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**Continuity in Transatlantic Relations
Policy Convergence and the Domestic Internalization of
EU-U.S. Antitrust Cooperation**

Yimeng Dou and Christopher A. Whytock*

The relationship between EU and U.S. antitrust regulators is widely considered to be a model of successful transgovernmental cooperation.¹ With foundations developed primarily in the 1990s during the George H.W. Bush and Bill Clinton administrations, this relationship remained strong through the George W. Bush administration. Notwithstanding high profile transatlantic antitrust disputes in the Boeing/McDonnell Douglas and General Electric/Honeywell merger cases, cooperation generally predominated over conflict during this period.

But at the time of the transition from the Bush administration to the Barack Obama administration in 2009, there were reasons to expect change in EU-U.S. antitrust relations. Some observers predicted that U.S. antitrust enforcement under Obama would be more vigorous than under Bush.² Others expected Obama to place more emphasis on international cooperation than his predecessor, but with a focus on Asia more than Europe.³ In the same year, the Lisbon Treaty entered into force, amending the Treaty on European Union (“TEU”), creating a new Treaty on the Functioning of the European Union (“TFEU”), and provoking debate about the implications for EU antitrust policy.⁴ Meanwhile, the global financial crisis was deeply affecting both the European Union and the United States, raising doubts about the effectiveness of antitrust policy as pursued by EU and U.S. regulators (Wilson, 2010, p. 65). In addition, a longer-term trend—the growing economic and political influence of rapidly developing countries

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¹ See, e.g., Devuyt (2001, p. 127).

² See, e.g., Wilson (2010, p. 65).

³ See, e.g., Harty (2010, pp. 52, 58).

⁴ See, e.g., Nihoul and Lübbig (2010).

such as China and India—was creating new challenges for antitrust regulators on both sides of the Atlantic (Parisi, 2010, p. 68).⁵

In this chapter, we argue that notwithstanding these developments, there has been more continuity than change in EU-U.S. antitrust relations between the Bush and Obama administrations. While there continue to be occasional disagreements regarding both general approaches and specific cases, cooperation still predominates over conflict. And while antitrust regulators in both the European Union and the United States have had to adapt to a changing global environment, their intensified focus on the rest of the world does not appear to be undermining the bilateral EU-U.S. relationship.

Section 1 of this chapter provides an overview of EU and U.S. antitrust policies. Section 2 discusses the framework for EU-U.S. antitrust cooperation developed in the 1990s. Section 3 compares EU-U.S. antitrust relations during the Bush and Obama administrations, focusing primarily on merger review cooperation, showing that there has been more continuity than change. Section 4 speculates about the sources of continuity in EU-U.S. antitrust relations. Our explanation emphasizes policy convergence and the domestic institutionalization of transatlantic relations. Section 5 concludes by proposing several avenues for more systematic evaluation and understanding of EU-U.S. antitrust relations.

1. EU and U.S. Antitrust Policy

Generally speaking, antitrust policy aims “to maximize consumer welfare by encouraging firms to behave competitively while yet permitting them to take advantage of every available economy that comes from internal or jointly created production efficiencies, or from innovation producing new processes or new or improved products” (Areeda & Hovenkamp, 2006, p. 4). The premise of antitrust policy is that “competition presses producers to satisfy customer wants at the lowest price while using the fewest resources.”⁶ Mergers—combinations of two independent

⁵Additionally, in 2010, Joaquín Almunia became the European Commissioner for Competition, replacing Neelie Kroes, who had served since 2004.

⁶ Ernest Gellhorn, William E. Kovacic, and Stephen Calkins (2004): “In economic terms, competition maximizes consumer welfare by increasing both allocative efficiency (making what consumers want as shown by their willingness to pay) and productive efficiency (producing goods or services at the lowest cost thus using the fewest resources) . . .” (p. 57).

firms into a single firm—are a major focus of antitrust policy because of their potential for distorting markets and reducing competition.

Some fields of economic activity (such as international trade) are governed by international law and international institutions (in the case of international trade, for example, the General Agreement on Tariffs and Trade and the World Trade Organization). In contrast, there is no formal multilateral treaty or international organization that governs the field of antitrust. As a result, antitrust policy remains predominantly national or (in the case of the European Union) supranational policy.

1.1 EU Antitrust Policy

The goal of EU antitrust policy is “to make EU markets work better, by ensuring that all companies compete equally and fairly on their merits. This benefits consumers, businesses and the European economy as a whole” (European Commission, 2012b). The European Commission’s Directorate-General for Competition enforces EU antitrust rules (European Commission, 2012b). The basic rules are found in the TFEU and a variety of EU regulations.⁷

Article 101 of the TFEU prohibits anti-competitive agreements between firms. Specifically, it provides that “all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market . . .” shall be prohibited as incompatible with the internal market.⁸ Article 102 prohibits abusive conduct by companies that have a dominant market position. Specifically, it

⁷ The regulations include Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty Official Journal L 1, 04.01.2003, p.1-25; Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty Official Journal L 123, 27.04.2004, p. 18-24; and Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), Official Journal L 24, 29.01.2004, p. 1-22. This last regulation replaced the EU’s prior merger regulation.

⁸ Article 101(1) also enumerates examples of offending agreements, decisions and practices (including those which “(a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.). Article 101(3) contains exceptions for certain agreements, decisions or practices which “contribute[] to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit” if specified conditions are satisfied.

provides that “[a]ny abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.”⁹ Article 107 deals with state aid, and provides that “any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market,” subject to certain exceptions.¹⁰

Under the 2004 Council regulation on mergers (the “Merger Regulation”), firms planning a merger with a “Community dimension”¹¹ must notify the Directorate General and provide it with information about the transaction prior to the transaction’s closing (Merger Regulation, article 4, section 1)¹². The Directorate General then examines the notification to determine whether or not the merger is “compatible with the common market.” A merger “which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market” and will be prohibited (Merger Regulation, article 2, section 3 and article 7, section 1). Ordinarily, the Directorate General must reach its decision

⁹ Article 102 also provides specific examples: “Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

¹⁰ Article 107(2) lists types of aid that “shall be compatible with the internal market” and Article 107(3) lists types of aid that “may be considered compatible with the internal market.”

¹¹ Article 1(2) of the Merger Regulation provides “[a] concentration has a Community dimension where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.” Article 1(3) provides that “[a] concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million; (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million; (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.”

¹² Ordinarily, this notification is to occur after the signing of the merger agreement, but an exception allowing earlier notification is available when the parties demonstrate a “good faith intention to conclude an agreement” (Merger Regulation, article 4, section 2).

within twenty-five working days following the receipt of notification, although it can increase the time period by an additional ninety working days if it determines that an in-depth “phase II” review is required (Merger Regulation, article 10, sections 1 and 3).¹³

1.2 U.S. Antitrust Policy

Two federal agencies enforce US antitrust law: the Department of Justice (“DOJ”), through its Antitrust Division, and the Federal Trade Commission (“FTC”), through its Bureau of Competition (Broder, 2011, p. 2). As the DOJ puts it:

The goal of the antitrust laws is to protect economic freedom and opportunity by promoting free and fair competition in the marketplace. Competition in a free market benefits American consumers through lower prices, better quality and greater choice. Competition provides businesses the opportunity to compete on price and quality, in an open market and on a level playing field, unhampered by anticompetitive restraints. Competition also tests and hardens American companies at home, the better to succeed abroad (United States Department of Justice, n.d. b).

As the FTC puts it, the goal is to promote “the rights of American consumers by promoting and protecting free and vigorous competition” (Federal Trade Commission, 2008).¹⁴

The primary U.S. antitrust rules are found in a variety of statutes, including the Sherman Act and the Clayton Act. Section 1 of the Sherman Act prohibits “every contract, combination . . . or conspiracy in restraint of trade or commerce among the several states.” The courts have held that certain practices are per se illegal under Section 1, including price-fixing, bid-rigging, and customer and market allocations (Broder, 2012, pp. 17-18). Other restraints are assessed using a “rule of reason” to determine whether the practice’s pro-competitive effects outweigh its anticompetitive effects (Broder, 2012, p. 18). Section 1 is roughly analogous to Article 101 of the TFEU, in that it governs anticompetitive agreements. Section 102 of the Sherman Act

¹³ See also European Commission (2004a).

¹⁴ See also Federal Trade Commission (2008): “[T]he antitrust laws have had the same basic objective: to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up.”

prohibits monopolization, and is roughly analogous to Article 2 of the TFEU in that it governs single-firm conduct (Broder, 2012, p. 18).

Among other things, the Clayton Act contains rules pertaining to mergers. Section 7 of the Clayton Act prohibits mergers “the effect [of which] may be substantially to lessen competition or to tend to create a monopoly.” In general, the Clayton Act requires that firms planning a merger that exceeds a specified size threshold must notify the DOJ and the FTC of the proposed transaction and wait for a time period (usually thirty days) before completing the transaction (Federal Trade Commission, 2008, p. 1). If either agency decides further examination is necessary, that agency may make a “second request” for information and extend the waiting period (Federal Trade Commission, 2009b, p. 1). If the DOJ or FTC finds the proposed transaction may violate antitrust laws, that agency may seek a court order barring the transaction (Federal Trade Commission, 2009b, p. 2).

2. The Foundations of EU-U.S. Antitrust Relations

A challenge for both EU and U.S. regulators is that while antitrust law is national (or, in the case of the European Union, supranational), markets are global.¹⁵ Economic activity in one country can have anticompetitive effects in another country. For example, a merger of two firms outside Europe may affect markets inside Europe, just as a merger of two firms outside the United States may affect markets inside the United States. How can EU and U.S. antitrust authorities regulate such activity effectively?

2.1 Extraterritoriality

The traditional approach is to apply domestic antitrust law extraterritorially. For example, one country may apply its merger regulations to the merger of two companies in another country, and potentially rule against the merger if it finds that the merger would have anticompetitive effects in domestic markets. U.S. regulators have long applied U.S. antitrust rules to transactions involving companies outside the United States, based on concerns about the effects of those transactions inside the United States. Beginning in the late 1980s, the European

¹⁵ See Smitherman (2007, p. 17): “Competition laws remain national, while markets and merger activity, as well as anticompetitive conduct, have become increasingly international. . . . Historically, states have responded by extending national laws via applying them extraterritorially Though controversial, the practice has been the catalyst for transnational cooperative efforts”

Union likewise began applying its antitrust law extraterritorially (Smitherman, 2007, p. 33-43). However, the extraterritorial approach is far from ideal. Relying on unilateral application of national and supranational rules can lead to over- (or under-) regulation, simultaneous application of conflicting rules, enforcement difficulties, and international disputes that can spill over into other policy areas.

2.2 The Framework for Transgovernmental Cooperation

The challenges of antitrust enforcement in a globalized world and the limits of unilateral extraterritorial approaches create the potential for mutual gains from antitrust cooperation. This potential has yet to give rise to a formal EU-U.S. treaty governing antitrust. But in the absence of formal interstate arrangements, there nevertheless has been substantial transgovernmental cooperation—that is, “regular and purposive relations among like government units working across . . . borders” (Slaughter, 2004, p. 12-13),¹⁶ in this case between EU and U.S. antitrust regulators (the European Commission’s Directorate General for Competition, and the DOJ’s Antitrust Division and the FTC’s Bureau of Competition).

During the George H.W. Bush and Bill Clinton presidencies, the European Union and the United States jointly produced a series of documents—including agreements, formal declarations, and statements of best practices—that provide a framework for EU-U.S. transgovernmental antitrust cooperation. In 1990, President Bush and European Commission President Jacques Delors signed the Transatlantic Declaration on E.C.-U.S. Relations (the “TAD”). The TAD declares that the European Union and the United States will pursue dialog on a variety of matters, including competition policy.¹⁷

In 1991, European Competition Commissioner Sir Leon Brittan, U.S. Attorney General William P. Barr and FTC Chairman Janet D. Steiger signed the Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws (the “1991 Agreement”). The 1991 Agreement contains guidelines for notification by each party to the other “whenever its competition authorities become aware that their enforcement activities may affect important

¹⁶ For an account of why EU-U.S. antitrust cooperation is primarily transgovernmental rather than interstate, see Whytock (2005).

¹⁷ See Pollack and Shaffer, 2001, p. 14. The text of the TAD is available at <http://www.eeas.europa.eu/us/docs/>.

interests of the other Party”; the exchange of information by “appropriate officials from the competition authorities of each party”; coordination by competition authorities in enforcement activities; and prompt consultation at the request of either party “at the appropriate level, which may include consultations between the heads of the competition authorities concerned.”¹⁸

Efforts to build a framework for EU-U.S. antitrust cooperation continued, and perhaps even intensified, during the Clinton presidency. In 1995, Jacques Santer, President of the European Commission, Felipe Gonzalez, President of the EU Council of Ministers and Prime Minister of Spain, and President Clinton, endorsed the New Transatlantic Agenda (the “NTA”). The NTA states that the European Union and the United States “will address in appropriate fora problems where trade intersects with . . . competition policy.” In the accompanying Joint EU-U.S. Action Plan, the parties stated that they “will pursue work on the scope for multilateral action in the fields of trade and competition policy. Our competition authorities will cooperate in working with other countries to develop effective antitrust regimes. . . . We will pursue, and build on, bilateral cooperation in the immediate term based on the E.C.-U.S. Agreement of 1991. We will examine the options for deepening cooperation on competition matters, including the possibility of a further agreement.”¹⁹

At the London EU-U.S. Summit of May 18, 1998, President Clinton, Prime Minister Tony Blair, and Commission president Santer issued a statement on the Transatlantic Economic Partnership (the “TEP”) (White House Office of Press Secretary, 1998). In this statement, the parties agreed to “exchange views inter alia on issues relating to the question of multilateral rules on competition law and its enforcement, and on means of enhancing international cooperation among competition authorities in relation to anticompetitive practices with a significant impact on international trade and investment,” at upcoming World Trade Organization meetings. The parties also stated that they “will continue to explore possibilities for further cooperation in the implementation of [EU and U.S.] competition laws.”²⁰

On June 4, 1998, Attorney General Janet Reno and FTC Chairman Robert Pitofsky, on behalf of the United States, and Karel Van Miert, European Commissioner for Competition

¹⁸ The text of the 1991 Agreement is available at <http://www.justice.gov/atr/public/international/int-arrangements.html>.

¹⁹ The text of the NTA and the Joint Action Plan is available at <http://www.eeas.europa.eu/us/docs/>.

²⁰ The text of the TEP is available at <http://www.eeas.europa.eu/us/docs/>.

Policy, and Margaret Beckett, the United Kingdom's Secretary of State for Trade and Industry on behalf of the Council of the European Union, signed the Agreement between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws (the "1998 Agreement").²¹ Among other things, the 1998 Agreement provides that "[t]he competition authorities of a Requesting Party may request the competition authorities of a Requested Party to investigate and, if warranted, to remedy anticompetitive activities in accordance with the Requested Party's competition laws" and specifies circumstances in which "[t]he competition authorities of a Requesting Party will normally defer or suspend their own enforcement activities in favor of enforcement activities by the competition authorities of the Requested Party."

In 1999, EU and U.S. antitrust authorities adopted the Administrative Arrangement on Attendance (the "AAA"), which provides guidelines for "reciprocal attendance at certain stages of the procedures in individual cases involving the application of their respective competition rules" (European Commission 2012d). In addition, plans for the development of the International Competition Network (ICN) took shape during the Clinton presidency. The ICN is an informal network of national antitrust agencies that seeks "to improve and advocate for sound competition policy and its enforcement across the global antitrust community" (International Competition Network, 2009a). U.S. Attorney General Janet Reno and Assistant Attorney General for Antitrust Joel Klein, along with European Commissioner for Competition Mario Monti, played a leading role in developing the ICN (International Competition Network, 2009b). Although the ICN is not focused on EU-U.S. antitrust cooperation specifically, it was largely a result of EU-U.S. cooperation and provides a framework for EU-U.S. cooperation on multilateral antitrust challenges.

2.3 Transgovernmental Cooperation on Antitrust Matters

Cooperation within this framework has taken a variety of forms. For example, EU and U.S. antitrust regulators notified each other of enforcement activities (including merger reviews) under the 1991 Agreement with increasing frequency. EU to U.S. notifications rose from 5 in 1991 to 42 in 1995 to 104 in 2000, and U.S. to EU notifications rose from 12 in 1991 to 35 in

²¹ The text of the 1998 Agreement is available at <http://www.justice.gov/atr/public/international/int-arrangements.html>. The 1998 Agreement does not apply to mergers (Federal Trade Commission, 1998).

1995 to 58 in 2000 (European Commission, 2012c, p. 296). Communication between EU and U.S. antitrust regulators became “a daily activity . . . ranging from high-level case-related meetings to regular phone calls, e-mails, and document exchanges between case teams” (Smitherman, 2007, p. 54). This communication entailed information exchanges, joint analysis of economic matters such as the definition of product markets (e.g. in the 1999 Exxon/Mobil and Amoco/Arco mergers), coordination of investigations, and coordination of remedies (e.g. in the 1994 Shell/Montedison and 1997 Guinness/Grand Metropolitan merger cases) (Smitherman, 2007, p. 54-56). According to former FTC Chairman Timothy Muris, there were 75 merger cases between 1991 and 1999 where there was communication between EU and U.S. regulators that confirmed decisions to clear, clear with undertakings, or challenge proposed mergers (Muris, 2001, at n. 15). Merger cases during the 1990s that were concurrently reviewed by EU and U.S. authorities generally resulted in complementary rather than conflicting enforcement decisions (Parisi, 2010, pp. 55-72).

To be sure, there were significant disagreements between the European Union and the United States on antitrust matters during the 1990s. Most prominently, in 1997 EU antitrust authorities rejected the proposed merger of Boeing Company and the McDonnell Douglas Corporation—both U.S. businesses without production assets in the European Union—after the merger had been cleared by U.S. antitrust authorities. This case prompted U.S. and European politicians to accuse each other of attempting to protect their national champions and provoked fears of a transatlantic trade war (Janow, 2000, p. 44).

But overall, cooperation predominated over conflict in EU-U.S. antitrust relations in the 1990s. As one expert put it, “[C]ooperation between U.S. and European competition authorities appears to have deepened and broadened and become regularized” (Janow, 2000, p. 42). Antitrust officials on both sides of the Atlantic shared this assessment. On the EU side, Alexander Schaub, formerly the European Commission’s Director General for Competition, commented that “staff level contacts have become a daily routine in our work” and noted that merger control is “the area where daily U.S.-EU cooperation has reached the most advanced stage” (Schaub, 2002, pp. 9-10). On the U.S. side, former FTC Chairman Robert Pitofsky noted that “virtually all knowledgeable observers agree that there has been substantial convergence in the method and content of merger enforcement in the E.C. and U.S., and a remarkable improvement in coordination and cooperation between the two enforcement authorities”

(Pitofsky, 2000, part III(B)(1)). Even in the Boeing/McDonnell Douglas case, conflict ultimately was resolved, with EU authorities ultimately clearing the merger (albeit subject to various undertakings on the part of Boeing) (Boeder, 2000, p. 142)—and the dispute surely helped motivate the 1998 Agreement, which enhanced the framework for future transgovernmental cooperation.

3. EU-U.S. Antitrust Relations under Bush and Obama

How much have the factors highlighted above—the transition from Bush to Obama, the 2009 Lisbon Treaty, the global economic crisis, and the growing influence of emerging economies—affected EU-U.S. antitrust relations? This section takes some preliminary steps toward answering this question. First, it assesses the development of the framework for EU-U.S. antitrust cooperation during the Obama and Bush administrations. Second, it examines specific instances of EU-U.S. cooperation in merger review during the two administrations as one way of evaluating the extent to which regulators are actually using the framework for cooperation. Third, it compares how EU and U.S. antitrust regulators themselves have characterized their relationship in official agency reports during the two administrations. Finally, it tracks the number of references to the European Union in DOJ and FTC antitrust speeches during the two administrations as an indicator of the degree of emphasis placed by U.S. officials on EU-U.S. antitrust relations. Overall, the results suggest that there has been more continuity than change in EU-U.S. relations between the two periods. During both administrations, cooperation has predominated over conflict.

3.1 Development of a Framework for EU-U.S. Antitrust Cooperation

The most active phase of development of the framework for EU-U.S. antitrust cooperation took place during the George H.W. Bush and Clinton presidencies. There have been fewer, but nevertheless significant, developments in the formal framework move during the George W. Bush and Obama presidencies. For example, although the concept for the ICN emerged during the Clinton presidency, it was in October 2001 during the Bush administration that FTC Chairman Timothy J. Muris, Assistant Attorney General Charles A. James, EU

Competition Commissioner Mario Monti, and other national antitrust authorities, officially launched the ICN (Federal Trade Commission, 2001).²²

The next year, FTC Chairman Muris, Assistant Attorney General James, and EU Competition Commissioner Monti, released a set of Best Practices on Cooperation in Merger Investigations containing detailed guidelines for coordinating merger reviews (the “2002 Best Practices”) (Federal Trade Commission, 2002a). The 2002 Best Practices include provisions for coordination on timing, collection and evaluation of evidence, communication between reviewing agencies, and crafting remedies and settlements (Federal Trade Commission, 2002a). The 2002 Best Practices were a product of the U.S.-EU Merger Working Group, which is a group of lawyers and economists from the FTC, the DOJ, and the E.U (Federal Trade Commission, 2002b).

At the EU-U.S. Summit on April 30, 2007, European Commission President Barroso, German Chancellor Merkel (Chair of the European Council) and President Bush signed the Framework for Advancing Transatlantic Economic Integration between the United States of America and the European Union (European Commission, 2007). The document established a Transatlantic Economic Council co-chaired by a U.S. cabinet-level official and a member of the European Commission, and declared the parties’ resolve to achieve a number of goals, including a number of priority areas of cooperation, including intellectual property rights, trade, financial markets, innovation and technology, and investment (European Commission, 2007, p. 3). Interestingly, antitrust is not among the areas of cooperation enumerated in the framework—but the recitals express the parties’ recognition of the importance of competition policy and the joint work that the European Union and the United States have undertaken in that field.

In 2011, during the Obama presidency, the European Commission, the DOJ and the FTC issued revised Best Practices on Cooperation in Merger Investigations (the “2011 Best Practices”).²³ The 2011 Best Practices are more detailed than the 2002 Best Practices. They “[p]rovide more guidance to firms about how to work with the agencies to coordinate and facilitate the reviews of their proposed transactions; [r]ecognize that transactions that authorities

²² The ICN’s website, where the full text of the memorandum establishing the ICN can be found, is <http://www.internationalcompetitionnetwork.org>.

²³ The text of the 2011 Best Practices is available at <http://www.justice.gov/atr/public/international/int-arrangements.html>.

in the US and Europe review may also be subject to antitrust review in other countries; and [p]lace greater emphasis on coordination among the agencies at key stages of their investigations, including the final stage in which agencies consider potential remedies to preserve competition” (United States Department of Justice, Office of Public Affairs, 2011).

In summary, while neither administration oversaw developments in the framework for cooperation as substantial as those in the 1990s, modest but significant progress was made during both administrations, particularly in the field of merger review. The 2011 Best Practices may lead to improvements in merger review cooperation, but overall this comparison of the Bush and Obama administrations’ respective framework-building accomplishments suggests more continuity than change in EU-U.S. antitrust relations.

3.2 EU-U.S. Merger Review

Cases of EU-U.S. merger review show that regulators have extensively used the framework for cooperation during both the Bush and Obama administrations. For example, during the Bush administration, the European Commission and the DOJ both approved Thomson Corporation’s acquisition of Reuters Group, subject to consistent sets of remedies, after having “cooperated extensively throughout the course of their investigations” and “with frequent contact between the investigative staffs and the sharing of documents and information” (Federal Trade Commission, 2009a, p. 10). Similarly, cooperation “throughout the course of their respective investigations” led to clearances by the DOJ and the European Commission, with consistent remedies, of Cookson Group’s acquisition of Foseco in 2008 (Federal Trade Commission, 2008a, p. 11).

During the Obama administration, the European Commission and the Antitrust Division both approved Cisco System’s acquisition of Tandberg ASA, with the Antitrust Division explaining that “it had taken into account commitments Cisco had made to the EC as part of the EC’s merger clearance process” and calling the joint investigation “a model of international cooperation between the United States and the European Commission” (Federal Trade Commission, 2011, p.8). EU and U.S. regulators also cooperated extensively to reach consistent remedies relating to the 2009 acquisition of Enodis Corporation by The Manitowoc Company (Federal Trade Commission, 2010, p. 7-8).

In fact, according to one expert, the only major conflict in EU-U.S. merger review since the Boeing/McDonnell Douglas transaction (which regulators on both sides of the Atlantic ultimately approved) has been the General Electric/Honeywell case (Parisi, 2010, p. 56). The DOJ cleared the merger of General Electric and Honeywell International in May 2001, but in July 2001 the European Commission issued a decision blocking the transaction (Smitherman, 2007, pp. 84-95). The merger did not take place. One might add to the short list of recent merger review conflicts the Oracle/Sun Microsystems case. The DOJ cleared the transaction in August 2009, but in November 2009 the European Commission issued a set of objections (John, Depoortere, & Peristerakis, 2011, p. 163; Financial Times, 2009). Although this resulted in an acrimonious exchange of criticisms between high-level officials on both sides of the Atlantic, the conflict was eventually resolved and, like the difficult Boeing/McDonnell Douglas case, the merger was ultimately cleared by the Commission subject to conditions (United States Department of Justice Antitrust Division, 2009, p. 1; John, Depoortere, & Peristerakis, 2011, p. 163). Overall however, during both the Bush and Obama administrations, cases of conflict have been “outnumbered by many instances of effective and complementary U.S.-EC merger enforcement” (Parisi, 2010, p. 61).²⁴

3.3 Agency Reports

Official assessments of EU-U.S. antitrust relations are consistent with the analysis so far—they, too, suggest that cooperation has predominated over conflict during both the Bush and Obama administrations. Specifically, we examined three types of reports: (1) the European Commission’s Annual Report on Competition Policy (the “EC Reports”), (2) the annual spring update of the DOJ’s Antitrust Division (the “DOJ Updates”), and (3) the FTC’s Annual Reports to Congress Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the “HSR Reports”).²⁵

We first counted the number of specific references to EU-U.S. antitrust cooperation in these annual reports from 2007 through 2010. The results are presented in Table 1. The total

²⁴ Parisi (2010, pp. 70-72) lists dozens of “[m]erger cases concurrently reviewed by EC and FTC since 1992 with complementary outcomes, i.e., non-conflicting enforcement decisions.”

²⁵ The EC Reports are available at http://ec.europa.eu/competition/publications/annual_report/index.html. The DOJ Updates are available at <http://www.justice.gov/atr/public/division-operations.html>. The HSR Reports are available at <http://www.ftc.gov/bc/anncompreports.shtm>.

number of references was 4 in 2007, 7 in 2008, 5 in 2009, and 6 in 2010. The numbers are very similar for the Bush and Obama administrations, suggesting more continuity than change. However, given the small number of references overall, it is not possible to draw reliable comparative conclusions. The small numbers are not surprising because the reports do not purport to be comprehensive and probably should not be expected to capture cooperation that has become routine. Therefore, we do not interpret the small number of references as an indication of overall levels of cooperation.

[TABLE 1]

Next, we examined the reports' narrative descriptions of EU-U.S. antitrust cooperation. The EC Reports describe a very close cooperative relationship. They describe "frequent contacts" and "numerous meetings" between EU and U.S. antitrust officials in 2007, 2008, 2009 and 2010; they characterize cooperation as "very close" (2007), "intense" (2008, 2009) and "intensive" (2010); and they note annual bilateral meetings between top EU and U.S. antitrust officials.

The DOJ Updates likewise describe a close cooperative relationship. The 2007 DOJ Update noted that the Division "worked closely" and "consulted closely" with EU officials. In 2008, the DOJ Update stated that "cooperation with foreign antitrust authorities reached an all-time high" and referred to EU-U.S. work on cartel conduct in the marine hose industry as "a model of international coordination." In 2009, the DOJ Update noted that the Division "worked constructively" with European Commission staff and "continues to work closely with its . . . European counterparts on a wide range of cartel, merger, and civil nonmerger enforcement and policy matters." In 2010, the DOJ Update noted that "[t]he [Antitrust] Division has . . . taken the innovative step of hiring Rachel Brandenburger—an accomplished antitrust lawyer in Europe and internationally—to serve as a special advisor to [the Assistant Attorney General for Antitrust]. The result of these actions has been more frequent and active engagement with the Division's counterparts around the world" The 2010 DOJ Update also noted that the Division has been "working actively with its many counterparts around the world in its efforts to bring greater cooperation and convergence to the international aspects of antitrust," including with the European Commission. The 2011 DOJ Update stated that "[i]t is safe to say that

cooperation with our international counterparts is at an all-time high on enforcement matters,” and referred to EU-U.S. cooperation on the Cisco/Tandberg merger investigation as “an excellent model for how international cooperation currently is working at the Division and how it should work in today’s world of multiple enforcers.” The 2012 DOJ Update noted that the Antitrust Division “cooperated closely” with the European Commission on one merger investigation, and “communicated extensively [with the European Commission] throughout the course” of another merger investigation. The HSR Reports do not provide general assessments of EU-U.S. antitrust relations, although they do note examples of specific merger cases in which there was close cooperation.

Like the first indicator, evidence from the agency reports suggests more continuity than change in EU-U.S. antitrust relations under the Bush and Obama administrations. Agencies on both sides of the Atlantic describe a very close and active cooperative relationship. The 2010 Brandenburger appointment and the 2011 statement that “cooperation with our international counterparts is at an all-time high” are pieces of evidence that tend to suggest that U.S. involvement in international antitrust cooperation during the Obama presidency might be more extensive than it was during the Bush presidency—but since the content of annual reports could be influenced as much by administration priorities for cooperation rather than actual levels of cooperation, this conclusion must remain highly tentative. Moreover, both the appointment and these statements pertain to international cooperation in general, not EU-U.S. bilateral cooperation in particular.

3.4 Official Speeches

As a complement to the more qualitative assessments of EU-U.S. antitrust relations presented above, we counted the number of references to the European Union in DOJ and FTC antitrust speeches during the two administrations. This indicator does not track specific instances of cooperation or conflict. We simply use it as one rough measure of the emphasis placed by U.S. officials on EU-U.S. antitrust relations.

We created two versions of the indicator, one for DOJ speeches and another for FTC speeches. We first downloaded all DOJ and FTC antitrust speeches made during the George W.

Bush and Obama presidencies that were available on the DOJ and FTC websites.²⁶ This resulted in a total of 193 DOJ speeches and 604 FTC speeches. After downloading the files, two programs were used to process the downloaded speeches. The first program converted speeches into text files.²⁷ The second program calculated the total number of times certain keywords appear in each file and then the total number of times these keywords appear in each year.²⁸ We included keywords designed to capture references to the European Union (including “European Union”, “European Commission”, “E.U.”, etc.).

The results for DOJ speeches are presented in Figure 1. The results do not indicate major change between the second term of the Bush presidency on the one hand and the Obama presidency on the other hand. Although the number of references to the European Union was relatively high in 2005 (70) and low in 2006 (12), the number remained fairly steady (ranging between 26 and 34) during the period of 2007-2010. The number increased significantly in 2011, but without more data it is difficult to discern whether this represents an upward trend near the end of Obama’s first term.²⁹

[FIGURE 1]

²⁶ DOJ Antitrust Division speeches are available at <http://www.justice.gov/atr/public/speeches/index.html>. FTC speeches are available at <http://www.ftc.gov/speeches/speech1.shtm>.

²⁷ The first program was written using both the standard Perl programming language and an open-source third-party library extension CAM::PDF, which is a PDF file manipulation library, available at <http://search.cpan.org/dist/CAM-PDF/>. The program automatically finds all the PDF files in the present directory and converts the PDF files into TXT files. Certain PDF files cannot be processed by the CAM::PDF utility and this program. Text from these files are directly copied and pasted into TXT files that are analyzed together with other files by the second program. A Perl program environment is necessary to execute the program. Details on how to download the Perl environment can be found at <http://www.perl.org/>. The data presented in this paper and the analysis programs are available upon request.

²⁸ The second Perl program works by scanning all the words in the TXT files contained in a folder and indexes the words to keep track of pre-defined keywords in the header section of the program. The program then outputs specific statistics for each file and concise yearly summaries, which were used to produce an overall summary of keywords from 2001 to March, 2012.

²⁹ The 2011 increase could be due to the appointment of Rachel Brandenburger, Special Advisor to Assistant Attorney General Christine Varney in the International Antitrust Division in 2010, who gave several speeches in 2011 focusing directly on the issue of transatlantic antitrust cooperation, and to the adoption of the 2011 Best Practices. See e.g., Brandenburger, R. (2011) Promoting innovation through competition. Retrieved from <http://www.justice.gov/atr/public/speeches/279093.pdf>. See also Brandenburger, R. (2011) Twenty years of transatlantic antitrust cooperation: The past and the future. Retrieved from <http://www.justice.gov/atr/public/articles/279068.pdf>.

The results for FTC speeches are presented in Figure 2. In contrast to the overall decline in the number of references to the European Union in DOJ speeches since 2001, there has been an overall increase in FTC speeches. However, consistent with the results for DOJ speeches, the results for the FTC speeches suggest more continuity than change during the second term of the Bush presidency and the Obama presidency so far. Specifically, the number of references to the European Union in FTC speeches between 2005 and 2011 have generally ranged between roughly 150 and 250, with one dip (to under 50) in 2006 and another (to just over 100) in 2010. The year with the largest number of references so far is 2011 (238 references), but there is insufficient data to determine whether this indicates a more general upward trend in the second half of Obama's first term.³⁰

[FIGURE 2]

4. Sources of Continuity in EU-U.S. Antitrust Relations

What explains the apparent stability between the Bush and Obama administrations in EU-U.S. antitrust relations—notwithstanding partisan change, the Lisbon Treaty, the global economic crisis, and the growing influence of emerging economies? Three sources of continuity stand out as possible explanations: domestic institutionalization, bipartisan support, and policy convergence.

4.1 The Domestic Institutionalization of Transatlantic Cooperation

A first factor that may help explain continuity in EU-U.S. antitrust relations is the domestic institutionalization of cooperation. Although international relations scholars are increasingly studying domestic institutions as factors influencing international relations, they remain largely focused on international institutions. Yet, at the international level, EU-U.S. antitrust relations are only weakly institutionalized. As discussed above, the bilateral framework consists of interagency agreements, declarations, administrative arrangements and statements of best practices rather than formal international treaties or international organizations. But antitrust cooperation between the European Union and the United States is deeply

³⁰ As with the DOJ speeches, the 2011 increase may be associated with the adoption of the 2011 Best Practices.

institutionalized at the domestic level—that is, at the level of their respective antitrust agencies and professional antitrust regulators.

There are at least two ways in which domestic institutionalization might contribute to the durability of EU-U.S. cooperation. First, the individual regulators who work directly on specific antitrust cases—whether merger reviews or other investigatory or enforcement actions—are typically career regulators based in national (in the case of the United States) or supranational (in the case of the European Union) agencies, rather than politically appointed officials. These individuals, including case handlers and their supervisors, on both sides of the Atlantic, cooperate with each other on an individual-to-individual basis, year after year, building relationships that are relatively insulated from partisan political changes. As John Parisi describes it: “The process . . . is conducted and overseen by professional staff in the international departments of the agencies. These public servants are grounded in their own agency’s law and practices and have acquired expertise about other systems. They have gotten to know and trust their counterparts and they serve as the diplomats who bring together the investigative staffs and help to bridge language, knowledge, and analytical gaps between the investigators” (Parisi, 1999). These individual-level interactions are the domestic micro-foundations of transatlantic cooperation, and would seem to be among the more important factors contributing to continuity in EU-U.S. antitrust relations.

Second, this institutionalization has taken place in regulatory agencies—the European Commission’s Directorate General for Competition, the DOJ, and the FTC—that operate with a certain degree of autonomy from elected officials. All of these agencies are, of course, potentially subject to political pressure. Moreover, their decisions can be subject to judicial review. Therefore, they are far from completely autonomous. Nevertheless, the Directorate General for Competition, the DOJ’s Antitrust Division and the FTC are more autonomous from partisan political change than elected heads of state. This is one reason why domestic institutionalization contributes to the durability of EU-U.S. antitrust cooperation—perhaps even more effectively than could formal agreements entered into by the European Union and the United States at the head-of-state level.

4.2 Policy Convergence

Second, there has been considerable of convergence of EU and U.S. antitrust policy. In theory, differences in antitrust goals and policies introduce preference heterogeneity and distribution problems that can hinder, or even preclude, international or transgovernmental cooperation (Koremenos et al. 2001, p. 768; Whytock, 2005, p. 38). But EU and U.S. antitrust goals and policies have grown very close. As one U.S. antitrust official has explained, the antitrust policies of both the European Union and the United States are aimed at a common objective: to promote consumer welfare by protecting competition (Brandenburger, 2010). And in the words of a top EU antitrust official: “Put simply, the EU and US agree on what competition policy should be all about” (Newman & Echevarria, 2005, p. 27).

While the story of EU-U.S. antitrust convergence has largely been a story of convergence on U.S. approaches, there are two Obama era policy changes that suggest significant convergence of U.S. policy toward EU approaches. First, in the field of merger review, in August 2010 the DOJ and the FTC adopted comprehensive revisions to their 1992 horizontal merger guidelines (Horton, 2011, p/158). The 2010 guidelines “substantially mimic the EC’s” (Horton, 2011, p.164). As one expert speculates, “European Commission (EC) competition authorities and practitioners are likely to view the New Guidelines positively, and welcome them as a bold step by the American Agencies to bring their own horizontal merger policies closer to the EC’s. . . . [T]he New Guidelines represent a substantial progressive step by the American Agencies towards convergence with Europe on horizontal merger issues” (Horton, 2011, pp. 158 and 163).

Second, in the field of single-firm conduct, the U.S. approach may be converging on the EU approach. During the Bush presidency, a significant area of divergence was in the area of single-firm conduct (Sokol, 2009, p. 7). However, Obama’s Assistant Attorney General for Antitrust, Christine Varney, withdrew guidelines for single-firm conduct cases under Section 2 of the Sherman Act that had been issued during the Bush administration. This move has been interpreted as signaling a more aggressive U.S. approach to single firm-conduct cases, more in line with the EU approach.³¹ As Varney explains, “The analytical approaches of the US and the European Commission [on single-firm conduct] are more similar than ever before. . . . [But] [d]espite these similarities, there’s much room for further convergence” (2009, pp. 2-3).

³¹ See Harty (2010): noting that the Obama administration is likely to take “a more aggressive approach to merger review and single-firm conduct” (pp. 54-55).

Preference heterogeneity and distribution problems will never be completely eliminated from the EU-U.S. antitrust relationship. For example, “[D]espite the increased antitrust enforcement promised by the Obama administration, European regulators still remain more aggressive enforcers of antitrust law than US regulators” (Harty, 2010, p. 58). However, these barriers to cooperation have largely dissipated, providing another possible explanation for the robustness of EU-U.S. antitrust cooperation.

4.3 Bipartisan Support

Finally, partisan factors do not seem to play a major role in EU-U.S. antitrust relations. To the contrary, the importance of a close cooperative relationship seems to be accepted by both Democratic and Republican administrations in the United States—as evidenced by the efforts made during the George H.W. Bush and Bill Clinton administrations, through the George W. Bush and Barack Obama administrations, to develop an effective framework for transgovernmental cooperation on antitrust matters. While partisan issues may arise regarding particular aspects of antitrust policy—with Obama, for example, promising to enforce antitrust rules more vigorously than Bush—these differences do not appear to undermine what seems to be bipartisan recognition of the importance of close EU-U.S. cooperation on antitrust matters.

5. Conclusion

Based on this chapter’s analysis, we conclude that there has been more continuity than change in EU-U.S. antitrust relations during the George W. Bush and Barack Obama presidencies. In both periods, cooperation has predominated over conflict, notwithstanding a variety of factors—including partisan change, the Lisbon Treaty, and the global economic crisis—that could have been expected to disrupt the EU-U.S. relationship. We speculate that this continuity can be explained, at least in part, by the domestic institutionalization of cooperation, policy convergence, and bipartisan recognition of the importance of EU-U.S. antitrust cooperation. Indeed, we suspect that these are among the most important factors that influence transatlantic cooperation in general.

There are several possible avenues for more systematic evaluation of EU-U.S. antitrust cooperation than we have been able to undertake in this chapter. In the field of merger review cooperation, an attempt could be made to identify every proposed merger with a potential

transatlantic dimension, including all mergers notified to both EU and U.S. authorities, and to examine the extent and nature of cooperation in each case or a carefully selected sample of cases. Beyond merger review, analysis could be extended to cooperation in two other important areas of antitrust policy: cartels and single-firm conduct. Interviews with EU and U.S. antitrust staff could be an important complement to analysis of publicly available reports, speeches, and other documents.

One area that deserves special attention is the growing emphasis of both EU and U.S. antitrust officials on developing bilateral and multilateral relationships with their counterparts in other countries.³² As a growing number of countries develop active antitrust regimes, the likelihood grows that EU and U.S. firms could be subjected to their jurisdiction; and as developing countries attract more firms, there is a greater likelihood of anticompetitive activity there that could affect EU or U.S. markets. Thus, EU antitrust authorities are “adopting a more strategic approach toward international agreements” focused on emerging antitrust regimes such as in China and India (Lagares, 2010, p. 155). As one DOJ Antitrust Division official recently explained, “We no longer live in a ‘bipolar’ antitrust world. In addition to Washington, DC and Brussels, international companies now routinely must pay attention to the rulings and decisions in 27 EU Member States, as well as in Beijing, Berne, Brasilia, Canberra, Moscow, New Delhi, Ottawa, Pretoria, Seoul, Tokyo, and elsewhere” (Brandenburger, 2011, p. 7). The 2011 Best Practices include suggestions to address the challenge that “[a]n increasing number of mergers reviewed by the DG Competition and the US agencies also are subject to review by other competition authorities around the world” (Federal Trade Commission, 2002, p. 2). And in addition to working within the multilateral framework of the ICN, both the European Union and the United States have entered bilateral arrangements with a variety of other countries.

³² This trend pre-dates the Bush and Obama administrations. For example, before George W. Bush took office in 2001, work had already begun on the ICN; the United States already had bilateral antitrust arrangements with countries including Australia, Brazil, Canada, Germany, Israel, Japan, and Mexico; and the European Union already had likewise established a variety of bilateral arrangements with an antitrust component. More recently, the United States established bilateral arrangements with Russia in 2009 and Chile and China in 2011; and the European Union established arrangements with Chile in 2002, China in 2003 and Columbia and Peru in 2011. See European Commission. (2012). Bilateral relations on competition issues. Retrieved from <http://ec.europa.eu/competition/international/bilateral/index.html>; United States Department of Justice. (n.d.). Antitrust cooperation agreements. Retrieved from <http://www.justice.gov/atr/public/international/int-arrangements.html>; Federal Trade Commission. (2012). International antitrust and consumer protection cooperation agreements. Retrieved from <http://www.ftc.gov/oia/agreements.shtm>.

We see no indication that this focus on the rest of the world is at the expense of EU-U.S. antitrust cooperation. Rather, we speculate that EU-U.S. antitrust relations are at this point so effectively institutionalized that the European Union and the United States can now direct their framework-building resources toward other countries, while fully maintaining their own bilateral relationship. In other words, the marginal return on investment in building relationships with other countries may be higher vis-à-vis other countries than vis-à-vis the already firmly established EU-U.S. relationship. The question going forward is the extent to which the efforts of the European Union and the United States to develop relationships with the rest of the world will be a joint, cooperative endeavor, or instead an area of rivalry.

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Figures and Tables

Table 1
References to EU-U.S. Antitrust Cooperation in Annual Agency Reports, 2007-2010

	2007	2008	2009	2010
EC Reports	2	2	2	3
DOJ Updates	2	2	2	1
HSR Reports	0	3	1	2

Figure 1
References to European Union in DOJ Antitrust Speeches, 2001-2011

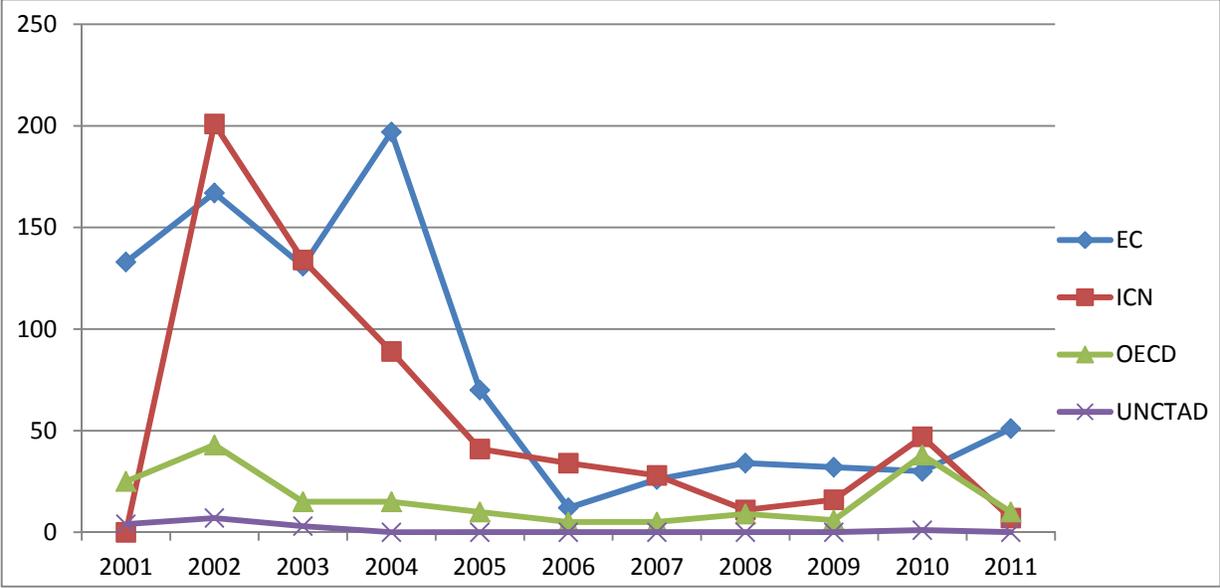


Figure 2
References to European Union in FTC Antitrust Speeches, 2001-2011

