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I. INTRODUCTION

The enhancement of cooperation in competition policy between the European Union and the United States is a genuine success story in the modern transatlantic relationship. Despite differences in philosophy, process, analytical method, and, sometimes, substantive outcomes, the 1991 EU/US Cooperation Agreement ("1991 Agreement") has helped foster impressive progress by public and non-government bodies in both jurisdictions to strengthen the foundations of competition policy governing transatlantic commerce. Not only have the European Union and the United States taken significant steps to work more effectively together, their cooperation has provided important insights for building a framework of global and regional cooperation through multinational networks such as the International Competition Network ("ICN") and the Organization for Economic Cooperation and Development ("OECD").

This essay celebrates past achievements under the 1991 Agreement and prescribes nine actions to further these achievements. The European Union and the United States have built a strong relationship over the past two decades, yet much depends on their ability and commitment to do still better. Sustained efforts to reinforce existing ties and devise new links are necessary to ensure that the largely friendly rivalry between the European Union and the United States acts as a positive force for the transatlantic policy and inspires the development of sound global norms of process and substance.

Indeed, this latter consideration is assuming ever-greater importance. Even though the EU and U.S. duopoly of policy-making power gives way to a loose oligopoly whose members include China and India, these transatlantic partners, owing to the scope and depth of their experience, remain enormously influential in the formation of international standards. The European Union and the United States must recognize their common cause and shared responsibility to do what they can to see that the global expansion of competition improves economic performance and increases the well-being of consumers.

II. THREE LEVELS OF ENGAGEMENT

In key respects, the advances in EU/U.S. cooperation resemble the core elements of the New Transatlantic Agenda ("NTA") established between the two jurisdictions in 1995. One of the NTA's chief aims has been to improve the quality and reduce the cost of regulating

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transatlantic commerce. As Mark Pollack and Gregory Shaffer have observed, the NTA seeks to strengthen EU/U.S. regulatory coordination by enhancing interaction at three levels:

- Intergovernmental contacts among the chiefs of government and other high level public officials (such as agency or department heads);
- Transgovernmental contacts on a day-to-day basis among lower level officials; and
- Transnational contacts among non-government institutions and individuals, including academics and the business community.

This process-oriented approach has a number of applications to transatlantic competition policy and supplies a mechanism by which EU and U.S. competition policy can promote the adoption of superior norms. Efforts to promote convergence between the EU and the U.S. competition policy systems often urge acceptance of what often are called "best practices." Experience in other areas of public- and private-law suggests that convergence across jurisdictions in competition policy might take place in a three-step process: decentralized experimentation at the national or regional level, the identification of superior approaches, and the opting-in to superior approaches by individual jurisdictions.

The experimentation inherent in the distribution of competition policy authority across jurisdictions supplies a useful means to test different substantive commands, analytical techniques, and procedures. When experience in one jurisdiction illuminates superior approaches, such methods ought to become focal points for possible emulation by others. Without a conscious process to identify and adopt superior ideas, decentralization cannot fulfill its promise as a source of useful policy innovations.

Before examining recent EU/U.S. activities in this field, it is useful to identify what transatlantic cooperation should strive to accomplish. Rather than speaking of the promotion of "best" practices, it might be more accurate and informative to say that the objective is the pursuit of "better" practices. The development of competition policy in any jurisdiction is a work in progress. This stems from the inherently dynamic nature of the discipline. Most competition laws, including the laws of the European Union and the United States, are consciously evolutionary systems that contemplate the adaption of analytical concepts over time to reflect new learning. To speak of "best" practices may suggest the existence of fixed objectives that, once attained, mark the end of the endeavor. Envisioning problems of substance or process as having well-defined, immutable solutions neglects the imperfect state of our knowledge and obscures how competition authorities must work continuously to adapt to a fluid environment that features industrial dynamism, new transactional phenomena, and continuing change in collateral institutions vital to the implementation of competition policy.

This means taking nothing about the EU/U.S. relationship for granted and approaching new challenges with the same intensity of commitment that accompanied the approval of the 1991 cooperation agreement. The three-level engagement suggested here makes the cycle of reassessment and refinement a core element of steadily improving transatlantic cooperation. A routine process of evaluation should focus on the adequacy of the existing legislative framework, the effectiveness of existing institutions for implementation, and the quality of substantive outcomes from previous litigation and non-litigation interventions.

III. EU AND U.S. COOPERATION INITIATIVES AND SUBSTANTIVE RESULTS

The past two decades have featured increased EU/U.S. engagement in the form of intergovernmental, transgovernmental, and transnational contacts. None of this was automatic or inevitable. The better relationships resulted from a substantial investment in the infrastructure of cooperation—activities that did not yield immediately observable results in the form of new cases but set the foundation for improvements in policy-making over time.

Nor has the journey to better cooperation been trouble free. The Boeing/McDonnell Douglas and General Electric/Honeywell mergers revealed important differences in EU and U.S. analytical perspectives. Several times in the past ten years, U.S. policymakers have taken jarring, ill-considered measures to express their disagreement with their European counterparts. For example, in October 2001, the Department of Justice used the occasion of the opening of the OECD's first Global Forum on Competition to scold the European Union for its treatment of the GE-Honeywell deal. In November 2009, DOJ abruptly cancelled the annual EU/U.S. bilateral consultations to display its irritation at the European Union for opening a second phase inquiry into the Oracle-Sun transaction. A fortunate, unexpected consequence of these discordant episodes has been a renewed and heightened commitment by the two jurisdictions to build relationships that avoid or diminish future conflict.

Notwithstanding various disputes and disagreements, we have observed a progression toward stronger modern cooperation contacts in all three dimensions of engagement. Consider a sampling of examples:

1. Intergovernmental contacts have continued at the highest levels of the DG COMP, DOJ, and the Federal Trade Commission ("FTC"). These have occurred in a variety of contexts that go beyond the regular, formal EU/U.S. bilateral consultations. For example, the heads of the three institutions played pivotal roles in the formation of the ICN in 2001 and have cooperated extensively in the design and implementation of the ICN's working plan. Contact among these high level EU and U.S. officials is also commonplace at conferences and in discussions about specific policy matters. Measured either by the sheer volume of contacts or the breadth and depth of discussions, the intergovernmental level of discourse in competition policy is more robust today than at any period of the EU/U.S. relationship.

2. The same can be said for experience with transgovernmental contacts. In the past decade, the EU and U.S. competition authorities expanded the work plan of the existing staff-level merger-working group and established a new working group dealing with antitrust/intellectual property issues. The frequency of staff-level meetings, by teleconference or face-to-face meetings, also has increased to address a variety of matters within and outside the context of the formal working groups. The development of new policy guidelines in the European Union and the United States (most recently, with the adoption of the 2010 Horizontal Merger Guidelines) have benefitted from a routine process of sharing drafts and discussing proposed measures. Regular staff-to-staff contacts also have increased dramatically in the context of joint work on ICN and OECD projects. The establishment of the FTC's International Fellows Program has provided an

extremely useful vehicle for staff secondments that bring EU officials to work for several months with case-handling teams at the FTC.

3. A similar intensification of activity can be documented for transnational contacts. Allan Fels, the former head of the Australian Competition and Consumer Commission, has emphasized the importance of co-producers to the success of a competition policy regime. These entities include universities, legal societies, consumer groups, and other non-government bodies whose contributions can increase the effectiveness of a competition policy system.

   Systems that recognized the value of their participation can improve performance by drawing upon knowledge and experience these bodies have assembled. There are many outward signs of intensified engagement by non-government EU and U.S. co-producers. For example, the expanding roster, year-by-year, of conferences, workshops, and related events that emphasize comparative perspectives suggests the greater energy that major professional legal societies (among them, the American Bar Association and the International Bar Association) have devoted to EU/U.S. competition policy. Such events often attract a substantial transnational audience of academics, practitioners, and government officials. The same can be said for trade associations, such as the International Chamber of Commerce ("ICC"), and academic bodies, including relatively new institutions such as the Association of Competition Economics ("ACE") based in Europe. And compared to ten years ago, major university programs in competition law and economics have increased their emphasis on comparative transatlantic studies.

   Collectively, these non-government initiatives have played a crucial role in educating the academics, the business community, and the legal profession about the foundations of competition policy in both jurisdictions and about current policy developments. By engaging government policymakers and participants from non-government constituencies in formal public debate and informal discussion, these bodies help formulate a consensus about competition policy norms and provide a key source of relational glue for the competition policy community. Their significance can be observed in the growing tendency of government-based networks, such as ICN, OECD, and UNCTAD, to include non-government parties in their work.

It is possible to trace a number of specific policy outcomes to the three levels of contacts sketched above. Though not a complete accounting, the following list includes noteworthy measures rooted in the expanded interaction between government and non-government parties across the two jurisdictions.

- Enhancements in formal EU/U.S. protocols involving merger review, including the coordination of premerger inquiries in both jurisdictions.
- New enforcement guidelines and policy statements that featured significant discussion among the EU and U.S. competition authorities and nongovernment bodies (such as the internationally-oriented legal societies and business associations).

- Greater transparency in U.S. practices for merger and non-merger matters, including emulation in a growing number of instances of the EU practice of providing explanations for a decision not to prosecute where the enforcement agency has undertaken a substantial investigation.
- The successful launch of a new multinational competition policy network (the ICN) and the healthy invigoration of the work plans of existing multinational networks.

These and other measures would not have occurred when they did, nor as extensively as they did, without the deeper transatlantic integration fostered by the three-level contacts that the European Union and the United States have undertaken.

IV. A SUGGESTED AGENDA FOR THE FUTURE: NINE STEPS TO FURTHER ENRICH COOPERATION

The three-level framework of past cooperation supplies a valuable foundation for additional work to improve the EU/U.S. relationship in the field of competition policy. But for all of the progress in cooperation achieved to date, there is considerable room for further learning about basic forces that shape policy in the European Union and the United States and therefore influence the transatlantic relationship. Discussions among government officials and within non-government networks tend to focus on specific enforcement developments (e.g., the resolution in the European Union and the United States of each jurisdiction's *Microsoft* cases) or matters of practical technique, but do not often ask basic questions about the origins and institutional foundations of the systems. The agenda for discourse inevitably must expand to incorporate examination of these considerations if cooperation is to be enriched and common progress toward better practices is to be achieved.

Discussed below are nine possible conceptual focal points to be used to direct further cooperation and understanding, along with a description of the specific means that the EU and U.S. competition policy communities might take to address these points.

1. Toward a Deeper Understanding of the Origins and Evolution of Both Systems

The many recurring discussions about transatlantic competition policy often rest upon a terribly incomplete awareness about how the EU and U.S. systems originated and have evolved over time. A relatively small subset of the U.S. competition policy community engaged in transatlantic issues is familiar with the distinctive path by which competition policy concepts developed within the EU member states and supplied the foundation for the EU competition policy regime itself. European specialists in competition policy likewise often display a fractured conception of the origins and evolution of the U.S. system—a conception often derived from the works of U.S. scholars whose grasp of the actual path of U.S. policy evolution is itself infirm. An accurate sense of where the policies originated and how they have unfolded is essential to understanding the influences that have shaped modern results in specific cases.

The latter consideration is particularly important in discussions about what has been called procedural fairness. Any assessment of the relative strengths and weaknesses of EU and U.S. process must begin with a careful mapping of the formal and informal mechanisms by which the two jurisdictions ensure that decisions rest on evidence that has been rigorously tested

and properly evaluated. This foundational mapping exercise is necessary to illuminate the full life cycle of quality control mechanisms—from the opening of a file through the process of judicial review—that each jurisdiction relies upon. By providing an informative, side-by-side comparison of the two systems, this exercise can improve understanding about how each jurisdiction operates. This vital initial step has not taken place to date—a major reason for which recent discussions about procedural fairness stalled.

2. Scrutinizing the Analytical and Policy Assumptions in Specific Cases

EU and U.S. officials from time to time disagree about specific matters, and the differences mentioned above ensure that they will do so again in the future. Can we realistically imagine that things would be otherwise? The realistic aim is to ensure that the sources of disagreement are clearly understood, that the search for common analytical ground proceeds urgently, and that expressions of disagreement take place with proper attention to time, place, and manner. In discussions of cases such as *Boeing/McDonnell Douglas, GE/Honeywell*, and *Microsoft*, two things seem to have received inadequate attention:

First, the EU and U.S. agencies too rarely engage in a careful, confidential *ex post* examination of the specific theories of intervention and an examination of the specific evidence upon which each jurisdiction relied in deciding how to proceed. A side-by-side, behind-closed-doors deconstruction of the decision to prosecute (or not to prosecute) would be a valuable way to identify alternative interpretations and test them in an uninhibited debate involving agency insiders (and, perhaps, experts retained by each agency to assist in the review of the case). Discussions of this type take place less often than they should.

Second, discussions of cases at conferences and seminars infrequently come to grips with what appear to be differences in assumptions about the operation of markets and the efficacy of government intervention as a tool to correct market failure. Embedded in EU and U.S. agency evaluations of the highly visible matters mentioned earlier are differing assumptions about the adroitness of rivals and purchasers to reposition themselves in the face of exclusionary conduct by a dominant rival, the appropriate tradeoff between short-term benefits of a challenged practice and long-term effects, and the robustness of future entry as a means for disciplining firms that presently enjoy dominance. Putting these and other critical assumptions front and center in the discussion, along with the bases for the assumptions, would advance the transatlantic dialogue in the future.

3. Focusing on How Institutional Design Affects Doctrine

In discussing competition law, academics, enforcement officials, and practitioners tend to focus on developments in doctrine and policy and to assign secondary significance to the institutional arrangements by which doctrine and policy take shape. This tendency overlooks the important role that the design of institutions can play in influencing substantive results. It is impossible to understand the development of EU and U.S. competition law without considering the impact of matters such as private rights of action, the internal organization of competition agencies (including the placement and role of economists in the decision to prosecute), and the manner in which the competition agency recruits professional personnel and the backgrounds of the agency's professionals who work for the agencies and the parties who appear before the agencies.

4. Devoting Attention to Inter- and Intra-jurisdictional Multiplicity and Interdependency

Efforts to formulate effective competition policy increasingly will require EU and U.S. competition agencies to study more closely how other government institutions affect the competitive process. To an important degree, both jurisdictions resemble a policy-making archipelago in which various government bodies other than the competition agency deeply influence the state of competition. Too often each policy island in the archipelago acts in relative isolation, with a terribly incomplete awareness of how its behavior affects the entire archipelago. It is ever more apparent that competition agencies must use non-litigation policy instruments to build the intellectual and policy infrastructure that connects the islands and engenders a government-wide ethic that promotes competition.

5. Periodic Comprehensive Reviews of Institutional Arrangements

Both jurisdictions at regular intervals should undertake a basic evaluation of the effectiveness of their competition policy institutions. In many respects, the European Union stands far ahead of the United States in carrying out this type of assessment. Major institutional reforms introduced in the past decade—modernization, reorganization of DG Comp, and the introduction of a new position of economic advisor—indicate the EU's close attention to these issues. Key focal points for a parallel inquiry in the United States ought to include the scope of coverage of the competition policy system, the adequacy of existing substantive rules and remedies, the type and consequences of public enforcement, the role of private rights of action, and the design and administration of public enforcement bodies.

6. Ex Post Evaluation

The European Union and the United States should each routinely evaluate its past policy interventions and the quality of its administrative processes. In every budget cycle, each authority should allocate some resources to the *ex post* study of law enforcement and advocacy outcomes. Beyond studying what it has achieved, a competition authority should choose selected elements of its enforcement process and methodology for assessment. Rather than treating *ex post* evaluation as a purely optional, luxury component of policy-making, we must regard the analysis of past outcomes and practices as a natural and necessary element of responsible public administration. Even if definitive measurements are unattainable, there is considerable room for progress in determining whether actual experience bears out the assumptions that guided our acts. An elaborate deconstruction of specific cases would provide an informative basis for analyzing differences in philosophy and substantive perspective and for identifying variations in procedure.

7. Enhancement and Disclosure of Data Bases

The European Union and the United States should each prepare and provide a full statistical profile of their enforcement activity. The maintenance and public disclosure of comprehensive, informative databases on enforcement are distressingly uncommon in our field. Every authority should take the seemingly pedestrian but often-neglected step of developing and making publicly available a database that reports each case initiated, provides the subsequent procedural and decisional history of the case, and assembles aggregate statistics each year by type

of case. The EU and U.S. agencies might devise a common classification template that permits its own staff and external observers to see how many matters of a given type the agency has initiated and to know the identity of specific matters included in category of enforcement activity. Among other ends, a current and historically complete enforcement database would promote better understanding and analysis, inside and outside the agency, of trends in enforcement activity.

8. Assessment and Enhancement of Human Capital

Continuous institutional improvement will require the EU and U.S. competition agencies to regularly evaluate their human capital. The capacity of an agency's staff deeply influences what it can accomplish. The agencies routinely must examine the fit between their activities and the expertise of their professionals. The agencies could share views about developing a systematic training regimen for upgrading the skills of their professionals. One might devise a common training program for junior personnel. Staff exchanges also supply an effective means for improving the discussion at the staff level and educating each agency about how the other builds capability.

9. Investments in Competition Policy R & D and Policy Planning

An essential element of continuous institutional improvement is the enhancement of the competition agency's knowledge base. In many activities, particularly in conducting advocacy, the effectiveness of competition agencies depends on establishing intellectual leadership. To generate good ideas and demonstrate the empirical soundness of specific policy recommendations, competition authorities must invest resources in competition policy research and development. Regular outlays for research and analysis serve to address the recurring criticism that competition policy lags unacceptably in understanding the commercial phenomena it seeks to address. In a number of areas, the European Union and the United States could devise joint research programs in areas of common interest.

Examining the research and development ("R&D") function is one element of exploring larger questions about how the competition agencies should set priorities and, within the larger competition policy community, about what competition agencies should do. The question of setting priorities is likely to assume greater importance in the European Union as certain functions that once occupied considerable EU attention devolve to the Member States, freeing resources for the DG Comp to design new programs. The consideration of how we measure agency performance, and assess the mix of its activities, is a topic for a larger discussion within the agencies and the larger competition community.

V. CONCLUSION: FUTURE INTERNATIONAL RELATIONSHIPS

The best practice in competition policy is the relentless pursuit of better practices. The maintenance and enhancement of the EU/U.S. relationship in competition policy will require a significant investment of resources even though such investments do not immediately generate the outputs—most notably, cases—by which competition authorities traditionally are measured.

The European Union and the United States are engaged not only in their own bilateral arrangements, but also bilateral agreements with other jurisdictions, participation in regional initiatives, and work in multinational networks such as ICN and OECD. The European Union and the United States are major partners in these overlapping ventures, and each year each

agency must decide, through its commitment of personnel, to "buy," "sell," or "hold" its position in each venture. Each agency is aware that the participation in these activities cannot be carried out effectively—namely, with good substantive results—except through the allocation of first-rate personnel. There is no point in trying to do this work on the cheap. The hazard is that the European Union, the United States, and other jurisdictions may experience, or may now be encountering, some measure of international network or relationship fatigue. Thus, a major challenge for the EU and the U.S. agencies is to develop acceptance of a norm that regards these investments as valuable and necessary.