

**INFLUENCING A GLOBAL AGENDA:  
IMPLICATIONS OF THE MODERNIZATION OF EUROPEAN  
COMPETITION LAW FOR THE WTO**

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February, 2004

**Abstract**

This article characterizes the Modernization of EC competition law as an economization, whereas most pieces concentrate on its procedural and structural aspects. Moreover, it attempts to relate the Modernization to WTO discussions: it argues that the influence that the Modernization will have on WTO discussions will enable the adoption of an international competition law, and it posits that, since the Modernization moves EC competition enforcement closer to that of the U.S., it should mitigate American hostility toward WTO-level competition regulation.

*Keywords:* modernization, convergece, competition law, antitrust, WTO

*JEL classification:* K21, K33, L40

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## 1. Introduction

Competition law enforcement regimes may be classified into three categories: global, regional, and national. The most important competition authorities at each level are, respectively, the World Trade Organization (“WTO”), the European Commission (“EC”), and the United States (“U.S.”). Although they are geographically distinct, one finds many substantive similarities across the three levels, owing both to the historical development of competition law and to recent reforms aimed at convergence. Historically, for example, many jurisdictions that have enacted competition laws since World War II have looked to the experiences of the United States for guidance. As a result many of these newer competition regimes have substantive and procedural provisions that resemble those in U.S. law. Moreover, a growing recognition of the benefits of convergence has also led many jurisdictions to revise their competition laws to conform with other jurisdictions. In mergers, for example, the International Competition Network has created a number of “recommended practices” for merger notification procedures that are being adopted at an astounding pace.<sup>1</sup>

One of the driving forces behind convergence has been the desire to address multijurisdictional issues, such as merger notification by a multinational company. Convergence is viewed as a proper method for preventing conflicting outcomes, and recent activity, notably by the EC, demonstrates the advantages of competition law convergence in the international arena. The United States and Europe historically have had very different competition regimes, and, until recently, harmonization appeared aspirational at best. Yet, since the mid-1990’s when the EC began modernizing its competition law enforcement system, the differences between the two jurisdictions have begun to dissipate. The central features of the modernization of European competition law included decentralization, expansion of the direct effect, and economization. These changes, together with the growing emphasis on economic analysis and market performance, have narrowed the divergence between European and American competition law enforcement.

Convergence may not be sufficient for reaching all types of international anticompetitive practices, however, so long as jurisdictional reach remains different. A particularly thorny area, for example, has been to determine the best method of addressing harm caused by non-tariff barriers (“NTBs”). The essence of these barriers, which include the non-competitive market structure, closed-to-foreign business practices, and unreasonable government regulation, is a private restraint on

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<sup>1</sup> See, [http://www.internationalcompetitionnetwork.org/2003\\_practices.pdf](http://www.internationalcompetitionnetwork.org/2003_practices.pdf). Since these practices were adopted in September 2002, jurisdictions as diverse as the European Union, Serbia, Mexico and Ireland have used them to assist in merger reform.

the functioning of a free market, as opposed to public restraints which are generally dealt with by international trade law. These NTBs are blamed for blocking easy market access and undermining the welfare of domestic and global economies. They are largely responsible for shifting the competition law debate from convergence to the possibility of creating an international competition law; thereby prompting the question, what form should international competition policy assume?<sup>2</sup> The debate has centered on bilateral/regional cooperation, as supported by the U.S., versus multilaterally at the WTO, as advocated by the EC as well as Korea and Japan. The U.S. has been reluctant to accept a multilateral approach to international competition law, stressing the difficulty of negotiation and the characterization of non-trade issues in conjunction with competition law. The EC, on the other hand, supports the WTO studies in addition to expanding bilateral agreements:

The European Community is at the forefront in recognizing the need for a globalized competition law response to the global economy. Its role in both contexts of bilateral agreements and the debate on the institution of a multilateral world competition code demonstrate this.<sup>3</sup>

This bilateral/regional versus multilateral debate exposes differences between the United States and the European Community. It is here that similarities seem less apparent and, as in every jurisdiction, one is made aware that each body of law reflects that jurisdiction's own economic, social, political, and historical experiences. The development of European competition law, for example, has been guided by principles that are markedly different from those in the United States. In Europe, *ordo-liberalism*,<sup>4</sup> stressing the process of competition to achieve various ends, permeates the law and guidelines. This intellectual legacy is reflected not only in Articles 81 and 82 of the Treaty of Rome, but also in each individual country's competition law. As a result, those countries tend to pursue more extensive goals than the U.S.; in fact, fostering economic integration has been considered more important

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<sup>2</sup> At the 1996 Singapore Ministerial Conference, member states of the WTO decided to launch a new discussion about competition law and policy, one of the so-called "Singapore issues".

<sup>3</sup> Barry J. Rodger, *Competition Policy, Liberalism and Globalization: A European Perspective*, 6 Colum. J. Eur. L. 289 (2000), p.319.

<sup>4</sup> *Ordo-liberalism*, the thought of the Freiburg School of Germany in mid-twentieth century, was called the "third way" between the *laissez-faire* liberalism and the state interventionism. It argues for strong protection of economic liberties and freedom of trade, supported by competition and non-discrimination rules. This philosophy's idea of "economic constitution" guaranteed by a (supra)national body has been the major source of support for the integration of European market, as well as for the market economy system.

than protecting market mechanism.<sup>5</sup> American antitrust law, on the other hand, focuses on market performance, reflecting its roots both in “pragmatic liberalism” and, more recently, conservatism.<sup>6</sup>

These divergent principles affect the way the two authorities analyze competition cases, resulting in different approaches: economically analytical versus clause centric.<sup>7</sup> The difference in case analyses, discussed further below, has, in part, prompted U.S. resistance to an international competition law at the WTO. Notably, the U.S. appears afraid to compromise its ability to impose “sound” enforcement methods derived from the “most developed” neo-classical economics on foreign jurisdictions, including the EC.

Understanding the European and American paths of convergence, and the differences in the guiding principles behind European and American competition law, provides important insight into the future of competition law in the international arena, particularly in the third level of competition law enforcement, the WTO. It is precisely these ideological differences, combined with substantive convergence between the two jurisdictions, which may contribute to the establishment of an international competition law in the WTO.

It is hard to predict correctly the future performance of the discussions at the WTO, partly because its discussions about trade issues often reflect conflicts among the political interests of member countries, rather than achievement of logical understandings through persuasion. A conclusion can be reached, however, that the history of the EC should ensure continuity of the EC’s advocacy of a multilateral approach, and that the modernization of EC competition law would make it easier for the WTO to launch the basic scheme of international competition law. This history of the EC has demonstrated to its participants that it has the ability to successfully

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<sup>5</sup> Helmuth Schroter, *The Reform of EC Competition Policy: International and Comparative Competition Law and Policies* (ed. Yang-Ching Chao, et. al., 2001), p. 160.

<sup>6</sup> In the U.S., as the economy became more complex as it expanded, classic liberalism developed into the pragmatic liberalism that supported government’s active role in correcting economic deficiencies caused by unregulated capitalism. This concept, largely advocated by the Democrats, traditionally supported strong enforcement of antitrust laws and remained influential particularly with the political hegemony of the Democratic Party incumbent. When the Republicans took political leadership in early 1980’s, however, the antitrust philosophy became to be better described by the conservatism that favored the market function, widening the gap between the EC and the U.S.

<sup>7</sup> Such difference can be also attributed to the difference of the legal systems (civil v. common law), socio-economic situation (U.S. economy is dominating the world), philosophy (ordo-liberalism v. Conservatism or pragmatic liberalism), development of economics (arguably maintained by American practitioners), etc.

address the trade and competition interface with competition law among diverse economies. Furthermore, the modernization of EC competition law enforcement is intended to economize competition analysis and enforcement, strengthen economic integrity, increase the efficiency of enforcement, and promote free trade. Such changes would narrow the gap between the American and European ways of thinking about competition law, while increasing emphasis on achieving optimal market performance.

This paper analyzes the broad implications the Modernization of European competition law is likely to have on its major trading partner, the United States, and thereby on the future of the discussions about international competition law at the WTO. Both the EC and the U.S. are aware of the increasing importance of competition law in the international arena, although currently, they advocate different approaches. The European Community's history of addressing the interface between trade and competition, together with its modernization reforms that converge EC and U.S. competition laws, may mean that an international competition law at the WTO can, indeed, be realized.

This paper proceeds as follows. First, it considers the general differences between the U.S.' and the EC's trade and competition interface. Second, it presents the role of extraterritorial enforcement in international competition law, comparing the U.S. and the EC, and examining the consequences of these differences for the international arena, notably for an international competition law within the WTO. In Section 4, the history of the modernization process is set forth, and then the implications of the 2002 Modernization in the international arena are analyzed. Finally, this paper concludes with a prediction for the WTO negotiations.

## **2. The Trade/Competition Interface in Europe and the United States**

Historically, trade law has been understood to involve public restraints of trade, while competition law was primarily concerned with private restraints; further, trade law is internationally oriented, whereas competition law has national roots.<sup>8</sup> The globalization of economies and the expansion of the role of competition policy at both the domestic and international levels have, however, led to a growing recognition of the dynamic relationship between trade and competition laws. As discussed above, as trade barriers have been dismantled, NTBs have become an increasingly popular means of protectionism. Following the consummation of the Uruguay Round in 1994, competition law has emerged as an effective tool for dismantling NTBs. While there is general agreement that NTBs must be addressed,

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<sup>8</sup> See Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 A.J.I.L. 1 (1997), at 3.

there is not yet agreement on how best to address it. History guides much of the current debate on methodology.

The European Community has had an early and thorough understanding of the trade/competition interface, at least within its member states.<sup>9</sup> The principle of ordoliberalism, as discussed above, has guided EC competition law, allowing for flexible goals such as redistribution, competitor protection, consumer protection, and economic integration in addition to the classic economic efficiency.<sup>10</sup> It is noteworthy, of course, that one of the main goals of competition policy in the EC has been the single market imperative.<sup>11</sup> After the explicit removal of national trade laws within the EC, such as antidumping and countervailing duty laws, the EC developed harmonization of relevant laws and policies to prevent a spillover among member economies that might deteriorate the integration. It also recognized that private restraints can defeat integration efforts and regarded competition law as an effective way to solve those problems.

The U.S. has witnessed a very different experience from the European Community. Since the mid-1970's, when the Chicago School began to gain strength, and particularly after the early 1980's, when the Reagan Administration's deregulation was effectuated, the focus of American antitrust law has shrunk to address only narrow economic efficiency problems. The American approach is best considered one of "conservatism", a policy dramatically different from the (ordo-) liberalism of the EC. Although it is true that the post-Chicago School that has emerged since late 1980's has reached different conclusions, emphasizing the strategic behavior of businesses and the diverse roles of antitrust, Chicagoan principles continue to dominate American competition policy.

These historical differences and distinct policy goals have influenced and continue to sway transatlantic positions on the future of international competition law and policy. It is not surprising that the EC experience led its leaders to initiate a multilateral discussion at the WTO about international competition law. Sir Leon Brittan expressed his preference for the WTO to serve as a forum for creating common competition laws in his Davos speech in 1992.<sup>12</sup> Soon after, most EC states

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<sup>9</sup> See *id.*, pp.4-11.

<sup>10</sup> See Richard Whish, *Competition Law* (4<sup>th</sup> ed., 2000), pp. 15-21. Other scholars list economic efficiency, preservation of liberty, fair competition, and other socio-political ideas including market integration, as goals of competition law. See Alison Jones & Brenda Sufin, *EC Competition Law* (2001), pp. 4-17.

<sup>11</sup> See Richard Whish, *id.*, at 19.

<sup>12</sup> See Leon Brittan, *A Framework for International Competition*, Address delivered at World

followed his initiative. The EC's enthusiasm for a multilateral approach stands in contrast to the United States' preference for unilateral or bilateral methods of addressing competition law at the international level. The U.S., generally, advocates the continued use of unilateral, extraterritorial methods, as described in the next section.

### 3. Extraterritoriality as an Approach to International Competition Law

#### 3.1. *Extraterritorial Jurisdiction in the U.S. and the EC*

Unlike their European partners, Americans have generally considered antitrust to be independent from international trade law, preferring to use extraterritorial application of their antitrust laws to deal with international private restraints on trade. Americans remain skeptical about the use of a multilateral bargaining table to discuss international competition law, and instead promote resolution of these problems at the national level through national laws or through bilateral agency cooperation. For issues that might not be suitable for national law or bilateral negotiation, the U.S. advocates resolution through sectoral trade agreements.<sup>13</sup> One American explains, "I do not believe that an international agreement is necessary for achieving international competition law" because a system of international competition law is already evolving without formal international agreement, "based on implicit consensus and explicit, effective (and virtually unilateral) enforcement. Its leading edge is cartel prosecution in the United States, both civil and criminal."<sup>14</sup>

The antitrust authorities of the U.S. have been active in investigating international cartel cases, relying on the distinct "effects doctrine,"<sup>15</sup> and this aggressive approach to extraterritoriality has only recently been tempered. The Reagan administration took a less aggressive approach to international antitrust

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Competition Forum, Davos, Switzerland (1992).

<sup>13</sup> See Eleanor M. Fox, *id.*, at 14-15. As for approaches to this subject, Professor Fox lists four ways: a complete international code with a supranational enforcement agency (as proposed by the Munich group in 1993); harmonization/convergence of national antitrust laws; plurilateral agreement via bilateral agreements; and accumulation of bilateral agreements plus extraterritorial enforcement. Currently, the U.S. has established bilateral antitrust cooperation agreements with eight economies (including the European Union). See the agreements at [http://www.usdoj.gov/atr/public/international/int\\_arrangements.htm](http://www.usdoj.gov/atr/public/international/int_arrangements.htm).

<sup>14</sup> Harry First, *The Vitamins Case: Cartel Prosecutions and The Coming of International Competition Law*, 68 *Antitrust L.J.* 711 (2001), p. 712.

<sup>15</sup> This doctrine originates back to the *United States v. Aluminum Co. of America* (148 F. 2d 416, 2d Cir.) (1945) in which Judge Learned Hand ruled that liability might be imposed on persons abroad for conduct outside the borders of the state.

enforcement, but the importance of that legacy has been minimal, since the removal in 1992 of a footnote in the Department of Justice's Guidelines for International Operations that required that consumers in the United States be adversely affected by trade restraints before suits could be brought against those restraints of trade affecting exports.<sup>16</sup> Since then, even an exclusion of American firms by non-U.S. firms from non-U.S. markets is potentially subject to U.S. antitrust prosecution. Most recently, in *United States v. Nippon Paper*,<sup>17</sup> the First Circuit confirmed that American antitrust law had "stunted" the growth of comity in antitrust by the Supreme Court ruling in *Hartford Fire*.<sup>18</sup> Thus the reach of American antitrust law appears enormous, and more so when contrasted with the EC.

The EC has been less aggressive about extraterritoriality. Its approach is based on general public international law, depending on subject-matter and enforcement jurisdiction. In order for a state, including the EC, to claim jurisdiction, certain conduct must satisfy territoriality and nationality principles, and, in addition, the state must get permission of the other state within which the enforcement will occur.<sup>19</sup> In the *Woodpulp I* case,<sup>20</sup> the European Court of Justice ("ECJ") declared that Article 81 could be applied extraterritorially, but that its application must be limited to direct sales; the Court depended upon the concept of "implementation" based on conduct rather than effects. By refraining from making a decision regarding the effects doctrine, despite the invitation from the Commission to do so, the ECJ remained consistent with noticeable cases from prior days.<sup>21</sup>

Although many commentators argue that EC competition law accepted the effects doctrine in a similar fashion to the U.S., the evidence is mixed. It is true that the Commission has favored the effects doctrine, and the Court of First Instance ("CFI") has recognized this attitude. Recently, in the *Gencor* case (1999), the CFI

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<sup>16</sup> See U.S. Department of Justice, Antitrust Enforcement Guidelines for International Operations, text available at <http://www.usdoj.gov/atr/public/guidelines/internat.htm>.

<sup>17</sup> 109 F.3d 1, 8 (1997), certiorari denied, 522 U.S. 1044 (1998).

<sup>18</sup> *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (a U.S. court can assume jurisdiction over foreign conduct that was meant to produce, and did in fact produce substantial effect in the U.S.).

<sup>19</sup> See Richard Whish, *id.*, pp. 392-394.

<sup>20</sup> *Wood Pulp*, 19 December 1984, European Commission decision (IV/29.725), [1985] OJ L85/1, [1985] 3 CMLR 474.

<sup>21</sup> For example, see the *Beguelin* judgment of November 25, 1971 (case 22/71, 1971 ECR 949), *Dyestuffs* case of July 14, 1972 (case 48-57/69, 1972 ECR 619), *Continental Can* judgment of February 21, 1973 (case 6/72, 1973 ECR 215), and the *Commercial Solvents* judgment of March 6, 1974 (case 6-7/73, 1974 ECR 223).



ruled that Community merger rules could be applied to transactions that had been carried out outside the Community, but were likely to significantly impede competition within the Community, based on the effects theory.<sup>22</sup> The Commission also has been active in reviewing particular merger cases that occurred outside of its territory but that would have a significant impact on the EC, e.g., the mergers of Boeing/McDonnell Douglas (1997), Exxon/Mobil (1999), and GE/Honeywell (2001).

It is not clear, however, whether the effects doctrine is fully recognized in EC law<sup>23</sup> because the highest court appears to consciously avoid answering this question. At the same time, the compatibility of the effects criterion with international law is continuously questioned.<sup>24</sup> One commentator argues that “it is not correct to state that the Court accepted the effects theory” when it based the *Woodpulp I* judgment on the implementation theory.<sup>25</sup>

It is clear that the U.S.’ use of extraterritorial enforcement of its antitrust laws is an effective device for capturing international anticompetitive conduct, and this use has been accepted by U.S. courts. Whether and to what extent the same is true for the EC has not yet been determined.<sup>26</sup>

### 3.2. *Extraterritoriality Disagreements: Implications for the International Arena*

The potential differences between jurisdictional reach play an important role in the disagreements between the U.S. and the EC in WTO discussions. The United States has resisted an international competition law, since it has been able to rely on extraterritorial enforcement of its own laws. The EC meanwhile, together with other trading partners, is concerned about the U.S. antitrust authorities’ power to impose penal sanction, such as fine or imprisonment, and private litigants’ potential to subject them to the broad discovery and treble damage liability. Consequently, trading partners have opposed the effects doctrine of the U.S. almost universally and some countries have even responded with legislation blocking discovery and permitting defendants to claw back the treble-damages portion of any private

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<sup>22</sup> *Gencor Ltd. v Commission of the European Communities*, 25 March 1999, Case T-102/96, 1999 ECR 753, para. 74.

<sup>23</sup> See Richard Whish, *id.*, pp. 399-400.

<sup>24</sup> See Michael Waelbroeck & Aldo Frignani, *European Competition Law* (Vol. IV of the *J. Megret Commentary*) (1999), p. 86.

<sup>25</sup> *Id.*, p. 88.

<sup>26</sup> Despite the different legal logic, however, the consequences are similar in terms of application of antitrust laws particularly with regard to prosecuting international cartel cases. For example, see the decision of prohibition and fines on vitamin cartels, 21 November 2001, Case COMP/E-1/37.512, OJ L 006 [2003].

recovery that might be awarded by a U.S. court.<sup>27</sup>

This dissatisfaction with the aggressive enforcement of U.S. antitrust law has led major countries to advocate an international competition law, particularly with respect to hard-core cartels (historically the main target of U.S. extraterritorial enforcement). They believe that an international competition law would both curtail the U.S.' ability to use its antitrust laws extraterritorially, and would increase their ability to address conduct outside of their borders.<sup>28</sup> Advocates of an international competition law have looked to a variety of multilateral arenas, including the United Nations Conference on Trade Development, the Organization for Economic Co-Operation and Development, the International Competition Network, and the WTO. The WTO is often considered the most appropriate forum, however, because any agreement would have binding effects on member economies.<sup>29</sup>

### 3.3. *International Competition Law at the WTO*

Although the notion of competition policy in the WTO dates back to the GATT's Havana Charter of 1947, substantive multilateral talks began in the mid-1990's. Perhaps not coincidentally, this period occurred simultaneously with the aggressive cartel prosecution by U.S. authorities and private litigants, when many European and Asian businesses were fined or held liable at an unprecedented rate.<sup>30</sup> Meanwhile, since 1989, the U.S. also began to use its antitrust laws to open previously closed foreign markets, through agreements such as the Structural Impediment Initiative (SII) with Japan.<sup>31</sup> Arguably, the impetus for a multilateral discussion of competition

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<sup>27</sup> Blocking statutes were enacted by many western countries, including Australia, Canada, United Kingdom, and France.

<sup>28</sup> Recently a significant deviation is developing, however, in non-U.S. and non-EC countries to address the extraterritoriality issue more aggressively than before. For example, five economies sanctioned the vitamins price-fixing cases until recently, based on similar theories to the effects doctrine. In Korea, the Korea Fair Trade Commission applied the effects doctrine to impose surcharges of \$ 2.8 million on the vitamin cases and the High Court approved the decision (August 26, 2003).

<sup>29</sup> In comparison, the 1998 Recommendation of the Council Concerning Effective Action Against Hardcore Cartels by the OECD did not have a binding effect.

<sup>30</sup> Among the 28 companies that have been fined \$10 Million or more for Sherman Act Violations as of January 2003, only six were American and the rest were either European or Japanese, including F. Hoffmann-La Roche, Ltd. (1999) of Switzerland fined the historical \$500 million for vitamins price fixing scheme. For detailed data, see Sherman Act Violations Yielding a Fine of \$10 Million or More at <http://www.usdoj.gov/atr/public/criminal/12557.htm>.

<sup>31</sup> The most famous, and yet factually finalizing, token of the market-opening battle between U.S. and Japan was the Kodak-Fuji dispute (1998) concerning Kodak's sale of photographic

law was a response to the aggressive unilateralism of the U.S.

In 1996, the Singapore Ministerial Conference established the Working Group on the Interaction between Trade and Competition Policy (“Working Group”), and mandated that the group consider issues raised by WTO Members, as well as identify areas that merit further consideration in the WTO framework.<sup>32</sup> The Working Group extensively studied the substantive nature of a possible international competition law. After its Preliminary Report and Program in 1997, the Working Group produced three Reports on the interaction between trade and competition policy, in 1999, 2000, and 2001.<sup>33</sup>

The American position was firmly against an international competition law at the WTO, because “we have already achieved a de facto international competition law in the area of cartel behavior.”<sup>34</sup> This commentator argued that a multilateral agreement is extremely difficult to put together, and that such an “approach holds great risks in terms of producing outcomes that may not be as procompetitive as many of its proponents hope.”<sup>35</sup> Joel Klein, the Assistant Attorney General of the Department of Justice of the U.S. at that time, stated,

“I would hate to see our energy and attention diverted from these practical efforts at improving enforcement, particularly against international cartels, diminished by an unwieldy and theoretical WTO exercise. Indeed, a premature effort

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paper in Japan.

<sup>32</sup> The mandate of the Working Group on the Interaction between Trade and Competition Policy was “to study issues raised by members relating to the interaction between trade and competition policy, including anticompetitive practices, in order to identify any areas that may merit further consideration in the WTO framework.” See WTO Singapore Ministerial Declaration (Adopted on December 13, 1996), text available at [http://www.wto.org/english/news\\_e/pres96\\_e/wtodec.htm](http://www.wto.org/english/news_e/pres96_e/wtodec.htm).

<sup>33</sup> Doc. WT/WGTCP/2 (Dec. 8, 1998); Doc. WT/WGTCP/3 (Oct. 11, 1999); Doc. WT/WGTCP/4 (Nov. 30, 2000). The topics were; (1) the relevance of the fundamental WTO principles of national treatment, transparency, and most-favored-nation treatment to competition policy, and vice versa; (2) approaches to promoting cooperation and communication among Members, including in the field of technical cooperation; and (3) the contribution of competition policy to achieving the objectives of the WTO, including the promotion of international trade. For detailed description of the work within WTO, see Robert D. Anderson, *International Cooperation in Competition Policy: Approaches Currently under Consideration in the WTO: International and Comparative Competition Law and Policies* (ed. Yang-Ching Chao, et. al., 2001), pp. 217-234.

<sup>34</sup> Harry First, *id.*, at 727.

<sup>35</sup> *Id.*, at 733. See also Harry First, *Theories of Harmonization: A Cautionary Tale*, in *Comparative Competition Law: Approaching an International System of Antitrust Law 17* (Hanns Illich ed., 1998).

to negotiate rules at the WTO is fraught with risk; as Dan Tarullo, Assistant to the President for International Economic Policy, explained in the Financial Times in August, 'a world competition code is not a good idea'.<sup>36</sup>

At the Doha Conference in November 2001, however, a number of WTO Members made proposals for the development of a multilateral framework agreement on competition policy. Although some differences were evident among Members favoring such an agreement, broadly speaking, the relevant submissions indicated that it should have three main elements. They were: (1) core principles, comprising transparency, non-discrimination, procedural fairness, and prohibition of hardcore cartels; (2) development of modalities for cooperation of a voluntary nature; and (3) support for technical assistance and institution-building related to competition policy.<sup>37</sup> The majority of Members supported these elements, with some variations, including the EC and its member states, all other European states, Canada, Korea, Japan, and several Latin American countries.

At Doha, the U.S. and several developing and least developed countries relaxed their staunch opposition, a significant change from their earlier positions. The U.S. representative expressed, "[t]he United States can see merit in adherence to core competition principles of transparency, non-discrimination and procedural fairness. We can also support consultative and capacity-building efforts to help countries develop modern competition policy that promotes efficient, effective and dynamic markets."<sup>38</sup> American support did not extend further, however, and the U.S. remained

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<sup>36</sup> Joel I. Klein, *Anticipating The Millennium: International Antitrust Enforcement at The End of The Twentieth Century*, Address presented at Fordham Corporate Law Institute 24th Annual Conference on International Law and Policy (1997). Text available at <http://www.usdoj.gov/atr/public/speeches/1233.htm>. However, it is quite interesting to see the same official suggesting the establishment, by a group of international organization, of a "joint working group" for merger regulations to exchange information and to explore a "Global Competition Initiative" to overcome increasing burdens on international cooperation and coordination among various national antitrust authorities. See Joel Klein, *Time for a Global Competition Initiative?*, Speech at the EC Merger Control 10th Anniversary Conference (September 14, 2000), text available at <http://www.usdoj.gov/atr/public/speeches/6486.htm>. Probably the contradiction stems from the opposite impact of the multilateral discussion: the beneficiary of the multilateral talks will be the mega-corporations many of which are American.

<sup>37</sup> Robert D. Anderson & Frédéric Jenny, *Current Developments In Competition Policy In The World Trade Organization*, 16-FALL ANTITR 40 (2001), p.42.

<sup>38</sup> See the remarks of Robert B. Zoellick, the U.S. Trade Representative, in the press release "USTR Zoellick Outlines U.S. Efforts to Promote Growth and Development by Launching New Trade Round: U.S.-EU Effort Directed at Expanding and Strengthening Global Trading System" of July 17, 2001. Text available at <http://www.ustr.gov/releases/2001/07/01-54.pdf>.

adamant about rejecting multilateral negotiation of further aspects, out of fear that such talks might distort “sound” legal principles about competition.<sup>39</sup> In an earlier speech Joel Klein summarized the U.S. reluctance:

“[A] hasty effort at the WTO is fraught with risk. First, it will be hard to reach agreement on sound competition rules, which depend so much on the strict application of neutral legal and economic principles, in the WTO. A WTO competition policy debate would have to balance many (often diverse) national interests. Second, efforts to achieve a "minimum" set of competition principles or to identify common substantive standards could end up legitimating weak and ineffective rules - minimum standards often become the maximum. Third, a universal commitment to the adoption and enforcement of competition laws goes beyond core WTO concerns.”<sup>40</sup>

Thus the limited support of the U.S. at Doha for an international agreement meant that no substantive nor procedural factors regarding competition law were included, with the exception of those relating to hardcore cartels where no significant dispute exists. Limited support also meant that the Working Group could not increase its mandate, and its role still remains confined to “study.” Largely as a result of U.S. lack of enthusiasm, after Doha the nature and content of the Working Group’s future is generally expected to be limited to “modality” and “capacity building”:

“[T]he modalities for cooperation that are contemplated under the current proposals are essentially voluntary in nature and are less far-reaching than elements that were contemplated in the past. For example, all references to the concept of "compulsory positive comity" have been dropped. Much of the emphasis would be on voluntary cooperation in the development of national legislation and the exchange of national experience, rather than with the enforcement process as such. by opting in favor of an approach that relies principally on broad principles, moral suasion, and institution-building, rather than on detailed legal prescriptions, the current proposals avoid additional potential pitfalls.”<sup>41</sup>

From the viewpoint of international competition law such a result was not satisfactory: a discussion which started by studying the possibility of core legal principles within the WTO agreement was watered down to the examination of

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<sup>39</sup> See Kerrin M. Vautier, *International Approaches to Competition Laws: Government Cooperation for Business Competition: International and Comparative Competition Law and Policies* (ed. Yang-Ching Chao, et. al., 2001), p. 199.

<sup>40</sup> Joel Klein, *A Note Of Caution With Respect To A WTO Agenda On Competition Policy* (1996), text available at <http://www.usdoj.gov/atr/public/speeches/jikspch.htm>.

<sup>41</sup> Robert D. Anderson & Frédéric Jenny, *id.*

voluntary prohibitions of cartel activities.<sup>42</sup>

Against this background of advancements and setbacks for an international competition law, the EC was steadily making progress within its own borders by introducing changes to European competition law. These changes, as it turns out, would bring the European system closer to its transatlantic neighbor's system. The following sections discuss these changes, and conclude with a discussion of the impact these changes are likely to have on an international competition law within the WTO.

#### **4. Modernization of EC Competition Law and Its Impact**

##### *4.1. Early Efforts for Modernization: Economization*

In the broad sense, modernization began in the mid-1990's. A series of measures that reflect keen attention to economic analysis were taken,<sup>43</sup> including, the Notice on the Definition of the Relevant Market of 1997, the EC Concentration Control Regulation of 1998, the new Group Exemption Regulation of 1999, the Guidelines on Vertical Restraints in 2000, and the Green Paper on merger review of 2001. Reviewing these changes reveals that the 2002 Modernization's implicit aim to implant neo-classical economic analysis for rule of reason analysis into competition enforcement, similar to U.S. methodology, emerged as early as the mid-1990's.

The U.S. has frequently found fault with the EC's shortage of economic capability, and has claimed that EC decisions were not subject to sufficiently rigorous

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<sup>42</sup> The Cancún Ministerial Conference that closed on 14 September, 2003, ended without much success on the Singapore issues, including trade and competition policy, leaving prior discussions effectively same as they were. See [http://www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/min03\\_14sept\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm). It was evident that the major cause of the deadlock in Cancún was the different approaches between the EU and developing countries concerning the Singapore issues and agriculture, however, this issue is to be dealt with by separate work other than this article.

<sup>43</sup> See the Notice on the Definition of the Relevant Market in 1997 (OJ EC 1997, C372/3), EC Concentration Control Regulation of 1998 (OJ EC 1997, L 180/1), the Notice on the Notion of "Full-Function Joint Ventures" of 1998 (OJ EC 1998, C 66/1), the new Group Exemption Regulation 2790/1999 (OJ EC 1999, L 333/21), Guidelines on Vertical Restraints in 2000 (OJ EC 2000, C 292/1), the group Exemption Regulations for Specialization Agreements and Research & Development Projects (Commission Regulation 2658/2000 on Specialisation Agreements, OJ EC 2000, L 304/3 and 2659/2000 on R&D agreements, OJ EC 2000, L 304/7), the Guidelines on Horizontal Cooperation (OJ EC 2001, C3/2), and the Green Paper on the review of Council Regulation 4064/89 of December 11, 2001, COM (2001) 745 final.

economic review.<sup>44</sup> The EC has responded by enhancing the capabilities of its economics staff<sup>45</sup> and introducing new regulations requiring sufficient economic support for decisions.

Central to the early modernization trend in Europe has been the continuous improvement of the block exemptions on vertical restraints. The most recent example of an improvement in this respect is the block exemption for car sales and servicing of 2002.<sup>46</sup> The EC Competition Commissioner Mario Monti explained the new regulation, saying that, "specific distribution and servicing systems can be allowed but only if their advantages outweigh the competition restrictions on the market and provided consumers get a fair share of the resulting benefit."<sup>47</sup> Such an approach clearly advocates a rigorous rule of reason approach based on economic analysis, emphasizing consumer welfare and efficiency, and brings European review of vertical restraints closer to a U.S. review.<sup>48</sup>

In the U.S., vertical restraints are generally subject to rule of reason analysis unless they are "air-tight." In the *Schwinn* case,<sup>49</sup> the U.S. Supreme Court emphasized the independence and survival of small businesses regardless of efficiency.<sup>50</sup> In

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<sup>44</sup> See Janet L. McDavid, Proposed Reform of The EU Merger Regulation: A U.S. Perspective, 17-FALL ANTITR 52 (2002), p.53.

<sup>45</sup> The EC has recently sought proposals from private economists to consult with the Commission. See Call for Expressions of Interest from Competition Policy Experts: Merger Control, Specifically in Economic Analysis and Financial Analysis and Accounting, 2002/S 135-104760 (July 19, 2002), text available at [http://europa.eu.int/comm/dgs/competition/call\\_for\\_experts/2002\\_s\\_135\\_en.pdf](http://europa.eu.int/comm/dgs/competition/call_for_experts/2002_s_135_en.pdf).

<sup>46</sup> Commission Regulation (EC) No 1400/2002 of July 31, 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, text available at [http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l\\_203/l\\_20320020801en00300041.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_203/l_20320020801en00300041.pdf). Also notice the "new-style" of the block exemptions: see footnote 79.

<sup>47</sup> EC Press Release, Commission adopts comprehensive reform of competition rules for car sales and servicing, July 17, 2002, text available at [http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=IP/02/1073|0|RAPID&lg=EN](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/02/1073|0|RAPID&lg=EN).

<sup>48</sup> The decision of the EC was to exempt the distribution system, or more precisely, to refine the block exemption of 2000 to satisfy industry and consumer needs. This result is quite similar to the U.S.: if the exempted practices were challenged in the U.S., the claim could fairly be expected to be dismissed by summary judgment.

<sup>49</sup> *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

<sup>50</sup> Until the 1960's, the willingness to sacrifice efficiency to preserve small, locally-owned businesses made virtually all vertical restraints subject to a *per se* legality test. For example, see *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). Also, the Robinson-Patman Act was still being enforced for the similar purpose at that time.

*Sylvania*, however, the Supreme Court overruled *Schwinn's* holding that vertical restraints were *per se* unlawful and announced a return to a rule of reason test for measuring the legality of nonprice vertical restraints.<sup>51</sup> The decision reflected the emerging Chicago School ideology and recognized the efficiency caused by inter-brand competition. Though recently there have been some new challenges from post-Chicagoan commentators (who question the soundness of the “ticket for summary dismissal” of vertical claims and ask for more refined rule of reason analysis<sup>52</sup>), *Sylvania* is now an icon in American antitrust law.

Compared to *Sylvania*, some commentators might argue that the EC’s block exemption of vertical restraints has gone too far,<sup>53</sup> but importantly, it is undeniable that the EC is explicitly trying to adopt the economic analysis scheme to refine its rule of reason analysis, even sacrificing the traditional value of “competition as process” that emphasizes the freedom of business. The exemption of vertical restraints within the automobile distribution system will inevitably undermine the business freedom of distributors and repairers, but under economic reasoning, consumers will derive greater benefit.

This direction clearly parallels American antitrust enforcement.<sup>54</sup> In this sense, early modernization, characterized as “economization”, increases convergence between the transatlantic authorities. A closer examination of the European reforms and the effect these changes will have on competition analysis suggests an even deeper step towards convergence, as discussed below. Before exploring these details, however, a brief understanding of pre-Modernization European competition case

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<sup>51</sup> *Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

<sup>52</sup> See Warren S. Grimes, *The Life Cycle of A Venerable Precedent: GTE Sylvania and The Future of Vertical Restraints Law*, 17-FALL ANTITR 27 (2002).

<sup>53</sup> However, this is unlikely to be the case, particularly after the adoption of the Modernization proposal in December 2002 and the changes to the “new-style” block exemptions.

<sup>54</sup> The series of reforms since mid-1990’s is often compared to the Chicago School revolution a generation ago in the U.S. See William J. Kolasky, *North Atlantic Competition Policy: Converging Toward What?*, Speech before the BIICL Second Annual International and Comparative Law Conference (2002), text available at <http://www.usdoj.gov/atr/public/speeches/11153.htm>. Mr. Kolasky stated that Europe was going through a similar transition today in reforming its competition policy, as the U.S. had over the last quarter century, overcoming wooden, formalistic rules that at times placed more emphasis on protecting competitors than consumers and viewed efficiencies suspiciously. A similar observation was made by Charles A. James, *Antitrust in the Early 21<sup>st</sup> Century: Core Values and Convergence*, Address presented at the Program on Antitrust Policy in the 21st Century Sponsored by the Directorate General for Competition at the European Commission and the U.S. Mission to the European Union Brussels (2002). Text available at <http://www.usdoj.gov/atr/public/speeches/11148.htm>.



analysis is necessary.

#### 4.2. Pre-Modernization Analysis of Competition Cases in the EC

In Europe, under the civil law tradition, competition law has, until recently, concentrated largely on the enforcement of certain forms of contracts and stereotypical clauses occurring therein, and on market behavior.<sup>55</sup> Generally, an agreement which is prohibited by Article 81(1) and which does not satisfy Article 81(3) will be declared to be automatically void by virtue of Article 81(2).<sup>56</sup> One commentator has criticized that the Commission's practice to adopt a relaxed interpretation of Article 81(1) and to apply economic assessment under 81(3) was erroneous.<sup>57</sup> She argued that settled case law of the ECJ required a two-stage examination in order to establish whether a particular agreement was subject to the prohibition of Article 81(1). First, if the purpose of the agreement was anti-competitive and in clear contradiction to the objectives of Article 81(1), no actual effect on the market was necessary and the agreement was automatically prohibited. Such an agreement might be validated only if an exemption (block or individual) under Article 81(3) was granted *ex-ante*. Second, where the object was not clearly anti-competitive, the analysis would proceed to the next phase, which looked at the specific impact which the agreement was likely to have on competition. The commentator explained that this was the European rule of reason. She stated that, as a result, naked restraints on pricing, market sharing and some kinds of collective boycott were likely to be condemned as *per se* illegal if they were found to be capable of restricting trade among member states. For all other restraints, she continued, the ECJ would engage in some form of economic analysis, particularly with regard to vertical agreements.<sup>58</sup> The European interpretation of the rule of reason must be understood in the Community context, and the commentator emphasized, "the ultimate consequences for competition are assessed under that paragraph [meaning Article 81(1)] and not under Article 81(3)."<sup>59</sup> However, this approach was not

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<sup>55</sup> Floris O.W. Vogelaar, *Modernization of EC competition law, economy and horizontal cooperation between undertakings*, 1/1/02 INTECONOMCS 19 (2002), p.22. See also footnote 54.

<sup>56</sup> Richard Whish, *id.*, p. 65.

<sup>57</sup> See Doris Hildebrand, *The Role of Economic Analysis in the EC Competition Rules* (1998), pp. 206-207, citing Case T-141/89, *Trefileurope Sales v. Commission*, 6.4.1995, (1995) II ECR 791, para. 10.

<sup>58</sup> *Id.*, pp. 234-235. For detailed explanations about the current application of Article 81, see Richard Whish, *id.*, at 65, 123, and 246-258.

<sup>59</sup> *Id.*, p. 235. She argued that the Commission's practice to adopt a relaxed interpretation of the applicability of Article 81(1) and to apply economic assessment under 81(3) was

formally accepted until the 2002 Modernization.

The European competition law was viewed at times as lacking *per se* prohibitions, such that all agreements had to be assessed in their factual, legal and economic contexts.<sup>60</sup> The CFI also held that within the system under which Article 81 (1) was applied, there was no room for a European equivalent of the U.S.-style rule of reason.<sup>61</sup> Although it is well known that the ECJ has been a greater proponent of the rule of reason-type approach than the Commission or the CFI, its rule of reason cannot be compared with that of the United States; as it is more limited:

“[T]he European rule of reason analysis involves the identification of the relevant product as well as the relevant geographic market. The assessment of market needs from the competition theory point of view further elaboration. Rule of reason analysis, as understood by U.S. authorities, involves identification of the relevant market, establishing the defendant’s market power as well as multitude of other factors used to analyze whether the restraint adversely affects competition in the inter-brand market, and the justifications establishing a legitimate objective and the necessity of the restraint to achieve that objective.”<sup>62</sup>

This paper does not address the exact meanings of the *per se* or rule of reason standards of the two jurisdictions. The relevant facts here, rather, are that the U.S. government frequently expresses its perception that the rule of reason analysis conducted by the EC is “poor”, and that such statements continue to affect WTO discussions. This criticism culminated in 2001 when the EC blocked the GE/Honeywell merger (2001)<sup>63</sup>, arguably stressing the negative range-effect which

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erroneous.

<sup>60</sup> *Id.*, reciting ECJ judgment in *Volk/Vervaecke*, case no. 5/69, ECR, 1969, p.295. This view may stem from the idea that without explicit statutory provisions *per se* prohibitions are not allowed under a civil law system such as those found in Europe. It might also reflect a belief that the EU does not need such doctrine considering the common belief in the U.S. that the reason why *per se* is used in antitrust is simply for efficiency and certainty of antitrust enforcement: it sometimes can sacrifice justice.

<sup>61</sup> *Id.*, reciting CFI judgment in *Metropole Television and others v. Commission*, case no. T-112/1999 of September 18, 2001, OJ C 044 [2002].

<sup>62</sup> *Id.*, p. 235 (body & footnote). Recall that in the U.S., if a court decides to apply the rule of reason standard to certain cases, it is almost tantamount to dismissal, because it is extremely difficult to prove, by complex economic analysis, the stringent requirements to satisfy the rule. In practice, the excessive burden made it almost impossible to survive the full blown rule of reason analysis in proceedings, as seen in the IBM case that settled after almost 10 years of litigation, consuming tremendous time and money from both parties. The view of the CFI can be understood in this respect.

<sup>63</sup> Commission Decision, *General Electric/Honeywell*, Case No. COMP/M.2220 (July 3,

was not considered to be harmful in the United States. A critic stated, "It could be deduced from the above that we consider competition policy in the European Union as an obstacle to effective competition in European markets, as a protectionist instrument and, therefore, as a brake on globalization".<sup>64</sup> It was said that "the EU's approach lacks a sound economic basis."<sup>65</sup> Another popular opinion was that EC competition law aims to protect competitors, not competition.<sup>66</sup> As section C outlines, the Modernization process creates a dramatic break with traditional EC case analysis.<sup>67</sup>

#### *4.3. Details of Case Analysis under 2002 Modernization: Facilitation of Economic Analysis*

On December 16, 2002, the Council of the European Union adopted the "Modernization" Regulation to replace the 40-year old Regulation 17, which had dictated the basic procedural framework for all EC competition cases outside the merger area.<sup>68</sup> Regulation 1/2003<sup>69</sup> ensued after the White Paper,<sup>70</sup> and in combination with the subsequent adoption of the Commission proposal for a new procedural Regulation 17,<sup>71</sup> comprises what is called "Modernization".

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2001), text available at [http:// europa.eu.int/comm/competition/mergers/cases/decisions/m2220\\_en.pdf](http://europa.eu.int/comm/competition/mergers/cases/decisions/m2220_en.pdf).

<sup>64</sup> David S Evans & A Jorge Padilla, Competition Policy In Europe: A Trans-Atlantic Perspective, Foreign Affairs (January/February 2002 issue). Cited text is available at [http://www.nera.com/wwt/newsletter\\_issues/5104.pdf](http://www.nera.com/wwt/newsletter_issues/5104.pdf).

<sup>65</sup> Donna E. Patterson & Carl Shapiro, Transatlantic Divergence In GE/Honeywell: Causes And Lessons, 16-FALL ANTITR 18 (2001), p. 19.

<sup>66</sup> For example, see Press Release of the USDOJ: Statement By Assistant Attorney General Charles A. James on The EU's Decision Regarding The GE/Honeywell Acquisition (July 3, 2001), text available at [http://www.usdoj.gov/atr/public/press\\_releases/2001/8510.htm](http://www.usdoj.gov/atr/public/press_releases/2001/8510.htm). It states that "[c]lear and longstanding U.S. antitrust policy holds that the antitrust laws protect competition, not competitors. Today's EU decision reflects a significant point of divergence."

<sup>67</sup> The criticism over the GE/Honeywell decision lessened in 2002, arguably because of the Americans' recognition of the potential benefits of Modernization. For details about the criticism over GE/Honeywell, see footnote 90.

<sup>68</sup> The Regulation will enter into force on May 1, 2004, the same day when ten new states will join the EU.

<sup>69</sup> OJ [2003] L1/1.

<sup>70</sup> Commission White Paper on Modernisation of the Rules Implementing Art. 85 and 86 [now 81 and 82] of the EC Treaty [1999], OJ C132/1, [1999] 5 CMLR 208.

<sup>71</sup> [1959-62] OJ Spec. Ed. 87.

Narrowly construed, Modernization relies on three main elements: an end to the system of notification and authorization of individual exemptions; further decentralization of EC competition rules so that both national courts and national competition authorities can directly apply Article 81(3); and an increased *ex-post* control through greater investigative powers to the Commission.<sup>72</sup> Previously, Regulation 17 conferred exclusive power to grant individual exemptions to the Commission, and required notification of agreements in order for them to be eligible for exemption. Modernization reflects the realization that the centralized system of the past was overly burdensome and inefficient.<sup>73</sup>

Many commentators have focused on the procedural and structural changes rather than the substantive changes.<sup>74</sup> However, the true value of the Modernization lies not in the procedural changes, but in the impact it will have on enforcement: formal acceptance of rule of reason case analysis and the subsequent structural changes that this acceptance predicates. For example, EC competition law used to depend largely on the enforcement of certain forms of contracts or stereotypical clauses within them, and regulation of market behavior; this phenomenon was at least partially attributable to exemptions of many economically controversial matters under the block exemption. The new regime requires an assessment of restrictive behavior on the basis of economics-oriented analytical notions such as market position or market power, effect on the market, market structures, and the likely impact of certain types of transactions. In this sense, the series of measures taken in the 1990's supplement Modernization so as to enable such analysis.

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<sup>72</sup> Damien Geradin, *Competition between Rules and Rules of Competition: A Legal and Economic Analysis of the Proposed Modernization of the Enforcement of EC Competition Law*, 9 Colum. J. Eur. L. 1 (2002), p. 14.

<sup>73</sup> One of the downside of the centralized notification procedure is the immense administrative overload. See Damien Geradin, *Competition Between Rules and Rules of Competition: A Legal and Analysis of The Proposed Modernization of The Enforcement of EC Competition Law*, 9 Colum. J. Eur. L. 1 (2002), at 12. For example, the Commission received 221 notifications in 1997, although the number dropped to 101 in 2000. More importantly, many of the notifications were concerned with agreements that lacked any serious anti-competitive effect. See Richard Whish, *id.*, at 136.

<sup>74</sup> For example, see *id.*; Mario Siragusa, *A Critical Review Of The White Paper On The Reform Of The EC Competition Law Enforcement Rules*, 23 FDMILJ 1089 (2000); Barry J Rodger, *Reform of EC Competition Law Enforcement: Evolution/Revolution/Devolution or simply no Solution?*, Address at the Columbia Law School on March 26 2003 (text available from the author). The author introduces criticisms that the Commission should have invested further resources in Competition Directorate General, and that the reforms are intended merely to transfer the burden to national authorities and courts.

#### *4.4. Implications of Modernization's Reforms to Case Analyses*

It is this paper's contention that, as a result of Modernization, in connection with the early measures since the mid-1990's, competition law enforcement in the EC will experience fundamental improvements and further economization will result. As a result of the abolition of individual exemptions and replacement by a Council Regulation 1/2003, which would render the criteria in Article 81(3) directly applicable without prior decision of the Commission, prior authorization would be replaced by directly applicable exceptions:<sup>75</sup> "Article 81 would then become a unitary norm comprising a rule establishing the principle of prohibition".<sup>76</sup> Notably, the economic analysis of Article 81 is expected to be applied in its entirety, a complete break from past methods.<sup>77</sup> The new structure is twofold: first, there is an abstract analysis of restrictions of competition within the meaning of article 81(1), and then, once a restriction of competition has been determined, an economic balancing test is conducted under article 81(3).<sup>78</sup> It would be analyzed whether the economic advantages objectively outweigh the harms as expected to be caused by restrictions of competition and the questioned practice should be exempted: a classic rule of reason test based on efficiency and consumer welfare.

Furthermore, Article 81(3) sets out four criteria, all of which must be satisfied for an exemption<sup>79</sup>: (1) the agreement must lead to an improvement in the production

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<sup>75</sup> See Richard Whish, *id.*, at 249.

<sup>76</sup> White Paper on Modernization, *id.*, para. 69.

<sup>77</sup> See Richard Whish, *id.*, at 147 & 249.

<sup>78</sup> Floris O.W. Vogelaar, *id.*, pp. 25-26; For details, see Richard Whish, *id.*, pp. 246-258. Note that the Article 81 does not use the term of "exemption" and above analysis is possible regardless of whether a questioned practice is pre-exempted or not.

<sup>79</sup> One may argue, due to the fact that the system of block exemptions will remain effective after the Modernization is in place and their number may grow, that economic analysis may not take primary importance. It would be the case, according to this argument, that the considerable number of agreements that will be covered by block exemptions will not be subject to economic analysis. It should be noted, however, that a block exemption is regarded to represent an economic effects-based approach to the assessment of vertical restraints (note that all of the block exemptions were concerned with vertical agreements until the issuance of the Commission Regulations 2658/2000 on Specialization Agreements and 2659/2000 on Research and Development Agreements). The block exemptions are generally non-formalistic because they do not narrowly prescribe the details of the agreements. As a result, they should lead to an economics-based assessment of vertical restraints. See Mat Hughes, *The Economic Assessment of Vertical Restraints under UK and EC Competition Law*, ECLR 2001, 22(10), at 430. Such a statement is particularly true in that the typical format of the block exemptions has changed with Modernization. The older exemptions were very specific, with a positive-list approach, so as to enable prescriptive and formalistic application. However, the "new-style" block exemptions of Regulations 2790/1999, 2698/2000 and 2659/2000, on Vertical Agreements, Specialization Agreements

or distribution of goods, or to the promotion of technical or economic progress; (2) the agreement must allow consumers a fair share of the benefit; (3) the restrictions contained within the agreement should be indispensable to the achievement of the benefits of the agreement; and (4) the agreement must not afford the parties the possibility of substantially eliminating competition.

The new method of economic analysis based on Article 81(3) has been evaluated as follows:

“The Commission states that Article 81(3) contains “all the elements of ‘rule of reason’” and presents an ideal forum for the analysis of the pro- and anti-competitive aspects of an agreement. The Commission’s opinion is thus that Article 81(3) is intended ‘to provide a legal framework for the economic assessment of restrictive practices and not to allow the application of the competition rules to be set aside because of political considerations’.”<sup>80</sup>

One commentator has described the method of economic analysis in this way:

“On the strength of economic arguments and analyses, it should be assessed in each case what will be the most likely reactions of competitors, suppliers, purchasers and consumers, of the undertakings concerned and third parties – in short: of the ‘market’ – before any case may be decided. For example, in the context of joint ventures this analysis should take place bearing tribute to factors like the degree of transparency of the market, cost structures, homogeneity of the offer, elasticity of the demand, technological positioning of the parties involved and the existence of barriers to entry.”<sup>81</sup>

Essentially, after Modernization, the European approach is not much different from the rule of reason analysis under Section 1 of the Sherman Act. The two-phased formalistic application based on the notification and authorization of agreements for the purposes of obtaining an exemption is no longer required and replaced by an *ex-post* determination of whether the four criteria of Article 81(3) are satisfied by

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and R&D Agreements have taken a negative approach: they set out provisions that must not be included if an agreement was to receive block exemption. The negative approach was a deliberate response of the Commission to the criticism that the block exemptions operated in too mechanical and legalistic a manner, and this approach is expected to continue. See Richard Whish, *id.*, at 144 & 147. As a result, despite the continuing existence of block exemption system, a rule of reason analysis based on economic thinking is made much more possible even for agreements that might be eligible for block exemptions.

<sup>80</sup> Jones & Brenda Sufrin, *id.*, p. 191, reciting White Paper para. 56 & 57.

<sup>81</sup> *Id.*

national courts and competition authorities.<sup>82</sup>

Also, under the new regime, businesses will depend increasingly on advance self-assessment instead of a notification and individual exemption.<sup>83</sup> Moreover, when entering into facially restrictive agreements, companies must assess for themselves whether the conditions for an exemption are met, instead of simply relying on legislative and mechanical prescriptions of the exemption. If they are sure that they can establish the redeeming virtues of the questioned practices, e.g., the creation of efficiency, against a possible challenge from the Commission or national competition

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<sup>82</sup> Under the post-Modernization explicit rule of reason test, rigorous economic analysis is inevitable and requires the authority to expend enormous resources in personnel, time, and finance. Officials at the Commission have confirmed that the main objectives to be attained by reform includes a more economic approach in the evaluation of restrictive agreements. See Helmuth Schroter, *id.*, at 161. Such detailed analysis requires, however, that the Commission lessen its workload. The Commission has already addressed this obstacle, by increasing decentralization, and stating that it will seek greater support from Member state national authorities. Improved enforcement of EC competition rules is expected, by reducing the Commission's workload, and by delegating to national competition authorities duties for which they are better-suited. See Damien Geradin, *id.*, at 27. The case selection is expected to focus on the undertakings with market power. See Jones & Brenda Sufrin, *id.*, p.222, reciting the White Paper para.78. Of course, there exist dangers of non-conformity of decisions of national courts and subsequent forum-shopping as raised by many business people e.g. the International Chamber of Commerce, but the EC argues to have implemented to overcome such risks to ensure the conformity over all member states. Efficient enforcement is supported by the U.S. experience. In the U.S., where economic analysis is central, the large antitrust enforcement bodies of the Department of Justice and the Federal Trade Commission are generally said to have the capacity to prosecute and maintain only about 100 cases each year due to constraints on budget and personnel. Although it is true that the vast majority (i.e., 80% or more) of U.S. government cases never go to trial but rather are settled through some sort of voluntary agreement (Robert Pitofsky & et. al., *Trade Regulation* (5<sup>th</sup> ed., 2003), p. 87), the resource restraint is evident. As of 2002, the FTC had 505 full-time employees for antitrust mission with \$73 million budget. See FTC appropriation history and full-time equivalent history, text available respectively at <http://www.ftc.gov/ftc/oed/fmo/appropriationhistory.htm> and <http://www.ftc.gov/ftc/oed/fmo/fte2.htm>. The antitrust division of USDOJ was appropriated \$130 million and hired 366 attorneys in 2002. See DOJ Appropriation Figures For The Antitrust Division fiscal Years 1903–2004, and FY2003 Budget Summary, available at <http://www.usdoj.gov/atr/public/10804a.htm> and <http://www.usdoj.gov/jmd/2003summary/html/sel-employs03.htm>, respectively. A report of the American Bar Association admits, “[T]he Task Force believes that the performance of the U.S. competition policy system today suffers from the failure of budgets to keep pace with legitimate enforcement and policymaking functions assigned to the two federal enforcement agencies.” American Bar Association Section Of Antitrust Law, *The State Of Federal Antitrust Enforcement – 2001*, at 17. Text available at <http://www.abanet.org/antitrust/antitrustenforcement.pdf>.

<sup>83</sup> Terry Calvani, *Devolution and Convergence in Competition Enforcement*, ECLR 2003, 24 (9) (2003), at 421. As a result, they will not be able to enjoy immunity from fines during the period of investigation of the notification by the Commission.

authorities, and thereby survive the rule of reason hurdle, they may proceed; if not, they had better stop. This is the exact way that, in the U.S., business is done and antitrust laws are enforced: *ex-post*, on the basis of economic analysis.<sup>84</sup> The effect of the new system on businesses is to strengthen their economization, thanks to the mutual-stimulus of economic reasoning to prove their own merits to win a case. The White Paper clarifies, “in a system of *ex-post* control, undertakings would have to make their own assessment of the compatibility of their restrictive practices with Community law, in the light of the legislation in force and the case-law . . . .”<sup>85</sup> In short, considerations of the above changes, coupled with the “new-style” block exemptions,<sup>86</sup> are enough to characterize the Modernization as a shift to economization that requires each player, including the Commission, business, and lawyers, to undertake a thorough analysis using modern neo-classical economics. This economization should increase the convergence of enforcement measures between the EC and the U.S., due to the more similar manner of case analysis and policy.

One seemingly embarrassing case of divergence was the merger of GE/Honeywell (2001),<sup>87</sup> in which the EC tried to apply a rigorous economic analysis, and in doing so reached a conclusion about the competitive effects of the proposed merger that was contrary to the American analysis. In the face of U.S. opposition, the EC blocked the proposed merger. Indeed, the case almost led to a breakdown of relationship between the two competition authorities.<sup>88</sup> However, the divergent

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<sup>84</sup> Mr. Calvani explains, “[s]elf-assessment will come as a shock to many, though by no means all, European lawyers. While both the Federal Trade Commission and the Antitrust Division make provision for advisory opinions and business review letters respectively, they have never played the role of Art. 81(3) exemptions or ‘comfort letters’ in Europe (Indeed, the US advisory opinions and business review letters have played scarcely any role at all). Self-assessment has been the ‘bread and butter’ of many American antitrust counselors.” *Id.* On the other side, the self-assessment will increase the burden and responsibility of business due to more uncertainty.

<sup>85</sup> White Paper on Modernisation, *id.*, para. 77.

<sup>86</sup> See footnote 79.

<sup>87</sup> See footnote 63. Discussion of this case is a little out of focus because the Modernization does not apply to merger cases. However, it is included because of the important implications about the differences of economic analysis between the EC and U.S. In the decision, the Commission concluded that the proposed merger would lead to the creation or strengthening of a dominant position on the markets for large commercial jet aircraft engines and others, and the result will impede effective competition in the common market significantly. On May 2, 2001, the U.S. approved the merger requiring a divestiture concerning military helicopter engines and the authorization of an additional service provider for certain small aircraft engines. For details, see Press Release of the Department of Justice at [http://www.usdoj.gov/atr/public/press\\_releases/2001/8140.htm](http://www.usdoj.gov/atr/public/press_releases/2001/8140.htm).

<sup>88</sup> The two have developed extensive relationship of cooperation and, as a result, until the



outcomes do not necessarily mean that case analysis in the two jurisdictions is indifferent from convergence: rather, the opposite should be true. The American criticism concentrated on the “outdated” economic theory the Commission applied, e.g. the hostile treatment of range effect, reciprocal dealing, entrenchment, etc.,<sup>89</sup> instead of the economic “approach” the Commission has taken to analyze the GE/Honeywell. Their perspective was clear in the saying, “we find ourselves replaying these old debates [meaning the old economics of 1960’s] on a more global stage”.<sup>90</sup> Ironically, thanks to the debates, several positive points about the common views for economic analysis were reaffirmed, i.e. consumer welfare is the ultimate

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GE/Honeywell case, no party prohibited a merger over the other’s objection, sometimes politically eliminating some possibilities. This case was a real shock to the U.S. in this regard.

<sup>89</sup> For example, see William J. Kolasky, *Conglomerate Mergers and Range Effects: It’s A Long Way From Chicago to Brussels*, Address before the George Mason University Symposium (2001), text available at <http://www.usdoj.gov/atr/public/speeches/9536.htm>.

<sup>90</sup> Id. While there emerged various justifications or excuses for the conflicting findings about the proposed merger, it is apparent that the EC did not intend (or, at least want to appear) to sacrifice efficiency to protect a competitor, i.e. national champion. Many Europeans argued that the divergent results originated from the different analytical technique to measure efficiency and/or different evaluation of supporting evidence for the efficiency, not the goal of competition policy itself. Some Americans who have been directly involved in the review process also confessed, “the factual record before the EC was somewhat different than the factual record before the DOJ”. See John Deq. Briggs & Howard Rosenblatt, *A Bundle Of Trouble: The Aftermath of GE/Honeywell*, 16-FALL ANTITR 26 (2001), at 26. Assuming that these explanations are to be accepted, this merger case is a clear evidence of economization and a further foothold for convergence between the two competition policies. Note that, until very recently, the EC was widely believed not to “treat efficiencies as a defense to a merger that created or strengthened a dominant position, and that it might even view efficiencies as an additional reason for prohibiting a merger on the ground that they would further entrench the merged firm’s dominant position.” See Frédéric Jenny, *Competition and Efficiency*, in *Antitrust in a Global Economy*, 1993 Corporate Law Institute, Fordham U. School of Law, 194 (B. Hawk, ed., 1994), recited from William J. Kolasky, *North Atlantic Competition Policy: Converging Toward What?*, Speech before the BIICL Second Annual International and Comparative Law Conference, id. The issue of whether the EC relied on out-of-date theories that have been discarded in the U.S. is not problematic from the perspective of convergence, as long as the thesis that efficiency is the most important value in merger review is accepted (setting aside the other goal of market integration), because differences of analytical technique can be coordinated. At the same time, although the decision of the EC has been criticized much in the U.S., it is noteworthy that there exists fair number of advocates for the EC’s conclusion based on “sound” economic analysis. For example, two leading American economists argued, “it is reasonable to conclude that the GE/Honeywell transaction would have harmed competition and consumers.” Robert J. Reynolds & Janusz A. Ordover, *Archimedean Leveraging and The GE/Honeywell Transaction*, 70 ANTITR LJ 171 (2002), at 197. Then, the question of the debate over GE/Honeywell is whose analysis was right from the viewpoint of modern economics, instead of who is right or wrong, or who is more economically-oriented.

goal and a merger with enough efficiency will not be challenged.<sup>91</sup> Now the GE/Honeywell merger is considered to be an example that requires fine-tuning for sensitive analysis of modern economics, not one of direct conflict about principles. One high American official observed, “[t]o the extent there is any difference between us... it is not over these fundamental principles, but rather over how we apply them in practice”,<sup>92</sup> admitting that different legal traditions, different institutions, and different economies should be taken into account of any sound competition policy.<sup>93</sup> Again, this case symbolizes the desire of Americans to guide a more economic approach in the EC, escaping from the “old” fashion, and moving towards “sound” and deeper convergence. Modernization should be expected to resolve such concerns, leading to greater convergence based on modern economics.<sup>94</sup>

The impact of the Modernization is not limited to the convergence of economic analysis with the U.S. Previously, central block exemptions under Article 81(3) allowed legitimate business agreements that would otherwise fall into the prohibition. Considering the divergent views about extraterritoriality, this increased the tensions surrounding discussions between the EC and the U.S., because sometimes it could directly conflict with the American effects doctrine. For example, without Regulation 417/85 which applies to specialization, or Regulation 1475/95 which applies to motor vehicle distribution, such agreements could be violations of U.S. antitrust law if they produce direct effects on the American economy, e.g. by blocking Ford’s market access.<sup>95</sup> Negotiations dealing with this problem would cause significant problems in

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<sup>91</sup> William J. Kolasky, U.S. and EU Competition Policy: Cartels, Mergers, and Beyond, Speech before the Council for the U.S. and Italy Bi-annual Conference (2002). Text available at <http://www.usdoj.gov/atr/public/speeches/9848.htm>. Therefore, in the current environment, convergence is more visible even as concerns a case like GE/Honeywell, because many doubts about the core principles of economic analysis are eliminated. For the reform of EC competition policy compared to that of the U.S., see also footnote 54.

<sup>92</sup> *Id.*

<sup>93</sup> See William J. Kolasky, North Atlantic Competition Policy: Converging Toward What?, Speech before the BIICL Second Annual International and Comparative Law Conference (2002), *id.* In this speech, he listed five areas of historical divergence between U.S. and EU competition policy: efficiencies in merger review, fidelity discounts, predatory pricing, essential facilities, and monopoly leveraging. He argued that those divergences should be resolved by close cooperation between the agencies.

<sup>94</sup> In the author’s opinion, it was not an accident for U.S. senior officials to react so positively to the remarks of the high officials of the EC competition authority that stressed the importance of efficiency, at the time of final stage of reviewing the 2002 Modernization after GE/Honeywell. For example, see *id.* made in May 17, 2002, in which he stated, “[w]e in the United States applaud Commissioner Monti’s bold leadership in embracing the consumer welfare model of competition policy”.

<sup>95</sup> Although vertical restraints are not considered big problems, recall that they are still subject

the WTO, and no one can reasonably forecast the outcome. In fact, this type of problem was one of the most important factors in the U.S.' reluctance to join the WTO discussions, and its resolution suggests that the U.S. may be more likely to be open to such discussions in the future.

### **5. Conclusion: the Impact of Modernization on the Development of WTO Competition Law**

This article does not comment on whether the WTO should adopt a competition law, or if such a law would be good or bad; nonetheless, consensus indicates that globalization has created a need for some form of international competition law enforcement, and for the moment many jurisdictions believe the WTO to be the appropriate forum. In Doha, Members agreed on the basis of the past achievement, that a framework for competition rules should be negotiated within the WTO after the Cancún Ministerial Conference in 2003. The large divide between the U.S. and the EC, a divide that stalled WTO progress in the past, remains as it was, even after the Cancún Conference. Yet the American view, that an international agreement is not needed, that international antitrust enforcement can come from a single country, and that the U.S. is capable of teaching others to follow by acting as an example with tough enforcement, is losing force, as few of these benefits have been realized by other countries. It is unlikely that aggressive unilateralism will be able to perform simultaneously the crucial tasks of accommodating all countries' interests, guaranteeing free trade, and assuring equal and free competition among WTO member nations. Such an impossible task would transform the reasonableness, which is the beauty of competition law, into an ugly battle of selfishness.

As this paper suggests, however, it is possible that the EC's successful history of addressing the trade/competition interface, together with their Modernization of competition law, may prompt a change in the U.S. position. Assurances by the EC reforms that the Europeans will review cases based on sophisticated modern economic analyses, and may even sacrifice traditional *ordo-liberalism* in favor of market freedom, promise more convergence with the U.S. law. At the least, Modernization of the EC competition law enforcement envisages the possibility of successfully reaching an agreement on the core principles on hardcore cartels.<sup>96</sup>

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to rule of reason analysis in American antitrust, and sometimes become real problems in international context. One should be reminded of the Kodak/Fuji battle in Japan disputing the hindrance of market access due to restrictive market structure (vertical restraints).

<sup>96</sup> It is the author's observation that the change of U.S.'s hostile attitude against WTO discussion of international competition rules was partly influenced by the modernization efforts of the EC.

Mario Monti, the EC Competition Commissioner, appears to agree. He recently stated that the competition laws of the EC and the U.S. are radically converging, facilitating discussion at the multilateral level:

“[A] silent process of convergence in competition law and practice has been going on for a number of years and has recently intensified. Of course, further efforts are needed and on both sides of the Atlantic we are deeply committed to this process. Our motivation in this endeavour is enhanced by a common awareness: besides being important in itself, US-EU convergence is a key building bloc for a multilateral co-operation in antitrust towards which our agencies are working closely together.”<sup>97</sup>

Convergence of the two biggest economies should mitigate, if not dispel, American fears of the weakening effect of multilateral negotiations on competition principles. Modernization will not remove all sources of friction between the U.S. and the EC; disagreement over extraterritoriality still remains. At least one result, however, is already evident: the U.S. has less incentive to oppose, and fewer grounds upon which to base opposition, the development of an international competition law in the WTO, thus the probability of its success is greatly increased.

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