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# Dialogue and Consultation Facilitates Convergence in the Analyses of Mergers in the US and EU

David Scheffman

Director, Bureau of Economics, Federal Trade Commission\*

Mary Coleman

Deputy Director, Bureau of Economics, Federal Trade Commission\*

## Introduction

The different decisions reached by the European Commission (EC) and the US Department of Justice in the GE/Honeywell case have raised much controversy and led to questions about whether the EC and the US federal antitrust agencies have different approaches and analyses that they employ to investigate mergers. As has been pointed out elsewhere, GE/Honeywell is clearly the exception rather than the rule.<sup>1</sup> In order to promote convergence, in the past two years, officials and staff from the EC and the US antitrust agencies have spent a substantial amount of time sharing our experiences in conducting mergers analyses. The dialogue is ongoing. This dialogue has involved quite detailed discussions of the benefits and pitfalls for various merger analyses, with examples from our own experiences. Lawyers and economists from the DOJ and the FTC have made a number of presentations to the European Commission staff,<sup>2</sup> generally followed by much detailed discussion. EC staff have made a number of visits to the US that involved presentations and testimony by them and attending events such as the FTC Merger

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\* The opinions stated in this article present those of the authors and do not necessarily represent those of the Federal Trade Commission or any individual Commissioner. We thank Randy Tritell, John Parisi, and Bill Kovacic for their helpful comments. We retain the blame for any errors or omissions.

<sup>1</sup> See Timothy J. Muris, Merger Enforcement in a World of Multiple Arbiters, Prepared Remarks Before the Brookings Institution Roundtable on Trade & Investment, Washington, D.C. (Dec. 21, 2001), <http://www.ftc.gov/speeches/muris/brookings.pdf>.

<sup>2</sup> See, e.g., David Scheffman, Sources of Information and Evidence in Merger Investigations: an FTC Economist's View, Prepared Remarks to a Session on the "Use of Economics in EC Competition Law," Brussels (January, 2003), <http://www.ftc.gov/speeches/other/sourcesofinfobrussels03.pdf> [hereinafter Scheffman, Sources of Information and Evidence]; David Scheffman, "Critical Loss" Analysis, Presentation Delivered to EU Merger Taskforce, Brussels (January, 2003), <http://www.ftc.gov/speeches/other/criticalloss.pdf> [hereinafter Scheffman, Critical Loss]; David Scheffman, Hot Topics in Economics: Using New Economic Arguments and Evidence in Antitrust Investigations and Litigation, Presentation Before the Conference Board 2003 Antitrust Conference, New York, NY (March 18, 2003), <http://www.ftc.gov/speeches/other/030318dtscb.pdf> (various presentations based on this have been made to the EC and EU Member State competition authorities' staffs) [hereinafter Scheffman, Hot Topics].

Efficiencies Roundtable<sup>3</sup> and the DOJ/FTC Intellectual Property hearings.<sup>4</sup> A number of joint working groups have been created on merger analysis and other antitrust analyses. In addition, the agencies interact extensively on individual cases that we both review.

We have learned from this extensive interaction with our colleagues in the European Commission that, as a general matter, the approaches of the agencies in the US and the EC are generally similar. Although the statutory and institutional frameworks differ, both jurisdictions have a consumer welfare focus in their assessment of mergers.

The primary differences between the jurisdictions involve the extent and nature of the evidence developed in merger investigations. Factors underlying differences include more discovery typically in US investigations, more time and resources used in the typical US investigation, differences in the role of economists in the investigation and decision making processes, and a greater emphasis on quantitative economic analyses in the US<sup>5</sup> In this article, we discuss the commonalities between the approaches employed by the EC and the US agencies, some of the remaining differences and methods to promote continued convergence. Our central theme is that sound and common analyses generally lead to similar decisions. We believe that with ongoing dialogue on approaches to merger analysis and continued interaction on cases, along with the increased emphasis on economic analysis and the creation of a Chief Competition Economist position in the EC's Competition Directorate General (DG COMP),<sup>6</sup> further convergence of analyses will be achieved. We will continue to learn from each other regarding the types of economic analyses that are useful in merger analysis and techniques for conducting these analyses. We have also learned much from process discussions. We like the fact that the EC competition authority issues "fully reasoned decisions." The Muris FTC has emulated that transparency in providing much more information about the reasons for its decisions.

## **SIMILAR APPROACHES IN MARKET DEFINITION AND GUIDELINES SUPPORT THE USAGE OF COMMON ECONOMIC ANALYSES**

The basic economic approach to assessing whether or not a merger is likely to raise competitive concerns is very similar in the EC and in the US agencies, as seen by comparing the "Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competi-

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<sup>3</sup> See FTC, Bureau of Economics: Merger Roundtable Papers, <http://www.ftc.gov/be/rt/mergerroundtable.htm>.

<sup>4</sup> See Competition and Intellectual Property Law and Policy in the Knowledge-based Economy Public Hearing Materials, <http://www.ftc.gov/opp/intellect/index.htm>.

<sup>5</sup> See Scheffman, Sources of Information and Evidence, *supra* note 2.

<sup>6</sup> See Press Release, European Commission, Commission Adopts Comprehensive Reform of EU Merger Control (Dec. 11, 2002), [http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.getfile=gf&doc=IP/02/1856|0|AGED&lg=EN&type=PDF](http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.getfile=gf&doc=IP/02/1856|0|AGED&lg=EN&type=PDF).

tion Law”<sup>7</sup> and the “Draft Commission Notice on the Appraisal of Horizontal Mergers”<sup>8</sup> (“EC Draft Guidelines) released by the EC to the US 1992 Horizontal Merger Guidelines (“US Guidelines”).<sup>9</sup> While the EU Merger Regulation has a “creation or strengthening of dominance” test and the US Clayton Act has a “substantial lessening of competition” test, we share, as Commissioner Monti has stated it,<sup>10</sup> the same fundamental concern: the use of market power and its ultimate effect on consumer welfare. The fundamental question posed by the agencies in each jurisdiction is the same: will the merger create or enhance the unilateral or joint exercise of market power?<sup>11</sup> In answering this question, both the EC and the US agencies consider many factors:

- What is the relevant product and geographic market in which to assess the merger?<sup>12</sup>
- What are market shares and concentration in the relevant market? Is the impact of the merger on shares and concentration significant enough to warrant further review?<sup>13</sup>
- What theories of potential adverse competitive effects are relevant to assessing the possible competitive effects of the merger?<sup>14</sup>
- What support exists for such theories, including assessing the impact of the potential for entry and efficiencies on the likelihood of competitive harm?<sup>15</sup>

With respect to product and geographic market, the hypothetical monopolist approach is employed by both jurisdictions. We have advocated a more consistent rigorous approach by the EC to market definition -- among other things, regularly employing “Critical Loss” analysis.<sup>16</sup> That is, to determine what is likely to happen in the event of a small but significant and non-transitory price increase: how much customer switching is there likely to be and whether the gain in profit from higher prices charged to remaining customers would offset the margins lost from customers who switched to other products.

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<sup>7</sup> [http://www.europa.eu.int/comm/competition/antitrust/relevma\\_en.html](http://www.europa.eu.int/comm/competition/antitrust/relevma_en.html).

<sup>8</sup> [http://www.europa.eu.int/comm/competition/mergers/review/final\\_draft\\_en.pdf](http://www.europa.eu.int/comm/competition/mergers/review/final_draft_en.pdf).

<sup>9</sup> <http://www.ftc.gov/bc/docs/horizmer.htm>.

<sup>10</sup> Mario Monti, Remarks to the ICN Conference, Naples (September 28, 2002), [http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.getfile=gf&doc=SPEECH/02/473|0|AGED&lg=EN&type=PDF](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.getfile=gf&doc=SPEECH/02/473|0|AGED&lg=EN&type=PDF).

<sup>11</sup> See US Guidelines at § 0.1; EU Draft Guidelines at ¶ 11.

<sup>12</sup> See, e.g., US Guidelines at § 1.0; EC Draft Guidelines at ¶ 6.

<sup>13</sup> See, e.g., US Guidelines at §§ 1.4 & 1.5; EC Draft Guidelines at ¶¶ 13-18.

<sup>14</sup> See, e.g., US Guidelines at § 2; EC Draft Guidelines at ¶¶ 11, 19-74.

<sup>15</sup> See, e.g., US Guidelines at §§ 3 & 4; EC Draft Guidelines at ¶¶ 78-95.

<sup>16</sup> See Scheffman, Critical Loss, *supra* note 2.

Similarly, with regard to competitive effects analysis, the basic theories of potential harm are similar. In each jurisdiction we consider the potential for competitive harm from unilateral effects (either from creation or maintenance of a dominant firm or through non-cooperative oligopolistic interaction such as in the differentiated products setting) or from what we call coordinated effects. In our presentations and discussions with EC staff, we have advocated more emphasis on the utilization of “natural experiments”-based economic analyses, both for assessment of market definition and competitive effects.<sup>17</sup> We have also advocated against heavy reliance on so-called “simulation models” (such as were employed in the EC’s review of the Volvo/Scania matter), since we believe that in most cases these analyses are too crude and unproven to be reliable predictors of potential merger effects.<sup>18</sup>

The Draft EC Guidelines in a number of respects represent an improvement on the US Guidelines, in that they provide considerably more detail and are based in experience and knowledge developed on both sides of the Atlantic (including the over 10 years since the last major revision of the US Guidelines). The analytical approach is basically consistent with that of the US Guidelines, supplemented by substantial learning and experience since 1992.

## Differences in the EU and the US

### Role of Economists

While the general approach to merger analysis is the same, there are still some significant differences in the application of these approaches, particularly with respect to economic analysis. To date, the role of economists in the EC and the US agencies has been very different. At both the FTC and DOJ, economists are in a separate group from the attorneys and have a separate reporting structure where the economists report to other economists, ultimately to the chief economist. A staff economist is assigned to every merger investigation and is part of the team that reviews the transaction, working with the attorneys to develop potential theories of competitive harm and then reviewing the information gathered to assess these theories. The economist will review all the types of evidence gathered, from interviews, documents, deposition and, of course, data. In both agencies, based on this information, the economist provides a separate recommendation as

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<sup>17</sup> A “natural experiment” is a technique in which differences in characteristics (over time or across geographies) are used to test whether changes in these characteristics impact price or other competitive factors. For instance, if the number of competitors differs across different geographic areas, one can assess whether this impacts the level of pricing, if one can control properly for other factors that might explain these differences. See, e.g., Scheffman, Sources of Information and Evidence, supra note 2.

<sup>18</sup> See, e.g., Timothy J. Muris, Improving the Economic Foundations of Competition Policy, Remarks before George Mason University Law Review’s Winter Antitrust Symposium, Washington, DC (January 15, 2003), <http://www.ftc.gov/speeches/muris/improveconfoundatio.htm>; Scheffman, Hot Topics, supra note 2. This is not to say that the results of simulation models cannot in some circumstances provide useful information in a merger analysis. However, we believe that such models cannot be relied upon as the primary component to predict the likely effects of mergers and that other quantitative analyses are likely to be more useful. We understand that the results of the simulations models did not play an important role in the decision by the EC on the Volvo/Scania matter.

to whether the agency should proceed with an enforcement action.<sup>19</sup> The role of the economist as part of the team, but with a separate reporting structure and recommendation, we believe, is one of the strengths of the US system. It encourages significant internal debate about the pluses and minuses of various theories and how the evidence comports with those theories. This provides either DOJ or FTC with a good basis for understanding the strengths and weaknesses of potential cases and thus whether (1) there is reason to believe that competitive harm would result from the merger; and (2) what issues the agency is likely to face if it chooses to challenge the merger and has to litigate. We have had substantial discussions with the EC regarding the role of economists in the US agencies in the EU/US Best Practices Working Group.

In the EC, there are many fewer Ph.D. economists in DG COMP's Merger Task Force; these economists are in the same reporting structure as the attorneys and generally report to attorneys.<sup>20</sup> While of course various members of the case team will debate issues throughout the investigation, the team forwards one recommendation to its management. While there has been some role for economists from DG COMP's Policy Directorate to participate in later stages in the investigation, this has generally occurred late in the process. The EC has recently announced some changes to this approach that we believe will increase and improve the economic analyses used in merger investigations by the EC. The position of Chief Economist has been developed and he/she will have a staff of several economists to provide input to the Commissioner on competition cases. In addition, the EC is seeking to hire more economists for the Merger Task Force.<sup>21</sup> These measures will move DG COMP closer to the US model so long as the office of the Chief Economist is able to participate in investigations early and continuously. Director General Lowe suggested this possibility will exist in complex cases.<sup>22</sup> An important role, therefore, for the Chief Economist, we believe, is to work with the merger investigation teams to develop general tools that should be applied in developing evidence in merger cases.

## Evidence Used

Differences between the EC and the US agencies exist also with regard to the evidence gathered in investigations. There is generally much more extensive discovery from the parties, customers, competitors, and third parties in the US. The US agencies rely heavily on interviews and depositions with industry participants, customers, and third parties, as well as (sometimes voluminous) documents and data from the parties (and sometimes customers and third parties) in conducting

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<sup>19</sup> If both the legal and economic staff have the same recommendation, there may be a joint recommendation memorandum.

<sup>20</sup> In a reorganization the Merger Task Force is going to be dispersed, with a broader group of personnel involved in merger investigations. Our comments about the role of economists however appear to be largely applicable to the new organization.

<sup>21</sup> See Mario Monti, Merger Control in the European Union: A Radical Reform, Brussels (Nov. 7, 2002), at 6, [http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.getfile=gf&doc=SPEECH/02/545|0|AGED&lg=EN&type=PDF](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.getfile=gf&doc=SPEECH/02/545|0|AGED&lg=EN&type=PDF).

<sup>22</sup> See Philip Lowe, Review of the EC Merger Regulation – Forging a Way Ahead, Brussels (Nov. 8, 2002), [http://europa.eu.int/comm/competition/speeches/text/sp2002\\_035\\_en.pdf](http://europa.eu.int/comm/competition/speeches/text/sp2002_035_en.pdf).

their analysis.<sup>23</sup> The US probably relies less on representations put forward by interested parties than does the EC – although credible customer complaints are very important on both sides of the Atlantic. For the economists in the US, all sources of information are important in reaching their recommendation, although where possible, the economists will focus on quantitative analyses to determine how such analyses fit into the other evidence gathered. As we have noted elsewhere, while sometimes these analyses involve econometrics where appropriate, frequently they involve the use of less sophisticated quantitative techniques (e.g., spreadsheet analyses).<sup>24</sup> While the EC also gathers some documents and obtains data with which to conduct empirical analyses, much of the information gathered from the parties comes from the Form CO and their responses to Article 11 letters and from third parties' responses to questionnaires issued under Article 11. In addition, with limited economist resources available, the data analyses that can be conducted are more limited and sometimes require hiring outside consultants to conduct the analysis. The limitations on the evidence used appear have contributed to the recent reversals by the Court of First Instance of Commission decisions to block mergers.<sup>25</sup> The decision to hire a Chief Economist is one of the many steps the EC has taken to address this issue.

As described above, during the past 18 months, we have had many discussions with the EC about the types of empirical analyses that we employ in merger investigations and encouraged more emphasis on the use of quantitative analyses (with a focus on less complex analyses where possible). This dialogue has not only helped us to sharpen our thinking about these approaches, but has also provided the EC with ideas about how they might employ such techniques going forward (to the extent that they are not already doing so). Examples of analyses discussed include critical loss, various uses of scanner data in consumer products mergers, use of natural experiments, use of financial analyses, quantitative approaches to analyzing the potential for coordinated effects<sup>26</sup> and several other techniques.

As part of our discussions with the EC on conducting quantitative analyses, we have also discussed best practices for empirical analyses,<sup>27</sup> and for interacting with the parties and outside

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<sup>23</sup> See, e.g., Scheffman, Sources of Information and Evidence, supra note 2.

<sup>24</sup> See, e.g., David Scheffman and Mary Coleman, FTC Perspectives on the Use of Econometric Analysis in Antitrust Cases, <http://www.ftc.gov/be/ftcperspectivesoneconometrics.pdf> [hereinafter Scheffman and Coleman, FTC Perspectives]; David Scheffman and Mary Coleman, Current Economic Issues at the FTC, <http://www.ftc.gov/be/hilites/riofinal.pdf>.

<sup>25</sup> See, e.g., Airtours plc v. Commission, Case T-342/99, 2002 ECR II 2585 (CFI), available at [http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61999A0342](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61999A0342); Schneider Electric SA v. Commission, Case T-310/01, 2002 ECR II 4071 (CFI) (evidentiary problems found in markets outside of France), available at [http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62001A0310](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62001A0310).

<sup>26</sup> See Scheffman, Hot Topics, supra note 2. For a discussion of the analyses related to coordinated effects, see Mary Coleman, Empirical Analysis of Potential Coordinated Effects from a Merger, Presentation Before the George Mason University Law Review Winter 2003 Antitrust Symposium (January 2003), available at <http://www.ftc.gov/be/seminardocs/gmucoleman.pdf>.

<sup>27</sup> See Scheffman and Coleman, FTC Perspectives, supra note 24.

consultants with regard to these analyses. As part of these discussions, we have described the best practices recently released by the Bureau of Economics at the FTC.<sup>28</sup> Such interaction is important not only in obtaining data to conduct such analyses in a timely fashion such that quantitative analyses can be incorporated into the decision-making process effectively, but also ensuring the parties understand what we are analyzing and what information and analyses from them we would find useful.

## Road to Continued Convergence

Although there are differences in evidence and approaches, there actually is not much deviation in decisions made on mergers that are reviewed by both jurisdictions. GE/Honeywell was clearly an unusual event. At times the issues that arise in a merger differ because of differences in the nature and structure of competition in the European Union versus the US. However, when essentially the same competition issues are considered, generally the same conclusions are reached. Throughout “common” investigations, communication between the agencies about theories and evidence gathered (to the extent allowed by confidentiality restrictions or by the parties’ grant of a waiver of those restrictions) greatly facilitates this outcome. In fact the recently announced Best Practices on Cooperation in Merger Investigations reflects this experience and should facilitate this cooperation and communication further.<sup>29</sup>

An example of such cooperation occurred in the investigation of the Cruise line mergers. In that case, there were three jurisdictions involved: the FTC reviewed both the Royal Caribbean/Princess and Carnival/Princess mergers in the US while the EC reviewed the Carnival/Princess merger and the competition authorities of the United Kingdom (UK) reviewed the Royal Caribbean/Princess proposed merger. Throughout the investigation, there were discussions between the FTC staff and the staffs from the EC and UK. While the facts of the industry differed somewhat in Europe versus the US, the basic issues of what is the relevant market and what would be competitive effects from the merger were similar.

The US agencies and the EC are committed by their 1991 Cooperation Agreement<sup>30</sup> to attempt, as much as possible, to achieve convergence in their approaches to merger analysis, as was reiterated in the Best Practices. The agencies have taken several steps to achieve these goals. The Best Practices on Cooperation in Merger Investigations is an important step in this process. The

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<sup>28</sup> See FTC, Best Practices for Data, and Economics and Financial Analysis in Antitrust Investigations, <http://www.ftc.gov/be/ftcbebp.pdf>. For a more detailed discussion of these best practices, see Mary Coleman, Best Practices for Interacting with the Federal Trade Commission Re: Data and Empirical Analyses in Antitrust Investigations, ABA Economics Newsletter (2003), available at <http://www.ftc.gov/be/bestpractices.pdf>.

<sup>29</sup> See Press Release, FTC, United States and European Union Antitrust Agencies Issue “Best Practices” for Coordinating Merger Reviews (Oct. 30, 2002), <http://www.ftc.gov/opa/2002/10/euguidelines.htm>; US EU Merger Working Group, Best Practices on Cooperation in Merger Investigations, [http://europa.eu.int/comm/competition/mergers/others/eu\\_us.pdf](http://europa.eu.int/comm/competition/mergers/others/eu_us.pdf).

<sup>30</sup> Agreement Regarding the Application of their Competition Laws, Sept. 23, 1991, US - Commission of the European Communities, <http://usdoj.gov/atr/public/international/docs/ec.html>.

agencies formed a working group to discuss the processes employed by the two jurisdictions and came to agreement on suggestions for parties to follow to ensure the investigations by the agencies are able to proceed on similar time frames and that information can flow between the agencies such that similar outcomes are more likely.

The agencies will continue to work closely together on cases when there are active investigations on both sides of the Atlantic. To the extent possible given confidentiality restraints and waivers thereof, staff will discuss theories and evidence gathered in the investigation. Of importance, staff will discuss with each other the information that the parties (and third parties) are providing, checking for consistency in the arguments and evidence presented. It is not uncommon for firms to make somewhat different arguments in the two jurisdictions that will ultimately undermine their credibility. We strongly urge parties to make their best efforts to present consistent arguments to the US agencies and the EC. In addition, where appropriate, staffs on both sides of the Atlantic will discuss potential remedies, with an aim to having consistency in approaches to ameliorate competitive concerns.