-McDonnell Douglas merger for consistency with past decisions and EC law: (1) the 20-year exclusive supply contracts with three top air carriers; (2) the spillover effects of McDonnell Douglas' publicly funded defense division; and (3) the expansion of Boeing's market share.¹¹¹ An examination of the remedies the EU demanded

108. See Fauziah Ismail, *Airbus Chief Pierson Slams Boeing-McDonnell Merger*, BUS. TIMES, July 17, 1997, at 1 (stating that fines on EU companies could essentially prohibit the enlarged Boeing from operating in Europe). The loss of the European market would be a tremendous blow to Boeing. The EU estimates that the European market for planes will be between 2000 and 2100 orders over the next ten years—just slightly smaller than the U.S. market, which U.S. authorities estimate will need between 2000 and 2500 new planes over the same time period. See *EU Panel Rejects \$15 Billion Boeing/McDonnell Deal*, BOSTON GLOBE, July 17, 1997, at C2 (reporting the number of new planes the U.S. and European markets will require).

109. See Boeing-McDonnell Douglas Decision, *supra* note 2, at 36-38 (taking note of the concessions Boeing agreed to in order to obtain EU consent to the merger); *Commission Clears Merger*, *supra* note 61 (announcing the EU's intention to "strictly monitor" Boeing regarding its compliance with agreed upon concessions).

110. See Regulation 4064/89, art. 14, *supra* note 21, at 22 (articulating the 10% of annual revenue fine that the Commission is authorized to levy in the event of non-compliance); see also Cole & Ricks, *supra* note 1, at A5 (noting that the annual revenue of Boeing is approximately \$48 billion).

111. See *Commission Clears Merger*, *supra* note 61 (listing these as the commission's central concerns).

for approval of merger follows. These examinations reveal that the Commission's initial concern and final decision on the Boeing merger are generally, but not entirely, consistent with past Commission decisions and EC law.

A. *Exclusive Supply Arrangements*

Exclusive supply arrangements of the type contracted between Boeing and Delta, Continental, and American Airlines, have been consistently held to violate EC Competition Law.¹¹² Neither the Merger Regulation nor any other specific EC Competition regulation outlaws these arrangements.¹¹³ Rather, the Commission has repeatedly interpreted Articles 85 and 86 of the EC Treaty to hold such arrangements a violation of EC law.¹¹⁴ According to the Commission,

112. See CAMERON MURKBY HEWITT, BUSINESS GUIDE TO COMPETITION LAW 16 (1995) (stating that exclusive supply arrangements are generally considered a violation of EC Competition Policy). These agreements fall under the provisions of Article 85(1) of the EC Treaty, prohibiting practices which restrict trade between member states. See EC TREATY art. 85(1); see also *supra* Part I.A (discussing the goals of EC Competition Policy as contained in the EC Treaty). The Commission, however, has exempted certain types of exclusive purchasing arrangements from the provisions of Article 85. See Commission Regulation 1984/83, *supra* note 21, at 5-7 (stating that Article 85(1) shall not apply to certain agreements). Regulation 1984/83 only applies, however, to purchasing agreements whereby one party agrees to purchase goods for resale exclusively from the other party. See *id.* at 26. Agreements longer than five years in duration and covering a broad range of goods are not privy to the exemption. See Regulation 1984/83, arts. 2.1(a)-3(d), *supra* note 21, at 8. Article 85(3) may also exempt a particular exclusive supply arrangement. These exemptions do not mean that the agreement is not bound by Article 85(1), but rather that it is exempt because, although it restricts competition, it improves production or distribution without eliminating competition. See EC TREATY art. 85(3) (permitting certain practices that may restrict competition if they are "indispensable" to improvements in "the production or distribution of goods or . . . [the promotion of] technical or economic progress" and can be implemented while allowing consumers a fair share of the resulting benefits and without eliminating competition); see also HEWITT, *supra*, at 23 (explaining the exemption provided by Article 85(3)).

113. See Regulation 4064/89, recital 25, *supra* note 21, at 16 (stating that the Merger Regulation allows exclusive supply arrangements on a limited basis, namely in circumstances when "the undertakings concerned accept restrictions directly related and necessary to the implementation of the concentration"). The Commission has clarified this provision in its Ancillary Restraints Notice, which allows exclusive supply arrangements of a limited duration if such an arrangement is necessary in order to minimize disruption of procurement and supply within an integrated seller. See BARRY E. HAWK & HENRY L. HUSER, EUROPEAN COMMUNITY MERGER CONTROL: A PRACTITIONER'S GUIDE 272, 282-83 (1996) (discussing the Ancillary Restraints Notice).

114. See Commission Decision 93/406, 1993 O.J. (L 183) 19, 30-37 (Langnese-Iglo Decision) (finding that a two-year renewable exclusive supply agreement between a buyer and seller was incompatible with EC law because the market was shared by only two main competitors, because high barriers to entry existed, and because the agreements provided no social or economic advantage to consumers); Commission Decision 91/299, *supra* note 37, at 30-38 (holding an agreement, which offered a seller's major customers loyalty rebates and discounts and obligated buyers to fulfill their entire supply requirements exclusively from the seller an abuse of a dominant position in violation of Article 86); Commission Decision 89/22, *supra* note 44, at 65-67, 72 (holding that an exclusive supply agreement in the form of promotional payments to loyal customers constituted a violation of EC law); Commission Decision 79/934, 1979 O.J. (L 286) 32 (BP Kemi/DDSF Decision) (holding that a six-year exclusive supply ar-

exclusive supply agreements prevent other suppliers from competing for the purchaser's business,¹¹⁵ and thus constitute a restriction on competition.¹¹⁶ The mere existence of an exclusive supply contract, however, is not a per se violation. But, when such a contract covers a range of products over a lengthy period of time¹¹⁷ and the contract is implemented in an already weak competitive context (e.g., dominant market participant and high barriers to entry),¹¹⁸ the Commission has not hesitated to hold that such arrangements are incompatible with EC law.¹¹⁹

Considering the EU's prior decisions, the Commission's refusal to approve the merger without cancellation of Boeing's exclusive supply

rament in which buyer agreed to purchase up to 25,000 tons of its ethanol requirements from the seller was incompatible with EC law, despite the fact that the buyer could fulfill its requirements exceeding 25,000 tons with ethanol from other suppliers, and that either party could terminate the agreement upon twelve months notice); cf. Commission Decision 84/44, 1984 O.J. (L 19) 17 (Grohe's Distribution System Decision) (holding that a selective supply agreement, prohibiting a seller from reselling the supplier's plumbing fittings to any party, other than a specific plumbing contractor, was a violation of EC law). But see Commission Decision 84/387, 1984 O.J. (L 212) 1, 7-12 (BPCL/ICI Decision) (finding that a five-year mutually exclusive supply contract was compatible with EC law, despite its object and effect of restricting competition, because it met the criteria of an Article 85(3) exemption, specifically that the arrangements sought to return a market functioning at over-capacity to equilibrium, made production more efficient and increased the supply available to consumers); Commission Decision 78/194, 1978 O.J. (L 61) 17 (Jaz-Peter Decision) (finding that a six-month, renewable, mutually exclusive supply contract was compatible with EC law despite its restriction on competition because it met the criteria for an Article 85(3) exemption: the arrangement would benefit consumers by improving distribution and quality and could not be used to quash competition due to the existence of other competitors in the contracting parties' market).

115. See Commission Decision 93/406, *supra* note 114, at 26 (stating the exclusive supply agreements prevent other suppliers from competing); Commission Decision 79/934, *supra* note 114, at ¶ 59-60 (stating that exclusive supply agreements prevent others from competing, resulting in a restriction of competition and a violation of Article 85). The Commission in Langnese also noted that when two leading suppliers dominate a market (a duopolistic market), such suppliers compete for the conclusion of exclusive agreements, with the effect of excluding "competition of any other kind for the duration of the agreement." Commission Decision 93/406, *supra* note 114, at 33, 36.

116. See Commission Decision 93/406, *supra* note 114, at 30 (finding that exclusive supply agreements involving goods which comprise more than fifteen percent of the relevant market have an appreciable effect on competition); Commission Decision 79/934, *supra* note 114, at 38, 40 (finding that an obligation to buy ethanol exclusively from BP Kemi would give Kemi BP a decisive competitive advantage in the ethanol market and distort competition).

117. See Commission Decision 79/934, *supra* note 114, at 41 (stating that the longer an exclusive supply contract lasts, the more competition is impeded).

118. See Commission Decision 93/406, *supra* note 114, at 32 (holding that when a company already occupying a dominant position, concludes exclusive supply contracts, it leads to less competition); Commission Decision 89/22, *supra* note 44, at 72 (holding that an exclusive supply arrangement concluded by a dominant competitor is a violation of EC law); Commission Decision 79/934, *supra* note 114, at 42 ("When on such a market, which already displays a weak competitive structure, one of the most important suppliers enters into long-term contracts with one of the most important purchasers, which then induce the purchaser to take all his requirements or the major part of his requirements from the same supplier, there exists an appreciable disadvantage for the supplier's competitors . . . and there is thus a restriction of competition.").

119. See Commission Decision 79/934, *supra* note 114, at 40-42.

agreements with the three airlines is warranted. First, the exclusive supply contracts between Boeing and the air carriers were for a period of twenty years,¹²⁰ substantially longer than necessary to trigger a violation of EC law.¹²¹ Second, Boeing's exclusive supply contracts with the airlines were for a range of products (i.e., large commercial jets of various sizes and dimensions), an element that the Commission considers as impermissibly restricting competition.¹²² Furthermore, the exclusive supply agreements, would have existed in a weak competitive market of only two competitors possessing approximately 70% and 30% of the market—another crucial factor in past Commission decisions on the incompatibility of an exclusive supply agreement with EC law.¹²³

Thus even absent the possibility of a proliferation of exclusive supply arrangements between Boeing and other air carriers,¹²⁴ the Commission would be hard-pressed to approve the proposed merger, for doing so would give approval to a concentration clearly operating in violation of a well explored and accepted tenet of EC law.¹²⁵

B. Spillover Effects of McDonnell Douglas' Defense Division

Although EC law and past Commission decisions support the Commission's investigation and conclusion on the exclusive supply contracts, the Commission's consideration of the spillover effects of governmental aid to the defense arm of a company are unprecedented.¹²⁶ A survey of the phase two (i.e., in-depth or Article 8) investigations from 1993-1996 reveals that the Commission has not once considered the affects of the potential spillover of state aid in the context of an investigation pursuant to the Merger Regulation.¹²⁷

120. See Boeing-McDonnell Douglas Decision, *supra* note 2, at 23.

121. See Commission Decision 79/934, *supra* note 114, at 42 (holding that a six-year agreement "certainly goes beyond what is appropriate under EEC rules of competition"); see also Commission Regulation 1984/83, *supra* note 21, at 8 (limiting the Regulation's exemption of certain exclusive supply agreements to those less than five years in duration).

122. See Commission Decision 93/406, *supra* note 114, at 30-31 (finding an exclusive supply agreement impermissibly restrict competition in violation of Article 85, unless the company could show the agreement was for a limited duration and for certain specified goods).

123. See *supra* note 118 (citing cases where exclusive agreements, concluded in a weak competitive market, were found to violate EC law).

124. See Boeing-McDonnell Douglas Decision, *supra* note 2, at 28 (finding that the merger would enhance Boeing's ability to conclude additional exclusive supply deals).

125. See *supra* notes 112-19, 121-22 and accompanying text (examining under what circumstances the Commission has rejected exclusive supply agreements).

126. See Boeing-McDonnell Douglas Decision, *supra* note 2, at 39 (noting that the spillover effects of the defense side of McDonnell Douglas were difficult to address fully in the context of the Boeing investigation under the Merger Regulation).

127. See EUROPEAN COMM'N, XXVTH REPORT ON COMPETITION POLICY 1996, at 61-66, 171-89 (1997) [hereinafter REPORT ON COMPETITION 1996] (summarizing the year's Commission decisions but including no cases dealing with the spillover effects of state aid); EUROPEAN

This is not to conclude that the Commission lacks the authority to consider state aid in a merger decision, but simply that there is no precedent for the Commission having done so in the Boeing-McDonnell Douglas case.

It is foreseeable, however, even absent precedent, that concerns of state aid may invade a Commission decision. State aid to industry, except in particular circumstances, is prohibited by Article 92 of the EC Treaty.¹²⁸ Thus, a merger threatening to proceed in violation of the prohibition on state aid would predictably and justifiably be of concern to the Commission.¹²⁹

Although the spillover effect of McDonnell Douglas' defense side may be a predictable concern of the Commission based on EC Competition Law, the question remains as to whether EC law was the only basis for the Commission's concern. The continuing tension between the United States and the EU over each entity's public financing of its commercial aircraft manufacturers, especially in the area of research and development, suggests that general economic policy issues may have been the true source of the Commission's concern.¹³⁰

COMM'N, XXVTH REPORT ON COMPETITION POLICY 1995, at 61-65, 159-78 (1996) [hereinafter REPORT ON COMPETITION 1995] (same); EUROPEAN COMM'N, XXIVTH REPORT ON COMPETITION POLICY 1994, at 456-64 (1995) (same); REPORT ON COMPETITION 1993, *supra* note 38, at 173-89 [hereinafter REPORT ON COMPETITION 1993] (same).

128. See EC TREATY art. 92 (prohibiting state aid except in special circumstances).

129. Although, in the above discussion, the spillover effect of state aid from McDonnell Douglas' defense division to Boeing's commercial division is viewed as a possible violation of Article 92, the spillover effect could also be seen as an element that may strengthen Boeing's ability to compete—i.e., greater research and development capacity—and hence strengthen its dominant position. See *infra* Part IV.C.

130. See *U.S. Government Support to U.S. Commercial Aircraft Industry During the Past 15 Years Exceeds \$33 Billion*, OFFICIAL PRESS RELEASE EUR. UNION IP/91/1084 (Eur. Comm'n, Brussels, Belg.), Dec. 4, 1991 (maintaining that an extensive study provides "conclusive evidence" that the U.S. government has provided between \$33.5 and \$41.5 billion to enhance the competitiveness of its commercial aircraft manufacturers in the world market between 1976 and 1990). The EU contends that U.S. commercial aircraft manufacturers benefited largely from Defense Department and NASA program grants, and criticized the United States for the lack of transparency in its subsidization of commercial aircraft manufacturers. See *id.* In 1992, the United States and the EU reached an agreement on the subsidization of each other's respective commercial aircraft manufacturers. See Agreement Between the European Economic Community and the Government of the United States of America Concerning the Application of the GATT Agreement on Trade in Civil Aircraft and on Trade in Large Civil Aircraft, 1992 O.J. (L 301) 32. The Agreement generally prohibits direct government support for the production of large civil aircraft. See *id.* art. 3. It allows, however, direct government support for development of large commercial aircraft only when a "project appraisal, based on conservative assumptions, has established that there is a reasonable expectation of recoupment" of all government costs, including interest within 17 years. See *id.* art. 4.1. The amount of development aid is limited to 25% of the project's total development costs, recoverable at an interest rate "no less than the cost of borrowing to the government," plus eight percent of the project's development cost, recoverable at an interest rate "no less than the cost of borrowing to the government plus 1%." *Id.* art. 4.2.

The Agreement also prohibits indirect government aid exceeding three percent of the annual commercial turnover of the civil aircraft industry in the party concerned and four percent

Although the Commission's decision and prior press releases emphasize that this is not the case,¹³¹ continuing EU objections to U.S. government involvement in the commercial aircraft industry suggest that the Commission saw the Boeing decision as a chance to state its discontent with the United States' indirect subsidization of its aircraft manufacturers.¹³² If this was the EU's goal, it succeeded. Not only did the EU remind the United States of its opposition to its aid to U.S. aircraft manufacturers, but the EU compelled Boeing to report directly to it on any potential spillover of state-funded research and development to its commercial aircraft division.¹³³

C. *Expansion of Boeing's Market Share and Other Factors Strengthening Dominance*

Market share is a central element of EC merger analysis. Article 2 of the Merger Regulation specifies that concentrations within the scope of the Regulation will be appraised, among other factors, on the "market position of the undertakings concerned."¹³⁴ Past Commission decisions have consistently interpreted this language to require an assessment of the market shares of the companies involved in a concentration.¹³⁵ This assessment will then be used, among other

of the annual commercial turnover for large civil aircraft of any one firm of the party concerned. (Party here means either the United States or EU—whatever body is granting the aid.) See *id.* art. 5.2. The Agreement considers indirect aid any identifiable reduction of production costs resulting from government-funded research and development in the aeronautical area. See *id.* art. 5.3. The Agreement also provides for the regular exchange of information and consultation regarding the aid granted to each party's industry. See *id.* arts. 8, 11. The Commission, however, is unsatisfied with the Agreement's results. See EUROPEAN COMM'N, REPORT ON UNITED STATES BARRIERS TO TRADE AND INVESTMENT 1997, at 31 (July 1997) [hereinafter U.S. BARRIERS TO TRADE AND INVESTMENT]. The Commission maintains that "the Agreement suffers from an important divergence between the U.S. and EU in the way to interpret the indirect support discipline, and on the European side, there is the concern that its implementation has created an increasing imbalance of obligations." *Id.* The Commission calculated that in 1995, the U.S. commercial aircraft industry received indirect support well in excess of the amount provided for in the Agreement—according to EU calculations between 8.8% and 15.9% of U.S. manufacturers' commercial turnover. See *id.* at 32.

131. See *Commission Clears Merger*, *supra* note 61 (stating that the Commission's decision was based on EC law and past precedent); *Analysis of Boeing-McDonnell Douglas File*, *supra* note 15 (asserting that the Commission's decision was based strictly on EC Competition Policy and "nothing else").

132. See U.S. BARRIERS TO TRADE AND INVESTMENT, *supra* note 130, at 31-32 (articulating EU concern with U.S. Government aid to its civil aircraft manufacturers in July 1997, the same month the Commission announced its decision on the Boeing-McDonnell Douglas merger).

133. See *Boeing-McDonnell Douglas Decision*, *supra* note 2, at 39 (conditioning approval in part on Boeing's commitment to report any potential spillover effects to the Commission).

134. Regulation 4064/89, art. 2.1 (b), *supra* note 21, at 16 (stipulating the factors to consider in an assessment of a merger).

135. See REPORT ON COMPETITION 1996, *supra* note 127, at 171-89 (summarizing the year's Commission decisions and including discussions of market share in all phase two inquiries); REPORT ON COMPETITION 1995, *supra* note 127, at 159-78 (same); REPORT ON COMPETITION 1994, *supra* note 127, at 456-64 (same); REPORT ON COMPETITION 1993, *supra* note 38, at 173-89

factors, to judge whether a concentration creates or strengthens a dominant position, and if so, whether this creation or strengthening would "significantly impede" competition.¹³⁶

The Merger Regulation in its recital indicates that combined market shares of a concentration amounting to less than 25% will be presumed to be compatible with EC law.¹³⁷ The Regulation does not stipulate the market share required to provoke a presumption of a merger's incompatibility with EC law. The Commission has found, however, a concentration resulting in a market share as low as 30% sufficient to justify a ruling of incompatibility.¹³⁸ With its acquisition of McDonnell Douglas, Boeing's market share would reach 70%.¹³⁹ It is understandable, then, that control over two-thirds of the market by a single competitor would generate considerable concern for the Commission.

Merger Regulation, however, specifies that it is the creation or strengthening of a dominant position which is to be the situation guarded against.¹⁴⁰ The mere existence of a dominance position, without more, is not a violation under the Merger Regulation.¹⁴¹ Thus, to justify its opposition to the merger, the Commission would need to show that the additional six percent of the market Boeing stood to gain in its acquisition of McDonnell Douglas would amount to a strengthening of Boeing dominant position in the market for commercial aircraft. In its decision the Commission concluded that McDonnell Douglas' market share was not reflective of its impact on the conditions of competition.¹⁴² According to the Commission,

(same).

136. See Regulation 4064/89, art. 2, *supra* note 21, at 17 ("A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded . . . shall be declared incompatible with the common market.").

137. See Regulation 4064/89, recital 15, *supra* note 21, at 15.

138. See Commission Decision 94/811, 1994 O.J. (L 332) 48 (Shell/Montecatini Decision) (declaring a merger resulting in a market share of 30% incompatible with the common market). The Commission, however, has found mergers resulting in 50% and 60% market share compatible with EC Law. See REPORT ON COMPETITION 1996, *supra* note 127, at 171, 179-80 (discussing the Bosch/Allied Signal and Schering/Gehe-Jenapharm mergers, which resulted in 50% and 60% total market shares, respectively, but which both were found to be compatible with EC law). In both cases, the Commission found the strength of competitors to be sufficient to ward off any anticompetitive effects that might be caused by the increase in market share. See *id.*

139. See Boeing-McDonnell Douglas Decision, *supra* note 2, at 25.

140. See Regulation 4064/89, art. 2.3, *supra* note 21, at 17 (stating that a "concentration which creates or strengthens a dominant position . . . shall be declared incompatible with the common market").

141. See EUROPEAN UNION LAW AFTER MAASTRICHT, *supra* note 12, at 433 (quoting former EC Competition Commissioner Sir Leon Brittan as stating that "[r]elatively high market shares, together with other factors which suggest dominance may not in themselves necessarily be decisive considerations").

142. See Boeing-McDonnell Douglas Decision, *supra* note 2, at 25 (stating that the effect of

McDonnell Douglas' six percent share of the market was enough to force Boeing to improve its price and purchasing conditions to induce customers to purchase Boeing planes over ones produced by McDonnell Douglas.¹⁴³ With the loss of McDonnell Douglas as an independent company, this source of competition would disappear, giving Boeing a greater opportunity to control price and purchasing conditions¹⁴⁴—a basic indication of a strengthened dominant position.¹⁴⁵

In addition to looking at how an increase in a company's market shares affects competition,¹⁴⁶ the Merger Regulation instructs the Commission to consider both the relationship between the concentration's market share and its economic and financial power, and the market shares and competitive potential of the concentration's competitors.¹⁴⁷ The stronger the merged company's economic and finan-

McDonnell Douglas on the conditions of competition in the market for large commercial aircraft was higher than reflected by its market share). Even if McDonnell Douglas' market share had been reflective of its competitiveness, past Commission decisions suggest that Boeing's 6% increase in market share through its acquisition of McDonnell-Douglas would have been enough to justify a finding of incompatibility with EC law. See Commission Decision 96/346, 1996 O.J. (L 134) 32, 43-5 (RTL/Veronica Decision) (finding a concentration increasing a competitor's market share 10%—from 50 to 60%—a violation of EC law). See also *Commission Orders Blocker to Divest Dutch Toys "R" US Operations*, OFFICIAL PRESS RELEASE OF THE EUR. UNION IP/97/570 (Eur. Comm'n, Brussels, Belgium), June 26, 1997 [hereinafter *Blocker/Toys "R" US*] (finding that a concentration resulting in only a small increase in market share, but contributing considerable market potential, to be incompatible with EC law when the acquiring company already occupied a position of dominance due in part to its "different retail formulae" and its "gatekeeper position vis-à-vis suppliers with regard to access to the retail market").

143. See *Boeing-McDonnell Douglas Decision*, *supra* note 2 at 25. (noting that Commission conducted a study that demonstrated the existence of McDonnell Douglas as a competitor influencing the outcome of the airlines' negotiations with Boeing in terms of price and purchasing conditions).

144. See *id.* (finding that the loss of McDonnell Douglas as a competitor would decrease Boeing's incentive to offer competitive prices).

145. See Folsom, *supra* note 12, at 432 (explaining how ability to control price indicates a dominant position).

146. See EUROPEAN UNION LAW AFTER MAASTRICHT, *supra* note 12, at 430 (explaining that the Commission uses a variety of factors in its examination of mergers). In RTL/Veronica, for example, the Commission looked not only at the fact that HMG (the name of the merged companies), would achieve a market share of at least 60% in the TV advertising market, but also at its audience share, its ability to coordinate the program schedules of its three channels ("in order to attract a maximum of viewers and to target the most attractive groups for advertisers"), its ability to directly counteract the programming of competing channels and new entrants, and the structural link with a production company, which would allow it preferential access to new productions. See *id.* Commission Decision 96/649, 1996 O.J. (L 294) 14, 15 (RTL/Veronica II). See also REPORT ON COMPETITION 1996, *supra* note 127, at 187-89 (discussing the Commission's reasons for disapproving the joint venture of Saint-Gobain/Wacker-Chemie/NOM which included consideration of its 60% market share, as well as its technological ingenuity, its ability to provide a whole range of product grades, the weakness of its competitors, and the improbability of new market entrants).

147. See Regulation 4064/89, art. 2.1, *supra* note 21, at 16 (instructing the Commission to take into consideration "the actual or potential competition from undertakings located whether within or outwith the Community" and "the market position of the undertakings concerned and their economic and financial power").

cial power as compared to its market share, the more likely it is that the Commission will find the concentration in violation of EC law.¹⁴⁸ Similarly, the stronger a concentration's competitive potential and relative market shares as compared to its competitors, the more likely the Commission is to rule against the merger.¹⁴⁹ In making these assessments, the Commission has looked at customer base,¹⁵⁰ preferential access to supplies and other essential elements of production,¹⁵¹ additional competitive potential, and other specific company strengths.¹⁵² The Commission examines both the parties to the merger and their competitors, as well as the potential shifts in the market due to changes in technology, and supply and demand trends.¹⁵³

148. See Commission Decision 96/346, *supra* note 142 (finding that a concentration between the Netherlands' future leading broadcaster and a TV production company already dominant in the Dutch market—due in part to its specific strengths such as a large number of popular formats, preferential access to foreign formats, and contracts with a high number of popular Dutch TV personalities—would result in a large unchallenged sales basis (i.e., financial power), constituting an unacceptable impediment to competition).

149. See Commission Decision 96/346, *supra* note 142, at 47 (noting that a concentration, which would place the concentration in a market position "high above that of the other players in the market," contributed significantly to the Commission's incompatible ruling). Cf. REPORT ON COMPETITION 1994, *supra* note 127, at 457 (discussing the Mannesmann/Vallourec/Illva merger in which the Commission found that a concentration resulting in a duopoly for seamless stainless steel tubes was not a significant impediment to competition given the power of producers outside the EU to compete with the duopoly).

150. See Commission Decision 96/346, *supra* note 142, at 49-50 (noting that combination of commercial channels created by the concentration would give the concentration a high audience share, which was the most important parameter for the concentration's customer base and that a structural link created by the concentration would secure an unchallenged customer base for the merging company).

151. See *id.* at 49 (noting that a structural link between a broadcast company and a production company would give the broadcast company preferential access to productions and hence further the concentration's competitive advantage to the detriment of competitors); REPORT ON COMPETITION 1996, *supra* note 127, at 179 (discussing the Commission's concern in Rewe/Billa that the merged company would have joint purchasing power, possibly leading to anticompetitive effects); *Blocker/Toys "R" US*, *supra* note 142, at 1 (noting that a dominant company's position as a "gatekeeper" vis-à-vis suppliers contributed to the Commission's finding of incompatibility).

152. See Commission Decision 96/346, *supra* note 142, at 48 (demonstrating that a production company's specific strengths, such as popular formats and contracts with a number of popular TV personalities, were contributing factors in the Commission's incompatible ruling).

153. See Commission Decision 96/177, 1996 O.J. (L 53) 20 (Nordic Satellite Distribution Decision) (denying approval of joint venture, but noting that changes in technology may alter the market so as to make the venture compatible with the common market); Commission Decision 95/255, 1995 O.J. (L 161) 27 (Siemens/Italtel Decision) (finding that a merger between two telecommunications equipment manufacturers would not result in market dominance due in part to actual and potential technological developments leading to structural changes in the telecommunications market); Commission Decision 94/893, 1994 O.J. (L 354) 32, 60-62 (Proctor & Gamble/Schickedanz Decision) (finding that the merged company's 60% market share would impede competition when its main competitor's market share totaled only 10% to 15%, and new competitors faced significant barriers to market entry); Commission Decision 94/811, *supra* note 138, at 48 (finding that a proposed merger between Shell and Montedison, leading to the concentration of the two main polypropylene producers, would significantly impede competition when the parties' competitors did not represent a significant constraint on

In the Boeing case, the Commission, in addition to noting the increase in Boeing's market share from sixty-four percent to seventy percent,¹⁵⁴ also explored the relationship between Boeing's market share and its financial and economic position. The Commission considered the following factors in its decision: (1) the increase in customer base (from sixty percent to eighty-four percent);¹⁵⁵ (2) the superior bargaining power with suppliers due to its involvement in both defense and civil aircraft production; and (3) the remaining competitive potential of McDonnell Douglas.¹⁵⁶ The Commission's use of these factors in prior cases illustrates the consistency of the Commission's decision on the Boeing-McDonnell Douglas merger with past Commission investigations regarding the compatibility of a proposed merger with EC law.¹⁵⁷

The Commission also looked at the ability of the only other competitor on the market: Airbus. The Commission noted that although Airbus' market share had increased in the 1980s and early 1990s, that it had since declined to roughly 30%, demonstrating Airbus' present difficulty in attacking Boeing's market position.¹⁵⁸ The Commission also cited Airbus' inability to forge "significant inroad[s] in most of the top ten operators' fleets" as evidence of Airbus' limited ability to compete with Boeing.¹⁵⁹ Additional factors the Commission found to demonstrate the constraint on Airbus' ability to compete with Boeing included: (1) that Airbus, unlike Boeing, could not offer a "family of aircraft," and (2) that Airbus planes only accounted for fourteen percent of the fleet in service.¹⁶⁰ Both factors, according to the Commission, influenced customer purchasing decisions. An inability to offer a complete family of aircraft influenced customers' purchasing deci-

their market power and new market entrants were unlikely); REPORT ON COMPETITION 1996, *supra* note 127, at 179-80 (discussing the Schering/Geh-Jenapharm case in which the Commission held that the strength of the parties' competitors, demand mobility, and a highly innovative market were sufficient to prevent any strengthening of the parties' dominant position based on its control of 60% of the market share); *id.* at 178 (discussing the BP/Mobil case in which the Commission concluded that the strength of the parties' competitors and the likelihood of new market entrants was sufficient to prevent a creation of a dominant position).

154. See Boeing-McDonnell Douglas Decision, *supra* note 2, at 24-25.

155. See *id.* at 26-27. The Commission felt that such power could be used to enter into additional exclusive arrangements like those already existing with Continental, Delta, and American, or to gain an unfair foothold in capturing the former customers of McDonnell Douglas. See *id.* at 27-28.

156. See *id.* at 18. The Commission also looked at the exclusive supply contracts between Boeing and three major air carriers, as well as the spillover effect of McDonnell Douglas' publicly-funded defense division. These factors are discussed *supra* Part IV.A-B.

157. See *supra* notes 140-53 (citing past Commission decisions involving these factors).

158. See Boeing-McDonnell Douglas Decision, *supra* note 2, at 21. But see Goldsmith, *supra* note 2, at A1 (reporting that in 1997 Airbus increased its market share from 30% to 45%).

159. See Boeing-McDonnell Douglas Decision, *supra* note 2, at 21.

160. See *id.* at 22-23.

sions because of a preference, identified by the Commission, of customers to fulfill their entire fleet requirements with planes from a single manufacturer.¹⁶¹ Because Boeing's acquisition of McDonnell Douglas would grant it monopolies on the smallest narrow-body and largest wide-body segments, Boeing would be the only manufacturer with the ability to cater to this preference.¹⁶² Second, the fact that Airbus accounted for only fourteen percent of the fleet in service influenced customers' purchasing decisions because of a second preference, identified by the Commission, of air carriers to purchase from the manufacturer of their existing fleet,¹⁶³ due to the cost savings derived from a "commonality of benefits."¹⁶⁴

The Commission's above analysis is fairly consistent with EC law and past cases. The Merger Regulation suggests that a concentration's effect on a competitor should be taken into account,¹⁶⁵ and past Commission decisions have consistently done so.¹⁶⁶ Furthermore, a market in which a competitor controls only 30% of the market and faces other obstacles to competition, has spurred the Commission in the past to deny a merger approval absent modifications.¹⁶⁷ Thus, the Commission's concern with Airbus' 30% market share and its investigation into additional obstacles impeding the ability of Airbus to compete with Boeing, are consistent with prior merger decisions.¹⁶⁸

161. See *id.* at 21-22.

162. See *id.* (finding that Airbus could not offer the same family of aircraft as Boeing because it lacked planes at the extreme ends of the market for narrow- and wide-body jets).

163. See *id.* at 23 (listing the examples of cost savings from "commonality of benefits," including "engineering spares inventory and flight crew qualifications").

164. See *id.* at 23 (stating the importance of existing fleet in service in customer purchasing decisions).

165. See Regulation 4064/89, art. 2, *supra* note 21, at 16 (stating that decisions should reflect the effects of a concentration on actual or potential competition from companies both in and out of the EU).

166. Commission Decision 94/893, *supra* note 153, at 62 (finding that Proctor & Gamble's market dominance would impede competition from existing competitors and create significant barriers to market entry); REPORT ON COMPETITION 1996, *supra* note 127, at 179 (discussing the Schering/Geh-jenapharm case in which the Commission considered the strength of the parties' competitors, demand mobility, and a highly innovative market sufficient to prevent any strengthening of the parties' dominant position based on their control of 60% of the market); *id.* at 178 (discussing the BP/Mobil case in which the Commission considered the strength of the parties' competitors, as well as the likelihood of new market entrants, as sufficient to prevent a creation of a dominant position).

167. See Commission Decision 91/619, 1991 O.J. (L 334) 42 (denying a merger approval when competitors controlled only 25-30% of relevant markets); Commission Decision 96/346, *supra* note 142 at 32 (denying merger approval when competitors controlled only 40% of the relevant market).

168. The Commission's consideration of the merger's effect on competitors resulted in the accusation that the Commission was more concerned with the merger's effect on competitors, i.e., Airbus, than with its effect in competition. See *A Dangerous Merger?*, *supra* note 18, at A22 (questioning whether the EU's reaction really resulted from a desire to protect its own aircraft manufacturing industry). It should be noted, however, that consideration of the merger's effects on Airbus was a means for the Commission to ascertain whether the merger was a signifi-

D. Remedies

The orders to end and refrain from entering exclusive supply contracts with air carriers, to report potentially anticompetitive behavior to the Commission (i.e., the potential spillover from the defense division), and to grant nonexclusive licenses are supported by past Commission decisions.¹⁶⁹ However, the Commission's ring-fencing remedy aimed at reducing the anticompetitiveness of the merger due to its increased market share and customer base, and its enhanced ability to negotiate with suppliers, is unusual.¹⁷⁰ Divestiture of part or all of a concentration is the usual remedy for concentrations that strengthen a dominant position so as to impede competition.¹⁷¹ The Commission, however, noted that it could not order divestiture in the case of Boeing because no existing manufacturer was interested in purchasing McDonnell Douglas.¹⁷² Regardless of whether the Com-

cant impediment to competition. It was not necessarily a means to support European industry. Interestingly, such an attempt to foster European industry would not have been a contravention of EC law, for the goal of EC Competition Policy is not only to promote competition, but also to promote the strength of European industry. See Regulation 4064/89, recitals 4, 13, *supra* note 21, at 14-15 (stating that concentrations should be assessed in part on how they increase the competitiveness of European industry and strengthen European integration); see also REPORT ON COMPETITION 1996, *supra* note 127, at 18 (stating the Commission's policy to "promote the competitiveness of European industry as a whole by the strict enforcement of the competition rules").

169. See generally Commission on Decision 94/811, *supra* note 138, at 70; Commission on Decision 93/406, *supra* note 114, at 36 (ordering Langnese to end its exclusive supply contracts); REPORT ON COMPETITION 1996, *supra* note 127, at 186 (discussing the Commission's approval of a merger between pharmaceutical companies Ciba-Geigy and Sandoz contingent, in part, on the companies' agreement to grant nonexclusive licenses to third parties); REPORT ON COMPETITION 1995, *supra* note 127, at 163 (discussing Glaxo's commitment to grant a license of one of its two migraine therapies under development to a third party to avoid an incompatibility ruling on its acquisition of Wellcome).

170. See Boeing-McDonnell Douglas Decision, *supra* note 2, at 36, 39 (agreeing to the Boeing-McDonnell Douglas merger subject to the ring-fencing condition); cf. REPORT ON COMPETITION 1996, *supra* note 127, at 187 (discussing Kesko/Tuko case in which Commission held that although Kesko and its retailers were separate legal entities, they nonetheless comprised a "centrally planned retailing organization"). In Kesko/Tuko, the Commission found it necessary to view Kesko and its retailers (rather than Kesko alone) as the party to the proposed merger with Tuko. The fact that Kesko and its retailers were separate legal entities did not decrease the potential for anticompetitive behavior. The Commission took into account the fact that Kesko and its retailers possessed a number of shared "characteristics," such as "agreements between [Kesko and its retailers,] the organization of the groups as regards sourcing, marketing operations and joint presentation of logos, the ownership by [Kesko] of retailing premises, and financial commitments" made by the retailers to Kesko. See REPORT ON COMPETITION 1996, *supra* note 127, at 186-87 (discussing the Kesko/Tuko merger).

171. See REPORT ON COMPETITION 1995, *supra* note 127, at 64-65 (1996) (discussing the cases of Mercedes Benz/Kässbohrer, ABA/Daimler Benz, Orkla/Volvo and Crown Cork and Seal/Carnaud Metal Box in which the Commission approved the proposed mergers only after the parties involved agreed to significant divestitures); see also Commission Decision 96/649, *supra* note 146, at 14 (approving a proposed joint venture but only after Endemol, the production company initially party to the venture, excused itself).

172. See Boeing-McDonnell Douglas Decision, *supra* note 2, at 17-18, 39 (discussing reasons why divestiture was not an option for resolving competition problems the merger introduced).

mission's decision was the only pragmatic solution, it is still a deviation from past practice.¹⁷³

V. IMPLICATIONS OF THE COMMISSION'S DECISION

The Commission's analysis of the Boeing merger was, for the most part, consistent with the Merger Regulation and past Commission decisions. The existence of the exclusive supply contracts and the increase in market share, as well as the economic strength of Boeing with suppliers and customers, and the competitive potential of McDonnell Douglas, are factors, relied upon by the Commission in the Boeing case, which have also formed the basis of past Commission decisions on whether a proposed merger was compatible with EC law.¹⁷⁴ The Commission's unusual ring-fencing remedy and, perhaps, its investigation of the potential spill-over of state-funded research and development from McDonnell Douglas' defense division to Boeing's commercial division, however, do indicate some incongruity between the Boeing decision and prior decisions.¹⁷⁵ This incongruity alone, however, is not enough to support the accusations, offered on the eve of the decision, that the Commission's investigation of the merger was unwarranted or merely an effort to unfairly

Given that no one other than Boeing was prepared to purchase McDonnell Douglas, the Commission noted that a divestiture order in the Boeing case would do little to promote competition in the aircraft manufacturing industry. *See id.* at 39. Had McDonnell Douglas' ability to compete further declined, an inability to maintain customers and generate revenues eventually would have forced McDonnell Douglas to exit the market, leaving only Boeing and Airbus as the remaining competitors. *See id.* U.S. officials warned against this outcome because it would result in an "inefficient disposition" of McDonnell Douglas' manufacturing operations and the loss of employment for many Americans. *See id.* at 17-18. Presumably, EU officials opposed this outcome because, at least with an order to "ring-fence" McDonnell Douglas' defense division and have Boeing report annually on spillovers of state-funded research and development, the EU stood to gain some influence over the shape of a post-McDonnell Douglas aircraft market.

173. *See* EUROPEAN COMM'N XXII REPORT ON COMPETITION 1992, at 22 (1993) (stating that conditions which the Commission imposes consists mainly of divestitures or agreements to withdraw from the market where anticompetitive effects would ensue). The Commission's approval of the Boeing-McDonnell Douglas merger pursuant to the ring-fencing, rather than an order to divest, suggests that contrary to popular opinion, the EU was looking for a way to approve the merger. Consistent with the Merger Regulation and past decisions, the Commission, after finding that the proposed merger significantly strengthened Boeing's dominant position, could have refused to approve the merger unless Boeing agreed to a partial divestiture of McDonnell Douglas. *See supra* note 171 (listing cases in which divestiture was required to obtain Commission approval). Nonetheless, the Commission agreed to the remedy. *See* Boeing-McDonnell Douglas Decision, *supra* note 2, at 39 (agreeing to the merger subject to the ring-fencing and other commitment).

174. *See supra* Part IV (discussing consistency of EU's Boeing-McDonnell Douglas decision with past decisions and EC law).

175. *See supra* Part IV.B, D (discussing the unusual investigation into spillovers of state aid and the Commission's ring-fencing remedy).

support Airbus in the market for commercial aircraft.¹⁷⁶ The Commission's decision, even taking into account some incongruity, was made in accordance with its laws and past precedent.¹⁷⁷

The general consistency of the Commission's decision on the Boeing-McDonnell Douglas merger is important for two reasons. First, consistent decisions lead to predictability that is essential for firms attempting to structure mergers compatible with EC law. Second, consistent decisions based on the rule of law lend legitimacy to the EU as a real and powerful player in mergers of international significance. Legitimacy is particularly significant in this case, because it narrows the essential issue posed by the U.S.-EU conflict over the Boeing-McDonnell Douglas merger. The issue in this case is not that the EU acted arbitrarily or purely out of a desire to advance Airbus, but rather that the EU nearly reached a conclusion contrary to the United States, despite the fact that the EU acted in accordance with its own laws and past decisions. Thus, the means for preventing a fu-

176. See *supra* notes 10-16 and accompanying text (detailing controversy surrounding Boeing-McDonnell Douglas merger and U.S. accusations of EU protectionism).

177. A lack of perfect inconsistency between the Boeing decision and other decisions may in part be explained by the flexibility allowed by the Merger Regulation and EC Competition Policy in general. Although the Merger Regulation lists factors that the Commission should consider in reaching a conclusion on a given concentration, it does not provide a precise check list of elements necessary to guide the Commission in determining whether a concentration is compatible with the common market. See Regulation 4064/89, art. 2.1(a)-(b), *supra* note 21, at 16 (stating that Commission's assessment must consider various aspects of a concentration and "shall take into account . . . the need to maintain and develop effective competition" in view of several factors, but providing no strict list of acceptable and unacceptable behavior). Instead, the commission has emphasized the importance of looking at the specific circumstance of each concentration and analyzing the concentration's compatibility using criteria it feels most appropriate considering that circumstance. See REPORT ON COMPETITION 1994, *supra* note 127, at 24 (emphasizing importance Commission attaches in its review of concentrations to context and particularities of each sector); see also REPORT ON COMPETITION 1996, *supra* note 127, at 61-66, 170-89 (discussing various factors and different circumstances the Commission considered in its 1996 merger decisions); REPORT ON COMPETITION 1995, *supra* note 127, at 61-66, 159-77 (discussing factors considered in Commission's merger decisions in 1995); REPORT ON COMPETITION 1994, *supra* note 127, at 456-64 (discussing Commission's consideration of various circumstances in 1994 merger decisions); REPORT ON COMPETITION 1993, *supra* note 38, at 173-87 (discussing the various factors and circumstances considered in the Commission's merger decisions in 1993). Furthermore, consideration of the broad policy goals of furthering European integration and strengthening the competitiveness of European industry, expressed in both the Merger Regulation and the EC Treaty, may influence Commission decisions. See EC TREATY arts. 1-3 (stating that the Community's "task" is "to promote throughout the Community a harmonious and balanced development of economic activities" through establishment of the common market). Regulation 4064/89, *supra* note 21, at 15 (recognizing that, to achieve its goals, Commission must consider, among other things, the EC Treaty objective of strengthening EC "economic and social cohesion"); see also REPORT ON COMPETITION 1995, *supra* note 127, at 67 (discussing Perrier case, in which Court of First Instance held that although Merger Regulation primarily involves questions of competition, Commission may still consider social effects of a concentration). Because of the political repercussions of admitting such, there is no way of knowing how much the EU's goal of strengthening or preserving European industry (i.e., Airbus) affected the Commission's decision to investigate and press for concessions in the Boeing-McDonnell Douglas case.

ture Boeing-like crisis lies in reconciling the differences in the application of EC and U.S. competition law.

VI. RECOMMENDATIONS

A. *The Failure of the Present System to Address Conflicts between EU and U.S. Competition Policy*

Finding a solution to the potential clash between U.S. and EU antitrust law is not a new endeavor.¹⁷⁸ In 1991, the United States and the EU signed the Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws ("U.S.-EU Agreement" or "Agreement").¹⁷⁹ The U.S.-EU Agreement contains four major elements: (1) notification of cases handled by the competition authorities of either party when the case concerns the "important interests" of the other party;¹⁸⁰ (2) cooperation and coordination of the investigations and decisions formulated by each authority;¹⁸¹ (3) consideration of the other party's "important interests" when taking measures to enforce competition laws;¹⁸² and (4) consideration of a request for one party to initiate appropriate enforcement measures against anticompetitive activities affecting the

178. See generally Joseph P. Griffin, *EC and U.S. Extraterritoriality: Activism and Cooperation*, 17 *FORDHAM INT'L L.J.* 353 (1994) (discussing U.S. and EU concerns regarding extraterritorial application of their antitrust laws).

179. 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) 47 [hereinafter U.S.-EU Agreement]. The European Commission initially adopted the U.S.-EU Agreement in 1991, but after considering a complaint brought by France against the Commission, the European Court of Justice found the Agreement procedurally void. See Case C-327/91, *French Republic v. Commission*, [1994] E.C.R. 3641, 3661-63, 3668, 3679 (holding U.S.-EU Agreement void because Commission lacked authority to sign a treaty "intended to produce legal effects" without formal approval of the European Council). The European Council and the Commission readopted the Agreement without changes the following year. See Decision of the Council and the Commission of 10 April 1995 Concerning the Conclusion of the Agreement of the United States of America Regarding the Application of Their Competition Laws, 1995 O.J. (L 95) 45 (readopting U.S.-EU Agreement of 1991 and declaring it applicable from its original date of enactment). The Agreement states that its goal is to "promote the cooperation and coordination and lessen the possibility of impact of differences between the Parties in the application of their competition laws." U.S.-EU Agreement, *supra*.

180. See U.S.-EU Agreement, *supra* note 179, at 47-48 (listing specific activities normally requiring notification, and discussing time frame, application, and contents of notification).

181. See *id.* at 48-49 (indicating that one party may assist the other in enforcement activities or coordinate their activities when mutual interests exist).

182. See *id.* at 49-50. The clause requiring U.S. and EU mutual consideration of each other's important interests is often referred to as the negative comity clause. See Allison Himelfarb, Comment, *The International Language of Convergence: Reviving Antitrust Dialogue Between the United States and the European Union with a Uniform Understanding of "Extraterritoriality"*, 17 *U. PA. J. INT'L ECON. L.* 909, 936-37 (discussing Article 6 in terms of negative comity).

requesting party, but occurring within the other party's territory.¹⁸³ Despite the positive experiences reported by both the Commission and the United States on its application,¹⁸⁴ the Agreement limits its own effectiveness in instances when the antitrust authorities fundamentally disagree on the compatibility of a proposed merger with antitrust law.¹⁸⁵ Because the Agreement does not compel parties to cooperate, differences in antitrust law and opinion cause the Agreement's mechanism for cooperation to break down, allowing each party to decide the merger without regard for the other authority's assessment.¹⁸⁶

This is similar to what occurred in the Boeing-McDonnell Douglas case. Although the merger would have been an ideal opportunity for the application of the U.S.-EU Agreement, it found little expression in either authorities' review of the case.¹⁸⁷ Although the EU decision

183. See U.S.-EU Agreement, *supra* note 179, at 49. The clause acknowledging the right of the United States and EU to request initiation of enforcement action is often referred to as the positive comity clause. See Himelfarb, *supra* note 182, at 936 (discussing Article 5 in terms of positive comity).

184. In its first annual report to the European Council, reporting on the application of the Agreement from April 10, 1995, to June 30, 1996, the Commission stated that its experience with the Agreement had been "very positive." See Commission Report to the Council and the European Parliament on the Application of the Agreement Between the European Communities and the Government of the United States of America Regarding the Application of Their Competition Laws, COM (96) 479 final at 4; see also *id.* at 6-10, 13 (recounting contact between the United States and EU regarding actual and potential antitrust violations affecting both parties, and concluding that the only significant problems in the Agreement's application centered on the exchange of confidential information). A case often heralded as proof of the U.S.-EU Agreement's success is that of Microsoft. See REPORT ON COMPETITION 1994, *supra* note 127, at 27 (citing Microsoft case as an exceptional example of collaboration between U.S. and EU antitrust authorities, but noting that its success depended on the parties' willingness to exchange confidential information).

More recently, U.S. and EU antitrust authorities, while carrying on separate investigations, continued to consult with each other during the course of their investigations. See Varney, *supra* note 12, at 4-5 (noting that in Glaxo/Wellcome case, the FTC and EU Commission consulted to "identify the product markets of mutual concern, the likely competitive effects, and the best available remedy" to address each authority's anticompetitive concerns). FTC Chairman Christine Varney also noted, however, that the cooperation between the FTC and the EU highlighted the different approaches taken by the two antitrust authorities. See *id.* at 5 (stating that the FTC's and EU's analysis reflect differences in application of two authorities' antitrust laws).

185. See U.S.-EU Agreement, *supra* note 179, at 47-50 (containing no provisions for the Agreement's enforcement); Laura E. Keegan, Comment, *The 1991 U.S./EC Competition Agreement: A Glimpse of the Future Through the United States v. Microsoft*, 2 J. INT'L LEGAL STUD., 149, 151 (1996) (arguing that although useful in the Microsoft case, the U.S.-EU Agreement may provide limited assistance in cases in which the two investigating antitrust authorities' enforcement policies diverge).

186. See U.S.-EU Agreement, *supra* note 179, at 49 (stating that subject to appropriate notice, either party may limit or terminate its participation in coordinated investigations); arts. 5.4, 9, *supra*, at 49-50 (emphasizing that nothing in agreement limits or contradicts either party's discretion to implement enforcement actions under its own laws or policies).

187. See *Cool Heads Needed in Brussels and Washington*, *supra* note 60, at 16 (stating that "[i]f there was a case for close co-operation between the EU and the U.S. competition authorities, Boeing's acquisition of McDonnell Douglas must surely be it").

expressly states that the Commission consulted with U.S. antitrust authorities pursuant to the U.S.-EU Agreement, and that it considered the "important defense interests" of the U.S. government in its merger decision,¹⁸⁸ the FTC opinion is devoid of even a passing reference to the agreement.¹⁸⁹ Furthermore, the official¹⁹⁰ communication that did take place between U.S. and EU authorities first occurred three and a half months after the Commission announced it would proceed with a phase two investigation of the merger, and four days before the FTC announced its decision.¹⁹¹ The United States did not apprise the EU of its concerns until July 13, 1997, a mere two weeks before the EU reached its conclusion.¹⁹² The vast majority of each party's investigation and analysis of the merger occurred in isolation. It is not surprising then, given this lack of communication coupled with the difference in EU and U.S. antitrust law, that the two authorities nearly reached fundamentally different views on the same merger. The limited interaction between the United States and the EU in this case highlights the weakness of the Agreement.¹⁹³ The consultative and information-sharing basis of the U.S.-EU Agreement confirm its limited strength. The Agreement can only facilitate cooperation; it cannot compel it.

Several other attempts have been made to avoid international crisis like the Boeing-McDonnell Douglas merger: (1) the International Antitrust Enforcement Assistance Act, which empowers U.S. antitrust authorities to share confidential information with other nations' antitrust authorities—so long as the information remains confidential;¹⁹⁴ (2) the Trans-Atlantic Business Dialogue, designed to facilitate interaction between U.S. and EU businesses with the hope that both sides can help educate the other about complying with each other's regu-

188. See Boeing-McDonnell Douglas Decision, *supra* note 2, at 17-18 (stating that, in compliance with U.S.-EU Agreement, EU notified the United States of the Commission's preliminary finding and asked the United States to consider important EU interests); *Commission Clears Merger*, *supra* note 61, at 2-4 (stating that the Commission consulted with the United States and took into account U.S. interests in accordance with Agreement).

189. See *In re Boeing Company/McDonnell Douglas Corp.*, *supra* note 6 (containing no reference to the U.S.-EU Agreement).

190. There is no way to know how much informal communication went on outside the spectre of the general public.

191. See Boeing-McDonnell Douglas Decision, *supra* note 2, at 17-18 (stating that the EU did not notify the United States of the Commission's preliminary conclusions and concerns until June 26, 1997, and that FTC announced its approval of the merger on July 1, 1997).

192. See *id.*

193. See *id.* (describing communication between the United States and EU about the merger); see also International Framework, *supra* note 35, at 424 (noting that bilateral agreements like the U.S.-EU Agreement may be less effective due to their lack of substantive rules or principles).

194. See International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. §§ 6201, 6207 (1994).

latory authorities;¹⁹⁵ (3) provisions within the New Transatlantic Agenda aimed at strengthening the U.S.-EU Agreement and the enforcement of competition laws;¹⁹⁶ and (4) "working groups" within the Organization on Economic Cooperation and Development ("OECD") and the World Trade Organization ("WTO") to study issues relating to trade and competition policy.¹⁹⁷ Although these efforts have contributed to cooperation among competition authorities, they fail to fully resolve the problem presented in the Boeing case, namely what to do in the event that two antitrust authorities reach contrary decisions on the same proposed merger.

B. *Toward a Solution*

Unfortunately finding a means to reconcile, and optimally avoid, conflicting merger decisions is not easy. Two general approaches dominate the debate over how to most appropriately deal with future conflicts. The first is to establish a recognized procedure for reconciling competing antitrust decisions based on internationally agreed upon antitrust standards.¹⁹⁸ Such a procedure could be developed under the existing dispute resolution framework of the WTO, which provides a formal mechanism for members to reconcile trade disputes and has the authority to issue binding decisions.¹⁹⁹ The WTO's

195. See U.S. BARRIERS TO TRADE AND INVESTMENT, *supra* note 130, at 1-2 (discussing benefits of Trans-Atlantic Business Dialogue).

196. See *id.* (discussing U.S. and EU efforts through New Transatlantic Agenda to improve cooperative enforcement of competition laws); Varney, *supra* note 12, at 16 (opining that U.S. cooperation with New Transatlantic Agenda will improve effectiveness and efficiency of anti-trust enforcement).

197. See REPORT ON COMPETITION 1996, *supra* note 127, at 377 (reporting WTO's establishment of Working Party to examine links between trade and competition policy issues); Antitrust Division Official Predicts Scant Prospect of International Code, 11 Int'l Trade Rep. (BNA) No. 6, at 220 (Feb. 9, 1994) (discussing the OECD working group's idea for establishing an international antitrust authority).

198. See International Framework, *supra* note 35, at 417-30 (discussing possibility of creating international antitrust rules). The FTC has considered and rejected the possibility of international antitrust rules. See FTC Chairman Robert Pitofsky, International Antitrust: An FTC Perspective, Remarks Before the Fordham Corporate Law Institute 22nd Annual Conference on International Antitrust Law & Policy (Oct. 26, 1995), available at <<http://www.ftc.gov/speeches/pitofsky/fcli95.htm>> (arguing that the development of an international antitrust code is unrealistic); FTC Commissioner Roscoe B. Starek, III, Competition and Consumer Protection Enforcement: Aiming Toward a Common Goal in the Emerging Global Marketplace, Remarks Before the 20th Annual International Business Law Institute on the Practice of International Business Transactions (Apr. 11, 1996), available at <<http://www.ftc.gov/speeches/starek/minnbar.htm>> (rejecting idea of an international antitrust code).

199. See Resolution of the European Parliament on the Twenty-Fifth Competition Report of the European Commission 1996 O.J. (C 362) 135, 139 (urging the development of an international framework within the WTO); International Framework, *supra* note 35, at 424-25 (stating that the "WTO is the prime candidate for a framework of competition rules because its institutional framework provides a forum for negotiation and the arbitration of conflicts through its dispute resolution system). Whether the WTO would be the most appropriate forum for the

dispute resolution system would be used in cases where, upon completion of their antitrust investigations, two authorities reach conflicting decisions and one authority feels the other has reached its decision in violation of international antitrust standards.²⁰⁰ The companies involved could petition their receptive member states to bring their case before the WTO,²⁰¹ which would judge the case based on international antitrust standards.²⁰²

The second approach is far more simple: do nothing. Proponents of this position argue that further steps to harmonize antitrust laws are premature.²⁰³ Thus far, conflicts, including the Boeing-McDonnell Douglas merger, have worked themselves out.²⁰⁴ According to this point of view, the Boeing-McDonnell Douglas merger did not pose a crisis. Boeing would have worked with the Commission until the parties reached a mutually acceptable solution, and the Commission, fearing damage to the U.S.-EU relationship or a potential trade war, would have eventually approved the merger.²⁰⁵

Both approaches have their drawbacks. While the establishment of a recognized forum for resolving competing antitrust decisions is good idea in the abstract, it is an approach that will succeed only if

development of international antitrust standards is a source of debate. Compare Varney, *supra* note 12, at 14 (rejecting the WTO as the appropriate forum for discussing international antitrust issues and maintaining the OECD has a "comparative advantage" in analyzing and reaching consensus on international issues), with International Framework, *supra* (finding that there are several disadvantages to having international standards promulgated and enforced by the OECD and that the WTO would provide a better forum).

200. See International Framework, *supra* note 35, at 425-26 (discussing how disputes could be resolved by the WTO dispute resolution system); *International Co-Operation in Antitrust Matters: Making the Point in the Wake of the Boeing/McDD Proceedings*, EC COMPETITION POL. NEWSL., Feb. 1998, available at <<http://europa.eu.int/en/comm/dg04/speech/eight/ensp98004.htm>> [hereinafter *International Co-Operation*] (stating the dispute resolution mechanism would not be used to review decision's rendered by national authorities, but rather to settle disputes over a country's compliance with the established international rules). See generally WORLD TRADE ORGANIZATION, WTO: TRADING INTO THE FUTURE 4, 18-19 (1995) (describing forum for dispute resolution and negotiations within the WTO).

201. See International Framework, *supra* note 35, at 426 (noting that private parties do not have access to the WTO's dispute resolution system).

202. See *id.* at 426 (noting that the dispute resolution system would use internationally agreed upon standards to judge disputes).

203. See *id.* at 433 (noting that substantive international rules regarding mergers is premature); *International Co-Operation*, *supra* note 200 (concluding that an international dispute resolution mechanism for competition issues is "inconceivable under current circumstance"); Varney, *supra* note 12 ("U.S. Government is firmly of the view that competition issues are not ripe for negotiations in the WTO to establish a comprehensive new framework of rules."); Pitofsky, *supra* note 198, at 15 (agreeing with an Expert Report issued for public comment by the EU, and finding that drafting an international antitrust code is unrealistic).

204. See *International Co-Operation*, *supra* note 200 (arguing current international cooperation was sufficient in the Boeing case); *supra* note 185 and accompanying text (discussing positive responses to current U.S.-EU cooperation in the competition field).

205. See *International Co-Operation*, *supra* note 200 (arguing that the outcome of the Boeing case proved the capacity of the EU to withstand international pressure and obtain concessions from Boeing).

there are workable standards by which to judge the antitrust dispute.²⁰⁶ International antitrust standards, however, threaten to provide little guidance in resolving an international merger dispute similar to the Boeing-McDonnell Douglas case.²⁰⁷ In order to reach an international consensus on the standards by which to judge antitrust disputes, particularly if these standards were then to be used by an adjudicatory body with the authority to issue binding decisions, such standards would necessarily consist of broad and general statements about what constitutes anticompetitive behavior.²⁰⁸ On the extreme ends of the spectrum, agreeing upon what is clearly prohibited behavior and what is not, would be relatively uncontroversial.²⁰⁹ It is the gray area in the middle, precisely where a dispute along the lines of the Boeing-McDonnell Douglas merger would fall, which would prove problematic in reaching an international consensus. Both the FTC's and EU's analysis of the Boeing-McDonnell Douglas merger asked whether the merger would negatively impact competition.²¹⁰ In fact both authorities looked at similar criteria (e.g. market share and competitive potential of McDonnell Douglas) and premised their investigation on the goal of promoting consumer welfare.²¹¹ It is doubtful international standards would create a more specific basis of review or a more concrete goal. Thus, while international antitrust standards may harmonize some aspects of international antitrust

206. See International Framework, *supra* note 35, at 434-35 (discussing the importance of having standards by which to judge disputes under a dispute settlement system).

207. See *id.* at 431, 432 (discussing how common international rules could address horizontal constraints such as cartels, market sharing, boycott of foreign firms, price fixing, bid rigging, collective exclusive dealing, but explicitly stating at present such rules would be inappropriate for mergers).

208. See Starek, *supra* note 198 (expressing concern that international antitrust standards would be standards of the "lowest-common denominator"). An international agreement of international antitrust standards and a binding mechanism for dispute resolution brings up issues of national sovereignty. See International Framework, *supra* note 35, at 425 (noting current unwillingness of countries to accept the constraints on national sovereignty that an international antitrust code would demand); Starek, *supra* (noting that sovereignty issues impede cooperation on substantive elements of international antitrust law).

209. See International Framework, *supra* note 35, at 426 (describing the basic practices, such as cartels and price fixing, that would be prohibited under international antitrust rules, but cautioning that other types of anticompetitive behavior, such as certain vertical restraints or exclusive distribution or supply contracts, would take longer to develop).

210. See Boeing-McDonnell Douglas Decision, *supra* note 2, at 24 (analyzing whether the Boeing-McDonnell Douglas merger "significantly impeded" competition); *In re Boeing-McDonnell Douglas Corporation*, *supra* note 6 (analyzing whether the Boeing-McDonnell Douglas merger would "substantially lessen competition").

211. See Boeing-McDonnell Douglas Decision, *supra* note 2, at 24-26 (analyzing market shares and the competitive potential of McDonnell Douglas); *In re Boeing-McDonnell Douglas Corp.*, *supra* note 6, at 2-3 (analyzing market share and the competitive potential of McDonnell Douglas); *supra* note 46 (stating protection of the consumer is a primary goal of EC Competition law and U.S. antitrust law). See also *supra* note 177 (discussing other goals of EC Competition Policy).

laws, they do not provide a workable solution for resolving future merger disputes.

The opposite approach—to do nothing—is not particularly instructive either. Given the rapid internationalization of today's markets and the growing trend toward mergers of global proportions,²¹² it is unrealistic to believe that opposing national antitrust authorities will continue to reach compatible decisions.²¹³ It makes little sense to wait until a crisis explodes before taking any meaningful steps to prepare for its resolution. In the Boeing case, the explosion could have resulted in nearly five billion dollars in fines for Boeing and loss of the European market, or a trade war between the U.S. and EU to the detriment of both U.S. and EU customers.²¹⁴

Instead, a proactive, yet still pragmatic, approach is to strengthen U.S.-EU cooperation specifically in the field of merger assessments. Although the current U.S.-EU Agreement extends to mergers, its usefulness in coordinating merger assessments, as the Boeing case demonstrates, has proved less than successful.²¹⁵ Part of the difficulty of cooperating on merger assessments are the time constraints on merger investigations and confidentiality requirements.²¹⁶ In fact, the recent extension of the U.S.-EU Agreement specifically excluded mergers from its scope.²¹⁷

212. See REPORT ON COMPETITION 1996, *supra* note 127, at 343 (reporting 131 merger notifications to the EU Commission in 1996, compared to 60 in 1992); FTC Chairman Discusses Merger Wave and Merger Enforcement at the FTC (Sept. 23, 1997), available at <<http://www.ftc.gov/opa/9709/pitmerg.htm>> (noting that the number of mergers reported to U.S. antitrust authorities has doubled in the last five years).

213. See International Framework, *supra* note 35, at 419 (recognizing the increase in international mergers and pointing out the potential for conflicts of law or remedy); *International Co-Operation*, *supra* note 200, at 1 (discussing how the increase in "world-scale mergers" subjects firms to "different competition rules with different criteria for taking decisions, different procedures, different time limits" and how such difference may result in trade disputes).

214. See *supra* Part III and notes 17 & 44 (discussing the Commission's power to impose fines on Boeing and commenting on the threat of a trade war). A trade war between the U.S. and EU would be particularly destructive given the fact that the U.S. and EU are "each other's single largest trading partners," and that both are the other's "most important source of direct foreign investment." See U.S. BARRIERS TO TRADE AND INVESTMENT, *supra* note 129, at 2-3. See generally, WORLD TRADE ORGANIZATION, *supra* note 200, at 7 (discussing how trade barriers are self-defeating and self-destructive).

215. See U.S.-EU Agreement, *supra* note 179, at 47-48 (making mergers subject to the Agreement), *supra* Part VIA (discussing the failings of the U.S.-EU Agreement as applied to the Boeing-McDonnell Douglas merger).

216. See REPORT ON COMPETITION 1996, *supra* note 127, at 308-09 (discussing how confidentiality and timing issues make cooperation on international mergers difficult); see also Pitofsky, *supra* note 198, at 12-14 (noting that the Shell/Montedison case could have proceeded more easily if the United States and EU could have coordinated their investigations, but that such coordination, was impeded by confidentiality constraints).

217. See Commission Communication to the Council Concerning the Agreement Between the European Communities and the Government of the United States on the Application of the Positive Comity Principles in the Enforcement of their Competition Laws, COM(97) 233 final (proposing the conclusion of an agreement between the EU and the United States to

A reluctance to address ways to cooperate effectively in international merger cases, however, is unwise. Mergers have constituted the area of greatest activity in the competition field in recent years and current trends suggest that this will continue to be the case for some time to come.²¹⁸ Thus, the U.S. and EU need to return to the negotiation table to address ways in which merger investigations can be coordinated more effectively. Time constraints and confidentiality requirements are not insurmountable impediments to effective cooperation.²¹⁹ The constraints U.S. and EC law place on the time in which the relevant antitrust authority must conduct its investigation and render a decision, need not be altered under a more rigorous framework for international cooperation. Instead, given the limited time in which to make an assessment in a merger case,²²⁰ coordination should begin from the moment one authority decides that an investigation is warranted. As far as confidentiality is concerned, the parties under investigation, recognizing that one coordinated decision is better than two conflicting ones, could grant a limited waiver of their confidentiality rights, or pursuant to national laws, the antitrust authorities could enter into special agreements so as to allow the antitrust authorities to exchange confidential information.²²¹

Coordination in merger assessments should continue throughout the two authorities' investigations. It is not enough for one antitrust authority to merely notify the other that it is beginning an investigation, or to suggest that the other authority take its interests into account. Coordination should entail actually working together. In the final stages of their assessments, U.S. and EU antitrust officials should work together to ensure that the decisions rendered by each author-

strengthen the positive comity principles of the 1991 U.S.-EU Agreement); see also *International Co-Operation*, *supra* note 200, at 5 (noting that "in contrast to the 1991 Agreement mergers are not within the scope the proposed Agreement").

218. See REPORT ON COMPETITION 1996, *supra* note 127, at 301 (noting that out of the 98 notifications pursuant to the U.S.-EU Agreement between April 1995 and June 1996 that 66 have involved mergers); *supra* note 212 (indicating the increase in mergers).

219. See *International Co-Operation*, *supra* note 200, at 5 (noting that time constraints were a factor in the decision to exclude mergers from the proposed strengthening of the U.S.-EU Agreement).

220. See Hart-Scott-Rodino Antitrust Improvements Act of 1976, tit. II, 15 U.S.C. § 18 (setting time table for requests of information and the rendering of merger decisions by U.S. antitrust authorities); Regulation 4064/89, art. 7, *supra* note 21, at 19 (indicating the time in which the Commission must notify parties and conduct its investigation).

221. See, e.g., International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. §§ 6201, 6207; see also Varney, *supra* note 11, at 12-14, 16 (suggesting that parties subject to investigations could help coordination of U.S. and EU antitrust investigations by waiving confidentiality requirements and noting that coordination in the Shell/Montedison case could have been more productive if the parties agreed to waive confidentiality requirements). Such confidentiality agreements would be made on the premise that the confidential information shared between the antitrust authorities could not be disclosed to third parties.

ity are complementary. The time to reconcile differences in the authorities' opinions is prior to the time either authority renders a decision.

CONCLUSION

The Boeing-McDonnell Douglas merger provides an interesting case study. The general consistency of the Commission's decision suggests that even if antitrust authorities conduct legitimate merger investigations and render decisions soundly supported by law and past precedents, conflicts can arise.²²² While a compromise was reached in the Boeing case, the rapid globalization of the world economy and the increasing trend to structure mergers of international proportions, essentially ensure that future conflicts will arise. We cannot merely wait and hope that these conflicts will continue to resolve themselves. A deeper commitment to coordination and cooperation in the merger field is required of both the U.S. and EU, if healthy international competition is to be fostered and the welfare of consumers on both sides of the Atlantic safeguarded.²²³

222. See *supra* Part V (concluding that the Commission reached a decision supported by its own antitrust laws and precedent); see also *International Co-Operation*, *supra* note 200, at 3 (stating that "diverging approaches of the competition authorities in Brussels and Washington made it impossible to reach commonly accepted solutions" in the Boeing-McDonnell Douglas case).

223. See Himmelfarb, *supra* note 182, at 948 (supporting a strengthening of the U.S.-EU Agreement).

