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The Boeing/McDonnell Douglas Merger Review: A Serious Stretch of European Competition Powers

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NOTE

THE BOEING/MCDONNELL DOUGLAS MERGER REVIEW: A SERIOUS STRETCH OF EUROPEAN COMPETITION POWERS

I. INTRODUCTION

In 1990, just before the long-awaited Merger Regulation[1] promulgated by the then-titled European Economic Community was to take effect, a leading scholar on European competition law, Barry Hawk, predicted that the European Commission's (EC) "broad remedial powers under the Regulation may raise jurisdictional and comity issues if the EC attempts to invoke them in transactions involving non-Community firms."[2] Today, this prediction has become a stark reality, most recently evidenced by the heated controversy surrounding the EC's review of the merger between Boeing and McDonnell Douglas, two U.S. aircraft manufacturing giants.

The EC, as part of a remedial condition of its approval of the merger under the Merger Regulation, insisted that Boeing relinquish "exclusive supply" contracts that the manufacturer had sealed with three U.S. airline companies.[3] The contracts were unrelated to the merger, and U.S. critics, including members of Congress, accused the EC of imposing a settlement remedy that exceeded the boundaries of its antitrust authority

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1. Council Regulation 4064/89, 1989 O.J. (L 395) 1, *corrected version in* 1990 O.J. (L 257) 13 [hereinafter Merger Regulation].

2. Barry E. Hawk, *The EEC Merger Regulation: The First Step Toward One-Stop Merger Control,* 59 ANTITRUST L.J. 195, 210 (1990).

3. *See* Commission of the European Communities, *The Commission Clears the Merger Between Boeing and McDonnell Douglas Under Certain Conditions and Obligations,* RAPID Press Release, July 30, 1997, *available in* LEXIS, Intlaw Library, ECNews File [hereinafter Commission Press Release]. At the time of this publication, the official decision was not reported, but was slated to be reported in 1997 O.J. (L 336) 16.

under the Merger Regulation.[4] These critics claimed the EC was not analyzing the impact of the merger on competition, but merely was acting to protect Boeing's European rival manufacturer, Airbus Industries.[5] Relations between the U.S. and the European Union (EU) quickly became strained, despite years of work toward cooperation between the antitrust authorities of the two world powers.[6]

The Boeing case sparked much posturing in both the United States and the EU with politicians, lawyers and antitrust officials on both sides exchanging threats and accusations.[7] But now that the dispute has ended, with Boeing caving in to the EC's demands, the "jurisdictional and comity issues" alluded to by Hawk in 1990 and raised in the Boeing case in 1997 are unresolved. In particular, the boundaries of European remedial powers under the Merger Regulation are at least unclear—and at most, they are potentially limitless if the Boeing case stands as an unofficial precedent allowing the EC to structure remedies wholly unrelated to a merger and targeted at transactions without effects or implementation within the EU. As Hawk noted, the EC's remedial powers are broad. Yet they should not be so broad as to give the EU jurisdiction over private agreements between foreign businesses that are unrelated to a merger under review. This stretch of power, which occurred in the Boeing case, is contrary to principles of comity and will make it difficult for businesses to predict which of its transactions have the potential to run afoul of European merger control.

This Note provides a legal analysis of the Merger Regula-

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4. Both the House of Representatives and the Senate passed resolutions opposing the European Commission's "interference" in a U.S. business transaction. H.R. Res. 191, 105th Cong. (1997), 143 CONG. REC. 5550 (1997); S. Res. 108, 105th Cong. (1997), 143 CONG. REC. 7609 (1997); *see also* Brian Coleman, *Air Freight: Threat of Trade War Over Boeing Reflects Antitrust Limitations: Clinton Hints at Retaliation, As U.S. - EU Cooperation on Probe Breaks Down*, WALL ST. J. EUR., July 18, 1997, at A1.

5. *See, e.g.*, S. Res. 108., *supra* note 4.

6. For example, in 1991, the U.S. and the European Commission signed a treaty outlining principles of cooperation in international antitrust investigations. *See* Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, U.S.-Eur. Comm., 30 I.L.M. 1491 [hereinafter 1991 Agreement].

7. *See* discussion *infra* Part II.

tion that will show how the EC exceeded its remedial powers in its application of that regulatory framework to the Boeing case. This Note argues that the exclusive supply contracts between Boeing and the three U.S. airlines were beyond the reach of EC review under the Regulation, and thus should not have been part of any settlement agreement between Boeing and the EC. Furthermore, this Note suggests that the EC also could not secure jurisdiction over Boeing's contracts using its two other main bases for antitrust review, Articles 85 and 86 of the Treaty of Rome.[8]

Some would argue that the EC's questionable grab of jurisdiction over Boeing's contracts demonstrates the need for an international antitrust authority, most likely under the auspices of the World Trade Organization, that would provide less biased and less politicized reviews of mergers and other international transactions with antitrust implications.[9] This viewpoint recognizes that private restraints on trade, such as certain types of exclusivity agreements between private parties, increasingly are replacing government barriers as major impediments to free trade, thereby linking antitrust issues to trade issues in the global market.[10] In the Boeing case, for example, an international antitrust authority might have harmonized U.S. and EU laws as they applied to the merger and might have adjudicated the dispute between the two powers. But rather than revisit proposals for internationalization of antitrust law, this Note will suggest less ambitious solutions that might have been utilized in the Boeing case. For example, a conciliation mechanism, similar to one recommended in 1995

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8. Treaty Establishing the European Economic Community, Mar. 25, 1957, arts. 85-86, 298 U.N.T.S. 11 [hereinafter EEC Treaty].

9. For a summary of different views about the internationalization of antitrust, see Spencer Weber Waller, *National Laws and International Markets: Strategies of Cooperation and Harmonization in the Enforcement of Competition Law*, 18 CARDOZO L. REV. 1111, 1124-25 (1996); *see also* Diane P. Wood, *The Internationalization of Antitrust Law: Options for the Future*, 44 DEPAUL L. REV. 1289, 1295 (1995); *see also* Thomas J. Schoenbaum, *The International Trade Laws and the New Protectionism: The Need for a Synthesis with Antitrust*, 19 N.C.J. INT'L L. & COM. REG. 393, 436 (1994) (stating that "[a]n International Antitrust Authority should be created under the auspices of the GATT to foster harmonization of national antitrust laws that affect trade, to resolve disputes, and to promote cooperation on issues relating to antitrust process and enforcement.").

10. *See* Waller, *supra* note 9, at 1124-25; *see also* Wood, *supra* note 9, at 1291.

by the Organization for Economic Co-operation and Development (OECD),[11] could provide a strong framework for conflict resolution that might have allowed Boeing and U.S. officials to prevent the EC from manipulating its Merger Regulation to serve vague political or corporate interests. As Professor Spencer Weber Waller wrote in 1996: "The present system provides numerous possibilities for opportunistic behavior that benefits different countries and their nationals in particular disputes."[12] This Note concludes that unless or until an international antitrust regime is established, any mechanism designed to reduce such "opportunistic behavior" would be a welcome addition to the mix of national antitrust laws and cooperation agreements that now govern competition on the world market.

Part II of this Note provides a background of the conflict between the United States and the EC in the Boeing/McDonnell Douglas merger. This section includes a look at the EC's concerns about the exclusive contracts between Boeing and the three airline buyers. Part III provides a brief outline of the Merger Regulation, with emphasis on Article 8(2), the provision used to declare the Boeing/McDonnell Douglas merger "compatible" with the European Community after Boeing agreed to give up its exclusivity clauses in its contracts with the airlines. This section shows how the settlement imposed in the Boeing merger fell beyond the scope of the Regulation. Part IV suggests that the exclusive contracts were also beyond the jurisdictional reach of the EC under Articles 85 and 86 of the Treaty of Rome because they were not implemented in the EU and did not have appreciable effects in the Union. Part V traces the use of international comity considerations in the extraterritorial application of antitrust laws, and contemplates the use of an enhanced U.S.-EU co-operation treaty, with more specific provisions for conflict resolution, as a basis for a renewed injection of comity into antitrust analysis. Part VI suggests ways the United States and the EU can incorporate a conflict resolution mechanism into their antitrust coop-

11. OECD REVISED RECOMMENDATION CONCERNING CO-OPERATION BETWEEN MEMBER COUNTRIES ON ANTICOMPETITIVE PRACTICES AFFECTING INTERNATIONAL TRADE, OECD Doc. No. C(95) 130 (Final) (July 27 & 28, 1995) [hereinafter OECD Recommendations].

12. Waller, *supra* note 9, at 1124.

eration agreement with an aim of curtailing the manipulation of each regime's competition laws.

II. BACKGROUND OF THE DISPUTE

On July 1, 1997, the U.S. Federal Trade Commission (FTC) announced its approval of the merger of Boeing Corporation and McDonnell Douglas Corporation.[13] The union of the two aircraft manufacturers reduced the number of competitors building large commercial jet airliners to just two—Boeing and Airbus Industries. Still, the FTC found that the commercial aircraft manufacturing division of McDonnell Douglas, called Douglas Aircraft Company (DAC), was no longer an effective player in the market.[14] While declining to declare DAC a failing firm, the FTC found that its buyout by Boeing would have little impact on competition, and in any event, no companies other than Boeing wanted to buy DAC.[15] Applying U.S. antitrust laws to these circumstances, the FTC held that the merger would not substantially lessen competition or tend to create a monopoly in either defense or commercial aircraft markets.[16]

Upon FTC approval, Boeing expected to slide easily into its position of world dominance,[17] in which it would have more than 70% of the market for large airliners.[18] But instead, Boeing found itself in last minute negotiations with a different and foreign antitrust authority. The EC, invoking jurisdiction under EU competition laws,[19] refused to approve the merger without certain concessions from Boeing. U.S. officials intervened to try to persuade the EC to approve the

13. *See Statement of Chairman Robert Pitosky and Commissioners Janet D. Steiger, Roscoe B. Starek III and Christine A. Varney in the Matter of Boeing Company/McDonnell Douglas Corporation, File No. 971-0051* (visited Oct. 8, 1997) <http://www.ftc.gov/opa/9709/boeingsta.htm> [hereinafter FTC Statement].

14. *Id.*

15. *Id.*

16. *Id.* A critique of the FTC's finding and its application of U.S. antitrust laws to the merger is beyond the scope of this article.

17. *See* Brian Coleman, Jeff Cole & Robert S. Greenberger, *Crash Landing: Boeing's Ordeal In EU Was Mostly Of Its Own Making*, WALL ST. J. EUR., July 28, 1997, at A1 [hereinafter *Crash Landing*].

18. *See Boeing v. Airbus: Peace in Our Time*, ECONOMIST, Aug. 1, 1997, at 59, 61. The EC also places Boeing's post-merger market share for large commercial jet aircraft at 70%. *See* Commission Press Release, *supra* note 3.

19. *See* Merger Regulation, art. 21.

merger on terms favorable to Boeing.[20] But the EC, which under its Merger Regulation can impose a fine of 10% of a company's worldwide turnover for a violation of the regulation,[21] would not back down.

Congress, led by legislators from Boeing's home state of Washington, quickly responded. In its July 23, 1997, resolution chastising the EC's actions, the U.S. House of Representatives said the EC was "apparently determined to disapprove the merger to gain an unfair competitive advantage for Airbus Industries, a government-owned aircraft manufacturer; and . . . this dispute could threaten to disrupt the overall relationship between the EU and the United States which had a two-way trade in goods and services of approximately $366 [billion] in 1996."[22] Furthermore, resolutions passed in both the House and Senate vowed that any disapproval by the EC of the Boeing/McDonnell Douglas merger "would constitute an unwarranted and unprecedented interference in a United States business transaction that would threaten thousands of American aerospace jobs."[23] In addition, reports circled that the Clinton administration threatened to challenge government subsidies to Airbus Industries before the WTO or to impose taxes or penalties on Airbus-manufactured planes sold in the United States.[24]

The FTC was in turn accused of trying to protect a "national champion" by approving the merger.[25] The EC engaged in its own campaign to stop the merger as it was originally planned. Karel Van Miert, the European Competition Commissioner, openly complained about parts of the merger during a visit to the United States in early 1997.[26] Meanwhile, Van

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20. *See Crash Landing, supra* note 17.

21. *See* Merger Regulation, art. 14(2). Turnover is defined as "products sold and services provided to undertakings or consumers in the Community." *Id.* art. 5(1).

22. H.R. Res. 191, *supra* note 4.

23. *Id.*; *see also* S. Res. 108, *supra* note 4.

24. Vago Murdian, *White House Eyes Options in Advance of EU's Merger Rejection,* 196 DEF. DAILY, July 16, 1997, at 11, *available in* LEXIS, Market Library, Iacnws File. Vice President Al Gore stated that the United States would act quickly if a U.S. company were put at an "unfair competitive disadvantage because of an improperly motivated regulatory decision of a foreign country." *See* Stanley Holmes & Michele Matassa Flores, *Boeing-Deal Tussle About Trade,* SEATTLE TIMES, May 15, 1997, at D1.

25. *Boeing v. Airbus: Peace in Our Time, supra* note 18, at 59.

26. *See* Emma Tucker, Editorial, *Van Miert's Finest Hour,* FIN. TIMES, July

Miert insisted that the EC was not out to protect Airbus.[27]

A. Boeing's Concessions to Gain EC Approval of the Merger

After much wrangling among the EC, the United States, and Boeing, the aircraft maker acceded to European demands and agreed to a list of obligations and conditions that would satisfy the EC and gain its approval of the merger. Boeing agreed to:

> 1) Refrain from entering exclusive supply contracts until 2007, and not enforce the exclusivity rights in its existing contracts with three U.S. airlines.[28]
>
> 2) License to competitors non-exclusive patents developed from publicly financed research and development.[29]
>
> 3) Maintain DAC, the commercial aircraft manufacturing unit of McDonnell Douglas, as a separate legal entity for a period of ten years.[30]
>
> 4) Refrain from using its dominant position to abuse relationships with customers and suppliers.[31]

Part one of the settlement, requiring Boeing to give up its exclusivity contracts, was the most unpalatable to Boeing. It stirred the most controversy, and is the focus of this article.

24, 1997, at 11. One anonymous EC official told the newspaper: "This case has politicised the Merger Regulation which is the one bit of competition policy that should be kept in an iron cask sealed off from the politicians. It has undone a lot of the efforts that have been made over the last few years to give credibility to the Commission's handling of mergers, even if the result is not too bad." *Id.*

27. *Id.*

28. *See* Commission Press Release, *supra* note 3.

29. *Id.* This part of the Boeing/EC settlement reflects the EU's concern about U.S. subsidies to the aircraft industry. The EU's concern is that the monetary and research and development benefits secured in contracts to manufacture defense aircraft can spill over to benefit the civil aircraft manufacturing side. The U.S. and EU have long been fighting over such indirect and direct subsidies that are given to aircraft manufacturers and signed a treaty on the issue in 1992. *See* discussion *infra* Part I.A.

30. *Id.*

31. *Id.*

B. The EC's Objections to Exclusive Supply Contracts

Throughout its review of Boeing's proposed takeover of McDonnell Douglas, members of the EC repeatedly voiced concern about exclusive supply contracts that Boeing had entered into with three U.S. airlines.[32] The first contract of this type, hailed as a bellwether for the aviation industry,[33] was struck between Boeing and American Airlines in November 1996. Under the contract, American agreed to purchase jet aircraft solely from Boeing for the next twenty years in exchange for greater flexibility in exercising purchasing options. Delta Airlines cinched a similar deal with Boeing in March 1997, and Continental followed in June.[34] Together, the three airlines account for less than 11% of all demand for commercial jet aircraft.[35]

In its review of the Boeing/McDonnell Douglas merger, the EC found that the conclusion of these exclusive supply contracts unlawfully reinforced Boeing's dominant position in the worldwide market for large commercial jet aircraft.[36] The EC used the Merger Regulation to force Boeing into settlement talks that ultimately resulted in the relinquishment of the contracts.

Few antitrust experts would argue that the EC lacked jurisdiction to review the merger under its Merger Regulation.[37] But because the exclusivity contracts were wholly unrelated to the merger, critics questioned the EC's motives in

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32. *See Airbus Industrie, EU Object to Boeing's Exclusive Deal with Continental*, AIRLINE FIN. NEWS, June 16, 1997, vol. 12, no. 24, *available in* LEXIS, Market Library, Iacnws File.

33. *See* Bruce A. Smith et al., *Business Deals Evolve as Market Grows*, AVIATION WK. & SPACE TECH., Mar. 17, 1997, at 56, vol. 146, no. 11, *available in* LEXIS, Market Library, Avweek File.

34. *See Airbus Wins Aircraft Contracts, Rebounds from Boeing's Sole Source Deals*, AIRLINE FIN. NEWS, June 23, 1997, vol. 12, no. 25 *available in* LEXIS, Market Library, Iacnws File. Boeing maintained that the airlines requested the contracts. *See* Michael L. Weiner et al., *Interview with Thomas L. Boeder And Benjamin S. Sharp, Attorneys for Boeing*, 12 ANTITRUST 5, 7 (1997) [hereinafter Boeing Interview]. Industry analysts confirmed that the deals were favorable to the airlines. *See* Karen Walker, *Delta Deal Fires Debate; Decision Calls for 20-year Alliance with Boeing Co.*, 13 AIRLINE BUS., May 1997, at 14, *available in* LEXIS, Market Library, Rbi File.

35. *See Boeing v. Airbus: Peace in Our Time*, *supra* note 18, at 61; *see also* FTC Statement, *supra* note 13, at 3.

36. *See* Commission Press Release, *supra* note 3.

37. *See* discussion *infra* Part III.

challenging them in the context of a merger review.[38] A brief account of the history of competition between U.S. and European civil aviation industries makes any pledge of objectivity on either side difficult to swallow. It also indicates why Airbus, and the EC, may have been eager to pry away Boeing's exclusive contracts.

In the 1960s, after Boeing introduced the jumbo jet, European governments banded together to form Airbus, which is a four-nation consortium made up of France's Aerospatieale, Germany's Daimler-Benz Aerospace, British Aerospace and CASA of Spain.[39] By the 1980s, Airbus began making a strong showing in the market for wide-body jets. The Reagan administration, acting on complaints from Boeing, began calling for a U.S.-Europe agreement to control subsidies to aircraft manufacturers.[40] This effort culminated in a 1992 treaty,[41] which limited certain kinds of subsidies. However, with that issue seemingly laid to rest, a battle heated up between Boeing and Airbus over which firm would make the market's preferred jumbo jet.

According to recent reports, Airbus is now developing a 600-seat super-jumbo jet to rival the Boeing 747.[42] But economies in airline manufacturing are such that the cost of the Airbus super-jumbos would rise if the consortium could not take early orders for future purchases of the jumbo jets.[43] The exclusive contracts between Boeing and the U.S. airlines had the potential to hinder Airbus' efforts to get future orders for jumbo jets, and thus, raise its costs for sales everywhere. This in turn would make the project less lucrative.[44]

With the convergence of these financial and political interests, a pure application of the Merger Regulation, which pro-

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38. *See* Boeing Interview, *supra* note 34, at 7-8.

39. *See Boeing v. Airbus: Peace in Our Time*, *supra* note 18, at 59-60. At that time, Boeing, McDonnell Douglas and Lockheed made up the U.S. aircraft manufacturing industry. Lockheed dropped out of civilian aircraft manufacturing in 1981. *Id.* at 59.

40. *Id.* at 60.

41. Agreement Between the Government of the United States of America and the European Community Concerning the Application of the GATT Agreement on Trade in Large Civil Aircraft, State Dept. No. 92-199, 1992 WL 466106 (entered into force July 17, 1992).

42. *See Boeing v. Airbus: Peace in Our Time*, *supra* note 18, at 61.

43. *Id.*

44. *Id.*

vides a foundation for settlement agreements, was overlooked. The limits of European remedial powers were lost in the clash of interests.

III. THE EU MERGER REGULATION

The EC can review any merger that meets its jurisdictional requirements under the EU Merger Regulation.[45] The key factor is whether the merged entity would do enough business worldwide and in the EU to trigger EU jurisdiction under the Merger Regulation. The Regulation applies to "all concentrations with a Community dimension."[46] A "concentration" includes a merger of two independent undertakings, or certain joint ventures.[47] At the time of the Boeing acquisition of McDonnell Douglas, a concentration had a "Community dimension" where the combined aggregate worldwide turnover of all undertakings involved was more than 5 billion ECU[48] and the

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45. The Merger Regulation was adopted on December 21, 1989, and became effective on September 21, 1990. Prior to this enactment, the EC attempted to review mergers under Articles 85 and 86 of the Treaty of Rome. *See generally*, Alec Burnside & Carl Meyntjens, *The EEC Merger Regulation and Its Impact on Non-EEC Businesses*, 1990 BYU L. REV. 1373 (1990). For an additional history of EU merger control and a summary of the EC's process in applying the Merger Regulation, see SIR LEON BRITTAN, COMPETITION POLICY AND MERGER CONTROL IN THE SINGLE EUROPEAN MARKET 23-56 (1991).

46. Merger Regulation, art. 1.

47. *Id.* art. 3; *see also* Spencer Weber Waller, *Understanding and Appreciating EC Competition Law*, 61 ANTITRUST L.J. 55, 73 (1992).

48. An ECU is a value equaling a weighted combination of the values of the currencies of all members of the European Union. *See* Waller, *supra* note 47, at 59 n.24. Since the Boeing case, the EC has amended the Merger Regulation to lower the ECU threshold allowing it to obtain jurisdiction over a proposed concentration. Under the amendment, a concentration has a community dimension when: the combined aggregate world-wide turnover of all undertakings involved is more than 2,500 million ECU; in each of at least three Member States the combined aggregate turnover of all undertakings is more than 100 million ECU or for two undertakings is more than 25 million ECU; and the aggregate Community-wide turnover of each of at least two of the undertakings is more than 100 million ECU. *See* Council Regulation (EC) No. 1310/97 of 30 June 1997 amending Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings, 1997 O.J. (L 180) 9.07.

The Merger Regulation has provisions governing notifications, investigations and other procedures applicable in the EC's review of a concentration. When the Commission is notified of a merger or joint venture, its has 30 days to determine whether the concentration falls under the Merger Regulation, and if so, whether to initiate proceedings on the grounds that the concentration raises serious questions about its compatibility with the common market. When the Commission finds a concentration raises serious questions, as it did in the Boeing case, it will open aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than 250 million ECU.[49] Because EU jurisdiction is based on volume of sales both worldwide and in the Community, the Merger Regulation can apply to non-EU companies, even if they have no assets or property in the European Community.[50]

If a concentration is found to have a community dimension, the EC will determine if it is compatible with the common market.[51] In making this determination, the EC must consider: the need to maintain and develop effective competition within the common market; the structure of the markets concerned, the actual or potential competition; the market position of the parties entering the concentration and their economic and financial power; alternatives available to suppliers and users; the interests of consumers, and the development of technical and economic progress, provided that the development is advantageous to consumers and does not form an obstacle to competition.[52]

After considering these factors, the EC decides if the concentration would create or strengthen a dominant position, and as a result, significantly impede effective competition.[53] Any concentration found to create or strengthen a dominant position and significantly impede competition in the Community or a substantial part of it will be declared incompatible with the common market under Article 8 of the Merger Regulation.[54]

If the EC finds that a concentration is incompatible with the common market, it may block the proposed union of the parties[55] or order them to separate if they have already

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formal proceedings that must be completed within four months. *See* Merger Regulation, arts. 6, 8, 10.

49. *See* Merger Regulation, art. 1.

50. *See* Waller, *supra* note 47, at 74; *see also* James S. Venit, *European Merger Control: The First Twelve Months*, 60 ANTITRUST L.J. 981, 981-82 (1992).

51. Merger Regulation, art. 2.

52. *Id.* art. 2(1)(a),(b); *see also* Waller, *supra* note 47, at 74.

53. Merger Regulation, art. 2(3).

54. *Id.* arts. 2(3), 8(3).

55. The first proposed merger blocked by the Commission was a joint acquisition of the de Havilland division of Boeing of Canada and Boeing Canada Technology by Aerospatiale, a French company, and Alenia, an Italian company. *See* Areospatiale-Alenia/de Havilland, 1991 O.J. (L 332) 42. For a discussion of that case, see Jason A. Garick, *International Horizontal Mergers: A Comparison of European Union and United States Regulatory Policy and Procedure*, 7 TRANSNAT'L

merged or entered into a joint venture.[56] If the parties proceed anyway, the EC has the power to impose fines of up to 10% of the aggregate worldwide turnover of the merging parties.[57]

Article 8(2) of the Merger Regulation prescribes the EC's power to declare a problem concentration "compatible" after modifications are made by the parties. The modifications must be such that the concentration will no longer create or strengthen a dominant position that would significantly impede competition in the common market.[58] Firms seeking to merge or enter into a joint venture have considerable incentive to modify their arrangements and get the EC's stamp of approval under Article 8(2). This is because the EC's alternative is to block the concentration or impose substantial fines on the firms.[59] The EC "can block a transaction without seeking judicial enforcement, a fact that greatly strengthens its hand in settlement negotiations."[60] While few concentrations are blocked, many transactions are modified in response to EU competition concerns.

LAW. 293, 301-22 (1994); *see also* Venit, *supra* note 50, at 983.

56. Merger Regulation, art. 8(4).

57. *Id.* art. 14(2).

58. *Id.* arts. 8(2), 2(2). The text of article 8(2) is:

> Where the Commission finds that, following modification by the undertakings concerned if necessary, a notified concentration fulfills the criterion laid down in Article 2(2), it shall issue a decision declaring the concentration compatible with the common market.
>
> It may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-a-vis the Commission with a view to modifying the original concentration plan. The decision declaring the concentration compatible shall also cover restrictions directly relating and necessary to the implementation of the concentration.

59. *See* Helmut Bergmann, *Settlements in EC Merger Control Proceedings: A Summary of EC Enforcement Practice and a Comparison with the United States*, 62 ANTITRUST L.J. 47, 51 (1993). Parties may appeal a decision to block a concentration before the European Court of Justice. But the parties must wait until the appellate process is concluded before proceeding with a merger or joint venture. Therefore, an appeal is not always a practical or attractive course of action for a firm, and [i]n fact, the parties are more likely to abandon a transaction if the EC renders a blocking decision. *Id.* at 50.

60. *Id.* at 50.

A. *Application of the Merger Regulation to the Boeing/McDonnell Douglas Merger*

Boeing notified the EC of its intent to merge with McDonnell Douglas on February 18, 1997.[61] The EC exercised jurisdiction because the merger met the definition of a concentration with a Community dimension.[62] Within the initial one-month review, the EC found that the merger raised serious questions about its compatibility with the common market. The EC then opened formal proceedings.

After a more complete investigation, the EC found that "the proposed merger leads to a significant strengthening of Boeing's already existing dominant position in the worldwide market for large commercial jet aircraft."[63] Because Boeing's dominant position was to be strengthened, the merger would have been incompatible with the common market under Article 2(3). Rather than face the possibility of heavy fines, Boeing negotiated with the EC and agreed to make changes. The EC, acting under its Article 8(2) powers, eventually declared the merger compatible subject to these conditions and obligations.[64]

Among these conditions and obligations were Boeing's promises to license to competitors non-exclusive patents developed from publicly financed research and development and to maintain McDonnell Douglas' commercial aircraft manufacturing division as a separate legal entity for ten years.[65] Concessions such as these typically constitute part or all of EC reme-

61. *See* Commission of the European Communities, *Commission Begins An In-depth Investigation Of The Boeing/McDonnell Douglas Merger*, RAPID Press Release, Mar. 19, 1997, *available in* LEXIS, Intlaw Library, ECNews File.

62. Worldwide and Community-wide ECUs for Boeing/McDonnell Douglas were not published. But together, the manufacturers have two-thirds of the EU large commercial jet aircraft market, according to the Commission. *See* Commission Press Release, *supra* note 3.

63. *Id.* The Commission stated that:

> strengthening arises from MDC's own competitive potential in large commercial jet aircraft, from the enhanced opportunity for Boeing to enter into long-term exclusive supply deals with airlines (already exemplified by those with American, Continental and Delta) and from the acquisition of MDC's defense and space activities, which latter confer advantages in the commercial aircraft sector through spillover effects in the form of R&D benefits and technology transfer.

Id.

64. *Id.*

65. *Id.*

dial settlements. However, relinquishment of exclusive supply contracts unrelated to a merger is not typical of an Article 8(2) settlement.[66]

B. *Settlements Under the Merger Regulation; The Conditions and Obligations Provision*

Article 8(2) of the Merger Regulation is the "legal basis for [EC] settlement procedure"[67] and is used by the EC to engage firms in settlement talks designed to make proposed concentrations "compatible" with the European common market. Article 8(2) says the EC "may attach to its decision [declaring a concentration compatible] conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-a-vis the EC with a view to modifying the original concentration plan."[68] The text of Article 8(2) says nothing about what types of modifications, and more specifically, what types of conditions and obligations designed to achieve those modifications, are acceptable terms of a remedial settlement.

Formulating an appropriate remedy is not always easy. In an interview conducted shortly after the EC's Boeing decision, Alexander Schaub, the EC Director General for Competition, pointed out the difficulties in fashioning remedies designed to make concentrations compatible with the common market. Schaub said:

> The concerns expressed by the EC in Boeing were firmly based on the doctrine developed in the process of applying the Merger Control Regulation. According to this doctrine, a dominant firm shall not be allowed to strengthen its competitive potential by acquiring a competitor. It is as clear as that. Another question is looking for a suitable remedy to your basic competition concerns and applying that remedy in a proportionate manner. In certain situations doctrinally pure remedies are not easy to find, let alone to apply without do-

66. *See generally* Bergmann, *supra* note 59. Typical remedies include requiring partial divestitures of certain assets, requiring the merging parties to license technology to third-party competitors or otherwise benefit them so that they may continue to compete, or to create future obligations for the parties that seek to avoid anti-competitive results of the merger. *Id.* at 47.

67. *Id.* at 51.

68. Merger Regulation, art. 8(2).

ing more harm than good to the parties and to consumers or to the general public.[69]

Certainly, innovative remedies are important in light of the absence of specific remedial directions in Article 8(2), the difficulties in tailoring remedies that are responsive to numerous interests and the obstacles to information-gathering that sometimes accompany review of foreign mergers.[70] Nonetheless, remedies imposed, whether inside or outside the context of a settlement, must have some limitations grounded in competition law and doctrine. If they do not, firms undergoing a merger review would, like Boeing, find that some prior agreements or transactions—unrelated to the merger—present an obstacle to gaining approval of the merger. Likewise, with no limits on the remedies that they can enforce, European competition authorities could use Merger Regulation settlements to undo transactions or eliminate practices of the merging parties that they find unfavorable to the interests of Europe's own competitors, even when those transactions or practices were in place long before the merger review began and had little antitrust implications.[71] In such a climate, businesses would have difficulty knowing when and how they might run afoul of European competition law. Thus, particularly for the benefit of businesses, the EC must negotiate settlements with elements anchored in the Merger Regulation.

A closer look at Article 8(2) demonstrates that the provision provides that anchor; it limits the types of transactions that may be reviewed under that section, and thus included in any remedial settlement.

1. The Ancillary Restrictions Provision

The text of Article 8(2) states that "[t]he decision declaring the concentration compatible shall also cover restrictions di-

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69. *See Interview with Alexander Schaub, Director General for Competition, EC Commission,* 12 ANTITRUST 13, 14 (1997).

70. *See generally* Michael Weiner, *Remedies in International Transactions: A Case for Flexibility,* 65 ANTITRUST L.J. 261, 276 (1996).

71. Boeing entered its first exclusive supply contract with American Airlines in November 1996. It announced its intent to merge with McDonnell Douglas in December 1996. An attorney for Boeing claims the first contract pre-dated even any discussions of the merger. Boeing Interview, *supra* note 34, at 7.

rectly relating and necessary to the implementation of the concentration."[72] These restrictions, called ancillary restrictions, are usually agreements between merging parties that include non-competition clauses, exclusive supply agreements or other restraints established to facilitate a merger.[73] Normally, this type of restraint is reviewable only under Articles 85 and 86 of the Treaty of Rome,[74] but for efficiency's sake, Article 8(2) allows the EC to review and possibly alter or eliminate such restrictions in the context of a merger review.[75] The EC applies the ancillary restrictions provisions using guidelines issued in 1990.[76]

On its face, the ancillary restriction provision seems of minor importance, but in fact, "the guidelines on the types of transactions covered and on ancillary restraints are crucially important in that they will effectively define the relative scopes of application of the Regulation, existing EEC competition rules, and national laws with respect to joint ventures and ancillary provisions."[77] According to the guidelines, any agreements that are unrelated to the merger are not subject to the EC's review under the Merger Regulation.[78] Only agreements that meet the definition of ancillary restriction can be reviewed under the Merger Regulation. The guidelines state:

> For restrictions to be considered "directly related" they must be ancillary to the implementation of the concentration, that is to say subordinate in importance to the main object of the concentration. They cannot be substantial restrictions wholly different in nature from those which result from the concentration itself . . . The notion of directly related restrictions likewise excludes from the application of the Regulation addi-

72. Merger Regulation, art. 8(2).

73. *See* Hawk, *supra* note 2, at 210-11.

74. *Id.*

75. *See* Commission Notice Regarding Restrictions Ancillary to Concentration, 1990 O.J. (C 203) 5 (1990) [hereinafter Commission Notice]. The Commission Notice, which is a guideline for application of the ancillary restrictions provision of Article 8(2), states that covering these restrictions under the merger review avoids parallel Commission proceedings, one concerned with the assessment of the concentration under the Regulation, and the other aimed at the application of Articles 85 and 86 to the restrictions which are ancillary to the concentration. *Id.*

76. *See id.* The Commission issues such guidelines for the application of numerous regulations.

77. *See* Hawk, *supra* note 2, at 195 n.3.

78. Commission Notice, *supra* note 75.

> tional restrictions agreed at the same time which have no direct link with the concentration. It is not enough that the additional restrictions exist in the same context as the concentration . . . .Restrictions must likewise be "necessary to the implementation of the concentration," which means that in their absence the concentration could not be implemented or could only be implemented under more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably less probability of success.[79]

Furthermore, the guidelines state that "the restrictions meant are those agreed on between the parties to the concentration which limit their own freedom of action in the market."[80] The EC applies these guidelines to determine whether certain agreements are ancillary to a concentration, and thus subject to conditions and obligations during a merger review.

As for exclusive purchase or supply agreements, the notice on ancillary restrictions describes the type of exclusive purchase and supply agreements that are common to mergers or joint ventures and most often meet the definition of ancillary. These agreements occur when the sale of part of a company disrupts supply or purchase lines within the company. To ensure that the acquired portion continues to receive products or have an outlet for its products necessary to its business, the acquiring firm may enter into an exclusive supply or purchase agreement with the company that remains after the sale. This agreement can last until the acquired portion is able to establish other outlets or lines of supply. The EC will tolerate these normally anti-competitive arrangements in only clearly necessary instances.[81]

2. Applying the Ancillary Restriction Guidelines to Boeing's Exclusive Supply Contracts

Boeing's exclusive supply contracts with three U.S. airlines did not meet the definition of ancillary restriction under the EC's own guidelines, and therefore were beyond the scope of review and alteration under the Merger Regulation. The contracts were wholly different in nature from any agreements de-

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79. *Id.* art. II(4)(5).
80. *Id.* art. II(3).
81. *See id.* part III(C).

signed to effectuate the concentration between Boeing and McDonnell Douglas. It is possible the contracts were entered into during the same general time that Boeing was formulating its acquisition of McDonnell Douglas, but the guidelines state that timing is not enough to subject restrictions to review under the Regulation in the absence of a "direct link" with the merger.[82] Likewise, the exclusive supply contracts were not "necessary to the implementation" of the concentration. Boeing could have acquired McDonnell Douglas even in the absence of the exclusive supply contracts with the airlines. In addition, the absence of these contracts would have had no impact on the cost, implementation or success of the merger transaction itself.

In any event, the agreements were not between Boeing and McDonnell Douglas, the "parties to the concentration," but were restrictions between Boeing and third parties. In a merger review, the EC may look at restrictions on third parties that are the "inevitable consequence of the concentration itself" under Article 2 of the Merger Regulation,[83] which allows an assessment of the concentration's impact on the market, on consumers and on supply and demand trends. But if these restrictive "effects" on third parties are not the result of the merger itself, they are not reviewable under the Merger Regulation. Rather, if "restrictive effects on third parties are separable from the concentration they may, if appropriate, be the subject of an assessment of compatibility with Articles 85 and 86 of the EEC Treaty."[84]

C. *Using the Ancillary Restrictions Provision to Limit the Scope of Settlements*

The ancillary restriction provision provides a simple and effective limit on the types of conditions and obligations that can be required by the EC in a merger review. In summary, the EC may not review or require alterations to any agreements that are unrelated to the merger. Had the EC considered its own guidelines in the Boeing case, it should have concluded that it could not force Boeing to give up the exclusive

82. *See id.* art. II(4).
83. *Id.* art. II(3).
84. *Id.*

supply contracts in the context of a merger review. Rather, it should have looked for remedies having a direct relation to the problem concentration.

IV. EC Competition Powers Under Articles 85 and 86

While lacking jurisdiction over Boeing's exclusive supply contracts under the Merger Regulation, the EC might have tried to attack them under Articles 85 and 86 of the Treaty of Rome.[85] These articles provide a well established basis for review of horizontal and vertical restraints that potentially restrict competition.[86] Boeing's exclusive supply contracts would be considered a vertical restraint because the agreements flowed from the manufacturer down to its purchaser. This type of agreement is analogous to "exclusive purchase agreements" that are of great concern to the EC and that usually require a reseller to purchase certain goods solely from one manufacturer.[87] The EC sees some vertical restraints as an impediment to the integration of the European market, and, along with ensuring effective competition, integration remains a major goal of European competition law.[88] The EC also has recognized that vertical restraints may not only hinder integration and trade among member states, but also may interfere with trade between the EU and other nations.

> Just as vertical restraints can either promote or hinder the creation of a real single market, they can be either beneficial or detrimental to international trade. The Union's policy in this area is therefore of wider international importance.[89]

Articles 85 and 86 are the primary tools used by the EC to effectuate its competition law policies favoring market integration and liberal international trade.

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85. EEC Treaty, *supra* note 8, arts. 85-86.

86. Vertical restraints are agreements between producers of goods and buyers of goods; typically they are between producers and wholesale or retail distributors. *See* Green Paper on Vertical Restraints in EC Competition Policy, COM(96)721 (final) at 1-2 [hereinafter Green Paper]. Horizontal restraints are agreements between businesses on the same tier, such as those resulting in cartels and other price-fixing schemes.

87. *See generally* Green Paper, *supra* note 86.

88. *Id.* at i.

89. *Id.*

A. *Article 85*

Article 85 prohibits agreements "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 . . . ."[90] The types of agreements prohibited include those which:

> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> (b) limit or control production, markets, technical development or investment;
>
> (c) share markets or sources of supply;
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
>
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such contracts.[91]

Under Article 85(2), any agreement found to be in violation of Article 85(1) is "automatically void."[92] The definition of prohibited agreements under Article 85 is broad, and has been used aggressively to punish illegal cartels.[93] With respect to other potentially violative agreements, the EC relies on a notification system in which firms inform the EC about their transactions.[94] Article 85(3) allows the EC to grant individual exemptions from Article 85(1) for certain agreements or concerted practices that may restrict competition, but that also contribute "to improving the production or distribution of goods or to promoting technical or economic progress, while allowing

90. EEC Treaty, *supra* note 8, art. 85(1).
91. *Id.*
92. *Id.* art. 85(2).
93. *See* Waller, *supra* note 47, at 58-60.
94. *Id.* at 61.

consumers a fair share of the resulting benefit."[95] The EC also has issued regulations creating exemptions for entire categories of agreements. These "block exemptions" do not require notification.[96]

B. Article 86

Article 86 of the Treaty of Rome prohibits "[a]ny abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it" insofar as that abuse "may affect trade between Member States."[97] The abuse includes, but is not limited to, conduct:

> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical developments to the prejudice of consumers;
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such contracts.[98]

Article 86 does not prohibit firms from obtaining a dominant position, which can range from 45 percent to 60 percent of market share, but rather allows the EC to strictly police the behavior of firms in a dominant position.[99] Prohibited practices by dominant firms often include predatory pricing, refusals to deal and tying.[100] In addition, the EC can consider the existence of these practices as evidence of a dominant posi-

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95. EEC Treaty, *supra* note 8, art. 85(3).
96. *See* Waller, *supra* note 47, at 63-66.
97. EEC Treaty, *supra* note 8, art. 86.
98. *Id.*
99. *See* Waller, *supra* note 47, at 68-69.
100. *See id.* at 70-71.

tion.[101] While Article 85 is more often applied to vertical restraints, Article 86 can also be used to prohibit those agreements when they involve dominant firms.[102]

C. *Extraterritorial Application of Articles 85 and 86*

For many years, the EC from time to time exercised antitrust jurisdiction over foreign transactions that had an "effect" in the European Community, thereby using a doctrine very similar to that employed in the extraterritorial application of U.S. antitrust laws and developed in *United States v. Aluminum Co. of America*.[103] Continued use of the effects test was thrown into doubt in 1988 when the European Court of Justice (ECJ) [104]formulated a new doctrine for determining whether European competition laws should apply to non-EU firms. In the famous *Wood Pulp* case,[105] the ECJ affirmed a decision in which the EC asserted jurisdiction over non-EU producers of wood pulp who conspired to fix prices for EU customers, but the Court did not base its opinion on the effects doctrine, as the EC had. Rather, the Court held that the EU competition laws applied to the wood pulp cartel because the price-fixing scheme was implemented in the European Community.[106] Since *Wood Pulp*, the EC has attempted to utilize the implementation doctrine adopted by the Court, but in practice, the results of this approach are often similar to results under the effects test as used in the United States.[107]

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101. *See id.* at 69.

102. *See generally* Green Paper, *supra* note 86; *see also* Case 322/81, Michelin v. Commission, 1983 E.C.R. 3461, [1983] 1 C.M.L.R. 282 (1985).

103. *See* Waller, *supra* note 47, at 59-60; *see also* United States v. Aluminum Co. of Am., 148 F.2d 416, 444 (2d Cir. 1945).

104. Private parties or member states may appeal EC competition law decisions to the ECJ. *See* LOUIS HENKIN, ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 1423-25 (2d ed., 1987).

105. Case 9/85, A. Ahlstrom Osakeyhito Oy v. Commission (Wood Pulp), 1988 E.C.R. 5193.

106. *Id.*

107. *See* Waller, *supra* note 47, at 60. For a discussion of problems arising from the EC's use of the effects approach and ECJ's use of the implementation approach, see Allison J. Himelfarb, Comment, *The International Language of Convergence: Reviving Antitrust Dialogue Between the United States and the European Union with a Uniform Understanding of Extraterritoriality*, 17 U. PA. J. INT'L ECON. L. 909 (1996).

D. EC Jurisdiction Over Boeing's Contracts Under the Implementation or Effects Tests

The EC would have been unlikely to gain jurisdiction over Boeing's exclusive supply contracts by using either the implementation approach or the effects test. First, the contracts were between Boeing and U.S. airlines and were not implemented or in any way carried out in the EU. Thus, the EC's exercise of jurisdiction over the contracts would be in direct conflict with *Wood Pulp*.

The effects test might provide stronger grounds for asserting jurisdiction. Nevertheless, the EC would have quite a task to show, as required under this doctrine, that the foreclosure of less than 11 percent of the U.S. market for new large commercial jet aircraft sales had an appreciable effect in the EU. This foreclosure would be felt in the EU if it forced Airbus to raise prices or allowed Boeing to raise prices enough to hurt airline purchasers in the EU. But reports indicate that Airbus, a company with sales around $9 billion and profits of about $1 billion per year,[108] is too strong to be gravely affected by Boeing's three exclusive supply contracts.

In the absence of an implementation or effects in the EU, the EC should not apply Articles 85 and 86 to transactions involving non-EU firms. Thus, even if Boeing's exclusive supply contracts constituted the type of agreements that are subject to scrutiny under these articles, the EC would have failed to meet the threshold for extraterritorial application of the articles and would not have been able to require Boeing to give up the contracts.

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108. *See Boeing v. Airbus: Peace in Our Time*, *supra* note 18, at 59-60. Boeing attorney Thomas Boeder said: "Airbus, incidentally, has similar arrangements [exclusive supply contracts], we believe; one, for example, with U.S. Airways. Because of the way Airbus does business, it is much more difficult to get at any information to confirm that." Boeing Interview, *supra* note 34, at 9. The Boeing attorneys described the benefits to the airlines in the exclusive arrangements. *See id.* If these contracts are indeed beneficial to airlines, as reports said (*see* Walker, *supra* note 34), then perhaps they allow the airlines to keep prices low, rather than forcing them to raise prices for passengers.

V. COMITY PRINCIPLES IN INTERNATIONAL ANTITRUST ENFORCEMENT

As the Boeing case illustrates, global enforcement of one sovereign's antitrust laws has the potential to spark major disputes between trading partners and could result in the disruption of good relations and even the imposition of trade sanctions by one or both partners. The chances are great that such a dispute will arise in the future, given the increasing number of international mergers and transactions and the growing link between trade and antitrust issues. Unfortunately, this progression in international antitrust relations comes at a time when courts deciding antitrust suits have severely limited the use of comity principles in cases involving extraterritorial jurisdiction.

A. *The Declining Consideration of Comity in the United States and the EU*

The principle of comity has been defined as a "rule of courtesy."[109] Comity is not a legally binding limitation, but "more like an act of altruistic deference or an acknowledgement of superior foreign interests . . . in the matter at hand."[110] The extraterritorial enforcement of antitrust laws, as Hawk indicated, can give rise to comity issues,[111] especially when an antitrust authority seeks to apply its laws to a transaction already reviewed by the antitrust authority in the home state. For example, in the Boeing case, the FTC approved the merger before the EC completed its review.[112] Under comity princi-

109. BARRON'S LAW DICTIONARY 86 (4th ed. 1996).

110. *See* BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 738 (2d ed. 1995).

111. *See* Hawk, *supra* note 2, at 210.

112. *See* FTC Statement, *supra* note 13. In their decision approving the merger, the FTC commissioners briefly commented on Boeing's 20-year exclusive supply contracts. They said the contracts were potentially troubling, but they declined to act on them. Instead, the commissioners stated the agency intends to monitor the potential anticompetitive effects of these, and any future, long term exclusive contracts. *Id.* at 3. Commissioner Mary L. Azcuenaga dissented in so far as the decision approved the merger of the manufacturers' commercial aircraft units. She also stated:

> I also agree with my colleagues that no action is warranted concerning the twenty-year exclusive arrangements for commercial aircraft that Boeing recently reached with three major U.S. airlines. The arrangements account for an estimated 11% of the market, well below any level that

ples, the EC would have been obliged to give some deference to the opinion of the FTC, its rationale for approving the merger, and the overall interests of the United States in seeing the merger go forward.

Although comity principles can serve to minimize conflicts in international relations, their use in the United States has been declining and, as some scholars suggest, has never been strong in the EU.[113] In the United States, the 1993 Supreme Court decision in *Hartford Fire Insurance Co. v. California*[114] substantially abridged the broad use of comity principles applied by some lower courts. In *Hartford*, the Supreme Court considered whether the Sherman Act prohibited certain conduct by British corporations operating under British insurance market regulations.[115] The Court rejected the defendants' arguments that the U.S court should consider international comity (i.e., the British interest in allowing the conduct under its regulatory scheme) and thereby should decline to exercise jurisdiction over certain claims stemming from conduct not prohibited by British law.[116] The Court eschewed use of the criteria that many lower courts had used to determine whether international comity militated against an exercise of jurisdiction.[117] Instead, the Court held that international comity only

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> should be of concern under the laws enforced by the Commission. Given the state of the law and the fact that the exclusive arrangements apparently are unrelated to the proposed transaction, what is curious is that my colleagues choose to mention them at all.

Statement of Commissioner Mary L. Azcuenaga in The Boeing Company, *File No. 971-0051* (visited Oct. 8, 1997) <http://www.ftc.gov/opa/9709/boeingsta.htm>.

113. *See, e.g.,* Joseph P. Griffin, *EC and U.S. Extraterritoriality: Activism and Cooperation,* 17 FORDHAM INT'L L.J. 353, 357-58 (1994).

114. 509 U.S. 764 (1993).

115. *Id.*

116. *Id.*

117. The principal lower court case incorporating comity principles into an antitrust analysis was Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976). Timberlane adopted a rule of reason which the court said dictated a balancing of factors in the exercise of extraterritorial jurisdiction including:

> the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of businesses or corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

precludes a court from exercising jurisdiction over foreign actors when there is a "true conflict" between laws of the foreigners' state and U.S. domestic laws:[118] that is, where the foreign law specifically requires the company to do something prohibited by U.S. law. Since the British law did not require the conduct in question (but merely permitted it), the Court held that an exercise of jurisdiction did not violate international comity principles. The *Hartford* case is seen to strengthen U.S. antitrust authorities' hand in enforcing antitrust laws extraterritorially.[119]

More pertinent to the Boeing case is the question of when the EC considers international comity in its extension of jurisdiction to non-EU firms. As discussed above, the ECJ formulated its most recent test for the extraterritorial application of EU competition laws in *Wood Pulp*.[120] Also in that case, the ECJ declined to consider international comity arguments, or even to give a reason why comity did not preclude the exercise of EU jurisdiction over the non-EU producers.[121] This disregard of comity principles is consistent with previous cases in which the ECJ rejected requests for consideration of foreign interests in light of international comity.[122] As for the use of international comity principles by the EC, commentator Joseph P. Griffin notes, "It appears the EC believes that international comity is a matter of prosecutorial discretion . . . and not a legal prerequisite to the exercise of jurisdiction."[123]

The limited use of comity in the United States and EU means that both governments will continue to aggressively apply their antitrust laws to foreign companies. Commentator

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Id. at 614.

118. *Hartford*, 509 U.S. at 798.

119. *See* Carole Aciman, *Reengineering the International Corporation: Application of U.S. Antitrust Law to Non-U.S. Conduct Affecting Foreign Markets, Consumers or Producers*, 10 INT'L L. PRAC. 5, 6-7 (1997). The FTC and the Department of Justice (DOJ) (which enforce U.S. antitrust laws) call for consideration of international comity principles in DOJ guidelines. *See 1995 Antitrust Enforcement Guidelines for International Operations*, 4 CCH TRADE REG. REP. But Aciman notes that "the Guidelines are unclear on where the DOJ and the FTC will draw lines about whether to pursue enforcement actions." *Id.* at 6.

120. Case 9/85, 1988 E.C.R. 5193.

121. *Id.*

122. *See, e.g.*, Case 60/81, IBM v. Commission, 1981 E.C.R. 2639, 3 C.M.L.R. 635 (1981); *see also* Griffin, *supra* note 113, at 357.

123. *Id.* at 358 (citation omitted).

Roger Alford writes, "The narrow definition of a conflict of laws adduced in *Wood Pulp* and *Hartford Fire* ensures that comity will almost never be a factor in the extraterritorial application of antitrust laws; in the vast majority of antitrust cases, the conflict is between one state encouraging or permitting certain behavior and another state prohibiting that same behavior."[124] It follows that the narrow definition of international comity would provide one explanation for the EC's exercise of jurisdiction over Boeing's exclusive supply contracts; since the United States laws did not require Boeing to enter the contracts but merely permitted them, there was no "conflict of laws" and thus no reason to employ a comity analysis.[125] But this explanation fails to consider another source that arguably requires use of a broader definition of comity in antitrust actions involving U.S. and EU parties—the 1991 treaty between the U.S. and EU governing cooperation in competition law enforcement.[126] As Alford states:

> [T]he narrow definition of international comity is in tension with the U.S.-EU competition laws Co-operation Agreement. On the one hand, both the Supreme Court and the European Court of Justice have disavowed any notion of comity save in instances of foreign sovereign compulsion; on the other hand, the EC and the Justice Department have adopted, with great ceremony, the Co-operation Agreement, with its explicit incorporation of a comity analysis when either party's enforcement activities adversely affect the other party's sovereign interests.[127]

B. The 1991 Co-operation Agreement

The 1991 agreement contains a positive comity provision, which allows the U.S. or the EU to ask the other party to take enforcement action against a domestic business engaged in practices having anticompetitive effect in territory of the party

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124. Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: A Postscript on* Hartford Fire Ins. Co. v. California, 34 VA. J. INT'L L. 213, 227 (1993).

125. Of course, this is not to say that such an explanation might alone suffice for the exercise of EC jurisdiction given the lack of authority to do so under the Merger Regulation and Articles 85 and 86 as shown in this article.

126. 1991 Agreement, *supra* note 6.

127. Alford, *supra* note 124, at 228.

making the request.[128] In addition, Article VI of the treaty instructs each party to apply a more traditional comity analysis.[129] Under the heading Avoidance of Conflicts over Enforcement Activities, the article states: "[w]ithin the framework of its own laws and to the extent compatible with its importance interests, each Party will seek, at all stages in its enforcement activities, to take into account the important interests of the other Party."[130] An important interest would normally be reflected in antecedent laws, decisions or statements of policy by its competent authorities.[131] The agreement recognizes that as a general matter the potential for adverse impact on one Party's important interests arising from enforcement activity by the other Party is less at the investigative stage and greater at the stage at which conduct is prohibited or penalized, or at which other forms of remedial orders are imposed.[132] The treaty also sets out factors to be considered by a Party whose enforcement activities are adversely affecting the other Party's important interests.[133]

The U.S. and EU use the cooperation provisions of the treaty to consult on antitrust matters. The treaty has been effective in promoting cooperation in cases where the U.S. and EU have similar concerns. For example, in 1996 the DOJ and the EC had frequent contact during the parties' investigation of anticompetitive practices by A.C. Nielsen Co. The DOJ eventually closed its investigation and allowed the EC to negotiate and put an end to the practices.[134] In another case, the DOJ and the EC coordinated a settlement agreement with Microsoft in an attempt to end the company's exclusionary practices.

In the future, the U.S. and EU will have more opportunities to cooperate in antitrust investigations and settlement negotiations. The provisions of the 1991 agreement provide a strong foundation for cooperation, but so far, they have only

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128. 1991 Agreement, *supra* note 6, at art. V(2). The party asked to take enforcement action is not obligated to take that action. *Id.* art. V(3),(4); *see also* James F. Rill, *A Framework for Cooperation: The Status of International Antitrust Enforcement*, 18 WHITTIER L. REV. 321, 322 (1997).

129. 1991 Agreement, *supra* note 6, at art. VI.

130. *Id.* art. VI.

131. *Id.* art. VI(1).

132. *Id.* art. VI(2).

133. *Id.* art. VI(3).

134. *See* Rill, *supra* note 128, at 324-25.

been useful in situations where both parties have similar interests in the cessation of certain anticompetitive practices. The real question is whether the treaty leads to cooperation and conflict solving in cases where the U.S. and EU are at odds. The Boeing case presented an opportunity for this type of test of the treaty's "avoidance of conflict" provisions, but there is no evidence that either side considered Article VI or sought to apply the factors for consideration listed in the clause. If the treaty is to be an effective tool for cooperation in the future, the parties must recognize that the treaty not only governs amiable international antitrust reviews, but provides a framework for cooperation in the face of conflict as well.

VI. A FORUM FOR CONFLICT RESOLUTION

Absent from the framework for cooperation set out in the 1991 Agreement is a provision creating a conflict resolution mechanism. Such a mechanism would be useful in cases like Boeing because one party could assert that the other is illegally extending its jurisdiction and that claim could be mediated or adjudicated before a neutral party. The mechanism also could be used when the parties disagree about the type of remedy that should be imposed on an entity under review, even after one party has considered the other party's important interests under the 1991 agreement.

The OECD has been instrumental in developing principles for cooperation to be used by antitrust authorities of its members.[135] In 1986, the OECD issued recommendations for international antitrust cooperation that became a foundation for the U.S.-EU agreement.[136] In 1995, it revised those recommendations to include expanded provisions for notification and exchange of information and also to suggest a conciliation mechanism for settling disputes between Member States.[137]

135. *See generally* Wood, *supra* note 9, at 1294-95. OECD members are: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States.

136. *Revised Recommendations of the OECD Council Concerning Cooperation Between Member Countries in Restrictive Business Practices Affecting International Trade*, OECD Doc. No. C(86) 44 (Final) (May 21, 1986) *reprinted in* 25 I.L.M. 1629 (1986).

137. *See* OECD Recommendations, *supra* note 11.

These recommendations prod OECD members to consult with other member states whose antitrust investigations may affect their important interests.[138] The parties are to try to work out a satisfactory agreement concerning the particular enforcement activity,[139] but "[i]n the event that no satisfactory conclusion can be reached, the Member countries concerned, if they so agree, should consider having recourse to the good offices of the [OECD] Competition Law and Policy Committee with a view to conciliation."[140]

This provision recommends a completely voluntary approach to conciliation, but if the OECD were to agree, member states could incorporate a requirement for conciliation into their antitrust agreements. The U.S. and EU should amend their 1991 cooperation agreement to include a clause requiring the parties to bring any irreconcilable disputes before an arbitrator at the OECD. Because the OECD has been "a primary force in the international antitrust arena,"[141] it is most likely equipped to mediate or arbitrate such disputes. In the absence of an international antitrust regime, this solution could help stem the number of conflicts resulting in threats of or actual trade sanctions.

VII. CONCLUSION

In the Boeing/McDonnell Douglas merger, EU antitrust authorities imposed a remedial settlement that exceeded the limits of its Merger Regulation and exceeded the limits of extraterritorial application of its Article 85 and 86 competition powers. These actions also were contrary to comity principles that should be a factor in international antitrust reviews. If the EC, and other antitrust authorities including those in the United States, continue to use their competition powers in such an arbitrary manner, businesses will be forced to operate under an unstable and uncertain area of law and the possi-

138. *Id.* art. I(B).

139. *Id.* "Each member country, without prejudice to the continuation of its action under its competition law and to its full freedom of ultimate decision . . . should give full and sympathetic consideration to the views expressed by the requesting country, and in particular to any suggestions as to alternative means fulfilling the needs or objectives of the competition investigation or proceeding." *Id.* art. I(B)(4)(b).

140. *Id.* art. I(B)(8).

141. Rill, *supra* note 128, at 328.

bility of trade sanctions between nations will be heightened. To avoid these detrimental results, antitrust authorities must apply their competition laws to the letter and must exercise extraterritorial jurisdiction with caution and with consideration of comity. In addition, a conflict resolution forum should serve to help resolve these disputes. Nations should be willing to submit their disputes to such a forum so that they may avoid the pitfalls of extraterritorial application of antitrust laws.

Sondra Roberto