The Hart-Scott-Rodino Improvements Act of 2000 and

The International Effects of U.S. Merger Review Reform

Introduction

Since enacted into law in 1976 the Hart-Scott-Rodino Antitrust Improvements Act served as an effective watchdog over American business competition, much in the spirit of its celebrated relatives, the Sherman Antitrust Act of 1890 and the Clayton Act of 1914. In spite of its overall success during the subsequent decades, and to a certain extent because of it, U.S. lawmakers had been reluctant to modernize parts of its merger and acquisition standards, namely the premerger notification review threshold. The threshold, the minimum transaction value of a proposed merger requiring Federal review, determines which business combinations are subjected to the application fee and scrutiny of the Antitrust Division of the Department of Justice and the Competition Bureau of the Federal Trade Commission. Remaining a scant $15 million for over 20 years, the threshold had obsolesced to many competition policy actors and observers, but the lack of a simple solution prevented any action for several years. Indeed, as over 60 nations adopted premerger review policies closely resembling those of Hart-Scott-Rodino in the 1990s, the U.S. policy took on a growing inertia.[1]

But in December 2000 President Clinton took action by signing Senate resolution 1854, “Hart-Scott-Rodino Improvements Act of 2000.” Though it contained several provisions, the most salient was a premerger notification threshold increase from $15 to $50 million, or a jump of 233%. (Insert 1 on p. 14 details the changes.) Little fanfare accompanied the passage, and even less media coverage. Perhaps this owed to its bipartisan sponsorship by Senators Hatch (R-

[1] A. Douglas Melamed, AAG, U.S. Department of Justice, “Promoting Sound Antitrust Enforcement in the Global Economy,” 19 October 2000. He describes the challenge of prescribing standards when not all jurisdictional needs can be met: “Countries…need to reconcile their own sovereign interests in adopting an antitrust law suitable to their

UT), Dewine (R-OH), and Kohl (D-WI), in that there was no ideological divide to spark widespread interest like the Supreme Court's election decision a week prior. Or perhaps the business community, braced for a "hard landing," had more serious concerns than M&A, which are more closely associated with bull markets. The business press largely ignored the new standards, with a trickle of stories on the wire devoted to venture capitalists and small business organizations' praise. As of this writing, the E.U. reaction has been nil, and no major international organization had posted written comments on the new U.S. law on its web site. Even the American Antitrust Institute, which opposed similar legislation in 1999, has yet to post a formal comment, although they did agree to speak in person. This journalistic short shrift would suggest that the new law (rather uninterestingly) conveys no material effect on any single player in the field of consumers, regulators, and businesses, domestic or international. While it is true that the rule changes are far from sweeping, this is simply not the case.

The relevance of competition policy in international affairs has grown, largely due to the prominence of globalization which has inspired such ambivalence in recent years. It is closely associated with international trade policy, and the two are sometimes confused. As one economist describes the difference: "Competition policies dictate what a country *will do* in a certain situation, rather than what they will agree beforehand *not to do*."[2] Effective competition policy is one tool governments may use to limit the perception that the most powerful companies are growing more powerful, at consumer expense, on the heels of globalization. Regardless of their stance on globalization *per se*, no one likes to be pushed around by big corporations, and

specific needs, the impact their laws have on other nations, and the international antitrust issues facing other nations."

[2] Dr. Simon Evenett, Development Economics Research Group, The World Bank, interviewed 16 March 2001.

the image of "trust-busting" regulators conjures up images of Eliot Ness-like public servants crusading for the public good. Enforcement, one side of competition policy, can be front page news; consider the near-celebrity status that Justice Department Antitrust chief Joel Klein gained when he "took on" Microsoft. But once in the courts, as this case proved, even successful enforcement measures can take years to effect because of endless litigation and the appeals process.

Merger reviews, the preventative side of competition policy, can be dramatic as well as relatively speedy. Throughout just one calendar year (2000) AOL and Time Warner successfully negotiated with both E.U. and U.S. authorities the approval of their record-setting merger sure to affect the future of digital media on at least two continents. Accompanying the headlines, however, were the required divestitures and restrictions on future behavior, somewhat more than mere "slaps on the wrist," which may frustrate the future of the deal. Both Microsoft and AOL-Time Warner are marquee cases of competition policy in action, but one must remember that all business transactions—even the seemingly mundane—in a given jurisdiction are governed by regulations that collectively shape its competitive environment. Changes to these rules can create a vastly different competitive environment for businesses operating in this jurisdiction or for external players affected by this environment. By virtue of the United States' economic position in the globalizing world, this applies to virtually all other economies.

Numerous agencies and organizations abroad are vested in U.S. competition policy evolution, even though the pace of this evolution is very slow in some areas, notably international cooperation. To name a few, the European Union (EU), The Organization of Economic Cooperation and Development (OECD), the World Trade Organization (WTO), and the United Nations Conference on Trade and Development (UNCTAD), and The World Bank regularly report on competition policy. These fora apply different lenses to the policy of any given state as it relates to general economic development trends as well as specific issues involving "fair" and "unfair" practices affecting global economics. As a global economic leader, the lens most often applied to the United States is sharp, but one does not always expect urgent press releases from these groups about U.S. events. This is true with respect to the HSR Improvements Act of 2000, especially since the immediate articulation of new U.S. law, which has been minimal, has not been one of an outright loosening of competition policy. Within the next three to five years, however, these and various other stakeholders to U.S. competition policy will have some cause to assess their positions before and since the Act's passage.

As this paper highlights the two likely *medium-term* international effects of the recent, albeit small, shift in U.S. competition policy of passing the HSR Improvements Act of 2000, it focuses on the next three to five years. These international effects, whether through the reports of commissions, speeches by political or organization leaders, or changes in other nations' laws due to or in part by the Act, will arise gradually in the coming years; indeed, the time for any instantaneous effects is gone. The relative subtlety of change—the overall policy is structurally the same—implicitly condones the United States' system, but it also minimizes the short-term effects. Yet they are there. One can also argue that individual, incremental changes in the realm of competition policy can rarely be described as having stand-alone international impact, that the trend line is more critical than the data points. Merger waves spanning years, for example, are more suitable for analysis even in a domestic sense rather than a "bumper crop" from one particular year. That is, unless the bumper crop is preceded by a major regulatory shift, which the 2000 Act is not. Data germane to analyzing economic trends also tend to lag well behind the actual events driving the data. Thus, the medium-term is chosen as the appropriate analytical gauge for anticipating its effects outside of the switchboard or mail room at the Federal Trade Commission.

This analysis foresees two branches of international effects that will stem from HSR reform:

Technology. This first branch draws on one of the most oft-cited causes (or to some, culprits) of globalization. One enigmatic facet of technology is that as higher levels of technology reach into economies worldwide, the dynamics of business competition can change dramatically. But does a technological advance *anywhere* benefit competition *everywhere*? More specifically, by exhibiting technological competitiveness, does a jurisdiction attracting and encapsulating innovation practice an exclusionary technology policy?

Technological prowess is a chief U.S. advantage contributing to its leading economic position. This is not a matter of hubris; via intellectual and physical capital flow and other non-merger means, technology gravitates to the U.S. in part due to overt policies designed to increase national competitiveness. In recent decades this effort has been successful, with the United States becoming the “center for the global R&D explosion” in the eyes of technologists.[3] In anecdotal terms, she is the “Silicon Valley” of the world. Moreover, technology investments carry long-term benefits and spillovers to the local economy. To the degree that high technology firms are more likely than others to “slip under the radar” of merger review authorities, the

[3] Lewis Branscomb and James Keller, eds., Investing in Innovation: Creating a Research and Innovation Policy That Works. Boston: MIT press, 1998. p. 27.

recent changes to U.S. oversight levels give an advantage to businesses under U.S. auspices.[4] For these reasons, the HSR Improvements Act of 2000 will receive credit for feeding the virtuous cycle of technological innovation enjoyed by the United States as globalization expands investment in U.S. interests. However, an external corollary may be the continuation of the vicious cycle inhibiting the competitiveness of less technologically advanced economies.

Leadership. The HSR Improvements Act may detract from the U.S. image as an economic leader in pursuing convergent or multi-jurisdictional approaches to competition policy. Compared to an aggressive E.U. policy stance, the apparent U.S. lethargy risks impressing development-minded observers as a lack of leadership on a very serious issue. With a chance to make a step in the direction of change, the U.S. has merely revised numbers, leaving the overall system intact. Unlike the E.U., which has advocated a glide path toward a “common competition policy” under the WTO, the U.S. stance toward convergence of competition standards can be described in two ways.[5]

First, over the past decade, leading U.S. regulators have consistently professed that while the future is bright for international cooperation, the current systemic variability across jurisdictions precludes any current action beyond certain specific steps in bilateral enforcement and multilateral stances on cartels.[6] Second, the most recent eight years have been under just one U.S. President; it is possible that the new administration will avoid its precursor’s general

[4] Robert Pitofsky, “Antitrust Analysis in High Tech Industries,” Scottsdale, 26 February 1999. In this speech, Mr. Pitofsky points to not only the increased difficulty in assessing high-tech mergers, but the futility of lengthy enforcement suits against them: the 1969 IBM case finally dissolved in 1982 for lack of relevance.
[5] Paula Stern, “The Transatlantic Business Dialogue: A New Model for Trade Expansion and Regulatory Harmonization,” November 1997.
[6] For the most recent examples, see FTC Chairman Robert Pitofsky, “EU and U.S. Approaches to International Mergers—Views from the U.S. Federal Trade Commission,” Brussels, 15 September 2000, and DOJ Antitrust Chief Joel Klein, “Time for a Global Competition Initiative?” Brussels, 14 September 2000.

unwillingness to bend toward the more forward-looking system, regardless of its potential efficiency and benefits to the rest of the world. Yet the Justice Department's sponsorship of the International Competition Policy Advisory Committee (ICPAC) may have left a blueprint for change. With the passage of the HSR Improvements Act of 2000, the Bush administration inherited a new U.S. system for the prevention of anticompetitive mergers. Will its decisions taking effect during the next three to five years, particularly those owing to ICPAC recommendations, cloud the perception of U.S. leadership in global economic affairs?

Figure 1: Table of Changes to Hart-Scott-Rodino Standards[7]

Item/Issue:	HSR: 1976-2001	HSRIA: Feb 2001-	Change	Net Effect
**Size of Transaction* Test:				
Minimum Combined	$15 million, or	$50 million Only	+233%	Less Stringent
Net Sales or Assets	15% of Parent	(% of parent omitted)	N/A	Less Stringent
***Size of Person* Test:				
Minimum NS or A	$100 million/	Same for Transactions	N/A	None
of Acquirer/Acquired	$10 million	Smaller than $200M		
		But *Eliminated* for Larger Transactions	-100%	More Stringent
Transaction Thresholds Adjusted to GDP?	No	Annually, Beginning In FY 2005		Less Stringent
	All Sizes:	*Size:* *Fee:*		
***Notification Fee	$45 thousand	$50 - 99.9M: $45K	N/A	None
		$100- 499.9M: $125K	+178%	More Costly
		$500+M $280K	+522%	More Costly

* Size of transaction looks to the hypothetical combined value of the merged business, if approved. Thus, under the old system, both a $11M and a $10M company acquiring a $4M company would have to file ($11M plus $4M is the minimum threshold, $15M; and $4M is greater than 15% of $10M even though $4M plus $10M is less than $15M.) Under the new system, neither of these transactions would come close to the flat $50M threshold.

** Size of person (legal term for an entity) brought the threshold down to $10M for M&A by a parent worth $100M or more. This still holds under the new rules, but parents greater than $200M must file for any M&A, even those valued at less than $10M.

*** To remain revenue-neutral to the FTC and DOJ budgets, the fee system could not be abandoned altogether. Reason argued in favor of charging more of the transactions likely, on average, to use more resources.

The Basics of Competition Policy and Role of Merger Review

> *The bottom line as we see it is this—when you don't look at a merger in advance, there is a zero percent chance it will get stopped. The way business is today, especially at local and regional levels, that's serious.*
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> —Albert Foer, American Antitrust Institute[8]

In its broadest sense, competition policy encompasses any rule, regulation, or agreement that materially contributes to a state's competitive environment for commercial goods or

[7] Marian Bruno, Director of the Premerger Notification Office, Federal Trade Commission, Interviewed 12 March

services, foreign or domestic, imported or exported. At one extreme, a centrally planned economy adheres to a competition policy in which virtually all commercial activities are controlled. Conversely, in a completely "free" market, enterprises would be subject only to the discrimination of consumers. But even with the momentum towards democracy and free markets exhibited in the last half-century, most of the world's economies lie somewhere in the middle of this spectrum. While a state's trade policy, tax regime, and legal system certainly have competitive underpinnings, they are not usually treated as a part of competition policy due to the gravity of their own substance. As such, competition policy contains two categories of regulatory or legal measures: Enforcement and Prevention. Both have been based largely on protecting consumers from the harmful effects, i.e., higher prices, of anticompetitive behavior among enterprises.

Consumer protection serves as the backbone of regulations governing the way businesses compete. A state of "perfect competition" is desirable, for a market without adequate competition would tend to give a corresponding advantage to those selling the goods or services. Adam Smith was one of the first (and most eloquent) to link market behavior to public policy:

> To widen the market and to narrow the competition is always the interest of the dealers ... The proposal of any new law or regulation of commerce which comes from this order, ought always to be listened to with great precaution, and ought never to be adopted, till after having been long and carefully examined, not only with the most scrupulous, but with the most suspicious attention.[9]

2001.

[8] Albert Foer, President of the American Antitrust Institute, from an interview 19 March 2001.

[9] Adam Smith, The Wealth of Nations, Book I, Chapter XI: "Conclusions of the Chapter."

Evolving as a series of responses to business practices judged to be abusive of the public trust, predatory in nature, or otherwise unfair, these regulations migrated under the rubric of competition policy.

In the United States, the enforcement arena developed first. Starting with the Sherman Antitrust Act of 1890, the Government acquired the authority to sue a private corporation for its business methods relying on a new set of criteria. Because it only gave the right to sue after the fact, the enforcement dimension of competition policy took place exclusively in the courts. Designed to ultimately quell a business' ability to overcharge consumers on the basis of its monopolization of a market, the regulation specifically prohibited "any restraint of trade or commerce among the several States, or with foreign nations."[10] The Act immediately gained prominence for breaking up monopolies, or "trusts," arising from the then industrialized economy. Through its 1914 amendment, the Clayton Act, Federal powers were broad enough to include many business practices deemed over the years to convey excessive market power to a given competitor.

Until the passage of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, which introduced prevention-oriented competition policy, undulations in the U.S. antitrust environment resulted from case law. Since these cases were relatively infrequent, the environment changed little. The rationale for the HSR reforms in the 1970s stemmed from the fact that, although few instances of prosecutable Clayton Act violations occurred, they were extremely costly for consumers and the Government alike. Consumer harm, a (very rough) estimate of price

[10] U.S. Department of Justice. The Statutory Provisions and Guidelines of the Antitrust Division. The Sherman Act of 1890, article 1. Article 2 proclaims those who "…shall monopolize, or attempt to monopolize, or combine or conspire to monopolize…" any aspect of trade or commerce as guilty of the felony crime.

differentials in competitive and uncompetitive markets, could amount to millions of dollars per violation. And, if the system remained unchecked, the costs to of litigation could likewise reach millions. The political analogy used to promote the legislation was “it's too difficult to ‘unscramble the eggs’ once they have been cracked, stirred together, and fried.”[11]

The HSR reform shifted the bulk of Federal competition efforts from the courts to an administrative setting. The Act effectively created a screening system at the FTC and DOJ in which corporate transactions transferring ownership or likely to transfer substantial control or influence were subject to review before-the-fact. These transactions are in lay terms mergers and acquisitions (M&A), which had been a common feature in business for quite some time. Although the premerger reviews are administrative, or procedural, the law still requires a court case for an official Government denial of the transaction.[12] This follows the U.S. antitrust tradition in that theoretically, the same standards used to enforce Clayton Act violations would apply in these before-the-fact reviews by the offices of the Antitrust division of the Department of Justice and the Competition bureau of the Federal Trade Commission. But practically, the *ex ante* nature of the review posed a difficulty by adding another layer of uncertainty to the estimation of consumer harm described above.

Despite this apparent practical shortcoming, Hart-Scott-Rodino was a winner on almost every front. Because challenging a merger entailed defining a future economic scenario, the new system necessitated close coordination between economists, business experts and federal regulators, making the Government more savvy in the realm of business competition and market regulation. Because regulators could preempt future monopolies, consumers, already piqued by

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[11] Foer (AAI), 19 March 2001.

deregulation plans for the airline and telecommunications industries at the time, also gained. And although counter-intuitive, the business community also gained. Like an insurance policy, the new measure would not be free—it did introduce costs to M&A activity—but it could protect against potentially steep losses by preventing excessive consolidation (with nasty price implications) by competitors. Last, the Justice Department and Federal Trade Commission gained in that the filing fees produced a means by which their span of influence could far exceed their budgets. For example, the $220 million in premerger notification fees during fiscal year 1999 funded 100% of the two departments' antitrust activities, in both prevention and enforcement.[13]

After two decades of success, though, even Hart-Scott-Rodino began to draw critics. Led by Senator Orrin Hatch, an influential member of the Judiciary Committee throughout the 1990s, they mainly argued that due to almost a quarter-century of inflation, the Government oversaw progressively lower levels of business transactions. These levels had grown appreciably lower than what had been originally authorized by the HSR Act in 1976. Critics argued that in the mid 1970's roughly 50-100 mergers per year were intended for review under the legislation, compared to the 4,000+ transactions reviewed annually in the late 1990's.[14] Last, the funding for this growing intrusiveness has always been borne by the businesses themselves. Business groups (especially small businesses, for whom the flat fee was proportionately larger) lobbying for

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[12] By contrast, the E.U. system is usually completely procedural.
[13] Bruno (FTC), 12 March 2001. Note: the Antitrust Division of the DOJ collects criminal fines, but they go to a victims' compensation fund, not DOJ budgets.
[14] "Mergers and Acquisitions: Hatch and Reno Discuss Raising HSR Thresholds to Improve Reviews," *Bureau of National Affairs, Inc. News*, Vol. 76, no. 1901. Thursday, March 18, 1999.

threshold increases cited that the Government had more than doubled the filing fee since the late 1980s, so the Act was not, in their eyes, immune to new cost considerations.[15]

Why not simply raise the threshold? There were plenty of very logical reasons for inaction in Washington. First, there has been only a weak historical link between the size of a proposed merger and its anticompetitive effect: Whereas roughly 3% of "large" mergers reviewed are investigated, the portion of "small" mergers given a second look hovers around 2%.[16] Next, technological advancement has progressively enabled smaller companies, in terms of assets or sales, to rise to market dominance almost overnight. The nominally fixed threshold, in this sense, deflates in real money terms to follow threats downward into new or emerging product markets. Economic efficiency is another rationale; in the case of competition policy, the Government (and thus consumers, eventually) spend much more time and money to "unscramble the eggs" through enforcement actions than by adequately preventing their consummation in the first place. Finally, since their competition arms are fee-funded, the Justice Department and Federal Trade Commission's ability to prevent unfair competition depends on funds gained by all applicants through the filing process. Maintaining a larger pool of merger applicants devotes more resources to the investigation and actual enforcement of the most harmful mergers, a benefit to consumers and other businesses alike.

[15] Bruce F. Metge, "Let's Make The Hart-Scott-Rodino Act a Big Deal," Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., 1996.
[16] Joel Klein and Robert Pitofsky, "Annual Report to Congress, fiscal year 1998," Antitrust Division, U.S. Department of Justice and Bureau of Competition, U.S. Federal Trade Commission. Also, ibid, "Annual Report to Congress, fiscal year 1999." Figures cited are averages from these two reports.

Whether implicit or explicit, most countries do have a competition policy in some form, but the level of sophistication generally follows overall economic development.[17] While no system is perfect, those with a long history have endured the tests of time and evolved alongside a country's formative economic trials. Outside the United States there are two major movements in the competition policy arena involving both ends of the development spectrum. By far, the most active is the evolving system of the European Union. Due to the nature of the Common Market and the fact that its member states are well developed economically, the E.U. policies and decisions of its Competition Directorate deal principally with issues at the highest of levels, and they apply strictly to those M&A affecting multiple member states. Notably, the E.U. system is almost completely administrative, or procedural;[18] because it stays clear of courts the Commission can, thus, stick to predetermined time limits for the various stages of review.

The other major development globally has been the proliferation of merger review policies by new democracies and developing economies. Excluding the U.S. and E.U., there are 73 states with some form of premerger review,[19] and the UNCTAD reports giving over 50 developing or transition economies technical assistance in the area of competition policy since 1980.[20] While these numbers are large, they reflect neither minimized burdens on consumers and business, nor a run toward perfect competition. Some countries, including Croatia and Romania, appear to have instituted premerger review policies to generate revenues from fees (as in the U.S. example) rather than to fund prevention or enforcement budgets.[21] Yet the increased

[17] Ajit Singh and Rahul Dhumale, "Competition Policy: Development, and Developing Countries," South Centre, November 1999.
[18] The European Court of Justice may be involved in an appeals process, but this is rarely exercised.
[19] DOJ ICPAC Final Report, Annex 2-C**: "**Worldwide Antitrust Merger Notification Systems." March 2000.
[20] UNCTAD, "Competition and Consumer Policies." 2001.
[21] DOJ ICPAC Final Report, Annex 3-A**: "**Filing Fees of Selected Jurisdictions**."** March 2000.

awareness of the potential benefits of effective competition policy can only be seen as beneficial; even the sophisticated systems of today took decades to mature.

The fact that there are so many nations participating in the arena of competition policy has enabled the development of more lofty goals, such as those involving a convergence of competition rules among many nations. Determining the global future of competition policy is seen as one the 21st century's first major challenges for international organizations because of its close relationship to so many other international issues involving trade, overall economic development and competitiveness, and globalization. As will be discussed in the last section, the 1997-2000 International Competition Policy Advisory Committee advocated a Global Competition Initiative: "…a collaboration among interested governments and international organizations to create a *new* venue where government officials, as well as private firms, nongovernmental organizations (NGOs), and others can consult on matters of competition law and policy."[22] Regardless of the minimal tangible results thus far, the net effect of many organizations' efforts has been a greater recognition of the importance of competition policy, at any level, by its many government, business, and population group stakeholders.

Technology and the U.S. Competitive Landscape: A Virtuous Cycle?

> With breathtaking technological developments occurring everyday, we see firms anxious to seize first-mover advantages in network industries or to take out nascent entrants that threaten their long-term dominance. In such dynamic industries, the task of distinguishing between anti-competitive and pro-competitive transactions has never been more important.

[22] DOJ ICPAC Final Report, Chapter 6: "Preparing for the Future." March 2000.

—John Nannes, Assistant U.S. Attorney General[23]

Though he is an officer of the U.S. Government, Mr. Nannes' concerns are borderless. This section prescribes the first of two international effects of the Hart-Scott-Rodino Improvements Act of 2000. Recalling the history of antitrust policy in the United States, the differences in premerger notification systems, depicted in Insert 1, are far from revolutionary. But there are certain economic sectors for which the benefits of a more relaxed regulatory environment, even if judged to be slight, would be greater than others. Industries heavily reliant on intellectual property and rapid innovation are members of such a sector: "High technology," starring computer hardware and software, information technology and biotechnology industry groups. The United States already enjoys a well developed high-tech sector, and further advantages may serve as a competitive wedge distancing the U.S. from the rest of the world.[24] While this argument does not imply that firms in these economic classifications will necessarily take advantage of the regulatory changes by adopting anticompetitive practices, it shows that certain transactions will be possible this year in the United States without review that had not been possible last year, or since the 1970s. Further, the importance of these sectors to the overall vitality of the U.S. economy, especially in the context of its increased global reach in recent years, cannot be ignored.

Though the global economy is hardly a level playing field to begin with, the Act exaggerates its tilt slightly. The first analysis must be the immediate impact of the new thresholds: The new dollar amounts directly remedied the "creeping oversight" occurring over

[23] John Nannes, "Last Year and This Year: A View from the Antitrust Trenches," New York: 27 January 2000.
[24] Hamburg Institute for Economic Research, et al., Conflict and Cooperation in National Competition for High-Technology Industry. Washington: National Academy Press, 1996. p. 191.

the past two decades, chief argument among the proponents of modernization, but the remedy is not without cost. According to the FTC, the Government expects to lose 52% of its merger applicants under the new law.[25] This figure is of statistics compiled over the last few years showing that roughly half of the mergers involved business combinations that, if executed in February 2001, would not meet the new minimum thresholds and would therefore not be subject to any Federal review. The next detail is the sizes of the affected transactions. Smaller mergers raise competitive concerns, too; over 20% of all recent applications receiving second requests for information, or "second looks," by either the FTC or the DOJ came from transactions now exempt. It is natural to assume the mega-mergers reaching the headlines receive regulators' attention, but although they consume more effort than smaller cases, the smaller transactions can be even more harmful, proportionately, in regional or nascent markets, such as those in high-tech industries. Not expecting (nor advocating) a jump to $50 million, the American Antitrust Institute estimated that under a $40 million threshold, nine or ten anticompetitive mergers would occur annually.[26] By comparison, the Justice Department only filed injunctions against a total of 39 mergers in 1999. From this estimate the AAI asserts that the changes are not neutral to the U.S. economy in spite of their graduated nature.

Since the new standards are based objectively on dollar figures, one would expect that no industrial sector would "benefit" relative to others. This assumption is not valid. Business itself has evolved during the period since the original thresholds, with smaller companies gaining a greater ability to exert market power due to technological advances than had been the case in the 1970s or 1980s. Businesses gained market share in "old economy" industries very slowly,

[25] Bruno (FTC), 12 March 2001.

traditionally only after realizing profits and reinvesting them in higher capacity plants. Growth through M&A is another channel, of course, but acquisitions by a typical blue chip company would have invited Federal scrutiny even in the late 1970s or 1980s; nothing has changed in that regard. Through technological innovations, "new economy" businesses have proved they can create and dominate a new industry entirely, virtually from scratch (pun intended). In the last decade the Internet gave opportunities to many upstarts, such as eBay's online auction, the Yahoo! information and e-commerce portal, or Netscape's web browser. Each of these products has held a near-monopoly[27] thanks to technological progress during the previous decade in computer hardware and hardware, which also spawned famously from austere settings, in garages (Dell) or university labs (Sun Microsystems) and by unlikely entrepreneurs (Apple's Steve Jobs or Microsoft's Bill Gates). And their most striking feature is the fact that in some cases only a few years, they quickly surpassed many blue chip companies' market valuations, albeit with varying resilience of late.

On 1 February 2001, with the new HSR standards taking effect, many more startup companies and small businesses—not unlike the above examples when they were young—became eligible for purchase without Government notification or approval. This makes a remarkable difference to the competitive environment for startup companies, of which high technology businesses are prototypical, because of the nature of one popular source of funding, private venture capital. VC financing is generally not intended to be a long term relationship, with a typical time horizon being around three years. At or before this date, the startup firm is

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[26] Foer (AAI), 19 March 2001.
[27] Ironically, in many references to the landmark antitrust suit against Microsoft, experts point out that before Microsoft's Internet Explorer was launched, Netscape's Navigator web browser enjoyed a very healthy monopoly.

expected to deliver on its exit strategy—exit from the funding and control relationship with the VC firm, not its market—ideally at a substantial profit to the VC firm's initial investment(s). An initial public stock offering, or "going public," is the most glamorous exit strategy, but the more common route is to be acquired by another firm. As such, the National Venture Capital Association was one of the first to praise the HSR Improvements Act: "M&A activity is on the up-swing and will remain an important liquidity vehicle for venture-backed companies in the future. This legislation will exempt thousands of entrepreneurs from the costly and time-consuming filing process."[28] Thus, it benefits both VC firms and their investments. Since a healthy VC investment climate adds value to an economy by backing risky, yet innovative, businesses it is a reasonable hope that they remain content with the competitive landscape in the United States, lest their investments in the future eBays and Yahoo!s dry up. A note concerning the ability of medium to large corporations—$200 million or more in value—to swoop in and acquire upstarts after their VC funding stages: There is evidence in the HSR threshold revisions that the Justice Department wanted purview over the "dot-coms" typical of this post-VC lot. They achieved this by dropping the "size of person" test past $200 million, which means that any $200+ million company must file to acquire a business of any size, even a startup valued lower than $10 million.[29]

VC funding agreements are not the only sources of new business consolidation. Businesses that are small in terms of assets or sales dollars can still be valuable in terms of intellectual property. While no one expects an immediate slew of acquisitions in the sub-$50

[17] NVCA, "NVCA Hails Passage of Hart-Scott-Rodino Reform Legislation: Big Win for Venture Capitalists, Technology Companies, & The New Economy," Monday December 18, 2000.
[29] Bruno (FTC), 12 March 2001.

million price range, loosened standards do clearly facilitate consolidation of these companies, especially among those industries in which intellectual property value is a large portion of the business. Again, these are most common in the high technology sector, where common M&A targets would include biomedical research laboratories as well as smaller computer-related businesses. Though subtle, antitrust statutes can have complex effects on the structure and performance of innovative industries.[30] Consider the stereotypical small laboratory (of any science discipline) funded by a series of outsourced projects or grants; it is a hotbed of innovation unhindered by bureaucracy. But what if its talented scientists make an important and potentially marketable discovery unrelated to her funded project? How does it fund or staff the round-the-clock testing, patent application process, specialized equipment purchases, or manage the eventual product's marketing and distribution?

Although several options exist, quite often the answers to these tough questions lay in an acquisition scheme involving a larger, more sophisticated lab or an end-product company. Freedom from bureaucracy may help the creative process, but it can also hurt the ability of small players to see their innovations to market (read: cash in). The merger review system captures the competitive aspects this transaction down only to a certain (now higher) limit via the acquisition value, in which the purchase price of the lab or small business includes the intellectual capital accrued during its initial discovery process. Again, while the existence of a merger threshold did not cause this process, a less restrictive threshold creates a greater latitude for future business interactions of this type to take place. In crafting her recommendations to the Attorney General, the co-chair of the International Competition Policy Advisory Committee cited minimizing the

[30] Richard Nelson, ed. National Innovation Systems. Chapter 2: *The U.S. National Innovation System,* by David

overall burdens and uncertainties of smaller enterprises was one of the driving forces behind the committee's strong recommendation for a threshold increase. In fact, she was one of a minority of committee members advocating an increase to $50 million, well above the officially recommended $34 to $43 million figure representing the 1976 threshold adjusted for inflation.[31]

On a national level, the HSR Improvements Act shows that even regulations with consumer protection mandates can come under scrutiny if they either work against or fail to support explicit or implicit U.S. technology policies. Harvard's Lewis Branscomb summarizes these policies as "Federal science and technology initiatives [which] must be aligned with broader economic, trade, and regulatory policy initiative and goals…all consistent within a global context."[32] This broad category encompasses Federal efforts that arose since the realization that defense spending alone would not create all the technological spillovers necessary to lift the economy out of mediocrity. Today's drive to retain technological leadership stems historically from the United States' position following World War II (to some, the only man standing) and subsequent good showings in the space and arms races of the Cold War. Some examples of technology policy at work include the Bayh-Dole Patent Act of 1980, the National Cooperative Research Act of 1984 (which, incidentally, liberalized antitrust provisions for R&D), the Omnibus Trade and Competitiveness Act of 1988, and the Clinton-Gore technology policy announced one month into their administration. Falling behind Japan and Germany in the bread-and-butter areas of automobile, steel, and electronics technologies in the

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Mowery and Nathan Rosenberg. New York: Oxford Press, 1993. p. 29.

[31] Paula Stern, co-chair of the ICPAC (1997-2000), and President of the Stern Group, Inc. Interviewed 14 March 2001. Regarding the increase to $50 million, she reasoned that the $15 million figure was arbitrary back in 1976, so there was no justification for sticking with it on an inflation-adjusted basis in the future.

[32] Branscomb and Keller, p. 32.

late 1970s may have proved humbling, but the experience appears adequate to have spurred the several U.S. policy actions described above, in spite of certain antitrust risks.

Technology policy competition policy can be congruent, but when the economic landscape is less than rosy, optimism in the Government's ability to align the two may be difficult to muster. Prior to the full swing of the 1990s expansion, the Internet had not yet been a boon, and the U.S. still had strong competitors in Asia and Europe, sparking this attack:

> Combined with other policy initiatives in intellectual property, a more lenient U.S. antitrust policy may reduce the importance of new firms as agents for the commercialization of new technologies. The effects of these policy changes on the adoption of new technologies, an area in which U.S. performance has been weak, are uncertain but may prove detrimental. More generally, however, the current U.S. debate over science and technology policy exhibits little awareness of the importance of technology adoption for international competitiveness.[33]

Yet despite the relative solidity of the United States' leadership today, thanks in part to dominance in most computer, communications, and Internet technologies, global technological competitiveness has risen overall. Technology "hubs" around the world have erupted: Wireless and satellite communications in Scandinavia and Israel, respectively; computer software in India and China; and silicon chips and processors in Korea, Taiwan, and Japan are a few examples. The obvious way in which the U.S. benefits from these keen competitors is through the pressure they exert on U.S.-based producers to improve the quality of goods. But this only goes so far; consider that most "Japanese" cars sold in the U.S. are built in North America, yet U.S. carmakers still lag behind almost all others in overall quality.

[33] Nelson, p. 63.

The less obvious benefits stem from foreign investment in U.S. interests *whether in or outside of the U.S.*: Through M&A with U.S. businesses, partnerships or strategic alliances with U.S. businesses, involvement in research consortia with U.S. firms, establishing research facilities near U.S. technology centers, employing U.S.-educated people, sending students to U.S. universities, or through U.S. stock purchases, the residual effects of these investment vehicles translate into economic benefits for the U.S. government, business community, and consumer alike. Allowing or encouraging cross-border mergers and acquisitions is just one of the many vehicles for investment, and the liberalization of merger policy through the HSR Improvements Act is just another step toward a larger global network in which the U.S. has a stake. This is akin to a macroeconomic version of the "network effect" that describes the commercial strategy of a telephone network, the Internet, or a B-to-B exchange: Build a large enough network, and the value grows geometrically in return. With the biggest national economy, the U.S. involvement in a large enough network of interdependent capital markets (financial and intellectual) stands to return the greatest overall economic value. Perhaps the Gordon Gekko truism would be that *globalization is good*…for the United States.

These arguments point to a few ways in which the new HSR Improvements Act seed the U.S. high technology landscape, and by extension, how its benefits on the overall economy fit within the broad aims of U.S. technology policy. Keeping globalization in mind, one must recognize that U.S. merger reviews affect all transnational companies doing business in the U.S., or acquiring U.S. corporations. Especially for the most experienced businesses, the competitive effects of a more liberal M&A environment in the dominant U.S. economy would presumably wash between the host and home countries. Thus, to the extent that U.S. technology policy promotes a competitiveness beneficial to other nations, or is otherwise complementary to the global economy, international reaction to the Act will likewise be positive or neutral. However, since the global competition for attracting resources in technology (again, as in Silicon Valley) has the attributes of a zero-sum game, the outside perspective of a less restrictive U.S. competition policy would tend toward the negative, especially among nations not among the technologically elite. Essentially, by making the U.S. market a little more attractive to high technology industries, the Act keeps the technological "have nots" a little further away from the leader in such categories as foreign direct investment, research and development investment, intellectual capital attraction and retention, and general innovation. This is a virtuous cycle of technological sophistication on a global level just as Silicon Valley is a virtuous cycle on a regional level.

The HSR Improvements Act of 2000 does not do many things, and the things it does not do contribute to some rather far-reaching effects. It does not make it more difficult to pursue a growth strategy in the U.S. or with a U.S. company. It does not increase the difficulty of exiting venture capital contracts, and by extension it does not dampen the VC funding environment. It also does not erect any new barriers to international investment in the overall U.S. economy. It does not change the course of the U.S. ship, which has advanced in front of some neighbors, and remained well ahead of others. By setting the conditions for (1) greater consolidation at the base layers of high-tech industries and (2) continuing the virtuous technology cycle, the U.S. has quietly signaled a commitment to maintain its global technological advantage regained of late. Though not a protectionist measure—the rules apply to cross-border transactions as well—its net value is positively correlated to the vast technological activity, whether in terms of venture capital funding, university research programs, industry consortia, or tech-related education levels, for which the U.S. is well known.

As the global network reinforces this success, the most critical international observers will come to view the HSR Improvements Act as just one more step in the "creeping" U.S. monopolization of the global technology base. By effectively lowering some of the few remaining barriers separating the players in global business, the new merger thresholds help to protect the U.S. position at the front. Has the United States forsaken an opportunity to demonstrate thoughtful leadership and advance a long-range international competition framework? This author believes this question will be asked in the coming years, and that it will be answered in the positive

U.S. Leadership in Global Competition Policy: Asleep at the Helm?

> *I've argued for a more aggressive U.S. approach to multilateral competition policy, not to just sit down and write an agreement, but to build confidence and competence through cooperation among antitrust authorities, then (and only then) see what we can do about procedural and substantive convergence.*
>
> —Dr. Simon Evenett, The World Bank[34]

> *In many ways the U.S. sets the standards, or 'best practices,' in this area. The argument is that we should go to an International Organization for a convergence in competition policy… the fact is, there is no International Organization!*
>
> —Dr. Paula Stern, The Stern Group[35]

Lethargic might be one way to describe the pace of United States in leading a convergence of competition policies with her trading partners, as suggested at the outset of this

[34] Interview with Dr. Evenett, 16 March 2001. He is an economist in the Development Economics Research Group, The World Bank and a non-resident fellow at the Brookings Institution.

paper. *Prudent* might be another, and because this word brings along positive connotations of patience, calculation, even wisdom, the leading U.S. policy makers would prefer this description. For the relatively short time in which convergence in competition policy has interlaced with discussions of world trade, development, and other global economic issues, the latter has been the favored U.S. treatment by international observers. By almost any measure, the U.S. is an economic frontrunner and, although not immune from sharp criticism at times, is at least accustomed to the mantle of leadership. But in time, U.S. patience will be perceived as procrastination unless substantial progress is made in this arena; at its worst, the perception of U.S. inaction as indifference toward its economic followers could taint other international discussions.

This section describes the international justifications for a coherent, multi-jurisdictional approach to competition policy, in both enforcement and prevention, relying on the opinions of The World Bank and American Antitrust Institute and writings from other organizations, such as the European Union. It also presents the arguments used by the U.S. competition policy leaders during the years up to this point in the ongoing international debate, namely one of the co-chairs of the International Competition Policy Advisory Committee (ICPAC) and is supplemented by speeches by other U.S. and E.U. antitrust officials. Note that the International and U.S. perspectives are not entirely opposite; there are common goals and understandings and no one doubts the potential complexity of a solution. And while so far there has been no cause to overtly criticize the U.S. stance under the Clinton administration, the future may not be so kind to President Bush, who inherits a more mature global competition policy situation.

[35] Interview with Dr. Stern, 14 March 2001.

Competition policy, as discussed in the first section, defines many of the relationships between government, private enterprise, and consumers. Globalization has heightened international sensitivity to this dynamic, especially the checks and balances available to certain governments in their relations with transnational corporations. Less developed countries (LDCs) have a greater exposure to highly concentrated markets (in that there are generally fewer competitors attracted to their markets) and weaker bargaining power against anticompetitive behavior (in that a corporation may simply exit their markets if pressured, compounding the problem). From this perspective, the idea of continued globalization can distress a LDC because as corporations achieve a global reach, they have a greater ability to abuse their global scale efficiencies. They may do this by undercutting local or national players' prices just enough to drive them out while still commanding a hefty profit margin, a premium for operating in a less stable LDC environment compared to their other operations. Meanwhile, even the most developed nations, ones that can afford to consider (in a regulatory manner) the externalities of a merger, only consider the effects within their own jurisdiction.[36] In light of this dilemma accompanying globalization's momentum, the South Centre intergovernmental organization cogently summarizes the stance of those concerned with the status quo: "[We] recommend he establishment of an international competition authority, to prevent restrictive business practices and competition-reducing actions of large multinationals which are acquiring even greater market power as a consequence of the current huge wave of mergers and takeovers, both national and international."[37]

[36] Evenett (The World Bank), 16 March 2001.
[37] Singh and Dhumale, "Summary."

The European Union's Commission member Mario Monti and Competition Directorate General Alexander Schaub have gone one step further than the development community, advocating the World Trade Organization as a suitable global competition authority, at least eventually. Since first introduced 1996 by Monti's predecessor, Karel Van Miert, he has refined it such that the WTO framework would "…include core principles on competition law and serve to underpin the impressive progress which has been made in trade liberalisation over the past few decades, by ensuring that governmental barriers to trade are not replaced by private ones which have the same effect."[38] This perspective does have merit on at least two counts. By aligning its purpose with that of international trade it groups competition with an international issue that has already achieved some momentum or progress in recent years. But it does so at the risk of over-simplifying the core issues of competition and antitrust policies. Also, the E.U. expediently targets an existing forum on which to hang the new framework. Although Mr. Klein has repeatedly (and unabashedly) objected to the plan,[39] it was an excellent strategy five years ago, since the E.U. could have expected either a good response (with others joining on board) or a poor response (stimulating debate, counterproposals, and perhaps agreement). However, while Professor Monti continues to beat the WTO drum, as Dr. Stern points out, there is no consensus on a suitable organization as of yet.

Because the most recent change to U.S. competition policy—in fact the only legislative change in over a decade—has been the Hart-Scott-Rodino Improvements Act of 2000, observers favoring greater international cooperation will have cause to question U.S. inaction. As stated in the previous section, the Act by itself is not an affront; however, it does not make the global

[38] Mario Monti, "European Competition Policy for the 21st Century," Brussels, 20 October 2000.

economic playing field any more level. Over the next few years, especially if continues to be the only change to the U.S. system, international organizations will analyze U.S. policy and find this to be one quantifiable example of a step *away* from harmonization, cooperation, and convergence.

There is no "standard pace" for the United States in resolving differences, particularly economic ones, with others in the world community. The dispute over bananas, for example has gone unresolved between the U.S. and E.U., the world's largest trading partnership, for several years.[40] A necessary ingredient for any critique of U.S. movement toward a competition policy involving, rather than excluding, her trading partners would be "hard" evidence that the direction of U.S. movement has been away from involvement or toward exclusion. These must be actions rather than policy positions or sentiments delivered at one of the many public appearances by Federal Trade Commissioners, DOJ Assistant Attorneys General, or just as commonly, the General Counsels to these competition policy stewards. Unfortunately there are only two examples of competition policy-related agreements or laws within the past five years; in some respects this dearth of activity itself qualifies as evidence.

The earlier of the two is the 1998 Positive Comity agreement signed with the E.U., which was actually a more formal version of a 1991 agreement of the same name.[41] In brief, it confers the initial responsibility for investigating and enforcing alleged violations of competition rules *of either party* to the jurisdiction closest to the infraction. The importance of this 1998 agreement

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[39] See *Europe Information Service: European Report*, "Global Competition Plan Slammed by U.S.," 7 July 1999.
[40] E.U. Directorate General for Trade, "Agriculture Commissioner Franz Fischler welcomes Farm Ministers' decision on banana regime reforms," 20 December 2000. The dispute will not be resolved at least until 1 April 2001, but may be delayed until 1 July 2001, according to the article.
[41] U.S. Federal Trade Commission. "United States and European Communities Sign Agreement on "Positive Comity" in Antitrust Enforcement," Washington, 4 June 1998.

to the international perspective of the United States' position on multilateral convergence cannot be overstated, for several reasons. First, the positives: The U.S. can tout this agreement as a very important first step toward other bilateral cooperative partnerships, and, by choosing a rather sophisticated system with which to partner, she identifies a model of acceptable "best practices" outside the U.S. system. From this, impartial observers would see that the U.S. is willing to move forward, and recognizes the high standards adopted by others. There are negative interpretations, too: The agreement has not worked well in practice; its future effectiveness is difficult, if not impossible, to assess; and its lackluster results with such a sophisticated partner[42] does not bode well for future bilateral or multilateral positive comity agreement candidates. Even the ICPAC Final Report, which strongly advocates adoption of similar (but better) bilateral agreements, describes the 1998 U.S.-E.U. Positive Comity Agreement as "oversold at its inception" (E.U. Competition Director-General Alexander Schaub) and "a small and modest element…hardly a common resort" (FTC Chairman Robert Pitofsky).[43] In short, it is unclear whether this first example of U.S. action will in the long run be interpreted as a step in the right direction or a discouraging first misstep.

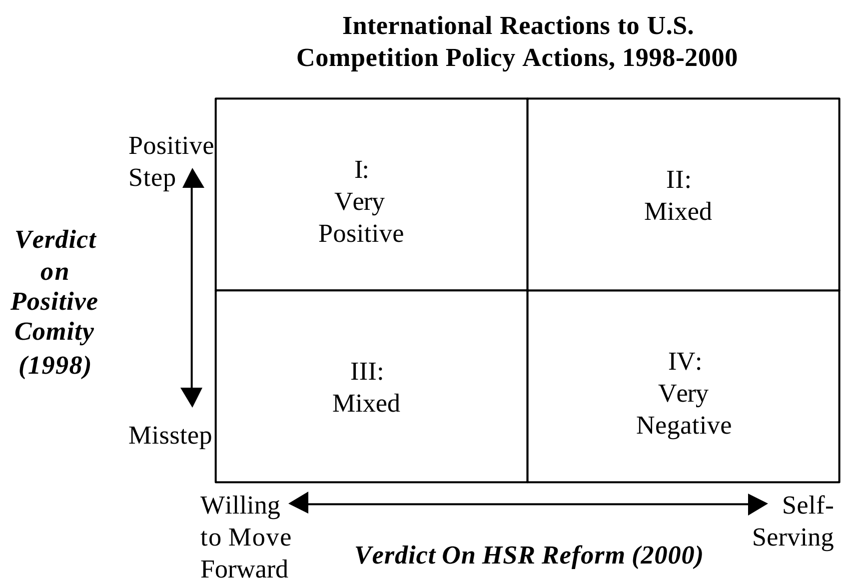
The only other action taken by the U.S. in the competition policy arena has been the Hart-Scott-Rodino Improvements Act of 2000. In addition to the details of the arguments posed in the previous section, there are a few points relevant to this analysis. First, the standards continue the tradition of transparency and of basing review standards on microeconomic and consumer

[42] The European Union's Competition Directorate enforces fixed value standards for merger applications as well, but the values are appreciably larger and tailored to its supranational governance structure. The 1989 regulation also spells out a threshold review measure such that after four years, the Council may adjust the fixed value up or down, unlike the fixed threshold under HSR. See Council Regulation 4064/89. "The Control of Concentrations Between Undertakings," Brussels. 21 December 1989. Article 1 (3).
[43] ICPAC Final Report, Chapter 5.

welfare standards; the world looks to this U.S. example.[44] The potential liability is that the changes do foster a less restrictive U.S. regulatory environment; to the extent that onlookers view this as unhealthy to their piece of the global economic pie, it will cast a shadow on U.S. progress. But a salient positive feature is that a merger threshold increase was the first and most prominent ICPAC "targeted reform" recommendation aimed at preparing the U.S. system for future international cooperation. Using its report's words, "Perhaps one of the most effective ways in which the United States can stimulate global reform is leading by example."[45] The HSR reform can thus be viewed as a self-improvement measure, an investment every country should be willing to make if it values the potential of international cooperation.

Unfortunately, both U.S. actions can be subject to different interpretations. Depending on the "verdict" for each, this could lead to one of four general outcomes, as depicted by the following matrix:

Figure 2: Effects Matrix



[44] Evenett, 16 March 2001.

Of the weight of the arguments highlighted in the previous section, this author believes box II will be the likely result in the medium term analysis of U.S. actions. But compared to the "hard" evidence of actual policy actions there are many more indicators of the extent of U.S. willingness to move toward convergence.

These indicators come by way of the public statements of leading Government officials who, over the past few years, have created a fairly extensive and consistent record of U.S. hopes and concerns for the future of competition policy. It should be noted that two key personalities will be absent from the competition policy front: Assistant Attorney General Joel Klein, a political appointee, is already working in the private sector; and FTC Chairman Robert Pitofsky completes his 6-year term in September but will likely resign as soon as his replacement is confirmed by the Senate.[46] It would be far easier to anticipate the international reaction to U.S. competition policy if she were to continue on the same track followed for the past eight years. Yet despite the "one voice" of leading U.S. antitrust authorities during this span, the recent change in administrations may alter the course. For a variety of reasons, chief among them being the disincentive to straying too far from policies held during the large economic expansion enjoyed during this period, one can assume that the new presidential administration will not diverge appreciably from the path set by its predecessor.[47]

In light of these international perspectives, U.S. antitrust authorities have generally affirmed the best intentions of these groups. Even in denouncing the E.U. plan under the WTO,

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[45] Ibid, Executive Summary.
[46] The Wall Street Journal, "Muris Appointment to Usher In Changes In FTC's Antitrust, Web-Privacy Policy," 22 March 2001.

Joel Klein has been careful to follow his attacks with suggestions that it is in the collective best interest of all to arrive at a long-term, sustainable solution rather than risk failure through a premature endeavor.[48] Perhaps the economic implications of imprudence are grave enough to suffer the *lethargic* label in the near term. To be sure, the leaders of the two competition branches have made it clear that we are far from reaching a panacea in competition policy. In a speech to the European Institute's Transatlantic Trade Seminar, Mr. Pitofsky balanced his optimism for eventual cooperation with a harsh look at its current state:

> I doubt very much that a consensus on international antitrust principles, even one subscribed to only by relatively more developed countries, is likely to be achieved outside the area of an anti-hard core cartel commitment. The present state of antitrust law with respect to monopoly power, mergers, vertical distribution practices and the whole range of competition issues varies too much country to country to expect a wide range of countries to find common ground.[49]

The hopes of these particular (European) stakeholders, after this grounding, should not have been high enough to expect real progress for several years. And again, since the only "hard" evidence of progress since this 1998 speech, the HSR Improvements act of 2000, is likely to weigh in as a step away from convergence, they may only have one place to look.

Whereas the HSR Improvements Act of 2000 addressed the major "targeted reform" directed at the U.S. system by the International Competition Policy Advisory Committee, the committee's major recommendation to the international community was an 'expanded dialogue"

[47] Joel Klein: "I think the core of what we have done will be the core of what the division does in the future, regardless of the Administration." Remarks in "A Trustbuster Looks Back," *BusinessWeek* 2 October 2000.
[48] See Bruce Odessey, "Expansion of International Cooperation Against Anti-Competitive Behavior: an Interview with Joel Klein," *USIA*, February 1999.
[49] Robert Pitofsky, "Competition Policy in a Global Economy: Today and Tomorrow," Washington, 4 November 1998.

through its Global Competition Initiative.[50] Though not as dour as Messrs. Klein or Pitofsky, this initiative also presupposes a long road ahead. Though it is conceptual thus far, it conjures notions of a steadily growing sense of trust, mutual understanding, and comity in the competition policy sphere of influence. And the ICPAC document iterates several times the importance of envisioning the GCI as a forum and not an organization. Dr. Stern, who developed the idea for the GCI and named it, cites her realization of the importance of developing and disseminating "best practices" by the many practitioners and policy makers as the impetus for her recommendation.[51] Merger review thresholds was one area in which the U.S. had not adhered to a global "best practice" of periodically adjusting all fixed-value standards for inflation or GDP growth.

This section's final word should go to an actual international organization. Whereas the timeframe for this analysis is three to five years, the World Bank is acting much sooner to "expand the dialogue" on the leadership role of the United States in global competition policy. Active participation in the developmental of the GCI is exactly the leadership opportunity the U.S. cannot afford to miss. Dr. Simon Evenett of its Development Economics Research Group will host the first seminar examining the GCI on 12 April 2001, less than thirteen months after publication of the ICPAC Final Report. He agrees that the U.S. will have an important role in determining the success or failure of the GCI; to him, the U.S. should be very receptive to the GCI's gradual approach to tackling the complexities of policies ranging virtually all levels:

[50] See ICPAC Final Report, Chapter 6, "Preparing for the Future."
[51] Stern, 14 March 2001.

> Procedural convergence—that's the important one—will only come with confidence among leading antitrust authorities such as the U.S. and E.U. Through them, we first need to build on the record of cooperation that is so important to the eventual goal of convergence.[52]

Although there has yet to be a Government adoption of the GCI, antitrust officials are invited to the upcoming seminar and there will likely be comments posted or speeches issued shortly thereafter indicating whether or not the FTC or DOJ will have a role in its future. The threshold adjustment of the HSR Improvements Act, a procedural issue, will not affect The World Bank's view of the U.S. desire or ability to make inroads to convergence. Perhaps it would make a good topic for a GCI discussion among those nations considering threshold changes. To be sure, competition policy has gained prominence as a path to understand the role of globalization in the balance of states' and business' interests. The work of international organizations in determining the adequacy of competition policies the world over will serve as a check on this balance, and with forum of the Global Competition Initiative, the United States is well poised to take this lead in the future, global world order.

Conclusion

The new premerger notification thresholds took effect on 1 February 2001, so businesses across the world that are affected by the U.S. competitive environment have begun to account for the changes enacted by the Hart-Scott-Rodino Improvements act of 2000. Outside of this core of stakeholders for which the changes may have an immediate impact, other international reactions will be more diffused. Whether though trade-related discussions (as related to actions amounting to trade barriers within the WTO or other fora) or through ongoing dialogues on competition

[52] Evenett, 16 March 2001.

policy convergence (as have been espoused vocally by the European Union) the U.S. role in competition policy is one of a first-tier player, if not the leader. Her economic strength alone may justify this, but the fact that many nations' overall economic reforms over the past two decades have included antitrust laws and premerger review systems of the U.S. model also illustrates her mantle in this regard.

Over the medium term many international observers will question the role of lower U.S. premerger thresholds in United States competitiveness. The HSR Improvements Act of 2000 slightly liberalizes the M&A system for businesses operating in the U.S., whether they be domestic or foreign-owned enterprises. This paper analyzed the potential beneficiaries of a more liberal M&A environment in light of the technological sophistication and global interdependence that characterize the modern competitive business environment. The U.S. economy enjoys an enviable position in that its potent high-tech sectors attract global resources to fuel a very fast pace of technological innovation. A more liberal M&A environment, through its facilitation of VC funding and lower level consolidation in technology sectors, only adds to the attractiveness of the U.S. system, fueling the "virtuous cycle" of technological success. And international organizations are keen to the economic imbalances that tend to be self-perpetuating. There are only a few tangible and recent U.S. competition policy actions, not enough to evidence a trend of progress. To be an effective leader in the future, more global economy the U.S. must not allow the HSR Improvements Act of 2000 be its sole example.

The HSR Improvements Act of 2000 fits the mold of a "sleeper," a seemingly innocuous event whose immediate impact belies its future ramifications. More specifically, through small shifts in the competitive conditions in the U.S. business environment—the market for businesses themselves—the future effects of this Act will extend well beyond U.S. borders. U.S. competition policy, of which merger review policy is a subset, affects more than purely domestic business decision making, if such a thing still exists. As national markets grow more interdependent, the economic leaders are less able to ignore the effects of their policy decisions affecting international commerce on regional or even global sectors, exchanges, or markets. And while the reforms contained in the HSR Improvement Act are but incremental changes to the competition policy of the world's dominant economy, substantial international attention to antitrust/competition rules makes any U.S. move an important one.