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Abstract

This Essay looks at the interplay of market opening, competition, and regulation in the air transport, telecom, and financial services areas, which are particularly relevant to the transatlantic relationship between the U.S. and Europe.

TRADE AND COMPETITION IN THE TRANSATLANTIC AREA

*Ambassador Hugo Paemen**

INTRODUCTION

Transatlantic trade and investment is one of the major backbones of today's global economy. Ties between the European Union ("EU") and the United States have traditionally been strong, with relatively open systems and largely similar values. Since the end of 1995, however, reflecting an increasing interdependence going beyond traditional economic issues, the relationship has had a new foundation that has put economic issues in a wider context. The New Transatlantic Agenda, adopted at the U.S.-EU summit of December 1995, sets out a blueprint for closer cooperation in four areas: promoting peace and stability, democracy, and development in the world; responding in common to global challenges, from fighting drug trafficking, money laundering, or terrorism, to promoting efforts to protect the environment; contributing to commercial relations in the expansion of world trade and closer economic relations; and strengthening transatlantic ties through closer people-to-people links.

In spite of these larger political goals, economic relations remain at the heart of our joint day-to-day business and still produce the most concrete results on both sides of the Atlantic. The sheer size of mutual direct investment is impressive — U.S. companies have so far invested some US$350 billion in the European Union, whereas the cumulative value of EU investment in the United States stands at around US$370 billion. It also has tangible results: nearly six million U.S. jobs are supported, directly or indirectly, by European investment, with a corresponding pattern in the European Union.

While this relationship is already complex, highly developed, and mature, improvements are not beyond reach. Transatlantic tariffs are already very low, so further tariff reductions will only produce modest real benefits. Focus has, therefore, shifted to non-tariff barriers which can be just as obstructive and

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cumbersome as customs duties but have effects on both trade and investment, which are often more difficult to calculate. In addition, attention has been directed to opening markets that previously had been closed to transatlantic competition.

This Essay looks at the interplay of market opening, competition, and regulation in the air transport, telecom, and financial services areas, which are particularly relevant to the transatlantic relationship.

I. *BALANCING OPENNESS WITH SAFEGUARDS*

Non-tariff barriers appear in two basic guises: public barriers and private ones. Classic examples of public barriers are product requirements such as standards, as well as the methods by which respect for such requirements are examined and verified. In the private arena, the most serious obstacles are created by anti-competitive behavior, such as agreements to restrict competition, whether domestic or international, or the misuse of economic power through, for example, the exclusionary practices of a monopolist firm. Sometimes the distinction between the public or private character of these obstacles becomes blurred, for example in cases where monopolies are mandated or tolerated by a public authority.

Today, there is general agreement on both sides of the Atlantic that competition is the key driving force behind efficiency, innovation, and entrepreneurial spirit. Even in sectors traditionally considered too vulnerable or sensitive to be exposed to the full rigors of market forces — for example, transport, banking and insurance, postal and telecommunications services, and agriculture — the barriers are coming down as we see whether a more competition-oriented environment cannot produce better results.

But, both in the European Union and the United States, deregulation of these industries has been accompanied by a fundamental debate about the extent to which public authorities should require the provision of some public services where a normally functioning competitive market would not provide them. There is question, for example, regarding the offering of affordable telephone services in remote rural areas. In addition to these "universal service" problems, it has long been recognized that certain safeguards, in the form of competition rules, are necessary to provide opportunities for new entrants to compete effectively and to prevent competition from developing in a way that goes against the interests of the consumer.

The challenge is clearly to strike the right balance, in each case, between free competition and regulation. Even as competition is "created" by breaking down regulatory barriers and allowing new competitors to enter the scene, it may be necessary to ensure that companies do not abuse their market power or enter into agreements that may reduce competition.

The founders of the European Economic Community were well aware of the need for such balance. They recognized the importance of competition to their endeavor to create a common market, and included a chapter on it in the Treaty of Rome.[1] These rules deal not only with the private behavior of companies, such as restrictions of competition and the abuse of market power, but also address the phenomenon of subsidies granted by Member States in a way that distorts competition within the single market. Since 1958, competition policy has gradually become one of the core policies of the European Union. Without it, the various national trade barriers, which were comprehensively eliminated by 1992, could have been reinstituted by private business arrangements aimed at deliberately limiting competition. Competition policy is therefore a vital tool in the maintenance of the single European market, the promotion of economic integration, sustainable growth, competitiveness, and improved standards of living. By the same token, it is also an essential component in the pre-accession cooperation agreements that the EU has concluded with our Central European neighbors.

II. *THE TRANSATLANTIC EXPERIENCE*

One of the most striking phenomena in transatlantic, and indeed, in global markets over the past decade has been the growth of trade in services. Transatlantic trade in services is growing both in absolute terms and in relation to merchandise. U.S. service exports have risen by twenty-six percent since 1992, and service exports to the European Union in 1996 were fifty-seven percent of merchandise trade. This dynamism exposes

1. Treaty Establishing the European Community, March 25, 1957, arts. 85-94, 298 U.N.T.S. 42 [hereinafter Treaty of Rome].

particularly good examples of the type of change that this Essay tries to address.

The air transport and telecom sectors provide particularly interesting, but contrasting, examples of service sectors which have traditionally been shielded from competition but are now increasingly open to international competition. In air transport, state regulation of international airspace created barriers encouraging the development of national flag carriers, whereas the telecom sector on both sides of the Atlantic originated from the basis of single monopoly network providers. This has changed dramatically in recent years, and now air transport and telecommunications are the most prominent sectors in which transatlantic or worldwide partnerships are emerging, not least because of the mobility and reach of aviation and telecom activities.

A. *Air Transport Sector*

In the air transport sector, the European Union and the United States are the two largest players and the two most interdependent markets in the world. Deregulation of the U.S. aviation market since the late 1970s has had an enormous effect in shaking up the domestic industry, resulting in efficient players and more competitive prices. Deregulatory experience in the EU has been slower, and in some ways more painful, as air transport has gradually been brought into the ambit of community competence. Because most European airlines originated as national flag-carriers, consolidation has manifested itself, not so much in the disappearance of carriers, but in the form of airline alliances. Although the intended end result on each side of the Atlantic was the same — an open and competitive air transport market — differences in timescale, historic development, and environment have had somewhat different results. Nevertheless, the EU and U.S. experience are now converging. With international alliances currently proposed or agreed upon between American Airlines and British Airways, United Airlines and Lufthansa, and Northwest and KLM to name but a few, it has become increasingly difficult to distinguish between an EU or U.S. carrier.

While airlines are on the way to competing globally, complementary regulatory instruments are lagging. An "Open Skies" agreement between the European Union and United States would elevate regulation — for example, of landing rights and allocation of airport slots — from our separate national legislative systems to the transatlantic level. Regarding the effects on competition, both EU and U.S. authorities are united in their aim to prevent industry realignments from producing adverse results, for example by imposing new monopolies on certain transatlantic routes. The difficulties, however, encountered by competition authorities in examining the proposed British Airways/ American Airlines alliance on both sides of the Atlantic highlight the need to replace national rules by common procedures.

B. *Telecom Sector*

Transatlantic strategic alliances are not unique to air transport. Telecom companies have also embraced them as a way to maximize their coverage and presence in the transatlantic market.

This development is all the more remarkable given the completely different starting points of the United States and Europe when deregulation began in the 1980s; Europe had nationally-owned telephone monopolies and the United States had AT&T. The famous consent decree of 1982 finally led to the break up of AT&T into regional Bell companies. In 1988, the European Commission for the first time began using a treaty provision that subjects state-owned monopolies to the competition disciplines of the Treaty of Rome.[2] This process has been gradual and careful, starting with the liberalization of the market for terminals, moving on to liberalization of new services, and culminating in full liberalization of voice telephony as of January 1, 1998. Ten years may seem like a long time to open up the market, but let us not forget that the original investigation into AT&T began in 1949! The World Trade Organization ("WTO") agreement on Basic Telecommunications Services,[3] signed by sixty-nine countries in February 1997, has gone one step further in instituting liberalization at the international level.

As for the aviation industry, the opportunities afforded by telecom liberalization on both sides of the Atlantic have spurred

2. *Id.* art. 90 298 U.N.T.S. 50.

3. *See* World Trade Organziation: Agreement on Telecommunications Services, Feb. 15, 1997, 36 I.L.M. 366 (entered into force Jan. 1, 1998) [hereinafter Telecommunications Services Agreement].

business into action. British Telecom ("BT") and MCI were the first to announce a major strategic alliance (although now superseded) and since then, Sprint, France Telecom, and Deutsche Telekom have followed suit. Each has been the subject of scrutiny by the relevant competition authorities. One of the main reasons the European Commission was able to approve the then proposed BT/MCI alliance was the openness of their home markets. In the case of the Atlas alliance between Sprint, France Telecom, and Deutsche Telekom, the two European companies had to undertake to open their home markets to full competition in order to get the blessing of the European Commission. In this way, existing competition rules, applied realistically, were able to integrate the dynamics of innovation and globalization.

The future of telecom cannot be decided by a handful of big players, and, for regulators, the problem remains of how to ensure that efficient new companies spring out of newly opened markets. It is not always possible to achieve the neat solution of separating network and services — as the U.K. Government is trying in its rail, gas, and electricity sectors. In the United States, penetration of local markets by long distance companies and vice versa has run into difficulties as mergers have created strong regional accumulations of market power. Recognizing these problems, signatories to the WTO Agreement on Basic Telecom Services took a significant step in including some basic safeguards and regulatory principles, for example on safeguarding conditions for interconnection and on universal service.[4]

C. *Financial Services Sector*

Turning to another example, in the last decade or so, the financial services sector has been revolutionized by a combination of technological advances and internationalization. As we enter the twenty-first century, a well-functioning financial services sector is key to economic growth in any country. The successful conclusion of the WTO financial services agreement on December 13, 1997[5] — against a backdrop of currency turmoil in Asia — was, therefore, a crucial achievement. It will open more opportunities for our financial institutions and will pro-

4. *See id.* at 367-68.

5. Stuart S. Malawer, *New Agreements and Cases in the World Trade Organization*, 1 N.Y.L.J. 219 (1998).

mote growth and stability in developing countries. At a time of instability and uncertainty in world financial markets, the agreement will increase confidence by showing that liberalization on a global scale will continue. Naturally, increased internationalization of financial services must go hand in hand with increased co-operation among supervisory bodies. This is not just to prevent a repetition of collapses such as those of Barings Bank and Daiwa, but, more generally, to build financial systems that are resilient and sound and that channel savings into investments most efficiently. Efforts are underway to provide assistance and ensure closer co-operation between supervisors by the G-7 and international bodies such as the Basle Committee.

An example of a truly globalized service is electronic commerce, which offers enormous opportunities for consumers and business worldwide. In 1996, US$1 billion worth of goods alone were already traded electronically, but by the year 2000, the overall value of global electronic commerce is expected to reach over US$200 billion.

What is unique about electronic commerce by comparison to telecom, aviation, or financial services is that it emerged from an environment free from regulation. Regulators everywhere have been caught off-guard and are now trying to catch up with developments in this virtual world.

Regulation is necessary and important in order to create a predicable legal and commercial environment, with adequate protection of public interest objectives such as privacy, prevention of fraud, and consumer protection. But this is the first time that a global form of business has developed spontaneously and, thus, by necessity, regulators will only truly come to grips with it at the global level. We otherwise risk creating heavy-handed national legal and regulatory barriers that would stifle what will undoubtedly be an engine of growth for the next century.

It is therefore of the utmost import that the United States and the European Union promote broad understanding and lead the way in defining how the principles of competition in the off-line world can be enforced in the on-line environment. The US-EU joint statement on electronic commerce, signed in December 1997,[6] is a major step in the right direction to developing a global marketplace where competition and consumer

6. *See* John R. Schmetz, *US and EU Conclude Agreement on Global Electronic Commerce,*

choice drive economic activity. But beyond this, we will need agreement at the global level on specific issues, like the protection of privacy and personal data, the recognition of digital signatures, taxation, encryption, domain names and trademarks, and the establishment of basic uniform commercial practices. Without such agreement, each of these could act as a non-tariff barrier and stifle the benefits of global competition.

Already, in the related area of Internet access, problems have arisen with complaints that Microsoft, a major global provider of operating systems, has been using its position with suppliers to unfair advantage. Competition authorities on both sides of the Atlantic are looking at the issue, but with different responses from the company involved.

All the examples mentioned here refer to areas where we have in fact managed to establish or to intensify free and open competition across the Atlantic. This development towards increased competition will benefit the business communities involved, but it will, in particular, benefit consumers both in the European Union and the United States — they will get a wider choice of products, and they will get these products at a competitive price. But as already alluded to, increased competion poses new and difficult questions to regulators and guardians of competition rules alike of how to keep pace with increasingly globalized businesses to ensure that markets remain open and fair.

III. *PROCEDURES*

A. *Bilateral*

Regulators, negotiators, and the industry itself have used a number of different instruments in order to stimulate competition in the transatlantic marketplace. The obvious, traditional instrument is the bilateral agreement, a good example of which is the recent EU-U.S. Mutual Recognition Agreement,[7] which aims at reducing costs and administrative barriers for imported products, thus leading to improved market access. An agreement opening up the air transport markets, which the European

4 INT'L UPDATE 10 (1997) (discussing statement signed in Washington, D.C. on December 5, 1997 at Transatlantic Summit).

7. WHITE HOUSE M2 PRESSWIRE, THE NEW TRANSATLANTIC AGENDA, Dec. 10, 1997, *available in* 1997 WL 16295218.

Union hopes to sign eventually with the United States, would be another case in point.

B. *Multilateral*

By contrast, in the telecom sector, the groundwork for increased competition has been laid at the multilateral level with the conclusion of the WTO Agreement on Basic Telecom Services[8] described earlier. As noted, almost all parties to the agreement subscribed not only to liberalization measures, but also to a set of regulatory principles to guarantee conditions of fair competition.

Industry plays an increasingly important role in the negotiation as well as the implementation of such liberalizing initiatives. It goes without saying that it is industry that drives international competition and efficiencies in the first place by seizing market opportunities and by pursuing cutting-edge solutions. But industry is also responsible for keeping markets open by maintaining conditions of fair competition and abstaining from unfair business practices.

A unique and explicit example of co-operation between business and governments with a view to eliminating barriers is the Transatlantic Business Dialogue[9] ("TABD") which, in November 1995, was launched almost simultaneously with the New Transatlantic Agenda. This forum of high-level company representatives has created the necessary pressure for the European Union and United States to conclude a Mutual Recognition Agreement[10] that will do away with red tape on US$40 billion worth of goods in the transatlantic market.

In spite of these valuable contributions by the private sector, there are limits to the degree of responsibility that business should have for general policy, a point on which there are, per-

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8. *See* Telecommunications Services Agreement, *supra* note 3.

9. The Joint Report of the European and American Business Executives Dialogue Conference, Seville, Spain, Nov. 10-11, 1995. The Report issued covered four areas including standards and regulatory issues, trade liberalization, investment problems, and third countries. *See* Judith Hippler Bello et al., *International Trade Highlights in 1995*, 30 INT'L LAW 391, 400 (1996).

10. The Mutual Recognition Agreement will promote bilateral trade in goods by facilitating the certification of products as being in compliance with local health, safety, environmental, and technical requirements. *See* George A. Bermann, *Regulatory Cooperation Between the European Commission and U.S. Administrative Agencies*, 9 ADMIN. L.J. AM. U. 933, 972 (1996) (discussing Mutual Recognition Agreement).

haps, some philosophical differences between the European Union and the United States. In Europe, we tend to favor a more regulated approach than in the United States, where it is believed that voluntary agreements and self-regulation can work. These differences should not become a major sticking point as long as both approaches are effective in delivering equivalent results.

But bilateral, multilateral, and even self-regulation agreements can only be part of the solution. In today's world where companies increasingly operate on an international level, it is important that competition authorities are able to keep up with the effects of globalization. Governments, however, are severely limited in their ability to monitor the activities of big, multinational companies. Consequently, there is a greater need to address private anti-competitive practices at an international level.

The European Union and the United States share similar approaches in the handling of antitrust problems as well as a commitment to enforcement, and as such are obvious partners in the field of antitrust cooperation. Since 1991, we have operated a very successful competition cooperation agreement. While this agreement relates only to procedures and to cooperation, it has nevertheless been very useful for both authorities. Dozens of cases have been modified under the 1991 agreement, and seldom, if ever, have our authorities arrived at completely divergent views. Even in the Boeing-McDonnell Douglas merger case,[11] where our competition authorities seemed headed in different directions, the consultations between the U.S. authorities and the European Commission helped bring the matter to an acceptable conclusion for all concerned. We are currently negotiating a new agreement that will further strengthen our cooperation and lead to a division of labor under the so-called positive comity principle, so that one authority can ask the other to examine a case if its center of gravity is in the territory of the other.

While an important step, in the end, such bilateral co-operation can only take us so far. The globalization of business and the advent of electronic commerce pose new challenges to our

11. The United States and the European Union, despite an agreement to co-operate on anti-trust enforcement, only narrowly avoided a clash in 1997 when Brussels objected to the merger of Boeing and McDonnell Douglas, even though it had been approved by US anti-trust authorities. *See* Guy de Jonquie'res, *Van Miert Calls For Competition Rules Accord,* FIN. TIMES 4, Jan. 31, 1998, *available in* 1998 WL 3528994

governments' capacity to effectively enforce competition rules — even where they co-operate with one another. Moreover, the same business activity now falls with greater frequency under the jurisdiction of two competition authorities, each of which must apply its own competition rules. This can become complicated for business if, for example, different authorities require divestiture of different assets in order to grant approval.

This is why we believe that, in the longer term, a set of multilateral competition rules have to be developed, and why we are pursuing a multilateral approach through discussions in the WTO and the OECD.[12]

There are already some provisions in the WTO under the GATT,[13] GATS,[14] and TRIPs[15] agreements providing for consultation and co-operation on anti-competitive practices. In addition, the broad national treatment and most-favored-nation rules have some applicability to discriminatory competition rules. The fact that the recent Kodak Fuji case[16] had to be brought under the so-called "non violation" provisions of the GATT, however, simply illustrates that there are, at present, no specific suitable rules to cope with such cases that involve restriction of competition brought about by an enlargement of public and private activities.

This points to the need for the European Union and the United States to make common cause in leading work at the

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12. The members of the Organization for Economic Cooperation and Development ("OECD") are Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Mexico, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. *See* ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, INTRODUCTION TO THE OECD CODES OF LIBERALIZATION OF CAPITAL MOVEMENTS AND CURRENT INVISIBLE OPERATIONS 2 (1995).

13. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. Pt. 5, 55 U.N.T.S. 187 [hereinafter GATT].

14. General Agreement on Trade in Services, in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, opened for signature Apr. 15, 1994, 33 I.L.M. 1167 [hereinafter GATS].

15. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization. Annex 1C, 33 I.L.M. 1197 (1994). [hereinafter TRIPs].

16. Kodak claimed that Fuji's substantial market position in Japan was the product of anticompetitive conduct by Fuji. Initially, Kodak filed its claims before the United States Trade Representative (USTR) under Section 301 of the Trade Act of 1974. The USTR referred the matter to the WTO. *See* Michael H. Byowitz, et. al., *International Legal Developments in Review: 1996 Business Regulation*, 31 INT'L LAW. 413, 415-16 (1997).

multilateral level towards a core of common principles and rules. These could start in areas where international consensus can most readily be secured — for example against hard-core cartels, or instances of abuse of dominant position. WTO members would make a common commitment to enforce such rules, and this could then be subject to WTO dispute settlement if members were in breach of the rules in any way that violated the rights and obligations of others. Of course, this would only work to the extent that there were co-operation between competition authorities such as exists between the United States and the European Union. But this, in itself, would help to encourage the development of competition rules in those countries where rules do not yet exist.

IV. *CONCLUSION*

The inevitable trend towards globalization of business that we are witnessing today has put tremendous pressure on governments to open up to international competition even those markets which have traditionally been protected as too sensitive and nationally important. This Essay discusses examples of where this process is currently underway — in the air transport, telecom, and financial service sectors.

Opening markets on an international basis can be accomplished through different means. In the transatlantic context, we have used bilateral agreements in the case of our mutual recognition agreements. On a multilateral level, WTO agreements on basic telecom and financial services will serve to open up these sectors to competition. But, it is well recognized that competition left to its own devices in these areas will not necessarily produce optimal results. In particular, in cases where new entrants have to rely on the infrastructure of a previous monopolist, some rules are needed to ensure equal access on a fair basis. In other cases, some regulation may be necessary to safeguard the interests of the marginal consumers. At the same time, it is desirable to have rules to preserve competition and prevent any one player from gaining too much market power.

Regulators and competition authorities have started to recognize that, just as markets open up internationally, they need to respond with adequate safeguards and competition rules at an equivalent level. In their 1991 bilateral agreement, the European Union and the United States have taken the first steps in co-operating on competition rules. Multilaterally, the WTO agreement on telecom includes pro-competitive regulatory principles which will guide the efforts of members to open up their telecom markets. Taking matters a step further, the WTO working group on trade and competition has started to address, on a more comprehensive basis, the effects of differing national competition rules, or the absence of such rules, and the differing views of regulatory authorities on trade.

But the example of electronic commerce, which poses both a challenge and an opportunity to develop a single set of global regulatory principles, shows that, if we are to keep up with increasingly globalized markets, in the end both regulators and the guardians of competition must go further. It will not be easy to agree on even a core of common competition rules, but without them we risk instituting, through duplicate competition processes and overlapping regulation, the same kind of barriers to business that liberalization has sought to remove in the first place.