Comparing International EU Competition Cases: What Can Business and Politics Learn?

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ABSTRACT
The European Union's (EU) involvement in high-profile and controversial competition disputes has raised questions about the Union's decision-making in the regulation of international business activity. Why does the EU decide to pursue such cases that hold the potential to destabilise bilateral and multilateral trading relations? This paper investigates the role of international and domestic factors that influence the EU's competition decisions as applied to foreign corporations. To explain the EU's decisions in external competition policy, the paper considers the causal influence of economic internationalization as well as the domestic pressures exerted by firms and politicians during the merger review process. Empirically, the paper analyses two merger disputes between the EU and the United States of America (US)—the 1997 Boeing-McDonnell Douglas merger and the 2001 GE-Honeywell merger—that provide useful insights and lessons for practitioners and academics alike. The paper finds that, despite its destabilising potential, the EU decides to pursue a vigorous external competition policy primarily as the result of international economic pressures and domestic political dynamics. While the preferences and strategies of individual firms play only a limited role in the EU's decision-making in external competition policy, they seem to play a more significant role in US politicians' decisions to intervene in transatlantic merger review cases.

I. Introduction

Since the late 19th century, the gradual proliferation of national competition policies reflects the emergence of free market economies throughout the world. These competition policies—broadly including merger review, cartel and monopoly policies and state aids—operate as regulatory tools to prevent anticompetitive business activity from undermining the benefits of competition in a domestic free market economy. However, as markets internationalize, the implementation of competition policy is no longer simply a behind-the-border matter of regulating domestic business activity.

The European Union's (EU) involvement in a number of high-profile and controversial competition policy disputes has raised serious questions about the Union's decision-making in the regulation of business activity that is becoming increasingly international. Why does the EU decide to pursue such competition cases that hold the potential to destabilise bilateral and multilateral trading relations?

This paper provides a preliminary investigation of the EU's external competition policy. The analysis scrutinizes the international and domestic factors that drive the EU's decision-making in this policy area as applied to foreign corporations. In particular, the roles and decisions of regulators, politicians and firms are examined in the context of two merger disputes between the EU and the United States of America (US)—the 1997 Boeing-McDonnell Douglas (BMD) merger and the 2001 GE-Honeywell (GEH) merger—that provide useful insights and lessons for practitioners and academics alike.

To explain EU regulatory decisions in external competition policy, the paper considers the causal influence of economic internationalization as well as the practical influence of firms exerting pressure during the merger review process and politicians deciding to intervene in regulatory decisions. These factors are traced empirically through four stages of the merger review process—initial contacts, notification contacts, review process contacts and remedial contacts—with particular emphasis on the BMD and GEH cases in which EU-US cooperation failed to prevent political intervention. The paper finds that, despite its destabilising potential, the EU decides to pursue a vigorous external competition policy primarily as the result of international economic pressures and domestic political dynamics. While the preferences and strategies of individual firms play only a limited role in the EU's implementation of its external competition policy, they seem to play a larger role in US politicians' decisions to intervene in the transatlantic merger review cases studied herein.

The paper begins by discussing the reasons why EU competition regulators pursue implementation cooperation with US competition authorities. Next, the paper outlines four different stages of transatlantic implementation cooperation in merger review: initial contacts, notification contacts, review process contacts and remedial contacts. Throughout these different stages of cooperation, EU and US competition regulators generally operate without direct political intervention. The paper then undertakes an in depth analysis of two merger cases (BMD and GEH) in which EU-US cooperation failed to prevent political intervention. A comparison across the four stages of cooperation in both cases suggests a number of lessons for regulators, politicians and merging firms. The paper then provides preliminary comments on the factors that influence political decisions to intervene. The final section summarizes the findings.

II. Transatlantic Implementation Cooperation—Cooperative Merger Review in Practice

At a basic level, EU-US implementation cooperation is designed to meet an external challenge—economic internationalization (EI)—to domestic competition policy.[1] In an EI environment, competition authorities find that internationally-oriented merger activity increasingly threatens to outpace their legal and administrative resources to enforce domestic competition policy. Because EI increases the number of internationally-oriented mergers, it also increases the potential for divergent regulatory decisions by EU and US competition authorities.

EI challenges conventional notions of jurisdiction based on sovereign territory. More specifically, it changes the context in which regulators act by increasing their need to enforce competition policy on firms that may not be based in their domestic jurisdiction. Without international cooperation, the result is an increase in the likelihood

[1] EI is conceived herein as a change in the international economy, which resembles the common notion of economic globalization. However, the current study uses the term "internationalization" with the intent of distancing itself from frequent claims in the globalization literature that the phenomenon is 1) making "the state" obsolete, and/or 2) occurring globally.

of divergent decisions that may prompt political intervention. John Parisi, Counsel for European Union Affairs in the International Antitrust Division of the FTC, succinctly explains the nature of the problem:

> As business concerns have increasingly pursued foreign trade and investment opportunities, antitrust compliance issues have arisen which transcend national borders and have led antitrust authorities in the affected jurisdictions to communicate, co-operate, and co-ordinate their efforts to achieve compatible enforcement results (1999, 133).

The challenges of EI and the cooperative responses needed are clear to competition regulators who wish to avoid political intervention. This preference is reflected in the desire to achieve compatible enforcement results (i.e., convergent decisions) in individual cases that are investigated simultaneously. Such claims benefit from further clarification of the precise reasons why, in an EI environment, EU and US competition authorities will choose to pursue implementation cooperation.

First, competition authorities will cooperate internationally when implementing competition policy in order to *increase information acquisition*. As Devuyst argues, "even if a competition agency is ready to use its antitrust rules extraterritorially, information central to the investigation is often located outside the jurisdiction of the competition authority using the extraterritoriality principle and is thus beyond its reach. Without the necessary proof, competition authorities are unable to take remedial action" (2000, 323). In an EI environment, the problems created by information asymmetries in internationally-oriented merger cases present real challenges to the effective enforcement of domestic competition policy. Implementation cooperation thus reflects a crucial role for information exchanges in competition policy.

As discussed below, information exchanges are crucial to regulatory cooperation and central to each stage of implementation cooperation. In addition, the centrality of information provides merging firms with an opening to influence implementation cooperation. Domestic EU and US laws create this opening by providing for the protection of confidential business information in the merger review process. If firms do not waive their rights to confidentiality in merger cases, cooperative analyses can be seriously hindered. Citing the obstacles created by domestic confidentiality provisions, ICPAC argues

> These laws have a particularly significant impact on the merger review process, because much of the information used to analyze a proposed transaction comes from extremely sensitive, confidential information relating to the companies' strategies, investment plans, and marketing goals and methods. It is this information that frequently proves most useful in analyzing a proposed transaction (2000, 65).

A series of transatlantic agreements on competition policy—the 1991 Bilateral Agreement, 1998 Positive Comity Agreement and 1999 Administrative Arrangements on Attendance—explicitly recognize and respect domestic laws protecting confidentiality.[2] As a result, competition regulators must obtain waivers from the merging firms before sharing confidential information with their foreign counterparts.[3] Indeed, competition regulators must often obtain multiple waivers to cover different types of information and different stages of the review process.

Despite these legal provisions, competition regulators have devised discretionary means through which to address the obstacles created by confidentiality requirements. In addition, waivers of confidentiality have become routine in EU-US implementation cooperation in merger review (Svetlicinii 2006). This is so because, by waiving rights of confidentiality, firms expedite the review process and increase the likelihood of regulators reaching convergent decisions (Parisi 1999, 140).[4] Merging firms generally prefer avoiding delays in the review process due to the time sensitivity of the transaction. Similarly, merging firms generally prefer convergent decisions on remedies (if remedies are necessary) because disagreements over such matters can delay the conclusion of the merger.

The second reason why competition authorities will cooperate internationally when implementing competition policy is to *reduce the likelihood of divergent decisions*.

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[2] Because the current study investigates implementation cooperation in merger review, the analysis does not consider cases brought under the Positive Comity Agreement (PCA). Due to domestic laws that require merger reviews under certain circumstances, the PCA does not apply to merger review.

[3] The EU and US deal differently with confidential information: "Although the end result may be much the same, information gathered in the US tends to be automatically treated as confidential. Under the European system, those supplying information must request such confidentiality" (Devuyst 2001, 147). Ham provides a useful list of the domestic legal constraints in both the EU and US that protect confidential information. These include the EU's Regulation 17, parts of the US Code and the FTC Act (1993, 588). See also Svetlicinii (2006).

[4] See Svetlicinii (2006) and Parisi (1999) for reasons why firms also may be reluctant to waive rights to confidentiality.

This reason is linked directly to and follows from the increasing information exchanges. As Devuyst argues,

> there is a need to avoid conflicts of law and remedies to international cases. As international business arrangements may face examination by different authorities at the same time, divergences in the laws applicable to the same set of facts may result in conflicting conclusions as to the legality of the behavior under review. Even where a common view exists among competition agencies as to the anticompetitive nature of the conduct, the remedies imposed in each jurisdiction may be incompatible. Cooperation is thus seen as necessary to reduce the likelihood of such conflicts (2000, 323).

It is important to distinguish between two possible types of divergent decisions: inconsistent and conflicting. Inconsistent decisions occur when "authorities who have chosen to take no action or to impose a 'lesser' remedy against a proposed transaction generally do not feel aggrieved by actions taken in other jurisdictions" (ICPAC 2000, 52). Inconsistent decisions do not challenge the ability of a regulator in one jurisdiction to implement its statutory mandate and require no further work to reconcile the inconsistencies. However, as will be discussed below, inconsistent decisions can still prompt political intervention. Regulators, therefore, will strive to avoid inconsistent decisions because they are often perceived by politicians as threats to national sovereignty and/or their domestic constituents' interests.

Divergent decisions can also be conflicting. This occurs when merging firms are unable to comply simultaneously with the decisions reached in two different jurisdictions. In such a case, the remedies imposed by one jurisdiction may "impact the remedies available to another jurisdiction. This is particularly problematic in largely global transactions where the impact of various remedies may differ from jurisdiction to jurisdiction" (ICPAC 2000, 52-53, note 38). Regulators strive to avoid conflicting decisions because of the perception they create for politicians. As with inconsistent decisions, politicians are likely to perceive conflicting decisions as threats to national sovereignty and/or their domestic constituents' interests. Challenges of this type can lead to international conflicts, including trade wars.

Thus, both types of divergent decisions—inconsistent and conflicting—can prompt political intervention (Schaub 2002, 11; Monti 2000, 2).[5] As Charles S. Stark, Chief of the Foreign Commerce Section in the US Department of Justice's Antitrust Division, argues:

> in cases in which the U.S. and EU are reviewing the same transaction, both jurisdictions consider themselves as having a stake in reaching, insofar as possible, consistent, or at the very least non-conflicting, outcomes. The reasons for this should be evident. Divergent antitrust approaches to the same transaction undermine confidence in the process; they risk imposing inconsistent requirements on the firms, or frustrating the remedial objectives of one or another of the antitrust authorities; and they may create frictions or suspicions that can extend beyond the antitrust arena—as we witnessed in the Boeing/McDonnell Douglas matter (2000, 5).

According to Devuyst, the third reason why competition authorities will cooperate internationally when implementing competition policy is to *reduce duplication* of work (i.e., various investigative efforts). As Devuyst argues, "cooperation would help to avoid unnecessary duplication of work and costs, both for the competition authorities involved and for the businesses whose conduct is subject to review" (2000, 323). While an important motivation for international cooperation, this reason is less important in merger cases than in non-merger cases (Devuyst 2001, 140). In merger cases, some duplication of work in the review process is mandatory due to domestic law requiring each authority to act under certain circumstances. The competition regulators are not allowed to determine at their own discretion whether or not they will initiate a particular merger review. Rather, they are statutorily required to open investigations when a transaction meets thresholds established by the US's Hart-Scott-Rodino Act (HSR) and the EU's Merger Control Regulation (MCR). As soon as proceedings have been opened, duplication of work becomes apparent as, for example, the competition regulators seek a considerable amount of identical information through the US's HSR filing and EU's Form CO requirements.

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[5] The EU's Director-General for Competition notes this linkage: "When divergences do occur, we must learn to manage them and avoid that they escalate into high-profile transatlantic political disputes" (Schaub 2002). As ICPAC argues, "When divergence [in decisions] occurs, it is the agencies that must often explain and at times attempt to reconcile their differences. Clashes also may lead to trade wars" (2000, 41). On the possibility of trade wars, see also Karpel (1998, 1067).

In summary, the primary reasons for competition regulators to cooperate in the implementation of merger review are to increase information exchanges and to reduce the likelihood of divergent decisions. Devuyst's third reason—to reduce duplication of work—is less important in merger review due to domestic laws requiring competition regulators to review the same merger. In addition, these reasons also support the argument regarding the causal stimulus of EI and a contention that competition regulators pursue their desire to maximize certainty and decision-making authority via discretionary implementation cooperation. The next section elaborates these insights across the different practical stages of transatlantic implementation cooperation in merger review.

III. The Practical Stages of Implementation Cooperation in Merger Review

The process of implementation cooperation can be disaggregated into four stages: initial contacts, notification contacts, review process contacts and remedial contacts. Across each stage of implementation cooperation, the EU and US competition authorities are engaging in behavior designed to reduce the likelihood of divergent decisions in individual merger cases. This behavior reflects the concern of the regulators that divergent decisions are typically perceived by politicians as likely to affect adversely their national and/or constituent interests. If politicians form this perception in individual merger cases, their likelihood of intervening increases. The competition regulators prefer avoiding such interventions.

In general, the record of individual merger cases suggests that EU-US implementation cooperation has met the challenge of EI. Official commentators on both sides of the Atlantic frequently declare the successes of EU-US implementation cooperation. For example, as former FTC Commissioner Robert Pitofsky argues,

> it is hard to imagine how day-to-day cooperation and coordination between enforcement officials in Europe and the United States could be much improved. Within the bounds of confidentiality rules, we share, on a regular and continuing basis, views and information about particular transactions, coordinate the timing of our review process to the extent feasible, and almost always achieve consistent remedies (2000).

Parisi agrees with this general assessment of EU-US implementation cooperation: "These efforts succeed in the vast majority of cases, despite differences in laws, procedures, and, sometimes, the interests of the affected countries" (1999, 133).[6] Despite these claims of success, it is useful to describe EU-US implementation cooperation in greater detail in order to identify areas in which problems can arise in transatlantic merger review.

1. Initial Contacts

The current study investigates concurrent jurisdiction merger cases that meet specific statutory thresholds found in the US's HSR and the EU's MCR. When mergers meet these thresholds, the firms must notify both the US and EU competition authorities of their intent to merge. Most EU-US implementation cooperation occurs after the competition authorities have received such formal notifications from the firms. However, EU-US implementation cooperation may begin even before merging firms submit a formal notification to the respective competition authorities. This section discusses the dynamics of competition authorities engaging in such informal initial contacts before receiving the formal notification of a proposed merger.

Initial contacts occur under the discretionary authority of the competition regulators. The domestic statutes governing EU and US merger review do not directly address these initial contacts. Like the other stages of implementation cooperation discussed below, these initial contacts emerged under the framework of the 1991 Bilateral Agreement. After signing the Bilateral, EU and US competition authorities devised, under their discretionary authority, a variety of ways to formalize their cooperation in practice. Such initial contacts, while not explicitly mentioned in the Bilateral, are one example of the agents increasing their discretionary means to pursue implementation cooperation.

During the merger review process, EU and US competition authorities are in contact with each other on a daily basis via telephone calls, faxes, emails and face-to-face interactions (Janow 2000, 44). This is particularly true of lower-level case managers and handlers who focus on the economic and legal analysis of the merger review process. During the course of daily contacts, individual case managers and handlers may, and often do, discuss pending mergers that have not yet been formally notified to one or both

[6] For similar arguments from academics and competition officials, see Fox (2007); Barnett (2006); Monti (2004, 2001a); Pate (2004); James (2002, 2001); Schaub (2002); Melamed (2000); Gerber (1999).

of the competition authorities—the beginning of the initial contacts stage. The regulators can sometimes be alerted to pending mergers simply by reading financial newspapers or through informal discussions with firms. In such cases, the merger may not have been formally notified, but the competition regulators can bring it to the attention of their foreign counterparts and discuss its implications in a hypothetical sense. These discussions must remain hypothetical and avoid concrete details because the regulators take great care not to broach confidentiality requirements during such informal initial contacts.

Initial contacts can function as an early warning system for possibly divergent analyses between EU and US competition regulators. For example, in order to respect confidentiality requirements, EU and US competition authorities frequently engage in hypothetical discussions over market definitions and other analytical concepts of merger review that may apply to individual merger cases soon to be notified. In such cases, the regulators may speak in loose terms about, for example, a pending notification that is expected from "some firms" in "some market". Thus, while respecting confidentiality requirements, regulators are able to make informal initial contacts as the first stage of implementation cooperation. By discussing market definitions and analytical concepts, even hypothetically, before receipt of the formal notification, the regulators can alert each other to the potential use of different approaches to evaluating a merger that could lead to divergent decisions. Of course, if the firms proposing a merger agree to waive their rights to confidentiality, initial contacts need not be limited to hypothetical discussions.

The European Commission provides a useful example of the fruits of cooperation that can follow from informal initial contacts:

> Bilateral cooperation was particularly intensive with regard to the large oil merger cases, most notably with regard to the Exxon/Mobil merger. Informal contacts between the FTC and the Commission started soon after the announcement of the Exxon/Mobil transaction (December 1998), long before the formal notification occurred in May 1999. This allowed the EU and US authorities to discuss the particular competition concerns for future oil and gas output which they feared might stem from the creation of so-called 'super majors' (European Commission 2000a, 99).

Thus, in the Exxon/Mobil merger case, informal initial contacts reduced the likelihood of divergent decisions because EU and US competition regulators were able to discuss the parameters of relevant product markets (oil and gas), the identification and characteristics of possibly dominant positions (super majors) and the future market impact of the transaction. All of these cooperative exchanges of information occurred under the discretionary authority of the regulators and were initiated approximately five months prior to the receipt of formal notification of the merger. As a result, the competition regulators were able to discuss in detail important aspects of the merger and coordinate their approaches long before the statutorily mandated timetables were set in motion by the formal notification.

Initial contacts can significantly expand the competition regulators' discretion because they allow information exchanges prior to opening the formal procedures for cooperation under the terms of the Bilateral Agreement. Because regulators can discuss expected mergers and exchange information prior to the firms' formal notification, initial contacts also increase discretionary flexibility regarding the strict statutory procedures (including formal deadlines) embodied in the HSR and MCR.

2. Notification Contacts

The next stage of implementation cooperation is characterized by notification contacts. These notifications contacts are formal, written exchanges between the competition regulators. As such, they should not be confused with the formal notifications that merging firms are required to submit separately to the regulators pursuant to the HSR and MCR.

Notifications occur when one regulator informs the other that it is initiating a competition investigation that may affect interests in the foreign jurisdiction. These notification contacts are explicitly mentioned in the 1991 Bilateral Agreement and the 2002 EU-US Guidelines on Best Practices on Cooperation in Merger Investigations.[7] According to these frameworks, this stage of implementation cooperation is triggered when merger review (or other non-merger proceedings) by one jurisdiction may affect the "important interests" of the other jurisdiction. Article II.2 of the Bilateral includes a number of circumstances that ordinarily trigger implementation cooperation, and

[7] http://ec.europa.eu/competition/mergers/legislation/eu_us.pdf, last accessed 18 March 2009.

"thereby give each party the opportunity to determine the extent to which its important interests might be affected" (Parisi 1999, 136).[8]

Due to differences in domestic legislation, the EU and US deal with these notifications differently. The Commission notes differences in notification procedures that arise from EU and US domestic legislation and summarizes the EU-US notification process as follows:

> on receipt of a notification [from the merging firms], the Commission publishes a notice of the fact of the notification [from the merging firms] in the Official Journal. Thus the proposed merger is made public at the outset and all mergers meeting the criteria for notification to the US are notified, even where, on subsequent examination, they do not raise competitive concerns. The corresponding US legislation[9] requires that the fact of a merger filing, as well as its content, remain confidential. Thus the US authorities notify the Commission only when, after a preliminary examination, they decide to open an investigation into the proposed merger (1996, 3.1).

3. Review Process Contacts

Following the receipt of a formal EU-US notification, the competition regulators engage in a variety of cooperative contacts during their respective review processes. These review process contacts "can focus on any or all of the main issues likely to arise in the context of a merger investigation" (Monti 2001b, 2). During the merger review process, such contacts can occur via telephone calls, faxes, emails and even face-to-face interactions during the EU's oral hearings and US's pitch meetings.

Review process contacts include a variety of exchanges of information designed to reduce the likelihood of divergent decisions. More specifically, review process contacts frequently target substantive issues such as the definition of relevant product and geographic markets and the assessment of the likely competitive effects of the proposed

[8] This list of triggering circumstances includes matters that

- are relevant to enforcement activities of the other party;
- involve anti-competitive activities (other than a merger or acquisition) carried out in significant part in the other party's territory;
- involve a merger or acquisition in which one or more of the parties to the transaction, or a company controlling one or more of the parties ot the transaction, is a company incorporated or organized under the laws of the other party or one of its states or member states;
- involve conduct believed to have been required, encouraged or approved by the other party; or
- involve remedies that would, insignificant respects, require or prohibit conduct in the other party's territory (Parisi 1999, 1136).

[9] Hart-Scott-Rodino Act, 1976, 15 U.S.C.§ 18A(h).

merger on the relevant markets (European Commission 2000b, 3). However, even the use of similar market definitions does not always guarantee convergent decisions because of differing market conditions and competitive realities in the EU and US (Janow 2000, 44).

While review process contacts occur under the discretionary authority of the regulators, information exchanged during these contacts must respect the rights of confidentiality afforded to firms by domestic law. Competition regulators are very careful to conform to this constraint on their discretionary authority for fear of violating relevant domestic statutes, which, in turn, would likely to prompt political intervention. This feature of the institutional landscape of EU and US competition policies opens a potential avenue for firms to exert influence in concurrent jurisdiction merger reviews. However, as discussed above, most firms waive their rights to confidentiality in merger cases in order to facilitate EU-US implementation cooperation and expedite the review process. In fact, competition regulators explicitly encourage merging firms to waive their rights to confidentiality as a way to increase the effectiveness of cooperation and the likelihood of consistent decisions.[10]

EU and US competition regulators do not typically make public comments regarding their respective review processes or transatlantic review process contacts. Rather, they prefer (and in some cases are legally required by domestic law) that their respective review processes and transatlantic review process contacts remain confidential until they are prepared to announce publicly whether or not to oppose a proposed transaction. Similarly, the competition regulators prefer that other actors not publicize ongoing cases.[11] Such publicity can lead to a politicization of the merger review process. Demonstrating this aversion to publicity during the review process, Parisi argues that

> trying the case in public is of little utility. The U.S. agencies normally keep silent during the course of an investigation—even where the press reports on it. And FTC Commissioners are constrained by judicial decisions limiting their utterances while an action is pending, lest their decision be tainted with prejudice. Suffice it to say that trying to use the press as a separate front for advocacy of your case is a diversion from the necessary task of dealing effectively with the enforcement agency on the merits of the case. The same can be said for 'politicizing' the matter by appeals to parliamentarians or officials of other government agencies (1999, 141).

[10] See 2002 EU-US Guidelines on Best Practices on Cooperation in Merger Investigations.
[11] For an example of firms attempting to publicize a merger review and reactions by competition regulators, see the GE/Honeywell case discussed below.

Review process contacts occur in most internationally-oriented merger cases that are simultaneously investigated by EU and US regulators. Unfortunately, systematic and consistently reliable reporting of these intensive and sometimes mundane and technical contacts is not available. However, selected evidence of close and "effective" (i.e., contributing to convergent decisions) implementation cooperation is documented and made regularly available in a variety of forms. For instance, such references are ubiquitous in speeches made by EU and US competition officials. More formally, the European Commission reports annually to the European Parliament and Council of Ministers on bilateral cooperation with the US competition authorities. These reports showcase and provide brief descriptions of competition cases in which EU-US review process contacts are particularly effective or ineffective.

4. Remedial Contacts

Remedial contacts occur when EU and/or US competition regulators determine that certain conditions will have to be met before final approval is granted to a proposed merger. The consideration of remedies, which are submitted by the firms, is part of the overall merger review process. However, this is considered a separate stage of implementation cooperation for the current study because, while competition regulators may agree throughout the review process contacts, they may disagree on the precise nature of the remedies necessary for approval. Like the other stages of implementation cooperation, remedial contacts occur under the discretionary authority of the EU and US competition regulators.

As the Commission argues, EU-US cooperation via remedial contacts is specifically in the interest of the firms involved: "co-operation in the devising of remedies can help the notifying parties avoid 'double-jeopardy' whereby they are required to negotiate remedies sequentially, and thus have to make further concessions to the second agency to secure the clearance of a deal which has already received the blessing of the first" (European Commission 1999, 4.2). While remedial contacts are important for merging firms, their importance for competition regulators is fundamentally based in the fact that disagreements over remedies can lead to divergent decisions, which may prompt political intervention. As discussed below, remedial contacts have evolved to include discretionary cooperation in market testing and implementation of remedies, two practical areas of merger review not explicitly identified in the Bilateral Agreement.

Remedial contacts represent the last practical stage of EU and US competition regulators engaging in implementation cooperation. Based on the data provided in the Commission's annual reports and the commentaries of EU officials, remedial contacts provide another means by which EU and US competition regulators reduce the likelihood of divergent (especially conflicting) decisions. In addition, the use of remedial contacts suggests that the EU and US competition regulators are increasing their implementation cooperation through their discretionary authority—market-testing and implementation of remedies.

IV. Flawed Cases of EU-US Implementation Cooperation

The preceding discussion suggests that EU-US implementation cooperation functions smoothly and tends to reduce the likelihood of divergent decisions. If competition regulators have reduced the likelihood of divergent decisions, then political intervention should be unlikely in individual concurrent jurisdiction merger cases. In fact, this is what appears to have happened. However, political intervention, while infrequent, does still occur. While implementation cooperation has contributed to depoliticizing transatlantic competition relations by reducing the likelihood of divergent decisions, competition policy—especially international cooperation in competition policy—remains susceptible to politicization.

Signs of politicization were particularly evident in two concurrent jurisdiction merger cases: the 1997 Boeing-McDonnell Douglas (BMD) merger and the 2001 GE/Honeywell (GEH) merger. EU and US competition regulators regard implementation cooperation to have been particularly "flawed" in these two cases. The current study uses the term "flawed" to indicate an outcome that deviates from the preferences of the competition regulators. Such deviations display significant levels of political intervention in and/or public challenges by private actors to the merger review process despite implementation cooperation. Based on their preferences and the cooperative framework created by the regulators, such political intervention and public challenges are undesirable outcomes. From the perspective of the competition regulators, the occurrence of such undesirable outcomes suggests a flaw in the framework or in the way in which it was implemented in these two cases. Therefore, both of these cases require more in depth analysis to understand where and why flaws occurred in the different stages of implementation cooperation.

1. The Boeing-McDonnell Douglas Merger of 1997

The Boeing/McDonnell Douglas (BMD) merger was the first significant flawed case of EU-US implementation cooperation since the 1991 Bilateral Agreement first established a cooperative framework for transatlantic competition relations. The case provoked considerable public and private attention because it involved a merger between two large US firms that was challenged in the EU but approved in the US. The EU's divergent decision and the subsequent US reaction surprised many observers in Brussels and Washington and contributed to the high-profile of the case. Due to the intransigent positions of the EU and US, the case "took the United States and European Union to the brink of a trade war" (Evenett et al. 2000, vii).[12] However, the flawed nature of this case appears to be rather easily explained. The escalation of the case should not surprise observers because such a divergent decision by competition regulators is likely to be perceived as a threat to national and/or constituent interests and, therefore, *should* prompt political intervention. In the end, the BMD merger was particularly significant not because of the escalation of political intervention, but because it served as a valuable learning experience on a number of fronts for both EU and US competition regulators.

The intent of the current discussion is to draw out lessons from the BMD case for regulators, politicians and merging firms. More detailed reports of the substantive issues of the merger and the divergent analyses taken by the EU and US can be found elsewhere.[13]

This case began when the Boeing Company and the McDonnell Douglas Corporation (MDC), two US aerospace companies, announced plans to merge on

[12] For similar claims, see ICPAC (2000) and Coleman et al. (1997).
[13] For example, see Damro (2001), Boeder (2000), ICPAC (2000), Van Miert (2000), Karpel (1998), Peck (1998), Fox (1997) and Snyder (1997).

December 15, 1996.[14] In accordance with the provisions of the Bilateral Agreement, and following the receipt of formal notification from the merging firms, the EU and US competition regulators notified each other that they were both opening their own investigations into the BMD case.

Following a preliminary investigation in Phase I, the Commission announced its intent to open an in-depth Phase II investigation on March 17, 1997. The Commission was concerned that Boeing already enjoyed a dominant position in the global market for aircraft over 100 seats—a position that would be strengthened by adding MDC. More specifically, the deal would have increased Boeing's share of the market in aircraft over 100 seats from 64 to 70 percent and left Airbus as the only other competitor in that product market. In addition, the Commission was concerned that the merger would increase significantly Boeing's defense and space business. In early May, the EU's Competition Commissioner Karel Van Miert also expressed his concerns about Boeing's twenty-year exclusive supply agreements with American Airlines and Delta Airlines, declaring them "totally unacceptable" (Morrocco 1997, 24). These agreements would have locked the airlines into purchasing arrangements requiring them to buy from only the newly merger BMD for twenty years.

On May 21, the Commission issued its formal Statement of Objections. The statement outlined the EU's concern that the merger would strengthen Boeing's existing dominant position. According to the MCR, such a transaction would be anticompetitive.[15] At this point, the US's FTC was unable to comment on the merger because its review was still ongoing (White House 1998a).

The EU's Statement of Objections included concerns over the impact of the merger on competition in the defense industry. However, following a communiqué from the US requesting comity considerations, the Commission agreed not to investigate the defense related portions of the merger. In accordance with the Bilateral Agreement, the Commission's decision reflected a determination that this aspect of the merger represented an "important interest" of the US. The fact that the EU dropped its defense

[14] According to the agreement, Boeing would purchase McDonnell Douglas for $13.3 billion.

[15] Under the MCR, the Commission is mandated to prevent the creation or strengthening of "a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it" (Article 2[2]).

related complaints suggests that the Commission calculated that including such a politically sensitive subject as defense would have increased significantly the likelihood of political intervention from the US (i.e., White House and Congress).

On July 1, it became apparent that the decisions of the EU and US competition regulators were significantly diverging. On that day, the FTC approved the BMD merger. According to the FTC's analysis, the merger would not raise significant competition concerns because MDC was no longer competitive in the commercial transport market (Sparaco 1997, 67). Because the FTC approved the merger, remedial contacts between the US and EU competition authorities were necessarily limited.

In the hopes of gaining similar approval in the EU, BMD submitted a new package of remedies to the Commission. This package was rejected by the Commission after closed-door negotiations on July 16. According to Boeing, the Commission's rejection was based on lingering concerns over BMD's dominant position and the exclusive supply agreements (Boeing 1997a).

Facing an intransigent Commission and with a final decision in the case scheduled for July 23, US politicians began to intervene in the process with threats of retaliation. These threats of retaliation took the form of numerous foreign intervention instruments. Once it became clear that the EU would not approve the merger without remedies (i.e., a divergent decision), the White House intervened with President William J. Clinton stating that he might consider a complaint to the World Trade Organization or retaliatory tariffs if no resolution was reached.[16] The US legislature also intervened in the review process. Both the House of Representatives and the Senate passed resolutions opposing EU "interference" in a US business transaction.[17] On July 16, the US Senate unanimously approved a resolution that condemned the EU for its intentions (Wolf 1997).

Roberto provides a useful summary of the political intervention that occurred in the BMD case as well as the Commission's reaction:

> Congress, led by legislators from Boeing's home state of Washington, quickly responded. In its July 23, 1997 resolution chastising the EC's actions, the U.S. House of Representatives said the EC was 'apparently

[16] Clinton stated that "we have a system for managing this through the World Trade Organization and we have some options ourselves when actions are taken by Europe in this regard" (White House 1998b).

[17] H.R. Res. 191, 105th Cong. (1997), 143 Cong. Record 5550 (1997); S. Res. 108, 105th Cong. (1997), 143 Cong. Record 7609 (1997).

> determined to disapprove the merger to gain an unfair competitive advantage for Airbus Industries, a government-owned aircraft manufacturer; and… this dispute could threaten to disrupt the overall relationship between the EU and the United States which had a two-way trade in goods and services of approximately $366 billion in 1996'.[18] Furthermore, resolutions passed in both the House and Senate vowed that any disapproval by the EC of the Boeing/McDonnell Douglas merger 'would constitute an unwarranted and unprecedented interference in a United States business transaction that would threaten thousands of American aerospace jobs'.[19] In addition, reports circled that the Clinton administration threatened to challenge government subsidies to Airbus Industries before the WTO or to impose taxes or penalties on Airbus-manufactured planes sold in the United States.[20] The FTC was in turn accused of trying to protect a 'national champion' by approving the merger[21]… Meanwhile, Van Miert insisted that the EC was not out to protect Airbus[22] (1998, 598-599).

For their part, Boeing and MDC continued to resist the demands of the Commission despite a fast-approaching MCR deadline for a final decision. Finally, facing the reality that the EU was not going to change its decision, the merging firms contacted the Commission with an eleventh-hour solution on July 23. Boeing Chairman and CEO, Philip Condit, argued that BMD's concessions were made due to a fear that the newly merged company would have faced "large fines and potential harm to our customers" without EU approval (Boeing 1997b, 1). The Commission accepted the final package of remedies offered by BMD, which addressed each of the EU's competition concerns.[23] Formal authorization of the merger as compatible with the SEM came on July 30. The newly-merger BMD began operating on August 4 as the largest aerospace company in the world (Damro 2001, 215).

2. The Lessons of BMD

[18] H.R. Res. 191.
[19] H.R. Res. 191 and S. Res. 108.
[20] …Vice President Al Gore stated that the United States would act quickly if a U.S. company were put at an 'unfair competitive disadvantage because of an improperly motivated regulatory decision of a foreign country.' See Stanley Holmes and Michele Flores, "Boeing Deal Tussle About Trade," *Seattle Times*, May 15, 1997, at D1.
[21] See 'Boeing v. Airbus: Peace in Our Time', *Economist*, August 1, 1997, at 59, 61.
[22] See Emma Tucker, Editorial, 'Van Miert's Finest Hour', *Financial Times*, July 24, 1997, at 11.
[23] For the exact remedies, see Boeing (1997b).

The BMD case provides a clear instance of divergent decisions and political intervention. As such, the case reveals useful insights for the current study. The case supports claims that politicians are likely to perceive divergent decisions as threats to national and/or constituent interests. Based on this perception, US politicians decided to intervene in the case with a variety of foreign intervention instruments. The outcome of the case, however, suggests that targeting such political pressure at the Commission is of little utility.

In addition, this flawed case served as a valuable learning experience for many actors involved in the merger review process. While the Bilateral Agreement had been signed six years prior, the competition regulators' experience at cooperating under the provisions was still limited. As Parisi argues "Unfortunately, despite the enforcement agencies' best efforts to explain the Agreement and operations under it, some misunderstandings of the Agreement were reported, particularly during the course of the *Boeing/McDonnell Douglas* merger case" (1999, 137).[24] Charles S. Stark, Chief of the Foreign Commerce Section in the DoJ's Antitrust Division, made clear the valuable lessons learned from BMD:

> Divergent antitrust approaches to the same transaction undermine confidence in the process; they risk imposing inconsistent requirements on the firms, or frustrating the remedial objectives of one or another of the antitrust authorities; and they may create frictions or suspicions that can extend beyond the antitrust arena—as we witnessed in the Boeing/McDonnell Douglas matter. *The Boeing/McDonnell Douglas experience led the agencies on both sides to draw a deep breath and commit themselves to extra and sustained efforts to make the coordination process work as well as it possibly can* (italics added) (Stark 2000, 5).

Interviewees familiar with the BMD case agree that the merger showed competition regulators that they should share more information in the early stages of their respective review processes in order to reduce the likelihood of surprising their foreign counterparts with an analysis that will likely result in a divergent decision. This lesson was not lost on subsequent EU-US implementation cooperation. In fact, after BMD, the US and EU competition regulators began exchanging and discussing mergers much sooner in their respective review process (i.e., initial contacts) and more intensively.

Indeed, research interviewees agree that the lessons learned from the BMD merger contributed to the success of the "best practice" case of WorldCom/MCI a year later.

3. The GE-Honeywell Merger of 2001

The 2001 GE/Honeywell (GEH) merger is another flawed case of EU-US implementation cooperation in competition policy. Like the BMD merger, the case provoked considerable public and private attention because it showcased a merger between two large US firms that was challenged in the EU but approved in the US. As discussed above, such an outcome should certainly prompt political intervention. Unlike the BMD case, GEH ended with the firms abandoning the merger instead of agreeing to implement the remedies required by the EU. If the BMD merger case served as a valuable learning experience for the EU and US competition regulators, how and why did the GEH merger case become flawed? Did the competition regulators forget the lessons learned from BMD?

The following discussion of the GEH merger again focuses on the motivations of regulators, politicians and firms. More detailed discussions of the GEH merger and the divergent analyses taken by the EU and US are reported elsewhere.[25] The following analysis of the merger focuses on the behavior of the EU competition authorities as the regulators who withheld approval of the merger.[26]

On October 22, 2000, two US firms—the General Electric Company (GE) and Honeywell International Inc. (Honeywell)—entered into an agreement under which General Electric 2000 Merger Sub, Inc., a wholly owned subsidiary of GE, would be merged with Honeywell. As a result, Honeywell would become a wholly owned subsidiary of GE.[27] While GE's diversification strategy had included a number of prior mergers, the transaction with Honeywell would be its largest ever.

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[24] "One such misconception was the assertion that, in a merger notified to both parties, one party 'goes first' while the other defers. This is clearly wrong… (Parisi 1999, 137).

[25] For example, see Fox (2007), Morgan and McGuire (2004), Burnside (2002) and Pflanz and Caffarra (2002).

[26] For more on the US DoJ's review of the GEH merger and differences with the EU, see Evans (2002).

[27] GE and Honeywell are highly diversified industrial firms. According to the European Commission, GE is "active in fields including aircraft engines, appliances, information services, power systems, lighting, industrial systems, medical systems, plastics, broadcasting (through the NBC media channel), financial services and transportation systems" while Honeywell is "an advanced technology and manufacturing company serving customers worldwide with aerospace products and services, automotive products,

On February 5, 2001, the Commission received the formal notification of the proposed merger pursuant to Article 4 of the MCR. Proposed as the largest industrial merger in history and active in the EU's Single Market, the GE/Honeywell merger easily met the thresholds in the MCR and fell within the EU's jurisdiction.[28] At the time, GE's CEO Jack Welch announced publicly "This is the cleanest deal you'll ever see… Every single activity, there is no product overlap… Everything is complementary. That's not a speech for the antitrust people, that's fact" (Murray et al. 2001, A1). However, on March 1, 2001, the Commission took an alternative view and decided to initiate Phase II proceedings in the case.

On May 8, 2001, the Commission released a Statement of Objections identifying competition concerns surrounding the proposed GE/Honeywell merger. According to the Commission's press release,

> GE alone already had a dominant position in the markets for jet engines for large commercial and large regional aircraft. Its strong market position combined with its financial strength and vertical integration into aircraft leasing were among the factors that led to the finding of GE's dominance in these markets. The investigation also showed that Honeywell is the leading supplier of avionics and non-avionics products, as well as of engines for corporate jets and of engine starters (i.e., a key input in the manufacturing of engines). The combination of the two companies' activities would have resulted in the creation of dominant positions in the markets for the supply of avionics, non-avionics and corporate jet engines, as well as to the strengthening of GE's existing dominant positions in jet engines for large commercial and large regional jets. The dominance would have been created or strengthened as a result of horizontal overlaps in some markets as well as through the extension of GE's financial power and vertical integration to Honeywell activities and of the combination of their respective complementary products. Such integration would enable the merged entity to leverage the respective market power of the two

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electronic materials, specialty chemicals, performance polymers, transportation and power systems as well as home, building and industrial controls" (2001a, 2).

[28] Due to confidentiality provisions, the exact numbers for GE and Honeywell turnover are not available. According to the Commission,

> The undertakings concerned have a combined aggregate worldwide turnover of more than EUR 5 000 million (for the full year 1999, EUR [...] * for GE and [...]* for Honeywell). Both GE and Honeywell have a Community-wide turnover in excess of EUR 250 million (for the full year 1999, [...]* for GE and [...]* for Honeywell), but they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension" (European Commission 2001a, 3).

The parts of this text that are enclosed in square brackets and marked with an asterisk were edited by the Commission to ensure that confidential information was not disclosed.

> companies into the products of one another. This would have the effect of foreclosing competitors, thereby eliminating competition in these markets, ultimately affecting adversely product quality, service and consumers' prices (European Commission 2001b, 1-2).

In its objection, the Commission clearly stated its concerns over GE's existing dominant position in specific relevant markets. According to the MCR, a merger that strengthens such a dominant position is likely to be anticompetitive and, therefore, should not be approved.[29] However, the EU's objections were also based on the use of an analytical tool in merger review known as "bundling" (Pflanz and Caffarra 2002). The economic theory of bundling suggests that competition may be undermined if a firm "bundles" its products from different markets because the combined range of products would give it "undo power" (Murray et al. 2001, A4). Reflecting this concern over bundling, an EU competition official, Enrique Gonzalez Diaz, "argued that by buying Honeywell, GE could parlay its powerful position in the large jet-engine market into possible dominance of a related industry, avionics, which produces crucial flight equipment. Honeywell is one of the strongest players in this market" (Murray et al. 2001, A4). Thus, a central problem with the proposed GEH merger was that GE could abuse its dominance *in the future* by bundling aircraft engines with flight equipment.

Because bundling relies on a prediction of the future structure of the market(s) and behavior of the firm, analysis of dominance may be particularly problematic when combined with or replaced by concerns over "bundling". On this basis, GE rejected the Commission's use of the economic theory of bundling from the beginning of the review process. In the US, the DoJ did not use bundling in its analysis.[30] This divergence in the analytical concepts used by the EU and US regulators might have been overcome by closer cooperation at an earlier stage. However, as discussed below, initial contacts between the two competition agents were limited due, in part, to the speed with which the merger agreement had been reached between GE and Honeywell and the firms'

[29] Under the MCR, the Commission is mandated to prevent the creation or strengthening of "a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it" (Article 2[2]).

[30] According to Hargreaves and Spiegel, the Chicago School was largely "responsible for discrediting the theory of 'bundling' in the US" (2001, 4). In addition, US commentators have argued "Although often applied in the computer industry, the bundling theory isn't widely accepted in aerospace… where sophisticated buyers, not consumers, choose among a relative handful of players" (Murray et al. 2001, A4).

reluctance to authorize pre-notification contacts between its legal counsel and the EU's Competition Directorate.[31]

After months of contentious negotiations, on June 14, 2001, GEH submitted a proposal to address the Commission's concerns about the proposed merger. While this submission came before the MCR's formal deadline, GEH made it clear to the Commission that this was its "last offer" (European Commission 2001c, 1). As the Commission notes,

> GE submitted a proposal for a package of undertakings to address the competition concerns identified by the Commission in its Statement of Objections of 8 May 2001. The proposal comprised structural undertakings relating to avionics- and non-avionics products, engine starters, small marine gas turbines, large regional jet engines and behavioural undertakings concerning corporate jet engines, the commitment not to engage in bundling practices and GECAS (2001a, 112).

The role of GECAS (GE Capital Aviation Services) would become a prominent point of contention between the merging firms and the Commission.[32] In particular, GEH's dominant position could be used to leverage GECAS—"the largest purchaser of aircraft, ahead of any airline" (EU Press Release 2001)—into purchasing and/or leasing only planes with GEH aircraft engines and flight equipment.

On the same day that GEH submitted its "last offer", the Commission announced that the proposal was insufficient to remove the competition problems identified in the Statement of Objections (European Commission 2001b, 2). The Commission also noted that it was regretful that GEH's proposal did not reflect remedies that the Commission had suggested earlier in the review process. These remedies were structural commitments that would have addressed the Commission's concerns over GECAS:

> In particular, we have explored with the parties commitments which would not have entailed further divestments in the aerospace industry but rather a structural commitment to modify the commercial behaviour of GECAS. We regret that this avenue has not been pursued. Unless the merger notification is formally withdrawn, the Commission will continue with the review procedure (European Commission 2001c, 1).

[31] More precisely, the merger was investigated by the EU's Merger Task Force, a unit within the Competition Directorate that no longer exists.
[32] GE Capital is GE's financial arm, while GECAS is GE Capital's aircraft leasing unit.

GEH did not withdraw the merger notification, and the Commission continued its review in accordance with the procedures established under the MCR. In response to the Commission's rejection of the offer, GE's Jack Welch declared publicly "You are never too old to get surprised… The European regulators' demands [for divestitures] exceeded anything I or our European advisers imagined and differed sharply from antitrust counterparts in the US and Canada" (Hargreaves and Spiegel 2001, 1).

Following the EU's rejection, negotiations continued between the Commission and the firms. However, by this time, US politicians began intervening in the merger review process. For example, US Attorney General Ashcroft dispatched a senior political appointee, Deborah Herman, to meet with EU officials to explain why the Department of Justice had approved the merger. In addition, "On June 15th, [President] Bush said he was 'concerned' about the European position" (Economist 2001, 5). Finally, Senator Jay Rockefeller wrote a letter to the Commission supporting the merger (Sorkin 2001, C9).

This political pressure was likely supported (if not initiated) by GEH. As Hill reports, "'At the time, we thought it would be impossible that the Europeans would try to block a U.S.-U.S. deal that had been given the go-ahead by Washington,' said an executive close to G.E. who spoke on the condition of anonymity. 'The conventional wisdom was that the political pressure would be too great'" (2001, C4). In addition to the increasing political intervention by US politicians, GEH also stepped up its publicity campaign to increase pressure on the Commission.

This strategy of publicity and any belief that political pressure might change the Commission's decision were clearly not informed by the lessons of the BMD merger five years earlier. Rather, such a strategy reflects a lack of knowledge about the Commission's commitment to resist external threats to its basic interest in regulatory independence. For example, in response to the publicity campaign, Monti deplored GEH's attempts at politicization as unjustified because the Commission had not yet issued its final decision in the case: "I deplore attempts to misinform the public and to trigger political intervention. This is entirely out of place in an antitrust case and has no impact on the Commission whatsoever. This is a matter of law and economics, not politics" (European Commission 2001d).

Undaunted, and perhaps emboldened, by the political and public challenges to the EU's merger review process, Commissioner Monti reiterated the Union's opposition to the merger on June 18, declaring that it

> would combine GE's strong position in the aircraft engine markets with Honeywell's similarly strong position in avionics and non-avionics such as weather turbulence detection products, collision avoidance and flight management systems and so-called black boxes. To this powerful combine, one must also add GE's leasing and financial arms, respectively GECAS, the largest purchaser of aircraft, ahead of any airline—and GE Capital. This could lead to less competition in the engine and in the aerospace sectors and result in higher prices for customers in the medium term (European Commission 2001d).

On June 26, 2001, the EU's Member States entered the merger review process. In accordance with the MCR, the representatives of the fifteen national competition authorities convened as the Advisory Committee on Concentrations (ACC) and endorsed the Commission's draft decision to block GE/Honeywell merger.[33] Before the ACC decision, GE initiated extensive lobbying efforts in the Member States (Sorkin 2001, C9).[34] This strategy was not likely to be useful because the ACC is simply advisory, it cannot reject or amend such reports. In any event, the ACC's endorsement of the Commission's draft decision suggests that GEH's lobbying efforts had little effect on the Member States.

The Commission's final decision was scheduled for June 30, 2001. Despite having submitted its "last offer", GE re-entered negotiations with the EU on July 27. This reversal of position may have been the result of the original GEH merger agreement that required GE to make its "best effort" to pursue regulatory approval of the merger (Sorkin 2001, C9). Under the terms of the merger agreement, had GE not re-entered negotiations with the Commission, Honeywell may have taken them to court and GE could have faced penalties.

During the renewed negotiations, GE did propose additional remedies, which were submitted to the Commission on June 28, 2001. According to the Commission,

[33] The exact voting in the ACC is not publicly available. However, leaks to the press suggest that only two members did not support the draft: Greece was not present and Ireland abstained from the vote (Sorkin 2001, C9).

[34] For more on these national lobbying efforts, see Meller (2001).

> At a very late stage in the procedure… the parties withdrew the package of undertakings submitted on 14 June 2001 and proposed a new and substantially modified set of undertakings. The new proposal relates to the sale of a minority interest in GECAS to third parties selected by GE combined with the behavioural commitments already submitted concerning GECAS's conduct in its dealings with Honeywell. In parallel, the parties reduce their proposed divestitures of Honeywell aerospace products (European Commission 2001a, 122-123).

However, the Commission remained unconvinced by the new offer, arguing that "In the present case the proposed undertakings are insufficient, they do not allow sufficient time for consultation and in any event they do not solve the competition problems identified" (European Commission 2001a, 125).

In the US, political attention remained focused on the case. For example, Paul H. O'Neill, US Secretary of the Treasury "attacked the European Commission, saying that it would be 'off the wall' for European regulators to block the deal, which American regulators have already approved" (Sorkin and Meller 2001, C1). Mr. O'Neill also intervened publicly stating

> that the European Commission had too much power. 'They are the closest thing you can find to an autocratic organization that can successfully impose their will on things that one would think are outside their scope of attention,' he said. 'When I see things like this, they're irritating,' Mr. O'Neill added, 'and yes, I'd like to say they need to stop, but they will stop in time' (Sorkin and Meller 2001, C2).

For its part, GEH began to view its proposed merger as a lost cause. In candid terms, GE's soon-to-be chairman and CEO Jeffrey Immelt revealed the dire circumstances when he admitted "We [GEH and the Commission] are so far apart that this is not a place where we would use political pressure" (Sorkin 2001, C9). Immelt's comments are notable for their implied understanding that political pressure was viewed as a possible (but no longer useful) option for winning regulatory approval of a concurrent jurisdiction merger.

Despite the publicity and political pressure, the EU regulators stood firm on their economic analysis of the proposed merger. On what would this time be GE's actual last offer, the Commission remained unconvinced for a number of reasons:

> On 28 June 2001, two weeks later and well beyond the deadline for the submission of undertakings, GE proposed a new set of remedies. Apart

> from the fact that these remedies were not adequate to deal with the competition concerns, they were submitted at a very late stage in the procedure and continued to present a series of technical shortcomings. Indeed, according to the Commission's Notice on remedies acceptable under the Merger Regulation, the Commission can only accept modified commitments when these solve the competition concerns in a clear and straightforward manner without the need for a further market test. The offer submitted by GE on 28 June did not meet this condition. The remedies proposed post-deadline were not sufficiently clear-cut to solve the identified competition concerns in a straightforward manner and could therefore not be accepted (Giotakos et al. 2001, 12-13).

The formal rejection of this final offer came on June 30, 2001, when the EU declared the merger incompatible with the SEM.[35]

4. The Lessons of GEH

On its own, the GEH merger case is significant because, as Monti acknowledged, "this was the first time the European Union and U.S. antitrust agencies have looked at the same facts in the same market and gone different ways" (Lawsky 2001, 1). Like the BMD merger case, GEH also provides lessons for implementation cooperation. For the competition regulators, information asymmetries may have contributed to the divergent analyses, in particular the use of the economic concept of bundling. Despite the lessons of BMD, the regulators' ability to engage in extensive initial and review process contacts was limited in this case by the speed with which the original merger agreement was reached between the firms (see below). In addition, the GEH case reveals how tenaciously competition regulators will resist external threats to their basic interest in regulatory independence. The external threats came in the form of political pressure and publicity campaigns, both of which challenged the regulator's own preference to maximize certainty and decision-making authority, and, therefore, were resisted.

For the US politicians, the EU's divergent regulatory decision—blocking a merger between two US firms that, at the time, was the largest industrial merger ever and was approved by the US competition regulators—was perceived as an unequivocal threat

[35] For more on the EU's reasons for blocking the merger, see Pflanz and Caffarra (2002) and Giotakos et al. (2001).

to national and/or constituent interests that prompted their intervention in the review process.

The GEH case also provides lessons for firms engaging in concurrent jurisdiction mergers. Up to this point, the current study has emphasized the fact that merging firms can exert influence in implementation cooperation by exercising their rights to confidentiality of sensitive business information. However, the GEH merger case provides additional insights into how firms can influence the merger review process. These lessons are based on (mis)calculations made by the merging firms in the merger review process, not necessarily on the general process of implementation cooperation. Nevertheless, they reveal additional means by which the likelihood of political intervention may be increased significantly in the merger review process.

The first lesson concerns the speed by which the merger was originally agreed. The GEH deal was notable for being "negotiated over a three-day weekend, too fast for the company to even consult its outside antitrust counsel or notify regulators" (Murray et al. 2001, A1).[36] GE itself admitted that the deal had been reached too quickly to engage actively in pre-notification contacts with the European Commission. As Hill argues,

> Mr. Welch's first mistake on the Honeywell deal was apparent the day he announced it. 'We haven't touched every base,' he said when asked whether G.E. and Honeywell had contacted regulators in the United States and Europe, as is often the case on big transactions. Indeed, the deal was negotiated in only 72 hours by Mr. Welch, who rushed to break up a planned merger between Honeywell and United Technologies, an old-style conglomerate that makes Pratt & Whitney aircraft engines and Otis Elevators (2001, C4).

While Welch was renowned for his decisiveness, the decision to proceed quickly with the merger created early problems with the regulators: "Mr. Welch's decisiveness… led him to put the deal together in just a few days without sounding out regulators. And when they balked, he refused to make enough concessions to satisfy them" (Sorkin 2001). As a result of these limited contacts with the regulators, "It was more than two months before Mr. Welch realized that the deal could face serious obstacles in Europe, executives close to him said" (Hill 2001, C4). Thus, regarding the initial merger

[36] In addition, "GE conceded yesterday that the Honeywell deal came together too quickly for it to consult its European merger lawyers" (Murray et al. 2001, A4).

agreement, the preceding analysis suggests that no matter how quickly a merger deal is agreed, legal counsel in Brussels and/or Washington should be consulted immediately. GE's problems in this regard appear to have emerged because of the firm's desire to sign a merger agreement as quickly as possible (72 hours) in order to beat United Technologies to the punch.

A separate but related lesson from the GEH merger relates to the initial contacts stage of the review process. During this stage, pre-notification contacts (PNCs) between the merging firms and the EU's Competition Directorate occur under the discretionary authority of competition regulators as confidential meetings and other less formal contacts arranged *prior to formal notification of a merger deal*.[37] At these meetings, case handlers usually inquire about what markets will be involved, what the current market shares are of the merging firms and what the future market position will be of the merged firm.[38] The Competition Directorate publicly advocates the use of PNCs, which are becoming increasingly viewed as standard operating procedures. Because they occur prior to the formal notification of the merger, PNCs are a crucial part of the merger review process where firms begin making their arguments for approval of a proposed merger before the tight statutory deadlines are set in motion. In addition, PNCs function

[37] The EU's MCR requires merging firms to file a notification within seven days "after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest. That week shall begin when the first of those events occurs" (Article 4[1]). While not formally mentioned in the MCR, first contacts between regulators and firms are often taken prior to this seven-day period, during a so-called pre-notification phase.

There is a great deal of variation in duration of PNCs because merger agreements are constructed in very different ways. The actual process by which firms agree to a merger can range from a "golf-course" agreement to a formal Memo of Understanding between the firms. As an agreement is being reached, the merging firms generally will contact their legal counsel (whether in-house or a private practice law firm) to inquire about regulatory requirements. (Sometimes firms notify their lawyers of a merger at the same time the news is made publicly available. When this happens, the firms must meet the seven-day deadline for filing a completed Form CO. In such cases, lawyers have been known to ask for additional time, arguing that the Form CO cannot be completed by the deadline. When an incomplete Form CO is submitted, the Competition Directorate is required to ask for another filing, which further delays the entire merger review process. Thus, such firms are occasionally granted extensions beyond the deadline.) The legal counsel in Brussels then typically contacts the Competition Directorate, explaining that a merger filing is expected. Usually that same day, the legal counsel is informed of which case manager to contact. Within a few days, the legal counsel has organized a PNC meeting and submitted a memo—about five pages detailing which firms, sectors and markets will be involved in the proposed merger.

[38] PNCs are usually attended by the case manager, two handlers, representatives of the parties and their outside counsel. The actual negotiators of the merger are often advised by their legal counsel to be present as the representatives of the merging firms.

as an early warning system through which merging firms can be alerted to potential problems the Commission may have with a proposed merger.

Despite the benefits and growing use of PNCs, the sense of urgency in the GEH merger case limited their utility. GE and Honeywell did not authorize their legal counsel to engage in active and vigorous PNCs with the Commission. Had the firms done so, they would have been alerted that the Competition Directorate had problems with the merger and, possibly even that it was considering the use of the economic theory of bundling. Armed with this information, GE and Honeywell would have had more time to formulate and press their arguments and/or adjust their deal accordingly.

Another lesson for merging firms relates to GEH's strategy of generating publicity to challenge the EU's opposition to the merger. Put simply, this case suggests that agitating for media exposure does not increase the likelihood that the EU will approve a merger. Such efforts simply challenge and irritate the Competition Directorate. Therefore, a media campaign may actually make the Commission less likely to change its position on a merger. Similarly, the Commission is challenged and irritated when merging firms attempt to generate political intervention through the Member States of the EU. In the GEH case, the firms lobbied in the national capitals prior to the ACC meeting. However, as mentioned above, the Member States are not particularly productive targets for such influence because the ACC is simply advisory and operates according to a majority decision-making rule. The only clear impact of these strategies is that they raise the suspicions of the Commission that the merging firms have something to hide.

These lessons are valuable not only for firms engaging in concurrent jurisdiction mergers but for all firms considering mergers that will meet the MCR's thresholds for review. In short, this case suggests that the EU is better consulted than challenged. But, what does the analysis reveal about why the GEH merger case became flawed? The divergent decision appears to be a central cause of the political intervention—politicians and commentators alike were surprised that the EU could block a merger between two US firms that had been approved by the US competition regulators. However, had the EU and US competition regulators engaged in initial contacts, they might have avoided the divergent decisions, including the EU's use of bundling. Based on the BMD merger, the competition regulators should have been aware of this fact. So, what happened to flaw their cooperative system? It appears that the merging firms are responsible for the flaw: the speed with which the merger agreement was reached and the resulting decision not to engage in PNCs severely limited the ability of the EU and US competition regulators to share information and potentially reach a convergent decision. In addition, the merging firms' media campaign and efforts to generate political pressure may have reduced the likelihood that the Commission would change its decision to one that was convergent with the US competition regulator's decision.

V. The Political Decision to Intervene

The preceding sections have focused on the role of firms and politicians in the decision-making of competition regulators. However, another important part of the story revolves around the decision-making of elected officials (politicians) in the merger review process. As the BMD and GEH cases suggest, the role of firms may help to explain political decisions to intervene in individual cases of regulatory cooperation in merger review. It would be naïve to think that firms never play a role in the political decision to intervene in the merger review process—certainly politicians in both the EU and US would be less likely to intervene if they were not prompted to do so by their constituents, which include firms.

The BMD and GEH cases provide useful examples of the potential influence of firms on the political decision to intervene. If firms do play an important role in determining these decisions, then the US politicians likely weighed the costs of not intervening (offending BMD and GEH) versus the costs of intervening (offending competitors of BMD and GEH). But the merging firms and their competitors in both cases can presumably influence the decision to intervene by adjusting their political support (e.g., reducing, withholding or redirecting private campaign contributions and public endorsements).

If this is the case, a fundamental question needs to be answered. How does a politician determine the value of the claims of the merging firms versus the claims of those firms' competitors, all of whom may be constituents and political supporters?[39]

[39] For simplicity, the following discussion assumes no variation in the values attributed by politicians to the claims of competitors, regardless of whether they are more appropriately characterized as domestic or foreign. However, it is worth noting that the foreign-based competitors of BMD and GEH, like Airbus and

Answering these questions requires a theory of the intervention cost calculations made by politicians. While such an undertaking is outside the scope of this paper, some preliminary comments are in order.

Two factors may prove useful for explaining the relative values attributed to these two different groups of firms: size and organizational ability.[40]

First, a privileged position may be given to the claims of merging firms involved in concurrent jurisdiction mergers because of the size of such firms. As was the case in BMD and GEH, the merging firms were very large. They were large enough to meet the statutory thresholds of the US's Hart-Scott-Rodino Act and the EU's Merger Control Regulation. Also, given the fact that competition regulators challenged both mergers, BMD and GEH controlled a large enough portion of the market that they could be considered to have a 'dominant position' in the parlance of EU competition law.

This potential explanation implies that the larger the firm, the more resources that firm has at its disposal to pressure politicians into intervening on their behalf. Such resources include, but are not limited to, campaign contributions, access to politicians and access to the media. Such large firms can also argue that prohibition of their merger will result in the loss of numerous jobs, which may adversely affect the constituent interests of targeted politicians. In comparison, competitors of the merging firms may be smaller and, in turn, have fewer political resources at their disposal. They may also have less of a desire to expend those resources obstructing a single merger than the merging firms' desire to complete the merger—the merging firms have already fully and publicly (to shareholders, etc.) committed to the merger and will go to considerable lengths to ensure regulatory approval. The role of and arguments presented by competitors also typically remain part of the confidential record of the oral hearing or market-testing procedures. Thus, competitors may have less access to and less of a desire to use the media. These limitations decidedly shift the politicians' decision to intervene in favor of the claims of the larger firms.

Pratt & Whitney respectively, may have been valued less by US politicians if they contributed less to politicians' campaigns and/or were not really considered constituents by the politicians.

[40] There are, of course, a large number of other factors that may play a role in a politician's decision to intervene, including their interest in seeking media, national, and international influence, as well as their views on nationalism, economic competitiveness and protectionism.

Second, a potentially useful factor for explaining the relative values attributed to the claims of merging firms versus competitors may by the organizational abilities of the two groups. Merging firms are generally well-organized, committed and united in their determination to achieve one goal: approval of the merger. Alternatively, competitors of the merging firms behave in accordance with a number of possibly different preferences based on their share of the market, etc. As a result, the competitors of merging firms may be less well-organized, committed and united in their determination to obstruct the merger. Because competitors are typically more numerous than the merging firms and have different preferences vis-à-vis any given merger, it is more difficult for them to reach a common, united position. As a result, they may give conflicting signals to politicians regarding whether a merger should be prohibited. These conflicting signals may be seen in conflicting testimony during pitch meetings and oral hearings. Even in market-testing, competitors may differ on the appropriate remedies necessary for approval of the merger: one competitor may support divestiture of assets that do not present anticompetitive challenges to another competitor; one competitor may seek divestiture of assets that they seek to purchase while another competitor opposes such a purchase on the grounds that it will create new anticompetitive problems in the market. These organizational problems for competitors again shift the politicians' decision to intervene in favour of the merging firms.

VI. Conclusions

This paper has provided a preliminary investigation into the international and domestic factors at play in the EU's implementation of its external competition policy, specifically in merger review. Economic internationalization seems to have prompted EU and US regulators to engage in extensive and intensive cooperation in the implementation of merger reviews that affect both jurisdictions concurrently. This cooperation is undertaken primarily to increase information acquisition and reduce the likelihood of divergent decisions while allowing for the legally-obligated duplication of work. Despite the resulting cooperation across a number of practical stages of the merger review process—initial contacts, notification contacts, review process contacts and remedial contacts—the paper finds evidence of flaws that have resulted in divergent decisions and triggered political intervention.

The paper argues that, despite the potential to destabilise bilateral and multilateral trading relations, the EU regulators have a preference to make decisions (even divergent decisions) in merger review in accordance with their statutory mandates and without political intervention. In the words of former Commissioner Monti, such decisions should be "a matter of law and economics, not politics" (European Commission 2001d). The regulatory decision-making process, however, allows a number of access points for firms and can prompt political intervention in the case of a divergent decision.

Such divergent decisions occurred in the BMD and GEH mergers. These two cases of flawed cooperation provide useful insights and lessons for academics as well as regulators, politicians and firms. While firms pressured the EU regulators in both cases, the empirical record shows that they did little to change the divergent decisions reached. This finding suggests that the preferences and strategies of individual firms under review play only a limited role in the EU's implementation of external competition policy. The firms did, however, play a larger role in the decisions of US politicians to intervene in both merger cases. The paper provides preliminary comments on potential factors—size and organizational ability—that may lead politicians to intervene in the review process on behalf of the merging firms. Further research is necessary to begin theorizing the precise intervention cost calculations made by politicians.

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