

**EXPANDING AUTHORITY:  
THE EUROPEAN UNION AND  
EXTRATERRITORIAL COMPETITION POLICY**

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Prepared for the  
European Community Studies Association  
Sixth Biennial International Conference  
Pittsburgh, Pennsylvania, USA  
June 2-5, 1999

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*In reality [extra-territorial enforcement of merger control laws] is about politics, about who can make and enforce rules governing competitive enterprises (Baker and Ayer 3).*

*"I am convinced that competition law has an increasing role to play on the international scene," Karel Van Miert, EU Competition Commissioner (1994).*

### **I. INTRODUCTION**

The twin pressures of competition in the Single European Market (SEM) and in the liberalizing international economy have led to the increasingly active application of the European Union's (EU) competition policy.<sup>1</sup> Similar to a market-opening trade policy, when competition policy is exercised extraterritorially, it can greatly benefit domestic producers by maintaining or enhancing access to foreign markets. Thus, extraterritorial competition policy (ECP) should be conceptualized as a new and effective instrument of the EU's foreign economic policy that can be used to guarantee access for domestic producers to overseas markets.<sup>2</sup> This new instrument significantly increases the EU's role in the international political economy and its identity as an international actor.<sup>3</sup>

The 1997 Boeing-McDonnell Douglas (BMD) merger is a remarkable, recent case of international state-market interaction whereby the EU intervened in a merger between

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<sup>1</sup> For this paper, my use of the term 'competition policy' will refer specifically to merger control (known as anti-trust in the United States), i.e., government policy in the pursuit of fair competition for managing the level of public and private market concentrations in any given sector.

<sup>2</sup> While this paper will focus on the impact of the EU's ECP, it should be noted that other international actors—in particular the United States—have a history of exercising ECP in a destabilizing manner.

<sup>3</sup> Article G.1 of the Maastricht Treaty officially changed the name of the European Community to the European Union. The term 'European Community' is still legally correct when referring to activities that fall under the rubric of the Single Market (Pillar I), including competition policy. For simplicity, I will refer to only the European Union regardless of whether the activity in question is legally subsumed under the competency of the European Community. In reality, Pillar I competencies are the most supranational in nature and, thus, provide a point of departure for assessing the EU's international identity.

two foreign firms. The case epitomizes the new tensions of the liberalizing international economy and the EU's response to international competition that led to the exercise of a new instrument of foreign economic policy. The EU's activities in this policy area are instructive because the 1989 Merger Control Regulation gave the Union unprecedented power to act on mergers between foreign firms that distort competition within the SEM. In addition, the EU's exercise of ECP in this case was governed by the 1991 EU-US Bilateral Agreement on Competition Rules. An investigation of the BMD case provides particular insights into the domestic and international sources of the EU's identity and its developing role in the international political economy.

In this paper, I will focus on a relatively new supranational policy area—ECP—through which the EU is expanding its authority and significantly contributing to its presence as an international actor. The first section of the paper provides a brief discussion of the EU's institutional capacity and legal foundation for exercising ECP. Second, I briefly comment on the EU's somewhat ambiguous international identity. Next, I provide an empirical discussion of the BMD case, highlighting those aspects of particular importance for the current study. Fourth, assessing the outcome of the BMD case, I address the implications of the EU's newly established authority for the international political economy. In the fifth section, I assess the EU's response to the destabilizing effects of ECP. In the final section, I summarize the findings.

## **II. THE EU AND EXTRATERRITORIAL COMPETITION POLICY**

In relation to other policy areas, scholarly work on competition policy by political scientists is limited. The topic does enjoy a great deal of attention from legal scholars

and economists. However, the political implications of and motivations for the extraterritorial application of competition policy are almost entirely unanalyzed by even these legal scholars and economists.<sup>4</sup> Most studies of competition policy investigate the impact of subsidies and state aids.<sup>5</sup> Regarding merger activity, most studies focus on cases of clearer national jurisdiction—merger activity between solely domestic firms and mergers between foreign and domestic firms. However, precedents are lacking for a legal entity (such as the EU in the BMD case) to rule against the merger of two foreign firms and threaten fines on those firms. Consequently, scholarly work on ECP is strikingly deficient. Within the specialized body of literature on European integration and EU policymaking, attention to *extraterritorial* competition policy is even more limited.<sup>6</sup>

This dearth of scholarship is due in part to the fact that the active pursuit of extraterritorial competition policy is a recent phenomenon to which national and international attention by policymakers is inadequate. The *Wall Street Journal* pointedly highlighted the weak state of attention to this topic, as well as the significance of the Boeing-McDonnell Douglas merger:

The prospect of a trans-Atlantic trade war over the Boeing-McDonnell Douglas merger brings into the open an issue largely ignored by governments. While companies are increasingly selling and merging across borders, antitrust authorities are working with little more than a patchwork of national laws and loose cooperation accords. The Boeing case makes plain that what few real collaboration agreements are in place—the US and EU signed what is considered one of the world's most

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<sup>4</sup> The extensive literature on multinational corporations has been sensitive to some extraterritorial dimensions of competition policy—primarily those dimensions that effect subsidiaries. However, this literature has not addressed the extraterritorial application of competition policy *to mergers between foreign firms*.

<sup>5</sup> For example, see Jacquemin (1991), Scherer (1993).

<sup>6</sup> For work by political scientists on primarily *domestic* competition policy in Europe, see Allen (1996), Bulmer (1994), Cini and McGowan (1998), Doern and Wilks (1996), Laudati (1996), McGowan and Cini (1999), Wilks with McGowan (1996), Wilks and McGowan (1995).

successful antitrust cooperation pacts in 1991—have weaknesses leaving even those who work together vulnerable to conflict (Coleman 1997).

To understand the implications of the EU's ECP for the international political economy, an institutional and legal background of this policy is necessary. Competition policy in the European Union is governed by Articles 4, 5, 65 and 66 of the ECSC Treaty; and 3(g), 5 and 85-94 of the EC Treaty. As such, competition policy covers state aids, subsidies, agreements between enterprises, mergers and other forms of cooperation among firms that jeopardize competition. Article 89 gave the Commission independent authority in competition policy. Regarding mergers, Articles 85 and 86 are the most central. Article 85 prohibits anti-competitive agreements between firms while Article 86 prohibits firms from taking "improper advantage of a dominant position" within the SEM. Article 86 implies that the existence of a dominant position is acceptable, but the *abuse* of that position is unlawful.<sup>7</sup>

Vital to the functioning of the SEM, the application of the EU's competition policy has undergone significant changes in the 1990s. Within the Union's institutional structure, the Commission is by far the dominant player in competition policy, exercising comprehensive supranational powers. Indeed, McGowan and Cini argue that "in contrast to all other EU policy areas, competition policy is unique, for both the Council of Ministers and the European Parliament find themselves on the sidelines" (1999, 177).

With broad authority in this area, the EU's application of competition policy has become decidedly more activist in the 1990s.<sup>8</sup> As Murphy notes,

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<sup>7</sup> This differs greatly from US anti-trust legislation which does not allow for the existence of a dominant position.

<sup>8</sup> Previous Competition Commissioners have played activist roles, greatly contributing to the success of the Union's competition policy. Laudati notes that recent Commissioners have been particularly successful: Franciscus Andriessen, 1981-4; Peter Sutherland, 1985-8; Sir Leon Brittan, 1988-93; and Karel Van Miert since 1993 (Laudati 1996, 232).

EC competition policy is well developed and is derived both from the Treaties and the jurisprudence of the Court of Justice. The Commission, which has considerable powers in this area, has exploited EC rules to great effect in recent years. Its tentacles stretch from the prevention of restrictive business practices and abuse of dominant position, to control of state aid and merger control, to market opening in areas such as air transport and telecommunications (Murphy 1987, 61).

Within the Commission itself, competition policy is the domain of Directorate General IV (DGIV). Highlighting the central role of DGIV, Wilks and McGowan further support Murphy's assertion, arguing that DGIV's "rise to prominence provides a spectacular case study in organizational success. In ten short years DGIV had transformed itself from a sleepy, ineffectual backwater of Community administration into a formidable machine for economic integration" (Wilks and McGowan 1996, 225).

In 1989, a very important step was taken by the Commission with the implementation of Regulation (EEC) No 4064/89, more commonly known as the Merger Control Regulation. The Merger Control Regulation greatly expands the authority of the Commission. It "provides for preventive control of mergers between firms with a Community-wide impact. It permits proactive intervention in economic concentration processes, that is to say, mergers can be approved or banned beforehand" (Turek 1997, 48). The regulation also enhances the Commission's extraterritorial reach by setting thresholds at which the Commission can examine mergers, even those of firms headquartered outside of the SEM:

1. the firms involved have an aggregate worldwide turnover of ECU 5 billion or more; (Article 1, 2a) and

2. at least two of the firms involved have an aggregate turnover within the EC of at least ECU 250 million (Article 1, 2b).<sup>9</sup>

The Regulation also established the Merger Task Force (MTF) within DGIV. This unit takes action based on complaint or the initiative of DGIV. The MTF was a central actor in the BMD case and has “firmly established its reputation for fast and efficient work” (O’Keefe 1994, 21).<sup>10</sup> While the MTF has the primary responsibility for conducting merger investigations, the final decision remains with the Commission. This institutional arrangement has led to concerns over the possible *politicization* of and lack of transparency in the merger control decision-making process.<sup>11</sup>

The most important component of the Merger Control Regulation for the current study is Article 2, 1(b). This article outlines the factors that the Commission should take into consideration when appraising market concentrations. Most are the economic considerations of traditional merger control: market position of firms involved, alternatives available to suppliers and users, access of firms involved to supplies or

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<sup>9</sup> Council Regulation (EC) No 1310/97 of 30 June 1997 amended the Merger Control Regulation. According to Aribaud, (1997) while the amendments did not apply to the BMD merger, the Commission’s experience in that case provided a large incentive for the adoption of this new merger regulation. The result was the creation of five new thresholds that would allow the Commission to examine extraterritorial mergers:

1. the combined aggregate world-wide turnover of all the undertakings concerned is more than ECU 2 500 million;
2. in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than ECU 100 million;
3. in each of at least three Member States included for the purpose of point (2), the aggregate turnover of each of at least two of the undertaking concerned is more than ECU 25 million;
4. the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 100 million;
5. unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

<sup>10</sup> O’Keefe does note some problems that are caused by the efficiency of the Merger Task Force: “The EC Commission’s tendency to promote speed, while commendable, in itself, leaves room for error on the side of brevity and inadequate reasoning. The Commission is evidently focusing on reaching the thresholds and seems undeterred by the progressive build-up on inconsistencies in this decision” (O’Keefe 1994, 30). For a more detailed study of the Merger Task Force’s effectiveness, see Neven, Nuttall and Seabright (1993).

markets, legal or other barriers to entry, supply and demand trends for relevant goods and services, and interests of intermediate and ultimate consumers. However, the article also identifies as worthy of consideration “the development of technical and economic progress provided that it is to consumers’ advantage and does not form an obstacle to competition.” This unspecified and ambiguous language can be interpreted loosely to include political objectives. It is this language that gives the Commission a legal right to consider factors outside the realm of traditional merger control—such as extraterritorial market access.

Regarding transatlantic relations, the EU-US agreement that governed the BMD case was the 1991 Agreement Between the Commission of the European Communities and the Government of the United States of America Regarding the Application of their Competition Rules (1991 Bilateral Agreement). The general components of the 1991 Bilateral Agreement include

- 1) notification when competition enforcement activities may affect the “important interests” (Art. 2, Para. 1) of the other Party,<sup>12</sup>
- 2) exchange of information,
- 3) conduct of enforcement activities, “insofar as possible” (Art. 4, Para. 3), that are consistent with objectives of the other Party, and
- 4) consultation and confidentiality of information.

This agreement also addresses anticompetitive behavior that occurs in the territory of one Party, but adversely affects the important interests of the other Party. First, in an instance of such anticompetitive behavior, the emphasis is on mutual notification by

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<sup>11</sup> For past examples of such politicization, see Cini and McGowan (1998, 126-131), McGowan and Cini (1999).



competition authorities during the decision-making process. Second, consideration of the effects of enforcement activities on the other Party is stressed. Finally, and most importantly, “*Nothing in this Article... precludes the notifying Party from undertaking enforcement activities with respect to extraterritorial anticompetitive activities*” (Art. 5, Para. 4) (italics added). These words are vital for understanding the BMD case and the Commission’s willingness to pursue extraterritorial competition policy.<sup>13</sup>

### III. THE EU’S INTERNATIONAL IDENTITY

The European Union is not often considered an international actor because it lacks the characteristic sovereignty of a traditional nation-state. However, as the EU acquires greater treaty-based responsibilities, it also develops an international presence. Many previous studies of the EU have focused primarily on the supranational institutions and internal policy making processes.<sup>14</sup> On the other hand, most of the international relations literature is dominated by the intergovernmental vs. neofunctional debate.<sup>15</sup> Only a limited amount of scholarly work has been directed at the role of the EU as an international actor.<sup>16</sup>

The current study represents an effort to elucidate and understand one means by which the EU is expanding its international identity and the implications of that change for the international political economy. The EU does desire an expanded international identity. However, exercising ECP may be a risky means by which to achieve this goal

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<sup>12</sup> The term “Party” refers to either the EU or US, not to the firms involved.

<sup>13</sup> A more extensive assessment of the Bilateral Agreement is provided below in Section VI.

<sup>14</sup> For example, see Bulmer (1993), Marks, Hooghe and Blank (1996), Peters (1994), Pierson (1996), Sbragia (1992), Wallace and Wallace (1996).

<sup>15</sup> For example, see Caporaso (1998), Haas (1964), Haas (1958), Lindberg (1963), Moravcsik (1999), Moravcsik (1993), Moravcsik (1991).

(see Section V). The extraterritorial application of competition policy to foreign mergers can greatly increase political tensions, lead to an escalation in trade wars, and encourage a *realeconomik* international environment.<sup>17</sup>

As discussed in the previous section, the EU's international identity in competition policy has both domestic, legal foundations (e.g., Merger Control Regulation) and an international legal dimension (EU-US Bilateral Agreement). Due to the degree of supranational authority that characterizes EU domestic competition policy, this policy area provides particular insights into the role and impact of the EU as an international actor.

The EU's network of bilateral and multilateral relations—cultivated via various EU-other agreements—represents one facet of an international identity for the EU (Manners and Whitman 1998). However, the current study must be expanded to also consider the *impact* of the EU and its foreign economic policy on the international political economy (Smith 1994). As Smith notes, the EU may “encourage the building of transnational networks” and “provide a model of continuous bargaining which is one way of coping with the emergence of a global political economy” (1994, 300). These potential developments must be considered not only in analyses of internal EU policy making, but also in the Union's relations with other international actors.

The BMD case demonstrates that the EU has added a significant, supranational instrument to its foreign economic policy. As will be shown below, the EU appears to have been successful in the formation and implementation of ECP as well as in building a variety of international relationships—both formal and informal. It is through this

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<sup>16</sup> For example, see Jorgensen (1997), Hanson (1998), Rhodes (1998), Rosecrance (1998), Sbragia with Damro (1999).

activity that the EU has expanded its authority and increased the role that it plays in the international political economy. However, the EU's long-term management of the destabilizing effects of ECP via formal and informal efforts at continuous bargaining remains in question.<sup>18</sup>

I argue that the EU has expanded its international identity specifically with regard to ECP. This expansion has occurred via the exercise of a new instrument of the Union's foreign economic policy, engagement in bilateral agreements, support and lobbying for a multilateral competition policy regime, and the establishment of informal, cooperative transnational relations. It is through the combination of this new supranational capability (ECP) and these supportive efforts at developing a continuous bargaining model that the EU is increasingly impacting the international political economy and asserting an international identity.

In the next section, I will provide an empirical discussion of the BMD merger case, highlighting those aspects that render insights into the EU's role in the international political economy.

#### **IV. THE BOEING-MCDONNELL DOUGLAS MERGER CASE**

On 15 December 1996, The Boeing Company and McDonnell Douglas Corp., two US aerospace companies, announced plans to merge. The deal, which called for Boeing to purchase McDonnell Douglas for \$13.3 billion (*Economist* 1997), would have increased "Boeing's [global] market share to 70 percent from 64 percent, leaving only

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<sup>17</sup> See Peterson (1995) for a discussion of a "*realeconomik* international environment."

<sup>18</sup> It is useful to note that the EU's exercise of ECP is not exclusive, and the destabilizing effects of ECP are not solely the result of the Union's initiative in this policy area. Other states—particularly the US—have the same authority and share the same difficulties.

Airbus to compete with it in the market for planes above 100-seats” (Torres 1997). Boeing announced that the main goal of the merger was to achieve “the balance [that MD’s] complementary defense business would bring to [Boeing’s] civil-government revenue ratio” (Procter 1997). The Commission was formally notified of the merger on 18 February 1997, and announced on 17 March, that it would begin an in-depth investigation and initiate second phase proceedings under the 1989 Merger Regulation. Specifically, the Commission was concerned that

With a market share of more than 60%, Boeing is by far the leading player in the overall world market for commercial jet aircraft of more than 100 seats. Following the proposed merger, there will be a further increase in Boeing’s market share and only one remaining competitor, Airbus. Furthermore, the merger will lead to a large increase in Boeing’s defence and space business. Whilst Boeing’s commercial aircraft operations have usually accounted for 70% to 80% of its total business, around 70% of MDC’s total business is related to the defence and space centre (DGIII 1997).

In early April, the Commissioner responsible for DGIV, Karel Van Miert, hinted that the EU would take action on the grounds of competitiveness (McKenna and Velocci 1997). In early May, Van Miert expressed “his ‘strong doubts’ about the merger, which would strengthen Boeing’s leading position in the civil aircraft market. He also cast as “totally unacceptable” Boeing’s 20-year “exclusive” supply deals with American Airlines and Delta Air Lines (Morrocco 1997, 24). These agreements would have committed the airlines to make purchases for the next twenty years exclusively from the newly-merged BMD. Such a deal would have threatened Airbus’ long-term development strategy which depended on continued access to the lucrative US market.

Van Miert’s complaint was not grounded in the terms of the 1991 EU-US Competition Agreement, but was rather based in the legal language of the 1990 Merger

Control Regulation. Citing a violation of EU competition policy in the worldwide market for large commercial jet aircraft, the Commission issued a 40-page, formal statement of objection to the BMD merger on 21 May (Aribaud 1997). This action served as a precedent for the extraterritorial application of competition policy by the EU (Kyrrou 1998, 4).<sup>19</sup> The Commission's statement declared that the BMD merger should be prohibited because it would lead to the strengthening of Boeing's existing dominant position. As Van Miert argued, the EU had the legal power to assert its jurisdiction in the case because "by exporting aircraft into the EU, the parties to this merger were economically active here in Europe" (Van Miert 1997). While the EU lacked the legal authority to actually *block* the merger of two US firms, it did threaten to levy a massive fine on BMD European operations of ten percent of worldwide annual sales (\$5 billion) if "adequate remedies" were not met by Boeing (Buckley, Waldmeir and Parkes 1997).<sup>20</sup>

On the same day, US Administration officials noted that they could not comment on the EU's extraterritorial action because the BMD merger was currently under review by the US Federal Trade Commission (FTC) (White House 1998a). Boeing responded that it would "continue to work with the EC to help the Commission better understand the data that underlie the process" (Boeing 1997a). On 1 July, the FTC announced its

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<sup>19</sup> In fact, the precedent for the EU's exercise of ECP on US-headquartered firms is the 1995 Kimberly-Clark and Scott Paper merger. In this case, the Commission demanded and received concessions from both US merging firms. However, the BMD merger is often regarded as the precedent for ECP because "never before had [the EU] threatened as loudly or as often to impose billions of dollars in fines on an American company if it did not get its way" (Andrews 1997).

<sup>20</sup> In comparison to the value of the merger deal itself (\$13-16 billion), the fines that were threatened by the Commission (\$5 billion) were, indeed, massive. The threat was also very credible considering the reputation that the EU had developed in the 1990s for the active enforcement of its competition policy. McGowan and Cini argue that the EU could have also held out the prospect of excluding Boeing from operating in the SEM or even threatened to impound any Boeing aircraft that entered EU airspace (1999, 191-192).

unconditional approval of the BMD merger, arguing that McDonnell Douglas was no longer a significant player in the commercial transport market (Sparaco 1997, 67).

Following internal negotiations, Boeing submitted adjustments to the original merger plan in the hopes of appeasing the European Commission. After closed-door negotiations, this revised proposal was rejected by the Commission on 16 July, largely due to two components: the dominant commercial aircraft business of a newly-merged BMD and the exclusive supply agreements (Boeing 1997b). The final decision in this case was scheduled for July 23. The EU's preliminary decision was unique as Van Miert got the entire 20-member Commission to back his stance; such a display of solidarity is usually reserved for only final decisions on mergers (Wolf 1997).

For its part, on 16 July, the US Senate unanimously approved a resolution that condemned the EU for its intentions (Wolf 1997). One day later, President Clinton hinted that Washington would consider retaliation if the EU tried to block the merger, noting his "concern" about the Commission's reasons for opposing the merger (Coleman 1997). Clinton added that "we have a system for managing this through the World Trade Organization and we have some options ourselves when actions are taken by Europe in this regard" (White House 1998b). Speaking diplomatically, Clinton also noted that he thought a trade war could be avoided (White House 1998b).

On 23 July, following last-minute talks and concessions by Boeing, the Commission finally gave its political approval of the merger. Van Miert declared that "there was 'broad agreement' that the remedies sought by the commission [*sic*] 'have largely been supplied'" (Morrocco 1997). The Boeing concessions covered each of the

Commission's concerns. Regarding the potential spillover of benefits from MD's defense business to Boeing's commercial airplane business,

Boeing agreed to license patents obtained under US government-funded contracts to commercial aircraft manufacturers on a non-exclusive, reasonable-royalty basis; to cross-license blocking patents to commercial aircraft manufacturers on a non-exclusive, reasonable-royalty basis; and to supply for a period of 10 years an annual report to the European Commission on its current unexpired patents arising from government-funding contracts and on its non-classified government-funded aeronautics research and development projects. Boeing also agreed to not unduly interfere with actual or potential relationships between its suppliers and other commercial aircraft manufacturers (Boeing 1997c).

Regarding Boeing's acquisition of MD's commercial aircraft business,

Boeing... agreed not to leverage customer support to obtain any advantage in sales of new commercial aircraft. Boeing also agreed to maintain McDonnell Douglas's commercial aircraft business in a separate legal entity for 10 years and to supply an annual report to the European Commission on the business activities of such commercial aircraft business (Boeing 1997c).

Finally, regarding the exclusive supply agreements,

Boeing agreed not to enter into any new 'exclusive' supplier agreements with commercial aircraft purchasers until Aug. 1, 2007, except where another aircraft manufacturer has offered such an agreement. Finally, ... Boeing further agreed not to enforce the exclusivity provisions in its existing agreements with American Airlines, Delta Airlines and Continental Airlines. The agreements remain otherwise unaffected (Boeing 1997c).

Boeing Chairman and CEO, Philip Condit, argued that without the Commission approval, the newly-merged company would have faced "large fines and potential harm to our customers" (Boeing 1997c). On 30 July the Commission gave its formal authorization to the BMD merger as compatible with the Single European Market.<sup>21</sup> One day later, the BMD merger was made legal after the appropriate merger documents were filed in the State of Maryland; the value of the transaction was \$16.3 billion (Boeing

1997d). On 4 August, the BMD merger was completed and the new Boeing Company began operations as a single firm, the largest aerospace company in the world.

In the next section, I will discuss the impact of the EU's ECP on the international political economy. I will also offer an argument for why the EU decided to exercise ECP in the BMD case despite the policy's generally destabilizing effects.

## V. THE EU, ECP, AND THE IPE

As shown in the previous section, the EU's exercise of ECP threatened instability in the international political economy (IPE) by causing a rift—or possibly a multi-sectoral trade war—between two of the world's preeminent traders and largest economies. The Union's action was all the more threatening because the EU and the US account for the highest volume of both domestic and transnational mergers. Had a trade war ensued, stability in the international political economy would have been jeopardized, and systemic conflict may have resulted.<sup>22</sup>

In addition to creating tensions similar to a market opening trade policy, ECP (defined as merger control law) generates other unique difficulties: “Merger control is considerably different from other aspects of competition policy. High emotions are aroused in the undertakings involved, especially in the event of a hostile bid, and politicians rapidly become embroiled in the situation” (O’Keeffe 1994, 31). The WTO has also noted the potential for ECP to destabilize the international political economy:

...as is widely recognized and was illustrated by the recent Boeing-McDonnell Douglas merger, extraterritorial application of competition law has considerable potential to give rise to disputes between countries (p. 31)... It should also be noted that extraterritorial application of competition

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<sup>21</sup> For the legal text of the EU-BMD agreement, see *Bulletin EU 7/8-1997, Competition (13/65)*.

<sup>22</sup> For a discussion of systemic conflict, see Kahler (1995, 1996).



laws is not without the potential to give rise to disputes between countries and business, faced with differing and possibly conflicting standards and procedures. This is particularly the case where countries have differing perceptions of where their national interests lie. The Boeing-McDonnell Douglas merger illustrates the sensitivities that extraterritorial application can give rise to, even in a country which makes widespread use of the practice itself (WTO 1997, 76).

So, why would the EU risk exercising ECP if it was so potentially destabilizing?

Beside the obvious economic arguments that were publicized by the Commission, there is a political dimension as well. McGowan and Cini argue that the BMD case is an example of the politicization of EU competition policy because “Van Miert had not attempted to conceal his hostility publicly to the deal rather than awaiting what should have been a confidential process” (1999, 192).<sup>23</sup> As noted above, Van Miert also worked to get the entire 20-member Commission to back his stance in a display of solidarity prior to the final decision (Wolf 1997).

Another side of the political dimension is that the Commission has an underlying motivation to exercise ECP as an institutional self-interest. This self-interest is based in the Commission’s desire to continue building itself into a formidable machine for European integration. Much scholarly work on institution-building in the EU has focused on the impact of major treaties (e.g., SEA, TEU) and informal rules and norms (e.g., 1966 Luxembourg Compromise). However, institution-building can also take the form of minor reforms and expansions of supranational competency. In order for institution-building to actually occur, the supranational institutions have to demonstrate a degree of credibility to the Member States. It is this need to demonstrate credibility that greatly contributed to the EU’s decision to exercise ECP. Without enhanced credibility in the

eyes of the Member States, the Commission's capacity as an international actor would be limited.

Based on the EU's institutional self-interest to develop its policy competencies vis-à-vis the Member States, ECP provides the EU an external policy arena in which to display its effectiveness. If the EU can successfully exercise ECP, especially against powerful US business interests, it strengthens the perception of its policy effectiveness and enhances its credibility in the eyes of the Member States. The Director-General of Competition, Alexander Schaub, has made clear the Commission's *perceived* benefits of exercising ECP in the BMD case:

...the Commission, often perceived in the US as a 'junior partner,' emerged stronger from this [BMD] case...it must be noted that the credibility of the Commission in Europe was reaffirmed. We have proven our capacity to withstand pressures and we were able to obtain from Boeing concessions that no Member State could have obtained on its own. (Schaub 1998, 4).

Schaub's comments elucidate the Commission's strategy and perception that the exercise of ECP can enhance its credibility in the eyes of the Member States.

The best opportunity for a display of policy effectiveness comes in the form of easy cases. The BMD merger was just such an easy case. First, Boeing's primary preference was to complete the merger *as soon as possible*. A battle with the EU would have delayed the merger, a very unsavory prospect for the firms involved in the deal. "Mergers are exceptionally sensitive to the passage of time... because of the risk of changes in Stock Market prices and general economic circumstances, but also because of

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<sup>23</sup> Cini and McGowan also argue that "There was certainly a political dimension to the case, with van Miert openly stating his hostility to the deal well before the completion of the formal investigation" (1998, 206-207).

the delicate balance of mutual trust and personal relations between management of the bidder and target firms on which the deal often hinges.” (O’Keefe 1994, 31).

The premium put on the immediacy of the BMD deal by Boeing representatives is evident in the rapid movement from the announcement of the merger to the final conclusion. Indeed, many in the industry were surprised at how quickly the deal originally came together between Boeing and McDonnell Douglas (Krause 1996). After the merger, Phil Condit intimated that had the firm decided to delay the merger, “the resulting uncertainty would have potentially damaged our customers, suppliers, employees and shareholders” (Boeing 1997d).

Second, the US made it clear that it did not want to escalate the situation into a trade war. President Clinton entered the BMD merger conflict on July 18. However, it was a weak effort that lacked any credible threat because the Administration’s desire to avoid a trade conflict was grossly evident. While the President hinted that Washington might have considered retaliatory measures, he also stated that a trade war could “probably” be avoided (Coleman 1997). Surprisingly, the strategy developed by senior Administration officials (US Trade Representative Charlene Barshefsky and Commerce Secretary William Daley) was that retaliatory action would be taken *if no resolution was reached* between the Commission and Boeing (Coleman 1997).

It was also evident that Boeing would not push for strong intervention by the US Government. McGuire reveals a history of Boeing’s concern over US Government involvement in trade negotiations: “On this, both European and American interviewees agreed: *the unwillingness of either MDC or Boeing to support unilateral US trade action*

*against the European Community over Airbus was the principal reason for the restraint of the US government”* (McGuire 1997, 5).

The confluence of these two factors—Boeing’s premium on an expeditious conclusion to the merger and the US Government’s aversion to intervention—opened a window of opportunity in 1997 through which the EU could demonstrate its credibility to the Member States. In other words, facing an unlikely opportunity, the EU exercised ECP in order to pursue its self-interest in institution-building. This decision was made despite the potentially destabilizing effect of ECP.

## VI. THE EU’S MANAGEMENT OF ECP IN THE IPE

So, what has been the EU’s response to the destabilizing effects of its ECP? The answer to this question presents itself in three parts: creation of a network of bilateral agreements, support and lobbying for a multilateral regime, and initiation of informal transnational cooperation. While these approaches demonstrate the increasing authority and impact of the EU as an international actor, it remains unclear whether they can fully remedy the destabilizing effects of ECP.<sup>24</sup>

### *A. Bilateral Agreements*

As noted above, the 1991 EU-US Bilateral Agreement legally governed the EU’s behavior in the BMD case.<sup>25</sup> However, the Bilateral Agreement does not provide significant incentives for cooperation. While it represented a first step toward

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<sup>24</sup> Once again, it is useful to note that the EU’s exercise of ECP is not exclusive. Other states have the same authority and share the same difficulties.

<sup>25</sup> The EU also currently maintains bilateral agreements on competition policy with Canada, Russian Federation, Moldova, Ukraine, Kazakhstan, Turkey, Switzerland, Israel, Cyprus. Based on the Europe

institutionalizing transatlantic cooperation, the Agreement is a non-binding document that lacks effective provisions for enforcement and dispute settlement. In addition, the Bilateral Agreement fully allows the use of ECP by either of its signatories.

Van Miert (1998) himself has noted the need for a dispute settlement mechanism to enhance international cooperation on competition policy. Indeed, the EU's calls for a multilateral competition regime (see below) suggest that even the EU is unsatisfied with the Bilateral Agreement. More specific to the BMD merger case, Richard Albrecht, Boeing's executive vice-president, echoed the shortcomings of the Bilateral Agreement, arguing that "From a company standpoint it would have been far preferable if whatever remedies were sought, were sought jointly" (*The Economist* 1998, 69).

In 1998, after the BMD merger, the EU and US signed the Positive Comity Agreement. This agreement was seen by the EU as a way to avoid duplication of effort with US competition authorities. It is viewed as a "strengthening of cooperation" because it allows either party to ask the other party to take up a case or handle a problem.

As Van Miert argues,

Our new agreement creates a *presumption* that when anti-competitive activities occur in the territory of one party and affect the interest of the other party; the latter will normally defer or suspend its enforcement activities in favour of the former. This instrument should be a positive alternative to the extra-territorial application of competition law, which is often a source of irritation (Van Miert 1998).

Unfortunately, while facilitating cooperation, the Positive Comity Agreement is also a non-binding, "good faith" agreement that lacks effective provisions for enforcement and dispute settlement. In addition, its future application to merger activity may be problematic due to domestic US and EU legislation which does not allow deferral or

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Agreements, the EU also maintains bilateral competition agreements with Bulgaria, Czech Republic,

suspension of merger review authority to other parties (EURECOM 1998, 2; Devuyt 1998, 467). Thus, while the Positive Comity Agreement may represent a strengthened *commitment* to cooperation, reform of domestic legislation may be necessary to achieve actual transatlantic cooperation on merger control.<sup>26</sup>

### *B. Multilateral Regime*

While the EU is successfully exercising ECP as a new unilateral power, it is also actively lobbying for the establishment of a multilateral competition policy regime. Currently, there does not yet exist a multilateral agreement on competition policy.<sup>27</sup> Indeed, only 40 of the 131 members of the WTO even have national merger control policies (Coleman 1997). The Uruguay Round did not address competition policy, and the subsequent WTO has no direct authority over competition policy except through the appeal of Members.<sup>28</sup> In addition, the IMF appears more concerned with how bloc exemptions in the SEM affect third countries, not the possibility of extraterritoriality (Subramanian 1994, 70-72). Finally, the Organization for Economic Cooperation and Development only “urges” its 38 members “to cooperate” in competition policy (OECD 1987).

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Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovak Republic, and Slovenia.

<sup>26</sup> Cini and McGowan offer an alternative future: “it is acknowledged that the agreement itself is of largely symbolic value and is merely part of an ongoing process of cooperation which may lead in future to greater transatlantic mutual understanding, and even eventually to policy convergence” (1998, 204).

<sup>27</sup> Some recent studies have endorsed such a multilateral competition policy regime. For example, see especially Campbell and Trebilcock (1997), Devuyt (1998), Doern (1996), Graham and Richardson (1997), Lloyd (1998), and Scherer (1994).

<sup>28</sup> International concern over competition policy is evident. At the 1994 concluding meeting of the Uruguay Round in Marrakesh, a number of countries expressed the view that national competition policies should be included in the future agenda of the World Trade Organization. (Subramanian 1994, 68). As a follow-up, the WTO released volume #1 of its annual report, *Trade and Competition Policy* (1997). While this report reaffirmed that the WTO has no jurisdiction over competition law, it is a strong signal of the growing international concern over competition policy. Instead, the report noted that the potential for international

The EU has a consistently documented position of supporting the establishment of multilateral agreements on competition policy.<sup>29</sup> The public rationale for the EU's support of multilateral cooperation on competition policy is nicely summarized by Devuyst:

The Commission's Expert Group underlined five reasons for the strengthening of international cooperation in competition policy:<sup>30</sup>

- increasing effectiveness of enforcement: in light of the cross-border nature of many restrictive business practices, competition authorities have a prime interest in cooperation to enhance the effective enforcement of competition rules;
- avoiding duplication of investigations: the lack of international competition rules leads to investigations on the same cases by different competition authorities, each applying their own procedures, time limits and criteria, thus pushing up costs and, more importantly, increasing legal uncertainty for the firms in question;
- avoiding market access distortions: as long as some antitrust authorities are less rigorous than others, market access problems may remain unresolved;
- avoiding conflicts over the extraterritorial application of competition rules; and
- protecting the interests of developing countries: in the absence of appropriate rules, developing countries in particular may be exposed to the risk of abuses of dominant positions and other anti-competitive practices by transnational enterprises (Devuyst 1998, 463-464).

The third and fourth reasons noted by Devuyst are particularly applicable to the BMD merger case. In the BMD case, Airbus's access to the US market was threatened by the 20-year exclusive supply agreements (a market access distortion) and ECP-generated conflict was evident.

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conflict that results from ECP has led national competition authorities to support international cooperation (WTO 1997, 76).

<sup>29</sup> See Brittan (1997), Commission (1995), Rakovsky (1997), Schaub (1998), Van Miert (1997). Following the BMD merger case, European Trade Commissioner Sir Leon Brittan endorsed the idea of an international competition authority within the World Trade Organization, declaring "I have long believed that we need an international agreement on competition rules... Otherwise there are bound to be more and more clashes when powerful competition authorities seek to deal with the same case" (Torres 1997).

<sup>30</sup> *Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules. Report of the Group of Experts* (Commission, Luxembourg 1995), 4, pp. 9-10. These five reasons support initiatives for both bilateral and multilateral cooperation.

Supporting the EU's calls for a multilateral regime, Boeing executives noted their strong desire to eliminate multiple approvals and speed up the merger process in the future. Specifically regarding the BMD merger—and with a definite view toward the future—Boeing Chairman and CEO Philip Condit added that

he hopes the lesson of the Boeing-McDonnell merger is that a global economy cannot tolerate multiple bureaucratic hurdles, in Boeing's case the US and European regulatory agencies that had to sign off on the deal. 'We are moving, I think, inexorably to a global economy and in a global economy, a single set of rules... is preferable,' Condit said. 'Over time we've got to keep working in that direction—'we' broadly, business and government" (Diamond 1997).

Unfortunately, Condit's urging and the EU's lobbying have yet to produce a multilateral competition policy regime.

### *C. Transnational Cooperation*

While EU-US bilateral agreements remain underdeveloped, they do contribute to international cooperation in some crucial ways. Under the current network of transatlantic bilateral agreements, the EU has developed informal transnational relations that may help to facilitate international cooperation and maintain the stability of the international political economy.<sup>31</sup>

Informal cooperation on merger control began under the 1991 Bilateral Agreement and continues under the Positive Comity Agreement. However, formal cooperation on merger control is limited under these two bilateral agreements because of domestic legal

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<sup>31</sup> I employ Risse-Kappen's definition of transnational relations: "regular interactions across national boundaries when at least one actor is a non-state agent or does not operate on behalf of a national government or an intergovernmental organization" (1995, 3). Specifically, I am focusing on relations between EU and US competition authorities (non-state agents) that occur in addition to the official framework of the transatlantic bilateral agreements.



restrictions (see above).<sup>32</sup> The formal cooperation that does occur includes the exchange of information, consultations, and investigation coordination. Nevertheless, the bilateral agreements serve a useful purpose by increasing informal (technocratic, primarily procedural and informational) contacts between EU and US competition authorities (Personal Interview 1999). Cini and McGowan also note a variety of lower level instances of ongoing transnational cooperation:

At the lowest level, simple enquiries are made, for example, on whether an investigation is under way, or about the reasoning behind a 'dawn raid'. In parallel cases, cooperation can also involve some discussion of timing, to see if it is possible to run the two cases together... Cooperation can also involve *discussion between case-handlers*. These discussions tend to be based on information which is publicly available, with a great deal of care taken not to divulge confidential information about the firms under investigation... case-handlers can also discuss possible remedies, such as fines, though this too is done in a rather abstract manner, using examples from similar earlier cases as points of reference (1998, 203).

Signs of transnational cooperation are appearing in EU-US merger control activities. However, because the final decision on a merger is made by the Commission, it is not certain that depoliticized and technocratic transnational cooperation will inevitably result in bilateral cooperation. Indeed, as McGowan and Cini (1999) argue, the merger control decision-making process in the Commission remains susceptible to politicization. This potential for politicization at the bilateral level can greatly heighten suspicions and tension over the extraterritorial exercise of competition policy. Transatlantically, the prospects for cooperation are unclear because the final decision-makers in both the EU and US are conducting themselves within a framework of weak bilateral agreements that lacks recourse to a multilateral competition policy regime.

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<sup>32</sup> The first instance of formal cooperation between EU and US competition authorities occurred in the 1995 case of Microsoft's anti-competitive behavior. This cooperation was possible because Microsoft waived its

## VII. CONCLUSIONS

The present paper offers an initial investigation into the EU's exercise of ECP and its impact upon the international political economy. I find that the EU is continuing to develop an international identity as it exercises a new supranational instrument of its foreign economic policy—ECP. Within this unique policy area, the EU does appear to be expanding its authority vis-à-vis the Member States and other international actors. The EU's international identity is presently under-developed and mostly uni-dimensional (Pillar I, economic), but definitely existent. Because the Commission's supranational authority remains economic and trade-related, ECP gives the Union a useful but risky forum in which to showcase its necessity and credibility to the Member States.

Evidence from the BMD case suggests that the Union's exercise of ECP derives from the reasonable desire to ensure market access opportunities for European firms and to enhance the Union's credibility in the eyes of the Member States. Thus, the EU continues to push for a multilateral agreement, but can use ECP as an important complement to its market access strategy at the same time.

While the EU has definitely established the extraterritorial exercise of competition policy as a new instrument of foreign economic policy, its response to the destabilizing effects of ECP is far from complete. The EU has responded to the destabilizing effects of ECP by establishing bilateral agreements, supporting and lobbying for a multilateral regime, and encouraging transnational relations. These efforts appear to have been successful in establishing both formal and informal relationships and in initiating a

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right to confidentiality. Examples of enhanced cooperation under the 1998 Positive Comity Agreement are lacking.

framework of continuous bargaining at the international level. It is through the exercise of a new supranational instrument of foreign economic policy and the efforts to develop a framework of continuous bargaining that the EU likely will have a long-term impact on the international political economy.

It should be cautioned, however, that the EU-US bilateral agreements are non-binding and lack dispute settlement and enforcement mechanisms. In addition, efforts toward a multilateral regime have not yet been successful. Finally, the informal transnational cooperation that has occurred in competition policy is still subject to politicization in the final decision-making process.

As these shortcomings are overcome, further research will be necessary to track and explain the development of this new policy instrument and its continued impact on the international political economy. In addition, as the EU continues to expand its authority via the exercise of ECP and other extraterritorial policy instruments, further research would be useful to address the resultant changes in our understanding of the EU as an international actor.

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