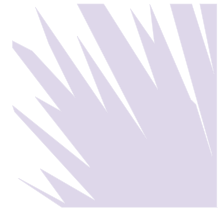


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RE-EXAMINING TRANS-ATLANTIC SIMILARITIES AND DIVERGENCES IN SUBSTANTIVE AND PROCEDURAL COMPETITION LAW

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I. INTRODUCTION

At first glance, there appear to be striking similarities between competition law in the US and in the EC, in particular as regards substance as opposed to procedure. The underlying legislative provisions, while different in wording, are roughly equivalent: they deal with restrictive agreements, exploitative unilateral behaviour and anticompetitive mergers. In more recent years both jurisdictions have apparently been pursuing common objectives, namely the maximisation of efficiency and consumer welfare. In relation to procedural law, some similarities can also be found: while criminal sanctions are not available at EC level for violations of the competition law, the European Commission ('the Commission') has not been afraid to impose severe financial penalties on those undertakings that have breached the competition law rules; and to this extent, then, they are not unlike their opposite number in America. Furthermore, there have been moves by the Commission to encourage the use of private actions within the EC Member States; such actions are regularly employed to enforce competition law in the United States. While comments in the US media concerning the interventionist, and perceived anti-business, aspect to EC antitrust and merger law are not uncommon – and in the context of the history of EC competition policy may not be completely unwarranted – there is more commonality between the competition laws of these jurisdictions than there is conflict.

That is not to say, however, that important differences do not exist. In fact, there are a number of differences concerning not only the substantive application of the competition law rules, but also the procedures employed. Cases involving such notable parties as Microsoft and GE/Honeywell, among others, have highlighted these differences. Substantive differences exist concerning bundling, predation, the licensing of intellectual property rights and the assessment of conglomerate mergers. Integrationist objectives, present in EC jurisprudence, are absent in the US. Furthermore, differences in attitudes and culture have also influenced European approaches to procedural issues. The reticence of the vast majority of the EC Member States to introduce class actions or treble damages for private plaintiffs who have been injured due to anticompetitive conduct is an obvious example. So too perhaps is the prevailing attitude in Europe concerning the use of criminal sanctions for the punishment of individuals who have engaged in the most egregious forms of anticompetitive behaviour, such as operating a hard-core cartel, or even concerning the offer of immunity for cartel whistle-blowers. That said, some other procedural differences may merely be superficial; the difference between the effects test and the implementation test in the context of the extra-territorial application of the competition law provisions may well fall into this category, although such a proposition has yet to be tested by the Community Courts.

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An important question that should be posed here is whether these substantive and procedural differences are a problem. That is, are they so significant that they amount to a problem that needs to be 'solved'? How do we solve it? Can cooperation help? Is convergence an answer? If so, what rules exactly should converge and to what standard: US, EU, or some other 'best practice'? And perhaps even more difficult, how does one achieve such convergence in practice? This paper will attempt to address these issues. Before doing so however, it will consider the current similarities and differences between US and EC competition law. The paper, then, is divided as follows: Part II compares the substantive competition laws; Part III compares the procedural competition laws; and Part IV considers the issue of future conflict between US and EC competition law. Finally, it is submitted that, while some further cooperation/convergence may be desirable, if it is to occur it must be done in a coherent, consistent and coordinated manner, all the while respecting the sovereignty of all jurisdictions involved.

II. COMPARING THE SUBSTANTIVE COMPETITION LAWS

This part of the paper compares the substantive aspects of both US and EC competition law. The comparative analysis provided deals with restrictive agreements, unilateral anticompetitive behaviour and merger control, respectively.

A. Restrictive Agreements

Restrictive agreements are prohibited under both US and EC competition law. According to the US Sherman Act of 1890 '[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations' is unlawful. In order to avoid an over-inclusive law, the US Supreme Court interpreted this provision as prohibiting only those agreements which impose an 'unreasonable' restraint of trade.¹ There are two broad categories of agreements, both with different methodologies for determining reasonableness. There are those agreements that are assumed to unreasonably restrain trade; such per se illegal agreements display a 'pernicious effect' on competition, do not possess redeeming features and do not warrant an elaborate investigation of the precise harm they engender.² They include agreements relating to hard-core cartels, that is, those cartels that aim to fix-prices, divide markets, restrict output or bid-rig.³ In order to be considered to be per se illegal, an agreement must be manifestly anti-competitive;⁴ it must not only be a 'naked restriction on trade' but must also lack a plausible efficiency justification.⁵ The second category of agreements is the default category;⁶ it concerns those that are considered under the 'rule of reason'. These types of agreements may be deemed to be largely pro-competitive, even if they also exhibit a certain restraining effect on competition in a given market.⁷ The rule-of-reason approach traditionally required a full analysis of the economic effects of an agreement, where the pro- and anti-competitive aspects of the agreement are weighed against one another.⁸ However, a 'quick look' approach to the rule-of-reason has also developed in recent years;⁹ accordingly, the analysis of economic effects is not as robust where a 'great likelihood of anticompetitive effects can easily be ascertained'.¹⁰

The wording of the EC provision on restrictive agreements, namely Article 81 EC, is quite different to that of Section 1 of the Sherman Act. Article 81(1) EC prohibits agreements between undertakings, decisions of associations of undertakings, and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. This provision details a non-exhaustive list of agreements which may be prohibited. Article 81(2) EC provides that such agreements are to be void and unenforceable. Article 81(3) allows for a limited exemption from Article 81(1) if the agreement

1 *Standard Oil Co. v. United States* 221 U.S. 1(1911), at 56.

2 *Northern Pacific Railway v. United States* 356 US 1 (1958), at 5.

3 See, e.g. *United States v. Socony Vacuum Oil Co.* 310 US 150 (1940), at 210; *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), aff'd as modified, 175 U.S. 211 (1899).

4 *GTE Sylvania* 433 U.S. 36 (1977), at 49-50.

5 *Broadcast Music Inc. v. Columbia Broadcasting System, Inc.* 441 U.S. 1 (1979).

6 A. Abbott (2005a), 'A Brief Overview of American Antitrust Law', The University of Oxford, Centre for Competition Law and Policy, The Competition Law & Policy Guest Lecture Programme - Paper (L) 01/05, 2005, at 6.

7 *Board of Trade of City of Chicago v. United States* 246 US 231 (1918).

8 A. Abbott (2005a), *op. cit.*, at 9.

9 *Ibid.*, at 9. See *National Society of Professional Engineers v. United States* 435 U.S. 679 (1978); *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma* 468 U.S. 85 (1984).

10 *California Dental Association v. FT* 526 U.S. 756 (1999).

(a) contributes to improving the production or distribution of goods or to promoting technical or economic progress, while (b) allowing consumers a fair share of the resulting benefit, and does not (c) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, or (d) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Community law employs a taxonomy of agreements that is very similar to that which exists under US federal law, particularly so following Modernisation.¹¹ Agreements which have as their ‘object’ the restriction of European competition do not warrant an effects-based analysis; they are the European equivalent of agreements that are considered to be per se illegal in the US. Cartel agreements (which in Europe, like in the US, are considered to be the ‘supreme evil of antitrust’¹²) and agreements that compartmentalise the common market are included within this category. By contrast, agreements which under EC law have as their effect the restriction of competition in the common market can be compared to those agreements subject to the rule-of-reason under US law. While the EC approach here is not identical to the US rule of reason,¹³ its underlying philosophy – revealed by *inter alia* its understanding of competitive harm,¹⁴ as well as its requirement that efficiency benefits be real and verifiable,¹⁵ is ‘very much in keeping with American antitrust analysis’.¹⁶ Above all, it is in the area of ‘effects’ where a number of recent reforms have, on the whole, brought about greater convergence with US law with its stronger focus on economic principles and consumer welfare maximisation.¹⁷ In particular, the Verticals Block Exemption Regulation¹⁸ that was adopted in December 1999 injected a significant degree of economic-based thinking into the analysis of the beneficial effects of certain types of vertical restraints; the Guidelines on Article 81(3) also played their part. Indeed, legislation on horizontal cooperation agreements, agreements of minor importance, and technology transfer have all helped to establish ‘a European policy approach towards agreements between firms that is more economics-based in terms of its priorities, processes and substantive case analysis’.¹⁹

One area where EC law has *not* been aligned with American antitrust reflects the geographical and political differences between the American federal state and the supra-national entity that is the European Community: European competition law has been traditionally hostile to agreements that are perceived as having a negative impact on the objective of free market integration, irrespective of efficiency analyses.²⁰ Community Courts jurisprudence from cases such as *Consten and Grundig*,²¹ *Delimitis*,²² *Pronuptia de Paris*²³ and *Parker Pen*²⁴ support this assertion. Even after the adoption of a consumer welfare approach by the Commission, such hostility is still evident in the treatment of agreements that provide absolute territorial protection to undertakings.²⁵ This traditional hostility was recently tempered somewhat in *GlaxoSmithKline Services Unlimited v. Commission*.²⁶ Although the agreement in question in that case was found to have as its object the restriction of parallel trade, it was held that according to the particular operative facts the welfare of final consumers

11 See, e.g. European Commission, *Guidelines on the Application of Article 81(3) of the Treaty*, 2004/C 101/08, 27 April 2004 (‘Guidelines on the Application of Article 81(3)’).

12 This quote is taken from the Supreme Court judgment in the case *Verizon Communications v. Law Offices of Curtis v. Trinko*, 540 US 398 (2004), at 408. Under EC law, price-fixing agreements are ‘by their very nature the worst kind of violations of Article 81: *POT/Thread*, Case COMP/38.337, Summary of Commission Decision of 14 September 2005 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, at paragraph 18.

13 In fact, the Court of First Instance has recently dismissed the existence of the rule-of-reason in the context of Article 81(1) EC: Case T-328/03, *O2 (Germany) GmbH & Co. OHG v. Commission* [2006] ECR II-1231, at paragraphs 66 to 71.

14 See, e.g. *Guidelines on the Application of Article 81(3)*, at paragraph 24.

15 See, e.g. *ibid.*, at paragraph 56.

16 A. Abbott (2005b), ‘A Brief Comparison of European and American Antitrust Law’, The University of Oxford, Centre for Competition Law and Policy, The Competition Law & Policy Guest Lecture Programme – Paper (L) 02/05, 2005, at 6.

17 That said, a vigorous policy of anti-cartel enforcement has also played its part: M. Bloom, ‘Substantial Antitrust Convergence: Developed Country Antitrust Enforcement is Converging on a Consumer Welfare Basis’, Speech, ABA Antitrust Section Spring Meeting, Washington, DC, 30 March 2005, at 7.

18 European Commission, *Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices*, Official Journal, L 336/21, 29 December 1999 (‘the Verticals Regulation’).

19 J. Vickers, ‘Abuse of Market Power’, Speech to the 31st Conference of the European Association for Research in Industrial Economics, Berlin, 3 September 2004, at 2: www.ofg.gov.uk/shared_ofg/speeches/spe0304.pdf.

20 See P. Marsden and P. Whelan, ‘The “Consumer Welfare” Standard as a Form of Substantive Protection for Consumers under European Competition Law’, Chapter 16, *Own Labels, Branded Goods and Competition Policy: The Changing Landscape of Retail Competition*, Ezrachi & Bernitz (eds), Oxford University Press, Oxford, 2009. Nonetheless, restrictions on competition that have adverse effects across US state lines are subject to possible censure under the Commerce Clause of the US Constitution, which gives Congress plenary power to regulate interstate commerce: A. Abbott (2005b), *op. cit.*, at 18.

21 Cases 56 and 58/64, *Etablissements Consten SA and Grundig-Verkaufs-GmbH v. Commission* [1966] ECR 299.

22 Case C-234/89, *Delimitis v. Henninger Bräu* [1991] ECR I-935.

23 Case 161/84, *Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgallis* [1986] ECR 353.

24 Case T-77/92, *Parker Pen v. Commission* [1994] ECR II-549.

25 The Verticals Regulation, at Article 4(b).

26 Case T-168/01, *GlaxoSmithKline Services Unlimited v. Commission* [2006] ECR II-2969.

could not be assumed to be adversely affected; the agreement therefore could not be prohibited solely on the grounds of its 'object'. This case, then, on its face at least seems to be at odds with earlier rulings such as *Consten and Grundig*, where no economic analysis of the welfare effects of agreements restricting parallel trade was conducted or required. It may however merely constitute an 'exceptional' case, and one that is confined to the specific characteristics of the pharmaceutical market.²⁷ Whether that is the case or not remains, for the moment at least, uncertain.

What is clear, in any case, is that such integrationist concerns are nowhere near as strong under US antitrust law. Indeed, following *GTE Sylvania*²⁸ non-price vertical restraints, including those imposing exclusive territories, are dealt with in the US using a rule-of-reason approach; this is due to the influence of 'Chicago School' economics.²⁹ The treatment of such vertical non-price restraints in the courts since that case was decided is such that commentators have claimed that they are almost considered to be per se lawful.³⁰ By contrast, and like the situation prevailing in Europe, until very recently vertical price, as opposed to non-price, restraints were considered to be per se illegal in the US.³¹ However, following the decision of the US Supreme Court in *Leegin*, minimum resale price maintenance is now to be judged under the rule of reason.³² European competition law has not yet followed suit. To date these sorts of vertical price restraints have not been tolerated in Europe. The attitude of the European authorities to such restraints is evident in its Verticals Block Exemption Regulation, where although some types of vertical agreements were exempted from Article 81(1) in order to respect modern economic theory, vertical restraints imposing fixed and minimum prices were not, irrespective of the market shares of the undertakings involved.³³ This fact demonstrates that, despite the more economics-based approach taken in relation to, amongst other things, vertical agreements, as well as the apparent adoption of a consumer welfare standard,³⁴ the Commission has not completely rejected legal formalism.³⁵ The US, by contrast, feels no real attachment to such formality in the context of vertical restraints.

B. Unilateral Behaviour

Unilateral anticompetitive conduct is an area of competition law where significant differences exist between the EC and the US. Article 82 EC, the European counterpart to Section 2 of the US Sherman Act 1890, prohibits an abuse by one or more undertakings of a dominant position within the common market. The non-exhaustive list of examples in this article resembles almost word for word the examples set out in Article 81(1). The prohibition of exploitative abuses, something that on its face is provided for in Article 82(a), and which is notably absent in US law, can be understood as an example of where ordoliberal standards may be implied by the competition provisions: it reflects the ordoliberal principle of forcing dominant firms to act as if they were operating under complete competition.³⁶ Article 82 EC has not yet been interpreted by the Community Courts as having as its sole or primary object the maximisation of consumer welfare.³⁷ To date it has been consistently interpreted by these Courts as a measure that aims to protect the competitive structure of the market, the so-called 'institution of competition', and to thereby support the economic freedom of undertakings to enter and compete in a given market irrespective of their efficiency; this is apparent in early competition cases such as *Commercial Solvents*,³⁸

27 A. Jones and B. Sufrin, *EC Competition Law*, Oxford University Press, 2007, at 231.

28 *GTE Sylvania* 433 US 36 (1977).

29 On the Chicago school of economic thought, see R. Bork, *The Antitrust Paradox*, Basic Books, New York, 1978; R. Posner, 'The Chicago School of Antitrust Analysis' (1979) 127 *University of Pennsylvania Review* 925; and E. Fox, 'The Modernisation of Antitrust: A New Equilibrium' (1981) 66 *Cornell Law Review* 1140.

30 A. Abbott (2005b), *op. cit.*, at 6.

31 See, e.g., *Dr. Miles Medical Co. v. John D. Park & Sons Co.* 220 US 373 (1911), at 407-408.

32 *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* 551 U.S. __ (2007).

33 The Verticals Regulation, at Article 4(a).

34 On this see P. Marsden and P. Whelan (2009), *op. cit.*; M. Hutchings and P. Whelan, 'Consumer Interest in Competition Law Cases' (2006) 16(5) *Consumer Policy Review* 182; and P. Marsden and P. Whelan, "'Consumer Detriment" and its Application in EC and UK Competition Law' (2006) 27(10) *European Competition Law Review* 569.

35 E. Buttigieg, 'Consumer Interests under the EC's Competition Rules on Collusive Practices' [2005] *European Business Law Review* 643, at 717. See also Case 322/81, *Nederlandsche Banden-Industrie Michelin NV v. Commission* [1983] 3461; and Case T-219/99, *British Airways v. Commission* [2003] ECR II-5917 (CFI); and Case C-95/04 P, *British Airways v. Commission* [2007] ECR I-2331 (ECJ).

36 C. Ahlborn and C. Grave, 'Walter Eucken and Ordoliberalism: An Introduction from a Consumer Welfare Perspective' (2006) 2(2) *Competition Policy International* 19.

37 P. Marsden and P. Whelan (2009), *op. cit.*

38 Case 6-7/73, *Istituto Chemioterapico Italiano Spa and Commercial Solvents Corporation v. Commission* [1974] ECR 223.

Hoffmann-La Roche,³⁹ *United Brands*,⁴⁰ and *Michelin I*.⁴¹ These cases represent a triumph for ordoliberal ideas⁴² in that they are primarily concerned with the restriction of the individual actions of competitors and not with the overall impact of unilateral conduct on economic welfare.⁴³ Consequently, they adopt very formalistic approaches to certain economic activities undertaken by a dominant undertaking, such as the granting of loyalty rebates for example. This remains the situation at present despite the fact that the Commission's preference for a consumer welfare approach in EC competition law started to take shape in the mid to late 1990s.⁴⁴ Cases such as *Michelin II*,⁴⁵ *IMS Health*,⁴⁶ *France Telecom*,⁴⁷ and *British Airways*,⁴⁸ for example, support this point. Even after the publication of DG-Competition's Discussion Paper on Article 82 in December 2005⁴⁹ – a document that purportedly advocates the maximisation of consumer welfare as the primary objective of Article 82 – the Court itself has had the opportunity to expressly adopt and mandate the employment of a consumer welfare approach in the context of abuse of dominance, but it refused to do so.⁵⁰

The US provision on unilateral conduct, by contrast, does not use the words 'abuse of a dominant position'. Rather it speaks of 'monopolization'. Section 2 of the Sherman Act makes it unlawful to 'monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations'. The mere existence of monopoly does not violate the Sherman Act;⁵¹ only conduct that can be interpreted as 'monopolisation' or an 'attempt to monopolise' is caught by the prohibition.⁵² In other words, it is the nature of the conduct that is at issue and not merely the status of an operator on the market. The reasoning behind this approach concerns innovation: 'To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct'.⁵³ As is obvious from the wording of Section 2, such conduct can consist of an attempt to monopolise. US law differs from EC law in this regard. Under the European competition law rules, an abuse can only be found once dominance is established; attempts to achieve dominance are not unlawful. In the US, by contrast, the anticompetitive conduct of a non-dominant firm can be subject to the prohibition in Section 2 of the Sherman Act, if such conduct would enable the firm to achieve a monopoly in a given market.⁵⁴ The European Commission cannot depend on Article 82 EC to prevent the creation of monopolies; its ex ante powers only exist in relation to the control of anticompetitive mergers, as provided by the European Community Merger Regulation.⁵⁵ For one legal commentator at least, this limitation goes some way to explaining European aggressiveness towards single firm conduct.⁵⁶

According to current authority, monopolisation contrary to Section 2 occurs where: (i) monopoly power is possessed in the relevant market; and (2) there has been 'willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident'.⁵⁷ Unlawful conduct under the second element is confined to exclusionary conduct – there is no equivalent in US federal law to Article 82(a) EC. Exclusionary conduct is conduct that 'exclude[s] rivals on some basis other than efficiency';⁵⁸ in

39 Case 85/76, *Hoffmann La Roche v. Commission* [1979] ECR 461.

40 Case 27/76, *United Brands v. Commission* [1978] ECR 207.

41 Case 322/81, *Nederlandsche Banden-Industrie Michelin NV v. Commission* [1983] 3461.

42 The theory of ordoliberalism holds that it is incumbent upon the state to create a proper legal environment for the economy and to maintain a healthy level of competition through measures adhering to market principles: E. Megay, 'Anti-Pluralist Liberalism: The German Neoliberals' (1970) 85(3) *Political Science Quarterly* 422.

43 Cf. T. Eilmansberger, 'How to Distinguish Good from Bad Competition under Article 82: In Search of Clearer More Coherent Standards for Anticompetitive Abuses' (2005) 42 *Common Market Law Review* 129, at 138.

44 See, e.g., J. Kallaugher and B. Sher, 'Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse Under Article 82' (2004) 25(5) *European Competition Law Review* 263.

45 Case T-203/01, *Michelin v. Commission* [2003] ECR II-4071.

46 Case C-418/01, *IMS Health GmbH & Co OHG v. NHC Health GmbH & Co KG* [2004] ECR I-5039.

47 Case T-340/03, *France Telecom SA v. Commission* [2007] ECR II-107.

48 Case T-219/99, *British Airways v. Commission* [2003] ECR II-5917 (CFI); and Case C-95/04 P, *British Airways v. Commission* [2007] ECR I-2331 (ECJ).

49 European Commission, *DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses*, Brussels, December 2005.

50 Case C-95/04 P, *British Airways v. Commission* [2007] ECR I-2331.

51 It is also true that dominance per se is not prohibited under EC law. Indeed, it is the *abuse* of a dominant position, and not the existence of that dominant position, that is unlawful.

52 *Standard Oil Co. v. United States* 221 U.S. 1 (1911), at 62.

53 *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko* 124 S.Ct. 872, (2004), at 879.

54 A. Abbott (2005b), *op. cit.*, at 13.

55 Council of Ministers, *European Community Merger Regulation*, OJ L 24, 29.01.2004, 1-22 (hereafter 'the ECMR').

56 A. Abbott (2005b), *op. cit.*, at 13.

57 *United States v. Grinnell Corp.* 384 U.S. 563 (1966), at 570-71. See also *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko* 124 S.Ct. 872, at 878-79.

58 *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* 472 U.S. 585 (1985), at 605.

determining whether it is present the authorities usually employ the ‘no economic sense’ test: conduct is deemed to be exclusionary if it makes no economic sense for the firm to engage in it but for the tendency of that conduct to lessen competition.⁵⁹ By employing such a test the US authorities only sanction inefficient conduct; conduct that is efficient is outside of the scope of Section 2 irrespective of its impact on the economic freedom of other actual or potential operators in the market. Unlike EC law, then, the objective behind the US provision on unilateral conduct is the protection of efficiency and therefore the maximisation of welfare; concerns for equality and freedom do not form part of the analysis. The Chicago School of economics is the dominant influence; unlike in Europe, ordo-liberalism has no part to play in assessing the lawfulness of unilateral conduct.

As the respective EC and US provisions on unilateral conduct pursue different aims, it would be no surprise if a given conduct were treated differently depending on the applicable (EC/US) law. Indeed, differences concerning various practices can be detected in the jurisprudence, including in relation to bundling,⁶⁰ fidelity rebates,⁶¹ and essential facilities,⁶² to name a few. The concept of predation, however, provides a sufficient illustrative example for present purposes. Under US law, predation – that is, the selling of a product below a determined level of cost – is not unlawful unless there is a likelihood of recoupment.⁶³ In other words, the authorities must demonstrate that there is a reasonable prospect that the alleged predator would be able to recoup its investment in below-cost prices. This requirement reflects the Chicago School belief in the inherent self-correcting mechanism that is the market: if monopolists cannot recoup their losses later, then it must be due to the existence of (actual or potential) competitive restraints; if such competitive restraints exist in the market, the consumer will not be harmed by any increased prices of the monopolist. The EC authorities do not exhibit such faith in the market. They believe that when predation occurs it is based on a factual assumption that below cost pricing can be a rational strategy adopted by a dominant firm to eliminate competitors.⁶⁴ Therefore, under the EC competition law rules, a demonstration of the possibility of recoupment is not required.⁶⁵ Consequently, it is easier to establish a predation case in Europe than it is in the US.⁶⁶ In the US, the prohibition on predation is rarely, if ever, enforced: apparently there have been no successful prosecutions for predatory pricing in the US since the case of *Brooke Group Ltd.*⁶⁷ The concept of predation, as interpreted by the US authorities, therefore illustrates another feature of the Chicago School and US enforcement in general, particularly as regards unilateral conduct, *viz.*, an aversion to intervention.

C. Mergers

There has been considerable convergence between the EC and US merger control laws over the last number of years. In the US, Section 7 of the Clayton Act 1914 prohibits the acquisition of share capital or assets ‘where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition’. Under the European Community Merger Regulation,⁶⁸ which was amended in 2004, concentrations (i.e. mergers, acquisitions and full-function joint ventures) that have a Community dimension⁶⁹ are prohibited by the Commission if they ‘would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position’.⁷⁰ The substantive tests of both jurisdictions have now converged: the

59 See *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko* 124 S.Ct. 872, at 878-79.

60 See, e.g. N. Economides and I. Lianos, ‘The Elusive Antitrust Standard on Bundling in Europe and in the United States at the Aftermath of the Microsoft Cases’, NET Institute Working Paper No. 07-47, January 2008; available online at: <<http://ssrn.com/abstract=1078932>>.

61 See, e.g. V. Auricchio, ‘Discount Policies in US and EU Antitrust Enforcement Models: Protecting Competition, Competitors or Consumer welfare?’ (2007) 3(2) *European Competition Journal* 373.

62 See, e.g. U. Muller and A. Rodenhansen, ‘The Rise and Fall of the Essential Facility Doctrine’ (2008) 29(5) *European Competition Law Review* 310; and A. Capobianco, ‘The Essential Facility Doctrine: Similarities and Differences Between the American and the European Approach’ (2001) 26(6) *European Law Review* 548.

63 *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* 509 U.S. 209 (1993). Recently, the Supreme Court confirmed that predatory buying also requires proof of recoupment: *Weyerhaeuser Co. v. Ros-Simmons Hardwood Lumber Co.* 127 S. Ct. 1069 (2007).

64 H. Schweitzer, ‘Parallels and Differences in the Attitudes Towards Single-Firm Conduct: What Are The Reasons’, EUI Working Paper, LAW No. 2007/32, 2007, at 31.

65 See Case C-62/86, *AKZO Chemie BV v. Commission* [1991] ECR I-03359; and Case C-333/94 P, *Tetra Pak v. Commission* [1996] ECR I5951.

The EC test for predation was recently restated by the CFI: Case T-340/03, *France Télécom SA v. Commission* [2007] ECR II-107.

66 See J. Temple Lang and R. O’Donoghue, ‘Defining Legitimate Competition: How to Clarify Pricing Abuses under Article 82 EC’ (2002) 26

Fordham International Law Journal 83, at 142.

67 D. Evans and J. Padilla, ‘Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach’ (2005) 72 *University of Chicago Law Review* 73, at 88.

68 Council of Ministers, *European Community Merger Regulation*, OJ L 24, 29.01.2004, 1-22 (hereafter ‘the ECMR’).

69 This is determined by turnover thresholds; *ibid.*, at Article 1.

70 ECMR, Article 2(3).

'significant impediment of effective competition' (SIEC) test is 'substantively identical' to the 'substantial lessening of competition' (SLC) test.⁷¹ The EC Horizontal Merger Guidelines⁷² are also similar in their structure and substance to the guidelines issued by the Department of Justice and the Federal Trade Commission.⁷³ This is manifest in relation to concentration levels, the determination of efficiencies, the interpretation of the relevant substantive tests and the distinction between coordinated/non-coordinated effects.

There has also been an increasing sophistication in the economic analyses undertaken by the Commission,⁷⁴ as evidenced by cases such as *Sony/BMG*⁷⁵ and *Oracle/PeopleSoft*.⁷⁶ This helps to bring EC merger law more in line with its US counterpart. Other factors that have led to convergence are the adoption of the Commission Notice on Market Definition⁷⁷ (which advocates the use of the SSNIP test) and the creation of the post of Chief Economist within DG-Comp in 2003. According to Abbott, while substantive convergence has undoubtedly occurred, it does not necessarily follow that we will eventually reach a point in time when no differences will exist between these laws;⁷⁸ for him, there are three important reasons why this is so:⁷⁹ (i) the EC takes far more consideration of the views of competitors than the American authorities when assessing mergers;⁸⁰ (ii) the EC enforcers have a tendency to employ economics in a different manner to their US counterparts; and (iii) the EC enforcement officials are receptive to non-standard theories and may as a result prohibit mergers that have no short term harm for consumers. For these reasons,⁸¹ then, substantive analyses may not be identical in practice between the US and the EC authorities, despite convergence on the theoretical frameworks.

It is hoped nonetheless that the convergence identified above will lead to less conflict when international or Trans-Atlantic mergers are contemplated. There is one particular area of merger control law, however, where potential still exists for serious conflict: non-horizontal (i.e. vertical and conglomerate) mergers. Indeed, the last occasion when major differences of opinion were aired across the Atlantic on merger control law concerned a transaction that required vertical and conglomerate effects analyses: *GE/Honeywell*.⁸² Following the outcome of that case, as well as *TetraLaval/Sidel*,⁸³ the European Commission adopted its Guidelines on Non-Horizontal Mergers.⁸⁴ These guidelines are a reminder from Brussels that non-horizontal mergers are on the radar of the Commission. By contrast, the US over the last two decades or more has adopted a rather cautious approach to non-horizontal mergers. The Department of Justice guidelines⁸⁵ on this area of merger control are widely believed to be outdated and provide very little guidance on what vertical mergers will be challenged.⁸⁶ Nonetheless, there is general agreement in the US that non-horizontal mergers pose far less competition problems than horizontal mergers. Indeed, it has been several decades since the agencies have challenged a conglomerate merger.⁸⁷ The US Antitrust Modernization Commission believed that such mergers 'generally do not raise antitrust issues'.⁸⁸ Given that the Commission is far more open to challenging such mergers than the US authorities, it is not difficult to foresee potential conflicts sometime in the future on this issue.

71 Wilmer Cutler Pickering Hale and Dorr LLP, *Guide to EC Merger Regulation*, Fourth Edition, at 41; and M. Bloom, *op. cit.*, at 14.

72 European Commission, *Horizontal Merger Guidelines*, Official Journal C 31, 05.02.2004, 5-18.

73 See the 1997 *Horizontal Merger Guidelines of the Department of Justice and the Federal Trade Commission*, available at www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html.

74 See M. Bloom, *op. cit.*, at 14.

75 Case No COMP/M.3333, *Sony/BMG*, 2004.

76 Case No COMP/M.3216, *Oracle/PeopleSoft*, 2004.

77 European Commission, *Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law*, OJ C372, 9/12/97, 5.

78 A. Abbott (2005b), *op. cit.*, at 14.

79 *Ibid.*, at 14-16.

80 On this problem, see P. Whelan, 'The Role of Third Parties in the Competition Enforcement Landscape: A Critical Review of Recent and Possible Future EC Developments' [2007] *Competition Law Journal* 41, at 50.

81 And others, such as when geographical markets are national or regional, or when effects are only felt in one jurisdiction; A. Abbott (2005b), *op. cit.*, at 17.

82 See Case COMP/M.220, *General Electric/Honeywell*, Commission Decision, 3 July 2001; and Case T-210/01, *General Electric v. Commission* [2005] ECR II-5575.

83 Case T-5/02, *Tetra Laval BV v. Commission* [2002] ECR II-4381.

84 European Commission, *Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings*, 28 November 2007, Brussels, available at: <http://ec.europa.eu/comm/competition/mergers/legislation/nonhorizontalguidelines.pdf>.

85 United States Department of Justice, *Non-Horizontal Merger Guidelines*, 14 June 1984; available at: www.usdoj.gov/atr/public/guidelines/2614.htm.

86 See e.g. the comments of R. Pitofsky in Federal Trade Commission, *Federal Trade Commission 90th Anniversary Symposium, A Conversation with Tim Muris and Bob Pitofsky*, 2004, at 172; www.ftc.gov/ftc/history/transcripts/040922transcript003.pdf.

87 S. B. Völcker, H. Schneider and L. B. Greenfield, 'EU Commission Adopts Non-Horizontal Merger Guidelines', 3 December 2007; www.wilmerhale.com/publications/whPubsDetail.aspx?publication=8145.

88 Antitrust Modernization Commission, *Antitrust Modernization Commission: Report and Recommendations*, 2 April 2007, at 68; http://govinfo.library.unt.edu/amc/report_recommendation/chapter1.pdf.

III. COMPARING THE PROCEDURAL COMPETITION LAWS

This part of the paper compares the procedural aspects of both US and EC competition law. The comparative analysis provided deals with a number of important issues such as notification requirements, sanctions, private enforcement, extra-territorial jurisdiction and merger control procedures.

A. Notification Requirements

Prior to the entry into force of Regulation 1/2003 on 1 May 2004,⁸⁹ there was a major procedural difference between EC and US law as regards the treatment of restrictive agreements: anticompetitive agreements that were in violation of Article 81(1) EC had to be notified to the Commission in order to benefit from an exemption under Article 81(3).⁹⁰ If the agreement merited an exemption, then the Commission may have decided to issue a decision in that regard. More likely, however, was the issuance of a non-binding comfort letter. National courts were prohibited from applying Article 81(3) EC and therefore if such an issue arose in a case before it - for example, if a defendant claimed that he should not have to perform a contract he previously agreed to as it was in violation of Article 81(1) and the plaintiff argued that the agreement should be exempt - the court was required to suspend its proceedings and request the Commission to rule on the particular issue. Quite obviously, this was a very inefficient manner of dealing with restrictive agreements. It also operated as an obstacle to the use of private enforcement actions within the Member States. By adopting Regulation 1/2003, the Council of Ministers abolished this notification regime, and with it the monopoly of the Commission as regards the application of Article 81(3).⁹¹ Consequently, from 1 May 2004 onwards courts in the Member States, like their counterparts in the US, have been able to rule on whether restrictive agreements are on the whole beneficial or detrimental as regards welfare levels, and therefore whether or not they should be void and unenforceable.

B. Sanctions

EC sanctions for anticompetitive agreements are also similar to those which are imposed in the US. Unlawful restrictive agreements are void and unenforceable. Fines are imposed by the authorities, and injunctions may be available. A major difference, however, is that the fines imposed in the US are not administrative in nature. In fact, the US authorities do not have the power to impose an administrative fine. Rather, if fines are imposed, they must be imposed by a court of law and they are criminal in nature. Both individuals and corporate bodies can be subject to such fines. Indeed, in the US individuals can be forced to serve a term of imprisonment of up to ten years for violating Section 1 of the Sherman Act.⁹² At EC level only administrative fines can be imposed;⁹³ they are not criminal in nature, at least not according to the traditional concept of 'criminality'.⁹⁴ The Commission has no power at present to impose fines on individuals, although some have argued that the EC Treaty does not need to be amended for such powers to be granted to this authority.⁹⁵

Criminal antitrust penalties, including imprisonment, exist in a number of Member States, such as Ireland, the UK, Estonia and Germany; they only apply to hard-core cartel type behaviour. In the US, in theory at least, unilateral anticompetitive behaviour, that is monopolisation, can also result in a criminal trial and the imposition of criminal punishment on both a corporate body and an individual. That said, it has been at least thirty years or more since a criminal fine has been imposed for violation of Section 2 of the Sherman Act.⁹⁶ Indeed, it is now current policy for the Antitrust

89 Council of Ministers, *Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty*, (2003) Official Journal L1/1 ('Regulation 1/2003').

90 See EEC Council, *Regulation No 17: First Regulation Implementing Articles 85 and 86 of the Treaty*, OJ 13, 21.2.1962, p. 204-211, at Article 4.

91 Regulation 1/2003, at Article 6.

92 Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 661.

93 Regulation 1/2003, at Article 23(5).

94 The sanction may be criminal for the purposes of Article 6 of the European Convention on Human Rights. See Case C-199/92 P. *Hils n. Commission* [1999] ECR I-4287, at paragraphs 149-150; and Case C-235/92 P. *Montecatini n. Commission* [1999] ECR I-4539, at paragraphs 175-176. See also P. Whelan, 'Protecting Human Rights in the Context of European Antitrust Criminalisation', in I. Lianos & I. Kokkoris (eds), *The Reform of EC Competition Law: Towards an Optimal Enforcement System*, Amsterdam, Kluwer International, 2009, forthcoming.

95 See, e.g., W. Wils, 'Is Criminalization of EU Competition Law the Answer?' (2005) 28(2) *World Competition* 117; and P. Whelan, 'Contemplating the Future: Personal Criminal Sanctions for Infringements of EC Competition Law' (2008) 19(2) *King's Law Journal* 364.

96 S. Weber Waller, 'Remedies for Monopolization and Abuse of Dominance: A Little History and Some Thoughts on Disclosure and Access', paper presented at 'Antitrust Marathon (Part II): The Long Plod to Greater Understanding on Section 2/Article 82', Competition Appeal Tribunal, London, 11 April 2008.

Division of the Department of Justice not to prosecute those who have violated Section 2.⁹⁷ Instead, other remedies such as injunctions, divestment, the licensing of IP rights, and other behavioural and structural measures are imposed in this context. The EC, by contrast, is capable of imposing fines on undertakings who have abused a dominant position; and indeed they have done so on a number of occasions including in the *Microsoft* case.

When the US authorities impose fines for violation of Section 1 of the Sherman Act, like the European Commission, they are restricted concerning the level of the fine. The latter authority must ensure that the fine imposed, whether for violation of Article 81(1) or of Article 82, does not exceed 10% of the gross global turnover of the undertaking for the last business year.⁹⁸ Furthermore, by establishing a set of guidelines on the fines to be imposed in antitrust cases, the Commission binds itself to a particular methodology due to the operation of the principle of legitimate expectations. Although US Federal Guidelines exist, they are merely a guide and do not have to be adhered to by the judiciary.⁹⁹ But no maximum figure in percentage terms exist as regards a US fine; only maximum dollar (and prison term) amounts are provided.¹⁰⁰ These dollar amounts are \$100 million for a company and \$1 million for an individual. The US authorities may exceed these limits when they impose a fine that is equal to twice the gain of the offender or twice the loss to the victim.¹⁰¹ The 10% cap in the EC has not prevented the Commission from imposing very large fines in appropriate cases, fines which are often in the hundreds of millions. Cartel cases, in particular, often result in heavy fines. To this extent, then, there is a definite degree of similarity between the practice of the US and of the EC.

C. Private Enforcement

A notable difference in antitrust procedure, however, concerns the use of private enforcement, more particularly the use of private damages actions, as a means of ensuring compliance with the antitrust rules. In the US, approximately 90% of enforcement is done by way of private damages actions.¹⁰² Opt-out class actions are allowed, and treble damages are paid out to victims who can establish a claim. Standing is not available to the so-called indirect purchaser,¹⁰³ but the 'passing-on defence' cannot be relied upon by an infringer and therefore does not reduce the amount that a direct purchaser may be able to claim.¹⁰⁴ As an exception to the usual asymmetric cost rules that exist in the US, successful plaintiffs may be able to recover their costs including a reasonable attorney's fee.¹⁰⁵ Liberal discovery rules are also a feature of the US regime. To avoid abuse of the mechanism of private enforcement, the US courts have developed the concept of 'antitrust injury': plaintiffs can only sue for the type of damage that the antitrust statutes were designed to prevent.¹⁰⁶

In Europe, by contrast, private enforcement is in a highly underdeveloped state.¹⁰⁷ Major obstacles to the use of private actions have been identified, including weak discovery rules, uncertainty over the passing-on defence and indirect purchaser standing, and the unavailability of collective actions. The extent to which these obstacles exist depends on the particulars of the different legal regimes in each of the Member States. The European Commission, after analysing the US approach to antitrust enforcement, has recently attempted to encourage private damages actions in Europe, although not all commentators have been receptive to this idea.¹⁰⁸ With its Green Paper¹⁰⁹ and White Paper¹¹⁰ on damages actions respectively, the Commission proposed options for consultation and

97 US Department of Justice, *US Department of Justice, Antitrust Division Manual*, 3d edition, 1998, at Chapter III, Section C.5; available at www.usdoj.gov/atr/foia/divisionmanual/ch3.htm#c5.

98 Regulation 1/2003, at Article 23(2).

99 *U.S. v. Booker*, 543 U.S. 220 (2005).

100 See Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 661 (codified as amended in scattered sections of 15 USC).

101 Criminal Fines Improvement Act of 1987, Pub. L. 100-185, 100 Stat. 1280 (codified as amended in 18 USC Section 3571).

102 W. Wils, 'Should Private Antitrust Enforcement be Encouraged in Europe?' (2003) 26(3) *World Competition* 473, at 476; and S. C. Salop and L. J. White, 'Economic Analysis of Private Antitrust Litigation' (1986) 74 *Georgetown Law Journal* 1001.

103 *Illinois Brick v. Illinois* 431 US 720 (1977).

104 *Hannover Shoe v. US Machinery* 392 U.S. 481 (1968).

105 Section 4(a) of the Clayton Act, 15 USC 15(a).

106 *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* 429 U.S. 477 (1977).

107 Ashurst, *Study on the Conditions of Claims for Damages in Case of Infringement of EC Antitrust Rules*, 31 August 2004, http://europa.eu.int/comm/competition/antitrust/others/private_enforcement/index_en.htm.

108 See, e.g., Wils (2003), *op. cit.*

109 European Commission, *Green Paper – Damages Actions for Breach of the EC Antitrust Rules*, COM(2005) 672, Brussels, 19 December 2005.

110 European Commission, *White Paper – Damages Actions for Breach of the EC Antitrust Rules*, COM(2008) 165 Final, Brussels, 2 April 2008 ('the White Paper').

advocated action concerning these options. Notably, however, the Commission did not believe that double damages should be imposed on infringers in order to compensate the victims of anticompetitive behaviour.¹¹¹ Unlike the US, however, the Commission was prepared to see pre-judgment interest paid on awards of damages,¹¹² which arguably reduces in any case the need for double, or indeed treble, multipliers.¹¹³ The Commission also failed to see the value of having US-style class actions operate in Europe; for it the appropriate approach in Europe would be the combination of two mechanisms: representative actions brought by qualified entities; and opt-in collective actions.¹¹⁴ It is believed that these mechanisms will avoid the excesses of the US system, such as those related to the principal-agent problem that may exist between the lawyers and the victims.¹¹⁵ As a result of the European Court of Justice's judgment in the *Manfredi* case,¹¹⁶ it is likely that the indirect purchaser should be granted standing in a private damages action. In order to maintain consistency with the primary objective of private enforcement, as understood by the Commission, the passing-on defence should be allowed,¹¹⁷ something that the Commission has advocated in its White Paper.¹¹⁸ Whether these proposals will eventually be adopted by the Member States, or indeed whether they will be mandated to adopt them through a Directive, remains for the moment an unanswered question. Likewise, whether further or indeed any convergence on this issue between the regimes in the Member States and the US regime will occur in future is also a topic subject to conjecture.

D. Extra-Territoriality

One area of procedural law where the US approach has perhaps been influential is in relation to extra-territorial jurisdiction, in particular its use of the 'effects' test. The European Court of Justice ('ECJ') has so far refused to expressly adopt an effects-based test of jurisdiction. Up to now it has always been possible in Article 81 and Article 82 cases to decide the jurisdictional question on other grounds. In both the *Dyestuffs*¹¹⁹ and *Wood Pulp*¹²⁰ cases the effects doctrine was argued at length before the Court, but the European Court of Justice essentially avoided the issue: the Court neither expressly adopted nor rejected the US test. In *Wood Pulp*, however, an 'implementation' test was adopted. The Court of First Instance ('CFI'), in relation to proceedings under the European Community Merger Regulation, also dodged the pertinent question and denied itself the opportunity to expressly rule on the validity and desirability of an effects-based test.¹²¹ Despite a reticence by both Courts to expressly adopt the effects test, it can be argued, especially after *Gencor*,¹²² that the 'implementation' doctrine is almost identical to the effects test. It is difficult to resist the conclusion that *direct sales* into the Community (by a foreign company engaged in concerted practices outside the EC) will be enough to establish the implementation requirement, especially when one remembers that the ECJ stated that an undertaking's presence in the EC (through subsidiaries etc.) is immaterial.¹²³ It is submitted that if direct sales into the Community equals implementation then implementation is almost identical to effects, as effects can be measured by reference to sales within the Community.¹²⁴ Some commentators are of the view that the ECJ has already adopted the effects test – albeit implicitly.¹²⁵ According to Van Gerven, the Court 'adopted the effects test without due justification and qualification', as it failed to establish a sufficient link between the alleged conduct and the Community.¹²⁶ It is submitted that, even if one is wrong about

111 *Ibid.*, at paragraph 2.5.

112 *Ibid.*

113 See R. H. Lande, 'Are Antitrust "Treble" Damages Really Single Damages' (1993) 54 *Ohio State Law Journal* 115, where he argues that, due to the absence of pre-judgment interest in the US, treble damages actually equate to single damages.

114 The White Paper, *op. cit.*, at paragraph 2.1.

115 On the difficulties that US class actions may engender, see Howrey's Antitrust Practice Group, 'Trends in Antitrust Litigation: The New Breed of Class Action'; www.howrey.org/docs/ARA2005USPrivate.pdf. Some have argued that the fear of Europeans in this regard is not warranted and that the debate on class actions needs to be more balanced; see e.g. G. Schnell, 'Class Action Madness in Europe - A Call for a More Balanced Debate' (2007) 28(11) *European Competition Law Review* 617.

116 Joined Cases C-295/04 to C-298/04, *Manfredi* [2006] ECR I-6619.

117 See P. Whelan, 'Defences That Are Appropriate in Follow-On Damages Actions', paper presented at the UKAEL Conference: 'Competition and Private Enforcement: The Next Steps', University College London, 4 July 2008, at 8.

118 The White Paper, *op. cit.*, at paragraph 2.6.

119 Case 48/69, *ICI v. Commission* [1972] ECR 619.

120 Cases 89/85, 104/85, 114/85, 116-17/85, and 125-29/85, *A. Ahlström Osakeyhtiö v. Commission* [1988] ECR 5193.

121 Case T-102/96, *Gencor v. Commission* [1999] ECR II-753.

122 *Ibid.*

123 Van Gerven believes that such a conclusion would be erroneous, as direct sales do not 'constitute a sufficiently close and relevant link with the regulating State that is compelling enough to justify jurisdiction on its part': W. Van Gerven, 'EC Jurisdiction in Antitrust Matters: The *Wood Pulp* Judgment' [1989] *Fordham Corporate Law Institute* 451, at 470.

124 C. E. Fox, 'The Merger Regulation and its Territorial Reach: *Gencor Ltd. v. Commission*' (1999) 20(b) *European Competition Law Review* 334, at 336.

125 R. Higgins, *Problems and Process: International Law and How We Use It*, New York: Oxford University Press, 1994, at 75 (The ECJ has 'adopted the effects test in all but name').

126 W. Van Gerven, *op. cit.*

the exact jurisdictional scope an implementation test allows, the courts would expressly adopt an effects test if it were required. Such a situation could possibly occur in the case of a foreign cartel that refuses to sell into the Community. If it did so, the artificial difference that currently exists between US and EC law on this point would disappear.

E. Merger Procedures

Finally, a note on merger procedures is warranted. Like in the EC under the ECMR, mergers that fulfill certain criteria (detailed in the Hart-Scott-Rodino Act) must be notified in the US before they can be completed. To that extent then there is similarity between both jurisdictions. Nonetheless, there are quite a number of different jurisdictional and procedural differences between the merger regimes established by these respective pieces of legislation. For example, in the EC, concentrations with a community dimension fall within the sole jurisdiction of the European Commission, while in the US the federated states share jurisdiction over mergers with the federal authorities. Also, the jurisdictional thresholds for pre-merger notification in the US are different than those that are detailed in the ECMR. For example, in the EU these thresholds are based solely on the size and location of an undertaking's turnover, while in the US, by contrast, the size and location of assets is also taken into account. The definition of the concept of 'control' under the US regime is also different than its European counterpart: in the US it exists with a 50% equity shareholding, whereas in the EC 'decisive influence' is what matters. Consequently, a concentration may be deemed to exist in the EC when less than 50% of the shares are held by one entity.

The mere filing of a merger under the Hart-Scott-Rodino Act must be kept confidential by the authorities, unlike in Europe. The filing requirements in each jurisdiction are also quite different. In particular, 'second requests' do not exist under the ECMR. Although the EC considered adopting a two-step approach, it ultimately decided to reject it.¹²⁷ For this reason, Form CO is far more taxing than the premerger notification form that is used to comply with the Hart-Scott-Rodino Act.¹²⁸

Importantly, mergers are prohibited in the US by a court of law; in the EC, by contrast, the Commission, an administrative body, decides on their compatibility with EC law.¹²⁹ A formal hearing may be conducted by the Commission roughly two weeks following the issuance of the Statement of Objections. At this hearing unsworn testimony is taken from the parties as well as other interested persons, which may include both customers and competitors. But it should be understood, however, that this process is not the equivalent to a trial in the United States: the testimony is not sworn and there is no cross-examination.¹³⁰ While a hearing officer exists to ensure that the proceedings are conducted in a fair manner, he/she has no authority to make a decision on the lawfulness of the concentration.¹³¹

Furthermore, there are differences in the time periods during which the authorities need to make their decisions. Article 10 ECMR imposes strict time periods which can only be tolled for a finite period; the consent of the parties is required. But under the Hart-Scott-Rodino Act, the deadline for the final decision may be tolled without limit provided the parties consent to this. Finally, the European Commission is required, in all cases, to take a decision on the merger. Indeed, unlike under the American legislation, a failure to issue a decision by the relevant deadline ensures that the concentration is cleared in the form originally notified. As stated above, then, significant procedural differences exist with regard to merger control.

IV. AVOIDING FUTURE TRANS-ATLANTIC CONFLICTS

This part considers the issue of possible future conflicts between the US and the EC concerning the enforcement of their respective competition laws. It is divided into three sections. Section A sets out the potential for concern in this area. Section B details the (limited) usefulness of

¹²⁷ European Commission, *20th Report on Competition Policy*, Brussels, 1990, at 36.

¹²⁸ See J. Parisi, 'A Simple Guide to the EC Merger Regulation of 2004' (January 2005) *The Antitrust Source*, at 5.

¹²⁹ The Commission's decision may be appealed to the Court of First Instance under Article 230 EC.

¹³⁰ See J. Parisi, *op. cit.*, at 7.

¹³¹ *Ibid.*

bilateral cooperation agreements in reducing these concerns. Finally, and in a similar vein, Section C considers the concept of multilateral convergence.

A. Potential for Concern

In recent years we have witnessed the rather speedy globalisation of the world, with firms that traditionally focused on national markets taking their operations 'global'. Indeed, it is clear that multi-jurisdictional business activity has expanded dramatically, particularly over the last decade. As a result of these international business strategies, a growing interdependence between national/regional markets has developed. Furthermore, profound changes in business activity, driven by improvements in technology, communications and transport, continue to occur, and markets continue to evolve. As stated by Friedman, the global market is increasingly composed of 'new players, on a new field, developing new processes and habits for horizontal collaboration'.¹³² Isolated and distinct economies are now a thing of the past; and the world can in fact be seen to be 'flat'.¹³³ The US and the EC, as two of the largest economies in the world, have inevitably been affected by this flattening effect of globalisation. Companies that operate in such an environment will have to comply with a number of different competition laws from different countries, and multinational companies that operate in Europe as well as in the US will have to stay within the respective antitrust and merger laws of both of these jurisdictions. Even where EC companies are not present in the US market, they may nonetheless be subject to US antitrust law if their business practices have effects on the US economy, i.e. due to the operation of the concept of extraterritoriality. This situation, then, provides the context for a possible conflict between the enforcement of the US and the EC competition laws.

As explained above, there are quite a number of similarities in the competition rules of both the US and the EC. These similarities exist in both substantive and procedural law. As for substantive law: cartels are not tolerated; restrictive agreements should lead to a reduction in welfare before they are deemed to be unlawful; and merger control is concerned with protecting competition on the merits and not with protecting competitors. With procedural law, similarities include: an effects-based jurisdictional test (in substance if not form); the use of a prohibition, as opposed to a notification, regime with restrictive agreements; severe financial sanctions; and an *ex ante* notification merger control regime. But even with such similarities, however, it is possible that different results will occur in any given case: different agencies may well come to different (reasonable) conclusions on the lawfulness of a given behaviour, particularly if they have their own unique manner of applying economics, as explained above in relation to merger control. It is also true, of course, that differences in the competition laws can be detected and that these differences are capable of leading to a Trans-Atlantic conflict. Conflict could occur, for example, where the US allows a particular practice but the EC prohibits it, and where the company/companies involved decide(s) to abandon on *both* the EC and US markets what the US authorities consider to be an efficiency-enhancing practice.

One particular area of concern that should be noted in this regard is the assessment of unilateral behaviour. As stated above, the US and EU competition rules on unilateral conduct appear to follow different objectives. The US rules are concerned solely with the maximisation of consumer welfare, while those in the EU protect the economic freedom of actors on a given market. Furthermore, the European model is arguably more interventionist. In contrast to the US authorities, who are concerned primarily with type-one errors (i.e. false positives), the European Commission is most anxious about type-two errors (i.e. false negatives); hence the more interventionist approach in the context of unilateral conduct.¹³⁴ Intervention may also be more likely in the EC as this jurisdiction has many more former state-owned monopolies that need to be 'dealt with' than the US.¹³⁵ It is here, then, that conflict is most likely, and that convergence is most desirable.

But should European competition law follow the American example here and pursue an enforcement standard based solely on consumer welfare maximisation? While opposition to such a

132 T. Friedman, *The World is Flat, A Brief History of the Twenty-First Century*, Farrar, Straus and Giroux, 2005, at 181.

133 S. Scott, 'Opening Remarks', 7th Annual ICN Conference, Kyoto, Japan, 14 April 2008.

134 M. Bloom, *op. cit.*, at 21.

135 W. Kolasky, 'Global Competition: Prospects for Convergence and Cooperation', Speech, American Bar Association Fall Forum, Washington DC, 7 November 2002, at 8.

solution would no doubt have to be overcome in Europe, and particularly in Germany, it is submitted that the more economics-based standard that is the consumer welfare standard should be adopted in Europe and followed through in the European Commission's decisions. This would not only reduce the possibilities for Trans-Atlantic conflict but would also ensure that two important advantages can be secured: (i) the alignment of EC competition law with its economic purpose in an internally consistent manner; and (ii) the prevention of form triumphing over substance to the detriment of consumers.¹³⁶ In order to secure these advantages, Article 82 EC should become more reliant on economic principles; but such principles should be capable of being applied in practice by the competition authorities, legal practitioners and courts.¹³⁷ In this regard, the outcome of the Article 82 consultation is eagerly awaited.¹³⁸ Indeed, it is hoped that this consultation will lead to increased convergence between the US and EC. In any case, the support of the Community Courts concerning the pursuit of the objective of consumer welfare maximisation would nonetheless be required for such convergence to occur.¹³⁹

Notable differences also exist concerning procedures. Most of these differences do not really pose difficulties for the smooth (as opposed to the efficient) operation of both US and EC competition law. They do not prevent, for example, the concurrent enforcement of the US and EC competition law rules. The use of criminal sanctions in the US, coupled with their absence at European level, is an example of a benign procedural difference: both US criminal and EC administrative treatment of a given conduct by a given individual/undertaking is indeed possible, as evidenced by for example the vitamins cartel cases. This is not to say that criminalisation within Europe would not have beneficial effects such as providing for an increase in deterrence or for the use of extradition arrangements between the EC and the US. The point is simply that the existence of criminal sanctions in the US does not mandate the use of such sanctions in the EC so as to avoid the possibility of serious conflict in competition law enforcement. This is a welcome fact, as an appetite for criminalisation does not currently exist within Europe as it does within the US, where cartel behaviour is generally seen to be a sophisticated form of theft.

But the possibility of conflict between the respective enforcement regimes is not the only concern when contemplating Trans-Atlantic competition law differences/similarities. Efficiency is something that also needs to be considered. This economic concept is particularly important in the context of merger control where significant differences exist on the particulars of the procedures employed. Indeed, procedurally the merging parties confront:

different forms, different measures for turnover and asset calculation, different timetables, ... different sorts of Phase II/Second Request examinations and incredible translation requests to name just a few of the hurdles.¹⁴⁰

There is an increased risk of procedural conflicts when, like with many merger cases, transactions are reviewed by multiple jurisdictions. In this context, the international business community faces significant burdens, costs, and uncertainties that are associated with filing and dealing with a large number of reviewing authorities, and which may *inter alia* 'discourage, unduly delay, or at best, constitute a tax on efficient, consumer-friendly transactions'.¹⁴¹ Even in relation to just the EC and the US, these issues are complex and may not have easy solutions. It is likely that these issues cannot be resolved unilaterally or through bilateral efforts alone.¹⁴² Indeed, multilateral efforts at convergence may be particularly fruitful in the area of merger procedures. For this reason as well as others, then, both bilateral and multilateral efforts at cooperation and convergence are considered in the sections that follow.

¹³⁶ J. Vickers, *op. cit.*, at 23.

¹³⁷ *Ibid.*

¹³⁸ See DG Competition, 'Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses', Brussels, December 2005, <http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf>.

¹³⁹ See L. Lovdahl Gormsen, 'The Conflict Between Economic Freedom and Consumer Welfare in the Modernisation of Article 82' [2007] 3 *European Competition Journal* 329.

¹⁴⁰ T. Calvani, 'Devolution and Convergence in Competition Enforcement' (2003) 24(9) *European Competition Law Review* 415, at 416.

¹⁴¹ C. James, 'International Antitrust in the 21st Century: Cooperation and Convergence', Speech, OECD Global Forum on Competition, Paris, France, 17 October 2001, at 8-9.

¹⁴² *Ibid.*

B. Bilateral Cooperation

Bilateral attempts to reduce the possibility of conflict in competition matters have by and large followed the Recommendation of the OECD.¹⁴³ Cooperation agreements¹⁴⁴ aimed at facilitating the smooth functioning of competition enforcement have been concluded between the US on the one hand and Germany, Australia, Canada, and the EC on the other. Other similar agreements have been concluded between *inter alia* France and Germany, and Canada, New Zealand and Australia. The EC-US agreements of 1991 and 1998¹⁴⁵ are the most progressive of the agreements, encompassing positive comity provisions for the first time. These cooperation agreements, although useful in reducing system friction and the avoidance of conflicts, cannot be used to resolve disagreements between national enforcement agencies, especially when significant differences exist between their relative substantive analyses of competition issues. Further, cooperation agreements are subject to confidentiality requirements and do not generally involve changes in the domestic laws of the countries involved. This fact may contribute to their failure and may empty the agreements of all substance. A binding international multilateral treaty may solve some of these problems, especially if adoption of such a treaty entails significant changes in the domestic laws of the co-signatories.

On 23 September 1991, the European Commission concluded an agreement with the US, aiming to solve problems of extraterritorial jurisdiction in competition matters by promoting cooperation and coordination between their antitrust enforcement agencies. This agreement was later annulled by the ECJ in an action brought by France, the Netherlands and Spain.¹⁴⁶ Its importance however was not forgotten and the Council of Ministers resolved the legality issue by issuing a joint declaration (with the Commission) reinstating the agreement.¹⁴⁷ The cooperation agreement implemented many of the OECD recommendations. In particular, it provided for: prior notification of investigation or enforcement activities if they will affect the 'important interests' of another state;¹⁴⁸ the institutionalisation of meetings between officials and the exchange of information between such officials;¹⁴⁹ coordination of activity in cases in which both parties have an interest;¹⁵⁰ and both positive comity and (traditional) negative comity.¹⁵¹

It is expedient at this juncture to distinguish between positive and negative comity. Negative comity is essentially a doctrine of politeness and good manners between states. It involves the consideration and balancing of numerous factors by one state before deciding to take enforcement or judicial action. Positive comity, by contrast, involves one state requesting another to take enforcement action to prohibit activity that is causing (anticompetitive) effects within the requesting state's territory. Positive comity aims to assist countries to prosecute conduct which both have an interest in but which only one has the appropriate enforcement tools to reach effectively. Under Article 5 of the 1991 agreement the request must be considered and replied to, but the requested enforcement agency is under no obligation to comply with the request. These positive comity provisions were elaborated on and strengthened in the EC-US agreement of 4 June 1998. These provisions for positive comity have only been resorted to on one occasion: the *Sabrel/Amadeus* review in 1999, where the US Department of Justice requested the Commission to investigate allegations of discrimination between Amadeus and Sabre airline reservation systems.¹⁵²

It has been argued that the Commission had no authority to agree to these positive comity provisions.¹⁵³ Article 3(2) of Regulation 17 provides that only Member States or natural or legal

143 OECD, *Revised Recommendation Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade*, OECD Doc C(95) 130 (final), 27 July 1995. On this see below.

144 See J. Parisi, 'Enforcement Cooperation Among Antitrust Authorities' (1999) 20 *European Competition Law Review* 133.

145 Agreement between the Government of the USA and the Commission of the European Communities Regarding the Application of their Competition Laws, 23 Sept. 1991, [1991] 4 CMLR 823, 30 ILM 1487 (hereafter 'the 1991 Agreement'); EU-US Positive Comity Agreement, 4th June 1998, [1998] OJ L173/28, [1999] 4 CMLR 502.

146 Case C-327/91, *France v Commission* [1994] ECR I-3641.

147 April 1995, [1995] OJ L94/45.

148 The 1991 Agreement, at Article 2.

149 *Ibid.*, at Article 3.

150 *Ibid.*, at Article 4.

151 *Ibid.*, at Articles 5 and 6 respectively.

152 The case was settled in July 2000. See European Commission Report, COM (2000) 618, p. 6.

153 See J. Walker, 'Extraterritorial Application of US Antitrust Laws: The Effect of the EC-US Antitrust Agreement' (1992) 33 *Harvard International Law Journal*, 583-591, 590; P. Torremans, 'Extraterritorial Application of EC and US Competition Law' (1996) 21 *European Law Review* 280, 289-291.

persons with a legitimate interest can submit to the Commission a request for enforcement action.¹⁵⁴ Torremans submits that the US does not fit either of these requirements and thus the provisions on positive comity may give rise to a new challenge before the Court of Justice.¹⁵⁵ Attorney General Tesauro believes that the positive comity provisions clearly breach Article 3(2) of the Regulation.¹⁵⁶ These opinions lead one to conclude that this aspect of the agreement is in a vulnerable position.

The agreements are further weakened by confidentiality requirements and by the fact that neither agreement affects existing laws in any way. Article 8 of the 1991 agreement for example states that:

notwithstanding any other provision of [the] agreement, neither party is required to provide information to the other party if disclosure of that information to the requesting party is (a) prohibited by the law of the party possessing the information; or (b) would be incompatible with important interests of the party possessing the information.¹⁵⁷

This article also stipulates that the agencies involved will try as far as possible to ensure that the confidentiality of the information received is protected.¹⁵⁸ Article 9 provides that the domestic laws of the co-signatories are not affected by the agreement.¹⁵⁹ As these agreements are not treaties they cannot override any provisions of EC or US law that may be inconsistent with their principles.¹⁶⁰ For Advocate General Tesauro both these articles combine to ensure that the agreement has a very limited effect on EC or US antitrust law.¹⁶¹ Regulation 1/2003 imposes an obligation of secrecy in competition matters on the Commission.¹⁶² Due to Article 9 of the 1991 agreement, this Regulation will take precedence over Articles 2, 3, and 5 of the agreement, ensuring 'the non-application of the agreement so far as the major provisions are concerned, ultimately emptying it of the whole of its substance'.¹⁶³ It is thus submitted that cooperation agreements do not solve problems of conflict due to extraterritoriality when confidentiality requirements impose limits on the ability of the enforcement agencies to deal with anticompetitive behaviour, especially when those who possessed the information in the first place give no waiver.

The agreement then seems to be of 'uncertain value'¹⁶⁴ given the fact that the ECJ may yet annul its positive comity provisions and the confidentiality requirements may result in an agreement with no substance. The agreement also displays weaknesses in that no obligations are created under it.¹⁶⁵ Consultations, exercise of positive comity, coordination of efforts and the use of negative comity for example are left to the total discretion of each state. The potential advantages of the agreement therefore depend on the reciprocal trust of each state, their sensitivity to international conflicts and their ability to forego investigations and enforcement actions when they recognise the existence of other more powerful, legitimate interests of co-signatories. Further, the agreement is silent on the position of private suits,¹⁶⁶ an issue of great importance in the US, where the majority of cases involve actions taken by private plaintiffs as opposed to enforcement agencies. The drawbacks of these agreements can be summarised as follows:

- They impose strict confidentiality requirements on the enforcement agencies;
- They do not affect existing legislation, including confidentiality laws;
- They only create discretionary powers and not legally binding obligations;
- They are silent on the issue of private suits; and

¹⁵⁴ Article 3(2) of Regulation 17/62, [1967] JO No. 13/204. This has been replaced by Article 7(2) of Regulation 1/2003.

¹⁵⁵ P. Torremans, *op. cit.*

¹⁵⁶ Conclusion of AG Tesauro in Case C-327/91, *France v. Commission* [1994] ECR I-3641.

¹⁵⁷ The 1991 Agreement, Article 8.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*, Article 9.

¹⁶⁰ A. Riley, 'Nailing the Jellyfish: The Illegality of the EC-US Government Cooperation Agreement' [1992] 3 ECLR 101, 106.

¹⁶¹ See Case C-327/91, *France v. Commission* [1994] ECR I-3641.

¹⁶² See Regulation 1/2003, at Chapter VIII.

¹⁶³ See AG Tesauro, *op. cit.*, at 540.

¹⁶⁴ M. Shaw, *International Law*, Cambridge, Cambridge University Press, 1997, at 489.

¹⁶⁵ C. Cocuzza and M. Montini, 'International Antitrust Cooperation in a Global Economy' [1998] ECLR 156, at 158.

¹⁶⁶ See P. Torremans, *op. cit.*, at 292.

- They do not provide a mechanism for solving conflicts involving a significant divergence on substantive analysis.¹⁶⁷

Torremans argues that a multilateral treaty producing binding obligations, which may override domestic legislation, should be adopted.¹⁶⁸ For him this treaty should define the applicable (extraterritorial) jurisdiction test in antitrust cases *viz.* the implementation doctrine, and should list the comity considerations to be undertaken as a matter of course in administering such a test.¹⁶⁹ In short, he believes that the cooperation agreements operate on a different level to that which is required. It is submitted that the advantages of Torremans' approach are obvious, effectively combating the disadvantages associated with cooperation agreements. However, it is also submitted that in the present political climate such an approach might not be feasible, involving as it does imposition of obligations on states, undermining their sovereignty to a degree that may not be appreciated. A multilateral cooperation framework that involves discretionary initiatives agreed at international level, possibly within the WTO or the OECD, may be a less challenging, less controversial – albeit weaker – alternative. A treaty establishing such a framework would need to change existing confidentiality laws if it were to be of any substance. Such an approach may involve a small number of states at first, expanding in scope once confidence has been established. Provision must be made to ensure downstream confidentiality. Although such a treaty may involve changes in the substantive provisions of domestic confidentiality laws, its successful operation depends to high degree on whether or not the agencies involved can assure the business community that sensitive information remains within a closed loop of enforcement agencies. In other words, a relaxation of confidentiality rules between enforcement agencies should not entail the abandonment of confidentiality requirements between these enforcement agencies and third parties. It is submitted that in the absence of a political will to adopt binding global competition standards, such a treaty may prove to be the best way forward.

C. Multilateral Convergence

There have been various attempts to create a framework for multilateral cooperation and convergence at certain international organisations such as the United Nations ('UN'), the Organisation for Economic Cooperation and Development ('OECD') or the World Trade Organisation ('WTO'). In 1980, at the United Nations Conference on Trade and Development ('UNCTAD'), a voluntary, non-binding code was adopted. The UN's *Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, detailed a set of core principles to be adopted in competition law systems. The aim of the UNCTAD in producing such a code was to encourage international consensus on substantive provisions of competition law. The code however fails in its attempt: the principles are very vague and its implementation at national level is left to the discretion of the individual UN states.

The OECD has attempted to encourage cooperation in the enforcement of national competition laws. In 1969, the organisation adopted a 'Recommendation' detailing the manner in which cooperation could be achieved.¹⁷⁰ This Recommendation has been modified over the years but it essentially provides that member countries should: notify other members when their national interests are affected by enforcement action under national competition law; share information and consult with the various enforcement agencies of member countries; coordinate parallel investigations when circumstances deem it appropriate; assist in investigation of anticompetitive activities; and rely on the concept of positive comity.¹⁷¹

The Recommendation only presents suggestions – as opposed to obligations – on how to facilitate effective cooperation in enforcement activities. Despite its voluntary nature, the

¹⁶⁷ See, e.g., the *Boeing/McDonnell Douglas* and *GE/Honeywell* cases. As Von Meibom and Geiger state: 'bilateral agreements are no guarantee of success [in international enforcement activities]. The *GE/Honeywell* case has shown only too well that competition authorities can reach different decisions despite having bilateral agreements. This demonstrates the limitations of what can be achieved with bilateral agreements as long as the law is not harmonized': W. Von Meibom and A. Geiger, 'A World Competition Law as an *Ultima Ratio*' [2002] ECLR 445, at 450.

¹⁶⁸ P. Torremans, *op. cit.*, at 292.

¹⁶⁹ *Ibid.*

¹⁷⁰ OECD, *Revised Recommendation Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade*, OECD Doc C(95) 130 (final), 27 July 1995.

¹⁷¹ Summary of the proposals in the Recommendation, *ibid.*

Recommendation has achieved a certain degree of success, evidenced by the conclusion of cooperation agreements between *inter alia* the US and Canada, the US and the EU, and the EU and Canada. Another important development at the OECD was the creation of the Global Forum on Competition in October 2001. This forum convenes on a regular basis, bringing together representatives of the thirty OECD members, the EU and twenty-one non-OECD members. The Global Forum is essentially intergovernmental in nature, concentrating on coordination of economic policy and exchange of information. It has no legal rule making functions.

According to Von Meibom and Geiger¹⁷² one of the most promising initiatives at the moment is the International Competition Network (ICN)¹⁷³, founded on 25 October 2001. The ICN is the direct result of the recommendations of the US Attorney General's International Competition Policy Advisory Committee.¹⁷⁴ It is a project-orientated, consensus-based, informal network of antitrust agencies from both developed and developing countries that examines enforcement and policy issues of common concern to Member States. The Network consists of a Steering Committee and five working groups.¹⁷⁵ Like the Global Forum on Competition, the ICN is an intergovernmental forum with no rule-making functions.¹⁷⁶ Those who prefer binding international rules would submit that the ICN, although useful in reducing friction between Member States, does not go to the root of the problem. It is not radical enough, does not create binding obligations on members, and does not take significant steps towards convergence on substantive provisions of antitrust law. Nevertheless, the ICN has made considerable strides towards developing trust among competition agencies and soft convergence of laws, which has had more practical benefits than all other international efforts to date.¹⁷⁷

That said, some commentators have noted that the WTO, with its existing dispute settlement procedure, may be an appropriate forum to develop an international competition law.¹⁷⁸ The WTO, the successor of the General Agreement on Tariffs and Trade (GATT), is an organisation that concentrates primarily on trade liberalisation and the globalisation of markets. It does not have any antitrust policies of its own: there are no WTO rules imposing obligations on countries expressly in relation to the enforcement of their competition laws (despite some early attempts at this in the telecoms sector).¹⁷⁹ In 1993, during the Uruguay round that led to the creation of the WTO, a Draft International Antitrust Code was drawn up by a group of experts at the Max Planck Institute.¹⁸⁰ This code envisaged the creation of an international antitrust regime involving common substantive provisions of competition law, and the creation of an International Antitrust Authority with competence to prohibit activities inconsistent with such provisions.¹⁸¹ This authority would have power to: bring actions against National Authorities when they refuse to take appropriate enforcement measures under its antitrust laws; sue private parties for an injunction to stop anticompetitive behaviour; have a duty to sue a party before the International Antitrust Panel envisaged in the code; and assist Member States in the enactment and enforcement of antitrust laws.¹⁸² This project was considered too ambitious and no competition agreement was annexed to the Plurilateral Treaties annexed to the WTO Charter. A minority of this working group proposed a less radical solution based on the adoption of fifteen core principles towards which gradual legislative convergence should be undertaken.¹⁸³ No international consensus on this issue ensured that the WTO members adopted not even this proposal.

172 W. Von Meibom and A. Geiger, *op. cit.*, at 452.

173 See www.internationalcompetitionnetwork.org.

174 See *Final Report of the International Competition Policy Advisory Committee to the US Attorney General and Assistant Attorney General for Antitrust*, February 2000.

175 *Ibid.* The Steering Committee identifies work projects for the working groups. These groups are: The Mergers Working Group; The Advocacy Working Group; The Funding Working Group; The Memberships Working Group; and the Non-Governmental Advisors Working Group. See also G. Murphy, 'Responding to Challenges of a Globalised Marketplace' [2002] ECLR 227.

176 *Ibid.*

177 P. Marsden, 'Tune in to the International Competition Network - Not the WTO - for Practical Advances in International Anti-trust', *In Competition*, Brussels (December 2001).

178 See, e.g., A. Jones and B. Sufrin, *EC Competition Law: Text, Cases and Materials*, Oxford, Oxford University Press, 2001, at 1073. On the development of a WTO competition policy, see generally P. Marsden, *A Competition Policy for the WTO*, London: Cameron May, 2003.

179 On this see P. Marsden, 'Innovative Trade Rules with Anti-competitive Effects', *International Business Lawyer*, London, (March 2001).

180 *Draft International Antitrust Code, GATT-MTO Plurilateral Trade Agreement*, Munich, Max Planck Institute, 1993.

181 *Ibid.*

182 For a concise summary of the Draft Code see C. Cocuzza and M. Montini, 'International Antitrust Cooperation in a Global Economy' [1998] ECLR 156, 160-61.

183 *Ibid.*

In June 1996, the EC Commission proposed that the December WTO Ministerial Conference establish a working group to investigate core principles of competition law that could be made available for adoption by Member States of the WTO.¹⁸⁴ The US was hostile to such a proposal believing that a WTO led international competition regime could not accommodate the diversity of its Member States.¹⁸⁵ Even if core principles were adopted they would be minimalist in nature, consisting of lowest common denominator ideas, undermining the effectiveness of present more broad ranging principles. The US also expressed the fact that the business community would have concerns about handing over business sensitive information to WTO bureaucrats.¹⁸⁶ Finally, the US questioned the appropriateness of the WTO dispute settlement procedures in dealing with competition law matters, believing that such reviews of anticompetitive behaviour 'could interfere with national sovereignty concerning prosecutorial discretion and judicial decision making, and could also involve WTO panels in inappropriate reviews of case specific, highly confidential business information'.¹⁸⁷ Convergence for the US should only entail 'moving together, based on learning and experience, but not binding rules' promulgated by an international organisation such as the WTO.¹⁸⁸

The EC proposal was not adopted. However, the 1996 WTO Ministerial Conference in Singapore did set up a working group to study the interaction of trade and competition policy.¹⁸⁹ In 2001, in Doha, Qatar, it was agreed at the Ministerial Conference that talks on convergence of competition rules would take place.¹⁹⁰ By late 2003, however, the EU had dropped its request on competition policy in order to ensure that a more limited, but still liberalising, trade agreement. As a result competition was effectively removed from the WTO's agenda.¹⁹¹ This example, then, highlights the difficulties that one faces when attempting to achieve a consensus concerning the convergence of competition law rules in a multilateral setting, particularly when opposition to such a project is registered by powerful jurisdictions such as the United States. Given this context, it is submitted that, for the moment at least, convergence - if it is to occur - should be of the soft law variety and should find its source in best practices guidelines and/or non-binding recommendations. Indeed, according to the United States at least, if convergence in a multilateral setting is to take place, it should be focused on discrete issues of best practices, a form of multinational antitrust convergence by 'baby steps'.¹⁹² It appears that the ICN is an existing forum that is particularly suited to such important work.¹⁹³

V. CONCLUSION

As outlined above, there are obvious similarities between competition law in the US and its counterpart in the EC, in particular as regards substance as opposed to procedure. The underlying legislative provisions, while different in wording, are roughly equivalent and in more recent years both jurisdictions have apparently been pursuing common objectives, namely the maximisation of efficiency and consumer welfare. Procedures, although not identical, also display similarities e.g. in relation to sanctions, the absence of notification requirements for agreements, and the use of extraterritorial jurisdiction. Important differences are also present. Indeed, substantive differences exist concerning bundling, predation, the licensing of intellectual property rights and the assessment of conglomerate mergers. Agreements that frustrate the objective of free market integration are prohibited in Europe; the US, by contrast, does not exhibit a similar concern for agreements that compartmentalise their national market. Differences in attitudes and culture have also influenced European approaches to procedural issues, as seen, for example, in the rejection of treble damages for private plaintiffs and the absence of individual criminal sanctions at EC level and in the majority of Member States.

184 Communication submitted by Sir Leon Brittan and Karl Van Miert, 'Toward an International Framework of Competition Rules', 18 June 1996, reprinted in European Commission Press Release IP(96) 523, 18 June 1996.

185 Address by Acting Assistant Attorney General Joel I. Klein, 'A Note of Caution with Respect to a WTO Agenda on Competition Policy', 18 November 1996, at 14. For a comprehensive summary of these contentions see J. Griffin, 'Foreign Governmental Reactions to US Assertions of Extraterritorial Jurisdiction' [1998] ECLR 64, 66-67.

186 Klein, *op. cit.*, at 14.

187 *Ibid.*, at 15.

188 T. Calvani, 'Devolution and Convergence in Competition Enforcement' (2003) 24(9) *European Competition Law Review* 415, at 418.

189 WTO Ministerial Conference Singapore, Final Declaration, 13 December 1996, 36 ILM 218 (1997), at paragraph 20.

190 WTO, Doha Ministerial Declaration, (WT/MIN(01)/DEC/1).

191 P. Marsden, 'Trade and Competition: Competition After Cancun - A Personal View' (2003) 2(10) *Competition Law Insight* 22, at 23.

192 T. Calvani, *op. cit.*, at 418. See also R. Tritell, 'International Antitrust Convergence: A Positive View' (Summer 2005) *Antitrust* 25.

193 See, e.g., S. Scott, 'Opening Remarks', *op. cit.*

The question that was posed here was whether these substantive and procedural differences are a problem. In a globalised world, it is likely that companies subject to EC competition law will also be subject to US law, and vice versa. Given that these laws are not identical to each other, it is obvious that possibilities for conflict exist. This is particularly the case with unilateral behaviour. The cooperation agreements concluded between the US and the EC may help to reduce the likelihood of conflict, but these agreements suffer from a number of serious disadvantages. In the absence of a viable harmonisation project – which itself is something that is very unlikely to be initiated at this point in time - it is convergence that should attempt to make up for the drawbacks of cooperation agreements. In particular, soft law convergence through the ICN should be pursued. Such soft law convergence can help not only reduce the possibilities of conflict, but also improve the efficiency of the US and EC competition law regimes, particularly in the area of merger procedures. It is submitted here, in any case, that if further cooperation/convergence is to occur it must be done in a coherent, consistent and coordinated manner, all the while respecting the sovereignty of all jurisdictions involved.

