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Transatlantic Irritations in Competition and Trade Policy

Transatlantic economic relations seemingly are in a state of disarray, or ambivalence, which is most apparent in the fields of competition and trade policy. It is not alone bilateral issues that are contentious between the European Union and the United States but also the attitude of both sides towards third countries, as well as each other's ideas of the (future) shape of the international trading system as a whole. Moreover, the EU-US case again demonstrates how the boundaries between policy areas that were formerly classified to be either of a national or of an international nature are blurring.

Such an "interlocking of portfolios" was most conspicuous four years ago when the takeover of McDonnell Douglas by Boeing brought the transatlantic trading partners (the "two elephants of world trade", in the words of Pascal Lamy, the EU trade commissioner) close to the brink of commercial warfare. The European Commission at that time firmly opposed the merger project, which it regarded as providing Boeing with even more market power and which in its view was allowed to go ahead in the United States mainly for reasons of industrial policy, but ultimately backed away from a formal prohibition in order to contain the "storm over the Atlantic" provoked by the issue in June 1997.

If Boeing/McDonnell Douglas could be interpreted as an example of "strategic" competition policy, aimed at international "rent shifting", the failed acquisition of Honeywell by General Electric (GE), which is the most recent case of competition policy that caused a sharp controversy between Brussels and Washington, revealed transatlantic differences of principle concerning the substance and procedures of "normal" or "genuine" competition policy. This time, the Europeans also resisted the pressure employed by American politicians, including the President of the United States himself, in favour of the merger: backed by a unanimous vote of his fellow commissioners, Mario Monti, who is in charge of European competition policy, refused to approve the deal, which would have created the biggest industrial conglomerate in the world and according to the Commission's market analysis would have seriously impaired competition in Europe. In response, US Senator Jay Rockefeller, Head of the US Senate's aviation sub-committee, even urged the federal competition authorities in the United States – the Antitrust Division of the US Department of Justice (DoJ) and the Federal Trade Commission (FTC) – to block future mergers sought by European companies.

GE/Honeywell is the second case (after MCI Worldcom/Sprint) in which, in line with the effects doctrine, a purely American merger was frustrated by the European Commission for its alleged adverse impact on European markets, and it is the first one in which a European veto stood against an American approval of the project (MCI Worldcom/Sprint was prohibited in the USA as well). Conversely, there has also been one merger project among European companies (Air Liquide/BOC) that was blocked in the United States in spite of its approval in Europe. Overall, GE/Honeywell and MCI Worldcom/Sprint are two of altogether just 15 rejections of merger projects imposed by the European Commission to date. This compares with a total of around 1700 examinations of merger and concentration cases that the Commission has conducted since the EC merger regulation went into force in 1990.

According to Charles James, Head of the DoJ's Antitrust Division, the EU's decision against GE/Honeywell nonetheless marks a "significant point of divergence" between the two jurisdictions, highlighting the lesser weight attached to consumer or customer interests – as against complaints by competitors – in European versus American competition policy. Timothy Muris, Chairman of the FTC, in this context asserts an inverse correlation of

competitor complaints with consumer benefits. In consequence, complaints by competitors, which are an important element of the EU's review process, are disregarded in US antitrust investigations. Mario Monti has nevertheless dismissed any allegations of having listened more to GE's competitors than to its customers as "a lot of rubbish" and tries to play down the European veto as a "rare case" of "well-meaning competition authorities" coming to different opinions about the impact of a merger on the global market.

The divergence in substance between the American and European ways of merger control relates to basic theoretical concepts like dominant position, "bundling" or "tying" of activities and the leverage that might be exerted through vertical integration. In the view of the European Commission, combining Honeywell with General Electric would have created new dominant positions on some markets (such as avionics and engines for business aircraft) and increased existing dominance on others (such as engines for big commercial aircraft); it would have widened the potential for bundling complementary products, e.g. General Electric jet engines and Honeywell electronic devices, into single packages and thus squeezing out competitors by the sheer breadth of offerings; and, most important, it would have further enhanced the power of Gecas, General Electric's aircraft leasing arm, to ensure that airlines and airframers (makers of aircraft bodies) choose to install GE – and Honeywell – products on their aircraft, presumably to their own cost and to the detriment of rival suppliers. The Commission, more generally, also relies on an *ex-ante* approach to the regulation of competition, since it lacks effective tools to prevent the abuse of market power after a merger has been approved, whereas the American antitrust authorities appear to be better equipped to intervene *ex post* in cases of conduct they deem to be economically harmful. The US officials also tend to disagree with the Commission's theories concerning the economic implications of company size, bundling and vertical integration in the first place. This reflects the influence of *laissez-faire* thinking, in line with the Chicago School of competition and the theory of contestable markets, which apparently has grown even stronger after the "change-of-guards" in Washington.

In the trade field, meanwhile, a bewildering mixture can be observed of (1) conflicts believed to be resolved but flaring up again (see the dispute about "dollar bananas" and the special WTO waivers demanded by the EU as a precondition for introducing the agreed tariffs-only regime); (2) unresolved issues such as the European ban on hormone-treated beef and tax-related export promotion via US Foreign Sales Corporations against which the EU could be authorised by the WTO to impose \$4bn of sanctions (a "nuclear device" according to Robert Zoellick, the US Trade Representative); (3) revival of old-style protectionism in the USA as exemplified by the American steel industry which has been shielded against privatised European steel companies through special ("countervailing") duties and may win general protection under Section 201 of US Trade Law – a precedent likely to be followed by the US textile industry; (4) new protectionist devices like the "Byrd amendment" that provides for paying the revenues from anti-dumping and anti-subsidy measures to the American companies that started the respective complaints; (5) different policies of domestic regulation, e.g. with regard to genetically modified organisms and the related "precautionary principle", spilling over into foreign trade; (6) new initiatives for creating a transatlantic free trade area; and (7) difficulties in finding common ground to spur the launch of a new multilateral trade round in Doha, Qatar, in November that addresses both further liberalisation and improved rule-making in international trade.

Close transatlantic ties, however, remain the key to international trade and competition regimes that avoid negative international policy externalities, such as "tit-for-tat" competition and trade policies and the mutual "poisoning" of different policy fields, and establish a balance between competition among national rules, on the one hand, and international minimum standards, on the other, lest protectionist policies again proliferate to the disadvantage of all the countries involved in the international division of labour.

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"International Trade and Competition Regimes"